

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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On Writ of Certiorari to the Court of Appeals
Appeal from York County
Honorable Eugene C. Griffith, Jr., Circuit Court Judge
Appellate Case No. 2019-000842

S.C. SUPREME COURT

THE STATE,

Petitioner,

vs.

JOHN KENNETH MASSEY, JR.,

Respondent.

APPENDIX

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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from York County
Honorable Eugene C. Griffith, Circuit Court Judge
Appellate Case No: 2015-000431

THE STATE,

Appellant,

vs.

JOHN KENNETH MASSEY, JR.,

Respondent.

RECORD ON APPEAL

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DAVID HAMILTON
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YORK COUNTY, SC

V.

John Kenneth Massey Jr.,

Defendant.

NOW COMES THE STATE OF SOUTH CAROLINA by and through the undersigned attorney and moves for the following relief pursuant to Rule 29, SCRCrimP:

The State moves to set aside the Court's quashing of indictment. Defense's motion to quash and the Court's granting of the motion constitutes an error of law. A motion to quash is appropriate when there exist "defects apparent on the face" of an indictment. S.C. Code Ann. § 17-19-90. Such a motion cannot be used to challenge the sufficiency of the State's evidence, which is an issue properly addressed through a motion for a directed verdict. *See State v. Garrett*, 305 S.C. 203, 206, 406 S.E.2d 910, 911 (Ct. App. 1991) ("A motion to quash an indictment addresses the sufficiency of an indictment, not the sufficiency of the State's evidence."), *overruled on other grounds by State v. Ramsey*, 311 S.C. 555, 430 S.E.2d 511 (1993).

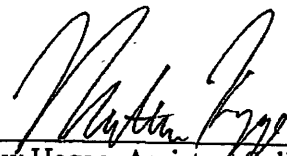
Furthermore, the State would incorporate all previous arguments in opposition to the Court's quashing the burglary in the first degree indictment into this motion. The garage that the State alleges the defendant entered during the nighttime is a building within two hundred yards and appurtenant to a dwelling. See S.C. Code Ann. §§ 16-11-10, 16-11-310, 16-11-311, *see also State v. Smalls*, 336 S.C. 301, 519 S.E.2d 793 (Ct. App. 1999). The fact that the garage sits on land actually owned by a family member to

Kristopher Callahan and his mother does affect the garage's appurtenant relationship to the dwelling of Kristopher Callahan and his mother. *See State v. Singley*, 392 S.C. 270, 274, 709 S.E.2d 603, 605 (2011) ("We have maintained consistently for well over one hundred years that burglary is a crime against possession and habitation, not a crime against ownership.").

Therefore, the Court should set aside its ruling quashing the burglary in the first degree indictment.

Respectfully submitted,

February 6, 2015
York, South Carolina



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R. 3

STATE OF SOUTH CAROLINA

COUNTY OF YORK

The State

v.

John Kenneth Massey Jr.,

Defendant.

IN THE COURT OF GENERAL SESSIONS
OF THE SIXTEENTH JUDICIAL CIRCUIT

Indictment Numbers: 2014-GS-46-00780,
00781, 00782

**ORDER DENYING STATE'S POST
TRIAL MOTION**

This matter is before the Court on the State's post-trial motion to set aside this Court's oral order of January 27, 2015, quashing the Defendant's indictment for burglary in the first degree.

The State moved on February 5, 2015, to set aside this Court's order quashing indictment number 2014-GS-46-00781 for burglary in the first degree, arguing that Defense's motion to quash and the Court's granting of the motion constituted an error of law as a motion to quash cannot be used to challenge the sufficiency of the State's evidence. The State also incorporated in its motion all of its previous pre-trial arguments made on the record.

The Court holds the State's arguments to be without merit. The Defendant is alleged to have entered an out building that was used as a business on a separate piece of property from the victim's mother's home. Therefore, the State's motion is denied.

IT IS SO ORDERED.

October 30, 2015

South Carolina

DAVID HAMILTON
CLERK OF COURT
YORK COUNTY, SC

CERTIFIED TRUE COPY

The Honorable Eugene C. Griffith, Jr.
Circuit Court Judge

APP'X 5

State of South Carolina) In the Court of General Sessions
County of York) Sixteenth Judicial Circuit
2014-GS-46-0780
2014-GS-46-0781
2014-GS-46-0782

State of South Carolina,)
Plaintiff,)
vs.) Transcript of Record
John Kenneth Massey,)
Defendant.)
_____)

January 26 - 27, 2015
York, South Carolina

B E F O R E:

The Honorable Eugene C. Griffith, Jr., Judge

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

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Circuit Court Reporter

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TRANSCRIPT OF RECORD

TRIAL DAY 1 - 01/26/15

(Whereupon, the proceedings commenced at 3:00 p.m.)

THE COURT: All right. Good afternoon, ladies and gentlemen. My name is Eugene Griffith. I'm a presiding judge here in York County this week. I live down in Newberry and a resident judge of the Eighth Circuit.

I'm informed that y'all met Judge Couch this morning and he's in the next courtroom. In any event, we need to select a jury for the case that the state has had on the trial roster. We ready to go?

MR. HOGGE: Yes, Your Honor.

THE COURT: You call the case.

MR. HOGGE: May it please the Court?

THE COURT: Yes, sir.

MR. HOGGE: The next case before this Honorable Court is the *State v. John Kenneth Massey, Jr.* He's indicted for criminal conspiracy on 2014-GS-46-780; also indicted for burglary in the first degree on 2014-GS-46-781; and also indicted for -- for grand larceny, Indictment No. 2014-GS-46-782.

THE COURT: All right. Mr. Hogge, will you introduce yourself to the jury, as well as your cocounsel?

MR. HOGGE: Yes, Your Honor. My name is Matthew Hogge. I work here in the York County Solicitor's Office.

1 And here with me I've got Jessica Holland with the York
2 County Solicitor's Office.

3 THE COURT: All right. Ladies and gentlemen of the
4 jury, Mr. Hogge had just introduced himself and his
5 cocounsel. He's also placed on the record the three
6 indictments for which Mr. Massey, who's seated here in the
7 courtroom with his attorney, Mr. Phil Smith -- Mr. Smith,
8 I'm going to publish the indictments. But I first want you
9 to stand and introduce yourself and your client to the
10 jury.

11 (Whereupon, Mr. Smith and the defendant conferred.)

12 MR. SMITH: My name is Phil Smith. And I have the
13 opportunity to represent John Massey today.

14 THE COURT: All right. Ladies and gentlemen of the
15 jury, can everybody hear me okay? Because the initial
16 qualification process y'all went through was a general
17 qualification to determine whether you are eligible and
18 qualified to sit as a jury -- sit as jurors in any
19 particular case. Now the process is slightly different.

20 The Court will ask more pointed and focused questions
21 to see whether or not you're qualified and eligible and not
22 -- without knowledge of the case being called. If you have
23 prior knowledge or prior involvement with any of the
24 potential witnesses or lawyers or anybody, then perhaps
25 you're not able to be a fair and impartial juror. And so

1 That has already happened in this case. So a grand
2 jury has made a decision that the case has facts for which
3 to be carried over for a trial. These indictments are just
4 allegations made by the state against Mr. Massey. And they
5 tell him what to be prepared for with his attorney to be
6 prepared to defend at trial when the case gets called.

7 So the three indictments, starting with Indictment 14-
8 782, is for grand larceny. And it reads that Mr. Massey,
9 in York County, on or about the 12th of January of '14, did
10 take away certain personal items of Kristopher Callahan,
11 this being in violation of the provisions of 16-13-30.
12 That indictment, Mr. Massey's pled not guilty to.

13 Also, Indictment 14-GS-46 -- Indictment 781 for
14 burglary in the first degree: That indictment alleges that
15 Mr. Massey, while in York County, on the 12th of January
16 also of '14, did unlawfully enter the dwelling of
17 Kristopher Callahan without consent, along Parris Road in
18 Rock Hill, with the intent to commit the crime of larceny
19 while inside and that this did occur in violation of Code
20 Section 16-11-311. To that indictment and allegations, Mr.
21 Massey's pled not guilty.

22 And lastly, Indictment 14-GS-46-780, that indictment
23 alleges that Mr. Massey, while in York County, on the 12th
24 of January of '14, did combine or confederate with a --
25 another gentleman -- another two gentlemen for the purpose

1 of committing the act of burglary and larceny, in violation
2 of Code Section 16-14-410. And on that indictment,
3 likewise, Mr. Massey's pled not guilty.

4 Now, first question to the jury -- jury venire: Does
5 any member of the jury know anything about the allegations
6 regarding this incident of January 12th, 2014, regarding
7 Mr. Massey and Mr. Kristopher Callahan? If so, please
8 stand.

9 (Whereupon, no potential juror stood.)

10 THE COURT: For the record, no one's standing. I'm
11 going to come back to the indictments momentarily, but I
12 want to go to the parties you've seen introduce themselves.
13 Any member of the jury panel ever been represented by any
14 of the attorneys who introduced themselves moments ago? If
15 so, please stand.

16 (Whereupon, no potential juror stood.)

17 THE COURT: No one's standing. Any member of the jury
18 panel related by blood, marriage, or close, personal
19 friends to any of the four parties who were stood and
20 introduced moments ago? If so, please stand.

21 (Whereupon, no potential juror stood.)

22 THE COURT: No one's standing. Back to the
23 allegations, any member of the jury panel related by blood,
24 marriage, close, personal friends to the alleged victim,
25 Mr. Kristopher Callahan, or live along Parris Road in Rock

1 while I'm doing that, when y'all are deliberating, I won't
2 be in the jury room with you. Because that's when y'all
3 will get to discuss the tediousness of "Well, the testimony
4 was this, that, and the other." Y'all will get to discuss
5 that without my help. It'll be y'all's decision when y'all
6 make a judgment on the facts.

7 All right. Those are my preliminary instructions.
8 Don't talk about the case, with each other or anyone.
9 Don't go inviting questions on Internet or social media.
10 Tell whoever asks, "I'm on the jury and Judge Griffith says
11 don't discuss the case."

12 If y'all will do that, I'll see you in the morning at
13 9:30. I will swear you. Don't let me forget that. I'll
14 place y'all under oath to listen attentively and to follow
15 instructions.

16 So go off -- you going take them out the back? Y'all
17 head out. I will see you in the morning at 9:30.

18 (Whereupon, the jury exited the courtroom at 3:50
19 p.m.)

20 (Off the record from 3:50 p.m. until 3:59 p.m.)

21 THE COURT: All right. We ready?

22 MR. HOGGE: Yes, Your Honor. The state would just
23 call a -- a *Denno* hearing. And the state would call Brian
24 Schettler to the stand to proffer his testimony.

25 (Whereupon, the witness came forward.)

1 BRIAN SCHETTTLER, having been first duly sworn,
2 testified as follows:

3 DIRECT EXAMINATION

4 BY MR. HOGGE:

5 Q Afternoon, Mr. Schettler. Can you give us your name?

6 A Brian Edward Schettler.

7 Q Where are you currently employed?

8 A Currently employed with the National Insurance Crime
9 Bureau.

10 Q And back in January, where were you employed?

11 A York County Sheriff's Office.

12 Q All right. And what was your position with the
13 sheriff's office?

14 A I was a detective in property crimes.

15 Q And up into January, how long had you been in law
16 enforcement?

17 A Over ten years.

18 Q Were you part of the John Massey investigation in
19 January of 2014?

20 A Yes, I was.

21 Q When did you first encounter John Massey during this
22 investigation?

23 A It would've been on the -- I believe it was the 13th.

24 Q Okay. And where did you encounter him?

25 A Would've been -- I -- I saw him throughout the day.

1 And then there was actually an arrest that took place that
 2 was part of. That's when I actually first ---
 3 Q Okay.
 4 A --- was person to person with him.
 5 Q And so you -- you arrested John Massey; is that
 6 correct?
 7 A That is correct.
 8 Q And how long after his arrest was it that you spoke
 9 with John Massey?
 10 A Less than 24 hours. It was the next day.
 11 Q Okay. Before you spoke to him that next day, did you
 12 verbally advise him of his *Miranda* rights?
 13 A Yes, I did.
 14 Q And did you read them from a card, or did you advise
 15 him from memory?
 16 A I read it from the card that's in my wallet.
 17 Q Okay. Do you have that card with you now?
 18 A I do.
 19 Q Would you go ahead and read for us from that card.
 20 A That card might be in my other wallet now.
 21 Q Is that the standard card that everybody has in ---
 22 A It is.
 23 Q --- the sheriff's office?
 24 A And I've got the card. I just didn't bring it with me
 25 today.

1 Q I'm going to hand you what Detective Branham handed me
2 from his wallet. Is that the standard card that everybody
3 would have in the sheriff's office?

4 A Yes, sir. Same one I have.

5 Q Could you just go ahead and read it for us, what's on
6 there?

7 A It says (as read): "*Miranda* Warning: You have the
8 right to remain silent. Anything you say can and will be
9 used against you in the court of law. You have the right
10 to talk to a lawyer and have him present with you while
11 you're being questioned. Can't afford to hire a lawyer,
12 one will be appointed to represent you before any
13 questioning if you wish. You can decide at any time to
14 exercise these rights, not answer any questions, or make
15 any statements. Do you understand each of these rights as
16 I've explained to you? Having these rights in mind, do you
17 wish to talk to us now?"

18 Q Thank you, Mr. Schettler. Where were you and John
19 Massey when you advised him of those rights?

20 A First time it was by the bumper of the SUV he was
21 stopped in; second time was down in the jail.

22 Q Okay. Was the defendant under arrest both those
23 times?

24 A Yes, sir.

25 Q And when you met with him -- and -- and where again

1 did you say you saw him the second time?

2 A At the jail ---

3 Q Jail?

4 A --- in ---

5 Q Okay. Who else was with you when you spoke with him
6 in the jail?

7 A My lieutenant, Beth Tolson.

8 Q And where exactly in the jail were you?

9 A There's an interview room out in the booking area, and
10 we were in that room.

11 Q Okay. When you spoke with him, did you threaten him
12 in any way during your conversation?

13 A No, sir.

14 Q Did you identify yourself as a police officer?

15 A Yes, sir.

16 MR. SMITH: Your Honor, before we get into contents,
17 could I move to sequester?

18 THE COURT: That'll be fine. We'll sequester the
19 witnesses as to this issue.

20 (Off the record briefly.)

21 Q And again, Mr. Schettler, did you threaten Mr. Massey
22 in any way during your conversation?

23 A No, sir.

24 Q Did you identify yourself as a police officer?

25 A Yes, sir.

1 Q Did you promise Massey anything if he agreed to talk
2 to you?

3 A No, sir.

4 Q All right. Did he appear to be under the influence of
5 drugs or alcohol at the time?

6 A No, sir.

7 Q Did he indicate that he understood his rights?

8 A Yes, he did, sir.

9 Q Did he ask for an attorney?

10 A No, he did not.

11 Q Did he ask you any questions about his rights?

12 A No.

13 Q What did you ask him?

14 A Had some pictures from a surveillance video; asked him
15 if he recognized who was in the video, at which time he
16 indicated that he did. We discussed those pictures. Then
17 we discussed the break-in, where the four-wheeler was
18 taken, at which time Mr. Massey and I went in to have a
19 discussion.

20 He didn't like the presence of Lt. Tolson in there and
21 asked her to leave. Once she left, Mr. Massey and I
22 further went into discussion about the break-in, the four-
23 wheeler, and the fact that it was part of a bigger ring and
24 that he wanted to cooperate and help them get that ring.

25 Q And when you say -- when you talked about it being a

1 part of a bigger and that he wanted to cooperate, was he
 2 saying those things or were you sharing with him
 3 information that you knew?

4 A I -- the only information I shared with him that I
 5 knew was that the pictures -- that he was identified in
 6 them; that -- what had transpired that day, when we
 7 observed a four-wheeler and black SUV -- black SUV going to
 8 a house where we conduct a surveillance on until he was
 9 stopped. And at that point he wanted to enter into
 10 negotiation as to what could be done, how he could help
 11 himself, at which time I told him I couldn't promise him
 12 anything, couldn't make those kind of deals. And it pretty
 13 much ended after that.

14 Q Okay. Now, what exactly did he say about his
 15 involvement in all of this?

16 A That -- eventually, once we went through the pictures,
 17 that that was him in the pictures and that the fact ---

18 Q Let me ---

19 A Yeah.

20 Q You say that that was him in the pictures. Did you
 21 indicate to him, "This is you," or did he indicate to you
 22 that that's him in the video?

23 A That he -- that was him in the video.

24 Q Okay.

25 A And -- but it wasn't the video; it was still pictures

1 that was taken from the video. And then he indicated that
2 he did take the four-wheeler and that he wanted to
3 cooperate at that point.

4 Q Okay.

5 MR. HOGGE: Beg the Court's indulgence.

6 (Whereupon, Mr. Hogge and Ms. Holland conferred.)

7 Q When you talk about the -- the video stills from the
8 surveillance, what exactly are you talking about, the
9 pictures that you showed to John Massey?

10 A There's a program that we use at the sheriff's office.
11 It's called "StarWitness." Basically, it's a program where
12 you can run the video through it and you can capture still
13 images off of it; basically, pulled up to the video where
14 you could identify the people in the building, captured
15 that still image, and that was the picture that I showed
16 him.

17 Q What video are you speaking about?

18 A Oh, I'm sorry. It's the surveillance video from the
19 shop.

20 Q What -- from the shop. Where are you referring to?

21 A Mr. Callahan's ---

22 Q Okay.

23 A --- place of business. I'm sorry.

24 Q Okay. That's all from the state.

25 THE COURT: All right. Mr. Smith?

1 MR. SMITH: If it please the Court, Your Honor?

2 THE COURT: Uh-huh.

3 CROSS-EXAMINATION

4 BY MR. SMITH:

5 Q Mr. Schettler, you indicated that you were using a
6 photograph to sort of prompt the discussion with my client;
7 is that right?

8 A Brought the photographs in to show him an example of
9 what -- the information I was talking about. Yes, sir.

10 Q Okay. Do you know how many photographs you had?

11 A I believe there was two, but I'm not 100 percent sure
12 on that.

13 Q Okay. And what was depicted in those photos?

14 A It was the inside of the garage. And depicted in
15 there, you could see the person that went into the garage.
16 You could see the person messing with the four-wheeler.
17 You could see the person taking the four-wheeler out of the
18 garage.

19 Q You could see all that occur in these two pictures?

20 A Like I said, I believe it was two pictures; could've
21 been more. I know that there specifically were two
22 pictures that I can say that there was.

23 Q Okay. And what happened to those pictures?

24 A I have no idea.

25 Q Did you give them to my client?

1 A No, sir.

2 Q Okay. Did you leave with them?

3 A I would've -- have to.

4 Q Okay. And this was your case back then, right?

5 A No.

6 Q This was not?

7 A No, it was not.

8 Q Okay. Whose case was it?

9 A Detective Branham's.

10 Q And you indicated that you read Mr. Massey rights two

11 separate occasions. I believe once, you said, was at the

12 bumper of the vehicle; is that right?

13 A That's correct.

14 Q Did you ask any questions then?

15 A Asked him if he'd submit for DNA.

16 Q Okay. And did he indicate he would?

17 A Yes, he did.

18 Q And then, the -- this subsequent interview, you said

19 it was at the sheriff's department; is that right?

20 A It was at the jail.

21 Q At the ---

22 A At the sheriff's -- attached to the sheriff's -- but,

23 I mean, it's the ---

24 Q Okay.

25 A --- York County Detention Center.

1 Q And -- and specifically, where within the jail? I
 2 mean, it obviously wasn't in a -- a -- a main cell block.
 3 Where -- where'd the interview occur?

4 A The interview room down in booking.

5 Q Okay. All right. And you indicated at some portion
 6 there were multiple officers in there or -- or were --
 7 someone was in there with you; is that right?

8 A That's correct.

9 Q And is that per protocol or is that form or how -- how
 10 is that -- why -- why was there someone there with you?

11 A There's just two of us that went down to talk to him
 12 at the time. At the time of the arrest, Lt. Tolson was
 13 with me and wanted to follow through the investigation with
 14 me.

15 Q Okay. Was Lt. Tolson your supervisor at the time?

16 A That's correct.

17 Q Okay. And -- but it is Lt. Tolson who left the room
 18 during the interview?

19 A At one point, yes.

20 Q All right. Now, you had to go get Mr. Massey from
 21 some cell or from wherever he was being held, right?

22 A I personally didn't. No.

23 Q But -- but somebody had to bring him -- you knew you
 24 were going to interview him; you didn't just see him
 25 walking the hall ---

1 A That's correct.

2 Q Okay. What did you take to memorialize that

3 interview?

4 A Say that again?

5 Q Write it down? Record it? What'd you take with you?

6 A We don't record interviews.

7 Q Did you take a notepad or anything with you?

8 A I asked Mr. Massey if he'd provide a statement

9 written, and he said he would not.

10 Q Okay. What about your notes so you could remember?

11 A I was there. I remember.

12 Q I understand. Did you take notes?

13 A Did I take notes?

14 Q Yes.

15 A No, sir.

16 Q How about Lt. Tolson? Did she take ---

17 A I can't ---

18 Q --- any notes?

19 A --- speak for her.

20 Q Well, you were right beside her. You -- you could

21 see?

22 A That's correct. But I don't know whether she did or

23 did not. I was -- I'm not her.

24 Q Okay. I'm sorry. You thought I asked if you were

25 her. No. Did you see her taking notes?

1 A I can't say whether I did or didn't. I don't recall.

2 Q But you just said you remember everything about the
3 interview; you didn't need notes. So surely, you remember
4 whether she was taking notes?

5 A She left the room. If she -- whatever she had, she
6 took with her.

7 Q Okay. And -- and what exactly is it you say Mr.
8 Massey said?

9 A Exact word?

10 Q Yes.

11 A Verbatim?

12 Q Yes.

13 A Can't say verbatim.

14 Q Okay. Okay. Then, your summary of what he said, what
15 would that be?

16 A The summary of what he -- the -- the summary of what
17 he said to me was he was in the pictures and that he took
18 the four-wheeler.

19 (Whereupon, Mr. Smith and the defendant conferred.)

20 Q And at this point in time, he was obviously in
21 custody. Was he handcuffed?

22 A No, he was not.

23 Q Was he -- were his legs shackled or anything like
24 that?

25 A No, they were not.

1 Q The room that you were in was a secured, locked room?

2 A The room was not locked. No. The door was closed,
3 but it wasn't locked.

4 Q But -- but no doubt, he was in custody. He wasn't
5 free to leave at that point, correct?

6 A He was free to leave the interview at any time.

7 Q What, and go ---

8 A --- back to his cell.

9 Q Back to jail?

10 A No. Back to his cell. He was already in jail.

11 MR. SMITH: I have no further questions, Your Honor.

12 THE COURT: Anything else?

13 MR. HOGGE: A few more, Your Honor.

14 REDIRECT EXAMINATION

15 BY MR. HOGGE:

16 Q Counsel referred to the photographs that you showed
17 Mr. Massey. Is that one such of those photographs?

18 A Yes, sir, it is.

19 MR. HOGGE: Your Honor, permission to put this in
20 evidence as Court's Exhibit 1?

21 THE COURT: Any objection?

22 MR. SMITH: For this ---

23 THE COURT: Purpose ---

24 MR. SMITH: --- hearing, no objection.

25 THE COURT: The Court's 1 for this hearing.

1 Q And going back ---

2 THE COURT: Wait a minute.

3 THE COURT REPORTER: Hold on.

4 THE COURT: Let her mark it.

5 MR. HOGGE: I'm sorry.

6 THE COURT: She can do several things at the same
7 time, but not that many.

8 (Whereupon, Court's Exhibit 1 was marked for
9 identification.)

10 Q And so you showed this photograph to Mr. Massey?

11 A That's correct.

12 Q And after that, more or less, he indicated to you ---

13 A --- that that was him and that that was the four-
14 wheeler that he took.

15 Q All right. And I regretted to -- failed to ask you
16 earlier: Did you have your gun on you went down to the
17 jail?

18 A No, I did not.

19 Q Okay.

20 MR. HOGGE: Nothing further, Your Honor.

21 THE COURT: Anything else, Mr. Smith?

22 MR. SMITH: No, Your Honor.

23 THE COURT: All right. You can step down.

24 THE WITNESS: Thank you, sir.

25 THE COURT: Uh-huh.

1 (Whereupon, the witness exited the witness stand.)

2 MR. HOGGE: Your Honor, I believe that we've met the
3 requirements of *Jackson v. Denno* that he is -- he informed
4 Mr. Massey of his *Miranda* rights before Mr. Massey gave
5 that statement, voluntarily waiving his rights.

6 THE COURT: All right. Mr. Smith, do you ---

7 MR. SMITH: Your Honor, I would object to admission of
8 the statement, both under *Jackson v. Denno* and as well -- I
9 -- I think it's going to be -- and -- and -- and I may
10 phrase this wrong -- more prejudicial than probative.
11 Obviously, it's an alleged confession of my client.

12 But, Your Honor, they did nothing to maintain this.
13 The witness first says he can remember anything; then he
14 says he can't remember what's been said. He had the
15 opportunity to take the statement in a form that could've
16 been presented appropriately to a jury. He chose not to do
17 that. And I think the state should suffer the consequences
18 and the alleged statement should be suppressed.

19 MR. HOGGE: Your Honor, I'd only argue that there's no
20 requirement that the state actually record someone's
21 statement post-*Miranda*. There's no such requirement. And
22 all the -- the necessary requirements were met here. He
23 made a -- he voluntarily waived his rights, and he made a
24 statement. That statement was not recorded; it was not
25 written down by the officer. But nonetheless, it's still

1 comports with the requirements of the law.

2 THE COURT: All right. I -- under the case law of the
3 *Jackson v. Denno*, I find that the officer did advise him of
4 his rights in the jail. He was in custody; no promises, no
5 threats were made to him. He was aware he was talking to
6 law enforcement. And he did have a conversation with the
7 detective.

8 I'll allow the statements to -- admission of being in
9 the photo and admission of taking the four-wheeler, but not
10 any embellishment above and beyond that. I mean, it's got
11 to be limited for that purpose. Because if we hear more
12 tomorrow in front of a jury, that will be prejudicial and
13 that will create testimony against my ruling here today.

14 So understood?

15 MR. HOGGE: Yes, Your Honor.

16 THE COURT: All right. So we'll allow it to that
17 extent.

18 MR. HOGGE: Your Honor, the state doesn't have any
19 other motions. There will be some identifications in this
20 trial. I don't believe that it implicates *Neil v. Biggers*.
21 The two -- the statements -- the identifications that the
22 state would seek to admit would be the identification of
23 Kris Callahan and Ronald Mitchell of Mr. Masséy. And how
24 that came about was Kris Callahan had in his garage a
25 surveillance-video system.

1 After he'd watched that surveillance-video system --
2 and I can proffer his testimony to this effect -- he -- he
3 watches the video. He -- he -- the person in the videos
4 looks familiar to him. And after he watches the video with
5 Ronald Mitchell, Ronald Mitchell identifies Mr. Massey.
6 Mr. Callahan realizes that that is indeed Mr. Massey.

7 Law enforcement had no role whatsoever in that
8 identification. So it does not fall under the normal *Neil*
9 *v. Biggers* and that there is certainly no suggestiveness
10 because there's no law enforcement there to suggest
11 anything.

12 THE COURT: Well, is Massey -- he's not listed as a
13 potential witness -- I mean -- I'm sorry. What's the other
14 gentleman's name?

15 MR. HOGGE: Kris Callahan and Ronald Mitchell.

16 THE COURT: Mitchell. Okay. Mitchell and Massey were
17 sounding the same. And Mitchell will be called as a
18 witness?

19 MR. HOGGE: Yes, Your Honor.

20 THE COURT: All right. Mr. Smith, what we got to say
21 about that?

22 MR. SMITH: Your Honor, my difficulty is I believe it
23 is suggestive. The statement I've been given by Ronald
24 Mitchell says: "My boss had a four-wheeler stolen and
25 showed me a video of the incident. The one suspect in the

1 dark jacket and light-colored pants definitely looks like
2 John Massey, a family member of mine. And the second
3 suspect, I don't really know."

4 So he says that person looks like. Then, the
5 statement I get from Mr. Callahan, who, based on the
6 summary of -- that -- that the solicitor just provided the
7 Court, says: Well, hold on, because he knows who he is
8 now; I know who he is too.

9 Second person doesn't write his own statement. A
10 Terry Callahan writes his statement. Says: "I had a four-
11 wheeler stolen January 12th, 2014, from my shop. The
12 cameras were running and were able to see the theft in
13 action. I showed the video to employees, and one of them
14 identified the person as John Massey. The other person was
15 not identified. The employee who identified John Massey
16 was Ronnie Mitchell. Kris watched the video and agreed it
17 could be John Massey."

18 So now we have one person saying looks like and one
19 said could and then the statements to come into court and,
20 I assume, have two people point to my client and say that's
21 it. I think they have been prejudiced by what they've --
22 how they've discussed and looked at this video and that the
23 ID should be suppressed.

24 THE COURT: Okay. Well, certainly, the statements
25 don't come in. It'd have to be their testimony.

1 MR. SMITH: Yes, Your Honor.

2 THE COURT: But I understand the context of the
3 statements is what you're concerned about.

4 MR. SMITH: Yes, Your Honor.

5 THE COURT: All right, Mr. Hogge. Tell me ---

6 MR. HOGGE: Yes, Your Honor. We -- the -- the
7 witnesses' testimony would be limited to that effect: that
8 they watched the video and it looked like John Massey.
9 They're not going to get on the stand and say yes,
10 absolutely, it was John Massey in the video. They're going
11 to testify in accordance to their statements: that they
12 looked at the video; it looked like John Massey; and then
13 further events escalated when Mr. Massey was arrested.

14 I don't believe *Neil v. Biggers* is implicated because
15 there's no law enforcement involvement whatsoever. It's
16 just Mr. Callahan, Mr. Mitchell, totally separate from law
17 enforcement, watching the video, saying that this looks
18 like John Massey.

19 And if the Court's inclined, I can proffer both of
20 their statements. They're outside in the hallway.

21 THE COURT: You talking about the written ones or you
22 want ---

23 MR. HOGGE: Or not ---

24 THE COURT: --- to proffer their testimony?

25 MR. HOGGE: Proffer their testimony, Your Honor.

1 THE COURT: All right. Mr. Callahan, he's the
2 proprietor?

3 MR. HOGGE: He is, Your Honor.

4 THE COURT: And he didn't recognize -- it's two
5 people; didn't know who it was. He showed it to some
6 employees, and one thought it might be or could be Mr.
7 Massey?

8 MR. HOGGE: (Nodded head up and down.)

9 THE COURT: I think that the -- Mr. Callahan, the
10 proprietor, wouldn't be allowed to say that's who it is,
11 because he's been told. And that's -- that will be
12 prejudicial of him to say it was so-and-so if he didn't
13 know. If he doesn't know, he doesn't know.

14 So I have a video; here it is. I showed it to my
15 employees. One of my employees thought it might be someone
16 he knew and leave it at that. His testimony stops there.

17 Mr. Mitchell will testify: I thought it was. And
18 then, that's how I think you'd have to go, that it would
19 have to be restricted to that and not allow the -- Mr.
20 Callahan to say I wasn't sure but then upon -- then I
21 thought it might be -- that doesn't seem very appropriate
22 in my -- just from what I've heard thus far.

23 MR. HOGGE: Right, Your Honor. The state's evidence
24 that we were going to put up, we -- we allege that Mr.
25 Massey once worked for Mr. Callahan. So when he watched

1 that video, he realized that that person was familiar; he
2 couldn't quite place a name with it.

3 THE COURT: And why don't you stop there. He says, "I
4 knew he was familiar, but I don't know who it was." You
5 just stop there ---

6 MR. HOGGE: Yes, Your Honor.

7 THE COURT: --- and leave it. That way, he's not
8 pointing to -- he -- his testimony is not being bolstered
9 in any way other than exactly what he said: I wasn't
10 certain; he looked familiar. I couldn't identify him at
11 that time. And don't go any further.

12 MR. HOGGE: Yes, Your Honor.

13 THE COURT: Because if you ask the next question --
14 Well, after you talked to everybody and they pointed out to
15 you, didn't it -- no. Just he looked familiar; I couldn't
16 identify him when I saw the video. And stop.

17 Mr. Mitchell and then the statement of the defendant
18 to the detective identifies the defendant if -- assuming
19 the testimony comes that way. But restrict Mr. Callahan
20 stopping at he looked familiar; I didn't know who he was
21 when I saw the video.

22 MR. HOGGE: Yes, Your Honor.

23 THE COURT: That's where I'd encourage you to restrict
24 his testimony. We'd stop there. If he goes further, then
25 I think that would be suggested by some other people and

1 influenced by other people. All right. Let me write that
2 down.

3 All right. What else do we have?

4 MR. HOGGE: Those are all the pretrial matters that
5 the state has. There is some issues with the jail phone
6 calls and redactions. And I'll save that towards the end
7 of the day if we want to get in them -- into them today.
8 But I'll hold off on those, Your Honor.

9 THE COURT: You want to be able to listen to those
10 with your client this afternoon?

11 MR. SMITH: I do, Your Honor.

12 THE COURT: Okay. Anything else I need to do before
13 we adjourn for the day?

14 MR. SMITH: Yes, Your Honor.

15 THE COURT: All right.

16 MR. SMITH: I would have a motion to quash the
17 burglary-first indictment.

18 THE COURT: Uh-huh.

19 (Whereupon, Mr. Smith and Mr. Hogge conferred.)

20 MR. HOGGE: Your Honor, I ask that we have Mr.
21 Callahan, my victim, come back into the courtroom. We had
22 earlier had them all leave out, but as the victim, I would
23 like to have him present in the courtroom.

24 THE COURT: Fair enough. All right. He can come back
25 in.

1 (Off the record briefly.)

2 (Whereupon, Defendant's Exhibits 1 through 5 were
3 marked for identification.)

4 THE COURT: All right.

5 MR. SMITH: Your Honor, if I can approach, I'm going
6 to hand up Defendant's ID No. 3, a photograph handed -- or
7 -- or turned over to me by the state in discovery. The
8 buildings depicted in that photograph, the red building is
9 the building in which the alleged burglary occurred.
10 You'll notice, over from that is a -- a residence, a home.

11 THE COURT: Uh-huh.

12 MR. SMITH: And that is the basis of the amended
13 burglary-first indictment, saying that the red building is
14 within 200 yards and appurtenant to the residence. Your
15 Honor, I'll also hand up Defense 1 and 2, also provided
16 from the state in discovery. And 2 is a zoomed-in version.
17 If you'll notice, the red building itself has a business
18 sign over it that operates as a building -- as -- as a
19 business. In fact, Your Honor heard some testimony from
20 the earlier witnesses talking about the business. And that
21 is the business in the red building that goes on with Mr.
22 Callahan's business.

23 And then, additionally, Your Honor, I want to hand up
24 what I pulled from the government property report, Defense
25 Exhibit 4 and 5. Defense Exhibit 4 shows the parcel that

1 the residence -- upon which the residence is located. Your
2 Honor -- Your Honor will notice the sort of bright-pink
3 line dividing that parcel from State's Exhibit 5, which is
4 a separate parcel of land upon which that red building or
5 that business is located.

6 Your Honor, the indictment that the state has provided
7 is correctly in line with the statute but I would argue is
8 faulty with regards to the facts of this case. I believe
9 it would be their requirement that they show it both be
10 within 200 yards and appurtenant to the residence.

11 Appurtenant to -- Your Honor, as -- as I've looked up
12 appurtenance, it's something that belongs to or is attached
13 -- would be the Black's Law Dictionary. Other dictionaries
14 -- Merriam-Webster would be constituting a legal
15 accompaniment or an auxiliary or accessory.

16 Your Honor, my point would be: (1) this does not look
17 appurtenant to; it is a separate business that operates
18 separately from the home itself. So there is no logical
19 appurtenance, as the definitions give us a right or a
20 privilege of property that -- that comes from the property
21 itself or appears pertaining thereto.

22 I -- I -- I don't think it does. It looks like
23 something separate. It's a business in one place and a
24 home in the other.

25 But there is a definition of appurtenance that does

1 say it would be that which comes with the land or a right
2 that comes with the parcel. Here, Your Honor, there is no
3 right from the residential parcel to the land upon which
4 the business exists. In fact, if someone were to purchase
5 that piece of property, they wouldn't get an easement or a
6 right or anything for that business.

7 That is a separate parcel. It is not appurtenant,
8 either in legal definition to the real property of the
9 separate parcel, nor an actual practicality that a business
10 runs somehow associated with the home. It is not. It's a
11 separate business, has a sign on it -- separate signage,
12 and it is not related to the house.

13 And therefore, burglary-first would not be an
14 appropriate charge for this case. We'd ask that that
15 indictment be quashed.

16 THE COURT: Am I to understand, on the property that
17 the business sits on is owned by someone else?

18 MR. SMITH: It is, Your Honor. At least what the
19 county records indicate.

20 THE COURT: All right.

21 MR. HOGGE: Your Honor, I'd like to proffer the
22 testimony of Kristopher Callahan.

23 THE COURT: Okay.

24 MR. HOGGE: Mr. Callahan, please come up to the bible
25 and be sworn.

1 (Whereupon, the witness came forward.)

2 KRISTOPHER CALLAHAN, having been first duly
3 sworn, testified as follows:

4 DIRECT EXAMINATION

5 BY MR. HOGGE:

6 Q Mr. Callahan, could you enlighten us a little on the
7 lay of your land, the -- the garage? And -- and to help
8 you out, I'm going to go ahead and show him this screen --
9 a blow -- a blown-up copy of what the judge has. And I've
10 got this laser point for you, if that helps you out. Hold
11 on one second. It's in slide-show mode. What all do you
12 have in your red garage here?

13 A Four-wheelers, boats, tools. There's beds in there.
14 There's refrigerators in there, freezers, things of that
15 nature, just things for storage and ---

16 Q Can you tell us a little bit about your business?

17 A I operate a waterproofing and grading company. It's
18 just a small, little -- little deal. We meet there at the
19 -- at the land in the mornings. And from there we, you
20 know, go off to our jobs.

21 Q Okay. And so are all of the items that are stored in
22 your garage, are they -- are they used in connection with
23 your business?

24 A No, sir.

25 Q What items that are in your garage are not used in

1 your business?

2 A Four-wheelers, boats, beds, tools -- some tools are;
3 some tools aren't -- refrigerators, ice machines, work
4 benches. I mean, it -- they're just things that are in my
5 garage.

6 Q Okay. Now, you also use this as a personal garage,
7 then?

8 A Yes, I do.

9 Q And -- and what all items do you keep in there related
10 to your business?

11 A Related to my business, really, the only things that
12 are in there related to my business are my tools that --
13 that I work on stuff on. But they don't go out to jobs or
14 anything. They -- everything that's in that building stays
15 in that building.

16 Q Okay. What's the reason behind the sign on that
17 garage?

18 A The sign was from -- there's a girl that lives with us
19 who rides rodeos. And I sponsored her in a rodeo, and they
20 had that sign made to put on one of the bucking chutes.

21 And once I got it back, I hung it on my shop, because I'm
22 -- I want to just, you know, display my name. I mean ---

23 Q Okay.

24 A --- just, I mean, there's all kinds of signs in my
25 shop.

1 Q Did members of the public come out onto your land to
2 see that sign?

3 A No, sir.

4 Q Was that sign there just for you?

5 A It's just there for me. The -- it's not there for --
6 I don't even know that it's visible from the road.

7 Q Okay.

8 A Never really looked to see.

9 Q And in that white house right next to the garage, how
10 far is that white house from that red garage?

11 A I would say roughly 45/48 feet, something like that.

12 Q Okay. And where -- if you could use the laser pointer
13 -- just hit that red button on there -- can you point out
14 to us where you sleep in the house, where your bedroom is?

15 A My bedroom is right there.

16 Q Is that your window to your bedroom?

17 A That is my door.

18 Q Okay. What's the -- who lives in that house with you?

19 A My mother, my father; and, like I said, the -- a -- a
20 lady named Sam who is just a friend of the family.

21 Q Okay.

22 A She also lives there.

23 Q And what's the -- the -- the status of the ownership
24 of the land? All this land, who owns what?

25 A How this started, this was all my grandfather's land.

1 When my mother and father got married, my grandfather drew
 2 a line -- I think it was 5 acres -- right here and give it
 3 to them so that they could build the home. In that area
 4 you have to have 5 acres in order to be able to build a
 5 home. I guess that was the -- the rules at the time.

6 Once my grandfather died, all this land here became my
 7 mother's. It never was put over -- it never was deeded
 8 into her name because it -- it's just family land. There's
 9 no need to change the land over. So we just left it in the
 10 farm name, which is ---

11 Q Okay.

12 A --- my uncle, Bill, who lives on the other side of us.

13 Q So is that that name on that -- the plaque ---

14 A William ---

15 Q --- that the ---

16 A --- E. Russell.

17 Q And that's your uncle?

18 A Yes, sir.

19 Q Okay.

20 MR. HOGGE: Beg the Court's indulgence.

21 (Whereupon, Mr. Hogge and Ms. Holland conferred.)

22 Q And so who uses that shop primarily?

23 A Primarily, just me and my father.

24 Q Okay. And so that -- that sign there that -- you said
 25 earlier that people will meet up there at the shop?

1 A Yes. We -- we -- my workers, you know, we just park
2 there. I park my equipment there. And from there we leave
3 and go to our jobs.

4 Q Okay. So is any business conducted in that building?

5 A There is no business conducted in that building. The
6 ---

7 Q Okay.

8 A --- business is ran out of the house.

9 Q Okay. All right. That's all the state has.

10 THE COURT: All right, Mr. Smith.

11 MR. SMITH: Thank you, Your Honor. May it please the
12 Court.

13 CROSS-EXAMINATION

14 BY MR. SMITH:

15 Q Mr. Callahan, Parris Road that the home address is
16 listed on, where is that in the photograph?

17 A Right there.

18 Q Okay. And then, the road that would -- would -- would
19 run with where the left portion of the photograph would be,
20 what road would that be?

21 A That's Russell Road.

22 Q Russell Road? Okay.

23 And then, as we came on down, sort of out the bottom
24 of the photograph, what road would we get to down there?

25 A Highway 324.

1 Q Okay. And you indicate that the red structure is --
2 is where you meet up for business; is that right?

3 A That is where we meet in the mornings. Yes, sir.

4 Q Okay. And then ---

5 A We'd meet outside.

6 Q Outside? Okay.

7 And Callahan Waterproofing and -- and Grading, that --
8 that's an active company, correct?

9 A Yes, it is.

10 Q And -- and the sign that's hanging on the front of
11 that building has two numbers listed to it. Are those
12 active numbers?

13 A Yes, they are.

14 Q Okay. And they -- business numbers?

15 A Yes.

16 Q Okay. And the -- the structure -- the red structure,
17 is it part of the business? In other words, the -- well,
18 does the business have insurance and is it bonded?

19 A No, sir.

20 Q It's not?

21 A (No audible response.)

22 Q Does it have a separate tax account from your personal
23 account?

24 A It would just be taxed with the land ---

25 Q Taxed with ---

1 A --- I guess.

2 Q --- the land? Okay.

3 So the -- the business would be taxed with the land
4 that -- that it's parcel to. And then, the home is taxed
5 with the land that it's parceled to; is that correct?

6 A I -- I can't give you a -- an honest answer there.
7 Because I'm ---

8 Q Okay.

9 A --- not sure.

10 Q Okay.

11 A I don't pay the taxes for that dwelling, that area.

12 Q Okay. And what all type of work does the business do?

13 A We do lot-clearing, waterproof basements, crawlspaces,
14 grading, septic tanks, anything somebody will pay me to do
15 to make a dollar.

16 Q All right.

17 MR. SMITH: I have no further questions, Your Honor.

18 THE COURT: Okay.

19 MR. HOGGE: I have no further questions for Mr.
20 Callahan.

21 THE COURT: Okay.

22 (Whereupon, the witness exited the witness stand.)

23 MR. HOGGE: Your Honor, I'd like to hand up a few
24 cases. The first is *State v. Smalls*. And in *State v.*
25 *Smalls*, the Court addresses the definition of a dwelling.

1 And it basically lines up with the statute, which is
2 there's the dwelling, where someone actually lives and
3 resides. In Section 16-11-310, Subsection 2, dwelling
4 means its definition found in 16-11-10 and also means the
5 living quarters of a building which is used or normally
6 used for sleeping within the lodging by a person.

7 And then, when you go to that section, they reference
8 16-11-10. The statute reads: "Any house, outhouse,
9 apartment building, erection, shed, or box in which there
10 sleeps a proprietor, tenant, watchman, clerk, laborer, or
11 person who lodges there with a view to the protection of
12 property shall be the dwelling house and of such a dwelling
13 house or any other dwelling houses, all houses, outhouses,
14 buildings, sheds, and erections which are within 200 yards
15 of it and are appurtenant to it or the same establishment.

16 The word appurtenant -- excuse me -- appurtenant
17 really does not have a legal definition in South Carolina.
18 There's been no case law that has addressed what the word
19 appurtenant means. The closest that the Court has ever
20 come is in an 1882 case in which it -- the Court in *State*
21 *v. Evans* -- that's 18 S.C. 137 -- touches on what
22 appurtenant means.

23 In the dichotomy of the business, Your Honor, whether
24 this is a business, a house, or a combination, I would hand
25 out *State v. Steadman*. And in *State v. Steadman*, on page

1 -- page 5, in that case, at the South of the Border, the
2 victim in that case had a -- an apartment above a -- an
3 actual office building. And then, next to it were motel
4 rooms. In that case someone broke into the -- the business
5 portion of it on the first-floor level.

6 And in that case the trial judge, in defining burglary
7 -- I'm quoting the case -- instructed the jury that the
8 crime consisted of the breaking and entering in the
9 nighttime of a dwelling or home of another for the purpose
10 of committing a felony. He further instructed the jury
11 that it was not necessary that the entire building be
12 devoted to dwelling purposes, nor that the dwelling area
13 entered be constantly inhabited every day or night of the
14 year and that the dwelling area might be in the building, a
15 portion of which is devoted to business purposes.

16 Here, there's slightly different facts in that it's a
17 separate building. But in that separate building, which is
18 appurtenant to the dwelling in that it is used for the
19 dwelling. He keeps his personal possessions there. He's
20 not using his four-wheeler for business purposes. He's not
21 using his boat in his construction business.

22 And so while there might be some business activity
23 there, that doesn't rob this of being a building
24 appurtenant to within 200 yards of a dwelling.

25 The state would also hand up *State v. Singley*. And in

1 that case, Your Honor, on page 3 the first full paragraph
2 of the second column, the Court states: "We have
3 maintained consistently for well over 100 years that
4 burglary is a crime against possession and cohabitation,
5 not a crime against ownership."

6 And so in this case, while the building might actually
7 be in somebody else's land on -- on that area, it's
8 actually yet his uncle's land -- this isn't a question of
9 ownership, what land this is titled to. This is a property
10 law that we're talking about. It's criminal law.

11 And going back to *State v. Singley*, it's a crime
12 against possession and habitation, not against actual
13 ownership.

14 THE COURT: All right. Anything from you, Mr. Smith?

15 MR. SMITH: Thank you, Your Honor. May it please the
16 Court: Your Honor, with regards to the case that was just
17 handed up that I received, *Steadman* and *Singley*, if Mr.
18 Callahan were sleeping in the building, even though it's on
19 his uncle's property, then I would agree that both cases
20 could apply. *Steadman* could apply because there is a
21 structure within which someone dwells. But that's clearly
22 not what the testimony is.

23 This is not a dwelling-house structure. So the
24 apartment above a business, the -- all that structure
25 becoming a dwelling by definition practically, is what the

1 *Steadman* case talks about. Here, we have a separate
2 structure.

3 Also, if he -- if he slept in the structure, *Singley*
4 would apply. Because even though it's on his uncle's
5 property, if it's home, then it wouldn't be about legal
6 ownership but would be about who possesses the right to
7 those -- or -- or -- properties or -- or who acts as the
8 person in control of those properties and he would be the
9 appropriate victim.

10 That's not what we have here. We have a -- a separate
11 structure that is not on the same property and is not in
12 keeping with what the house is. It's not like it's an
13 outbuilding the -- for a well house for the house or
14 something that's connected to the house.

15 So I -- I would submit that both practically and under
16 legal definition, it does not meet the required elements of
17 the law and of the indictment that it be appurtenant to the
18 dwelling house.

19 THE COURT: All right. Will y'all give me the benefit
20 of reading over these opinions and letting you know in the
21 morning first thing? Because I -- I'd like to read them
22 thoroughly. I don't want to glance over them and miss
23 something.

24 MR. HOGGE: Yes, Your Honor.

25 THE COURT: But I understand y'all's -- y'all's

1 respective position. It's quite an interesting little.
2 appurtenant definition. I mean, it's -- it's a matter of
3 whether it's a burglary-first or a burglary-second. If
4 you're right, it's second. If you're right, we go forward
5 with burglary-first. Okay.

6 MR. SMITH: Yes, Your Honor.

7 MR. HOGGE: Yes, Your Honor.

8 THE COURT: Does anybody suggest it's a factual
9 question?

10 MR. SMITH: I -- I would not, Your Honor.

11 THE COURT: Okay. I'll let you decide --

12 MR. SMITH: I -- I ---

13 THE COURT: --- tomorrow whether you think that too.

14 MR. SMITH: Unless I lose this ruling. Then I might.

15 THE COURT: Okay. I understand. All right.

16 MR. SMITH: Thank you, Your Honor.

17 THE COURT: I will read these tonight and let y'all
18 know in the morning. All right. What else we got?

19 MR. HOGGE: That's all the state has, Your Honor.

20 THE COURT: All right. I'll be here in the morning
21 early. I'd like to put this on the record before we get
22 the jury in here at 9:30. So I'll try to be here shortly
23 after 9, before 9:15. (To the court reporter) Can we
24 handle that?

25 THE COURT REPORTER: Sure.

1 THE COURT: Okay.

2 THE COURT REPORTER: Yes, sir.

3 THE COURT: Good deal. All right. Stand adjourned
4 till the morning.

5 MR. SMITH: Thank you.

6 (Whereupon, the proceeding was adjourned at 4:46 p.m.)
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1 TRIAL DAY 2 - 01/27/15

2 (Whereupon, the proceeding was resumed at 9:33 a.m.)

3 THE COURT: All right, folks. Do y'all want to --
4 we'll go ahead and resolve the issue from yesterday on the
5 motion on the indictment. Y'all want to be heard any
6 further on it? Because I've -- I've read the cases and
7 read the statute. Anything else you want ---

8 MR. HOGGE: Your Honor, I would just go back to my
9 statement as to the statue: The statute's clear that if
10 it's a building appurtenant to within 200 yards of a
11 dwelling, it is in itself a dwelling. And *State v. Smalls*
12 says the same.

13 In *State v. Steadman*, it's -- there's a discussion
14 about the actual dwelling -- doesn't -- it doesn't resemble
15 the facts here in that there's no outbuilding appurtenant
16 to discussion. It's just that the building -- the -- the
17 actual dwelling was used as both a dwelling and as a
18 business. But that didn't really change anything.

19 And the other case, the *Singley* case, I presented to
20 Your Honor to show that burglary is a crime of habitation
21 and of possession, not of ownership. And so I do not
22 believe that it matters at all that this might've been in
23 somebody's name.

24 This garage was used by Mr. Callahan. It was used in
25 connection with his property. He stored items in that

1 garage that didn't have anything to do with his business.
2 His four-wheelers didn't have anything to do with his
3 business; his boat didn't have anything to do with his
4 business.

5 And so that garage was appurtenant to within 200 yards
6 of his house, used in connection with his house. So this
7 is a burglary-first under the definition of the statute.

8 THE COURT: All right. Well, I disagree with you. I
9 think it's -- the victim in this case doesn't have any
10 ownership in either parcel of property. He may one -- one
11 day, if it's family land. But he doesn't right now.

12 The building's titled in his grandfather's estate or
13 his uncle's name or something, but not his, not his
14 mother's. And so it is close by in proximity. But it's a
15 separate piece of property. It's titled by someone totally
16 different. There's no one ever -- no testimony of anybody
17 ever sleeping there.

18 I -- I -- I think it's a burglary-second. I don't
19 think it's a burglary-first. And -- and I asked y'all if
20 y'all thought it was a factual question, and I think it's a
21 legal issue.

22 And using all the -- all the ownership, separate
23 parcel taxed, different owner, and that the victim doesn't
24 have any ownership interest in either piece of property --
25 or even a -- he lives with his parents; I don't know that

1 there's any type of contract for him to stay there, whether
2 it be a lease or -- I don't think that affects my decision
3 either.

4 But that building is an outbuilding. It's a -- looks
5 like a butler building to me. And it has a sundry of
6 things in it. And I just don't believe it's appurtenant to
7 the residence owned by the victim's parents, factually.

8 And so the indictment on burglary-first would -- I
9 didn't see the one that wasn't amended. There was two
10 handed to me. I don't know what the first one was.

11 Was it burglary-second?

12 MS. HOLLAND: It was also burglary-first.

13 DEPUTY CLERK OF COURT: It was ---

14 THE COURT: All right.

15 DEPUTY CLERK OF COURT: --- burglary-first.

16 MR. HOGGE: It's also burglary-first. There was ---

17 THE COURT: Okay.

18 MR. HOGGE: --- just a small change in language ---

19 THE COURT: Okay.

20 MR. HOGGE: --- Your Honor.

21 (Whereupon, Mr. Hogge and Ms. Holland conferred.)

22 MR. HOGGE: And I understand your ruling, Your Honor.

23 It's the state's position that we can now not go forward.

24 In that case of *State v. Smalls*, there was talk that if the
25 burglary-first indictment were quashed, that the state

1 could not then go on and pursue a burglary-second violent.

2 And I understand your -- Your Honor's ruling. And the
3 state would just put on the record that burglary is not a
4 crime of ownership, and it does not matter who owns that
5 property, who owns plats of lands. It's about possession,
6 and the victim was in possession of the house, of the
7 garage.

8 I might have to go check with my boss about whether or
9 not we would seek an appeal in this case. But I do not
10 believe we can go forward, based on that case, *State v.*
11 *Smalls*.

12 THE COURT: Well, I've read -- did you give me *Smalls*,
13 or is that something else?

14 MR. HOGGE: That's -- that was one of the three I
15 handed ---

16 THE COURT: Okay.

17 MR. HOGGE: --- up to Your Honor. And my co-counsel
18 just informed me about the issue of going forward. I -- I
19 didn't catch that when I first looked at the case, so I
20 could be wrong about that.

21 THE COURT: Well, let's read it.

22 (Off the record briefly.)

23 THE COURT: All right, sir. Where are you -- where
24 are you looking at this where you can't go forward?

25 Because, I mean, I'm ---

1 MR. HOGGE: I ---

2 THE COURT: --- I -- I'm presuming you can go forward
3 on burglary-second ---

4 MR. HOGGE: I'm not ---

5 THE COURT: --- over ---

6 MR. HOGGE: I'm not catching that, Your Honor.

7 THE COURT: But that -- that's what I've presumed.

8 It's not burglary-first; it's burglary-second. That --
9 that's what -- it -- it's certainly facts y'all presented
10 to me that would support a burglary-second indictment.
11 Now, whether that needs to be presented to the grand jury
12 and then go forward or not, that may be a different issue.

13 But the -- the burglary doesn't go away. It's just --
14 it's my take that it's not a burglary-first. It's ---

15 MR. HOGGE: To reduce it down to a ---

16 THE COURT: It's a ---

17 MR. HOGGE: --- second.

18 THE COURT: --- burglary-second. That -- that's

19 ---

20 MR. HOGGE: I understand, Your Honor. And I -- I
21 don't catch that ---

22 THE COURT: I am ---

23 MR. HOGGE: --- in the ---

24 THE COURT: --- I am in no way suggesting that this is
25 not a burglary on the -- all the facts being presented thus

1 far. In that building something was taken, it was in the
2 nighttime, and it was not -- had no permission to be there.
3 Those -- those elements are there.

4 MR. HOGGE: Yes, Your Honor.

5 THE COURT: It -- without -- I mean, certainly, to be
6 a -- proof beyond a reasonable doubt at trial, but on its
7 face, before a grand jury, it seems to me there would be
8 factually plenty to support a burglary-second indictment.
9 How y'all will resolve that . . .

10 (Whereupon, Mr. Hogge and Ms. Holland conferred.)

11 THE COURT: I mean, who -- who -- Mr. Smith, your take
12 is this: You can waive presentment and go forward, or wait
13 and get a different jury.

14 MR. SMITH: Yes, Your Honor.

15 THE COURT: I mean, that's kind of what you're looking
16 at.

17 MS. HOLLAND: Yeah.

18 THE COURT: I mean ---

19 MS. HOLLAND: He can waive. I think he can ---

20 THE COURT: You ---

21 MS. HOLLAND: --- waive.

22 THE COURT: --- you can waive and go forward. If you
23 like this jury and if you want to wait and take your chance
24 with a different jury, that's kind of the only -- because
25 the jury's not sworn; jeopardy is not attached. We're not

1 ---

2 MS. HOLLAND: Yeah.

3 (Whereupon, Mr. Smith and the defendant conferred.)

4 (Whereupon, Mr. Smith, Mr. Hogge, and Ms. Holland
5 conferred.)

6 MR. HOGGE: Judge, can we go ahead and take a short
7 recess to kind of ---

8 THE COURT: Sure.

9 MR. HOGGE: --- sort this out?

10 THE COURT: Sure. I mean, I ---

11 MS. HOLLAND: Okay.

12 THE COURT: --- we'll make the jury comfortable.

13 MS. HOLLAND: Okay.

14 THE COURT: Y'all figure out -- I mean, y'all may want
15 to do something. If y'all work it out, that's great too.
16 If you want to go forward, that's fine if you want. Y'all
17 let me know.

18 MS. HOLLAND: Okay.

19 MR. HOGGE: Yes, Your Honor.

20 MS. HOLLAND: Thank you so much.

21 (Whereupon, the proceeding was adjourned at 9:44 a.m.)

22 --- END OF TRANSCRIPT OF RECORD ---

23

24

25

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of General Sessions

Eugene C. Griffith Jr., Circuit Court Judge

Indictment No. 2014-GS-46-00781

THE STATE OF SOUTH
CAROLINA,

Appellant,

v.

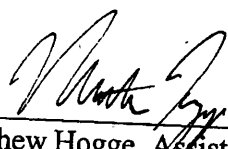
JOHN KENNETH MASSEY
JR.,

Respondent.

NOTICE OF APPEAL

The State of South Carolina appeals to the Court of Appeals the oral order of the Honorable Eugene C. Griffith Jr., made in open court on January 27, 2015, quashing the above-listed indictment. Appellant received notice of entry of the order on January 27, 2015. This order was not reduced to writing.

February 5, 2015


T. Matthew Hogge, Assistant Solicitor
Sixteenth Judicial Circuit Solicitor's Office
1675 1-A York Highway, York, SC 29745
Attorney for Appellant

Other Counsel of Record:

Philip Lee Smith
Sixteenth Circuit Public Defender's Office
1675-1E York Highway
York, SC 29745
Attorney for Respondent

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FEB 09 2015

**SC Court of Appeals
APP'X 59**

RECEIVED
R. 58

NOV 13 2015

SC Court of Appeals

CERTIFIED TRUE COPY

2015 NOV 10 AM 9:38

DAVID HAMILTON
CLERK OF COURT
YORK COUNTY, SC

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of General Sessions

Eugene C. Griffith Jr., Circuit Court Judge

DAVID HAMILTON
C.C.P. & G.S.
YORK COUNTY, SC

2015 NOV 10 AM 9:32

FILED-RECEIVED

Indictment No. 2014-GS-46-00781

THE STATE OF SOUTH
CAROLINA,

Appellant,

v.

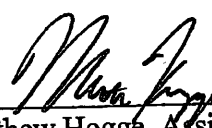
JOHN KENNETH MASSEY
JR.,

Respondent.

NOTICE OF APPEAL

The State of South Carolina appeals to the Court of Appeals the order of the Honorable Eugene C. Griffith Jr., signed October 30, 2015, and filed November 9, 2015, denying the State's Post Trial Motion of February 5, 2015. Appellant received notice of entry of the order on November 9, 2015.

November 10, 2015


T. Matthew Hogge, Assistant Solicitor
Sixteenth Judicial Circuit Solicitor's Office
1675 1-A York Highway, York, SC 29745
Attorney for Appellant

Other Counsel of Record:

Philip Lee Smith
Sixteenth Circuit Public Defender's Office
1675-1E York Highway
York, SC 29745
Attorney for Respondent

APP'X 60



R. 59

ALAN WILSON
ATTORNEY GENERAL

February 6, 2015

The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
P.O. Box 11629
Columbia, South Carolina 29211

RE: The State v. John Kenneth Massey, Jr.
Indictment No: 2014-GS-46-781

Dear Ms. Kitchings:

The State filed a notice of appeal on February 5, 2015 in referenced to the above matter. This letter is to advise the court that the State filed a post-trial motion on today and it is currently pending in the York County Court of General Sessions.

I am hereby requesting that all timelines are held in abeyance pending the circuit court's decision on the post-trial motion.

Sincerely,

Salley W. Elliott
Senior Assistant Deputy Attorney General
S.C. Bar No: 1871

SWE/ab

cc: Assistant Solicitor T. Matthew Hogge
Assistant Public Defender Philip Lee Smith
Robert M. Dudek, Esquire
Victim Services

WITNESSES

YCSO/ Benham

R. 6

tmh

ARREST WARRANT NUMBER

2014A4610100076

ACTION OF GRAND JURY

TRUE BILL

Rennu B Sanders

Foreperson of Grand Jury

Date: 3/20/2014

VERDICT

Foreperson of Petit Jury

Date:

DOCKET NO. 2014-GS-46-00780

The State of South Carolina

County of York

COURT OF GENERAL SESSIONS

March 20, Term 2014

THE STATE

vs.

JOHN KENNETH MASSEY JR.

Indictment for

CRIMINAL CONSPIRACY

SC Code: 16-17-410

CDR Code: 0049

After being fully advised as to my legal rights, I
hereby waive presentment to the Grand Jury.

Defendant

I,
hereby appear in my own proper person and plead
guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS. AND G.S.

APPX 62

STATE OF SOUTH CAROLINA)
COUNTY OF YORK)

INDICTMENT

R. 61

At a Court of General Sessions, convened on March 20, 2014, the Grand Jurors of York County present upon their oath:

CRIMINAL CONSPIRACY

The Defendant, John Kenneth Massey Jr., did in York County, South Carolina, on or about January 12, 2014, willfully, knowingly, and feloniously unite, combine, conspire, confederate, agree, or have tacit understanding with Nathaniel Good and/or Michael Kennedy for the purpose of committing the crime of burglary, all in violation of Section 16-17-410, Code of Laws of South Carolina (2003).

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


ASSISTANT SOLICITOR

APP'X 63

WITNESSES

YCSO/ Bringham

R.

rmh

ARREST WARRANT NUMBER

2014A4610100077

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury

Date: 3/20/2014

VERDICT

Foreperson of Petit Jury

Date:

DOCKET NO. 2014-GS-46-00781

The State of South Carolina

County of York

COURT OF GENERAL SESSIONS

March 20, Term 2014

THE STATE

vs.

JOHN KENNETH MASSEY JR.

Indictment for

BURGLARY IN THE FIRST DEGREE

SC Code: 16-11-311

CDR Code: 0079

After being fully advised as to my legal rights, I
hereby waive presentment to the Grand Jury.

Defendant

I
hereby appear in my own proper person and plead
guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS. AND G.S.

APPX 64

STATE OF SOUTH CAROLINA)
COUNTY OF YORK)

INDICTMENT

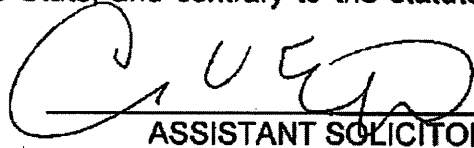
R. 63

At a Court of General Sessions, convened on March 20, 2014, the Grand Jurors of York County present upon their oath:

BURGLARY IN THE FIRST DEGREE

The Defendant, John Kenneth Massey Jr., did in York County, South Carolina, on or about January 12, 2014, while acting in concert with another person, willfully and unlawfully enter the outbuilding appurtenant to and within 200 yards of the dwelling of Kristopher Callahan, all located at [REDACTED] Parris Road in Rock Hill, South Carolina, without consent and with the intent to commit the crime of larceny therein; said entering or remaining did occur during the nighttime hours, all in violation of Section 16-11-311, Code of Laws of South Carolina (2003 & Supp. 2013).

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


ASSISTANT SOLICITOR

APP'X 65

WITNESSES

YCSO/Branham

R. 64

Amended
DOCKET NO. 2014-GS-46-00781

The State of South Carolina

County of York

COURT OF GENERAL SESSIONS

April 17, Term 2014

ag

ARREST WARRANT NUMBER

2014A4610100077

THE STATE

vs.

JOHN KENNETH MASSEY JR.

After being fully advised as to my
legal rights, I hereby waive presentment
to the Grand Jury.

Defendant

I
hereby appear in my own proper person and plead
guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS. AND G.S.

ACTION OF GRAND JURY

/s/ Ronnie B. Sanders, Foreperson

True Billed 3/20/2014

[Signature] **TRUE BILL**
Foreperson of Grand Jury
Date:

VERDICT

Indictment for
BURGLARY 1ST DEGREE

SC Code: 16-11-311
CDR Code: 079

Foreperson of Petit Jury
Date:

APPX 66

STATE OF SOUTH CAROLINA)
COUNTY OF YORK)

INDICTMENT

R. 65

At a Court of General Sessions, convened on April 17, 2014, the Grand Jurors of York County present upon their oath:

BURGLARY 1ST DEGREE

The Defendant, John Kenneth Massey Jr., did in York County, South Carolina, on or about January 12, 2014, while acting in concert with another person, willfully and unlawfully enter the dwelling of Kristopher Callahan, when he entered without consent the outbuilding appurtenant to and within 200 yards of the dwelling house establishment of Kristopher Callahan, all located at [REDACTED] Parris Road in Rock Hill, South Carolina, without consent and with the intent to commit the crime of larceny therein and said entering and remaining did occur during the nighttime hours, all in violation of Section 16-11-311, 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.

E B Springs IV
ASSISTANT SOLICITOR

APP'X 67

WITNESSES

YCSO/ Bringham

R.

.mh

ARREST WARRANT NUMBER

2014A4610100078

ACTION OF GRAND JURY

TRUE BILL

Ronnie B. Sachs

Foreperson of Grand Jury

Date: 3/20/2014

VERDICT

Foreperson of Petit Jury

Date:

DOCKET NO. 2014-GS-46-00782

The State of South Carolina

County of York

COURT OF GENERAL SESSIONS

March 20, Term 2014

THE STATE

vs.

JOHN KENNETH MASSEY JR.

Indictment for

**GRAND LARCENY, ENHANCED
AS THIRD OR SUBSEQUENT
PROPERTY CONVICTION**

SC Code: 16-13-30

SC Code: 16-1-57

CDR Code: 3587

After being fully advised as to my legal rights, I
hereby waive presentment to the Grand Jury.

Defendant

I
hereby appear in my own proper person and plead
guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS. AND G.S.

APP'X 68

STATE OF SOUTH CAROLINA)
COUNTY OF YORK)

INDICTMENT

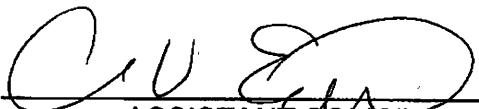
R. 67

At a Court of General Sessions, convened on March 20, 2014, the Grand Jurors of York County present upon their oath:

GRAND LARCENY

The Defendant, John Kenneth Massey Jr., did in York County, South Carolina, on or about January 12, 2014, feloniously take and carry away items belonging to Kristopher Callahan, valued at or more than two thousand dollars, with the intent to deprive the owner permanently of such property; said Defendant has two or more prior convictions for which the term of imprisonment is contingent upon the value of the property involved, all in violation of Section 16-13-30 and Section 16-1-57, Code of Laws of South Carolina (2003 & Supp. 2013).

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


ASSISTANT SOLICITOR

APP'X 69

Super Player

File View Play Divide Help

01

01/12/2014 06:20:17

Search Setting

Select Date

January, 2014

Sun	Mon	Tue	Wed	Thu	Fri	Sat
29	30	31	1	2		
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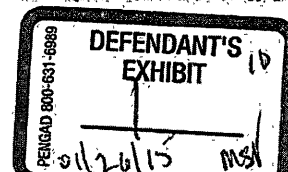
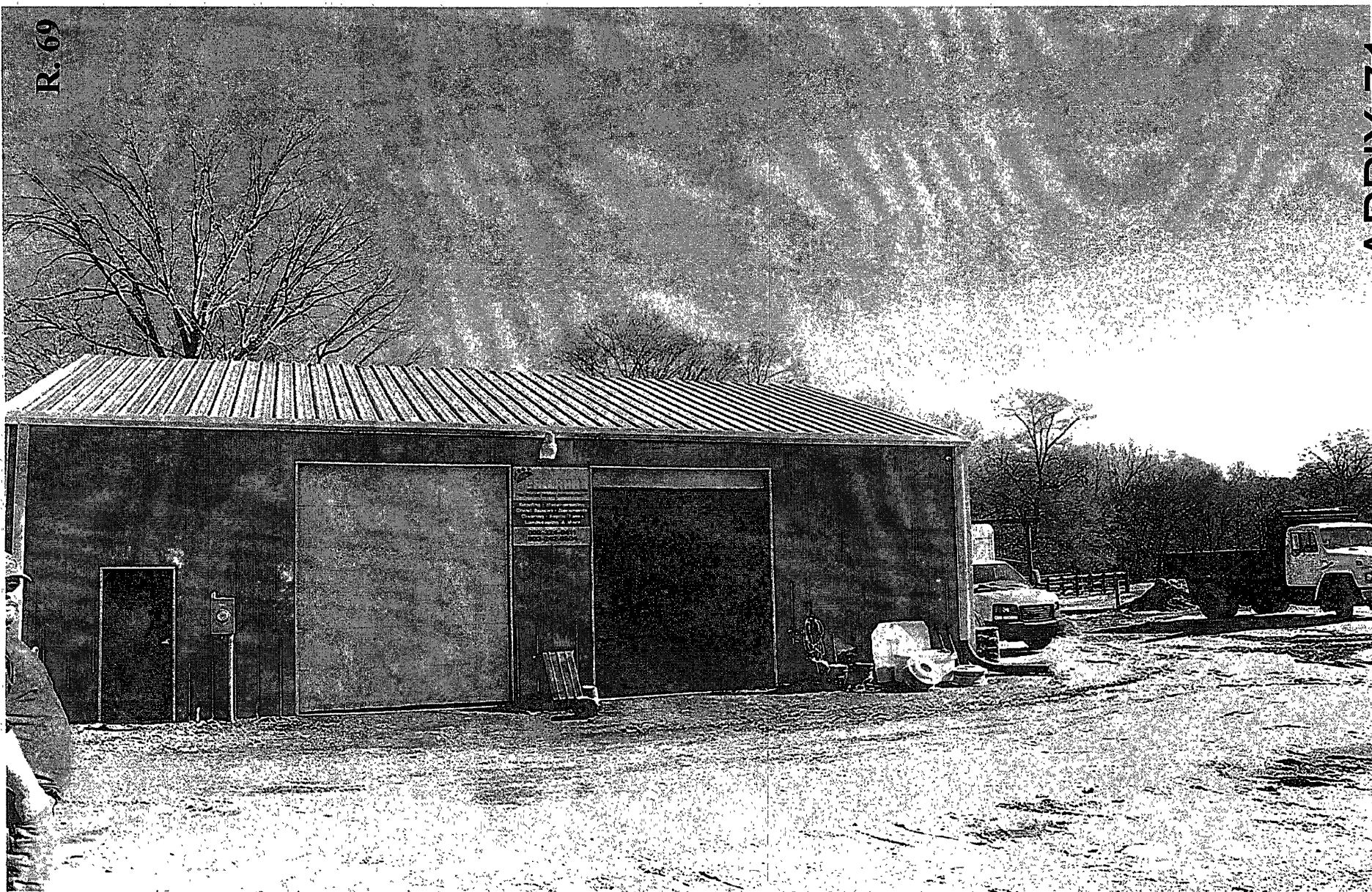
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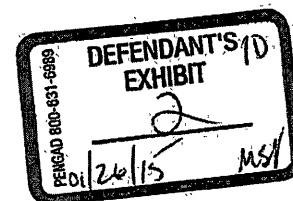
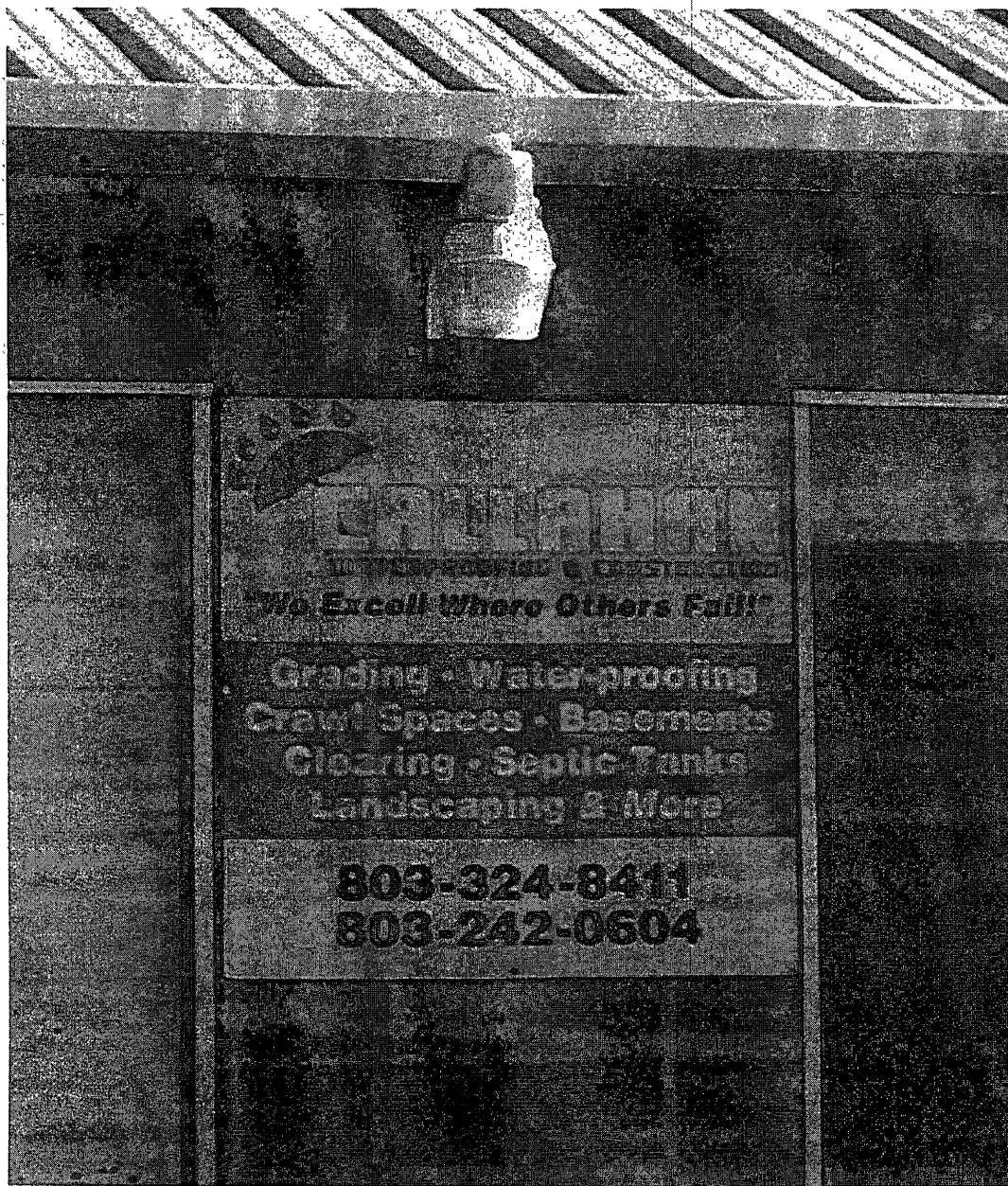
WASYCOURT'S
EXHIBIT NO. 1
IDENTIFICATION/EVIDENCE
DKT.#
DATE: 1/12/2014
APPX 70

R. 69

APP'X 71



R. 70



APP'X 72

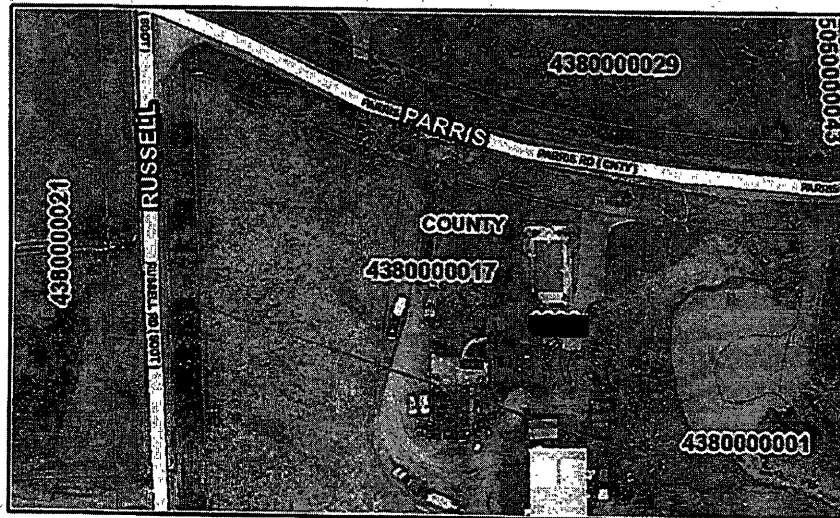
R.72

Parcel Number: 4380000017

Lot #:

York County Government, SC Property Report

Report generated 1/26/2015 1:23:13 PM



Tax lot in the center

Property Information

Parcel Number: 4380000017 **Land Value:** \$35,000
Total Lots: 1 **Sales Price:** \$0
Total Acres: 0 **Sales Date:** 0 / 0 / 9999
Deed Book/Page: 484 / 508 **School District:** 3
Plat Book/Page: 46 / 13 **Municipality:**
Fire Code: .BS-1
Owner(s): CALLAHAN ROGER D & THERESA R
Mailing Address: 1000 PARRIS RD, ROCK HILL, SC, 29730
Previous Grantor:
Property Location: HWY 46

Assessment

Total Assessed Value: \$8,440 **Total Market Value:** \$211,000
Total Tax Value: \$211,000 **Building Value:** \$176,000

Buildings Without Land

Site Address(es)

Tax ID	Owner	Mailing Address	Site Address	Type	Unit	Census Tract	County Council	School District	Water District	Electric District	Fire District	County Zoning	Road Owner
			1000 PARRIS RD			061403	4	3	ROCKHILL	York Electric		AGC	

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Page 1 of 1



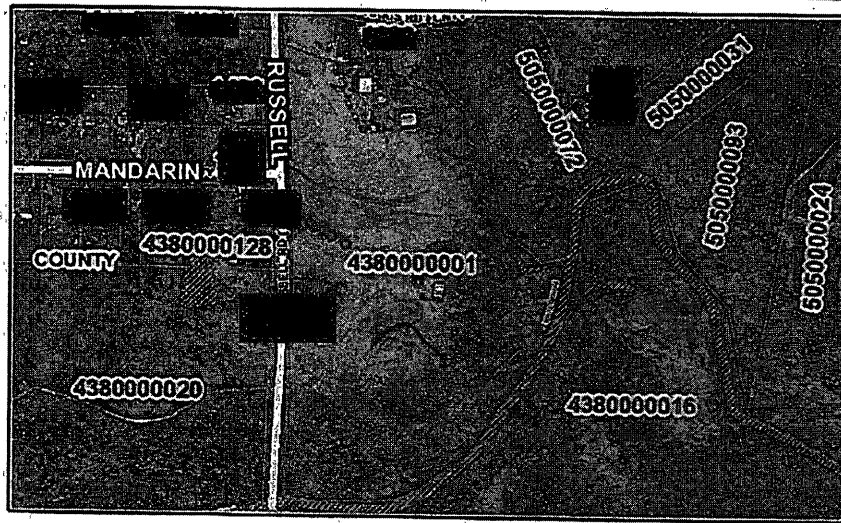
R.73

Parcel Number: 4380000001

Lot #:

York County Government, SC Property Report

Report generated: 1/26/2015 1:30:40 PM



Taxlot in the center

Property Information

Parcel Number: 4380000001 **Land Value:** \$237,300
Total Lots: 0 **Sales Price:** \$0
Total Acres: 16.95 **Sales Date:** 12 / 30 / 1993
Deed Book/Page: 900 / 323 **School District:** 3
Plat Book/Page: 28 / 206 **Municipality:**
Owner(s): RUSSELL WILLIAM E SR
Mailing Address: [REDACTED] RUSSELL RD, ROCK HILL SC, 29732
Previous Grantor: RUSSELL E B
Property Location: (18.60 LESS 1.65 AC)

Assessment

Total Assessed Value: \$3,221 **Total Market Value:** \$302,300
Total Tax Value: \$80,514 **Building Value:** \$65,000

Buildings Without Land

Site Address(es)

Tax ID	Owner	Mailing Address	Site Address	Type	Unit	Census Tract	County Council	School District	Water District	Electric District	Fire District	County Zoning	Road Owner
			[REDACTED] RUSSELL RD			051403	4	3	ROCKHILL	York Electric		AGC	

Disclaimer: While every effort is made to keep information provided over the internet accurate and up-to-date, York County does not certify the authenticity or accuracy of such information. No warranties, express or implied, are provided for the records and/or mapping data herein, or for their use or interpretation by the User.



CERTIFICATE OF COUNSEL

Counsel for Appellant certifies this Record on Appeal contains all material proposed to be included by the parties and not any other material and this Record on Appeal complies to the best of my ability with the April 15, 2014, order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

ALAN WILSON
Attorney General

MEGAN HARRIGAN JAMESON
Assistant Attorney General

BY: Megan Harrigan Jameson
Megan Harrigan Jameson

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR APPELLANT

February 7, 2017

APP'X 76

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from York County
Honorable Eugene C. Griffith, Jr., Circuit Court Judge
Appellate Case No. 2015-000431

THE STATE,

Appellant,

vs.

JOHN KENNETH MASSEY, JR.,

Respondent.

FINAL BRIEF OF APPELLANT

ALAN WILSON
Attorney General

MEGAN HARRIGAN JAMESON
Assistant Attorney General
S.C. Bar No. 100108

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3727

KEVIN S. BRACKETT
Solicitor, Sixteenth Judicial Circuit

1675-1A York Highway
York, South Carolina 29745
(803) 628-3020

ATTORNEYS FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the circuit court judge abuse his discretion and commit a reversible legal error by dismissing the indictment for first-degree burglary prior to trial when the grand jury issued a facially-valid indictment for first-degree burglary in Respondent's case, and Respondent's actions supported an indictment for first-degree burglary in violation of S.C. Code Ann. § 16-11-311?

STATEMENT OF THE CASE

On January 13, 2014, officers with the York County Sheriff's Office arrested Respondent John Kenneth Massey, Jr. following a burglary and robbery in Rock Hill, South Carolina, involving Respondent and two co-defendants. During its March 20, 2014 term, the York County Grand Jury indicted Respondent for criminal conspiracy, first-degree burglary, and grand larceny—third or subsequent property offense. On April 17, 2014, the York County Grand jury issued an amended indictment against Respondent for first-degree burglary.

The State called the case to trial on January 26, 2015, before the Honorable Eugene C. Griffith, Jr., circuit court judge. Following jury selection but prior to the swearing of the jury, Respondent moved to quash the first-degree burglary indictment, arguing the facts of the case did not give rise to an indictment for first-degree burglary. The circuit court judge heard proffered testimony from the victim and arguments from both parties. The following morning, the circuit court judge granted Respondent's motion and quashed the first-degree burglary indictment that had been issued by the grand jury. The circuit court judge then indicated the trial would proceed forward on a second-degree burglary indictment. The State objected and subsequently filed a "Post-Trial Motion" seeking to set aside the circuit court judge's quashing of the indictment. By written order filed November 9, 2015, the circuit court judge denied the State's motion. The State then timely filed a notice of appeal.

STATEMENT OF FACTS

During the evening of January 12, 2014, Respondent and two co-defendants entered a garage less than fifty feet from a residence on Paris Road in Rock Hill, South Carolina, and stole numerous items. (R. 9-10, 39, 60-67). Following an investigation into the incident, Detective Brian Schettler of the York County Sheriff's Department arrested Respondent during a traffic stop the next day. (R. 12-14). During Respondent's arrest, Detective Schettler advised Respondent of his rights. (R. 13-14).

The following day, January 13, 2015, Detective Schettler interviewed Respondent about the burglary on Paris Road. (R. 12-15). Detective Schettler again advised Respondent of his rights, and Respondent agreed to waive those rights and speak with him. (R. 15-16). After Detective Schettler presented Respondent with photographs taken from surveillance footage from inside the garage, Respondent implicated himself in the Paris Road burglary, as well as in a wider network of four-wheeler thefts in the area. (R. 16-19, 23-25, 68).

Thereafter, the York County Grand Jury indicted Respondent for criminal conspiracy, first-degree burglary, and grand larceny—third or subsequent property offense. The first-degree burglary indictment issued by the grand jury identified Respondent's offense as a violation of S.C. Code Ann. § 16-11-311 based on Respondent's action of "willfully and unlawfully enter[ing] the outbuilding appurtenant to and within 200 yards of the dwelling . . . located at . . . Parris Road in Rock Hill, South Carolina, without consent and with the intent to commit the crime of larceny therein . . . during the nighttime hours . . ." (R. 60-67). On April 17, 2014, the York County Grand Jury issued an amended indictment against Respondent for first-degree burglary, slightly modifying the language of the original indictment to include that Respondent "willfully and unlawfully enter[ed] the dwelling . . . when he entered without consent the

outbuilding appurtenant to and within 200 yards of the dwelling house establishment.” (R. 64-65).

The State called the case to trial and after the jury was selected but prior to impaneling, the circuit court judge conducted a Jackson v. Denno¹ hearing to determine the admissibility of Respondent’s statements to law enforcement following his arrest. (R. 11-27). The circuit court judge ruled Respondent’s statements to law enforcement were admissible. (R. 27). Thereafter, Respondent moved to quash the first-degree burglary indictment based on the ground that the facts of the case did not comport with the requirements of S.C. Code Ann. § 16-11-311. (R. 33-36). Specifically, Respondent argued the building subject to the burglary was a place of business instead of a dwelling, was not appurtenant to the dwelling, and was owned by someone other than the victim listed on the indictment. (R. 33-36). In support of his argument, Respondent introduced five exhibits: Defendant’s Ex. No. 1 (a photograph of the garage subject to the burglary); Defendant’s Ex. No. 2 (a photograph of a sign on the garage for “Callahan Waterproofing & Construction”); Defendant’s Ex. No. 3 (an aerial photograph of the garage and surrounding structures within a red line separating two different parcels of land between the garage and the dwelling); Defendant’s Ex. No. 4 (a York County property report for the dwelling located on Parris Road listing Roger and Theresa Callahan as the owners); and Defendant’s Ex. No. 5 (a York County property report for the parcel of land (including the garage) adjacent to the Paris Road dwelling located on Russell Road listing William Russell, Sr. as the owner). (R. 34-35). Respondent argued the first degree burglary indictment was “correctly in line with the statute but . . . [was] faulty with regards to the facts of this case. . . . And therefore, burglary-first would not be an appropriate charge for this case.” (R. 35-36).

¹ 378 U.S. 368 (1964).

In response, the State proffered the testimony of Kristopher Callahan, the victim listed in the indictment. (R. 36). Callahan testified he lives at the Paris Road home with his parents (Roger and Theresa Callahan) and a family friend. (R. 39). He testified the garage subject to the indictment is "roughly 45/48 feet" from his house. (R. 39). He explained the land the home is on was originally owned by his grandfather along with the adjacent property on which the garage sits. (R. 39-40). He testified his grandfather parceled off five-acres of land when his parents got married to build a home, which is where the Paris Road home is located. (R. 39-40). He testified the land on which the garage sits was deeded to his uncle, William Russell, Sr., after his grandfather died, but the property is owned and used jointly by the family. (R. 40). Callahan testified he exclusively uses the garage for personal storage of various items, including his four-wheelers, boats, tools, appliances, and beds. (R. 37-38). He testified he owns a small waterproofing and grading company and the employees meet at the garage in the mornings, but stressed that the garage is for personal use—not business. (R. 37-38, 40-42). He testified the business sign on the garage was made when he sponsored his family friend in a rodeo, and after the rodeo, he hung the sign on the garage to "display his name." (R. 38-39, 42). He testified the sign is not visible from the road and the public does not enter onto the land to conduct business. (R. 38-39).

Following Callahan's proffered testimony, the State argued the garage was appurtenant to and within the required two hundred yards of Callahan's residence, thereby satisfying the "dwelling" requirement pursuant to S.C. Code Ann. § 16-11-311 and § 16-11-10. (R. 43-45). Additionally, the State argued that "burglary is a crime against possession and cohabitation, not a crime against ownership[,]" and therefore, it is irrelevant that the parcel of land on which the garage sits is owned by someone other than Callahan. (R. 45-46). In reply, Respondent reiterated

his previous arguments, asserting the garage was used for business purposes and was not appurtenant to Callahan's residence. (R. 46-47). The circuit court judge informed counsel he wanted to review law before ruling and recessed court for the evening. (R. 47-49).

The following morning, the State summarized its argument for the circuit court judge, again arguing the garage was appurtenant to the residence, thereby satisfying the "dwelling" requirement pursuant to S.C. Code Ann. § 16-11-311 and § 16-11-10. (R. 50-51). The circuit court judge responded:

All right. Well, I disagree with you. I think it's— the victim in this case doesn't have any ownership in either parcel of property. He may one—one day, if it's family land. But he doesn't right now. The building's titled in his grandfather's estate or his uncle's name or something, but not his, not his mother's. And so it is close by in proximity. But it's a separate piece of property. It's titled by someone totally different. There's no one ever—no testimony of anybody ever sleeping there.

I—I—I think it's a burglary-second. I don't think it's a burglary-first. And—and I asked y'all if y'all thought it was a factual question, and I think it's a legal issue.

And using all the—all the ownership, separate parcel taxed, different owner, and that the victim doesn't have any ownership interest in either piece of property—or even a—he lives with his parents; I don't know that there's any type of contract for him to stay there, whether it be a lease or—I don't think that affects my decision either.

But that building is an outbuilding. It's a—looks like a butler building to me. And it has a sundry of things in it. And I just don't believe it's appurtenant to the residence owned by the victim's parents, factually.

(R. 51-52). The State responded that it understood the circuit court judge's ruling, but wanted to place upon the record that "burglary is not a crime of ownership, and it does not matter who owns that property, who owns plats of lands. It's about possession, and the victim was in possession of the house, of the garage." (R. 53). The circuit court judge indicated his desire to

continue forward with the trial, with the State pursuing a second-degree burglary conviction against Respondent. (R. 53-55). The State objected to continuing forward and the matter concluded for the day. (R. 53-56).

On February 6, 2015, the State timely filed a "Post-Trial Motion" seeking to set aside the circuit court judge's quashing of the indictment, based in the fact the circuit court judge's grounds for quashing the indictment were legally and factually erroneous. By written order filed November 9, 2015, the circuit court judge denied the State's motion. The State then timely filed a notice of appeal.

ARGUMENT

Did the circuit court judge abuse his discretion and commit a reversible legal error by dismissing the indictment for first-degree burglary prior to trial when the grand jury issued a facially-valid indictment for first-degree burglary in Respondent's case, and Respondent's actions supported an indictment for first-degree burglary in violation of S.C. Code Ann. § 16-11-311?

Prior to trial, the circuit court judge abused his discretion and committed reversible error by dismissing the first-degree burglary indictment in response to defense counsel's contention that the evidence did not factually support the indictment. Critically, that ruling was legally erroneous because the first-degree burglary indictment issued in Respondent's case was facially valid and sufficient to bring the case to trial and Respondent's actions were sufficient to prove the offense of first-degree burglary. For those reasons, the circuit court judge did not have the power to dismiss the first-degree burglary indictment under the circumstances, and his decision to do so was controlled by a legal error. Accordingly, the circuit court judge's ruling dismissing the indictment should be reversed, the indictment should be reinstated, and Respondent's case should be remanded for trial.

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). "In appeals of pretrial rulings, [the appellate court] is 'bound by fact findings in response to motions preliminary to trial when the findings are supported by the evidence and not clearly wrong or controlled by error of law.'" Reed v. Becka, 333 S.C. 676, 684, 511 S.E.2d 396, 400 (Ct. App. 1999) (quoting State v. Amerson, 311 S.C. 316, 320, 428 S.E.2d 871, 873 (1993)). Importantly, a trial judge's ruling on a matter "will not be disturbed absent a prejudicial abuse of discretion amounting to an error of law." State v. Sheldon, 344 S.C. 340, 342, 543 S.E.2d 585, 585-586 (Ct. App. 2001). An abuse of discretion occurs

when the trial judge's conclusions lack evidentiary support or are controlled by an error of law.
State v. Elders, 386 S.C. 474, 480, 688 S.E.2d 857, 861 (Ct. App. 2010).

ANALYSIS

The circuit court judge abused his discretion and committed a reversible legal error by dismissing the first-degree burglary indictment prior to trial, when the York County Grand Jury issued a facially valid indictment in Respondent's case. Furthermore, even if the circuit court judge had the legal authority to dismiss the first-degree burglary indictment, the circuit court judge committed reversible legal error by improperly dismissing the first-degree burglary indictment because the evidence in Respondent's case supported an indictment for first-degree burglary.

Pursuant to S.C Code Ann. § 16-11-311(A)(3), "[a] person is guilty of burglary in the first degree if the person enters a dwelling without consent and with intent to commit a crime in the dwelling, and . . . the entering or remaining occurs in the nighttime." "With respect to the crime[] of burglary . . . and to all criminal offenses which are constituted or aggravated by being committed in a dwelling house, any house, outhouse, apartment, building, erection, shed or box in which there sleeps a proprietor, tenant, watchman, clerk, laborer or person who lodges there with a view to the protection of property shall be deemed a dwelling house, and of such a dwelling house or of any other dwelling house **all houses, outhouses, buildings, sheds and erections which are within two hundred yards of it and are appurtenant to it** or to the same establishment of which it is an appurtenance shall be deemed parcels." S.C. Code Ann. § 16-11-10. See State v. Smalls, 336 S.C. 301, 305, 519 S.E.2d 793, 795 (Ct. App. 1999) (holding the State's proof showed the building actually broken into was a garage located approximately fifty-three feet behind the victim's dwelling satisfies the requirements of S.C. Code Ann. § 16-11-10).

Black's Law Dictionary defines "appurtenant" as "annexed to a more important thing." BLACK'S LAW DICTIONARY (10th ed. 2014). South Carolina courts have yet to provide an explicit definition of "appurtenant" in the context of "dwelling house" pursuant to S.C. Code Ann. § 16-11-10, but have suggested "that such a structure 'must be somehow connected with or contributory to it, [the dwelling house] such as a kitchen, smoke-house or such other as is usually considered as a necessary appendage of a dwelling-house. It cannot embrace a store, blacksmith shop, or any other building separate from it and appropriated to another and a distinct use.' "

WILLIAM SHEPARD MCANINCH ET AL., THE CRIMINAL LAW OF SOUTH CAROLINA 407-08 (6th ed. 2013) (quoting State v. Evans, 18 S.C. 137, 140 (1882)). Our Court has previously ruled the following structures were "appurtenant" to a dwelling house for burglary purposes: a dog house, State v. Langford, 55 S.C. 322, 33 S.E. 370 (1899), a smokehouse, State v. Branham, 13 S.C. 389 (1880), and a hen house even though it was across a public road from the dwelling house, State v. Johnson, 45 S.C. 483, 23 S.E. 619 (1896). Other jurisdictions have defined "appurtenant" similarly. See Jones v. State, 690 S.W.2d 318, 319 (Tex. App. 1985) (finding an unattached garage structure was appurtenant to the residence, as it was connected with the use and enjoyment of and was secondary or incident to the principle building—the house).

Additionally, "[t]he law of burglary is primarily designed to secure the sanctity of one's home, especially at nighttime, when peace, solitude and safety are most desired and expected To preserve this security and this sanctity the law has created safeguards and imposed severe penalties on their infringement." State v. Singley, 392 S.C. 270, 276, 709 S.E.2d 603, 606 (2011) (quoting State v. Brooks, 277 S.C. 111, 112–13, 283 S.E.2d 830, 831 (1981)). Accordingly, South Carolina has "maintained consistently for well over one hundred years that burglary is a crime against possession and habitation, not a crime against ownership." Singley, 392 S.C. at

274, 709 S.E.2d at 605 (citing State v. Clamp, 225 S.C. 89, 102, 80 S.E.2d 918, 924 (1954); State v. Alford, 142 S.C. 43, 45, 140 S.E. 261, 262 (1927); State v. Trapp, 17 S.C. 467, 471 (1882)). Accordingly, “the victim listed in the indictment need not be the owner of the dwelling burglarized; it is sufficient that the alleged victim was the occupant and possessor of the dwelling.” Singley, 392 S.C. at 274, 709 S.E.2d at 605 (citing Clamp, 225 S.C. at 102, 80 S.E.2d at 924; Alford, 142 S.C. at 45, 140 S.E. at 262; Trapp, 17 S.C. at 472). South Carolina burglary laws protect an interest separate and apart from ownership: the right to be safe and secure in one’s home. Singley, 392 S.C. at 276, 709 S.E.2d at 606 (citing People v. Smith, 142 Cal.App.4th 923, 48 Cal.Rptr.3d 378, 384 (2006) (noting the difference between possessory right under the burglary statute and family law); State v. McMillan, 158 N.H. 753, 973 A.2d 287, 292 (2009) (“[W]hile the defendant had some proprietary interest in the apartment as a co-lessee, this fact did not automatically give him license to enter under [the burglary statute] . . . [T]he entry here interfered with the security and safety of the occupant, thus implicating the very interests the burglary statute was designed to protect.”); State v. Lilly, 87 Ohio St.3d 97, 717 N.E.2d 322, 327 (1999) (“Because the purpose of burglary law is to protect the dweller, we hold that custody and control, rather than legal title, is dispositive. Thus, in Ohio, one can commit a trespass and burglary against property of which one is the legal owner if another has control or custody of that property.”)).

In the present case, Respondent, as alleged in the first-degree burglary indictment, entered Callahan’s garage within two hundred yards of his dwelling house during the nighttime hours with the intent to commit larceny. (R. 60-67). Significantly, the indictment contained the necessary elements of the offense of first-degree burglary and sufficiently apprised Respondent of what allegations he was facing. See State v. Crenshaw, 274 S.C. 475, 477, 266 S.E.2d 61, 62

(1980) (explaining an indictment is sufficient if “the offense is stated with sufficient certainty and particularity to enable the court to know what judgment to pronounce, the defendant to know what he is called upon to answer, and acquittal or conviction to be placed in bar to any subsequent conviction”); Smalls, 336 S.C. at 307, 519 S.E.2d at 796 (“[T]he true test of an indictment’s validity is not whether it could be made more definite and certain, but whether it contains the necessary elements of the offense intended to be charged and sufficiently apprises the defendant of what he must be prepared to meet.”); see also S.C. Code Ann. § 17-19-20 (“Every indictment shall be deemed and judged sufficient and good in law which, in addition to allegations as to time and place, as required by law, charges the crime substantially in the language of the common law or of the statute prohibiting the crime or so plainly that the nature of the offense charged may be easily understood and, if the offense be a statutory offense, that the offense be alleged to be contrary to the statute in such case made and provided.”). Under those circumstances, the indictment issued by the grand jury was facially valid and sufficient, and the circuit court judge had no authority to dismiss the indictment prior to trial. See United States v. Mills, 995 F.2d 480, 487 (4th Cir. 1993) (“The longstanding rule of law that courts may not ‘look behind’ grand jury indictments if ‘returned by a legally constituted and unbiased grand jury . . .’ is the touchstone for any inquiry into the legality of indictments.”) (quoting Costello v. United States, 350 U.S. 359, 363 (1956)); State v. Needs, 333 S.C. 134, 146, 508 S.E.2d 857, 863 (1998) (“[A] trial court generally has **no power** to dismiss a properly drawn indictment issued by a properly constituted grand jury before trial unless a statute grants that power to the court.” (emphasis added)); State v. Garrett, 305 S.C. 203, 206, 406 S.E.2d 910, 911 (Ct. App. 1991) (“A motion to quash an indictment addresses the sufficiency of the indictment, not the

sufficiency of the State's evidence.”), overruled on other grounds by State v. Ramsey, 311 S.C. 555, 430 S.E.2d 511 (1993).

Despite the fact the indictment was facially valid and sufficient, the circuit court judge in Respondent's case agreed with defense counsel's argument, granted Respondent's motion, and dismissed the first-degree burglary indictment issued by the grand jury. Critically, that ruling constituted reversible error for a variety of different reasons. Initially, the circuit court judge's ruling was legally erroneous because he had no authority whatsoever to dismiss the facially-valid indictment issued by the grand jury in light of the fact a pre-trial challenge to an indictment cannot be used to challenge the sufficiency of the State's evidence. See Needs, 333 S.C. at 146, 508 S.E.2d at 863 (explaining a trial judge ordinarily has no power to dismiss a properly drawn indictment prior to trial absent some statutory authority permitting the trial judge to do so); State v. Sweat, 221 S.C. 270, 272, 70 S.E.2d 234, 235 (1952) (holding a motion to quash the indictment raised on the ground the victims identified in the indictment did not actually own the property stolen was properly denied because the indictment was facially valid and because the motion—if treated as a motion for a directed verdict since it went to the sufficiency of the evidence—was out of order and premature); see also United States v. Guerrier, 669 F.3d 1, 3-4 (1st Cir. 2011) (“[C]ourts routinely rebuff efforts to use a motion to dismiss as a way to test the sufficiency of the evidence behind an indictment's allegations[.] . . . [I]n the ordinary course of events, a technically sufficient indictment handed down by a duly empaneled grand jury ‘is enough to call for trial of the charge on the merits.’ ” (citations omitted)); United States v. Redcorn, 528 F.3d 727, 733 (10th Cir. 2008) (“[A] challenge to the indictment is not a vehicle for testing the government's evidence.”); Gibson v. United States, 244 F.2d 32, 34 (4th Cir. 1957) (holding a pre-trial challenge to an indictment can only be made in respect to the validity

of the indictment itself and not in respect to whether the facts of the case support the allegations in the indictment, which is an issue to be raised during trial).

Furthermore, even if the circuit court judge had the legal authority to dismiss the first-degree burglary indictment based on purported evidentiary flaws, the circuit court judge committed reversible legal error by improperly dismissing the first-degree burglary indictment because the evidence in Respondent's case supported an indictment for first-degree burglary. Based on the record before the circuit court judge, it is clear Respondent entered a garage used exclusively by Callahan for personal storage within fifty feet of Callahan's residence during nighttime hours with the intent to commit larceny, thereby satisfying the requirements of S.C. Code Ann. § 16-11-311. The circuit court judge's ruling is based on several clear errors of law. Initially, the circuit court judge's finding Callahan's lack of ownership of the parcel of land on which the garage sits warrants dismissal of the first-degree burglary indictment is clearly erroneous. See Singley, 392 S.C. at 276, 709 S.E.2d at 606 (holding South Carolina burglary laws protect an interest separate and apart from ownership: the right to be safe and secure in one's home). It is of no importance that Callahan was not the titled owner of the property or that the garage parcel was deeded to a separate owner from the dwelling, as the only evidence before the circuit court judge established Callahan was in possession of the garage and the home. Adopting the clearly erroneous approach of the circuit court judge would lead to an absurd result where residences and their adjoining buildings could be burglarized without significant consequence, so long as the possessor was not the titled owner.

Additionally, the circuit court judge's findings that the garage was not used for "sleeping" and that he "just [didn't] believe it's appurtenant to the residence," and therefore, not a dwelling, is also legally erroneous. (R. 51). Callahan's testimony established the garage was

less than fifty feet from the home where he and three others permanently resided. Furthermore, a review of the aerial photograph of the two parcels of land with the red demarcation line, introduced as Defendant's Ex. No. 3, shows that the only ingress to the garage from the two adjoining roads is from the driveway of Callahan's dwelling. Moreover, the evidence before the circuit court judge established that the garage was solely used by Callahan to store his personal property. Cf. State v. Stone, 350 S.C. 442, 446, 567 S.E.2d 244, 246 (2002) ("The porch leads into and out of the laundry room and is used primarily to store wood and paint cans. . . . We find the screened porch is appurtenant, and is used for the protection of Griffith's property (paint and in finding otherwise. wood) so as to come within the definition of a dwelling."). Based on our Court's previous rulings, the garage was "appurtenant to" the dwelling home as required pursuant to S.C. Code Ann. § 16-11-10. See Langford, 55 S.C. 322, 33 S.E. 370 (holding a dog house was appurtenant to a dwelling); Branham, 13 S.C. 389 (holding a smokehouse was appurtenant to a dwelling); Johnson, 45 S.C. 483, 23 S.E. 619 (1896) (holding a hen house was appurtenant even though it was across a public road from the dwelling house). Therefore, the "dwelling" element of S.C. Code Ann. § 16-11-311 was satisfied and the circuit court judge reversibly erred.

For the foregoing reasons, the circuit court judge abused his discretion and committed a clear error of law by dismissing the properly-drawn indictments issued in Respondent's case. See Sheldon, 344 S.C. at 342, 543 S.E.2d at 585-586 (instructing a trial judge's ruling should only be reversed if it is legally erroneous or constitutes an abuse of discretion); see also State ex rel. Davis v. State Bd. of Canvassers, 86 S.C. 451, 455, 68 S.E. 676, 678 (1910) (explaining an appellate court "will correct errors of law" committed by a lower court). As a result, the circuit

court judge's ruling should be reversed, the indictment should be reinstated, and Respondent's case should be remanded for trial.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the ruling of the circuit court judge should be reversed, the indictment should be reinstated, and the case should be remanded for trial.

Respectfully submitted,

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February 7, 2017

STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from York County
Honorable Eugene C. Griffith, Jr., Circuit Court Judge
Appellate Case No. 2015-000431

THE STATE,

Appellant,

VS.

JOHN KENNETH MASSEY, JR.,

Respondent.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

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APP'X 97

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February 7, 2017

APP'X 98

STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from York County
Honorable Eugene C. Griffith, Jr., Circuit Court Judge
Appellate Case No. 2015-000431

THE STATE,

Appellant,

vs.

JOHN KENNETH MASSEY, JR.,

Respondent.

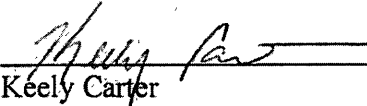
PROOF OF SERVICE

I, Keely Carter, certify that I have served the within Final Brief of Appellant on Respondent by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

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I further certify that all parties required by Rule to be served have been served.

This 7th day of February, 2017.



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APP'X 99

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from York County

Honorable Eugene C. Griffith, Circuit Court Judge

THE STATE,

APPELLANT,

V.

JOHN KENNETH MASSEY JR.,

RESPONDENT

APPELLATE CASE NO. 2015-000431

FINAL BRIEF OF RESPONDENT

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ATTORNEY FOR RESPONDENT

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ISSUE PRESENTED

Appellant's Statement of the Issue

Did the circuit court judge abuse his discretion and commit a reversible legal error by dismissing the indictment for first-degree burglary prior to trial when the grand jury issued a facially-valid indictment for first-degree burglary in Respondent's case, and Respondent's actions supported an indictment for first-degree burglary in violation of S.C. Code Ann. § 16-11-311?

Respondent's Counterstatement of the Issue

Whether the trial judge properly quashed the indictment for first-degree burglary because, as a matter of law, the shed allegedly burglarized by respondent was not appurtenant to the dwelling because it was located on a different parcel of land owned by someone other than the victim?

STATEMENT

On March 20, 2014, a York County grand jury indicted respondent for criminal conspiracy, grand larceny, and first-degree burglary. R. 60-67. On April 17, 2014, the grand jury issued an amended indictment for first-degree burglary. R. 64-65. The State called the case to trial on January 26, 2015, before the Honorable Eugene C. Griffith, Jr. R. 4. T. Matthew Hogge and Jessica E. Holland represented the State. R. 4. Philip L. Smith represented respondent. R. 4. Judge Griffith quashed the State's first-degree burglary indictment and gave the State the opportunity to go forward on second-degree burglary. R. 51, l. 8 – 56, l. 17. The hearing concluded without any decision on whether the State would go forward. R. 55, l. 5 – 56, l. 21.

Nine days later, the State served its notice of appeal. R. 57. The next day, the Attorney General sent a letter to the Court of Appeals stating the solicitor had filed a post-trial motion and asking this Court to hold all deadlines in abeyance. R. 59. On February 6, 2015, the solicitor filed in circuit court a "Post-Trial Motion." R. 1. On November 9, 2015, Judge Griffith entered a written order denying the State's motion. R. 3. The next day, the State served another notice of appeal. R. 58.

ARGUMENT

The trial judge properly quashed the indictment for first-degree burglary because, as a matter of law, the shed allegedly burglarized by Respondent was not appurtenant to the dwelling because it was located on a different parcel of land owned by someone other than the victim.

In this case, the Court must decide how far the State may stretch the meaning of the word “dwelling” in our first-degree burglary statute. See S.C. Code Ann. § 16-11-311(A). The definition of “dwelling” turns on the meaning of “appurtenant.” See S.C. Code Ann. § 16-11-310(2) (defining “dwelling”) and § 16-11-10 (defining “dwelling house”). Judge Griffith concluded, as a matter of law, that the State could not overextend the meaning of “dwelling” to include a shed owned by someone other than the alleged victim and situated on a separate parcel of land from the house where the alleged victim slept. R. 47, l. 25 – 48, l. 19. R. 51, l. 8 – 52, l. 10. As a result of his ruling, Judge Griffith quashed the indictment for first-degree burglary but offered the State the opportunity to proceed on second-degree burglary. R. 52, l. 22 – 56, l. 21. The State declined and filed a notice of appeal. R. 57.

The Only Question Before This Court is One of Statutory Interpretation

In its brief, the State attempts to move the discussion away from Judge Griffith’s interpretation of “dwelling” and describes his ruling as passing on the sufficiency of the evidence. This Court should ignore this portion of the State’s argument. First, Judge Griffith’s ruling is a legal interpretation and the only facts necessary to his decision were those available in the public records of land ownership, of which there was no dispute by the State. The defense provided the court with the land records showing the burgled shed was on a different parcel than the house where the alleged victim slept. R. 70 – 72. At no point did the State dispute that

someone else owned the shed, but made a legal argument that ownership did not matter. R. 45, l. 25 – 46, l. 13.

At the hearing, the State never contended that the question was not one of legal interpretation. R. 47, l. 25 – 56, l. 20. Judge Griffith asked, “Does anybody suggest it’s a factual question?” R. 48, ll. 8 – 9. The defense replied that it was not. R. 48, l. 10. The State did not make any argument that it was a factual question and after Judge Griffith announced that he was reading the cases cited by the parties, the solicitor told the court, “That’s all the state has, Your Honor.” R. 48, ll. 8 – 19.

The next morning, the solicitor made a legal argument that the shed was “appurtenant” to the house. R. 50, l. 8 – 51, l. 7. Judge Griffith disagreed, and ruled that the shed could not be appurtenant to the house because it was owned by somebody else and on a different parcel from the residence. R. 51, l. 8 – 52, l. 10. During his ruling, Judge Griffith noted that he asked the parties whether it “was a factual question” and stated his conclusion that it was a “legal issue.” R. 51, ll. 18 – 21.

Nine days after the conclusion of the hearing, the State filed its notice of appeal. R. 57. The next day, the Attorney General wrote a letter to this Court asking that its deadlines be placed in abeyance because the solicitor filed a post-trial motion. R. 59. That same day, February 6, 2015, the solicitor filed in circuit court a “Post-Trial Motion.” R. 1. In its post-trial motion, for the first time, the State contended that Judge Griffith had improperly ruled on the sufficiency of the evidence. R. 1. The State admitted in the post-trial motion that the shed sat on a parcel owned by someone else other than the alleged victim. R. 1.

At the hearing, it was the State, not respondent, who called Callahan to testify about whether the shed was used as a business. Regardless, whether the shed was used as a business is

irrelevant to Judge Griffith's ruling that the shed could not be appurtenant because it was on a separate piece of property. R. 3. R. 51, l. 8 – 52, l. 10. Accepting the State's argument that Judge Griffith improperly passed on the sufficiency of the evidence would unnecessarily avoid a legal ruling on uncontested facts and force the defendant to defend a much more severe charge that is not legally cognizable. This Court should ignore the State's diversionary arguments concerning the sufficiency of the evidence and focus squarely on the purely legal question concerning interpretation of the first-degree burglary statute.

"Dwelling" and "Appurtenant"

Judge Griffith correctly recognized that whether the State's indictment was sufficient turned on the definitions of "dwelling" and "appurtenant." The first-degree burglary statute requires entry of a "dwelling." S.C. Code Ann. § 16-11-311(A). Defining "dwelling," the burglary statute incorporates the ancient definition of "dwelling house" found in the general provisions of Title 16, Chapter 11. S.C. Code Ann. § 16-11-310(2). S.C. Code Ann. § 16-11-10. The definition of "dwelling house" found in section 16-11-10 controls the outcome of this case.

Section 16-11-10 states in full:

With respect to the crimes of burglary and arson and to all criminal offenses which are constituted or aggravated by being committed in a dwelling house, any house, outhouse, apartment, building, erection, shed or box in which there sleeps a proprietor, tenant, watchman, clerk, laborer or person who lodges there with a view to the protection of property shall be deemed a dwelling house, and of such a dwelling house or of any other dwelling house **all houses, outhouses, buildings, sheds and erections which are within two hundred yards of it and are appurtenant to it or to the same establishment of which it is an appurtenance shall be deemed parcels.**

S.C. Code Ann. § 16-11-10 (emphasis added). For an outbuilding, like the one at issue here, to qualify as part of a dwelling house, it must meet two requirements. *Id.* First, it must be within 200 yards of the property where the victim sleeps. *Id.* Second, the outbuilding must be

“appurtenant” to the property where the victim sleeps. Id. No dispute exists that the outbuilding in this case is within 200 yards of where the alleged victim sleeps; therefore, the scope of “appurtenant” controls. State v. Evans, 18 S.C. 137, 139 (1882) (holding that distance requirement and appurtenance requirement are distinct and both must be met). In Evans, the Court’s interpretation of the statute was that it “required two things as essentially necessary to constitute the new statutory offense; the out-house in which the offense is committed must be within two hundred yards of the dwelling-house and appurtenant to it.” Id.

Respondent agrees with the State’s conclusion from its research that South Carolina’s courts have never addressed the issue of whether an outbuilding on a separate parcel belonging to another owner meets the definition of “appurtenant.” Brief of Appellant at 10. In Evans, the Court described the codification of the common law offense of burglary which used the term “curtilage.” Id. at 139-40. The Court noted that the statute dropped the word “curtilage” in favor of the distance requirement and the appurtenance requirement. Id.

The closest case to the one at bar appears to be State v. Sampson, 12 S.C. 567 (1880). In Sampson, the defendant was charged with burglarizing a mill-house located 75 yards from the dwelling house. Id. at 568. The mill-house was “on the opposite side of a public road, and was not inclosed. No one slept in it.” Id. Applying the burglary statute, the Court said:

Now, in order to bring this mill-house within the terms of this statute, it is not sufficient to show that it is situated within two hundred yards of the dwelling-house, but it must also appear that it is an appurtenance of the dwelling-house, or of the establishment of which the dwelling-house is itself an appurtenance. Of this there is no evidence whatever. It does not appear that the dwelling-house of the prosecutor was the appurtenance of a farm or plantation of which the mill was a part and parcel, nor does it appear what the character of the mill was, whether a merchant-mill or an ordinary mill attached to and forming a parcel of a farm or plantation.

Id. at 569-70.

In Sampson, even though the victim owned the dwelling house and the mill-house, they were not appurtenant because of the physical separation of a public road, which of course includes a legal boundary or legal separation because of the public's right of way in the road. Here, the dwelling-house and the shed were separated by the legal boundaries demarcating ownership. They were on separate parcels. If, as in Sampson, a dwelling-house and a mill-house separated by a public highway, but owned by the same person, were not appurtenant, then here a shed owned by somebody else and on a separate parcel cannot be appurtenant.

The State argues that Judge Griffith's "clearly erroneous" approach "would lead to an absurd result where residences and their adjoining buildings could be burglarized without significant consequence, so long as the possessor was not the titled owner." Brief of Appellant at 14. Respondent replies that it will be the rare case that an owner of a home will not also own the adjoining buildings where he keeps his belongings. The absurd result would be a defendant convicted of first-degree burglary for robbing a business without realizing that the owner lived on a separate nearby parcel.

The PCR case of Padgett v. State supports the proposition that separate parcels means that second-degree burglary is the proper offense. 324 S.C. 22, 484 S.E.2d 101 (1997). In Padgett, the first-degree burglary indictment alleged the defendant broke into the dwelling of a man named Richardson. Id. at 28-29, 484 S.E.2d at 104. In fact, the building was a barn where no one lived. Id. The opinion notes that "there were no other buildings on the premises." Id. The Court held trial counsel ineffective for failing to challenge the indictment, stating that "counsel did not recognize a distinction between Richardson's barn and a dwelling for first degree burglary purposes." Id. Like in Padgett, without any other buildings where the victim slept on the same parcel, the charge should have been second-degree burglary. Padgett also

supports the trial court taking action in a motion to quash because the Court held trial counsel ineffective for failing to challenge the indictment.

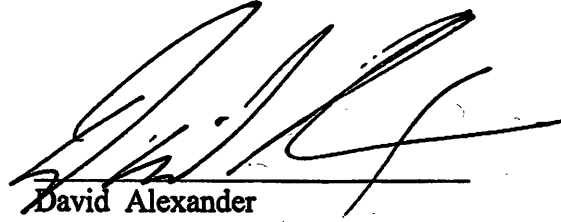
While the State is correct that one does not have to be the titled property owner to be a victim of burglary, here we are not dealing with whether Mr. Callahan was a victim of burglary, but whether the scope of the first-degree burglary statute includes parcels legally separate from the victim's dwelling. None of the cases cited by the State for the proposition that ownership is irrelevant dealt with the question of separate parcels. In State v. Singley, the defendant claimed he could not be charged with burglary of a home in which he jointly owned. 392 S.C. 270, 272-73, 709 S.E.2d 603, 604 (2011). In State v. Brooks, the defendant challenged the indictment because it did not say which felony he intended to commit in the house. 277 S.C. 111, 112-13, 283 S.E.2d 830, 831 (1981). In State v. Clamp, the defendant was charged with breaking into a house, not an outbuilding, and raised on appeal that the State failed to prove the victim owned the premises. 225 S.C. 89, 101, 80 S.E.2d 918, 923-24 (1954). The Court ruled that the victim's ownership of the house was irrelevant because she clearly occupied the premises. Id. In State v. Alford, the defendant was charged with housebreaking, not burglary, for breaking into a storehouse and the Court reversed because of a variance between the indictment and the proof at trial. 142 S.C. 43, 140 S.E.2d 261 (1927). In State v. Trapp, a case from 1882, the defendant claimed that even though the indictment alleged he burgled the house of Mrs. Trapp who was property's legal owner, it was insufficient because it should have alleged that her husband was the legal owner because of sexist notions of property existing at the time. 17 S.C. 467 (1882). Even in 1882, this argument was rejected. Id. None of these cases expand the definition of "appurtenant" in the manner suggested by the State.

The State likely realized its case was problematic when it obtained an amended indictment. R. 64-65. The State's original indictment for first-degree burglary alleged respondent "did . . . willfully and unlawfully enter the outbuilding appurtenant to and within 200 yards of the dwelling of Kristopher Callahan. . . ." R. 62-63. The State reworded its second indictment to say respondent "did . . . willfully and unlawfully enter the dwelling of Kristopher Callahan, when he entered without consent the outbuilding appurtenant to and within 200 yards of the dwelling house establishment of Kristopher Callahan." R. 64-65. The rewording of the indictment demonstrates that, before trial, the State already had concerns about whether its indictment was legally sufficient.

Judge Griffith properly recognized that an outbuilding cannot be appurtenant to a dwelling if it is situated on a distinct and separate parcel owned by someone other than the victim. Penal statutes must be strictly construed against the State. State v. Blackmon, 304 S.C. 270, 273, 403 S.E.2d 660, 662 (1991) ("Finally, when a statute is penal in nature, it must be construed strictly against the State and in favor of the defendant."). This Court should not expand the definition of first-degree burglary to include buildings owned by people other than the victim and located on a separate parcel of land.

CONCLUSION

For the foregoing reasons, this Court should affirm.

A handwritten signature in black ink, appearing to read 'David Alexander', is written over a horizontal line.

David Alexander
Appellate Defender

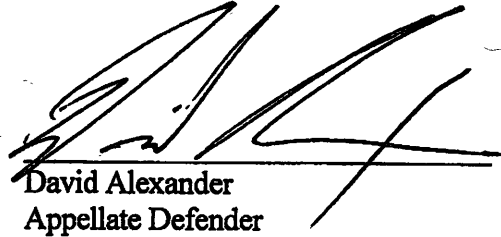
ATTORNEY FOR RESPONDENT

This 23rd day of February, 2017.

CERTIFICATE OF COUNSEL FOR APPELLANT

The undersigned certifies that to the best of my ability the Final Brief complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

February 23, 2017



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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from York County

Honorable Eugene C. Griffith, Circuit Court Judge

THE STATE,

APPELLANT,

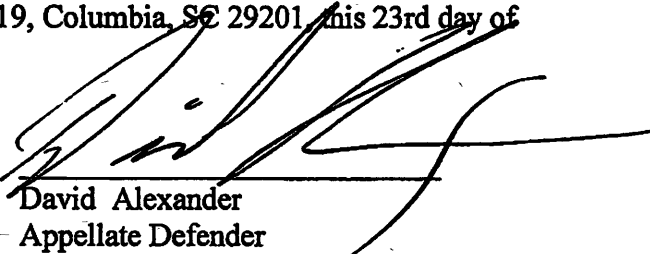
V.

JOHN KENNETH MASSEY JR.,

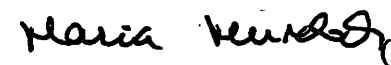
RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Final Brief of Respondent in the above referenced case has been served upon Megan Harrigan Jameson, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 23rd day of February, 2017.


David Alexander
Appellate Defender
ATTORNEY FOR RESPONDENT

SUBSCRIBED AND SWORN TO before me
this 23rd day of February, 2017.


(L.S)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State, Appellant,

v.

John Kenneth Massey, Jr., Respondent.

Appellate Case No. 2015-000431

Appeal From York County
Eugene C. Griffith, Jr., Circuit Court Judge

Opinion No. 5630
Submitted June 1, 2018 – Filed February 27, 2019

AFFIRMED

Attorney General Alan McCrory Wilson and Senior
Assistant Deputy Attorney General Megan Harrigan
Jameson, of Columbia; and Solicitor Kevin S. Brackett,
of York, all for Appellant.

Appellate Defender David Alexander, of Columbia, for
Respondent.

MCDONALD, J.: The State challenges the circuit court's pre-trial dismissal of John Kenneth Massey, Jr.'s first-degree burglary indictment, arguing the circuit court lacked authority to quash the indictment because evidence existed to support the charge. We affirm.

Facts and Procedural History

Kristopher Callahan (Victim) used a building on his uncle's property in Rock Hill for storage. Victim lived with his parents next door to the property; his parents' home is approximately forty-five feet away from the storage building.

Massey was arrested following the theft of a four-wheeler from the storage building. The York County grand jury indicted Massey for criminal conspiracy, first-degree burglary, and grand larceny. The first-degree burglary indictment alleged Massey entered "the outbuilding appurtenant to and within 200 yards of the dwelling of [Victim]." However, the grand jury later issued an amended indictment, which simply stated Massey entered "the dwelling of [Victim]."

Massey moved to quash the first-degree burglary indictment, arguing the storage building was not appurtenant to Victim's residence because it was on a separate parcel of land, and it was used for Victim's business, not as a dwelling.

Victim testified the land in the area was "family land," once owned by his grandfather, who gave his parents five acres to build the home in which Victim resides. Victim claimed his mother inherited the surrounding property upon her grandfather's death, but it was never titled in her name because "it's just family land. There's no need to change the land over. So we just left it in the farm name, which is . . . my uncle, Bill."

Although Victim runs a business from the family property, he testified he did not use the storage building for business operations, stating, "I operate a waterproofing and grading company We meet there at the—at the land in the mornings. And from there we, you know, go off to our jobs." Victim explained that the sign for "Callahan Waterproofing & Construction" listing his business's contact information on the exterior of the storage building was "to just, you know, display [his] name." Although Victim admitted he used the building to "work on stuff" related to his business, he claimed the tools do not leave the storage building when he goes to a job site. Victim further testified he and his father primarily use the storage building for belongings such as four-wheelers, boats, and tools.

The State argued the storage building was appurtenant to the family dwelling because it was within two hundred feet of Victim's residence. Under the State's theory, Uncle Bill's ownership of the land was irrelevant because burglary is a crime against possession and habitation, not ownership.

The circuit court granted Massey's motion to quash the indictment, noting Victim did not own either parcel of land or the storage building bearing the name of his

business. The circuit court explained that although the storage building was in close proximity to Victim's parents' home, it was on a separate piece of property and titled in someone else's name. The court elaborated, "that building is an outbuilding. It's a—looks like a butler building to me. And [] has a sundry of things in it. And I just don't believe it's appurtenant to the residence owned by the victim's parents, factually." Thus, the proper charge was not burglary first, but burglary second.

The State subsequently moved to set aside the quashing of the first-degree burglary indictment; the circuit court denied the State's motion.

Standard of Review

"In criminal cases, the appellate court sits to review errors of law only." *State v. Pulley*, 423 S.C. 371, 376-77, 815 S.E.2d 461, 464 (2018) (quoting *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006)). The appellate court "is bound by the trial court's factual findings unless they are clearly erroneous." *Id.* However, "[q]uestions of statutory interpretation are questions of law, which are subject to de novo review and which we are free to decide without any deference to the court below." *State v. Whitner*, 399 S.C. 547, 552, 732 S.E.2d 861, 863 (2012).

Law and Analysis

The State argues the circuit court erred in dismissing the first-degree burglary indictment because it alleged the necessary elements of first-degree burglary and sufficiently apprised Massey of the allegations he would face at trial. Under the State's theory, the Building's "appurtenance to" Victim's residence, satisfied the "dwelling" requirement of the first-degree burglary statute. *See* S.C. Code Ann. § 16-11-311 (2015). We disagree.

"A person is guilty of burglary in the first degree if the person enters a dwelling without consent and with intent to commit a crime in the dwelling, and . . . the entering or remaining occurs in the nighttime." S.C. Code Ann. § 16-11-311 (2015).

With respect to the crimes of burglary and arson and to all criminal offenses which are constituted or aggravated by being committed in a dwelling house, any house, outhouse, apartment, building, erection, shed or box in which there sleeps a proprietor, tenant, watchman, clerk,

laborer or person who lodges there with a view to the protection of property shall be deemed a dwelling house, and of such a dwelling house or of any other dwelling house all houses, outhouses, buildings, sheds and erections which are within two hundred yards of it and are appurtenant to it or to the same establishment of which it is an appurtenance shall be deemed parcels.

S.C. Code Ann. § 16-11-10 (2015). The Code further defines a "dwelling" as "the living quarters of a building which is used or normally used for sleeping, living, or lodging by a person." S.C. Code Ann. § 16-11-310 (2015).

"The cardinal rule of statutory construction is to ascertain and effectuate legislative intent." *State v. Jacobs*, 393 S.C. 584, 587, 713 S.E.2d 621, 622 (2011) (quoting *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000)). "[A] court must abide by the plain meaning of the words of a statute. When interpreting the plain meaning of a statute, courts should not resort to subtle or forced construction to limit or expand the statute's operation." *Id.* (citation omitted). "The text of a statute is considered the best evidence of the legislative intent or will, and the courts are bound to give effect to the expressed intent of the legislature." *State v. Ramsey*, 409 S.C. 206, 209, 762 S.E.2d 15, 17 (2014).

"Although it is a well-settled principle of statutory construction that penal statutes should be strictly construed against the state and in favor of the defendant, courts must nevertheless interpret a penal statute that is clear and unambiguous according to its literal meaning." *Jacobs*, 393 S.C. at 587, 713 S.E.2d at 623 (citation omitted).

The South Carolina Code does not define "appurtenant" for the purposes of first-degree burglary. Black's Law Dictionary defines appurtenant as "[a]nnexed to a more important thing." *Appurtenant*, Black's Law Dictionary (10th ed. 2014). Annex is defined as "[s]omething that is attached to something else, such as a document to a report or an addition to a building." *Annex*, Black's Law Dictionary (10th ed. 2014).

In discussing the common law offense of burglary, our supreme court has explained:

It was long ago held in this State that "a house to be parcel of the mansion-house, must be somehow

connected with or contributory to it, such as a kitchen, smoke-house or such other as is usually considered as a necessary appendage of a dwelling-house. It cannot embrace a store, blacksmith shop, or any other building separate from it and appropriated to another and a distinct use."

State v. Evans, 18 S.C. 137, 140 (1882) (quoting *State v. Ginns*, 10 S.C.L. (1 Nott & McC.) 583, 585 (1819)).

Initially, we note the State argues for the first time on appeal that the circuit court lacked authority to quash the indictment. When Massey moved to quash the indictment, the State argued it did not matter that Victim's uncle owned the storage building parcel because burglary is a crime of possession, not a crime of ownership. The State did *not* argue that the circuit court lacked authority to quash the indictment. Therefore, we find this argument unpreserved. *See State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693–94 (2003) ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge. Issues not raised and ruled upon in the trial court will not be considered on appeal.").

Applying the plain language of section 16-11-10 establishes that the storage building is not a dwelling for the purposes of our first-degree burglary statute. To fall under the first-degree burglary statute, a structure must be within 200 yards of a dwelling *and* appurtenant to it. S.C. Code Ann. § 16-11-10; *see also Evans*, 18 S.C. at 139 (finding a burglary indictment insufficient when it failed to allege a gin house, within the curtilage of a dwelling, was both within 200 yards of the dwelling *and* appurtenant to it). We find a storage building unattached to a residence and located on a separate parcel of land is not "usually considered as a necessary appendage of a dwelling-house." *Evans*, 18 S.C. at 140. The storage building here is separate from Victim's dwelling and "appropriated to another and a distinct use"—as reflected by the commercial signage and Victim's storage of his business tools there. Further, as there was no evidence that the storage building was used as a dwelling or was in any way "annexed to" or "attached to" the home, the circuit court correctly quashed Massey's first-degree burglary indictment.

Conclusion

The decision of the circuit court is

AFFIRMED.¹

HUFF and GEATHERS, JJ., concur.

¹ We decide this case without oral argument pursuant to Rule 215, SCACR

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from York County
Honorable Eugene C. Griffith, Jr., Circuit Court Judge
Appellate Case No. 2015-000431

THE STATE,

Appellant,

vs.

JOHN KENNETH MASSEY, JR.,

Respondent.

RESPONDENT'S PETITION FOR REHEARING

On February 27, 2019, this Court issued a published opinion affirming the circuit court judge's pre-trial dismissal of a facially-valid indictment for first-degree burglary based on the purported insufficiency of the evidence the State intended to introduce during trial. State v. Massey, Op. No. 5630 (Ct. App. filed Feb. 27, 2019) (Shearouse Adv. Sh. No. 9 at 103). In affirming the circuit court judge's pre-trial dismissal of the indictment, this Court held the State's argument that the circuit court judge lacked authority to quash the facially-valid indictment pre-trial was "argue[d] for the first time on appeal" and "[t]herefore, . . . unpreserved." This Court further held, "[a]pplying the plain language of section 16-11-10 established the storage building was not a dwelling for the purposed of our first degree burglary statute" and, based on that finding, determined the circuit court judge correctly quashed Massey's first-degree burglary indictment. Pursuant to Rule 221(a), SCACR, and contemporaneously with the filing of a motion

to depublish, Appellant, the State, respectfully petitions for rehearing because the State believes this Court misapprehended and overlooked several key arguments before this Court. First, this Court misapprehended and overlooked the State's argument before the circuit court judge that he did not have the authority to quash the facially-valid indictment based on a lack of evidentiary support presented pre-trial, as this argument was made to and ruled upon by the circuit court judge as opposed to being argued for the first time on appeal as this Court's opinion holds. Second, this Court misapprehended and overlooked that the circuit court judge did not have the authority to quash the facially-valid indictment pre-trial based on a lack of evidentiary support. Third, this Court misapprehended and overlooked the evidence presented establishing the building in question, which was located less than fifty feet from the victim's home and used exclusively for the storage of personal items, met the statutory requirements for a first-degree burglary charge.

This Court misapprehended and overlooked the State's argument before the circuit court judge that he did not have the authority to quash the facially-valid indictment pre-trial based on sufficiency of evidence grounds.

In seeking rehearing, the State initially submits this Court's finding that the State did not present its argument that the circuit court judge lacked authority to quash the facially-valid indictment pre-trial is not supported by the record. The State did indeed present this argument to the circuit court judge and the circuit court judge expressly ruled on the merits of this argument. (R. 1-2). Specifically, in its post-trial motion, the State argued,

A motion to quash is appropriate when there exist "defects apparent on the face" of an indictment. S.C. Code Ann. § 17-19-90. Such a motion cannot be used to challenge the sufficiency of the State's evidence, which is an issue properly addressed through a motion for a directed verdict. See State v. Garrett, 305 S.C. 203, 206, 406 S.E.2d 910, 911 (Ct. App. 1991) ("A motion to quash an indictment addresses the sufficiency of an indictment, not the

sufficiency of the State's evidence."), overruled on other grounds by State v. Ramsey, 311 S.C. 555, 430 S.E.2d 511 (1993).

(R. 1). Furthermore, beyond presenting the argument, the circuit court judge ruled upon merits of the argument in his written "Order Denying State's Post-Trial Motion," finding,

The State moved on February 5, 2015, to set aside this Court's order quashing indictment number 2014-GS-46-00781 for burglary in the first degree, arguing that Defense's motion to quash and the Court's granting of the motion constituted an error of law as a motion to quash cannot be used to challenge the sufficiency of the State's evidence. The State also incorporated in its motion all of its previous pre-trial arguments made on the record. The Court holds the State's arguments to be without merit. [. . .]

(R. 3). Accordingly, the matter was, in fact, raised to and ruled upon by the circuit court judge.

The rules of preservation serve three important functions, allowing the trial court an opportunity to rule on the issue after full and complete argument, enabling the trial court to prevent or cure any potential errors, and providing a record for meaningful appellate review. See e.g., State v. Torrence, 305 S.C. 45, 66, 406 S.E.2d 315, 327 (1991) (finding South Carolina's preservation and objection requirements enable judges to make reasoned decisions by fully developing issues and allow "potential errors to be prevented or cured."); Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006) (explaining the key purpose of South Carolina's issue preservation requirements is "to give the trial court a fair opportunity to rule on the issues, and thus provide [the appellate court] with a platform for meaningful appellate review.").

Under the unique circumstances of this case, the underlying purposes of the South Carolina issue preservation requirements were met in Massey's case when the State raised its argument regarding the lack of authority for the circuit court judge to quash the indictment pre-trial based on the sufficiency of the evidence. The circuit court judge was presented a full

argument on the issue and took the opportunity to rule on the merits of the issue. Further, because the motion and ruling occurred pre-trial, the circuit court judge could still cure any error committed by his prior ruling by considering and ruling on the State's motion. Finally, this Court has a clear platform on which to review the actions of the circuit court judge and its ruling on all motions before it. Therefore, this Court should have addressed the merits of the State's argument regarding the circuit court judge's lack of authority to quash the indictment on sufficiency of the evidence grounds just as the circuit court judge did.

This Court misapprehended and overlooked that the circuit court judge did not have the authority to quash the facially-valid indictment pre-trial based on sufficiency of the evidence grounds.

In seeking rehearing, the State respectfully submits this Court erred in refusing to address the merits of whether the circuit court judge lacked authority to quash the facially-valid indictment pre-trial based on a lack of evidentiary support.

In the present case, Massey was indicted by the York County Grand Jury for first-degree burglary. The first-degree burglary indictment issued by the grand jury identified Massey's offense as a violation of S.C. Code Ann. § 16-11-311 based on his action of "willfully and unlawfully enter[ing] the outbuilding appurtenant to and within 200 yards of the dwelling . . . located at . . . Parris Road in Rock Hill, South Carolina, without consent and with the intent to commit the crime of larceny therein . . . during the nighttime hours . . ." (R. 60-67). On April 17, 2014, the York County Grand Jury issued an amended indictment against Massey for first-degree burglary, slightly modifying the language of the original indictment to include that Massey "willfully and unlawfully enter[ed] the dwelling . . . when he entered without consent the outbuilding appurtenant to and within 200 yards of the dwelling house establishment." (R. 64-65).

Pursuant to S.C Code Ann. § 16-11-311(A)(3), “[a] person is guilty of burglary in the first degree if the person enters a dwelling without consent and with intent to commit a crime in the dwelling, and . . . the entering or remaining occurs in the nighttime.” “With respect to the crime[] of burglary . . . and to all criminal offenses which are constituted or aggravated by being committed in a dwelling house, any house, outhouse, apartment, building, erection, shed or box in which there sleeps a proprietor, tenant, watchman, clerk, laborer or person who lodges there with a view to the protection of property shall be deemed a dwelling house, and of such a dwelling house or of any other dwelling house **all houses, outhouses, buildings, sheds and erections which are within two hundred yards of it and are appurtenant to it or to the same establishment of which it is an appurtenance shall be deemed parcels.**” S.C. Code Ann. § 16-11-10 (emphasis added).

Massey, as alleged in the first-degree burglary indictment, entered the victim’s garage within two hundred yards of his dwelling house during the nighttime hours with the intent to commit larceny. (R. 60-67). Significantly, the indictment contained the necessary elements of the offense of first-degree burglary and sufficiently apprised Respondent of what allegations he was facing. See State v. Crenshaw, 274 S.C. 475, 477, 266 S.E.2d 61, 62 (1980) (explaining an indictment is sufficient if “the offense is stated with sufficient certainty and particularity to enable the court to know what judgment to pronounce, the defendant to know what he is called upon to answer, and acquittal or conviction to be placed in bar to any subsequent conviction”); State v. Smalls, 336 S.C. 301, 307, 519 S.E.2d 793, 796 (“[T]he true test of an indictment’s validity is not whether it could be made more definite and certain, but whether it contains the necessary elements of the offense intended to be charged and sufficiently apprises the defendant of what he must be prepared to meet.”); see also S.C. Code Ann. § 17-19-20 (“Every indictment

shall be deemed and judged sufficient and good in law which, in addition to allegations as to time and place, as required by law, charges the crime substantially in the language of the common law or of the statute prohibiting the crime or so plainly that the nature of the offense charged may be easily understood and, if the offense be a statutory offense, that the offense be alleged to be contrary to the statute in such case made and provided.”).

Under these circumstances, the indictment issued by the grand jury was facially valid and sufficient, and the circuit court judge had no authority to dismiss the indictment prior to trial. See United States v. Mills, 995 F.2d 480, 487 (4th Cir. 1993) (“The longstanding rule of law that courts may not ‘look behind’ grand jury indictments if ‘returned by a legally constituted and unbiased grand jury . . .’ is the touchstone for any inquiry into the legality of indictments.”) (quoting Costello v. United States, 350 U.S. 359, 363 (1956)); State v. Needs, 333 S.C. 134, 146, 508 S.E.2d 857, 863 (1998) (“[A] trial court generally has no power to dismiss a properly drawn indictment issued by a properly constituted grand jury before trial unless a statute grants that power to the court.” (emphasis added)); State v. Garrett, 305 S.C. 203, 206, 406 S.E.2d 910, 911 (Ct. App. 1991) (“A motion to quash an indictment addresses the sufficiency of the indictment, not the sufficiency of the State’s evidence.”), overruled on other grounds by State v. Ramsey, 311 S.C. 555, 430 S.E.2d 511 (1993).

Massey himself appeared to concede that this was a facially valid indictment to the circuit court, arguing the first degree burglary indictment was “correctly in line with the statute but . . . [was] faulty with regards to the facts of this case. . . . And therefore, burglary-first would not be an appropriate charge for this case.” (R. 35-36). Accordingly, because the first-degree burglary indictment was facially-valid, the circuit court had no authority to quash the indictment.

Despite the fact the indictment was facially valid and sufficient, the circuit court judge in Massey's case agreed with defense counsel's argument, granted Massey's motion, and dismissed the first-degree burglary indictment issued by the grand jury. Critically, that ruling constituted reversible error. The circuit court judge had no authority whatsoever to dismiss the facially-valid indictment issued by the grand jury in light of the fact a pre-trial challenge to an indictment cannot be used to challenge the sufficiency of the State's evidence. See Needs, 333 S.C. at 146, 508 S.E.2d at 863 (explaining a trial judge ordinarily has no power to dismiss a properly drawn indictment prior to trial absent some statutory authority permitting the trial judge to do so); State v. Sweat, 221 S.C. 270, 272, 70 S.E.2d 234, 235 (1952) (holding a motion to quash the indictment raised on the ground the victims identified in the indictment did not actually own the property stolen was properly denied because the indictment was facially valid and because the motion—if treated as a motion for a directed verdict since it went to the sufficiency of the evidence—was out of order and premature); see also United States v. Guerrier, 669 F.3d 1, 3-4 (1st Cir. 2011) (“[C]ourts routinely rebuff efforts to use a motion to dismiss as a way to test the sufficiency of the evidence behind an indictment’s allegations[.] . . . [I]n the ordinary course of events, a technically sufficient indictment handed down by a duly empaneled grand jury ‘is enough to call for trial of the charge on the merits.’ ” (citations omitted)); United States v. Redcorn, 528 F.3d 727, 733 (10th Cir. 2008) (“[A] challenge to the indictment is not a vehicle for testing the government’s evidence.”); Gibson v. United States, 244 F.2d 32, 34 (4th Cir. 1957) (holding a pre-trial challenge to an indictment can only be made in respect to the validity of the indictment itself and not in respect to whether the facts of the case support the allegations in the indictment, which is an issue to be raised during trial). As a result, the State respectfully submits this Court should reach the merits of this issue and determined the circuit court judge

erred in dismissing the facially-valid indictment pre-trial based on evidentiary concerns when he had no authority to do so.

This Court misapprehended and overlooked the evidence presented establishing the burglarized building met the statutory requirements for first-degree burglary charge to be warranted.

Notwithstanding any issue preservation concerns, the State respectfully submits in seeking rehearing that this Court erred by affirming the judge's lawless ruling on the sufficiency of the evidence on the merits and appears to have erroneously applied an "any evidence" to support the ruling standard of review rather than viewing the evidence in the light most favorable to the non-moving party as required.

Pre-trial, Massey moved to quash the first-degree burglary indictment based on the ground that the facts of the case did not comport with the requirements of S.C. Code Ann. § 16-11-311. (R. 33-36). Specifically, Massey argued the building subject to the burglary was a place of business instead of a dwelling, was not appurtenant to the dwelling, and was owned by someone other than the victim listed on the indictment. (R. 33-36). Massey argued the first-degree burglary indictment was facially-valid but should be quashed based on the sufficiency of the evidence. (R. 35-36).

In response, the State proffered the testimony of Kristopher Callahan, the victim listed in the indictment. (R. 36). Callahan testified he lives at the Paris Road home with his parents and a family friend. (R. 39). He testified the garage subject to the indictment is "roughly 45/48 feet" from his house. (R. 39). He explained the land the home is on was originally owned by his grandfather along with the adjacent property on which the garage sits. (R. 39-40). He testified his grandfather parceled off five-acres of land when his parents got married to build a home, which is where the Paris Road home is located. (R. 39-40). He testified the land on which the garage

sits was deeded to his uncle, William Russell, Sr., after his grandfather died, but the property is owned and used jointly by the family. (R. 40). Callahan testified he exclusively uses the garage for personal storage of various items, including his four-wheelers, boats, tools, appliances, and beds. (R. 37-38). He testified he owns a small waterproofing and grading company and the employees meet at the land where the garage sits in the mornings, but stressed that the garage is for personal use—not business. (R. 37-38, 40-42). He testified the business sign on the garage was made when he sponsored his family friend in a rodeo, and after the rodeo, he hung the sign on the garage to “display his name.” (R. 38-39, 42). He testified the sign is not visible from the road and the public does not enter onto the land to conduct business. (R. 38-39).

Following Callahan’s proffered testimony, the State argued the garage was appurtenant to and within the required two hundred yards of Callahan’s residence, thereby satisfying the “dwelling” requirement pursuant to S.C. Code Ann. § 16-11-311 and § 16-11-10. (R. 43-45). Additionally, the State argued that “burglary is a crime against possession and cohabitation, not a crime against ownership[,]” and therefore, it is irrelevant that the parcel of land on which the garage sits is owned by someone other than Callahan. (R. 45-46). In reply, Massey reiterated his previous arguments, asserting the garage was used for business purposes and was not appurtenant to Callahan’s residence. (R. 46-47).

Because the circuit court judge was asked to quash the indictment based on the sufficiency of the evidence, the motion was akin to a motion for a directed verdict. The correct standard that must be applied to sufficiency of the evidence challenges was viewing the evidence in the light most favorable to the non-moving party—the State. See State v. Bennett, 415 S.C. 232, 236–37, 781 S.E.2d 352, 354 (2016) (“[W]hen ruling on a directed verdict motion, the trial court views the evidence in the light most favorable to the State and must submit the case to the

jury if there is 'any substantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced.' "). This is the same standard this Court necessarily apply on appellate review. See State v. Pearson, 415 S.C. 463, 470, 783 S.E.2d 802, 806 (2016) (citing State v. Butler, 407 S.C. 376, 381, 755 S.E.2d 457, 460) (noting that when reviewing a circuit court judge's ruling on the sufficiency of the evidence on appellate review, an appellate court must the evidence and all reasonable inferences in the light most favorable to the State).

Here, the circuit court judge committed reversible legal error by improperly dismissing the first-degree burglary indictment because the evidence in Massey's case when considered in the might most favorable to the State supported an indictment for first-degree burglary. Based on the direct evidence presented to the circuit court judge, it is clear Massey entered a garage used exclusively by Callahan for personal storage within fifty feet of Callahan's residence during nighttime hours with the intent to commit larceny, thereby satisfying the requirements of S.C. Code Ann. § 16-11-311. The circuit court judge's ruling is based on several clear errors of law. Initially, the circuit court judge's finding Callahan's lack of ownership of the parcel of land on which the garage sits warrants dismissal of the first-degree burglary indictment is clearly erroneous. See State v. Singley, 392 S.C. 270, 276, 709 S.E.2d 603, 606 (2011) (holding South Carolina burglary laws protect an interest separate and apart from ownership: the right to be safe and secure in one's home). It is of no importance that Callahan was not the titled owner of the property or that the garage parcel was deeded to a separate owner from the dwelling, as the only evidence before the circuit court judge established Callahan was in possession of the garage and the home. Adopting the clearly erroneous approach of the circuit court judge would lead to an

absurd result where residences and their adjoining buildings could be burglarized without significant consequence, so long as the possessor was not the titled owner.

Additionally, the circuit court judge's findings that the garage was not used for "sleeping" and that he "just [didn't] believe it's appurtenant to the residence," and therefore, not a dwelling, is also legally erroneous. (R. 51). Callahan's testimony established the garage was less than fifty feet from the home where he and three others permanently resided. Furthermore, a review of the aerial photograph of the two parcels of land with the red demarcation line, introduced as Defendant's Ex. No. 3, shows that the only ingress to the garage from the two adjoining roads is from the driveway of Callahan's dwelling. Moreover, the direct evidence before the circuit court judge established that the garage was solely used by Callahan to store his personal property. Cf. State v. Stone, 350 S.C. 442, 446, 567 S.E.2d 244, 246 (2002) ("The porch leads into and out of the laundry room and is used primarily to store wood and paint cans. . . . We find the screened porch is appurtenant, and is used for the protection of Griffith's property (paint and in finding otherwise. wood) so as to come within the definition of a dwelling."). Based on our Court's previous rulings, the garage was "appurtenant to" the dwelling home as required pursuant to S.C. Code Ann. § 16-11-10. See State v. Langford, 55 S.C. 322, 33 S.E. 370 (1899) (holding a dog house was appurtenant to a dwelling); Branham, 13 S.C. 389 (1880) (holding a smokehouse was appurtenant to a dwelling); State v. Johnson, 45 S.C. 483, 23 S.E. 619 (1896) (holding a hen house was appurtenant even though it was across a public road from the dwelling house).

Therefore, the "dwelling" element of S.C. Code Ann. § 16-11-311 was satisfied and the circuit court judge reversibly erred in dismissing the facially-valid indictment pre-trial where the

evidence presented, viewed in the light most-favorable to the State as required, clearly established the building met the statutory requirements for first-degree burglary.

Conclusion

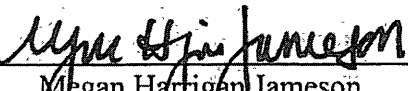
In conclusion, for the foregoing reasons combined with the all the reasons raised in the Final Brief of Appellant, the State respectfully urges this Court to grant rehearing pursuant to Rule 221, SCACR, give the State an opportunity to be heard through oral argument in this unique case, reconsider its decision, and ultimately reverse the ruling of the circuit court judge, reinstate the indictment, and remand the case for trial.

Respectfully submitted,

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Attorney General

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Senior Assistant Deputy Attorney General
S.C. Bar No. 100108

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ATTORNEYS FOR APPELLANT

March 14, 2019

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from York County
Honorable Eugene C. Griffith, Jr., Circuit Court Judge
Appellate Case No. 2015-000431

THE STATE,

Appellant,

vs.

JOHN KENNETH MASSEY, JR.,

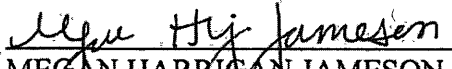
Respondent.

PROOF OF SERVICE

I, Megan Harrigan Jameson, certify that I have served the within Appellant's Petition for Rehearing on Respondent by depositing two copies of the same in the interagency mailbox addressed to:

David Alexander, Esquire
S.C. Commission on Indigent Defense – Appellate Division
PO Box 11589
Columbia, South Carolina 29211

I further certify that all parties required by Rule to be served have been served.
This 14th day of March, 2019.


MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
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IN THE COURT OF APPEALS

Appeal from York County
Honorable Eugene C. Griffith, Jr., Circuit Court Judge
Appellate Case No. 2015-000431

THE STATE,

Appellant,

vs.

JOHN KENNETH MASSEY, JR.,

Respondent.

RESPONDENT'S MOTION TO DEPUBLISH

On February 27, 2019, this Court issued a published opinion affirming the circuit court judge's pre-trial dismissal of a facially-valid indictment for first-degree burglary based on the purported insufficiency of the evidence the State intended to introduce during trial. State v. Massey, Op. No. 5630 (Ct. App. filed Feb. 27, 2019) (Shearouse Adv. Sh. No. 9 at 103). In affirming the circuit court judge's pre-trial dismissal of the indictment, this Court held the State's argument that the circuit court judge lacked authority to quash the facially-valid indictment pre-trial was "argue[d] for the first time on appeal" and "[t]herefore, . . . unpreserved." Despite finding the State's argument that the circuit court judge lacked authority to quash the indictment based on the sufficiency of the evidence was not preserved for this Court's review, this Court then went on to address the merits of the judge's lawless ruling on the sufficiency of the evidence. Contemporaneously with the filing of this motion, Appellant, the State, has petitioned for rehearing pursuant to Rule 221(a), SCACR.

Significantly, both our Supreme Court and this Court have already expressly found that a circuit court judge does not have the authority to quash a facially-valid indictment pre-trial based on the sufficiency of the evidence. See State v. Needs, 333 S.C. 134, 146, 508 S.E.2d 857, 863 (1998) (“[A] trial court generally has no power to dismiss a properly drawn indictment issued by a properly constituted grand jury before trial unless a statute grants that power to the court.” (emphasis added)); State v. Garrett, 305 S.C. 203, 206, 406 S.E.2d 910, 911 (Ct. App. 1991) (“A motion to quash an indictment addresses the sufficiency of the indictment, not the sufficiency of the State’s evidence.”), overruled on other grounds by State v. Ramsey, 311 S.C. 555, 430 S.E.2d 511 (1993). Despite the settled law on that subject, this Court’s published opinion as written affirms the circuit court judge’s lawless decision to quash a facially-valid indictment pre-trial based on sufficiency of the evidence grounds after reaching the merits of the issue solely due to an issue preservation finding. Under those unique circumstances, the State respectfully submits this opinion should be depublished based on a significant likelihood that it can only serve to confuse the bench and bar. Specifically, the opinion could be misconstrued as suggesting circuit court judges in our state can quash a facially-valid indictment—just as the circuit court judge did in Massey’s case—since this Court affirmed the circuit court judge’s ruling doing just that. See Mack v. Lott, 415 S.C. 22, 23, 780 S.E.2d 761 (2015) (directing depublishation for the benefit of the bench and bar due to an arguable lack of clarity on an issue). Accordingly, the State submits depublishation is warranted.

WHEREFORE, the State prays this Court will depublish the opinion in Massey’s case and grant such other and further relief as the Court may deem just and proper.

Respectfully submitted,

ALAN WILSON
Attorney General

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Senior Assistant Deputy Attorney General
S.C. Bar No. 100108

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March 14, 2019

ATTORNEYS FOR APPELLANT

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from York County
Honorable Eugene C. Griffith, Jr., Circuit Court Judge
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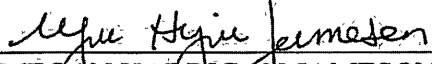
Respondent.

PROOF OF SERVICE

I, Megan Harrigan Jameson, certify that I have served the within Appellant's Motion to Depublish on Respondent by depositing two copies of the same in the interagency mailbox addressed to:

David Alexander, Esquire
S.C. Commission on Indigent Defense – Appellate Division
PO Box 11589
Columbia, South Carolina 29211

I further certify that all parties required by Rule to be served have been served.
This 14th day of March, 2019.


MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

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Post Office Box 11549
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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from York County

Honorable Eugene C. Griffith, Circuit Court Judge

Opinion No. 5630 (Filed February 27, 2019)

THE STATE,

APPELLANT,

V.

JOHN KENNETH MASSEY, JR.

RESPONDENT

APPELLATE CASE NO. 2015-000431

RETURN TO STATE'S MOTION TO DEPUBLISH
AND
PETITION FOR REHEARING

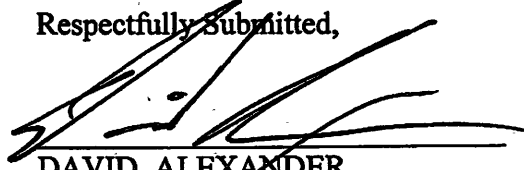
Pursuant to the Court's Order of March 18, 2019, counsel for Respondent hereby files this Return to the State's Motion to Depublish and its Petition for Rehearing. This Court should not depublish its well-reasoned and correct Opinion. This Court publishes opinions on a regular basis and the losing party always disagrees with this Court. The proper channel for a losing party, however, is to file a petition for rehearing and seek reversal at the Supreme Court. Whether to publish an opinion lies within this Court's discretion concerning the development of the common law, which it wisely exercised in favor of publication in this case.

As for the merits of the State's petition for rehearing, the Attorney General persists in the remarkable position that so long as a solicitor correctly cuts and pastes the words of a statute into an indictment, a circuit court judge has no power to prevent a criminal defendant from facing a trial no matter the underlying facts or, as in this case, the purely legal interpretation of the statute and indictment. Surely the State does not possess the nearly unlimited power to haul citizens to trial without judicial review as it claims here. The State simply failed to do its research and overcharged this defendant. Far from making a "lawless" decision, Judge Griffith properly recognized the legal deficiency in the State's charge and correctly ruled on the defendant's motion to quash. And also far from being "lawless," Judge Griffith gave the State the opportunity to proceed on the lesser offense, which it declined so that it could pursue this appeal. R. 51, l. 8 – 56, l. 17.

Furthermore, as the Court noted, the argument about Judge Griffith's power to hear the motion was raised for the first time on appeal and is not preserved. Another reason to keep the Court's Opinion in the ranks of published cases is to remind solicitors that our error preservation rules also apply to them and they have an equal duty to make their record below. The Court

should deny both the motion and the petition and the State may then pursue the normal procedural alternatives available to all losing parties to seek further review should it so desire.

Respectfully Submitted,



DAVID ALEXANDER
Appellate Defender

This 28th day of March, 2019.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from York County

Honorable Eugene C. Griffith, Circuit Court Judge

THE STATE,

APPELLANT,

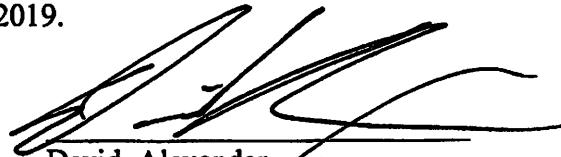
V.

JOHN KENNETH MASSEY, JR.

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Return to Petition for Rehearing in the above-entitled case has been served upon Megan Harrigan Jameson, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and John Kenneth Massey, Jr., #305341, at MacDougall Correctional Institution, 1516 Old Gilliard Road, Ridgeville, SC 29472, this 28th day of March, 2019.



David Alexander
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO BEFORE
ME this 28th day of March, 2019.

Courtney Powers (L.S)
Notary Public for South Carolina
My Commission Expires: May 2, 2027.

The South Carolina Court of Appeals

The State, Appellant,

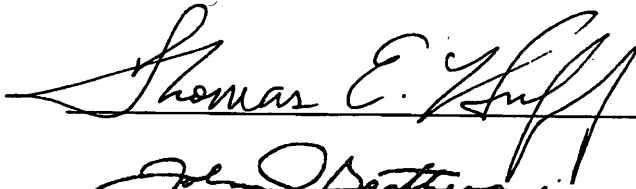
v.

John Kenneth Massey, Jr., Respondent.

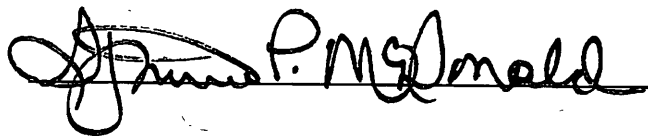
Appellate Case No. 2015-000431

ORDER

After careful consideration, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, we deny the State's petition for rehearing and motion to depublish.


_____ J.


_____ J.


_____ J.

Columbia, South Carolina

cc:

Alan McCrory Wilson, Esquire

Megan Harrigan Jameson, Esquire

David Alexander, Esquire

FILED

April 19, 2019

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