

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Sumter County

D. Craig Brown, Circuit Court Judge

ANDRE M. MASSEY,

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PETITIONER S.C. SUPREME COURT

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-001389

APPENDIX

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1 AND TRUTH OF EVIDENCE PRESENTED DURING THE TRIAL.

2 SO FAR, LADIES AND GENTLEMEN, I'VE ALREADY USED THE WORD
3 EVIDENCE PROBABLY 20 TIMES OR MORE. THERE ARE TWO TYPES OF
4 EVIDENCE THAT ARE NORMALLY PRESENTED DURING A TRIAL. THESE
5 ARE CALLED DIRECT EVIDENCE AND CIRCUMSTANTIAL EVIDENCE.
6 DIRECT EVIDENCE IS THE TESTIMONY OF A PERSON WHO CLAIMS TO
7 HAVE ACTUAL KNOWLEDGE OF A FACT. AN EXAMPLE OF THAT MIGHT BE
8 AN EYEWITNESS, "I SAW THIS," OR ANOTHER WITNESS WHO SAYS, "I
9 HEARD THIS," OR, "I TOUCHED THIS," OR, "I SMELLED THIS."
10 THAT'S DIRECT EVIDENCE. NOW, DIRECT EVIDENCE IS EVIDENCE
11 THAT IMMEDIATELY ESTABLISHES THE MAIN FACT SOUGHT TO BE
12 PROVEN.

13 CIRCUMSTANTIAL EVIDENCE, ON THE OTHER HAND, IS PROOF OF
14 A CHAIN OF FACTS AND CIRCUMSTANCES THAT INDICATE THE
15 EXISTENCE OF A FACT. IT'S EVIDENCE THAT IMMEDIATELY
16 ESTABLISHES COLLATERAL FACTS FROM WHICH THE MAIN FACT MAY BE
17 INFERRED. CIRCUMSTANTIAL EVIDENCE IS BASED ON INFERENCE AND
18 NOT ON PERSONAL KNOWLEDGE OR OBSERVATIONS.

19 HERE'S AN EXAMPLE THAT I COMMONLY GIVE. IF YOU WERE
20 SITTING IN A COMPLETELY SOUND-PROOF ROOM FOR SIX OR SEVEN
21 HOURS -- YOU COULDN'T HEAR ANYTHING AND YOU COULDN'T SEE
22 ANYTHING AS FAR AS THE OUTSIDE IS CONCERNED. YOU HAVE NO
23 DIRECT EVIDENCE OF WHAT THE WEATHER IS OUTSIDE BECAUSE YOU
24 CAN'T SEE IT, YOU CAN'T HEAR IT, AND YOU CAN'T SMELL IT.
25 NOW, IF SOMEONE WERE TO WALK IN THE DOOR TO THAT ROOM AFTER

1 SIX OR SEVEN HOURS SHAKING OFF A WET UMBRELLA AND THAT PERSON
2 SAID, "I JUST CAME IN FROM THE OUTSIDE," YOU WOULD HAVE
3 DIRECT EVIDENCE OF SHAKING OFF THE WET UMBRELLA AND YOU HAVE
4 DIRECT EVIDENCE OF WHAT THE PERSON SAID. BASED ON THAT, YOU
5 COULD, IF YOU SO CHOSE, INFER OR ACCEPT THAT IT WAS RAINING
6 OUTSIDE. THAT'S CIRCUMSTANTIAL EVIDENCE.

7 THE LAW MAKES ABSOLUTELY NO DISTINCTION BETWEEN THE
8 WEIGHT OR VALUE THAT YOU ARE TO GIVE TO DIRECT OR
9 CIRCUMSTANTIAL EVIDENCE NOR IS A GREATER DEGREE OF CERTAINTY
10 REQUIRED OF CIRCUMSTANTIAL EVIDENCE THAN OF DIRECT EVIDENCE.
11 IN OTHER WORDS, YOU WEIGH ALL THE EVIDENCE IN THE CASE,
12 WHETHER IT'S DIRECT OR CIRCUMSTANTIAL, AND AFTER WEIGHING ALL
13 THE EVIDENCE IF YOU ARE NOT CONVINCED OF THE GUILT OF THE
14 DEFENDANT BEYOND A REASONABLE DOUBT, YOU MUST FIND THE
15 DEFENDANT NOT GUILTY. IF, AFTER WEIGHING ALL THE EVIDENCE,
16 YOU ARE CONVINCED OF THE GUILT OF THE DEFENDANT BEYOND A
17 REASONABLE DOUBT, THEN YOU SHOULD FIND THE DEFENDANT GUILTY.

18 NOW, LADIES AND GENTLEMEN, NECESSARILY AS FACT FINDERS -
19 YOU KNOW THIS BY NOW BECAUSE I TOLD YOU THIS AT THE BEGINNING
20 OF THE TRIAL - YOU DETERMINE THE CREDIBILITY OF THE WITNESSES
21 WHO TESTIFY. CREDIBILITY MEANS BELIEVABILITY. IT BECOMES
22 YOUR DUTY TO ANALYZE AND EVALUATE THE EVIDENCE AND DETERMINE
23 WHICH EVIDENCE CONVINCES YOU OF ITS TRUTH.

24 NOW, YOU CAN BELIEVE EVERY WORD OF WHAT A WITNESS SAYS.
25 YOU CAN BELIEVE PARTS AND REJECT THE REST OR YOU CAN

1 DISBELIEVE EVERY WORD. THAT'S ENTIRELY UP TO YOU. YOU USE
2 YOUR GOOD COMMON SENSE IN DETERMINING WHO TO BELIEVE AND WHAT
3 TO BELIEVE. YOU CAN BELIEVE ONE WITNESS OVER SEVERAL
4 WITNESSES. YOU CAN -- AND YOU CAN BELIEVE SEVERAL WITNESSES
5 OVER ONE WITNESS. YOU HAVE ONE OBJECTIVE AND THAT IS SEEK TO
6 TRUTH IN THIS CASE.

7 NOW, YOU CAN BASE YOUR DETERMINATIONS ON WHETHER OR NOT
8 YOU BELIEVE SOMEBODY ON HOW THEY APPEAR ON THE WITNESS STAND.
9 WAS THE WITNESS HESITANT OR STRAIGHTFORWARD IN ANSWERING
10 QUESTIONS? DID THE WITNESS HAVE A REASON TO GIVE TESTIMONY
11 THAT WOULD HELP OR HURT ONE SIDE OVER THE OTHER? IN OTHER
12 WORDS, WAS THAT WITNESS BIASED OR PREJUDICED FOR OR AGAINST
13 ONE SIDE OR THE OTHER? WAS THE WITNESS'S TESTIMONY
14 STRENGTHENED OR WEAKENED BY OTHER TESTIMONY OR EVIDENCE IN
15 THE RECORD? AND YOU CAN CONSIDER ANYTHING ELSE WITHIN YOUR
16 REALM OF COMMON SENSE IN DETERMINING WHO TO BELIEVE AND WHAT
17 TO BELIEVE.

18 AS I TOLD YOU EARLIER, NORMALLY A WITNESS CAN'T GIVE
19 OPINIONS. NOW, THERE IS AN EXCEPTION UNDER OUR RULES OF
20 EVIDENCE FOR EXPERT WITNESSES. AS I TOLD YOU BEFORE, IF
21 SOMEONE IS QUALIFIED BY EDUCATION, TRAINING OR EXPERIENCE,
22 THAT PERSON CAN GIVE OPINIONS IN THAT PERSON'S PARTICULAR
23 FIELD. THAT DOESN'T MEAN YOU HAVE TO ACCEPT THE TESTIMONY AS
24 TRUE. YOU USE YOUR GOOD COMMON SENSE AND YOU WEIGH THE
25 TESTIMONY OF AN EXPERT JUST AS YOU WOULD THE TESTIMONY OF ANY

1 WITNESS.

2 YOU DON'T HAVE TO ACCEPT THE TESTIMONY JUST BECAUSE IT
3 COMES FROM AN EXPERT. IF THE REASONS GIVEN FOR THE OPINION
4 BY THE EXPERT ARE NOT SUFFICIENT IN YOUR JUDGMENT, YOU CAN
5 REJECT IT IN ITS ENTIRETY, AND IF YOU THINK THAT THE
6 WITNESS'S EDUCATION, TRAINING, AND EXPERIENCE ARE NOT
7 SUFFICIENT, YOU CAN REJECT THE TESTIMONY FOR THAT REASON AS
8 WELL.

9 ALL RIGHT. CONTINUE TO LISTEN CAREFULLY BECAUSE I DO
10 KNOW THAT IN THE LAST 10 MINUTES YOU MAY BEGIN TO WONDER:
11 WHEN IS THIS CHARGE GOING TO END? WELL, IT'S GOING TO GO ON
12 PROBABLY FOR ABOUT 15 MINUTES MORE, AND, AGAIN, THE REST OF
13 WHAT I TELL YOU IS JUST AS IMPORTANT AS WHAT I'VE ALREADY
14 TOLD YOU.

15 NOW, THE DEFENDANT HAS PLED NOT GUILTY TO THE
16 INDICTMENT, AND THAT PLEA PUTS THE BURDEN ON THE STATE TO
17 PROVE THE DEFENDANT GUILTY, AND THAT'S BECAUSE A PERSON
18 CHARGED WITH COMMITTING A CRIMINAL OFFENSE IS NEVER REQUIRED
19 TO PROVE HIMSELF NOT GUILTY. THE DEFENDANT DOESN'T HAVE TO
20 PROVE ANYTHING, AND HE DOESN'T HAVE TO DISPROVE ANYTHING.
21 IT'S A VERY IMPORTANT RULE OF LAW THAT THE DEFENDANT IN A
22 CRIMINAL TRIAL IS ALWAYS PRESUMED TO BE INNOCENT OF THE CRIME
23 FOR WHICH THE INDICTMENT WAS ISSUED UNLESS GUILT HAS BEEN
24 PROVEN BY EVIDENCE SATISFYING YOU OF THAT GUILT BEYOND A
25 REASONABLE DOUBT.

1 THE PRESUMPTION OF INNOCENCE DOES NOT END WHEN YOU WALK
2 OUT OF THIS DOOR, WALK DOWN THE HALL, AND ENTER YOUR JURY
3 ROOM TO DELIBERATE. THE PRESUMPTION CONTINUES AND
4 ACCOMPANIES THE DEFENDANT THROUGHOUT THAT DELIBERATIVE
5 PROCESS UNTIL YOU REACH A VERDICT OF GUILT BASED ON EVIDENCE
6 SATISFYING YOU OF THAT GUILT BEYOND A REASONABLE DOUBT. NOW,
7 THE PRESUMPTION OF INNOCENCE IS NOT A MERE LEGAL THEORY.
8 IT'S NOT SIMPLE CATCH PHRASE. IT IS A SUBSTANTIAL RIGHT THAT
9 EVERY DEFENDANT IS ENTITLED TO UNTIL A JURY IS SATISFIED FROM
10 THE EVIDENCE OF GUILT BEYOND A REASONABLE DOUBT.

11 ALL RIGHT. SO NOW I'M GOING TO TALK TO YOU ABOUT WHAT
12 REASONABLE DOUBT IS AND PERHAPS WHAT IT IS NOT. REASONABLE
13 -- THE STATE HAS THE BURDEN OF PROVING THE DEFENDANT GUILTY
14 BEYOND A REASONABLE DOUBT. SOME OF YOU MAY HAVE SERVED AS
15 JURORS IN CIVIL CASES WHERE YOU WERE TOLD THAT IT IS ONLY
16 NECESSARY TO PROVE THAT A FACT IS MORE LIKELY TRUE THAN NOT
17 TRUE, AND THE STANDARD THERE IS BY THE GREATER WEIGHT OF THE
18 EVIDENCE. IN CRIMINAL CASES THE STATE'S BURDEN OF PROOF IS
19 MUCH MORE POWERFUL THAN THAT, AND THAT IS THE STANDARD OF
20 PROOF BEYOND A REASONABLE DOUBT.

21 A REASONABLE DOUBT IS THE -- IS A DOUBT THAT WOULD MAKE
22 AN HONEST AND A SINCERE, CONSCIENTIOUS JUROR IN SEARCH OF THE
23 TRUTH HESITATE TO ACT. NOW, PROOF BEYOND A REASONABLE DOUBT
24 IS DOUBT THAT LEAVES YOU FIRMLY CONVINCED OF THE DEFENDANT'S
25 GUILT. NOW, THERE ARE VERY FEW THINGS IN THIS WORLD THAT WE

1 KNOW WITH ABSOLUTE CERTAINTY, AND IN CRIMINAL CASES THE LAW
2 DOES NOT REQUIRE PROOF THAT OVERCOMES EVERY POSSIBLE DOUBT.
3 HOWEVER, IF BASED ON YOUR CONSIDERATION OF THE EVIDENCE YOU
4 ARE FIRMLY CONVINCED THAT THE DEFENDANT IS GUILTY OF THE
5 CRIME CHARGED, YOU MUST FIND THE DEFENDANT GUILTY. IF, ON
6 THE OTHER HAND, YOU THINK THERE IS A REAL POSSIBILITY THAT
7 THE DEFENDANT IS NOT GUILTY, YOU MUST GIVE THE DEFENDANT THE
8 BENEFIT OF THE DOUBT AND FIND HIM NOT GUILTY.

9 ALL RIGHT. LADIES AND GENTLEMEN, A STATEMENT ALLEGED TO
10 HAVE BEEN MADE BY THE DEFENDANT HAS BEEN ADMITTED INTO
11 EVIDENCE IN THIS CASE. NOW, WHILE THE COURT - THAT MEANS ME
12 - HAS DETERMINED THAT THE STATEMENT IS ADMISSIBLE, I INSTRUCT
13 YOU THAT YOU MAKE THE ULTIMATE DECISION OF WHETHER OR NOT THE
14 DEFENDANT MADE THE STATEMENT. IF THE DEFENDANT DID MAKE THE
15 STATEMENT, YOU MUST DETERMINE WHETHER THE STATEMENT WAS MADE
16 BY THE DEFENDANT VOLUNTARILY AND OF HIS OWN FREE WILL. THIS
17 MEANS THAT THE STATEMENT WAS NOT CAUSED BY PRESSURE, FORCE,
18 FEAR, COERCION OR INTIMIDATION OR BY HOPE OF A PROMISE OF
19 LENIENCY OR A REWARD OF ANY KIND.

20 IN DETERMINING WHETHER THE STATEMENT WAS VOLUNTARY, YOU
21 SHOULD CONSIDER BOTH THE CHARACTERISTICS OF THE DEFENDANT AND
22 THE DETAILS OF THE QUESTIONING. SOME OF THE THINGS THAT YOU
23 MUST CONSIDER ARE THE AGE OF THE DEFENDANT, THE DEFENDANT'S
24 EDUCATION OR LACK OF EDUCATION, THE DEFENDANT'S MENTAL
25 ABILITY OR CAPACITY, THE DEFENDANT'S INTELLIGENCE, THE

1 DEFENDANT'S BACKGROUND AND ENVIRONMENT, THE PLACE AND LENGTH
2 OF DETENTION, THE NATURE OF THE QUESTIONING, AND THE ADVICE
3 OR LACK THEREOF TO THE DEFENDANT OF HIS CONSTITUTIONAL RIGHTS
4 INCLUDING, BUT NOT LIMITED TO, THE RIGHT TO REMAIN SILENT,
5 THAT ANY STATEMENT COULD BE USED AGAINST HIM IN COURT, THE
6 RIGHT TO HAVE A LAWYER PRESENT, THAT IF HE COULD NOT AFFORD A
7 LAWYER THAT A LAWYER WOULD BE APPOINTED TO REPRESENT HIM
8 WITHOUT COST, AND THAT HE COULD STOP MAKING A STATEMENT AT
9 ANY TIME. YOU CONSIDER ALL OF THE SURROUNDING CIRCUMSTANCES
10 BEFORE YOU GIVE ANY WEIGHT TO AN ALLEGED STATEMENT.

11 THE STATE HAS THE BURDEN OF PROVING BEYOND A REASONABLE
12 DOUBT THAT THE STATEMENT WAS MADE AND THAT IT WAS VOLUNTARY.
13 IF YOU DETERMINE THAT IT WAS, YOU MAY GIVE THE STATEMENT ANY
14 FURTHER CONSIDERATION THAT YOU THINK IS APPROPRIATE. YOU
15 DECIDE WHAT WEIGHT, IF ANY, SHOULD BE GIVEN TO ANY ALLEGED
16 STATEMENT. IF YOU DETERMINE THAT THE ALLEGED STATEMENT WAS
17 NOT MADE OR THAT IT WAS NOT THE FREE AND VOLUNTARY STATEMENT
18 OF THE DEFENDANT, YOU SHOULD NOT CONSIDER THE STATEMENT AT
19 ALL.

20 I FURTHER CHARGE YOU, LADIES AND GENTLEMEN, THAT IF
21 THERE ARE ANY STATEMENTS THAT ARE REFLECTED ON EXHIBITS THAT
22 ARE IN THE JURY ROOM WITH YOU AND IF ANY OF THOSE STATEMENTS
23 HAVE ANY REDACTIONS WHICH MEANS PORTIONS ARE DELETED OR
24 BLOCKED OUT, YOU ARE NOT TO DRAW ANY INFERENCE OR CONCLUSIONS
25 FROM THAT FACT WHATSOEVER. YOU CONSIDER THE STATEMENT AS IT

1 IS ON THE PAPER BEFORE YOU, IF AT ALL, IN ACCORDANCE WITH THE
2 INSTRUCTIONS THAT I JUST GAVE YOU.

3 ALL RIGHT. LADIES AND GENTLEMEN, IN JUST A MOMENT I'M
4 GOING TO TALK TO YOU ABOUT ARMED ROBBERY AND POSSESSION OF A
5 WEAPON DURING THE COMMISSION OF A VIOLENT CRIME. HOWEVER,
6 I'M NOT QUITE TO THAT POINT YET. I WANT TO INSTRUCT YOU AND
7 EMPHASIZE TO YOU THAT THE FACT THAT THE DEFENDANT DID NOT
8 TESTIFY IS NOT A FACTOR TO BE CONSIDERED BY YOU IN ANY WAY
9 DURING YOUR DELIBERATIONS AND IN YOUR CONSIDERATION OF THE
10 QUESTION OF THE GUILT OR NON-GUILT OF THE DEFENDANT.

11 THE FACT THAT THE DEFENDANT DID NOT TESTIFY MUST NOT BE
12 CONSIDERED BY YOU AT ALL. YOU CANNOT THINK ABOUT IT. YOU
13 CANNOT DISCUSS IT, AND IT CANNOT ENTER INTO YOUR DECISIONS
14 AND YOUR VERDICT IN THIS CASE IN ANY MANNER WHATSOEVER. SO I
15 REPEAT AND THIS IS UNDER YOUR OATH: YOU ARE TO DRAW NO
16 CONCLUSION WHATSOEVER FROM THE FACT THAT THE DEFENDANT DID
17 NOT TESTIFY. THE FACT THAT HE DID NOT TESTIFY SHOULD NOT BE
18 CONSIDERED BY YOU. HE'S NOT REQUIRED TO PROVE HIMSELF NOT
19 GUILTY. THE BURDEN OF PROOF REMAINS ON THE STATE TO PROVE
20 GUILT BEYOND A REASONABLE DOUBT. THE DEFENDANT DOESN'T HAVE
21 TO PROVE ANYTHING, AND HE DOES NOT HAVE TO DISPROVE ANYTHING,
22 AND HIS EXERCISE OF HIS RIGHTS SHOULD NOT BE CONSIDERED IN
23 ANY WAY AGAINST HIM IN THIS CASE.

24 ALL RIGHT. SPECIFICALLY, LADIES AND GENTLEMEN, THE
25 DEFENDANT IN THIS CASE IS CHARGED WITH ARMED ROBBERY. IN

1 ORDER TO PROVE THIS OFFENSE, THE STATE MUST FIRST PROVE
2 BEYOND A REASONABLE DOUBT THAT THE DEFENDANT TOOK PERSONAL
3 PROPERTY FROM THE PERSON OR PRESENCE OF ANOTHER PERSON.
4 PROPERTY IS IN THE PRESENCE OF A PERSON IF IT IS WITHIN THE
5 PERSON'S REACH, INSPECTION, OBSERVATION OR CONTROL SO THAT
6 THAT PERSON COULD NOT IF NOT - EXCUSE ME - SO THAT THE PERSON
7 COULD, IF NOT OVERCOME WITH VIOLENCE OR PREVENTED BY FEAR,
8 KEEP POSSESSION OF THAT PROPERTY.

9 THE STATE ALSO HAS TO PROVE BEYOND A REASONABLE DOUBT
10 THAT THE DEFENDANT CARRIED THE PROPERTY AWAY, INTENDING TO
11 PERMANENTLY DEPRIVE THE OWNER OF THAT PROPERTY AND TO KEEP
12 THE PROPERTY FOR THE DEFENDANT'S OWN USE. THE SLIGHTEST
13 REMOVAL OF THE PROPERTY OR THE COMPLETE POSSESSION OF THE
14 PROPERTY, EVEN FOR AN INSTANT BY THE DEFENDANT, IS SUFFICIENT
15 TO SHOW A TAKING AND CARRYING AWAY OF THE PROPERTY. NOW,
16 FURTHER, LADIES AND GENTLEMEN, THE TAKING AND CARRYING AWAY
17 OF THE PROPERTY MUST HAVE BEEN DONE WITH VIOLENCE OR BY
18 PUTTING THE OWNER OF THE PROPERTY IN FEAR OF VIOLENCE.

19 AND, FINALLY, THE STATE MUST PROVE BEYOND A REASONABLE
20 DOUBT THAT THE DEFENDANT WAS ARMED WITH A DEADLY WEAPON
21 DURING THE ROBBERY. A DEADLY WEAPON IS ANY ARTICLE,
22 INSTRUMENT, OR SUBSTANCE WHICH IS LIKELY TO CAUSE DEATH OR
23 GREAT BODILY HARM, AND WHETHER AN INSTRUMENT HAS BEEN USED AS
24 A DEADLY WEAPON DEPENDS ON THE FACTS AND CIRCUMSTANCES OF THE
25 CASE. THE FOLLOWING ARE EXAMPLES OF INSTRUMENTS WHICH MAY BE

1 DEADLY WEAPONS: PISTOL, SHOTGUN, RIFLE, DAGGER, KNIFE,
2 SLINGSHOT, METAL KNUCKLES, RAZOR, GASOLINE, A FIREBOMB, OR A
3 MOLOTOV COCKTAIL. A GUN MAY BE A DEADLY WEAPON EVEN IF IT IS
4 NOT OPERATING.

5 NOW, THE DEFENDANT IS ALSO CHARGED WITH POSSESSION OF A
6 WEAPON DURING THE COMMISSION OF OR THE ATTEMPT TO COMMIT A
7 VIOLENT CRIME. AND, MR. FOREMAN, THE VERDICT FORM WILL HAVE
8 BASICALLY TWO INQUIRIES. THE FIRST QUESTION -- BEFORE I GET
9 SPECIFICALLY INTO THE CHARGE OF POSSESSION OF A WEAPON, THE
10 FIRST INQUIRY SAYS: "AS TO THE CHARGE OF ARMED ROBBERY, WE,
11 THE JURY, UNANIMOUSLY FIND THAT THE DEFENDANT," AND IT HAS
12 TWO CHOICES, NOT GUILTY OR GUILTY. IF YOUR VERDICT ON THAT
13 COUNT IS NOT GUILTY, YOU WOULD STOP YOUR DELIBERATIONS AND
14 NOT GET TO THE QUESTION OF POSSESSION OF A WEAPON DURING THE
15 COMMISSION OF A VIOLENT CRIME.

16 AGAIN, THE DEFENDANT IS CHARGED WITH POSSESSION OF A
17 WEAPON DURING THE COMMISSION OF OR ATTEMPT TO COMMIT A
18 VIOLENT CRIME. THE STATE MUST PROVE BEYOND A REASONABLE
19 DOUBT THAT THE DEFENDANT WAS IN POSSESSION OF A FIREARM OR
20 VISIBLY DISPLAYED WHAT APPEARED TO BE A FIREARM DURING THE
21 COMMISSION OF A VIOLENT CRIME. A FIREARM IS ANY GUN,
22 AUTOMATIC RIFLE, REVOLVER, PISTOL OR ANY WEAPON WHICH WILL OR
23 IS DESIGNED TO OR MAY BE READILY CONVERTED TO EXPEL A
24 PROJECTILE.

25 NOW, IN ORDER TO FIND THE DEFENDANT GUILTY OF POSSESSION

1 OF A WEAPON DURING THE COMMISSION OF A VIOLENT CRIME, YOU
2 MUST FIRST FIND THE DEFENDANT GUILTY OF EITHER COMMITTING A
3 VIOLENT CRIME OR ATTEMPTING TO COMMIT A VIOLENT CRIME. I
4 CHARGE YOU, LADIES AND GENTLEMEN, THAT ARMED ROBBERY UNDER
5 LAWS OF THIS STATE IS A VIOLENT CRIME.

6 NOW, IN ORDER TO ESTABLISH CRIMINAL LIABILITY, CRIMINAL
7 INTENT IS REQUIRED. FOR EXAMPLE, CRIMINAL INTENT -- NOT FOR
8 AN EXAMPLE. THE STATE MUST PROVE CRIMINAL INTENT BEYOND A
9 REASONABLE DOUBT JUST AS IT MUST PROVE EVERY ELEMENT OF THE
10 CRIME BEYOND A REASONABLE DOUBT. CRIMINAL INTENT IS ALWAYS A
11 MATTER THAT MUST BE DETERMINED BY A JURY FROM THE
12 CIRCUMSTANCES SURROUNDING THE SITUATION. THERE'S NO WAY TO
13 PROVE INTENT TO A MATHEMATICAL CERTAINTY. YOU MAKE A
14 DETERMINATION OF WHETHER OR NOT THE ELEMENT REQUIRING INTENT
15 WAS PRESENT BY EXAMINING ALL THE FACTS AND CIRCUMSTANCES
16 SHOWN TO HAVE EXISTED.

17 IT IS NOT NECESSARY TO ESTABLISH INTENT BY DIRECT AND
18 POSITIVE EVIDENCE, BUT INTENT MAY BE ESTABLISHED BY INFERENCE
19 IN THE SAME WAY AS ANY OTHER FACT: BY TAKING INTO
20 CONSIDERATION THE ACTIONS OF THE PARTIES AND ALL THE FACTS
21 AND CIRCUMSTANCES OF THE CASE. CRIMINAL INTENT IS A MENTAL
22 STATE. IT'S A CONSCIOUS WRONGDOING. AND SO IT'S UP TO YOU
23 TO DETERMINE WHAT, IF ANYTHING, THE DEFENDANT INTENDED TO DO
24 BASED ON CIRCUMSTANCES SHOWN TO HAVE EXISTED.

25 ALL RIGHT. LADIES AND GENTLEMEN, THE STATE ALSO HAS THE

1 BURDEN OF PROOF OR BURDEN OF PROVING BEYOND A REASONABLE
2 DOUBT THAT THE DEFENDANT WAS THE PERPETRATOR OF THE CRIME.
3 THE DEFENDANT DENIES THAT HE WAS THE PERSON WHO WAS INVOLVED
4 IN THE COMMISSION OF ANY CRIME. IN THIS CASE THE STATE HAS
5 PRESENTED EVIDENCE THAT CERTAIN EYEWITNESSES MAY HAVE
6 IDENTIFIED THE DEFENDANT IN CONNECTION WITH THE CRIME
7 CHARGED. IDENTIFICATION IS A QUESTION OF FACT FOR YOU TO
8 DECIDE TAKING -- TAKING INTO CONSIDERATION ALL THE EVIDENCE
9 THAT YOU HAVE SEEN AND HEARD DURING THE COURSE OF THE TRIAL.

10 IN ARRIVING AT A DETERMINATION AS TO WHETHER OR NOT THE
11 STATE HAS PROVEN IDENTIFICATION BEYOND A REASONABLE DOUBT,
12 YOU SHOULD CONSIDER ALL THE FACTS AND CIRCUMSTANCES THAT
13 EXISTED AT THE TIME OF THE OBSERVATION OF THE PERPETRATOR BY
14 EACH WITNESS. IN THIS REGARD, THE RELIABILITY OF EACH
15 WITNESS IS OF PARAMOUNT IMPORTANCE SINCE IDENTIFICATION
16 TESTIMONY IS AN EXPRESSION OF BELIEF OR IMPRESSION BY THE
17 WITNESS. ITS VALUE DEPENDS UPON THE OPPORTUNITY AND THE
18 ABILITY OF THE WITNESS TO OBSERVE THE PERPETRATOR AT THE TIME
19 OF THE EVENT AND TO MAKE AN ACCURATE IDENTIFICATION LATER,
20 AND IT'S UP TO YOU TO DECIDE HOW MUCH WEIGHT TO PLACE ON SUCH
21 TESTIMONY.

22 NOW, IN EVALUATING THE IDENTIFICATION OF THE DEFENDANT
23 AS THE PERPETRATOR BY ANY WITNESS, YOU SHOULD TAKE INTO
24 ACCOUNT WHETHER THE WITNESS HAD ADEQUATE OPPORTUNITY AND
25 ABILITY TO OBSERVE THE PERPETRATOR AT THE TIME IN QUESTION.

1 THIS WILL BE AFFECTED BY SUCH CONSIDERATIONS AS THE LENGTH OF
2 TIME AVAILABLE TO MAKE THE OBSERVATION, THE DISTANCE BETWEEN
3 THE WITNESS AND THE PERPETRATOR, THE LIGHTING CONDITIONS AT
4 THE TIME OF THE OFFENSE, WHETHER THE WITNESS HAD KNOWN OR
5 SEEN THE PERSON IN THE PAST, THE HISTORY, IF ANY, BETWEEN
6 THEM INCLUDING ANY DEGREE OF ANIMOSITY AND WHETHER ANYTHING
7 DISTRACTED THE ATTENTION OF THE WITNESS DURING THE INCIDENT.

8 YOU SHOULD ALSO CONSIDER THE WITNESS'S PHYSICAL AND
9 EMOTIONAL CONDITION AT THE TIME OF THE INCIDENT AND THE
10 WITNESS'S POWERS OF OBSERVATION IN GENERAL. YOU SHOULD
11 CONSIDER THE LENGTH OF TIME THAT HAS -- THAT MAY HAVE ELAPSED
12 BETWEEN THE OCCURRENCE OF THE CRIME AND THE IDENTIFICATION OF
13 THE DEFENDANT BY THE WITNESS.

14 YOU SHOULD ALSO CONSIDER THE STRENGTH OF THE
15 IDENTIFICATION, INCLUDING THE WITNESS'S DEGREE OF CERTAINTY.
16 CERTAINTY, HOWEVER, DOES NOT MEAN ACCURACY. YOU SHOULD TAKE
17 INTO ACCOUNT THE CIRCUMSTANCES UNDER WHICH THE WITNESS FIRST
18 VIEWED AND IDENTIFIED THE DEFENDANT AND ANY -- ANY OTHER
19 OBSERVATION OR CONSIDERATION THAT YOU THINK IS APPROPRIATE.

20 YOU SHOULD CONSIDER OR YOU MAY CONSIDER WHETHER ANY
21 WITNESS AT ANY TIME EITHER FAILED TO IDENTIFY THE DEFENDANT
22 OR MADE AN IDENTIFICATION THAT WAS INCONSISTENT WITH THE
23 IDENTIFICATION TESTIFIED TO AT TRIAL. IN SHORT, LADIES AND
24 GENTLEMEN, YOU SUBJECT THE TESTIMONY OF ANY IDENTIFICATION
25 WITNESS TO THE SAME STANDARDS OF CREDIBILITY THAT APPLY TO

1 ALL WITNESSES. AND, AGAIN, THE STATE MUST PROVE BEYOND A
2 REASONABLE DOUBT THAT THE DEFENDANT WAS THE PERSON WHO
3 COMMITTED THE CRIME IN QUESTION, AND YOU MUST BE SATISFIED
4 BEYOND A REASONABLE DOUBT OF THE ACCURACY OF THE
5 IDENTIFICATION OF THE DEFENDANT BEFORE YOU MAY FIND HIM
6 GUILTY.

7 ALL RIGHT. LADIES AND GENTLEMEN, ALSO OR, LASTLY, THE
8 VERDICT FORM IN QUESTION AGAIN HAS TWO INQUIRIES. THE
9 VERDICT FORM HAS THE WORD VERDICT ON IT WHICH, YOU MAY
10 REMEMBER, I TOLD YOU COMES FROM THE LATIN WORDS WHICH MEANS
11 SPEAK THE TRUTH. QUESTION NUMBER ONE SAYS: "AS TO THE
12 CHARGE OF ARMED ROBBERY, WE, THE JURY, UNANIMOUSLY FIND THE
13 DEFENDANT NOT GUILTY OR GUILTY."

14 IF YOU FIND THE DEFENDANT NOT GUILTY, THEN YOU -- MR.
15 FOREMAN, YOU SIGN THE VERDICT FORM, DATE IT, TAP ON THE DOOR
16 AND LET THE BAILIFF KNOW YOU'VE REACHED A VERDICT, AND YOUR
17 VERDICT MUST BE UNANIMOUS. THAT MEANS EVERYBODY HAS TO
18 AGREE. THIS IS NOT A SEVEN TO FIVE, EIGHT TO FOUR, NINE TO
19 THREE OR EVEN ELEVEN-TO-ONE PROPOSITION. EVERYONE HAS TO
20 AGREE.

21 NOW, IF YOU FIND THAT THE STATE HAS MET ITS BURDEN OF
22 PROOF BEYOND A REASONABLE DOUBT AND THAT THE DEFENDANT IS
23 GUILTY OF ARMED ROBBERY, YOU GO TO QUESTION TWO AND IT SAYS:
24 "AS TO THE CHARGE OF POSSESSION OF A WEAPON DURING THE
25 COMMISSION OF A VIOLENT CRIME, WE, THE JURY, UNANIMOUSLY FIND

1 THE DEFENDANT" - AGAIN, TWO CHOICES: NOT GUILTY AND GUILTY.

2 NOW, ONCE YOUR VERDICT IS CONCLUDED AND ONCE YOU HAVE
3 REACHED A VERDICT THAT IS UNANIMOUS, YOU SIMPLY SIGN THE
4 VERDICT FORM, DATE IT, TAP ON THE DOOR, AND LET THE BAILIFF
5 KNOW YOU HAVE REACHED A VERDICT. IF YOU HAVE ANY QUESTIONS
6 DURING THE COURSE OF YOUR DELIBERATIONS, THERE WILL BE A PAD
7 MADE AVAILABLE TO YOU. SIMPLY WRITE THE QUESTION DOWN, TAP
8 ON THE DOOR, LET THE BAILIFF HAVE THE QUESTION, AND HE'LL
9 BRING IT TO ME, AND THE LAW WILL DICTATE AS TO WHETHER I AM
10 ABLE TO RESPOND TO THAT QUESTION.

11 IF SOMEONE EXCUSES HIMSELF OR HERSELF TO USE THE REST
12 ROOM, YOU HAVE TO STOP YOUR DELIBERATIONS. IF SOMEONE NEEDS
13 TO LEAVE THE JURY ROOM FOR ANY REASON, FIRST OF ALL, THE
14 PERSON HAS TO GET PERMISSION. IF SOMEONE DOES LEAVE THE JURY
15 ROOM, YOU HAVE TO STOP YOUR DELIBERATIONS. SO PLEASE KEEP
16 THAT IN MIND AND, MR. FOREMAN, YOU DON'T HAVE ANY GREATER
17 AUTHORITY THAN ANYBODY ELSE IN THAT JURY ROOM. YOU DON'T
18 HAVE THE AUTHORITY TO DECIDE WHEN ONE PERSON OR ANOTHER HAS
19 HAD ENOUGH TIME TO TALK. IN OTHER WORDS, YOU CAN'T CUT OFF
20 DEBATE. IF SOMEBODY WANTS TO TALK ABOUT THE CASE, THAT
21 PERSON IS ENTITLED TO TALK AS LONG AS THAT PERSON WANTS TO
22 TALK. BY THE SAME TOKEN, IF SOMEONE SIMPLY WANTS TO VOICE
23 HIS OR HER DECISION AS TO GUILT OR NON GUILT AND THAT'S ALL
24 THAT PERSON WANTS TO DO, YOU CAN'T MAKE SOMEBODY TALK. SO
25 YOUR JOB, QUITE SIMPLY, IS TO MAKE SURE THAT THE

1 DELIBERATIONS ARE CONDUCTED IN AN ORDERLY FASHION AND THAT
2 EVERYONE WHO WANTS A FULL OPPORTUNITY TO SPEAK IS GIVEN THAT
3 OPPORTUNITY, AND YOU MUST MAKE SURE THAT THE VERDICT IS
4 UNANIMOUS.

5 AND, LADIES AND GENTLEMEN, I AM NOT SO MUCH CONCERNED
6 WHAT ABOUT YOUR VERDICTS ARE GOING TO BE. I JUST WANT TO
7 MAKE SURE THAT YOU UNDERSTAND THAT YOUR VERDICT MUST BE BASED
8 ON AN HONEST AND COMPLETE DELIBERATION OF THE ISSUES IN THIS
9 CASE, AND I WANT TO MAKE SURE YOU UNDERSTAND THAT YOUR
10 VERDICT MUST BE UNANIMOUS.

11 THE NEXT PHASE OF THE TRIAL, LADIES AND GENTLEMEN, WHICH
12 WILL BE RELATIVELY BRIEF BUT WILL BE FOR THE LAWYERS TO TELL
13 ME IF THEY THINK THAT I CHARGED ANYTHING IMPROPERLY OR IF I
14 LEFT ANYTHING OUT. SO I'M GOING TO ASK YOU TO GO TO YOUR
15 JURY ROOM NOW, AND I'M GOING TO INSTRUCT YOU NOT TO DISCUSS
16 THE CASE YET. IF WE HAVE TO BRING YOU OUT, I WILL. IF NOT,
17 THE BAILIFF WILL COME TO YOUR DOOR WITH THE VERDICT FORM AND
18 THE EXHIBITS AND HE WILL TELL YOU THAT YOU CAN BEGIN
19 DELIBERATING THIS CASE.

20 ALL RIGHT. THANK YOU, LADIES AND GENTLEMEN. AND LUNCH
21 HAS BEEN ORDERED, AND IN CASE YOU'RE WONDERING, IT'S COMING
22 FROM SHULER'S WHICH IS GOOD FOR ME. BUT YOU WILL BE --
23 YOU'LL HAVE THAT MOMENTARILY. IT PROBABLY WILL BE HERE NEAR
24 1:00 IF IT'S NOT HERE ALREADY. ALL RIGHT. DO NOT BEGIN
25 DISCUSSING THE CASE QUITE YET.

1 ((WHEREUPON, THE JURY WAS EXCUSED FROM OPEN COURT AT
2 12:58 P.M.)

3 THE COURT: MR. HERRING?

4 THE CLERK: YES, SIR.

5 THE COURT: WOULD YOU ASK THE TWO ALTERNATES TO COME
6 BACK NOW?

7 THE CLERK: SIR?

8 THE COURT: THE TWO ALTERNATES.

9 THE CLERK: YOU WANT THEM TO COME BACK IN?

10 THE COURT: YES, SIR.

11 MR. SPRATLIN: YOUR HONOR, PRIOR TO THE TWO ALTERNATES
12 COMING OUT, I MAY HAVE AN ISSUE I'D LIKE TO ADDRESS WITH THE
13 COURT.

14 THE COURT: ALL RIGHT. MR. HASTIE?

15 MR. HASTIE: SIR?

16 THE COURT: YES, SIR, MR. SPRATLIN.

17 MR. SPRATLIN: YOUR HONOR, IT WOULD JUST BE THAT GIVEN A
18 RECENT CASE WE HAD HERE WHERE ONE OF THE JURORS INVOLVED IN
19 THE DELIBERATION PROCESS WAS NOT ABLE TO CONTINUE, WE WOULD
20 ASK THAT THE ALTERNATES NOT BE EXCUSED FROM THE TRIAL. WE
21 UNDERSTAND THAT---

22 THE COURT: WAIT A MINUTE. MR. WILDER, IF Y'ALL COULD
23 HOLD IT DOWN JUST A SECOND.

24 MR. SPRATLIN: I MEAN, WE UNDERSTAND IT MAY BE
25 INCONVENIENT FOR THEM. WE WOULD ASK THAT THEY AT LEAST BE

1 PLACED ON CALL.

2 THE COURT: WELL, THE LAW SAYS AT THE CLOSE OF THE
3 CHARGE THE ALTERNATES ARE TO BE DISMISSED. MY VIEW OF THAT
4 IS THAT THEY'RE DISMISSED AND THEY AREN'T ON CALL.

5 MR. SPRATLIN: YES, SIR.

6 THE COURT: THE ONLY ALTERNATIVE IS FOR THEM TO SIT IN
7 TWO SEPARATE ROOMS BY THEMSELVES. WHAT'S THE DEFENDANT'S
8 POSITION ON THAT? I THINK IT'S UP TO ME BUT...

9 MR. HASTIE: I JUST -- I FEEL THAT THEY SHOULD BE
10 RELEASED, YOUR HONOR.

11 THE COURT: ALL RIGHT. ANYTHING ELSE?

12 MR. SPRATLIN: NO, YOUR HONOR. WE WOULD -- WE WOULD
13 LEAVE IT UP TO THE COURT'S DISCRETION.

14 THE COURT: ALL RIGHT. I'M GOING TO GO AHEAD AND
15 DISMISS THE ALTERNATES.

16 MR. SPRATLIN: YES, YOUR HONOR.

17 THE COURT: AND ANY EXCEPTIONS OR ADDITIONS TO THE
18 CHARGE?

19 MR. SPRATLIN: NOT ON BEHALF OF THE STATE.

20 THE COURT: MR. HASTIE, ANY EXCEPTIONS OR ADDITIONS?

21 MR. HASTIE: MR. WILDER WILL MAKE IT.

22 MR. WILDER: IF IT PLEASE THE COURT, YOUR HONOR? THE
23 DEFENDANT WOULD RESPECTFULLY EXCEPT ON THE GROUNDS THAT
24 COMMON LAW ROBBERY WAS NOT CHARGED AS REQUESTED AND WOULD
25 RESPECTFULLY EXCEPT ON THE GROUNDS THAT WHATEVER YOU LEFT OUT

1 OF THE WRITTEN CHARGE YOU SAID YOU WOULDN'T DO. WE WOULD
2 RESPECTFULLY EXCEPT ON THE GROUNDS---

3 THE COURT: TALKING ABOUT WHAT I PREVIOUSLY TOLD YOU I
4 WOULD LEAVE OUT?

5 MR. WILDER: YES, YOUR HONOR. YOUR HONOR, WE JUST HAD
6 ASKED THAT IT BE CHARGED AS PRESENTED---

7 THE COURT: YES, SIR.

8 MR. WILDER: ---AND WHATEVER YOU LEFT OUT, WE
9 RESPECTFULLY EXCEPT TO THAT. THE ONLY OTHER THING, YOUR
10 HONOR, THAT WE RESPECTFULLY EXCEPT TO---

11 THE COURT: LET ME ADDRESS THAT FIRST. I THINK THE
12 IDENTIFICATION CHARGE THAT I GAVE IS MORE THAN COMPLETE, SO
13 THAT'S RESPECTFULLY DENIED.

14 MR. WILDER: THANK YOU. AND, YOUR HONOR, THE LAST
15 EXCEPTION WOULD BE AS I WAS LISTENING TO YOUR HONOR AND YOU
16 DESCRIBED THAT THE BURDEN OF PROOF IN A CIVIL CASE IS BEYOND
17 THE PREPONDERANCE OF THE EVIDENCE, AND THEN YOU USED THE
18 EXPRESSION IN A CRIMINAL CASE: THE STATE'S BURDEN IS MORE
19 POWERFUL THAN THAT. YOU USED THE WORD POWERFUL, AND AS I WAS
20 LISTENING TO THAT, YOUR HONOR, IT SEEMED TO ME THAT MY
21 IMPRESSION WAS THAT IT WAS AN IMPROPER COMMENT ON THE STATUS
22 OF THE STATE'S BURDEN IN THIS CASE, THAT -- THAT IN THIS
23 CRIMINAL CASE NOW THE STATE HAD A POWERFUL LOT OF EVIDENCE IN
24 THIS CASE. AND, ANYWAY, IT JUST SEEMS TO ME THAT IT WAS
25 IMPROPERLY SHIFTING OR CHARACTERIZING THE NATURE OF THE

1 BURDEN OF PROOF WHICH I'M SURE YOUR HONOR INTENDED TO SAY WAS
2 HIGHER IN A CRIMINAL CASE BUT---

3 THE COURT: I THINK I SAID THAT NUMEROUS TIMES. I THINK
4 WHAT I SAID WAS THE STATE'S PROOF MUST BE MORE POWERFUL THAN
5 THAT.

6 MR. WILDER: RIGHT. EXACTLY.

7 THE COURT: YOU THINK THAT'S OBJECTIONABLE, TOO?

8 MR. WILDER: WELL, THE WAY IT WAS EXPRESSED BY YOUR
9 HONOR, RESPECTFULLY, AND I KNOW YOU PROBABLY WERE JUST DOING
10 THAT ON THE FLY AND PROBABLY NOT READING IT, BUT THE STATE'S
11 PROOF IS MORE POWERFUL IN THIS CASE SEEMED TO ME TO BE
12 INDICATING THAT IN THIS CASE THE STATE HAD A POWERFUL DEGREE
13 OF PROOF AND THAT THEY HAD THAT, IN OTHER WORDS THAT THE
14 PROOF THAT EXISTS IN THIS CASE BY THE STATE IS POWERFUL AND
15 NOT THAT THEY HAVE THIS BURDEN OF PROOF WHICH YOUR HONOR WAS
16 GOING TO ARTICULATE. I BELIEVE IT WAS YOUR INTENTION TO
17 ARTICULATE ABOUT THE BURDEN, BUT IT'S THE USE OF THE WORD
18 POWERFUL IS WHAT I OBJECT TO IN THE CONTEXT THAT -- I BELIEVE
19 THE COURT REPORTER MIGHT BE ABLE TO READ IT BACK FOR YOU OR
20 SOMETHING.

21 THE COURT: ALL RIGHT. WELL, WHAT I'LL DO IS I'LL BRING
22 THE JURY BACK IN AND JUST BRIEFLY TELL THEM THAT IF I -- IF I
23 DID MISSPEAK AT ANY TIME, I WANT TO CLARIFY IT, AND I'LL JUST
24 GO OVER THAT ONE POINT AGAIN. I THINK THAT I SAID SIX,
25 SEVEN, EIGHT, OR NINE TIMES THAT THE DEFENDANT DOESN'T HAVE

1 TO PROVE ANYTHING, AND THE STATE HAS THE BURDEN OF PROOF
2 BEYOND A REASONABLE DOUBT, BUT JUST TO CLARIFY THAT, I'LL
3 BRING THE JURY BACK IN. ANYTHING ELSE, MR. WILDER?

4 MR. WILDER: NO, YOUR HONOR.

5 THE COURT: ALL RIGHT. BRING IN THE JURY, AND WHEN THEY
6 DEPART THE NEXT TIME, THE TWO ALTERNATES CAN STAY. AND, MR.
7 SPRATLIN -- MR. SPRATLIN IF YOU COULD -- IF ANY OF YOUR FOLKS
8 WANT TO BE PRESENT FOR ANY QUESTIONS, MAKE SURE THEY
9 UNDERSTAND THAT THEY HAVE TO HAVE A PHONE NUMBER THAT THEY
10 CAN COME VERY QUICKLY, AND IF ANYBODY -- I HOPE NONE OF Y'ALL
11 -- NEITHER OF THE LAWYERS WILL LEAVE THE IMMEDIATE COURTROOM
12 AREA.

13 MR. SPRATLIN: NO, YOUR HONOR, I WILL NOT.

14 THE COURT: ALL RIGHT.

15 (WHEREUPON, THE JURY WAS BROUGHT INTO OPEN COURT AT 1:04
16 P.M.)

17 THE COURT: ALL RIGHT. LADIES AND GENTLEMEN, THIS WILL
18 BE VERY BRIEF. IN CASE I MISSPOKE OR -- I GUESS THAT'S THE
19 BEST WORD FOR IT. IN CASE I DID, I WANT TO CLARIFY ONE
20 PARTICULAR POINT, NOT TO PLACE ANY PARTICULAR EMPHASIS ON IT,
21 BUT I JUST WANT TO CLARIFY ONE PARTICULAR POINT. AS I TOLD
22 YOU, LADIES AND GENTLEMEN, THE STATE HAS THE BURDEN OF
23 PROVING THE DEFENDANT GUILTY BEYOND A REASONABLE DOUBT, AND
24 AS I TOLD YOU, SOME OF YOU MAY HAVE BEEN JURORS IN A CIVIL
25 CASE WHERE YOU WERE TOLD THAT IT'S ONLY NECESSARY TO PROVE

1 THAT A FACT IS MORE LIKELY TRUE THAN NOT TRUE. THAT'S CALLED
2 BY THE GREATER WEIGHT OR THE PREPONDERANCE OF THE EVIDENCE.

3 IN CRIMINAL CASES THE STATE'S PROOF MUST BE MORE
4 POWERFUL THAN THAT, AND THE STATE'S PROOF MUST BE BEYOND A
5 REASONABLE DOUBT WHICH I DEFINED FOR YOU EARLIER. ALL RIGHT.
6 LADIES AND GENTLEMEN, YOU MAY GO BACK TO YOUR JURY ROOM, BUT
7 THE TWO ALTERNATES WOULD REMAIN BEHIND. AND, AGAIN, THE
8 BAILIFF WILL COME TO THE DOOR, AND WHEN HE COMES TO THE DOOR
9 WITH THE EXHIBITS AND THE VERDICT FORM, THAT WILL BE YOUR
10 SIGNAL TO DELIBERATE. DON'T BEGIN DOING IT QUITE YET. ALL
11 RIGHT. THANK YOU VERY MUCH.

12 (WHEREUPON, THE JURY WAS EXCUSED FROM OPEN COURT AT 1:06
13 P.M.)

14 THE COURT: ALL RIGHT. MR. HASTIE, ANY OBJECTION TO
15 THAT?

16 MR. HASTIE: NONE, YOUR HONOR.

17 THE COURT: ALL RIGHT. ANY -- ANY OTHER EXCEPTIONS OR
18 ADDITIONS, MR. SPRATLIN?

19 MR. SPRATLIN: NO, YOUR HONOR.

20 THE COURT: MR. HASTIE?

21 MR. HASTIE: NONE, YOUR HONOR.

22 THE COURT: ALL RIGHT. HAVE YOU CONFIRMED THAT ALL THE
23 EXHIBITS ARE IN ORDER?

24 MR. SPRATLIN: YOUR HONOR, WE STILL HAVE AN AMENDMENT TO
25 MAKE TO ONE OF THE EXHIBITS, THAT IS, THE STRIKING THROUGH OF

1 THE SOCIAL SECURITY NUMBER.

2 THE COURT: LET'S GO AHEAD AND GET THAT DONE SO THE JURY
3 CAN BEGIN DELIBERATING, BUT IS EVERYTHING ELSE IN ORDER?

4 MR. SPRATLIN: I BELIEVE SO, YOUR HONOR.

5 THE COURT: MAKE SURE THAT THE ENVELOPE CONTAINING THE
6 BULLETS IS NOT IN THERE AT THE SAME TIME THE GUN IS, AND I
7 THINK I'VE EXPLAINED TO THE JURY THAT IF THEY WANT TO SEE THE
8 BULLETS THEN THE GUN HAS TO COME BACK OUT. ALL RIGHT.

9 (WHEREUPON, THE ALTERNATES WERE EXCUSED FROM THE TRIAL.)

10 THE COURT: ALL RIGHT. ARE ALL THE EXHIBITS IN, MR.
11 SPRATLIN, AND MR. HASTIE?

12 MR. SPRATLIN: YES, YOUR HONOR.

13 MR. HASTIE: YES, YOUR HONOR.

14 THE COURT: ALL RIGHT. MR. HERRING, YOU CAN TELL THE
15 JURY THEY CAN DELIBERATE.

16 (WHEREUPON, THE JURY BEGAN DELIBERATING AT 1:12 P.M.)

17 THE COURT: ALL RIGHT. HAVE A SEAT. OKAY. I
18 UNDERSTAND THE JURY HAS REACHED A VERDICT. IS THE STATE
19 READY?

20 MR. SPRATLIN: THE STATE'S READY TO RECEIVE THE VERDICT,
21 YOUR HONOR.

22 THE COURT: DEFENDANT READY?

23 MR. HASTIE: YES, WE ARE, YOUR HONOR.

24 THE COURT: ALL RIGHT. JUST AS A MATTER OF COURSE, I'LL
25 INSTRUCT EVERYBODY IN THE COURTROOM THAT REGARDLESS OF WHAT

1 THE VERDICT IS I DON'T WANT THERE TO BE ANY VISUAL OR AUDIBLE
2 -- VISIBLE OR AUDIBLE RESPONSE TO WHAT THE VERDICT IS. ALL
3 RIGHT. YOU CAN BRING IN THE JURY.

4 (WHEREUPON, THE JURY RETURNED TO OPEN COURT WITH A
5 VERDICT AT 2:03 P.M.)

6 THE COURT: ALL RIGHT. MR. FOREMAN, HAS THE JURY
7 REACHED A VERDICT?

8 FOREMAN: WE HAVE, YOUR HONOR.

9 THE COURT: AND IS IT UNANIMOUS?

10 FOREMAN: YES, IT IS, SIR.

11 THE COURT: YOU CAN HAND THE FORM TO MR. HERRING. ALL
12 RIGHT. MR. MASSEY, IF YOU COULD PLEASE STAND. MR. HERRING,
13 YOU CAN PUBLISH THE VERDICT.

14 THE CLERK: CASE NUMBER 2008-GS-43-0853, THE STATE OF
15 SOUTH CAROLINA VERSUS ANDRE M. MASSEY. AS TO COUNT ONE AS TO
16 THE CHARGE OF ARMED ROBBERY: WE, THE JURY, UNANIMOUSLY FIND
17 THE DEFENDANT GUILTY. AS TO COUNT TWO AS TO THE CHARGE OF
18 POSSESSION OF A WEAPON DURING THE COMMISSION OF A VIOLENT
19 CRIME: WE, THE JURY, UNANIMOUSLY FIND THE DEFENDANT GUILTY,
20 SIGNED HARRY LASH, FOREPERSON, DATED AUGUST THE 5TH, 2009.
21 IF THIS BE YOUR VERDICT, SO SAY YOU ALL BY RAISING YOUR RIGHT
22 HAND. THANK YOU.

23 THE COURT: ALL RIGHT. Y'ALL CAN HAVE A SEAT. ANY --
24 ANY MATTERS BEFORE THE JURY IS DISCHARGED? FROM THE STATE?

25 MR. SPRATLIN: NONE, YOUR HONOR.

1 **THE COURT:** FROM THE DEFENDANT?

2 **MR. HASTIE:** YES. I WOULD LIKE TO HAVE THE JURY POLLED,
3 YOUR HONOR.

4 **THE COURT:** ALL RIGHT. MR. HERRING?

5 **THE CLERK:** YES, SIR. LADIES AND GENTLEMEN, WHEN YOUR
6 NAME IS CALLED, PLEASE STAND AND ANSWER TO THE TWO QUESTIONS
7 THAT I POSE TO YOU. JANA BRIDGES, IS THIS YOUR VERDICT AND
8 STILL YOUR VERDICT?

9 **JUROR BRIDGES:** YES, SIR.

10 **THE CLERK:** THANK YOU. ROCHELSEA BURSON, IS THIS YOUR
11 VERDICT AND STILL YOUR VERDICT?

12 **JUROR BURSON:** YES, IT IS.

13 **THE CLERK:** THANK YOU. PAUL LONG, IS THIS YOUR VERDICT
14 AND STILL YOUR VERDICT?

15 **JUROR LONG:** YES, IT IS.

16 **THE CLERK:** THANK YOU. MAGGIE GLOVER, IS THIS YOUR
17 VERDICT AND STILL YOUR VERDICT?

18 **JUROR GLOVER:** YES, SIR.

19 **THE CLERK:** THANK YOU. CHRISTINA DONLEY, IS THIS YOUR
20 VERDICT AND STILL YOUR VERDICT?

21 **JUROR DONLEY:** YES.

22 **THE CLERK:** THANK YOU. AUJA SUMTER, IS THIS YOUR
23 VERDICT AND STILL YOUR VERDICT?

24 **JUROR SUMTER:** YES, SIR.

25 **THE CLERK:** THANK YOU. LINDA MACDONALD, IS THIS YOUR

1 VERDICT A VERDICT AND STILL YOUR VERDICT?

2 JUROR MACDONALD: YES, SIR.

3 THE CLERK: THANK YOU. HARRY LASH, IS THIS YOUR VERDICT
4 AND STILL YOUR VERDICT?

5 JUROR LASH: YES, SIR.

6 THE CLERK: THANK YOU. OLA MAE POTTS, IS THIS YOUR
7 VERDICT AND STILL YOUR VERDICT?

8 JUROR POTTS: YES, SIR.

9 THE CLERK: THANK YOU. CHRISTOPHER PEYTON, IS THIS YOUR
10 VERDICT AND STILL YOUR VERDICT?

11 JUROR PEYTON: YES, SIR.

12 THE COURT: THANK YOU. ALLEN CHILDERS, IS THIS YOUR
13 VERDICT AND STILL YOUR VERDICT?

14 JUROR CHILDERS: YES, SIR.

15 THE CLERK: THANK YOU. DEBRA ANDERSON, IS THIS YOUR
16 VERDICT AND STILL YOUR VERDICT?

17 JUROR ANDERSON: YES, SIR.

18 THE CLERK: THANK YOU. YOUR HONOR, THE JURY HAS BEEN
19 POLLED, AND THE VERDICT STANDS.

20 THE COURT: THANK YOU, MR. HERRING. ALL RIGHT.
21 ANYTHING ELSE, MR. SPRATLIN, BEFORE THE JURY IS RELEASED?

22 MR. SPRATLIN: NO, YOUR HONOR.

23 THE COURT: MR. HASTIE?

24 MR. HASTIE: NO, YOUR HONOR.

25 THE COURT: ALL RIGHT. CAN THE LAWYERS COME AROUND FOR

1 JUST A MOMENT?

2 (WHEREUPON, A BENCH CONFERENCE WAS HELD.)

3 THE COURT: ALL RIGHT. LADIES AND GENTLEMEN ON THIS
4 JURY, WE'RE GOING TO PROCEED NEXT TO THE SENTENCING PORTION
5 OF THE PROCEEDING. IF YOU WOULD LIKE TO LEAVE, YOU MAY DO SO
6 AND SIMPLY LEAVE -- GIVE YOUR BADGE TO THE---

7 THE CLERK: IT WOULD BE OUTSIDE.

8 THE COURT: ---TO THE BAILIFF OUTSIDE, AND THE REST OF
9 THE PANEL IS COMING BACK AT 3:30. IF YOU WOULD LIKE TO STAY
10 FOR THE SENTENCING PROCEEDING, YOU MAY DO SO, BUT YOU NEED
11 NOT UNLESS YOU WANT TO. PLEASE FOLLOW THIS ONE LAST
12 INSTRUCTION: YOU MAY NOT DISCUSS THIS CASE UNTIL YOUR
13 SERVICE FOR THE WEEK IS OVER, AND THAT'S PRIMARILY FOR YOUR
14 BENEFIT. PLEASE DON'T DISCUSS IT WITH YOUR FELLOW JURORS OR
15 WITH ANYONE ELSE WHO MAY APPROACH YOU ABOUT THAT.

16 AFTER YOUR SERVICE THIS WEEK IS OVER, YOU CAN TALK ABOUT
17 THIS CASE ALL THAT YOU WANT. IF SOMEONE, HOWEVER, APPROACHES
18 YOU AND WANTS TO DISCUSS THIS CASE AND YOU DON'T WANT TO,
19 SIMPLY TELL THE PERSON THAT. IF THE PERSON PERSISTS, GET
20 THAT PERSON'S NAME AND GIVE THAT NAME TO MR. CAMPBELL'S
21 OFFICE, AND HE'LL GIVE THAT INFORMATION TO ME AND I'LL HANDLE
22 THAT ACCORDINGLY.

23 SO, IN SHORT, I WOULD APPRECIATE IT IF YOU DO NOT
24 DISCUSS THIS CASE SINCE YOU HAVE ADDITIONAL SERVICE TO
25 PROVIDE THIS WEEK, BUT YOU MAY DISCUSS IT AFTER YOU'RE

1 RELEASED THIS WEEK AS YOU -- AS YOU THINK IS APPROPRIATE.
2 ALL RIGHT. IF ANYONE WOULD LIKE TO LEAVE AT THIS TIME WHILE
3 THE SENTENCING IS CONDUCTED, YOU MAY LEAVE AT THIS TIME OR
4 YOU CAN STAY IN THE JURY BOX IF YOU WOULD LIKE.

5 ALL RIGHT. OKAY. MR. SPRATLIN AND MR. HASTIE, ARE YOU
6 READY TO PROCEED TO SENTENCING?

7 MR. SPRATLIN: YES, YOUR HONOR.

8 THE COURT: ALL RIGHT. MR. HASTIE?

9 MR. HASTIE: YES, YOUR HONOR.

10 THE COURT: ALL RIGHT. UNDER -- UNDER THE RULES - I
11 BELIEVE IT'S RULE 29 -- LOOK AT THOSE RULES, AND I WILL ALLOW
12 THE DEFENDANT 10 DAYS TO FILE ANY POST-TRIAL MOTIONS.

13 MR. HASTIE: THANK YOU.

14 THE COURT: MAKE SURE THAT YOU READ -- I THINK IT'S
15 29(A) THAT SAYS IT HAS TO BE DONE WITHIN 10 DAYS, AND I
16 CAUTION YOU TO MAKE SURE THAT YOU DON'T FILE ANY NOTICE OF
17 APPEAL PRIOR TO FILING OR EVEN AFTER FILING THE POST-TRIAL
18 MOTIONS BECAUSE THEN THE COURT LOSES JURISDICTION. ALL
19 RIGHT. MR. SPRATLIN?

20 MR. SPRATLIN: YES, YOUR HONOR. AS YOU KNOW, YOUR
21 HONOR, WE'VE ALREADY ENTERED SEVERAL OF THE ISSUES OF
22 SENTENCING INTO EVIDENCE AS COURT'S EXHIBITS DURING THE
23 PRETRIAL, SO LET ME FIND THE APPROPRIATE ONES.

24 THE COURT: MR. HASTIE, I WILL TAKE NOTICE AT THIS TIME
25 IN THE SENTENCING PHASE THAT YOU ARE CONTESTING IMPOSITION OF

1 A SENTENCE UNDER 17-25-45 IN LIGHT OF YOUR EARLIER MOTION TO
2 QUASH THAT NOTICE?

3 MR. HASTIE: YES, SIR.

4 THE COURT: THAT MAY ALSO BE PART OF YOUR POST-TRIAL
5 MOTIONS, BUT SINCE YOU'VE ADEQUATELY RAISED IT IN THE
6 PRETRIAL PROCEEDINGS, I DO TAKE NOTICE THAT YOU ARE
7 CONTESTING THE FORM OF THE NOTICE ITSELF, THE TERMINOLOGY
8 USED IN THE NOTICE---

9 MR. HASTIE: RIGHT.

10 THE COURT: ---AND ALSO THE FACT THAT IT WAS NOT
11 PROPERLY SERVED AND THAT YOU AND YOUR CLIENT DID NOT HAVE
12 PROPER NOTICE AND ANY OTHER ARGUMENTS THAT YOU WANT TO RAISE.
13 I'M NOT CUTTING YOU OFF. I'M JUST ANTICIPATING WHAT YOU
14 MIGHT SAY.

15 MR. HASTIE: YES, SIR.

16 THE COURT: ALL RIGHT. MR. SPRATLIN?

17 MR. SPRATLIN: YOUR HONOR, THE FIRST EXHIBIT I WOULD
18 HAVE FOR THE COURT IN REGARDS TO SENTENCING HAS ALREADY BEEN
19 MARKED AS COURT'S EXHIBIT NUMBER 5 EARLIER. IT IS THE NOTICE
20 OF INTENTION TO SEEK LIFE IMPRISONMENT. AS YOUR HONOR IS
21 AWARE, 17-25-45, I BELIEVE IT IS -- LET ME MAKE SURE I'M
22 PULLING THE RIGHT STATUTE ON THAT.

23 THE COURT: IT IS. THAT'S THE RIGHT ONE.

24 MR. SPRATLIN: THAT ALLOWS AND ACTUALLY REQUIRES THE
25 STATE TO SEEK LIFE IMPRISONMENT FOR CERTAIN OFFENDERS UNDER

1 THE RECIDIVIST STATUTE. NAMELY, YOUR HONOR, ARMED ROBBERY IS
2 A MOST SERIOUS OFFENSE, AND THE STATUTE REQUIRES THAT ANYONE
3 CONVICTED OF A PRIOR MOST SERIOUS OFFENSE, IN THIS CASE THE
4 DEFENDANT HAVING BEEN CONVICTED OF ONE COUNT OF BURGLARY
5 FIRST DEGREE BACK IN 2 -- BACK IN 1995, OCTOBER 17, 1995, IS
6 THE DATE ON THE SENTENCING SHEET, YOUR HONOR, AND I'LL HAND
7 UP A CERTIFIED COPY OF THAT CONVICTION, COURT'S EXHIBIT
8 NUMBER 4.

9 HE WAS CONVICTED ON THE SAME DATE OF ANOTHER COUNT OF
10 BURGLARY IN THE FIRST DEGREE. I HAVE A COPY OF THE CERTIFIED
11 -- A COPY OF THE CERTIFIED CONVICTION OF THAT AS WELL, YOUR
12 HONOR, COURT'S EXHIBIT NUMBER 3. AND LASTLY, YOUR HONOR, THE
13 DEFENDANT HAS ALSO BEEN CONVICTED OF FIVE COUNTS OF
14 KIDNAPPING AND ONE COUNT OF ASSAULT AND BATTERY WITH INTENT
15 TO KILL. THAT WAS ON THE SAME DATE AS THOSE BURGLARY IN THE
16 FIRST DEGREES, YOUR HONOR: OCTOBER 17, 1995. I HAVE THE
17 CERTIFIED COPY OF THOSE CONVICTIONS, CERTIFIED WITH A RAISED
18 SEAL AS ALL THE CONVICTIONS ARE.

19 THUS, YOUR HONOR, UNDER THE LAWS OF THE STATE OF SOUTH
20 CAROLINA -- IN ADDITION, YOUR HONOR, LET ME GO AHEAD AND
21 INTRODUCE THE COPY OF THE CERTIFICATE OF SERVICE OR PROOF OF
22 SERVICE FILLED OUT BY MS. CAROLINE SANDERS STATING THAT SHE
23 FIRST BEING DULY SWORN DEPOSES -- STATES THAT SHE DID SERVE
24 THE NOTICE OF INTENTION TO SEEK LIFE IMPRISONMENT UPON THE
25 DEFENDANT, ANDRE MASSEY, BY PERSONALLY DELIVERING A COPY OF

1 THE SAME TO THE DEFENDANT AT THE KERSHAW CORRECTIONAL
2 INSTITUTE LOCATED AT 4848 GOLD MINE HIGHWAY, KERSHAW, SOUTH
3 CAROLINA, 29067. THAT IS SIGNED BY HER, YOUR HONOR, AND IT
4 WAS SWORN TO AND AFFIRMED BEFORE A NOTARY, CATHERINE A. AMOSA
5 - I BELIEVE THAT'S THE WAY HER NAME IS PRONOUNCED - WHOSE
6 COMMISSION EXPIRES BACK ON DECEMBER 22ND, 2018. IT'S ALREADY
7 BEEN MARKED AS COURT'S EXHIBIT NUMBER 6.

8 THE COURT: ALL RIGHT. AND I BELIEVE IN THE PRETRIAL
9 THE DEFENDANT TESTIFIED THAT HE HAD RECEIVED THAT NOTICE.

10 MR. HASTIE: YES, SIR.

11 MR. SPRATLIN: YES, YOUR HONOR. AND THERE'S ALSO, YOUR
12 HONOR, ANOTHER CERTIFIED COPY FROM THE CLERK'S OFFICE TITLED,
13 "ACCEPTANCE OF SERVICE OF NOTICE OF INTENT TO SEEK LIFE
14 IMPRISONMENT. RECEIPT OF SERVICE ACKNOWLEDGMENT. RECEIPT
15 FOR THE ABOVE-REFERENCED NOTICE OF INTENT TO SEEK LIFE
16 IMPRISONMENT IN THE ABOVE-CAPTIONED CASE IS HEREBY
17 ACKNOWLEDGED THIS 30TH DAY OF JUNE 2009." IT'S SIGNED FOR BY
18 AN EMPLOYEE OF THE PUBLIC DEFENDER'S OFFICE FOR MR. HASTIE.
19 IT IS A CERTIFIED, TRUE, AND ACCURATE COPY. IT HAS ALREADY
20 BEEN MARKED AS COURT'S EXHIBIT NUMBER 7.

21 THE COURT: ALL RIGHT. AND, MR. HASTIE, WHAT WAS YOUR
22 POSITION AS TO WHETHER OR NOT YOU RECEIVED THE NOTICE?

23 MR. HASTIE: I DID RECEIVE THE NOTICE, YOUR HONOR.

24 THE COURT: ALL RIGHT. OKAY. 17-25-45 STATES THAT
25 UNDER SUB H. WHEN THE SOLICITOR'S REQUIRED TO SEEK OR THE

1 ATTORNEY IS TO SEEK SENTENCING UNDER THIS SECTION, WRITTEN
2 NOTICE MUST BE GIVEN BY THE SOLICITOR TO THE DEFENDANT AND
3 THE DEFENDANT'S COUNSEL NOT LESS THAN 10 DAYS BEFORE TRIAL,
4 AND BASICALLY THOSE THINGS HAVE BEEN ACCOMPLISHED HERE. AND
5 JUST FOR THE RECORD, WE'LL NOTE THAT WE HAVE A TWO-STRIKES
6 LAW AND A THREE-STRIKES LAW.

7 THE TWO-STRIKES LAW IS WHAT WE -- FALLS UNDER THE
8 CATEGORY OF MOST SERIOUS, AND THE CODE SECTION DOES ESTABLISH
9 THAT KIDNAPPING AND BURGLARY AND ASSAULT AND BATTERY WITH
10 INTENT TO KILL ARE ALL MOST SERIOUS OFFENSES. SO THIS
11 CONVICTION OF ARMED ROBBERY WHICH IS ALSO A MOST SERIOUS
12 OFFENSE DOES CONSTITUTE A SECOND STRIKE, AND THAT REQUIRES
13 THE SOLICITOR TO SEEK LIFE IMPRISONMENT WITHOUT PAROLE.

14 THE DEFENDANT HAS EARLIER RAISED THE ISSUE THAT THE
15 NOTICE ITSELF SAID THAT THE STATE WAS SEEKING OR -- EXCUSE
16 ME. "THE STATE HEREBY NOTIFIES THE DEFENDANT OF THE STATE'S
17 INTENTION TO SEEK LIFE IMPRISONMENT." THE DEFENDANT'S
18 POSITION WAS THAT THE NOTICE DID NOT INCLUDE THE PROVISIO
19 "WITHOUT THE POSSIBILITY OF PAROLE." I'VE ALREADY RULED
20 THAT, SINCE THE NOTICE SAID OR INCLUDED THE TERMINOLOGY
21 PURSUANT TO S.C. CODE ANNOTATED SECTION 17-25-45, THAT THE
22 NOTICE WAS APPROPRIATE. THAT MAY WELL BE AN APPELLATE ISSUE,
23 BUT THAT JUST REPEATS MY EARLIER RULING WHICH I GUESS
24 PROBABLY WAS SOMETIME MONDAY OR TUESDAY. MR. HASTIE, DID I
25 STATE YOUR OBJECTION IN THAT REGARD CORRECTLY?

1 **MR. HASTIE:** YES, YOU DID, YOUR HONOR.

2 **THE COURT:** ALL RIGHT. IS THERE ANY OTHER OBJECTION TO
3 -- AT THIS STAGE TO THE PROPRIETY OF SENTENCING THE DEFENDANT
4 UNDER THAT CODE SECTION?

5 **MR. HASTIE:** NO, YOUR HONOR.

6 **THE COURT:** ALL RIGHT. ALL RIGHT. MR. SPRATLIN, IS
7 THERE ANYTHING ELSE THE STATE WANTS TO SAY ABOUT SENTENCING?

8 **MR. SPRATLIN:** NO, YOUR HONOR.

9 **THE COURT:** MR. HUFF, AS THE VICTIM, UNDER THE LAW DOES
10 HAVE THE RIGHT TO SPEAK EVEN THOUGH THE SENTENCING WOULD
11 APPEAR TO BE MANDATORY. SO, MR. HUFF -- MR. HUFF, YOU DO
12 HAVE THE RIGHT TO SPEAK UNDER THE LAW. YOU NEED NOT SPEAK IF
13 YOU DON'T WANT TO, BUT YOU CERTAINLY MAY. MY ONLY REQUEST OF
14 YOU IS THAT IF YOU DO SPEAK THAT YOU ADDRESS YOUR STATEMENTS
15 TO ME AND NOT TO THE DEFENDANT.

16 **MR. HUFF:** NOT AT THIS TIME, YOUR HONOR.

17 **THE COURT:** THANK YOU, SIR. ALL RIGHT. ANYTHING ELSE,
18 MR. SPRATLIN?

19 **MR. SPRATLIN:** NO, YOUR HONOR.

20 **THE COURT:** ALL RIGHT. ANYTHING FROM THE DEFENSE OR THE
21 DEFENDANT BEFORE SENTENCING IS IMPOSED?

22 **MR. HASTIE:** JUST A MOMENT.

23 (AN OFF-THE-RECORD DISCUSSION TAKES PLACE BETWEEN MR.
24 HASTIE AND MR. MASSEY.)

25 **MR. HASTIE:** NOTHING FROM THE DEFENDANT, YOUR HONOR. OF

1 COURSE, I WOULD LIKE TO RENEW ALL THE MOTIONS I MADE EARLY ON
2 ON THE FIRST DAY OF THIS TRIAL.

3 THE COURT: AND YOU'LL HAVE -- YOU'LL HAVE THE
4 ADDITIONAL 10 DAYS TO NOTE THOSE AGAIN, BUT ALL OF THOSE, AT
5 LEAST INSOFAR AS SENTENCING ARE CONCERNED, ARE DENIED. I
6 THINK IT'S -- IT WILL BE AN INTERESTING QUESTION AS TO
7 WHETHER OR NOT THE SPECIFIC TERMINOLOGY OF "WITHOUT THE
8 POSSIBILITY OF PAROLE" IS TECHNICALLY REQUIRED IF THE NOTICE
9 SAYS PURSUANT TO THAT CODE SECTION. THAT WILL BE FOR THE
10 APPELLATE COURT TO RESOLVE. MR. HASTIE, I THINK YOUR EARLIER
11 ARGUMENT WAS THAT THAT WAS SUFFICIENT.

12 MR. HASTIE: THIS IS CORRECT.

13 MR. SPRATLIN: YOUR HONOR, MR. SPRATLIN I BELIEVE YOU
14 MEAN.

15 THE COURT: WHAT DID I SAY?

16 MR. SPRATLIN: YOU SAID MR. HASTIE.

17 THE COURT: OKAY. WELL...

18 MR. SPRATLIN: YES, YOUR HONOR. WE FEEL THAT IT IS
19 SUFFICIENT, ESPECIALLY IN LIGHT OF THE RECENT CASE LAW THAT
20 SAYS THAT WRITTEN NOTICE IS NOT ACTUALLY REQUIRED. SIMPLE
21 ACTUAL NOTICE IS SUFFICIENT, BUT MOST IMPORTANTLY JAMES V.
22 STATE, 372 SOUTH CAROLINA 287, WHICH STATES IN PART: THE
23 PURPOSE OF 17-25-45(H) IS---

24 COURT REPORTER: WHOA. SLOW DOWN.

25 MR. SPRATLIN: I'M SORRY?

1 COURT REPORTER: SLOW DOWN.

2 THE COURT: IF YOU'RE READING FROM SOMETHING, WE CAN'T
3 LISTEN ANY FASTER.

4 MR. SPRATLIN: OKAY. YOUR HONOR, THE PURPOSE OF
5 17-25-45 (H) IS TO INSURE THAT A DEFENDANT AND HIS COUNSEL
6 HAVE ACTUAL NOTICE THAT THE STATE IS SEEKING A SENTENCE UNDER
7 THE RECIDIVIST STATUTE AT LEAST 10 DAYS PRIOR TO TRIAL.
8 ACCORDINGLY, SO LONG AS THE DEFENDANT AND HIS COUNSEL AT
9 LEAST 10 DAYS PRIOR TO TRIAL POSSESS ACTUAL NOTICE OF STATE'S
10 INTENTION TO SEEK A SENTENCE UNDER SOUTH CAROLINA RECIDIVIST
11 STATUTE, THE STATUTE HAS BEEN SATISFIED.

12 THE COURT: ALL RIGHT. OKAY. MR. MASSEY COULD YOU
13 PLEASE STAND, SIR. DO YOU HAVE A SENTENCING SHEET, MR.
14 SPRATLIN?

15 MR. SPRATLIN: YOUR HONOR, I ACTUALLY WILL HAVE ONE
16 PREPARED FOR YOU IN ONE SECOND.

17 THE COURT: ALL RIGHT. MR. MASSEY, UNDER THE CURRENT
18 STATE OF THE LAW, SOUTH CAROLINA CODE SECTION 17-25-45
19 REQUIRES THE STATE, THE SOLICITOR, TO GIVE YOU NOTICE OF LIFE
20 IMPRISONMENT WITHOUT THE POSSIBILITY OF PAROLE IF YOU'RE
21 CONVICTED OF THIS SECOND OR SUBSEQUENT MOST SERIOUS OFFENSE.
22 IN OTHER WORDS, THE STATE COULD NOT DO ANYTHING OTHER THAN
23 THAT. THE STATE HAS NO DISCRETION.

24 SO WHEN IT COMES TO ME UPON YOUR FINDING -- THE JURY
25 FINDING YOU GUILTY OF THIS CHARGE, I TAKE NO PLEASURE IN

1 DOING IT, BUT I'M REQUIRED BY LAW TO COMMIT YOU TO THE SOUTH
2 CAROLINA DEPARTMENT OF CORRECTIONS FOR THE BALANCE OF YOUR
3 LIFE WITHOUT THE POSSIBILITY OF PAROLE. YOU CAN CONSULT WITH
4 YOUR ATTORNEYS ABOUT THE POST-TRIAL MOTIONS AND ANY APPELLATE
5 ISSUES, BUT THOSE WILL BE HANDLED IN THE ORDINARY COURSE OF
6 THE PROCEDURE, BUT I WILL SIGN A SENTENCING SHEET THAT DOES
7 IMPOSE THAT LIFE SENTENCE WITHOUT PAROLE.

8 AND THAT, AGAIN, JUST FOR THE RECORD IS IN LIGHT OF YOUR
9 EARLIER CONVICTIONS FOR BURGLARY IN THE FIRST DEGREE WHICH
10 WAS OCTOBER 17, 1995, THE SAME DATE A CONVICTION OF ASSAULT
11 AND BATTERY WITH INTENT TO KILL, KIDNAPPING, KIDNAPPING AGAIN
12 AND ANOTHER COUNT OF KIDNAPPING, ANOTHER COUNT OF KIDNAPPING
13 AND ANOTHER COUNT OF KIDNAPPING. I WILL SIGN THAT SENTENCING
14 SHEET, MR. SPRATLIN.

15 MR. SPRATLIN: YES, YOUR HONOR. I'M PREPARING ONE RIGHT
16 NOW AS WE SPEAK. I JUST NEED TO CHECK THESE C.D.R. CODES.

17 THE COURT: ALL RIGHT. OKAY. ANYTHING AT THIS TIME,
18 MR. HASTIE?

19 MR. HASTIE: NOTHING, YOUR HONOR.

20 THE COURT: ALL RIGHT. THANK YOU VERY MUCH. ALL RIGHT.
21 LADIES AND GENTLEMEN, WE'LL ALLOW THE DEFENDANT TO LEAVE THE
22 COURTROOM. MR. HASTIE, YOU AND MR. WILDER CAN CONSULT WITH
23 HIM ABOUT THE MOTIONS AND SO FORTH.

24 (PAUSE IN PROCEEDINGS.)

25 THE COURT: SENTENCING FOR POSSESSION OF A WEAPON DURING

SENTENCING

537

1 THE COMMISSION OF A VIOLENT CRIME IS NOT POSSIBLE UNDER THAT
2 STATUTE, 16-23-490, BECAUSE SUBSECTION A. SAYS THE FIVE-YEAR
3 SENTENCE DOES NOT APPLY IN CASES WHERE THE DEATH PENALTY OR A
4 LIFE SENTENCE WITHOUT PAROLE IS IMPOSED. SO I'M MARKING THE
5 SENTENCING SHEET. HE'S COMMITTED TO THE DEPARTMENT OF
6 CORRECTIONS FOR A DETERMINATE TERM OF NOT APPLICABLE, AND
7 THEN AT THE BOTTOM I'LL WRITE, "PURSUANT TO S.C. CODE SECTION
8 16-23-490, NO SENTENCE IS IMPOSED."

9 MR. SPRATLIN: YES, YOUR HONOR.

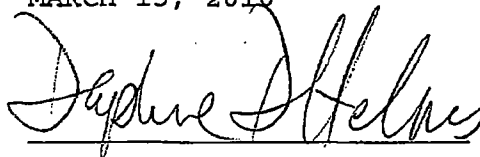
10 THE COURT: ALL RIGHT.

11 (WHEREUPON, THE PROCEEDINGS WERE CONCLUDED.)
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I, THE UNDERSIGNED DAPHNE D. HELMS, OFFICIAL COURT REPORTER FOR THE FIFTH JUDICIAL CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE, AND COMPLETE TRANSCRIPT OF RECORD OF ALL THE PROCEEDINGS HAD AND EVIDENCE INTRODUCED IN THE TRIAL OF THE CAPTIONED CASE, RELATIVE TO APPEAL, IN THE CIRCUIT COURT FOR SUMTER COUNTY, SOUTH CAROLINA, ON THE 3RD THROUGH 5TH OF AUGUST, 2009.

I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN, COUNSEL, NOR INTEREST TO ANY PARTY HERETO.

MARCH 15, 2010

A handwritten signature in cursive script, reading "Daphne D. Helms", written over a horizontal line.

DAPHNE D. HELMS, COURT REPORTER

FORM 5

STATE OF SOUTH CAROLINA

County of SumterAndre M. Massey, 229492

Full name and prison number (if any) of Applicant

v.

State of South Carolina

RECORDED
2013 DEC -6 PM 2:12
IN THE COURT OF COMMON PLEAS

JAMES C. CAMPBELL
CLERK OF COURT
SUMTER COUNTY, S.C.

2013-CP-43

JLS

CERTIFIED TRUE COPY

ORIGINAL FILE

APPLICATION FOR

POST-CONVICTION RELIEF

Barbara Hager
DEPUTY CLERK
SUMTER COUNTY
SOUTH CAROLINA

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention SCDC at Perry Correctional Institution
2. Name and location of Court which imposed sentence General Sessions
Court for Sumter County
3. Name(s) of co-defendant(s) (if any) N/A
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2008-GS-43-0853
 - (b) _____

- (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
- (a) August 5, 2009 - Life without Parole
- (b) _____
- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty ✓
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
Yes
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. South Carolina Court of Appeals
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. _____
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. _____
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. _____
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) N/A
- (b) N/A

- (c) N/A
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) Ineffective Assistance of trial Counsel
- (b) 11
- (c) 11
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) See Memorandum of Law
- (b) 11
- (c) 11
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? NO
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? NO
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? NO
- (d) any other petitions, motions or applications in this or any other Court? NO
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
- i. N/A
- ii. N/A
- iii. N/A
- iv. N/A
- (b) the name and location of the Court in which each was filed:
- i. N/A
- ii. N/A
- iii. N/A
- iv. N/A

(c) the disposition thereof:

- i. N/A
- ii. N/A
- iii. N/A
- iv. N/A

(d) the date of each such disposition:

- i. N/A
- ii. N/A
- iii. N/A
- iv. N/A

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

- i. N/A
- ii. N/A
- iii. N/A
- iv. N/A

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

NO

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

- i. N/A
- ii. N/A
- iii. N/A

(b) the proceedings in which each ground was raised:

- i. N/A
- ii. N/A
- iii. N/A

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) A Exclusive Post-Conviction ground(s)
 (b) 4.1
 (c) 11

17. Were you represented by an attorney at any time during the course of:

(a) your arraignment and plea? Yes
 (b) your trial, if any? Yes
 (c) your sentencing? Yes
 (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes
 (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed?
Yes

18. If you answered "yes" to one or more parts of (17), list:

(a) the name and address of each attorney who represented you:
 i. Calvin K. Hastie, Sr.; 7 East Hampton Ave.;
Sumter, SC 29150
 ii. LaNelle C. Durant, Appellate Defender, 1330 Lady
Street, Suite 401, Columbia, SC 29201-3382
 iii. _____

 (b) the proceedings at which each such attorney represented you:
 i. Trial
 ii. Direct Appeal
 iii. _____

19. State clearly the relief you seek in filing this application:

Reversal of Conviction and Sentence(s)

20. Are you now under sentence from any other court that you have not challenged?

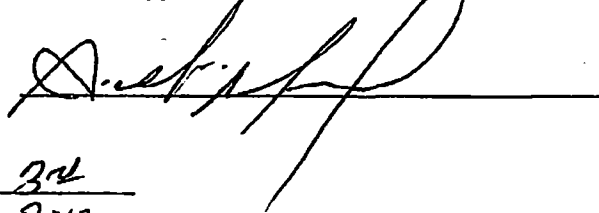
NO

STATE OF SOUTH CAROLINA)

County of Sumter)

VERIFICATION

I, Andre Massey # 229492, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.



SWORN to and subscribed before me this 3rd
day of December, 2013.

Nancy C. Michael (L.S.)
Notary Public

My Commission Expires: 1-23-2020

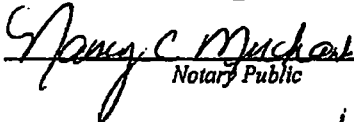
**APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

I, Andre Massey #229492, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.


Applicant

SWORN or affirmed to and subscribed before me this
8th day of December, 2013.


Notary Public

My Commission Expires: 1-23-2020

STATE OF SOUTH CAROLINA
COUNTY OF SUMTER

RECORDED

IN THE COURT OF COMMON PLEAS

Case No.:

Andre M. Massey #229442

2013 DEC 16 PM 2:12

2013-CP-43-2156

Applicant, JAMES C. CAMPBELL
CLERK OF COURT

v.

SUMTER COUNTY, S.C.

MEMORANDUM OF LAW
IN SUPPORT OF APPLICATION
FOR POST-CONVICTION RELIEF

State of South Carolina,

Respondent.

COME NOW, the applicant, above named, presents the Memorandum of Law in Support of Application for Post-Conviction Relief based on the following.

STATEMENT OF THE CASE

The applicant was indicted by the Sumter County Grand Jury during the July 17, 2008, term of General Sessions Court for Armed Robbery and Possession of a Firearm or Knife During the Commission of a Violent Crime (Indictment No. 2008-GS-43-0853). He went to trial on these charges on August 3-5, 2009, before Judge George C. James, Jr., and Jury. He was represented by Calvin Hastie and Arthur Wilder of the Sumter Law Firm, and the State was represented by Martin D. Spratin and Arthur Wilder, Solicitors for Sumter County. The Jury found him guilty of the charges, and Judge James sentenced him to a life sentence without parole pursuant to S.C. Code, §17-25-45. No sentence was imposed for the weapon conviction pursuant to the provision of his life sentence without parole under §17-25-45. A timely appeal was filed on his behalf.

The applicant was represented on appeal by Lanelle Contey Durant, South Carolina Appellant Defender. The S.C. Court of Appeals denied his appeal in unpublished opinion No. 2012-UP-098, submitted February 1, 2012 - filed February 22, 2012. A timely Petition for Rehearing was filed on March 8, 2012. On April 13, 2012, the Rehearing was denied and a Petition for Writ of Certiorari was filed on July 13, 2012. On Nov. 20, 2013, the S.C. Supreme Court DENIED the Writ of Certiorari.

ARGUMENT

The Applicant was denied the right to effective assistance of trial Counsel by Counsel's failure to move for suppression of evidence obtained as a result of his illegal arrest.

To establish a claim of ineffective assistance of Counsel, an applicant must show that Counsel's performance was deficient and that he was prejudiced by such deficiency of Counsel. *Strickland v. Washington*, 104 S.Ct. 2052 (1984). Specifically, when an applicant claims that Counsel failed to articulate a Fourth Amendment claim was ineffective assistance, he must show that claim is meritorious and that the results at trial would have been different absent the evidence that should have been excluded. *Kimmelman v. Morrison*, 105 S.Ct. 2574 (1986).

In this case, a store that was managed by a man named Herbert Huff in Sumter County was robbed in June 2007. During the investigation of the robbery, the police developed a sketchy description of the robber which led them to suspect that the applicant was the robber. Tr. p. 277-279. The police found that applicant was on parole and contacted his parole officer to find out where he lived. Based on the parole officer's information, the police located applicant's residence and, without any warrants from a magistrate or exigent circumstances, entered his residence, arrested him, and transported him to the police station for questioning. Tr. p. 93, L. 12-15; Tr. p. 109, L. 21-24; Tr. p. 390, L. 13-17.

With regards to such arrest as that in applicant's case, the U.S. Supreme has held that a seizure is converted into an arrest when police move a suspect from original site of seizure to police station for interrogation. *Dunaway v. New York*, 442 U.S. 200, 99 S.Ct. 2248 (1979). Moreover, in *Payton v. New York*, 100 S.Ct. 1371, 445 U.S. 573 (1980), the Court held that the Fourth Amendment, made applicable to the State by the Fourteenth Amendment, prohibits the police from making a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest. *Id.* 445 U.S. 576, 100 S.Ct. 1375. The Court reasoned that absent exigent circumstances (or an arrest or search warrant) searches and seizures inside a home are presumptively unreasonable and that Judicial officer,

and not a police or government enforcement agent, must decide when the right to privacy must yield to the right to search or seize. 445 U.S. 553, 100 S.Ct. 1378.

Here, the applicant submits that the State did not proffer any evidence at trial or any consent by him or any exigent circumstance to justify the police entrance into his home to arrest him without an arrest, or search, warrant for an armed robbery offense. As a result, the applicant contends that his in-custody incriminating statement, his identification as the robber, and the discovery of the alleged weapon used in the robbery could not be sufficiently attenuated from the taint of his illegal arrest and detention. In *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407 (1973), the Court stated that the proper inquiry is whether the evidence was found by exploitation of the initial search or arrest or by means sufficiently distinguishable to break the causal connection between the two. *Id.* 488.

Accordingly, in *Brown v. Illinois*, 442 U.S. 590 (1975), the Court set forth three factors for courts to consider in determining whether the causal chain has been broken: (1) the time elapsed between the illegal arrest and acquisition of the evidence, (2) the presence of intervening circumstances, and (3) the purpose and flagrancy of the official misconduct. The Court has ruled a confession inadmissible when only six hours elapsed between illegal arrest and confession; defendant in police custody entire time; and police repeatedly questioned defendant. See *Taylor v. Alabama*, 457 U.S. 687, 691, 102 S.Ct. 2664 (1982). A *Miranda* warning alone do not serve to dissipate the taint of an illegal arrest and detention, *Brown*, 442 U.S. at 217; and the purpose and flagrancy of police misconduct is shown when police's misconduct indicates a flagrant disregard for a defendant's Fourth Amendment rights by

¹ *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966).

intending to search his home for, and question him to obtain incriminating evidence after illegally arresting him. Brown, 422 U.S. at 217.

By a similar reasoning of the above decisions by the U.S. Supreme Court, the applicant submits that (1) the police obtained his confession within a couple of hours after his illegal arrest and detention, Taylor, *infra*; (2) the only intervening circumstances between his illegal arrest and his confession was a Miranda warning, and (3) the police arrested him inside of his home without his consent or a warrant and transported him to the police ^{station} with the intent to obtain his confession, to search his home for incriminating evidence, and to identify him as the robber. Brown, 422 U.S. at 217. The applicant thus contends that as the evidence against him was found by the police's exploitation of his illegal arrest and search ~~it~~ could not be sufficiently attenuated to break the causal connection between the two. Wong Sun, *Supra*.

Finally, the applicant contends that his trial counsel's failure to move for suppression of the state's illegally obtained evidence from ~~its~~ illegal arrest of the applicant and search of his residence was ineffective assistance of trial counsel that was prejudicial inasmuch as absent the illegally obtained evidence of his confession, the alleged weapon used in the robbery, and victim's identification of applicant as the robber, the results of his trial would have been different. Kimmelman, *Supra*.

The applicant was denied the right to effective assistance of trial counsel by counsel failure to object to Solicitor's vouching for credibility of a police witness.

To establish a claim of ineffective assistance of trial counsel, a PCR applicant must prove counsel's representation fell below an objective standard of reasonableness and, but for counsel's error, there is a reasonable probability that the results at trial

Would have been different; a reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. *Edmond v. State*, 534 S.E.2d 682 (S.C. 2000).

The applicant contends that the Solicitor improperly vouched for the credibility of his witness during his closing argument, as follows:

Solicitor: Isn't it more reasonable that what Detective Culick told you about applicant's confession to the crime is the truth. . . . Tr. p. 476, L. 18-20.

Improper vouching occurs when the Solicitor places the government's prestige behind a witness by making personal assurances of witness's veracity, or truthfulness, or when Solicitor implicitly vouch for witness's veracity by indicating that he has information not presented to the jury that supports the witness's testimony. See *State v. Kelly*, 540 S.E.2d 851 (2001).

In applicant's case, the only evidence directly connecting him to the robbery was his alleged statement he gave to the police and a questionable identification by the victim. Thus, officer Culick's testimony was very important corroborating evidence in the Solicitor's case. The applicant thus contends that his Counsel's failure to object to Solicitor's improper vouching, and failure to request a curative instruction from the Judge, was ineffective assistance of trial counsel that prejudiced his right to a fair trial since the jury could have perceived, incorrectly, that the Solicitor held the opinion the witness was, in fact, telling the truth. *Edmond*, *Supra*.

CONCLUSION

WHEREFORE, for the foregoing reasons, this Honorable Court should reverse applicant's conviction and sentence for a new trial.

Respectfully Submitted,

[Signature]
Andre M. Massey #229492
Perry Correctional Inst.
430 Oaklawn Road-248/
Pelzer, S.C. 29669

This 3rd day of
of December, 2013

Nancy C. Muckert, Notary
Comm. exp. 1-23-2027

Date: _____
RECORDED

2013 DEC -6 PM 2:12

James C. Campbell
Clerk of Court
Courthouse, Room 308
Sumter, SC 29105

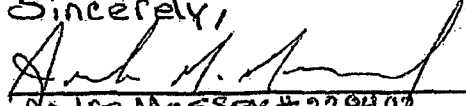
JAMES C. CAMPBELL
CLERK OF COURT
SUMTER COUNTY, S.C.

Re: Post-Conviction Application

Dear Mr. Campbell:

Enclosed please find the original Application for Post-Conviction Relief (PCR) and Memorandum of Law in Support same for filing with your office. I have enclosed a self-addressed, stamped envelope for your return to me clocked-stamped copies of these documents for my records.

Sincerely,


Andre Massey #229492
Perry Correctional Inst.
430 Oaklawn Road - Q4B/
Pelzer, S.C. 29669

cc: Applicant's file

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF SUMTER	)	FOR THE THIRD JUDICIAL CIRCUIT
	)	
Andre M. Massey, #229492,	)	2013-CP-43--2156
	)	
Applicant,	)	
	)	
v.	)	RETURN
	)	
State of South Carolina,	)	
	)	
Respondent.	)	

The Respondent, making its Return to the application for post-conviction relief filed December 6, 2013, would respectfully show this Court:

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Sumter County Clerk of Court. The Applicant was true bill indicted at the July 2008 term of the Sumter County Grand Jury Armed Robbery and Possession of a Weapon During a Violent Crime (2008-GS-43-853). Applicant was represented by Calvin Hasite, Sr. Applicant proceeded to a jury trial before the Honorable George C. James, Jr. On August 5, 2009, the Applicant was found guilty on both counts. Judge James sentenced Applicant to life without parole for Armed Robbery and did not impose a sentence for possession of a weapon during a violent crime pursuant to S.C. Code §16-23-49(A).

A timely Notice of Appeal was filed on Applicant's behalf by LaNelle Cantey Durant, Esquire. The South Carolina Court of Appeals affirmed Applicant's conviction. State v. Massey,

Op. No. 2012-UP-098 (Ct. App. filed February 22, 2012). The Remittitur was issued on November 22, 2013.

Attached herewith and incorporated herein are the records of the Sumter County Clerk of Court regarding the subject conviction(s), the Applicant's records from the South Carolina Department of Corrections, Appellate records, and trial transcript. The Respondent reserves the right to amend this Return upon receipt of any relevant materials.

II.

In his current Application, the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel
 - a. "Applicant was denied the right to effective assistance of trial counsel by counsel's failure to move for suppression of evidence obtained as a result of his illegal arrest."
 - b. "The Applicant was denied the right to effective assistance of trial counsel by counsel failure to object to solicitor's vouching for credibility of a police witness."

Any claims not specifically enumerated in the PCR application or amendments will be opposed by the State at an evidentiary hearing, and the State will seek summary dismissal of vague or general claims at an evidentiary hearing. S.C. Code §17-27-50. All amendments should be made well in advance of an evidentiary hearing by counsel of record. Rule 11, SCRCP.

III.

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the

application alleges ineffective assistance of counsel as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, the Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985).

The Respondent submits that the Applicant cannot satisfy either requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF SUMTER	)	
	)	
	)	2013-CP-43-2156
	)	
ANDRE M. MASSEY, #229492,	)	
	)	
Applicant,	)	
	)	
vs	)	AFFIDAVIT OF SERVICE BY MAIL
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Return** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Fulton Casey Dale Cornwell, Esq.
Harrison & Radeker, P.A.
PO Box 50143
Columbia, SC 29250

DATED this 13th day of May, 2014.


 Caroline Kaiser, Legal Assistant
 For Respondent

STATE OF SOUTH CAROLINA
COUNTY OF SUMTER
IN THE COURT OF COMMON PLEAS

C/A No. 2013-CP-43-2156

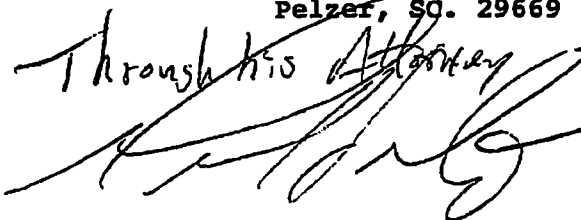
Andre M. Massey -- Applicant,

-Vs-

State of South Carolina -- Respondent,

AMENDED POST CONVICTION RELIEF
APPLICATION PURSUANT TO RULE 15, SCRPC

Andre M. Massey
SCDC# 229492
PCI (2A-217)
430 Oaklawn Rd.
Pelzer, SC. 29669

Through his Attorney


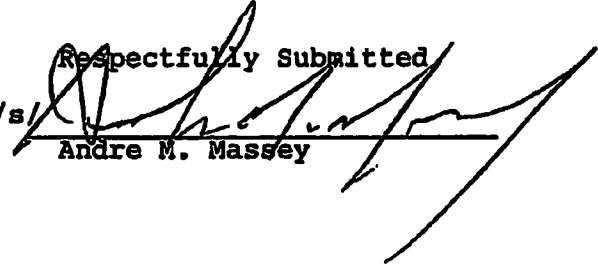
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STATE OF SOUTH CAROLINA)
COUNTY OF SUMTER)

Andre M. Massey)
Applicant,)
-vs-)
State of South Carolina)
Respondent,)
15, SCRCF.

COMES NOW, above captioned Applicant by and through attorney of record (Fulton Cornwell), respectfully moving this Honorable Court to amend the Original Application in the above captioned matter pursuant to Rule 15, SCRCF.

Respectfully Submitted
/s/ 
Andre M. Massey

ISSUE (A)

WAS COUNSEL INEFFECTIVE FOR FAILING TO OBJECT TO THE TRIAL COURT'S JURY INSTRUCTIONS THAT SHIFTED THE BURDEN OF PROOF IN VIOLATION OF THE DUE PROCESS CLAUSE AND DENIED THE APPLICANT HIS FOURTEENTH AMENDMENT RIGHT TO A FAIR TRIAL?

FACTS

During closing summation to the jury the Solicitor made the following statement to the jury without objection from Counsel:

Mr. Spratlin: What is beyond a reasonable doubt? Well, let me first tell you, it's not beyond all doubt. All doubt -- there are very few things you can know for certain in this world, very few things and the Defendant's guilt is not one of them.

You though, have to be convinced beyond a reasonable doubt that you can assign reason to.

If say, for instance, you felt that there was something wrong here and you could say, "okay well I don't think he's guilty because of this, then that would be a doubt which you could assign reason to.

But Ladies and Gentlemen, we don't have that here. That's not what we have, and also Ladies and Gentleman another definition and another way of defining reasonable doubt that actually gives you a duty.

It's a fair and impartial juror actively seeking the truth, Trp.463, L.17-25 through p.464, L.1-6.

As is seen in the above underlined portions of the Solicitor's closing he has repeatedly told the jury reasonable doubt is a doubt the jury can "assign reason to". The Solicitor further has told the jury there [is] "another definition" for reasonable doubt and that is the jury should be "seeking the truth, (emphasis supplied).

Applicant would assert that the Solicitor has successfully lightened the State's burden of proof and shifted it to the jury to "seek the truth".

Coming directly after the Solicitor's closing summation the Trial Court while instructing the jury regarding witness credibility made the following statement:

"You can -- and you can believe several witnesses over one witness. You have one objective and that is to SEEK THE TRUTH in this case.

[Tr.p.503, L.4-6].

As is seen in the above underlined the Trial Court has told jury it [is] their job to "seek the truth". The Trial Court then went on to instruct the jury on "reasonable doubt" and the following was recorded:

All right. So now I'm going to talk to you about what reasonable doubt is and perhaps what it is not. Reasonable doubt -- the State has the burden of proving the Defendant guilty beyond a reasonable doubt. Some of you may have served as Jurors in civil cases where you were told that it is only necessary to prove a fact is more likely true than not true, and the standard there is by the greater weight of the evidence. In criminal cases the State's burden is much more powerful than that, and that is the standard of proof beyond a reasonable doubt.

Reasonable doubt is the --, is a doubt that would make an honest and a sincere, conscientious Juror in SEARCH OF THE TRUTH hesitate to act.

Now proof beyond a reasonable doubt is doubt that leaves you firmly convinced of the Defendant's guilt. [Tr.p.505, L.11-25].

As is seen above the Trial Court instructing the jury regarding "Reasonable Doubt" has again told the jury "they", the jury are "in SEARCH OF THE TRUTH".

Applicant would assert the Court's charge [twice] telling the jury they are "in search for the truth" after the State just finished telling the jury the same thing regarding "reasonable doubt" clearly diluted the State's burden of proof and substantially

relieved the State of their burden of proving Applicant guilty beyond a reasonable doubt. Applicant would assert the Court's instructions were clearly confusing as Counsel did advise the Court as recorded:

Mr. Wilder: "It seemed to me that my impression was that it was an improper comment on the status of the State's burden in this case, [Tr.p.519, L.20-22].

Afterwards a brief colloquy between the Court and Counsel took place, Tr.p.519, L.14-25 -p.520, L.1-25, and Counsel's [only] concern was the Court's comments on the standard of proof required between civil and criminal trials rather than the Solicitor and the Court's comments on the "juries duty to search for the truth". Nonetheless, the Court thereafter re-charged the jury in regards to burden of proof.

THE COURT: All right Ladies and Gentlement this will be very brief. In case I misspoke or -- I guess that's the best word for it. In case I did, I want to clarify one particular point, not to place any special emphasis on it, but I just want to clarify one particular point. As I told you Ladies and Gentlemen the State has the burden of proving the Defendant guilt beyond a reasonable doubt, and as I told you, some of you may have been jurors in a civil case where you were told that it's only necessary to prove that a fact is more likely true than not true. That's called by the greater weight or preponderance of the evidence.

In criminal cases the State's proof must be more powerful than that, and the State's proof must be beyond a reasonable doubt, which I defined for you earlier

[Tr.p.521, L.17-25 -p.522, L.1-5].

As is seen in the above curative instruction the Court was attempting to cure any ailment and confusion regarding the difference between the State's burden of proof regarding criminal and civil trials, which [was Counsel's] only concern, (emphasis supplied). Yet, as is seen in the above portion of the Court's curative instruction the Court simply stated: "In criminal cases the State's proof must be more powerful than that, and the State's proof must be beyond a reasonable doubt, which I defined for you earlier."

Applicant would assert that any confusion that was created in the Court's initial charge, was not cured as the Court again told the jury the State's proof must be beyond a reasonable doubt which the Court had defined earlier. Applicant would assert that a reasonable jurist would have interpreted this instruction to mean it was the "juries job to search for the truth" just as the Court had twice defined earlier and further echoing the Solicitor's just finished closing regarding "another definition of reasonable doubt".

Applicant would assert that while Counsel may have been aware of the possibility of the Court's instructions shifting the State's burden regarding any confusion created by the Court's instructions in regarding to criminal and civil trials, Counsel clearly overlooked any possibility of the Court's instructions telling the jury their one sole objective in the case was to "search for the truth", not once but twice during the jury instructions.

Applicant would assert Counsel was ineffective for failing to object when the Court in defining reasonable doubt told the jury to "search for the truth." Surely this shifted the State's burden

DISCUSSION

Jury instructions on reasonable doubt which charge the jury to "seek the truth" are disfavored because they "[run] the risk of unconstitutionally shifting the burden of proof to the defendant", *State v. Needs*, 333 S.C. 134, 155, 508 S.E.2d 587, 567-68 (1998).

The standard for review of an ambiguous jury instruction is whether there is a reasonable likelihood that the jury applied the challenged instruction in a way that violates the Constitution, *Estelle v. McGuire*, 502 U.S. 62, 112 S.Ct. 475 (1991) See also *Boyde v. California*, 494 U.S. 370, 110 S.Ct. 1190 (1990).

Therefore, the proper inquiry in reviewing a reasonable doubt instruction is whether there is a reasonable likelihood that the jury applied the "reasonable doubt standard" in an unconstitutional manner, *Victor v. Nebraska*, 511 U.S. 1, 5, 114 S.Ct. 1239 (1994).

The Court in *State v. Alesky*, 538 S.E.2d 248, 251 (2000), relied on *U.S. v. Gonzales-Balderas*, 11 F.3d 1218 (5th Cir. 1994) in analyzing a contested jury instruction regarding "seek the truth" language. The Fifth Circuit Court of Appeals in a nearly identical situation where the Court had instructed the jury: Remember at all times you are the judges -- judges of the facts. Your sole interest is to "seek the truth" from the evidence in the case, *Gonzales, supra*, at 1223.

The Court in *Gonzales* held:

As an abstract concept, "seeking the truth" suggest determining whose version of events is more likely true, the government's or the defendant's and thereby intimates a preponderance of the evidence standard. Such an instruction would be error if used in the explanation of the concept of proof beyond reasonable doubt, *Id.*

As is seen in the above the Gonzales Court found it to be error if used on the explanation of the concept of proof beyond a reasonable doubt, Id. Likewise our Court in Aleskey found that reversal wasn't required when the Court's improper instructions were given in the context of "witness credibility and not reasonable doubt", Id 343 S.C. at 29, 538 S.E.2d at 252-53.

Applicant would assert that reversal is required in the instant case as the Court gave the improper instruction in the context of "witness credibility" and during the explanation of the concept of reasonable doubt. This is precisely the error to be found reversible by the Gonzales Court and our Court in Aleskey.

In the more recent case of State v. Daniels, 401 S.C. 251, 737 S.E.2d 473 (S.C.2012), addressing a nearly identical issue concluded that jurors are sworn to declare the facts of the case as they are proved from the evidence and placed before them, 50A CJS Juries §1 (2004). The very term "jury" connotes a deliberative body of persons Id. A judge sits as a public officer who presides over, conducts and administers the law by virtue of the office, and does so cloaked in judicial authority, Id Judges §7 (2004). Judge and juries are not, as the trial judge put it in Daniels, "together". The Daniels Court further concluded, that while their functions may act as complement to one another, it is erroneous to imply that they somehow work hand in hand, and any blurring of their roles serves as unnecessary and improper distraction.

It should be noted that in the instant case the Trial Judge prior to trial told the jury that "as far as this trial is concerned you Ladies and Gentlemen are the sole judges of the facts,

Tr.p.209, L.24-25, and then went on to instruct the jury that the "only difference between me and you in that regard is you don't wear a black robe", but it is extremely important for you to understand that you are the only people in the world who can decide what the facts are in the case, Tr.p.210, L.1-4.

Applicant asserts that this is identically the same implication that was admonished and found error in Daniels, supra. The Daniels Court went on to conclude that "the constitutional framework governing criminal trials is a highly technical body of law developed by the United States Supreme Court and by State Courts operating under Supreme Court guidance. It is inappropriate to jeopardize the Constitutionality of the trial by instructing the jury this way." The Daniels Court further concluded it is critical that the jurors understand the proper application of the reasonable doubt standard.

Applicant asserts that Counsel's failure to object to the Trial Court's erroneous jury instructions on "reasonable doubt" and telling the jury to "search for the truth" shifted the burden of proof in violation of the Due Process Clause.

Here Counsel's performance was deficient and Applicant was prejudiced thereby, Strickland v. Washington, 466 U.S. 668, 687 (1984). Applicant should receive a new trial on this issue.

ISSUE (B)

WAS COUNSEL INEFFECTIVE FOR FAILING TO OBJECT TO THE TRIAL COURT'S JURY INSTRUCTIONS THAT IMPERMISSIBLY COMMENTED ON THE FACTS OF THE CASE THAT WAS TO BE DETERMINED BY THE JURY?

FACTS

During the Trial Court's instructions to the jury the following was recorded:

"And finally, the State must prove beyond a reasonable doubt that the Defendant was armed with a deadly weapon during the robbery.

A deadly weapon is any article, instrument or any substance which is likely to cause death or great bodily harm and whether an instrument has been used as a deadly weapon depends on the facts and circumstances of the case.

The following are examples of instruments which may be deadly weapons: pistol, shotgun, rifle, dagger, knife, slingshot, metal knuckles razor, gasoline, a fire bomb, or molotov cocktail, a gun may be a deadly weapon even if it is not opporating, Tr.p.509, L.19-25 -p.510, L.1-4.

As is seen in the underlined portions of the Trial Court's instructions the Court told the jury that the [State] had to prove Applicant was armed with "a deadly weapon". The Trial Court then instructed the jury that [whether] an instrument has been used as a deadly weapon depends on the "facts and circumstances of the case. The Trial Court then instructed the jury "a pistol is a deadly weapon, (emphasis supplied).

The Court then instructed the jury that Applicant was also charged with possession of a weapon during the commission of or attempt to commit a violent crime, Tr.p.510, L.5-15.

Coming directly after the following instructions by the Court were recorded:

"Again the Defendant is charged with possession of a weapon during the commission or or attempt to commit a violent crime. The State must also prove beyond a reasonable doubt that the Defendant was in possession of a firearm or visibly displayed what appeared to be a firearm during the commission of a violent crime. A firearm is any gun, automatic rifle, revolver pistol or any other weapon which will or is designed to or may be readily converted to expel a projectile.

In order to find the Defendant guilty of possession of a weapon during the commission of a violent crime, You must first find the Defendant guilty of either committing a violent crime or attempting to commit a violent crime.

I charge you, Ladies and Gentlemen that armed robbery under the laws of this State is a violent crime.

Tr.p.510, L.16-25, -p511, L.1-5

Applicant would submit that as is seen in the above portion the Court has instructed the jury that the State must prove that Applicant was in possession of a weapon during the commission of a [violent crime] and that [a pistol] is a weapon. The Court then instructed the jury that armed robbery is a violent crime.

Applicant would submit the Trial Court's instructions here was an impermissible comment on the facts that prematurely directed a verdict for the State.

The Court at the on set of the trial had told the jury... "... as far as this trial is concerned you, Ladies and Gentlemen are the sole judges of the facts, Tr.p.209, L.24-25, and then at the end of the trial gave the above referenced instructions which led

the jury to conclude that the Trial Court's instructions that "a pistol [is] a "deadly weapon" and that armed robbery in this State "[is] a violent crime" had already determined the [facts] of the case that the State was required to prove and the jury to decide, but by the Trial Court's instructions and "examples" the jury could have easily interpreted and concluded the Trial Court had already made the determination for the jury in this regard, and therefore prematurely directed a verdict for the State and subsequently relieved the State of it's burden of proof.

Applicant would assert counsel should have objected to the Trial Court's instructions in this regard as an impermissible comment on the facts of the case. The failure to do so denied the Applicant his Sixth Amendment right to effective representation and his Fourteenth Amendment right to a fair trial.

DISCUSSION

Impermissible comments on the facts is prohibited in South Carolina, See South Carolina Constitution, art. V, §21 and as the Court said in State v. Hartley, 414 S.E.2d 182, at 183-84:

"Judges shall not charge juries in respect to matters of fact, but shall declare the law, State v. Bagwell, 201 S.C. 387, 23 S.E. 2d 244 (1942)(A judge cannot express in his charge, or intimate any opinion as to the weight or sufficiency of testimony without violating the prohibition of the Constitution as to charging upon the facts). 75 AM.Jur.2d Trial §1203 at 693 (1991)(The trial court may not instruct the jury what weight should be given [to the evidence] or even that any particular evidence is or is not entitled to receive weight or consideration from them), Cf. State v.

Edwards, 127 S.C. 116, 120 S.E. 490 (1923) ("Wherein Our Supreme Court held the absence of motive is a mere circumstance to be considered by the jury and rejected an instruction that the absence of motive may raise a reasonable doubt as to the defendant's guilt because it was a charge on the facts), Id.

Applicant asserts a reasonable jurist could have interpreted the Trial Court's instructions using "exmaples" that mirrored the facts of Applicant's case as directing a verdict for the State. Here the Trial Court impermissibly commented on the facts of the case and relieved the State from their burden of proving Applicant guilty of the offenses alleged but also found the facts that were to be determined by the jury. Applicant would assert the Trial Court acted in manner calculated to serve the Prosecution, and this was an abuse of power that denied the Applicant his right to a fair trial.

The prejudice was compounded by the Trial Court instructing the jury from the onset that "as far as this trial is concerned you Ladies and Gentlemen are the sole judges of the facts, Tr.p. 209, L.24-25,... "the only difference between me and you in that regard is you don't wear a black robe, Tr.p.210, L.1-2. Now, it is worthy to note that the Court did go on to charge the jury, "...but it is extremely important for you to understand that you are the only people in the world who can decide what the facts are in the case, Tr.p.210, L.2-4. Applicant would assert that by the Trial Court telling the jury "the only difference between me and you in that regard is you don't wear a black robe" would

have led a reasonable jurist to believe that the Judge [and] the Jury are the "judges of the facts" as the Court informed the jury "the only difference between me and you in that regard is you don't wear a black robe". Surely a reasonable jurist could have interpreted this instruction to mean that the Judge and the Jury would decide the facts [together], but the jury would be the one who renders the verdict in the case.

Applicant would assert that he was prejudiced by the Trial Court's instructions that impermissibly commented on the facts of the case on more than one occasion during the charge, and in doing so the Court acted in a manner to prematurely direct a verdict for the State.

Applicant asserts that Counsel should have objected to this type of instruction given by the Court. Counsel's performance was deficient and Applicant was prejudiced thereby, *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

Applicant should receive a new trial on this issue.

ISSUE (C)

WAS COUNSEL INEFFECTIVE FOR FAILING TO CHALLENGE APPLICANT'S PRIOR CONVICTION IN WHICH THE STATE, WHILE GIVING APPLICANT NOTICE OF INTENT TO SEEK LIFE WITHOUT PAROLE (LWOP), THE STATE RELIED ON EIGHT (8) PRIOR CONVICTIONS IN THE NOTICE THAT WERE ALL STEMMING FROM ONE INCIDENT AND SHOULD HAVE BEEN CONSIDERED ONE OFFENSE FOR SENTENCING PURPOSES UNDER SECTION §17-25-45 and §17-25-50 AND THEREFORE THE STATE SHOULD NOT HAVE BEEN ALLOWED TO USE ALL EIGHT (8) PRIOR CONVICTIONS.

FACTS

Prior to trial the State served Notice of LWOP (Applicant's attached Exhibit 1). The State's Notice listed eight (8) prior counts as basis for the LWOP. The Notice listed: "The basis is that on October 17, 1995, the defendant was convicted of Assault and Battery with Intent to Kill, and (5) counts of kidnapping; also on October 17, 1995, the defendant was convicted of burglary in the first degree, and another burglary in the first degree. Each aforementioned charge to which a conviction is stated above as Most Serious under section S.C. Code §17-25-45.

In the instant matter, Applicant was on trial for an unrelated armed robbery, and ultimately the jury found Applicant guilty of the underlying armed robbery, and prior to sentencing the Trial Court made the following statement, as was recorded:

The Two Strikes law is what -- falls under the category of Most Serious, and the Code Section does establish that kidnapping, and burglary and assault and battery with the intent to kill are all most serious offense. So this conviction of armed robbery which is also most serious offense does constitute a second strike and that requires the Solicitor to seek life imprisonment without parole.

(Tr.p.532, 11.7-13).

Applicant would submit that in reviewing the State's actual Notice (Applicant's Exhibit 1) and the Trial Court's above recorded statement, it is apparent the State and Court was using [all eight (8)] of Applicant's [prior] convictions for sentencing purposes under §17-25-45.

Applicant contends that Counsel was ineffective for failing to object and challenge the State and Court's use of Applicant's eight (8) prior convictions, as the counts listed in the State's Notice and referenced by the Trial Court all stemmed from "a continuous course of conduct and should not have been separated for sentencing purposes under 17-25-45, but should have been considered as one offense for sentencing purposes under §17-25-50.

Applicant would further submit, Counsel should have required the State to state with specificity "which one" of the prior convictions the State was actually relying on rather than a mere "shotgun blast" and hope something sticks. Clearly this was unduly prejudicial to Applicant and Counsel's performance was deficient in this regard.

Applicant contends that his eight (8) prior convictions stemmed from "a continuous course of conduct, and therefore [if] he had been previously told during the plea negotiations of his prior convictions that the "eight (8)" prior convictions would be used against him at a later as eight (8) separate counts he would not have pled guilty to those offenses.

DISCUSSION

Applicant would submit that Our Court has held that a petitioner has standing to petition for post conviction relief [if] he is in custody, or results of his [prior] convictions, still persists, Jackson v. State, 489 S.E.2d 915 (S.C.1997).

Further in Jackson our Court said that regardless of whether the defendant served jail time, the Petitioner may bring action for post conviction relief, Id.

Here, Applicant believes he has made the requisite requirements as required by Jackson, supra that he has been severely prejudiced by the State using all of his [prior] convictions "as a whole" to seek life without paroles under the LWOP, §17-25-45, even though under the doctrine of "continuous course of conduct" all of his priors should have been considered one offense for sentencing purposes and the State should have been required to state with specificity which "one" of the priors they were relying on to seek LWOP, and the failure of counsel to challenge the prior convictions as well as the State use of all eight (8) of the prior convictions prior to trial was deficient performance that unduly prejudiced Applicant.

IN State v. Woody, 545 S.E.2d 521 (S.C.App.2001), Woody was convicted of second degree burglary in July 1999. At sentencing the State asserted that Woody's third serious offense as defined in 17-25-45 because Woody had previously been convicted of 2 armed robberies. In support of it's ocntention the State presented 2 indictments to which Woody pleaded guilty on January 21, 1981, alleging that on April 24, 1980 Woody committed 2 armed robberies, one for a convenience store, and one for the conveneince store's clerk.

The Woody Court found that 17-25-50 requires the trial court to combine [prior] offense arising out of the simultaneous acts committed in the course of a single indicdent", State v. Boyd, 288 S.C. 206, 209, 341 S.E.2d 144, 146 (Ct.App.1986)(holding that under sections 17-25-50, two prior violations of The Controlled Substanaces Act occuring in the same incidents should be treated as one offense, and noting that, if multiple prior convictions are obtained for violations of the controlled substance act unrelated to one another and not arising out of a single incident, there is no prohibition against counting each conviction for sentencing purposes).

In State v. Muldrow, 259 S.C. 414, 192 S.E.2d 211 (1972), Our Supreme Court recognized that this section is a recidivist statute, See Legare v. State, 333 S.C. 275, 509 S.E.2d 472 (1999)

In contrast, section 17-25-45(f) limits prior convictions which may trigger the life without parole provision contained in section 17-25-45 to those convictions which are separate from and prior to the present adjudication.

Consequently there two strikes can properly be read together and the Court found it could be applied to Woody. The two prior armed robberies were closely connected offenses within one incident, therefore in determining the number of prior offenses, they must be treated as one offense under section §17-25-50 for sentencing purposes. As one incident the armed robbery const- a sinlge most serious offense, See section 17-25-45(c)(1)(Supp.2-000)(defining the term most serious offense). The Woody Court found that applying 17-25-45(f), Woody's convcition was considered a prior most serious offense because it occurred on a separate occassion from his present adjudication on the second degree burglary charges. The Court further found that Woody's conviction for second degree burglary is categorized as a "serious offense", under section 17-25-45(c)(2)(Supp.2000)(defining the "serious offense"), and therefore Woody's prior most serious offense of armed robbery did not invoke the life without parole provisoin of section 17-25-45(B), which requires two or more such prior convictions as a trigger, §17-25-45(B).

In a more recent decision our Supreme Court in Gordon v. State, 356 S.C. 143, 588 S.E.2d 105 (S.C.2003), found that in light of Gordon's 1997 trafficking conviction the State moved for a sentence of LWOP, §17-25-45(Supp.2002). The Court declined to impose a LWOP finding that the crime charged in the 1997 indictment, September 21-23 (1996) and the one charged in the 2000 indictment (September 27,1997) were so closely connetted in point of time as to come within the provision of §17-25-50, "continuous course of conduct.

In the instant matter the State relied on eight (8) prior convictions all stemming from one incident "October 17, 199f" and therefore should not have been able to use all eight (8) of the priors in the Notice of Intent to seek LWOP, but rather should have been required to state with specificity which of the priors offenses they were relying on.

The prejudice and confusion is even more apparent by a stringent review of the Trial Court's use of all eight (8) as well during the sentencing phase of Applicant's trial.

Applicant would assert that counsel was deficient in failing to object to the State and Trial Court's use of all eight (8) prior convictions in regards to sentencing. Here Counsel should have objected and required the State to state with specificity which which of the eight (8) prior offenses the State was actually relying on, and then Counsel should have moved to challenge the State's use because the prior were all stemming from a continuous course of conduct, and Counsel should have investigated the "terms" from the prior plea in order to determine whether or not Applicant was advised that the eight (8) prior convictions could or would be used against him at a later date.

Here the prejudice incurred is easily seen as the State and Trial Court were allowed to use all eight (8) of Applicant's prior convictions in regards to sentencing Applicant under the LWOP for the present offense.

Applicant should receive a new trial on this issue.

ISSUE (D)

WAS COUNSEL INEFFECTIVE FOR FAILING TO OBJECT TO THE TRIAL COURT'S IMPOSITION OF LWOP UNDER §17-25-45 (TWO STRIKES) WITHOUT FIRST ENTERING JUDGEMENT FOR THE ARMED ROBBERY THAT APPLICANT WAS ON TRIAL FOR, AND THEREFORE WITHOUT THE TRIAL COURT FIRST ENTERING JUDGEMENT FOR THE ARMED ROBBERY HE WAS WAS NOT ELIGIBLE TO BE SENTENCED UNDER "TWO STRIKES" (LWOP)

FACTS

Ultimately the jury returned a verdict of guilty on the armed robbery charge, and the following was recorded:

THE COURT: All right Mr. Massey, under the current state of the law, South Carolina Code Section 17-25-45 requires the State, Solicitor to give you notice of life imprisonment without the possibility of parole if you are convicted of this second or subsequent most serious offense.

In other words, the State could not do anything other than that. The State has no discretion.

So when it comes to me upon your finding, - the jury finding you guilty of this charge, I take no pleasure in doing it, but I'm required by law to the South Carolina Department of Corrections for the balance of your life without the possibility of parole.

You can consult with your attorneys about post trial motions and appellate issues, but those will be handled in the ordinary course of the procedure, but I will sign a sentencing sheet that does impose that life sentence without parole.

And that again, just for the record is in light of your earlier convictions for burglary in the first degree which was on October 17, 1995, the same date a conviction of assault and battery with intent to kill, kidnapping, kidnapping again, another count of kidnapping, and another count of kidnapping, I will sign that sentencing sheet Mr. Spratlin,

(Tr.p.535, 11.17-25, -p.536, 1.14)

As is seen in the above underlined the Trial Court advised Applicant his attorneys would file any [post trial motions] regarding the life without parole sentence, and that just for the record the LWOP sentence was "in light of Applicant's [earlier convictions], which occurred on the same date as one another.

Applicant would submit he was denied the effective assistance of counsel when counsel failed to object or atleast challenge the LWOP sentence post trial, based on the Court's imposition of LWOP without first entering judgement for the "armed robbery" in and of itself, and without the Court first entering judgement regarding the armed robbery there was [NO] second strike to trigger the LWOP, (emphasis supplied).

In South Carolina a conviction does not become final in the trial court until 2-steps have occurred. First, the jury must return a verdict, and second, sometime thereafter, the judge must enter a final judgement of the conviction. In South Carolina a Court's final judgement in a criminal case is the pronouncement of the sentence, Cooper v. SC.Dept. of Probation, Parole and Pardon Service, 377 S.C. 489, 661 S.E.2d 106 (SC.2008).

Applicant would submit that while the jury did return a verdict of guilty on the armed robbery, but during sentencing the merely stated the jury found the Applicant guilty of armed robbery, and subsequently thereafter the Court sentenced Applicant to life without parole on two-strikes, based on Applicants [prior convictions], but the Court never entered judgement for the armed robbery offense in order to trigger the LWOP, and therefore there was [NO] second strike.

While there is no law directly on point concerning this issue in South Carolina, Appellant would therefore submit this case calls for a case of first impression, since the issue is viable and structural in nature.

In support of this claim Applicant would submit the case of *Ramdass v. Angelone*, 120 S.Ct. 2113 (2000) is tenable and instructive in the instant matter.

DISCUSSION

In *Ramdass* the United States Supreme Court granted certiorari to resolve a (Simpson) issue not applicable to the instant matter, but there is tenable discussion on what does and what does not count as a "strike" for sentencing purposes under the recidivist statute. Although *Ramdass* dealt with a Virginia Three-Strike and Applicant's issue revolves around South Carolina's Two-Strike law there is a direct correlation to Applicant's case.

In *Ramdass*, sometime after midnight on September 2, 1992, Mohammed Kayani was working as a convenience store clerk. Bobby Lee *Ramdass* and his accomplices entered the store and forced the customers to the floor at gunpoint. While *Ramdass* ordered Kayani to open the store's safe, the accomplices took the customer's wallets and money from the cash registers, cigarettes, kool aid and lottery tickets.

When Kayani fumbled in an initial attempt to open the safe, *Ramdass* squatted next to him and yelled at him to open the safe.

At close range *Ramdass* held the gun to Kayani's head and pulled the trigger. The gun did not fire at first, but *Ramdass* tried

again and shot Kayani just above his left ear killing him. Ramdass stood over the body and laughed. He later inquired of an accomplice as to why the customers were not killed as well.

The murder of Kayani was not an isolated incident. Just four months earlier after serving time for a 1988 robbery conviction, Ramdass had been released on parole and almost at once engaged in a series of violent crimes. In July Ramdass committed a murder in Alexandria, Virginia. On August 25, Ramdass and three accomplices committed an armed robbery of a Pizza Hut restaurant, abducting one of the victims. Four days later, Ramdass and an accomplice pistol-whipped and robbed a hotel clerk. On the afternoon of August 30, Ramdass and two accomplices robbed a taxi driver, Emanuel Selassie, shot him in the head, and left him for dead.

Through major surgery and after weeks of unconsciousness, Selassie survived. The same day as the Selassie shooting, Ramdass committed an armed robbery of a Domino's Pizza restaurant.

The crime spree ended with Ramdass' arrest on September 11, 1992, nine days after the Kayani shooting. Ramdass faced a series of criminal prosecutions. For those reasons the Ramdass Court discussed the, later, the sequence of events in the criminal proceedings which was important to the claim Ramdass made to the court as well as Applicant's claim.

Under Virginia Law, just like South Carolina law, a conviction does not become final in the trial court until two steps have occurred. First, the jury must return a guilty verdict, and second, sometime thereafter, the judge must enter a final judgement of conviction and pronouncement of sentence. Unless, the judge

determines to set the verdict aside.

On December 15, 1992, a jury returned a guilty verdict based on the Pizza Hut robbery. On January 7, 1993 a jury rendered a guilty verdict for the Domino's robbery; on January 22, the trial court entered a judgment of conviction on the Pizza Hut robbery; on January 30, the sentencing phase of the Kayani murder trial was completed, with the jury recommending that Ramdass be sentenced to death for [that] crime; and on February 18, the trial court entered judgement on the Domino's verdict. After his capitol trial for the Kayani killing, Ramdass pled guilty to the July killing/murder in Alexandria and the shooting of Selassie.

Thus, at the time of capitol sentencing trial, a final judgement of conviction had been entered for the Pizza Hut crime; a jury had found Ramdass guilty of the Domino's crime; but the trial court had not entered a final judgement of conviction, and charges in the Alexandria murder had not yet been filed, and indeed Ramdass had denied any role in the crime until sometime after the sentencing phase in the case before the court. Id at 2117.

From the State Supreme Court's denial of his claims on direct review, Ramdass filed a petition for writ of cert on the unrelated Simmons issue, supra. On remand, the Virginia Supreme Court affirmed Ramdass death sentence concluding that Simmons applied only if Ramdass was eligible for parole. But, in a conclusion not challenged by Ramdass, the Court did not count the 1988 robbery conviction as one which qualified under the three-strikes provision. The Court also held the Domino's robbery did not count as a conviction because no final judgement had been entered on the verdict, (emphasis supplied) Id at 2118.

In the instant matter Applicant submits his exhibit (11)(sentencing sheet) as a fortior, in which a stringent review of exhibit (11) reveals that judgement was never entered on the armed robbery charge itself, rather Applicant was simply sentenced as a two-strike offender. Clearly [before] the robbery charge would mechanically count as "a strike" for recidivist sentencing, the trial court would have no doubt had to enter judgement and pronounce sentence for the robbery conviction itself.

In essence Applicant technically does not have a second strike since judgement for the robbery has never been entered prior to being sentenced under the Two-Strikes provisional requirement under 17-25-45.

Applicant would further submit the trial court clearly advised counsel he could file post-trial motions regarding the sentence, but for reasons unknown counsel sat idly mute. More on point, if the mere availability of a post trial procedure to set aside the verdict is enough, is the same true as well for the mere availability for an appeal. This was clearly a meritorious argument that counsel should have preserved for appellate review.

It is true that Applicant's old convictions, like, burglary 1st, kidnapping and ABWIK have had an entry of judgement and thus do count as [one] strike due to the continuous course of conduct regarding those priors under 17-25-50, but under South Carolina State Law, a defendant must have two-strikes at the same time in order to be sentenced under the recidivist statute.

If no judgement has been entered on the robbery conviction itself, then it would be as if judgement had never been entered

on the robbery verdict, (emphasis supplied).

Applicant would submit that since counsel utterly failed to file post trial motions to challenge the sentence at the Court's invitation is deficient performance, as counsel failure in this regard foreclosed Applicant from being able to challenge the LWOP on direct review. Clearly, no arbitrary line-drawing at all is necessary to decide this issue.

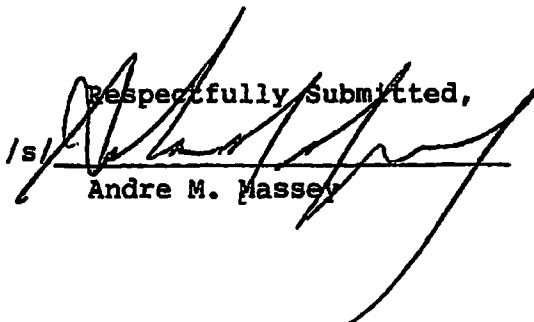
Trial counsel's failure in this regard prejudiced Applicant and denied him his Sixth Amendment right to counsel at a critical stage of the proceeding, *Strickland v. Washington*, 466 U.S. 668 (1984).

Applicant is entitled to a new trial on this issue.

CONCLUSION

WHEREFORE, based on the foregoing statement of facts, issues presented and citations of authorities relied on Applicant has shown he was denied the Effective Assistance of Counsel and is entitled to a new trial on the issues presented.

THEREFORE, Applicant should receive a new trial or any other relief this Court deems just and appropriate.

Respectfully Submitted,
/s/ 
Andre M. Massey

APPLICANT'S EXHIBIT (1)
STATE'S NOTICE OF INTENT TO SEEK
LIFE WITHOUT PAROLE (LWOP)

STATE OF SOUTH CAROLINA
COUNTY OF SUMTER
The State,
v.
ANDRE M. MASSEY,
Defendant.

IN THE COURT OF GENERAL SESSIONS
INDICTMENT NO. 2008-GS-43-0853

ACCEPTANCE OF SERVICE
OF NOTICE OF INTENT TO
SEEK LIFE IMPRISONMENT

RECEIPT OF SERVICE ACKNOWLEDGEMENT

Receipt for the above referenced Notice of Intent to Seek Life Imprisonment in the above captioned case is hereby acknowledged this 3rd day of June, 2009.

OSS for CH
Calvin Hester, Sr., Esq.

STATE OF SOUTH CAROLINA
COUNTY OF SUMTER
State of South Carolina
vs.
ANDRE M. MASSEY

IN THE COURT OF
GENERAL SESSIONS
Indictment No. 2008-GS-43-0853
NOTICE OF INTENTION TO
SEEK LIFE IMPRISONMENT

To: Andre M. Massey and his Attorney at Record Calvin Hester, Sr.

Pursuant to S.C. Code Ann. §17-25-45, the State hereby notifies the Defendant Andre M. Massey of the State's intention to seek life imprisonment if the Defendant is convicted of Armed Robbery under indictment number 2008-GS-43-0842.

The basis of this notice is that on October 17th, 1994 the Defendant was convicted of Assault and Battery with Intent to Kill and five (5) counts of Kidnapping under indictment number 1993-GS-43-0587. Also on October 17th, 1994 the Defendant was convicted of Burglary in the First Degree under indictment number 1994-GS-43-0636 and another separate count of Burglary in the First Degree under indictment number 1995-GS-43-0105. Each aforementioned charge for which a conviction is stated above, is defined as a Most Serious offense under S.C. Code Ann. §17-25-45.

Certified copies of both the Defendant's Prior Records and the indictments in the above mentioned convictions are attached to this notice.

Martin D. Spentini
Martin D. Spentini, S.C. Bar# 77061
Assistant Solicitor, Sumter, S.C.
Sumter County Courthouse
141 North Main St.
Sumter, SC 29150
(803) 436-2185

APPLICANT'S EXHIBIT (II)**SENTENCING SHEET**

STATE OF SOUTH CAROLINA

COUNTY OF SUMTER

STATE VS.

ANDRE MAURICE MASSEY

AKA:

Race: Black

Sex: Male

Age:

SS#: [REDACTED]

Address: [REDACTED], SC 29150

DL#

SID#

In disposition of the said indictment comes now the Defendant who was

☒ CONVICTED OF or ☐ PLEADSTO: Armed RobberyIn violation of 16-11-330 of the S.C. Code of Laws, bearing CDR Code #☐ NON-VIOLENT☒ VIOLENT☐ SERIOUS☒ MOST SERIOUS☐ Mandatory GPS (CSC
w/minor 1st or Lewd Act)☒ \$17-25-45The charge is: ☐ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury, _____ (Defendant Initial)The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Martin Sorantin
Solicitor

Defendant

Calvin Haste 12045
Attorney for Defendant SC Bar #WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,for a determinate term of Life w/parole - SC Code § 17-25-45 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years

and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment of \$ _____; plus

costs and assessments as applicable*; the balance is suspended with probation for _____ months/years and subject to South

Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☐ CONCURRENT or ☐ CONSECUTIVE to sentence on: _____☐ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State Department of Corrections.☐ The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred, ☐ Defendant Waives Hearing, ☐ Ordered

PTUP

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms:

☐ set by SCDPPPS

Recipient:

*Fine:

\$14-1-208 (Assessments 107.5%)

\$14-1-211(A)(1) (Conv. Surcharge)

\$14-1-211(A)(2) (DUI Surcharge)

\$58-5-2895 (DUI Assessment)

\$35.13 (Public Def/Prob)

\$73.3, 1B TP (Law Enforce. Funding)

\$33.7, 1B TP (Drug Court Surcharge)

\$50-21-114(BUI Breath Test Fee)

\$58-5-2842(J) (Vehicle Assessment)

3% to County (if paid in installments)

\$90.11 TP (SCCJA Surcharge)

TOTAL

James C. Campbell II
Clerk of Court/ Deputy Clerk

Court Reporter:

Daphne Nelms

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2008-GS-43-0853

AW#: J302502

Date of Offense: June 07, 2007

S.C. Code §: 16-11-0330(A)

CDR Code #: 0139

CERTIFIED TRUE COPY
OF ORIGINAL FILE

SENTENCE SHEET

DEPUTY CLERK OF COURT

SUMTER COUNTY

SOUTH CAROLINA

0, 1, 3, 9

_____ days/hours Public Service Employment

Obtain GED

Attend Voc. Rehab. or Job Corp.

May serve W/E beginning

Substance Abuse Counseling

Random Drug/Alcohol Testing

Fine may be pd. in equal, consecutive weekly/monthly

pmts. of \$ _____ beginning

\$ _____ paid to Public Defender Fund

Other:

Mandatory LWOP under§ 17-25-45☐ Appointed PD or appointed other counsel, \$35.13 TP
Requires \$500 be paid to Clerk during probation.

PRESIDING JUDGE

Judge Code:

Sentence Date:

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF SUMTER) C/A No.2013-CP-43-2156

Andre M. Massey -- Applicant,

-Vs-

State of South Carolina -- Respondent

CERTIFICATE OF SERVICE

The undersigned does hereby certify he has served a true and correct copy of the enclosed Amended Post Conviction Relief Applicant on the Attorney for Respondent, Mr. Alan Wilson, SC. Attorney General, P.O. Box 11549, Columbia, SC. 29211,

by placing the aforesaid in a properly addressed, first-class postage affixed envelope and placed in the U.S. Mail this 6th day of JANUARY, 2015.

The Original was placed in the U.S. Mail the same day stated herein and mailed to the Clerk of Court for Sumter County, Mr. James C. Campbell, 141 N. Main St., Rm 308, Sumter, SC. 29150-4965.

SWORN TO AND SUBSCRIBED BEFORE ME

THIS 7th DAY OF January, 2015

Dancy C. Marshall
NOTARY PUBLIC

MY COMM. Expires 1-23-2023

RESPECTFULLY SUBMITTED,

/s/

Andre M. Massey

RECEIVED

JAN 13 2015

Referred to

Answered

RECEIVED

1911 JAN 12

Returned to
Answered

1 STATE OF SOUTH CAROLINA

IN THE CIVIL COURT

2 COUNTY OF SUMTER

3
4
5 ANDRE MAURICE MASSEY,)

6 Applicant,)

7 -vs-)

8 STATE OF SOUTH CAROLINA,)

9 Respondent.)

TRANSCRIPT OF RECORD

13-CP-43-2156

10
11 March 29, 2017
12 Sumter South Carolina

13
14 B E F O R E:

15 HONORABLE D. CRAIG BROWN, Judge.
16
17

18 A P P E A R A N C E S:

19 TIMOTHY L. GRIFFITH, Esquire
20 Attorney for the Applicant

21 JULIE A. COLEMAN, Asst. Attorney General
22 Attorney for the Respondent/State

23 L. COCONUT PANTSARI, R.P.R.
24 Circuit Court Reporter
25

1 INDEX OF WITNESSES

2 WITNESSES:PAGE

3 ANDRE MASSEY

4 Direct By Mr. Griffith 5

5 Cross By Ms. Coleman 18

6 Redirect By Mr. Griffith 21

7 CALVIN HASTIE, SR.

8 Direct By Ms. Coleman 23

9 Cross By Mr. Griffith 31

10 Redirect By Ms. Coleman 37

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12 Certificate 50

13 INDEX OF EXHIBITS

14 (Court Reporter's Note: No exhibits were marked or
15 received into evidence.)
16
17
18
19
20
21
22
23
24
25

1 (The following proceedings are reported on
2 March 29, 2017.)

3 THE COURT: Is the State ready to proceed?

4 MS. COLEMAN: Yes, Your Honor.

5 THE COURT: Defense counsel -- the applicant's
6 counsel? Excuse me.

7 MR. GRIFFITH: We are ready, Your Honor.

8 THE COURT: Call your case, please, ma'am.

9 MS. COLEMAN: Thank you. May it please the
10 Court. This is Andre Massey versus the State of South
11 Carolina Docket Number 2013-CP-43-2156. The applicant
12 is presently confined in the South Carolina Department
13 of Corrections pursuant to an order of commitment of the
14 Sumter County Clerk of Court.

15 Applicant was true billed indicted at the
16 July 2008 term of the Sumter County Grand Jury for armed
17 robbery and possession of a weapon during a violent
18 crime. Applicant was represented by Calvin Hastie, Sr.

19 Applicant proceeded to a jury trial before the
20 Honorable George C. James Jr.; and on August 5, 2009, he
21 was found guilty on both counts. Judge James sentenced
22 the applicant to life without parole for armed robbery
23 and did not impose a sentence for possession of a weapon
24 during a violent crime pursuant to S.C. Code
25 16-23-49(a).

1 A timely notice of appeal was filed on
2 applicant's behalf, and the South Carolina Court of
3 Appeals affirmed applicant's conviction. Remittitur was
4 issued November 22, 2013.

5 Applicant filed a timely application for post
6 conviction relief on December 6, 2013, alleging
7 ineffective assistance of counsel. He has since filed
8 an amendment on November 29, 2016. The State filed its
9 return May 12, 2014. He is present today and
10 represented by Mr. Timothy Griffith.

11 Your Honor, there should be a copy of the
12 amended application in the packet.

13 THE COURT: There is, yes, ma'am.

14 MS. COLEMAN: What we realized this morning is
15 it has got some scribbles on it. Those are copies of
16 Mr. Griffith's notes. It should just be a couple of
17 circles and lines; but if that is a problem, we can see
18 if we can make a new copy.

19 MR. GRIFFITH: I do have an unmarked copy if
20 Your Honor would like it.

21 THE COURT: It doesn't bother me; however, if
22 you need them...

23 MR. GRIFFITH: I have the original that I
24 marked up, Your Honor.

25 THE COURT: It doesn't bother me.

ANDRE MASSEY -- DIRECT -- MR. GRIFFITH

5

1 MS. COLEMAN: Thank you, Your Honor.

2 THE COURT: Mr. Griffith, are you ready to
3 proceed?

4 MR. GRIFFITH: Yes, Your Honor.

5 THE COURT: Let's go.

6 MR. GRIFFITH: Your Honor, we would call
7 Mr. Massey.

8 (The witness comes forward.)

9 ANDRE MASSEY, being
10 first duly sworn, testifies as follows:

11 CLERK: State your name for the record and
12 spell your last name, please.

13 THE WITNESS: Andre Massey, M-A-S-S-E-Y.

14 MR. GRIFFITH: If it please the Court, Your
15 Honor.

16 THE COURT: Yes, sir.

17 DIRECT EXAMINATION

18 BY MR. GRIFFITH:

19 Q Mr. Massey?

20 A Yes, sir.

21 Q Where are you currently incarcerated?

22 A Perry Correctional Institution, Columbia, South
23 Carolina.

24 Q And you are sentenced to a term of what?

25 A A natural life sentence, sir.

1 Q And, Mr. Massey, today we are going to go through
2 your issues that you have for post conviction
3 relief. You and I have discussed this at length,
4 and I would like for you to give us much as
5 information as you can as to your issues. I am
6 going to name the issues and then, of course, if
7 you will elaborate on it --

8 A Yes, sir.

9 Q -- that would be perfect. Your first issue,
10 Mr. Massey, concerns ineffective counsel for
11 failing to -- excuse me, Your Honor -- you do have
12 a copy of your complaint in front of you; is that
13 correct.

14 A Yes, sir.

15 Q So use that as a reference. Failing to object to
16 trial court's jury instruction that shifted the
17 burden of proof in violation of the due process
18 clause and denied the applicant his Fourteenth
19 Amendment right to a fair trial.

20 In that issue we have talked about the judge's
21 instructions to the jury as to what is reasonable
22 doubt. Do you remember that?

23 A Yes, sir.

24 Q Can you tell us why you feel that the judge's
25 instructions were incorrect?

ANDRE MASSEY -- DIRECT -- MR. GRIFFITH

7

1 A I felt like the judge's instruction were incorrect
2 due to the fact that the judge put -- he didn't
3 really let the jury determine reasonable doubt. He
4 really pretty much told them what reasonable doubt
5 was. He never let the jury decide for themselves
6 what reasonable doubt was.

7 Q Did he use some words like, "assign reason to,"
8 rather than reasonable doubt?

9 A Yes, sir.

10 Q And so how do you feel that affected the jury?

11 A Well, I feel like it prejudiced me as far as me
12 having a chance for a fair trial because basically
13 the seed was already planted, so to speak, and my
14 lawyer didn't object. So that also made the trial
15 different. I feel like if he would have jumped
16 into that, it would have changed the whole outcome
17 of the trial.

18 Q And in your application and your statements, as the
19 Court is aware, the burden of proof is on the
20 solicitor to prove beyond a reasonable doubt. Do
21 you think that that changed the burden from the
22 solicitor to -- moved that off the solicitor?

23 A Yes, I kind of do.

24 Q Okay. So did anything happen? Did the judge make
25 any change to that statement during the trial?

1 A Well, the judge, he had charged the jury and told
2 them that -- after he made the statement, he
3 charged them and told them it was up to them; but
4 it was too late then because, like I said, the seed
5 was already planted.

6 Q So the jury had already heard the instructions, but
7 he reinstructed the jury, but you don't feel that
8 that cured the problem?

9 A No, sir.

10 Q Because they had already heard it. Did your
11 counsel object? Your counsel objected the first
12 time. Did he object after that?

13 A No, he didn't object the second time.

14 Q So do you feel that your counsel should have
15 objected and raised that issue again with the
16 Court?

17 A Yes, I do.

18 Q So now looking at page 9, your next issue, this
19 issue reads, "Counsel was ineffective for failing
20 to object to the trial court's jury instructions
21 that impermissibly commented on the facts of the
22 case that would be determined by the jury."

23 Could you tell us what you recall the judge
24 was talking about to the jury?

25 A It was something about the weapon. As far as he

ANDRE MASSEY -- DIRECT -- MR. GRIFFITH

9

1 was explaining to them the difference between -- he
2 explained to him the difference between a deadly
3 weapon, what a deadly weapon was during the
4 commission of a violent crime.

5 So in the process of that, he just told them
6 it was gun, in which a gun was involved in my case,
7 which the judge didn't know at that time; but it
8 could have been a knife. It could have been a
9 pipe. It could have been -- you know what I'm
10 saying? -- any other form of weapon. But he used a
11 gun. You know what I'm saying? He used the gun,
12 which a gun was in my case.

13 That's what he used to try to break down what
14 a weapon during a violent crime was. You see what
15 I'm saying? Instead of saying the word weapon or
16 just saying weapon, he like: "Okay, a gun. A
17 deadly weapon is a gun." Why would he say gun and
18 a gun was used in my case. You know what I'm
19 saying? So I feel like I was prejudiced. I was
20 prejudiced from it.

21 Q If you could slow down.

22 A I'm kind of nervous.

23 THE COURT: Take your time. I don't want you
24 talking too fast. It might mess up my court reporter
25 over here.

1 THE WITNESS: I apologize.

2 A When he made the statement about a deadly weapon,
3 first he said a weapon during the commission of a
4 violent crime. Then he said a deadly weapon. Then
5 he turned around and said a gun.

6 Like I said, a gun was used in my crime. So
7 why would you say a gun? How come you didn't say a
8 knife? How come you didn't say a pipe? How come
9 you didn't say any other kind of weapon, any other
10 form of weapon? He said a gun.

11 My counselor, my lawyer, didn't object to that
12 fact. I feel like he was ineffective on that issue
13 right there. And if he had objected when he made
14 that, the outcome of the case could have been also
15 different.

16 Because, like I said, I was really like a
17 sitting duck. He was telling them that is what a
18 gun -- this is what he's charged with, and this is
19 what a gun is. Okay.

20 Who said anything about a gun? You
21 understand? Would you bring a gun up? Why didn't
22 you say a knife? Why wouldn't you say any other
23 type of weapon except for a gun?

24 Q I want you to speak slowly so she can write it all
25 down.

1 A I'm sorry.

2 Q I want you to say everything you want to say
3 certainly. You've got to give her a little time.
4 Would you say basically then that he was speaking
5 about facts that are in the case?

6 A Yes, sir.

7 Q Rather than just an instruction to the jury?

8 A Yes, sir.

9 Q And you said he didn't know it was a gun, but do
10 you know for a fact that he did not know it was a
11 gun?

12 A I can't honestly sit here and say that I know for a
13 fact that he did not. I can't say that, no.

14 Q Okay. So having this judge use the word gun, you
15 feel that that was prejudicial to you in that he
16 was basically giving facts of the case to the
17 jury --

18 A Yes, sir.

19 Q -- rather than being the judge, the impartial
20 judge?

21 A Yes, sir.

22 Q Let's look at your next issue, which starts on
23 page 14. It states: "Was counsel ineffective for
24 failing to challenge applicant's prior conviction,
25 which the State willingly -- giving applicant

1 notice of intent to seek life without parole, the
2 State relied on eight prior convictions in the
3 notice that were all stemming from one incident and
4 should have been considered one offense for
5 sentencing purposes under Section 17-25-45 and
6 17-25-50. Therefore, the State should not have
7 been allowed to use all eight prior convictions."

8 Now, you and I have talked about this at
9 length, and I want you to tell the judge, the
10 Court, how you feel about that and why you think it
11 was wrong.

12 A I feel it was wrong, and the reason why I think it
13 was wrong is because all those crimes happened --
14 all those eight incidents happened -- in one time.
15 All that was under one conviction. It wasn't eight
16 separate convictions. All that happened at one
17 time in one day.

18 So really it was basically like the DA -- I'm
19 sorry -- the solicitor took like a shotgun blast or
20 whatever and was like, "Okay. We just going to
21 pick one." They never actually picked one charge
22 to say, "Okay. Well, we are going to we use this
23 for a most serious offense, and we are going to
24 enhance this you are looking at LWOP for the armed
25 robbery."

1 They just took all eight of them, and my
2 lawyer never challenged any of that. He was
3 ineffective for the simple reason he never
4 challenged any of that, and he allowed for them to
5 even do that.

6 I also feel I was prejudiced due to the fact
7 that if he would have challenged it and he would
8 have made them actually just pick one charge
9 instead of like, so to speak, a shotgun blast, I
10 would have been -- my trial would have been
11 different.

12 I mean, they just said eight. Okay. If I got
13 eight charges and they all stem -- and the judge
14 also said that, "Okay. All these charges stem from
15 one incident." So which one was it? You said
16 eight. You just picked all eight of them, and you
17 never challenged it or anything like that.

18 Q And basically what you are saying is this stems
19 from one occurrence and so that should have been
20 one event?

21 A Yes, sir.

22 Q So are you convinced that your lawyer should have
23 objected to the fact that they included all eight
24 of those, rather than cause them to be one event?

25 A Yes, sir.

1 Q Let's look at your next issue, which starts on
2 page 20. This one states: "Was counsel
3 ineffective for failing to object to the trial
4 court's imposition of life without parole under
5 17-25-45, two strikes, without first entering
6 judgment for the armed robbery that applicant was
7 on trial for? Therefore, without the trial court
8 first entering judgment for the armed robbery, he
9 was not eligible to be sentenced under two
10 strikes."

11 So first of all, you were found guilty by the
12 jury; is that correct?

13 A Yes, sir.

14 Q And after you were found guilty by the jury, did
15 the judge then impose a sentence on the armed
16 robbery that you had been found guilty of?

17 A No, sir, he did not.

18 Q So no sentence had been imposed at that time?

19 A No sentence had been imposed as of to this date. I
20 still have not been sentenced. But I'm serving --
21 I'm serving -- technically this is what it is.

22 I'm not real good with the legal terminology
23 or anything like that. I just know how to really
24 explain myself to a situation in the situation.
25 It's like this.

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15

1 In layman's terms technically, I am doing a
2 natural life sentence under the two-strikes law for
3 one strike. I was never found -- the judge -- I
4 was found guilty by a jury. The judge never
5 sentenced me to time.

6 In order to enhance the sentence -- under
7 17-25-45 in order to enhance a charge, I would have
8 to be convicted and I would have to be charged -- I
9 would have to be convicted, and I would have to be
10 sentenced in order for the enhancement -- you know
11 what I'm saying? -- to be legit.

12 I was convicted but I was never charged; so
13 therefore, technically I'm am doing a natural life
14 sentence for one strike. I never got sentenced in
15 order to obtain the second strike to make the
16 enhancement to a second most serious offense. So
17 really I am just doing a natural life sentence
18 under one strike. I don't have a second strike at
19 all.

20 Q So you believe your counsel should have objected to
21 this --

22 A Yes, sir, I believe my counsel should have
23 objected. If he had objected to anything at all,
24 he should have objected to that right there. That
25 right there was the main issue.

1 Q Do you recall whether or not during any discussions
2 or motions after the trial if your attorney
3 objected to that at that time?

4 A No, sir.

5 Q He didn't object. Did your attorney make any
6 statements at all about --

7 A No, sir.

8 Q -- the sentencing to life --

9 A No, sir.

10 Q -- without parole. Do you want to elaborate on
11 anything else? Do you want to talk a little more
12 about anything else in here?

13 A Really, that was really the main thing. Everything
14 you had said -- you had said based on everything I
15 wanted to talk about and everything like that, but
16 it's just that, I mean, right is right and wrong is
17 wrong.

18 I'm not going to sit up here and try to appear
19 to be no angel or anything like that. No, I have
20 made mistakes, and so has everybody else in life.
21 But my thing is the law is the law. You
22 understand? I respect the law. I understand the
23 law. I just want a fair shot. That's all I ask,
24 just a fair shot. That's it.

25 Q So on that last issue, the judge -- what you are

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17

1 saying -- is the judge stated the priors were on
2 the same date?

3 A Yes, sir.

4 Q But you were not eligible because there was no
5 second strike because it was that same day?

6 A Exactly.

7 Q So the judgment for the robbery had not been
8 entered prior to your being sentenced under the two
9 strikes provisional requirement. Is that true?

10 A That is true, sir.

11 Q And your counsel's failure to object prejudiced you
12 and denied you the Sixth Amendment right to counsel
13 in that you didn't have the opportunity to argue
14 about whether you should receive a life without
15 parole sentence?

16 A Yes, sir.

17 Q Is there anything else you want to add?

18 A No, sir.

19 MR. GRIFFITH: If it please the Court. If
20 counsel would allow, we will have a good bit more to say
21 on it in closing argument at that time.

22 THE COURT: All right.

23 Q Thank you. Please answer any questions she has.

24 THE COURT: Cross examination.

25 MS. COLEMAN: Thank you, Your Honor.

1 CROSS EXAMINATION

2 BY MS. COLEMAN:

3 Q Good morning, Mr. Massey. How are you?

4 A Good morning.

5 Q How many times did you meet with your attorney
6 before going to trial?

7 A Twice, I believe.

8 Q Twice?

9 A Yes, ma'am.

10 Q Do you recall reviewing discovery with your
11 attorney?

12 A No, ma'am, I don't.

13 Q Do you recall discussing possible defenses with
14 your attorney?

15 A With Mr. Hastie and Mr. Wilder --

16 COURT REPORTER: Wait a minute. I didn't
17 understand you. Say that again.18 THE COURT: Hold on a minute. I can't
19 understand you. Slow down.

20 THE WITNESS: I'm sorry.

21 MR. GRIFFITH: Is his microscope on? I can
22 barely hear him.

23 THE COURT: Yes, it's on.

24 COURT REPORTER: The last question was: "Did
25 you discuss any possible defenses with your attorney?"

1 A Yes, I do, with Mr. Hastie and Mr. Wilder.

2 Q Did you give your attorney any leads or potential
3 witnesses to investigate?

4 A Yes, yes. Yes, I did.

5 Q Did he investigate those for you?

6 A He told me he did, yes.

7 Q Were there any pleas offered to you by the State?

8 A No, ma'am, they made me go to trial.

9 Q Was there any evidence presented at the trial about
10 a gun being used in the armed robbery?

11 A It was -- a gun was brought up, but my fingerprints
12 or nothing, that was never on the gun. So they
13 never could say that the gun was mine.

14 Q Now, on October 17th of 1995, you were convicted of
15 five counts of kidnapping and assault and battery
16 with intent to kill; right?

17 A Yes.

18 Q And also on that same date, October 17, 1995, you
19 were convicted of two counts of burglary first;
20 right?

21 A Yes.

22 Q Were you given notice by the State of their intent
23 to seek life without parole?

24 A On this charge right here?

25 Q Yes.

1 A Yes, ma'am.

2 Q And was that within ten days of the trial?

3 A Yes, ma'am.

4 Q Did you have a hearing over the sentence of life
5 without parole before the trial?

6 A Like you talking about the pretrial hearing that we
7 had went to?

8 Q Yes.

9 A Yes, ma'am.

10 Q Okay. So was this argued to the judge?

11 A Yes, ma'am. They was arguing about the judge with
12 the actual LWOP, life without parole. The wording
13 was wrong in it or some of the words with life with
14 parole or life -- it was just some words, and
15 that's when Mr. Hastie was arguing something about
16 the wording was wrong. It wasn't really right.

17 Q And that's when he moved to quash the LWOP notice?

18 A Yes, ma'am.

19 Q And the Court denied his motion; right?

20 A Yes, ma'am.

21 MS. COLEMAN: That's on page 50, Judge, just
22 for your reference.

23 BY MS. COLEMAN:

24 Q And the Court explained, when he was denying this
25 motion, that if the wording were wrong, if he,

1 quashed the motion, that if the wording were wrong,
2 Q And the Court explained, when he was denying this
3 motion, that if the wording were wrong, if he,
4 quashed the motion, that if the wording were wrong,
5 if he quashed auashed the motion, the State would
6 just reword it and give you a new one; is that
7 right?

8 A Yes, ma'am.

9 Q Your attorney did argue to suppress the search
10 warrant used in this case, didn't he?

11 A Yes, ma'am.

12 Q Okay.

13 A Fruit of the poisonous tree.

14 Q And the Court found that there was no evidence
15 obtained in the protective sweep search; right?

16 A Yes, ma'am.

17 Q Thank you. Nothing further.

18 THE COURT: Any redirect?

19 MR. GRIFFITH: Yes, Your Honor, just briefly.

20 REDIRECT EXAMINATION

21 BY MR. GRIFFITH:

22 Q Mr. Massey, before you were incarcerated, you had
23 not studied law or anything like that, had you?

24 A No, sir.

25 Q Did you have an understanding, when they were

1 talking about life without parole, that this would
2 mean your natural life?

3 A Not really.

4 Q Okay. And so when your attorney would talk about
5 these things, you didn't really understand. Is
6 that what you are saying?

7 A Not fully, no, sir, I didn't.

8 MR. GRIFFITH: I have nothing further.

9 MS. COLEMAN: Nothing further.

10 THE COURT: Sir, you may step down.

11 MR. GRIFFITH: No further witnesses, Your
12 Honor.

13 THE COURT: I'm sorry?

14 MR. GRIFFITH: No further witnesses.

15 THE COURT: Sir, you may step down.

16 THE WITNESS: I apologize.

17 THE COURT: That's okay.

18 (The witness leaves the witness stand.)

19 MS. COLEMAN: The State calls Calvin Hastie.

20 (The witness comes forward.)

21 CALVIN HASTIE, being
22 first duly sworn, testifies as follows:

23 CLERK: State your name for the record and
24 spell your last name.

25 THE DEFENDANT: Calvin Hastie, H-A-S-T-I-E.

1 DIRECT EXAMINATION

2 BY MS. COLEMAN:

3 Q Good morning, Mr. Hastie. How are you?

4 A I'm pretty good. Good morning.

5 Q How long have you been practicing law?

6 A Twenty years.

7 Q Do you recall whether you were appointed or
8 retained in this case?

9 A Appointed.

10 Q And do you remember when that was roughly, the day?

11 A No, I don't remember the exact date that I was
12 appointed.13 Q How many times did you meet with the applicant
14 prior to his trial?15 A I don't remember the exact number but several
16 times. I went to the extent of -- he had mentioned
17 Arthur Wilder -- to take a more seasoned lawyer
18 with me just because this was such a serious case.
19 I took Mr. Wilder out to the jail to meet with him
20 on a few occasions as well.

21 Q Would you say it was more than twice?

22 A Yes, it was.

23 Q Did the applicant cooperate during the course of
24 your representation?

25 A Yes, he did.

1 Q Did you file any Brady or Rule 5 motions?

2 A Yes, I did.

3 Q Did you review the discovery material with the
4 applicant?

5 A Yes, I did.

6 Q Did you discuss with the applicant the elements of
7 the charges and what the State was required to
8 prove?

9 A Yes, we went through all that.

10 Q Did you discuss applicant's version of the facts?

11 A Yes, I did.

12 Q And what was his version?

13 A Well, his version of the facts, really he did rob
14 the place. So he did commit the crime.

15 Q Can you just tell us a little bit factually about
16 the fact pattern here in the case?

17 A Okay. It was a store, like a clothing sales store;
18 and he was charged with going in there and just
19 sort of scouting the place out originally. And
20 people saw him in there earlier that day and were
21 able to describe what he had on.

22 Then he went back in later that day with a
23 weapon, with a gun. An older man was at the store.
24 I think his name was Mr. Huff, who identified him
25 and identified the type of weapon. He did have a

1 gun.

2 That was all talked about during the trial,
3 during Mr. Huff's testimony, a description of the
4 gun. There was a gun. So there was no mistake
5 about the gun or whether or not a gun was used or
6 what type of weapon it was. It was described by
7 Mr. Huff in great detail.

8 Q Thank you. Did you discuss any possible defenses
9 with the applicant?

10 A Well, we talked about defenses but there really
11 wasn't much that he could defend himself with.
12 That's why I tried to look at the search and things
13 like that to try to help in the situation.

14 I just thought that the way they went about
15 the search, entering his home, the evidence that
16 they gathered on him was improperly gathered; and
17 the search was improper. All of that was denied by
18 the Court.

19 Q What was your trial strategy in this case?

20 A Our strategy was just to try to get some of the
21 evidence not to be submitted against him. Like,
22 again, the search that took place by the detective,
23 the sweep that they made through his home, and
24 things like that. So we tried to look at some of
25 the technical aspects of how or what happened to

1 him versus the actual facts of the case.

2 Q Can you briefly describe the State's evidence
3 against the applicant?

4 A Well, the biggest evidence they had was against
5 Mr. Huff, the elderly man that was there. When he
6 got on the jury stand [sic] and spoke about how
7 fearful he was, how he put the gun in his face and
8 said he would kill him if he didn't give him the
9 money, I think that was very convincing to the
10 jury.

11 Q Would you say this was a strong case against him?

12 A Oh, yeah, as far as the robbery was concerned.

13 Q Would you describe the evidence as overwhelming?

14 A Yes, I would.

15 Q What kind of investigation did you do?

16 A Well, we talked to -- he gave us some names of some
17 folks that he met with that morning and stuff like
18 that. I talked to folks that knew him. I tried to
19 see what kind of person he was.

20 So we talked to several people that knew him
21 very well and could speak about what type of young
22 man he was. People spoke very highly of him too.
23 This was a tragedy.

24 I don't know whether he was under the
25 influence of something at the time because this

1 really made no sense. He sort of knew he had
2 already been in trouble and knew that this would --
3 I don't think he understood the LWOP part before
4 this happened to him.

5 For him to go and commit a crime like this, he
6 was digging his own grave; and I think he
7 understood all of that. But people said he was a
8 good young man, and I tried to get some of them to
9 come in and speak at the trial for them, but most
10 of them refused.

11 Q Did you have enough time to prepare for trial?

12 A I believe we did. That's why I asked Mr. Wilder to
13 come and join me on this case because it was just
14 so serious.

15 Q And you filed a motion to suppress the search
16 warrant; correct?

17 A Yes, I did.

18 Q Was that successful?

19 A No, it was not. I thought that led to everything,
20 that search warrant, how they did that, but it was
21 not successful.

22 Q Did you argue a motion to quash the State's notice
23 of LWOP?

24 A I think I did. I was just reading in some of the
25 report that it was argued, yes.

1 Q What basis did you argue that motion on?

2 A To quash the motion?

3 Q Yes. If you remember. If not --

4 A I don't quite remember.

5 THE WITNESS: Your Honor, I just -- I've had
6 the flu. So this is my first day back. I am planning
7 on going to the doctor's office as soon as I get off the
8 stand here.

9 THE COURT: Just breathe to your right.

10 THE WITNESS: Could I get some water, please.

11 MS. COLEMAN: Sure.

12 THE COURT: I've already had the flu this year
13 myself.

14 THE WITNESS: This may be my second time.

15 THE COURT: I understand.

16 BY MS. COLEMAN:

17 Q If you would like the transcript too, to flip
18 through while you are up there, I am happy to hand
19 it to you.

20 A State your question again.

21 Q You argued a motion to quash the LWOP notice. Can
22 you recall what basis you argued that motion on?

23 A Yeah, I think I was talking about there was a
24 mistake in the motion, as far as how it was written
25 and prepared. Again, Judge James denied that fact

1 as well.

2 Q Did the applicant have the necessary prior
3 convictions to allow for the LWOP notice?

4 A I argued that too. I didn't think he should have
5 been given the LWOP, but it was overruled by the
6 Court again. Because it was, I think, of the same
7 incident; but they still counted it as two separate
8 ones and gave him the LWOP anyway. I just didn't
9 think he should have been given the LWOP, but he
10 was given it and I argued to my ability, and it was
11 denied by the Court.

12 Q Did you discuss that with the applicant, what the
13 denial meant?

14 A If he denied the motion?

15 Q Yes.

16 A Oh, yeah, that this would be a life sentence for
17 him. This was very serious and I think he
18 understood that. But I think he felt that we were
19 going to prevail at trial; and of course, we did
20 not. He also appealed, I believe, this entire
21 situation.

22 Q Was there any evidence obtained in the protective
23 sweep that the police did before -- while they were
24 arresting the applicant?

25 A I can't remember what was obtained right now due to

1 the protective sweep.

2 Q Would you agree with me if I said the transcript
3 says that everyone agreed that no evidence was
4 obtained in the protective sweep?

5 A I would agree.

6 Q Okay. Thank you. Is there any question under
7 South Carolina law that a gun is a deadly weapon?

8 A Not at all.

9 Q And was there evidence presented in this case about
10 a gun?

11 A Yes.

12 Q Was the applicant sentenced for possession of a
13 weapon during a violent crime?

14 A Yes, I believe he was.

15 Q Did you feel any need to object to the trial
16 court's instruction to seek the truth that the
17 applicant alleges shifted the burden of proof in
18 this case?

19 A No. I believe Judge James was very clear on the
20 instructions. He was very particular to go through
21 the instructions with my client and ensure he
22 understood them. Whether he understood them or
23 not, I'm not sure.

24 Q I have nothing further. Thank you.

25 THE COURT: Cross examination.

1 MR. GRIFFITH: Thank you, Your Honor.

2 CROSS EXAMINATION

3 BY MR. GRIFFITH:

4 Q Attorney Hastie, on the issue of life without
5 parole, did you argue with the judge or with the
6 Court about the fact that all these occurred during
7 the same set of circumstances, the priors, and this
8 one?

9 A Yes, I believe I did.

10 Q And you just stated that he was not sentenced -- I
11 mean, that he was sentenced for the gun?

12 A I believe he was. I'm not 100 percent sure of
13 that. I'm not sure. You may have the record
14 there.

15 MR. GRIFFITH: If it please the Court.
16 Counsel informed the Court that he was not convicted for
17 the gun -- not sentenced for the gun.

18 BY MR. GRIFFITH:

19 Q So I know it was sometime back --

20 THE COURT: Hold on a minute.

21 MS. COLEMAN: Your Honor, that's written on
22 the sentencing sheet. He was convicted of the
23 possession, but it was not sentenced under that statute
24 that Judge James indicated.

25 THE COURT: Correct. I remember seeing part

1 of the packet that the possession of a weapon conviction
2 sentence is written as N/A, which I assume mean not
3 applicable. Go ahead.

4 BY MR. GRIFFITH:

5 Q I just brought that out, Mr. Hastie, to say this
6 was a long time ago, wasn't it?

7 A Yes, sure.

8 Q So remembering everything that happened may or may
9 not be easy in this case; is that correct?

10 A That's correct.

11 Q I just bring that up. So did you object when
12 counsel -- when the judge was beginning to talk
13 about reasonable doubt? The judge had said
14 basically that reasonable doubt was what the people
15 can assign to it. Basically I will read the
16 statement that the judge said from the transcript.

17 A Okay.

18 THE COURT: If you will reference that. What
19 page number is that, Mr. Griffith?

20 MR. GRIFFITH: From the transcript page 463,
21 line 17 through 25; and 464, line 1 through 6.

22 BY MR. GRIFFITH:

23 Q "What is beyond a reasonable doubt? Well, let me
24 first say it's not beyond all doubt -- all doubt.
25 There are few things you can know for certain in

1 this world, very few things, and the defendant's
2 guilt is not one of them.

3 "You though have to be convinced beyond a
4 reasonable doubt that you can assign reason to. I
5 say, for instance, if you felt there was something
6 wrong here and you could say, 'Okay. Well, I don't
7 think he is guilty because of this,' then that
8 would be a doubt which you could assign reason to.

9 "Ladies and gentlemen, we don't have that
10 here. It's not what we have. Also, ladies and
11 gentlemen, another definition and another way of
12 defining reasonable doubt, it actually gives you a
13 duty as a fair and impartial juror actively seeking
14 the truth."

15 So in that statement where he says you could
16 assign reason to -- a reasonable doubt that you can
17 assign reason to. Did you make any objection to
18 that statement?

19 A No, I did not.

20 Q And as to the judge's statement to the jury about
21 there being a gun -- a gun being a deadly weapon.
22 When the judge made that statement, did you make
23 objection at that time to use of the term, a gun?

24 A No, I did not.

25 Q Do you recall that the judge said, for instance, a

1 gun?

2 A Yes, I do.

3 Q A pistol, he said. I'm sorry. So were you aware
4 whether the judge -- during pretrial was it talked
5 about, not in the presence of the jury, as to
6 whether there was a gun in the case?

7 A During the pretrial discussions?

8 Q During any portion of the trial, pretrial or at any
9 time before the judge charged the jury, was it
10 discussed that there was a gun used or a pistol
11 used during this trial?

12 A I don't recall at this time without reviewing the
13 entire transcript.

14 Q But you did not object to that statement?

15 A No, I did not.

16 Q But you were talking about life without parole, and
17 the eight prior convictions that were all -- did
18 the State count those as eight prior convictions as
19 you recall?

20 A I don't recall how they counted them as
21 convictions, whether it was eight or just two.

22 Q Were they all part -- do you recall whether they
23 were all part of the same occurrence on the same
24 set of circumstances?

25 A Yeah, we discussed that. I don't know what the

1 State's decision was about that. That was a
2 discussion that came about whether or not they
3 were -- they did happen on the same day, I believe,
4 and with the same occurrence. That was discussed.
5 What was the outcome of it? I don't recall
6 particularly at this time.

7 Q And did you make objection at that time when it was
8 discussed in court?

9 A In court?

10 Q Yes.

11 A Maybe not in court, but I certainly objected when
12 we had our discussions concerning this whole
13 matter. Again, I didn't think he should have been
14 brought up on this LWOP charge from the very
15 beginning. I was clear with the Solicitor's Office
16 about that.

17 Q Thank you. Now, as to the fact that on the
18 sentencing, before he was sentenced for the
19 robbery, do you recall whether he was sentenced for
20 the robbery before or after the life sentence was
21 imposed?

22 That is to say, whether the judge imposed that
23 sentence, causing it to be more than one strike.
24 So that it occurred. It was a second strike.
25 Because he was indeed sentenced at that times.

1 That is to say, he was -- the judge made --
2 found him guilty and he was then convicted of that
3 crime so that it would be a second strike. That
4 probably sounded confusing. I'm sorry.

5 A I know what you are saying, but I don't recall how
6 that happened as far as I am concerned. I don't
7 remember.

8 Q Did you make an objection during the time when the
9 judge was imposing the life sentence, life without
10 parole?

11 A I saw in the transcript where Judge James went very
12 carefully and went through all of my objections
13 that I made throughout the trial at the very end
14 about the life sentence and all of that, about
15 renewing and making sure all of my objections were
16 renewed, even though they were denied by him.

17 On page 448, about the search warrant, and he
18 discussed about my objection, whether or not I was
19 going to renew my objections; and I did. The
20 in-court identification. He said about the motion
21 to exclude, meaning a life without parole notice,
22 to the extent that somebody would move for a
23 directed verdict on, "You repeat that as well?"

24 Yes, I did. He talked next about the
25 statement given by the defendant in the Jackson

1 versus Denno hearing. "You object in saying that
2 it was not the product of his free and
3 unconstrained will and so forth?"

4 "Yes, sir, I am renewing my objection on all
5 of this." There was a litany of things that I had
6 objected to during the trial. We stated all that
7 at the end of the trial as well, to include my
8 motion I made earlier for a mistrial on all those
9 same grounds. In those motions we did move for a
10 mistrial, and all of those were denied.

11 Q Thank you, Attorney Hastie. No further questions
12 at this time.

13 REDIRECT EXAMINATION

14 BY MS. COLEMAN:

15 Q Mr. Hastie, he just read to you a portion of the
16 transcript from the solicitor's closing argument
17 about how to assign reasonable doubt. In your
18 opinion is that a standard argument that people
19 make in closing arguments or was that unusual?

20 A About? Be more specific of what the solicitor
21 said. I thought that was the judge's comment.

22 Q I believe it was the solicitor's comment.

23 MR. GRIFFITH: No.

24 MS. COLEMAN: Was it the judge?

25 MR. GRIFFITH: It was the judge.

1 THE WITNESS: It was the judge's comment.

2 Okay.

3 MS. COLEMAN: I apologize. It was the
4 solicitor.

5 THE COURT: Hold on a minute, ma'am. Two
6 lawyers don't need to be conversing back and forth.

7 And, Mr. Hastie, you don't need to be talking
8 at the same time either.

9 I can't hardly follow that. I know my court
10 reporter in trying to take down everything everyone is
11 saying in here, can't follow that.

12 Now, if there is an objection, Mr. Griffith,
13 or if you want to stand up and add something on the
14 record as we go through this, I will give you that
15 opportunity. But I don't want it back and forth with
16 everybody in the courtroom talking. Okay?

17 MS. COLEMAN: Sorry, Your Honor.

18 THE WITNESS: Yes, sir.

19 THE COURT: Thank you.

20 BY MS. COLEMAN:

21 Q On page 463 he just read to you line 17 through 25,
22 and 464, line 1 through 6. This is in the closing
23 argument by the solicitor about how to assign
24 reason to doubt.

25 Do you believe that that was a standard

1 argument that solicitors make in closings? Or was
2 that unusual?

3 A (Pause.) That could be standard that solicitors
4 use in their closing arguments.

5 Q Did you at that time find it objectionable?

6 A I did not.

7 Q Do you see any reason now, looking back, to object
8 to that?

9 A I do not.

10 Q You testified that you discussed the prior
11 convictions with the State while you were
12 negotiating whether or not they would notice him
13 for LWOP. Is this something you discussed with him
14 on more than one occasion?

15 A Yes, certainly on more than one occasion because I
16 just thought it was unfair to charge this young man
17 with the LWOP at this time.

18 Q Were they allowed to notice him for LWOP under
19 South Carolina law?

20 A They noticed him within the proper rules that were
21 allowed.

22 Q The applicant has also asked you about exactly when
23 judgment was entered and whether it was entered
24 before the sentence. If you had objected to this
25 technicality, do you believe you would have been

1 successful?

2 A I do not.

3 Q Thank you. Nothing further.

4 THE COURT: Mr. Griffith, any further?

5 MR. GRIFFITH: Nothing further, Your Honor.

6 THE COURT: Sir, you may step down.

7 THE WITNESS: Thank you, Your Honor. I
8 apologize.

9 (The witness leaves the witness stand.)

10 MS. COLEMAN: The State has no further
11 witnesses, Your Honor.

12 THE COURT: Anything by way of argument,
13 Mr. Griffith? You indicated that you so desired to put
14 some argument on the record.

15 MR. GRIFFITH: I would like to put some
16 argument on the record, Your Honor.

17 THE COURT: Go ahead then.

18 MR. GRIFFITH: Thank you, Your Honor. May it
19 please the Court. Your Honor, as to the first issue
20 that we just went over, the solicitor speaking to the
21 jury, in this case, Your Honor, the solicitor, in trying
22 to give his definition of what reasonable doubt is, the
23 judge is to give instructions to the jury.

24 The solicitor in this case, we contend, Your
25 Honor, lifted the burden, lightened the burden on the

1 State to prove reasonable doubt. Because the jurors, to
2 be in a position where they possibly were confused about
3 what reasonable doubt was or did not understand or
4 confused between his definition and the judge's
5 definition of what reasonable doubt was, the judge is to
6 charge the jury.

7 In State v. Daniels, it confirms that the
8 Supreme Court admonished the judge for this same kind of
9 statement made in a case. Your Honor, counsel's failure
10 to object to this is ineffective in this case. He
11 should be granted a new trial on that issue.

12 The issue (B), which for the Court's help with
13 keeping track, is on page 9 of his complaint. The Court
14 preemptively prejudiced the jury with his instructions
15 by mentioning that there was a gun, that is, a pistol,
16 in this case.

17 The jury then was basically testified to by
18 the judge on instruction in that a pistol was a deadly
19 weapon, and so a deadly weapon was used. A weapon, of
20 course, was used in this case.

21 In this case counsel should have objected to
22 use of those words during the instructions. The judge
23 can't charge jurors in respect to matters of fact. He
24 has to charge them in respect to matters of law.

25 Here the judge was giving matters of fact that

1 could have confused the jury by mentioning the word
2 pistol being used in this example. Here, he made no
3 difference between him and the State in that he
4 interjected a fact that should have been brought in
5 under testimony, rather than by instructions to the
6 jury. We believe this prejudiced the jury, and counsel
7 should have been objected in that case.

8 As to issue number (C), which begins on
9 page 14, Your Honor, the eight convictions all occurred
10 in the same set of events, Your Honor. Under the rules
11 of our State, all of these should be considered as one
12 occurrence; and that should be only one set of events,
13 one conviction.

14 So the State introducing them and talking
15 about there being eight was improper. This was one
16 offense for sentencing purposes under 17-25-50. They
17 should not have been separated for sentencing purposes
18 under 17-25-45.

19 So under that he should be -- the applicant
20 believes he has made the requisite requirements by
21 Jackson, Jackson v. State, in that he has been severely
22 prejudiced by the State using all of his prior
23 convictions as a whole, rather than causing it to be
24 called one event.

25 As to issue (D), Your Honor, which begins on

1 page 20, here the judge, of course, had not yet posted
2 that sentence. Having taken in the prior sentencing in
3 consideration of the life without parole was improper.

4 In Ramdas v. Angelone --

5 THE COURT: Spell that last word you just
6 pronounced, please, for my court reporter.

7 MR. GRIFFITH: A-N-G-E-L-O-N-E. It's Ramdas,
8 R-A-M-D-A-S v. A-N-G-E-L-O-N-E.

9 THE COURT: Thank you.

10 MR. GRIFFITH: In that case the Supreme Court
11 granted certiorari to hear the case. There was a
12 discussion in that case as to what counts as a strike
13 for sentencing purposes. That was talking about
14 Virginia's three-strike rule, but it still applies here
15 to this two-strikes law.

16 This is a similar circumstance in that these
17 cases -- he was not, at the end of that case after a
18 final judgment of conviction or pronouncement of
19 sentence, the jury must first return a guilty verdict.
20 Second, sometime after the judge must enter a final
21 judgment of conviction and pronouncement of sentence.

22 If he does not then, of course, that violates
23 the Supreme Court's decision in this case in that the
24 trial court had not entered a final judgment of
25 conviction before imposing the life sentence.

1 In this case we would argue that he is
2 entitled to a new trial or at the minimum to a new
3 consideration of his sentence on this case. Thank you.

4 THE COURT: Thank you. Yes, ma'am.

5 MS. COLEMAN: Your Honor, on the first issue
6 about shifting the burden of proof, I have a case I
7 would like to hand up if I may approach.

8 THE COURT: Yes.

9 MS. COLEMAN: This is State versus
10 A-L-E-K-S-E-Y. It's a South Carolina case. This
11 discusses this burden-shifting language when the judge
12 asked the jury to seek the truth.

13 The Court found that this was not prejudicial
14 to the applicant or to the defendant in the case because
15 there was overall language about the presumption of
16 innocence and the State's burden of proof. So when
17 taken as a whole, as long as the instructions explain to
18 the jury that the State has the burden of proof, it's
19 not prejudicial.

20 In this case on page 5 of 4 and 5 of 5 of the
21 trial transcript, the judge discussed to the jury the
22 presumption of innocence and the State's burden of
23 proof. So we would argue that this is not prejudicial,
24 and it was not objectionable at the time when taken as a
25 whole.

1 The second issue, the Court's instructions
2 about the pistol, I think it's clear this was just being
3 used as an example of a deadly weapon. This is standard
4 language that's used by most judges, I believe, in their
5 arguments -- in their explanations -- of what possession
6 of a deadly weapon during a violent crime is.

7 I don't think there was any impermissible
8 language used about specific facts in this case. We
9 would argue it's not prejudicial as well because he
10 didn't receive a sentence on this charge.

11 He was convicted of possession of a weapon,
12 but he was not sentenced pursuant to the statute. There
13 was clearly evidence in this case presented about the
14 use of a gun. So there is no reason for him not to use
15 that language.

16 The third issue, the prior convictions, it's
17 clear that the solicitor based this on two prior
18 strikes. There were eight convictions that he grouped
19 them into two groups.

20 He apparently pled guilty to both on the same
21 day in 1995. The first strike were five counts of
22 kidnapping and assault and battery with intent to kill.
23 The second strike was a plea to two counts of burglary
24 first.

25 THE COURT: Hold on a minute.

1 MS. COLEMAN: Yes.

2 THE COURT: He got convicted here of a most
3 serious offense; correct?

4 MR. GRIFFITH: Yes, Your Honor.

5 THE COURT: And the prior kidnapping, that's a
6 most serious offense as well; correct?

7 MR. GRIFFITH: Yes, Your Honor.

8 THE COURT: Which falls under the two-strike
9 rule, not the three-strike rule; correct?

10 MS. COLEMAN: Correct, yes.

11 THE COURT: The argument has been,
12 Mr. Griffith, that they grouped all of these and counted
13 these as strikes. They didn't need but one strike back
14 in -- when was he convicted on the prior sentence?

15 MS. COLEMAN: In 1995.

16 THE COURT: All right, 1995. Assuming for
17 argument's sake, that is one strike. Am I missing
18 something here? Those are most serious offenses,
19 regardless, most serious offenses.

20 Then he is convicted on or about August 5 of
21 2009 of an armed robbery, which is another most serious
22 offense. That's under the statute, under the law.
23 That's life without parole. It's not a three-strike
24 issue, it's a two-strike issue here. Or am I missing
25 something?

1 MS. COLEMAN: I believe you are correct,
2 Judge. And that goes to his final argument about how
3 the judgment for the second strike of armed robbery was
4 not entered before the sentencing, which I would argue
5 is a mere technicality.

6 He would not have been successful if he had
7 objected to it. It's clear under the law that he had
8 two strikes, and he was entitled to be sentenced to life
9 without parole.

10 Furthermore, that's a direct appeal issue, I
11 would argue. Of course, he is framing it as failure to
12 object, but I think that this is something he should
13 have argued on direct appeal. He cannot argue it on
14 post conviction relief. We ask that you deny the
15 application. Thank you.

16 THE COURT: Any response on that,
17 Mr. Griffith? I would be happy to hear from you if so.

18 MR. GRIFFITH: May it please the Court, Your
19 Honor. She mentioned that he was not sentenced for the
20 pistol, the gun. However, this prejudiced the jury. It
21 was an opportunity for the jury to be prejudiced by the
22 statements that were being made of fact rather than
23 instruction.

24 So this caused the jury to be prejudiced
25 whether he was sentenced for it or not. It was long

1 before the sentencing that the jury was hearing all the
2 information and making their decision as to his
3 innocence or guilt. That caused them to be prejudiced,
4 Your Honor, I believe.

5 On the last issue, we were talking about, Your
6 Honor, we are not talking about the fact whether or not
7 it was two strikes or three strikes. What we are
8 talking about is that final judgment, a conviction,
9 final judgment had not yet been entered on the robbery.

10 So because final judgment had not yet been
11 entered, then it couldn't be counted. Yes, it's a
12 technicality. It's a technicality that the Supreme
13 Court said, "Hey, well, judgment was not entered yet.
14 So you can't count that."

15 So if they went back and said, "Okay. We are
16 entering the judgment now, and now we are going to give
17 him life without parole," the argument is that the
18 Supreme Court has said that the judgment has to be
19 entered before you impose the life, the two-strike rule.

20 They were talking about a Virginia case
21 three-strike rule; but here we are talking about two
22 strikes. The judgment has to be entered first. It's a
23 technicality, but it's a very important technicality
24 that the Supreme Court has argued is prejudicial and not
25 correct and that he is entitled to post conviction

1 relief under that ruling.

2 THE COURT: Thank you. I will take a look at
3 it and let you know.

4 *** END OF REQUESTED TRANSCRIPT OF RECORD ***

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C E R T I F I C A T E

I, the undersigned L. Coconut Pantsari, Official Reporter for the Third Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete Transcript of Record of all the proceedings had and the evidence introduced in the trial of the captioned cause, relative to appeal, in the Civil Court for Sumter County, South Carolina, on the 29th day of March, 2017.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

July 10, 2017

s/L. Coconut Pantsari

Court Reporter

BY MR. GRIFFITH: [6] 5/17 21/20 31/2 31/17 32/3 32/21 BY MS. COLEMAN: [6] 18/1 20/22 23/1 28/15 37/13 38/19 CLERK: [2] 5/10 22/22 COURT REPORTER: [2] 18/15 18/23 MR. GRIFFITH: [25] 3/6 4/18 4/22 5/3 5/5 5/13 17/18 18/20 21/18 22/7 22/10 22/13 30/25 31/14 32/19 37/22 37/24 40/4 40/14 40/17 43/6 43/9 46/3 46/6 47/17 MS. COLEMAN: [20] 3/3 3/8 4/13 4/25 17/24 20/20 22/8 22/18 28/10 31/20 37/23 38/2 38/16 40/9 44/4 44/8 45/25 46/9 46/14 46/25 THE COURT: [44] 3/2 3/4 3/7 4/12 4/20 4/24 5/1 5/4 5/15 9/22 17/21 17/23 18/17 18/22 21/17 22/9 22/12 22/14 22/16 28/8 28/11 28/14 30/24 31/19 31/24 32/17 38/4 38/18 40/3 40/5 40/11 40/16 43/4 43/8 44/3 44/7 45/24 46/1 46/4 46/7 46/10 46/15 47/15 49/1 THE DEFENDANT: [1] 22/24 THE WITNESS: [10] 5/12 9/25 18/19 22/15 28/4 28/9 28/13 37/25 38/17 40/6	464 [2] 32/21 38/22 49 [1] 3/25 5 50 [3] 12/6 20/21 42/16 A A-L-E-K-S-E-Y [1] 44/10 A-N-G-E-L-O-N-E [2] 43/7 43/8 ability [1] 29/10 able [1] 24/21 about [60] accurate [1] 50/5 actively [1] 33/13 actual [2] 20/12 26/1 actually [3] 12/21 13/8 33/12 add [2] 17/17 38/13 admonished [1] 41/8 affected [1] 7/10 affirmed [1] 4/3 after [7] 8/2 8/12 14/14 16/2 35/20 43/17 43/20 again [7] 8/15 18/17 25/22 28/20 28/25 29/6 35/13 against [4] 25/21 26/3 26/4 26/11 ago [1] 32/6 agree [2] 30/2 30/5 agreed [1] 30/3 ahead [2] 32/3 40/17 all [43] 10/24 12/3 12/7 12/13 12/14 12/15 12/16 13/1 13/13 13/14 13/16 13/23 14/11 15/19 15/23 16/6 16/23 17/22 24/9 25/2 25/17 27/7 30/8 31/6 32/24 32/24 34/17 34/22 34/23 36/12 36/14 36/15 37/4 37/6 37/8 37/10 42/9 42/11 42/22 46/12 46/16 48/1 50/6 alleges [1] 30/17 alleging [1] 4/6 allow [2] 17/20 29/3 allowed [4] 12/7 13/4 39/18 39/21 already [6] 7/13 8/5 8/6 8/10 27/2 28/12 also [8] 7/14 10/14 13/6 13/14 19/18 29/20 33/10 39/22 am [11] 6/5 15/1 15/13 15/17 28/6 28/18 36/6 37/4 46/17 46/24 50/10 amended [1] 4/12 amendment [3] 4/8 6/19 17/12 and Mr [1] 18/15 ANDRE [4] 1/5 3/10 5/9 5/13 angel [1] 16/19 Angelone [1] 43/4 another [3] 33/11 33/11 46/21 answer [1] 17/23 any [28] 7/25 9/10 10/9 10/9 10/22 13/2 13/4 16/1 16/5 17/23 18/25 19/2 19/7 19/9 21/18 24/1 25/8 29/22 30/6 30/15 33/17 34/8 34/8 39/7 40/4 45/7 47/16 50/11 anything [11] 7/24 10/20 13/17 14/23 15/23 16/11 16/12 16/19 17/17 21/23 40/12 anyway [1] 29/8 apologize [4] 10/1 22/16 38/3 40/8 apparently [1] 45/20 appeal [4] 4/1 47/10 47/13 50/7	appealed [1] 29/20 Appeals [1] 4/3 appear [1] 16/18 applicable [1] 32/3 applicant [25] 1/6 1/19 3/11 3/15 3/18 3/19 3/22 4/5 6/18 11/25 14/6 23/13 23/23 24/4 24/6 25/9 26/3 29/2 29/12 29/24 30/12 30/17 39/22 42/19 44/14 applicant's [5] 3/5 4/2 4/3 11/24 24/10 application [4] 4/5 4/12 7/18 47/15 applies [1] 43/14 appointed [3] 23/7 23/9 23/12 approach [1] 44/7 are [27] 3/1 3/7 4/15 5/2 5/21 5/24 6/1 11/5 12/22 12/23 12/24 13/18 13/22 16/25 18/3 22/6 23/3 28/18 32/25 36/5 46/18 47/1 48/6 48/7 48/15 48/16 48/21 argue [11] 17/13 21/9 27/22 28/1 31/5 44/1 44/23 45/9 47/4 47/11 47/13 argued [8] 20/10 27/25 28/21 28/22 29/4 29/10 47/13 48/24 arguing [2] 20/11 20/15 argument [11] 17/21 37/16 37/18 38/23 39/1 40/12 40/14 40/16 46/11 47/2 48/17 argument's [1] 46/17 arguments [3] 37/19 39/4 45/5 armed [9] 3/16 3/22 12/24 14/6 14/8 14/15 19/10 46/21 47/3 around [1] 10/5 arresting [1] 29/24 Arthur [1] 23/17 ask [2] 16/23 47/14 asked [3] 27/12 39/22 44/12 aspects [1] 25/25 assault [2] 19/15 45/22 assign [8] 7/7 32/15 33/4 33/8 33/16 33/17 37/17 38/23 assistance [1] 4/7 Asst [1] 1/20 assume [1] 32/2 Assuming [1] 46/16 attorney [14] 1/19 1/20 1/21 16/2 16/5 18/5 18/11 18/14 18/25 19/2 21/9 22/4 31/4 37/11 auashed [1] 21/5 August [2] 3/20 46/20 August 5 [2] 3/20 46/20 aware [2] 7/19 34/3 B back [8] 24/22 28/6 31/19 38/6 38/15 39/7 46/13 48/15 barely [1] 18/22 based [2] 16/14 45/17 basically [8] 7/12 11/4 11/16 12/18 13/18 32/14 32/15 41/17 basis [2] 28/1 28/22 battery [2] 19/15 45/22 be [38] 4/11 4/16 6/9 8/22 13/24 14/9 15/8 15/8 15/9 15/9 15/11 16/19 25/21 28/14 29/16 32/9 33/3 33/8 35/23 36/3 37/20 38/6 38/7 39/3 41/2 41/11 42/11 42/12 42/19 42/23 47/8 47/17 47/21 47/24 48/3 48/11 48/18 48/22 because [18] 7/12 8/4 8/10
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STATE OF SOUTH CAROLINA
COUNTY OF SUMTER

Andre M. Massey, #229492,

Applicant,

V.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FOR THE THIRD JUDICIAL CIRCUIT

2013-CP-43-2156

ORDER OF DISMISSAL

This matter comes before the Court by way of a post-conviction relief (PCR) application filed on December 6, 2013. Respondent submitted its Return on May 13, 2014. An evidentiary hearing was convened on March 29, 2017, at the Sumter County Courthouse. Applicant was present at the hearing and was represented by Timothy Griffith, Esquire. Respondent was represented by Assistant Attorney General Julie A. Coleman of the South Carolina Attorney General's Office.

Applicant testified on his own behalf at the evidentiary hearing. Applicant's trial counsel, Calvin Hastie, Sr., Esquire ("Trial Counsel") also testified. The Court had before it a copy of the trial transcript, the records of the Sumter County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, and the pleadings. The Court finds as follows:

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Sumter County Clerk of Court. Applicant was true bill indicted at the July 2008 term of the Sumter County Grand Jury Armed Robbery and Possession of a Weapon During a Violent Crime (2008-GS-43-853). Applicant was represented by Calvin

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Hastie, Sr., Esquire. Applicant proceeded to a jury trial before the Honorable George C. James, Jr. On August 5, 2009, Applicant was found guilty on both counts. Judge James sentenced Applicant to life without parole for Armed Robbery and did not impose a sentence for possession of a weapon during a violent crime pursuant to S.C. Code §16-23-49(A).

A timely Notice of Appeal was filed on Applicant's behalf by LaNelle Canteay Durant, Esquire. The South Carolina Court of Appeals affirmed Applicant's conviction. State v. Massey, Op. No. 2012-UP-098 (Ct. App. filed February 22, 2012). The Remittitur was issued on November 22, 2013.

II. ALLEGATIONS

In his current application, Applicant alleges that he is being held in custody unlawfully based on the following allegations:

1. Ineffective Assistance of Counsel
 - a. "Applicant was denied the right to effective assistance of trial counsel by counsel's failure to move for suppression of evidence obtained as a result of his illegal arrest."
 - b. "The Applicant was denied the right to effective assistance of trial counsel by counsel failure to object to solicitor's vouching for credibility of a police witness."

On November 29, 2016, Applicant filed an amended application to include the following allegations:

1. Was counsel ineffective for failing to object to the trial court's jury instructions that shifted the burden of proof in violation of the due process clause and denied the Applicant his Fourteenth Amendment right to a fair trial?
2. Was counsel ineffective for failing to object to the trial court's jury instructions that impermissibly commented on the facts of the case that was to be determined by the jury?
3. Was counsel ineffective for failing to challenge

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Applicant's prior conviction in which the State, while giving Applicant notice of intent to seek life without parole (LWOP), the State relied on eight (8) prior convictions in the notice that were all stemming from one incident and should have been considered one offense for sentencing purposes under section 17-25-45 and 17-25-50 and therefore the State should not have been allowed to use all eight (8) prior convictions.

4. Was counsel ineffective for failing to object to the trial court's imposition of LWOP under 17-25-45 (two strikes) without first entering judgment for the armed robbery that Applicant was on trial for, and therefore he was not eligible to be sentenced under "two strikes" (LWOP).

III. APPLICABLE LAW

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove counsel's performance was deficient. Id. Under this prong, courts measure an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, any

deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

As a matter of general impression, this Court finds Applicant's testimony and assertions to be not credible. In contrast, this Court finds Counsel's testimony to be credible and persuasive. These credibility findings have been applied to the Court's findings and conclusions set forth below.

INEFFECTIVE ASSISTANCE OF COUNSEL

Applicant raises several allegations arguing that Counsel was ineffective in his representation surrounding his trial. In post-conviction relief cases, an applicant asserting a constitutional violation must frame the issue as one of ineffective assistance of counsel. See Al-Shabazz v. State, 338 S.C. 354, 363, 527 S.E.2d 742, 747 (1999) (citing Drayton v. Evatt, 312 S.C. 4, 9, 430 S.E.2d 517, 520 (1993)). This Court finds that the testimony presented at the PCR hearing satisfies neither prong of the Strickland test; Applicant can show neither ineffectiveness nor prejudice, thus these allegations should be denied and dismissed with prejudice.

"Seek the truth" jury instruction

Applicant alleges that Trial Counsel was ineffective for failing to object to the trial court's use of the phrase "seek the truth" in its jury instructions, which shifted the burden of proof from the State to the defendant. This allegation is meritless.

Applicant testified that this burden shifting language prejudiced him because "the seed was already planted" in the jury's mind and no curative instruction as given. Applicant noted to this Court that the Supreme Court of South Carolina admonished a trial judge for a similar statement in State v. Daniels, 401 S.C. 251, 737 S.E.2d 473 (2012). However, this Court finds that the "seek the truth" instruction given by the trial court here does not rise to the level of the instruction given in Daniels. See State v. Daniels, 401 S.C. 251, 737 S.E.2d 473 (2012) (holding that jury instruction that "whatever verdict you reach will represent truth and justice for all parties that are involved in this case" was improper).

Furthermore, even if the trial court's instruction was improper, Trial Counsel was not ineffective because Applicant has failed to meet his burden of proving deficiency and prejudice. Trial Counsel credibly testified that he saw no legal reason to object to the trial judge's use of the words "seek the truth." At one point after the jury instructions, Trial Counsel and co-counsel did, in fact, make an exception to the jury instructions that they believed improperly characterized the State's burden of proof. Tr. 519. After the defense's objection, the trial judge brought the jury back in and issued a curative instruction to clarify the State's proper burden of proof. Tr. 521-522. Because Trial Counsel did raise this objection to the trial court, this Court finds that he was not deficient.

Finally, there was no prejudice resulting from any jury instruction issued because the totality of the jury instructions was free from error. Although jury instructions to "seek the truth"

are disfavored because they run the risk of unconstitutionally shifting the burden of proof to the defendant, jury instructions must be considered as a whole, and if as a whole they are free from error, any isolated portions which may be misleading are not prejudicial. State v. Aleksey, 343 S.C. 20, 538 S.E.2d 248 (2000). The trial court here clearly explained the State's burden of proof to the jury multiple times and offered a curative instruction to be sure that they clearly understood the proper burden. As a whole, the trial court's instructions were free from error, so there can be no prejudice from any failure to object to an instruction.

Therefore, Applicant has failed to meet his burden of proving either prong of the Strickland test, and this allegation is denied and dismissed with prejudice.

Improper deadly weapon jury instruction

Applicant alleges that Trial Counsel was ineffective for failing to object to the trial court's jury instructions on use of a deadly weapon, which were improper because the trial court specifically listed a gun as an example. Applicant claims this is an improper comment on the facts of the case that improperly swayed the jury. This allegation is meritless and must be denied.

In its jury instructions, the trial court stated the following:

And, finally, the State must prove beyond a reasonable doubt that the defendant was armed with a deadly weapon during the robbery. A deadly weapon is any article, instrument, or substance which is likely to cause death or great bodily harm, and whether an instrument has been used as a deadly weapon depends on the facts and circumstances of the case. The following are examples of instruments which may be deadly weapons: pistol, shotgun, rifle, dagger, knife, slingshot, metal knuckles, razor, gasoline, a firebomb, or a Molotov cocktail. A gun may be a deadly weapon even if it is not operating.

Tr. 509-510. Applicant alleges that the trial court's use of the example of a pistol as a deadly weapon was a comment on the facts of his case because the evidence presented by the State included testimony of Applicant with a pistol.

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This Court finds that Trial Counsel was not deficient in choosing not to object to this jury instruction because it did not improperly comment on the facts of the case. The trial court's language was a standard jury instruction and included many different examples, not just a pistol. Trial Counsel credibly testified that he did not object because there was evidence presented at trial of Applicant's use of a pistol and there is no question under South Carolina law that a pistol is a deadly weapon. This Court further finds that Applicant has also failed to show prejudice from any failure to object because this instruction was not objectionable and did not change the outcome of the trial. This Court notes that Applicant did not receive a sentence for his conviction of possession of a weapon during a violent crime, so even if this instruction did cause Applicant to be convicted of this crime, he cannot prove any prejudice regarding this charge. Therefore, since Applicant has failed to prove either prong of the Strickland test, this allegation is denied and dismissed with prejudice.

Prior convictions

Applicant alleges that Trial Counsel was ineffective for failing to object to the State's use of his prior convictions to seek a sentence of Life Without Parole. This allegation is meritless.

Applicant testified at the evidentiary hearing that he was convicted on October 17, 1995 of five counts of kidnapping and assault and battery with intent to kill. He testified that he was also convicted on October 17, 1995 of two counts of burglary, first degree. The State relied on these prior convictions when seeking a Life Without Parole Sentence. Tr. 45.

In South Carolina, a person convicted of a "most serious" crime must be sentenced to Life Without Parole if they have one or more prior convictions for a "most serious" offense. S.C. Code Ann. § 17-25-45(A) (1976). Because Applicant had at least one "most serious" conviction from 1995, his Life Without Parole sentence was valid according to the statute. This

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Court finds that the LWOP sentence was proper under the statute and the State properly served notice of their intent to seek LWOP. Applicant has failed to show that an objection to the use of his prior conviction would have been successful or changed the outcome of the trial. Therefore, since neither prong of the Strickland test is met, this allegation is denied and dismissed with prejudice.

Life Without Parole Sentence

Applicant alleges that his sentence is invalid because the trial court did not "enter judgment" of the Armed Robbery conviction before sentencing Applicant to Life Without Parole, and Trial Counsel was ineffective for failing to object to the imposition of this sentence before judgment was entered. This allegation is meritless. At the conclusion of the trial, the jury deliberated for fifty-one minutes and returned with a verdict. Tr. 523-526. The jury found Applicant guilty as indicted of both charges. The clerk published the verdict by reading it aloud and asking the jurors to raise their right hand if that was their verdict. Tr. 524. Trial Counsel asked to poll the jury, and each individual juror confirmed aloud that their verdict was guilty. Tr. 525.

After the verdict was published, the trial judge entered into the sentencing phase of trial, at which he noted Trial Counsel's continued objection to the imposition of a Life Without Parole sentence based on his earlier motion to quash the LWOP notice. Tr. 528. After an on-the-record discussion about the LWOP notice, the trial court found again that notice was proper and appropriate under the statute and denied the objection. Tr. 528-533. Thereafter, the trial court sentenced Applicant to Life Without Parole. Tr. 536.

Applicant has failed to meet his burden of proving that the trial court improperly entered the sentence in any way or that Trial Counsel was ineffective for failing to object. This Court

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finds that Trial Counsel was not deficient and there was no prejudice resulting from the proceedings in the sentencing phase of the trial. Therefore, this allegation is denied and dismissed with prejudice.

ALL OTHER ALLEGATIONS

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this Order, this Court finds Applicant failed to present any testimony, argument, or evidence at the hearing regarding such allegations. Accordingly, this Court finds Applicant has abandoned any such allegations.

V. CONCLUSION

Based on all the foregoing, this Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

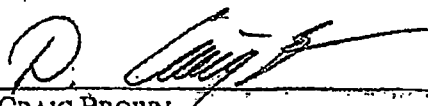
This Court notes that Applicant must file and serve a notice of appeal within thirty days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

DCB
P. 9/10

IT IS THEREFORE ORDERED:

1. That the application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. That Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 12 day of June, 2017.


D. CRAIG BROWN
Presiding Judge
Third Judicial Circuit

Florence, South Carolina

DCB
P-10-110

WITNESSES

SPD

Culick

ARREST WARRANT NUMBER

J302502

D/A: 06/08/07

ACTION OF GRAND JURY

True Bill

William Bandy
Foreperson of Grand Jury
Date: 7/17/08

VERDICT

Foreperson of Petit Jury
Date:

DOCKET NO. 2008-GS-43- 853

The State of South Carolina

County of SUMTER

COURT OF GENERAL SESSIONS

JULY TERM 2008

THE STATE

vs.

ANDRE MAURICE MASSEY

Indictment for

**ARMED ROBBERY, POSSESSION OF
FIREARM OR KNIFE DURING THE
COMMISSION OF A VIOLENT CRIME**

C. KELLY JACKSON, SOLICITOR

STATE OF SOUTH CAROLINA)
)
 COUNTY OF SUMTER) ARMED ROBBERY, POSSESSION OF FIREARM
 OR KNIFE DURING THE COMMISSION OF A
 VIOLENT CRIME

At a Court of General Sessions, convened on July 17, 2008, the Grand Jurors of
 SUMTER County present upon their oath:

CERTIFIED TRUE COPY
 OF ORIGINAL FILE
B. Jackson
 DEPUTY CLERK OF COURT
 SUMTER COUNTY
 SOUTH CAROLINA

COUNT ONE – ARMED ROBBERY

That ANDRE MAURICE MASSEY did in Sumter County on or about June 7, 2007, violate Section 16-11-330 of the Code of Laws of South Carolina (1976), as amended, while armed with a deadly weapon, to-wit: a handgun, did feloniously take from Herbert Huff at the Total Living Store, 25 Dugan Street, in the presence of Herbert Huff, by means of force or violence, goods or monies of the said Herbert Huff, such goods or monies being described: U. S. currency.

COUNT TWO – POSSESSION OF A FIREARM OR KNIFE DURING THE
 COMMISSION OF A VIOLENT CRIME

That ANDRE MAURICE MASSEY in Sumter County on or about June 7, 2007, was in possession of and did visibly display a firearm during the commission of a violent crime as defined in Section 16-1-60, to-wit: a handgun during the commission of armed robbery, in violation of Section 16-23-490, Code of Laws of South Carolina (1976), as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

P. Kelly Jackson

 SOLICITOR