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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO DORCHESTER COUNTY
Honorable R. Kirk Griffin, Circuit Court Judge

Appellate Case No. 2023-001724

JABARI MOORE,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

DONALD ZELENKA
Deputy Attorney General

BRYAN T. HALL
Assistant Attorney General
S.C. Bar No. 106039
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF CONTENTS..... i

QUESTIONS PRESENTED..... 1

STATEMENT OF THE CASE..... 2

STATEMENT OF THE FACTS..... 3

STANDARD OF REVIEW..... 4

ARGUMENT..... 5

 I. The PCR court correctly found Counsel’s performance was not deficient, where Counsel credibly testified that he was adequately prepared, conducted reasonable investigations, and presented adequate mitigation to the plea court..... 5

 II. Petitioner failed to prove there is a reasonable probability that he would not have pled guilty, and would have insisted on going to trial, but for Counsel’s performance and advice that Petitioner faced up to life if convicted at trial where there was overwhelming evidence of Petitioner’s guilt..... 10

 III. The PCR court correctly found Petitioner pled guilty knowingly and intelligently, where the record establishes Petitioner pled guilty with an awareness of the charges against him, his constitutional rights, and the negotiated eighteen (18) to twenty-five (25) year sentencing range, and correctly found Petitioner pled guilty freely and voluntarily where the record establishes Petitioner was competent and not forced or pressured to plead guilty..... 11

CONCLUSION..... 15

QUESTIONS PRESENTED

PETITIONER'S STATEMENT OF QUESTIONS

- I. Whether the PCR court erred finding petitioner understood the consequences of the charges against him and pled guilty voluntarily and intelligently where: (1) petitioner was only eighteen at the time of his guilty plea, (2) inexperienced defense counsel admitted he only spent two hours consulting with petitioner during the time he represented him, and (3) defense counsel had never worked with a juvenile or mentally ill client?
- II. Whether the PCR court erred finding defense counsel was not ineffective for failure to investigate and present adequate mitigation to the plea court?

RESPONDENT'S COUNTERSTATEMENT OF QUESTIONS

- I. Whether the PCR court correctly found Counsel's performance was not deficient, where Counsel credibly testified that he was adequately prepared, conducted reasonable investigations, and presented adequate mitigation to the plea court.
- II. Whether Petitioner failed to prove there is a reasonable probability that he would not have pled guilty, and would have insisted on going to trial, but for Counsel's performance and advice that Petitioner faced up to life if convicted at trial where there was overwhelming evidence of Petitioner's guilt.
- III. Whether the PCR court correctly found Petitioner pled guilty knowingly and intelligently, where the record establishes Petitioner pled guilty with an awareness of the charges against him, his constitutional rights, and the negotiated eighteen (18) to twenty-five (25) year sentencing range, and correctly found Petitioner pled guilty freely and voluntarily where the record establishes Petitioner was competent and not forced or pressured to plead guilty.

STATEMENT OF THE CASE

In January 2016, the Berkeley County Grand Jury indicted Petitioner for burglary in the second-degree, violent (2016-GS-08-0130) and grand larceny (2016-GS-08-0129). In March 2016, the Dorchester County Grand Jury indicted Petitioner for burglary in the first-degree (2016-GS-18-0037) and assault and battery in the first-degree (2016-GS-18-0036).

On February 16, 2017, Petitioner waived venue and pled guilty before the Honorable Diane Goodstein to both Berkeley County and Dorchester County charges. Petitioner was represented by John T. Kornegay, Esq. (“Counsel”). Assistant Solicitor Ryan D. Templeton prosecuted the case. Pursuant to a negotiated sentence range of eighteen (18) to twenty-five (25), Judge Goodstein sentenced Petitioner to twenty (20) years for first-degree burglary; ten (10) years for second-degree burglary, violent; ten (10) years for assault and battery, first-degree; and five (5) years for grand larceny. Applicant did not file an appeal.

On January 26, 2018, Petitioner filed an application for post-conviction relief (“PCR”). On May 8, 2018, the State filed its Return. On September 8, 2022, an evidentiary hearing was held before the Honorable R. Kirk Griffin. Petitioner was represented by Leslie T. Sarji, Esq. at the hearing. Respondent was represented by Lauren T. Mims. On September 27, 2023, Judge Griffin denied Petitioner PCR relief.

STATEMENT OF THE FACTS

On November 10, 2015, in Dorchester County, Petitioner and his co-defendants broke into the victim's house. (App. 25). Petitioner strangled the victim to the point of unconsciousness. (App. 25). Petitioner's co-defendants ransacked the house, trying to find things of value. (App. 25). Petitioner and his co-defendants took the victim's cell phone and car keys. (App. 25).

On November 10, 2015, at an AT&T store in Berkeley County, law enforcement responded to a burglary call at nighttime. (App. 25-26). Based on video surveillance, law enforcement saw Petitioner and his co-defendants break into the store by breaking the front window. (App. 26). Petitioner and his co-defendant stole a few cell phones and items that amounted to twenty-seven hundred dollars (\$2,700). (App. 26).

STANDARD OF REVIEW

Appellate courts give great deference to the PCR court's factual findings and will uphold them if there is any evidence of probative value in the record to support them. *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). However, appellate courts will review the PCR court's conclusions of law *de novo* and will reverse if the PCR court's decisions are controlled by an error of law. *Jamison v. State*, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014).

To establish ineffective assistance of counsel, the PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms (i.e. deficient performance), and (2) the applicant sustained prejudice as a result of counsel's deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984); *Cherry v. State*, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). To establish prejudice, the applicant must prove "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 117–18, 386 S.E.2d at 625 (quoting *Strickland*, 466 U.S. at 694).

Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). Applicant must overcome this presumption to receive relief. *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625. When evaluating a claim for ineffective assistance of counsel, the court is to examine counsel's conduct by the law available at the time of trial and "every effort be made to eliminate the distorting effects of hindsight." *Edwards v. State*, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011) (quoting *Strickland*, 466 U.S. at 689).

ARGUMENT

The PCR court correctly found Counsel's performance was not deficient, and Petitioner failed to show a reasonable probability that he would not have pled guilty but for Counsel's performance. A PCR applicant who pleads guilty on the advice of counsel may collaterally attack the plea only by showing that (1) counsel was ineffective (i.e. deficient performance), and (2) there is a reasonable probability that but for counsel's errors, the applicant would not have plead guilty but would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985); *Dalton v. State*, 376 S.C. 130, 136, 654 S.E.2d 870, 873 (Ct. App. 2007). Counsel is presumed to have rendered competent advice at the time their clients considered pleading guilty. *Padilla v. Kentucky*, 559 U.S. 356, 372 (2010). Additionally, the burden is on the applicant to convince the court that rejecting a plea or plea bargain would have been rational under the circumstances. *Id.*

I. The PCR court correctly found Counsel was not ineffective where Counsel credibly testified that he was adequately prepared, conducted reasonable investigations, and presented adequate mitigation to the plea court.

Petitioner alleges Counsel was inexperienced as an attorney, which resulted in prejudice to Petitioner. However, the record establishes Counsel's performance was reasonable under prevailing professional norms, and Petitioner failed to show actual ineffectiveness by Counsel that would have resulted in a different outcome. Thus, Petitioner failed to prove he was prejudiced by Counsel's alleged inexperience. Inexperience by itself is insufficient to support a finding of ineffectiveness. *United States v. Cronin*, 466 U.S. 648 (1984) (holding while counsel's youth and inexperience may shed light on an evaluation of counsel's performance, youth and inexperience do not justify a finding of ineffective assistance of counsel absent a showing of actual ineffectiveness) (stating "every experienced criminal defense attorney once tried his first criminal case"). The PCR Court correctly found Petitioner failed to prove actual ineffectiveness in Counsel's performance.

A. The record establishes Counsel made reasonable investigations under prevailing professional norms, and Petitioner failed to present evidence of what additional information Counsel could have discovered that would have resulted in a different outcome.

Petitioner alleges Counsel was ineffective for failing to investigate. However, the PCR court correctly found Counsel conducted reasonable investigations. A criminal defense attorney has a duty to conduct a reasonable investigation to discover all reasonably available evidence tending to rebut any aggravating evidence introduced by the State. *McKnight v. State*, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008). However, Counsel's duty to investigate is limited to reasonable investigations or a reasonable decision that makes particular investigations unnecessary. *Ard v. Catoe*, 372 S.C. 318, 331–32, 642 S.E.2d 590, 597 (2007). "The scope of a reasonable investigation depends on a number of issues, but at a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case." *Id.* To prevail upon a claim that counsel did not adequately investigate a case, an applicant must present evidence of what counsel could have discovered. *Jackson v. State*, 329 S.C. 345, 353–54, 495 S.E.2d 768, 772 (1998).

The PCR court found credible Counsel's testimony that he made reasonable investigations. Counsel testified that he conducted additional investigations outside of discovery and worked with John Tisdale, an investigator in the public defender's office. (App. 103). Counsel testified that the investigator reached out to witnesses that Petitioner requested including the son of the victim. (App. 103-04). Counsel testified that he and the investigator relayed to Petitioner that the victim's son stated Petitioner did not have permission to be in the home on the date of the burglary. (App. 103-04). Counsel further testified that there was nothing Petitioner asked him to investigate that was not investigated, including interviewing witnesses and attempting to interview Petitioner's co-defendants. (App. 109-10). Petitioner also indicated to the plea court that Counsel investigated his

case fully. (App. 29). Further, Petitioner failed to present evidence of what additional information Counsel could have discovered that would have resulted in a different outcome. Thus, Petitioner failed to prove prejudice, and the PCR court correctly found Petitioner failed to meet his burden.

B. The record establishes Counsel's preparation and consultation was reasonable under prevailing professional norms, and Petitioner failed to present evidence of what additional information or defenses Counsel could have pursued had he more fully prepared.

Petitioner alleges Counsel was ineffective for failing to prepare and not spending enough time consulting with Petitioner. However, the PCR court correctly found Counsel's preparation was reasonable under prevailing professional norms. "[B]revity of time spent in consultation with a defendant alone is not indicative of inadequate trial preparation." *Smith v. State*, 404 S.C. 493, 500, 745 S.E.2d 378, 382 (2012). Applicant must show evidence of how additional preparation or communication would have resulted in a different outcome. *Id.* In order to prevail upon a claim that counsel did not adequately prepare, an applicant must present evidence of what counsel could have discovered or what other defenses applicant could have requested counsel develop if counsel had more fully prepared. *Jackson*, 329 S.C. at 353-54, 495 S.E.2d at 772.

The PCR court found credible Counsel's testimony that he met with Petitioner sufficiently to be adequately prepared. Counsel testified that he was appointed to Petitioner's case "fairly long after" Petitioner was charged, and they met together four (4) or five (5) times. (App. 102). Counsel testified that he received and reviewed discovery with Petitioner. (App. 103). Counsel testified that he conducted investigations in Petitioner's case. (App. 103-04; 109-10). Counsel testified that he explained to Petitioner the strengths and weaknesses of his case, the elements of the crimes, and the constitutional rights Petitioner was waiving by pleading guilty. (App. 104; 110). Counsel testified that he was prepared to go to trial, but Petitioner decided to plead guilty. (App. 106). The record establishes Counsel was adequately prepared and consulted with Petitioner sufficiently

before Petitioner pled guilty. Further, Petitioner failed to present evidence of how additional consultation time or preparation would have resulted in a different outcome. Thus, Petitioner failed to prove prejudice, and the PCR court correctly found Petitioner failed to meet his burden.

C. The record establishes Counsel presented adequate mitigation to the plea court, and Petitioner failed to show a reasonable probability that a different sentence would have been imposed but for Counsel's failure to present further mitigating evidence.

Petitioner alleges Counsel was ineffective for failing to present adequate mitigation to the plea court. However, the PCR court correctly found that Counsel investigated and presented adequate mitigation to the plea court prior to sentencing. A criminal defense attorney has a duty to conduct a reasonable investigation to discover all reasonably available mitigation evidence. *McKnight*, 378 S.C. at 46, 661 S.E.2d at 360. Counsel may be found deficient for failing to sufficiently investigate and present mitigating evidence. *See Council v. State*, 380 S.C. 159, 172, 670 S.E.2d 356, 363 (2008). An applicant must prove prejudice by showing a reasonable probability that a different sentence would have been imposed but for Counsel's failure to investigate and present mitigating evidence. *Id.* at 171, 670 S.E.2d at 362.

In *Council*, the Supreme Court found an attorney was ineffective for failing to present mitigating evidence during the *penalty phase of a capital case*. *Id.* at 179, 670 S.E.2d at 366 (emphasis added). The only mitigating evidence the attorney presented was testimony from the defendant's mother regarding his childhood and her taking him to "mental health" when he was younger. *Id.* at 164, 670 S.E.2d at 358. At the defendant's PCR hearing, his PCR attorney called as a witness the neurologist who reviewed the defendant's mental health records, and she testified that the defendant had a decline in general cognitive functioning. *Id.* at 165-66, 670 S.E.2d at 359. The Court determined that it unreasonable for counsel not to further investigate the defendant's

background and present even minimal mitigating evidence obtained during the penalty phase of a capital trial. *Id.* at 172, 670 S.E.2d at 363.

Petitioner cites *Council*. However, *Council* is distinguishable from Petitioner's case. Petitioner's case was not a capital case. Petitioner's guilty plea was not bifurcated like a capital trial, in which there is a guilt phase and a separate penalty phase for sentencing. Petitioner alleges Counsel should have called an expert witness or a mitigation specialist at the guilty plea to present mitigation on Petitioner's behalf. However, Counsel cannot be expected to take such actions where it is not customary under prevailing professional norms to call an expert witness to present mitigation *at a guilty plea*. Additionally, calling an expert witness at a guilty plea would have been unreasonable under prevailing professional norms where Counsel already presented to the court a mitigation report prepared by an expert. Further, Petitioner failed to call an expert witness at his PCR hearing to prove the result would have been different if Counsel had called an expert at the guilty plea. *Glover v. State*, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995) (holding to prevail on a claim that counsel failed to call a witness, an applicant must produce the witness at the PCR hearing to show a reasonable probability the result would have been different based on the witness's testimony) (stating "applicant's mere speculation to what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice").

The PCR court found credible Counsel's testimony that he investigated and presented mitigation to the court prior to sentencing. Counsel testified that there was nothing about Petitioner that made Counsel believe he was incompetent, but Counsel had Petitioner evaluated for competency by Dr. Knight. (App. 109). Counsel testified that obtained a mitigation expert, Adrianna Harris, who wrote a report that Counsel discussed with the plea court. (App. 107; 37-40). Counsel presented mitigation to the plea court by informing the court that Petitioner was

abused by his parents when he was younger. (App. 38). Counsel also argued that Petitioner spent time living in foster homes. (App. 39). Before the plea court issued its sentence, Counsel presented mitigation and asked for the lower end of the negotiated sentencing range. (App. 40:25-41:2). Counsel's investigation and presentation of mitigation was reasonable under prevailing professional norms.

Counsel testified that he did not believe discussing Petitioner's mental health history would have impacted the judge's sentence. (App. 109:15-18). Petitioner pled guilty pursuant to a negotiated sentence range, and Petitioner failed to present evidence, beyond mere speculation, that the judge's sentence would have been different but for Counsel's performance. Thus, Petitioner failed to prove prejudice, and the PCR court correctly found Petitioner failed to meet his burden.

II. Petitioner failed to prove there is a reasonable probability that he would have proceeded to trial but for Counsel's performance and advice that Petitioner faced up to life if convicted at trial where there was overwhelming evidence of his guilt.

Petitioner alleges that but for Counsel's performance, he would not have pled guilty. However, the PCR court correctly found that Petitioner failed to show a reasonable probability that he would not have pled guilty and would have insisted on going to trial. The defendant must show that but for counsel's errors, he would not have pled guilty and would have insisted on going to trial. *Lockhart*, 474 U.S. at 59. Additionally, the burden is on the applicant to convince the court that rejecting a plea or plea bargain would have been rational under the circumstances. *Padilla*, 559 U.S. at 372.

Petitioner failed to prove that rejecting the plea would have been rational under the circumstances. Petitioner and his co-defendants broke into a house, wherein Petitioner strangled the victim. (App. 25). Counsel testified that the victim's son and Petitioner's co-defendants refuted Petitioner's assertion that he was invited into the home. (App. 103; 105). In a separate incident,

Petitioner and his co-defendants were caught on video surveillance breaking into a store and stealing cell phones and other items. (App. 26). Counsel testified Petitioner's co-defendants were unwilling to revise their statements or give statements in Petitioner's favor. (App. 104).

The primary consideration in Petitioner's decision to plead guilty was to avoid the possibility of receiving a life sentence at trial. Counsel testified that he explained to Petitioner that he was facing life in prison. (App. 106). Counsel testified that he explained to Petitioner that initially the solicitor was not open to plea negotiations because of Petitioner's role in the crime as Petitioner was accused of committing the assault and battery on the victim, unlike his co-defendants. (App. 102; 111). Counsel testified that the possibility of receiving a life sentence was a factor in Petitioner's decision to plead guilty. (App. 106). The record establishes Petitioner would not have rejected the plea because it would not have been rational for Petitioner to proceed to trial where the evidence against him was overwhelmingly in favor of a finding of guilt, and Petitioner faced up to life in prison if convicted. Thus, the PCR court correctly found Petitioner failed to meet his burden.

III. The PCR court correctly found Petitioner pled guilty knowingly and intelligently, where the record establishes Petitioner pled guilty with an awareness of the charges against him, his constitutional rights, and the negotiated eighteen (18) to twenty-five (25) year sentencing range, and correctly found Petitioner pled guilty freely and voluntarily where the record establishes Petitioner was competent and not forced or pressured to plead guilty.

Petitioner alleges he did not fully understand the consequences of his guilty plea. However, the record establishes Petitioner pled guilty knowingly and voluntarily with an awareness of the charges against him, the consequences and potential sentence range and consequences, and his constitutional rights.

To find a defendant entered a guilty plea knowingly and voluntarily, the record must establish the defendant had a full understanding of the consequences of his plea and the charges against him. *Dalton*, 376 S.C. at 138, 654 S.E.2d at 874. This involves awareness of “the privilege against self-incrimination, the right to a jury trial, and the right to confront one's accusers” and “the nature and crucial elements of the offense, the maximum and any mandatory minimum penalty, and the nature of the constitutional rights being waived.” *Pittman v. State*, 337 S.C. 597, 599, 524 S.E.2d 623, 624 (1999) (citing *Boykin v. Alabama*, 395 U.S. 238 (1969)). Statements made during a guilty plea should be considered conclusive unless the applicant presents valid reasons why he should be allowed to depart from the truthfulness of his statements. *Dalton*, 376 S.C. at 137-38, 654 S.E.2d at 874.

A. The record establishes Petitioner pled guilty knowingly and intelligently.

The PCR court found credible Counsel’s testimony that he explained to Petitioner the nature of the charges, the possible penalties, and his constitutional rights. In addition to Counsel’s explanation, the plea colloquy establishes the plea judge explained to Petitioner that he was pleading guilty to assault and battery in the first degree, which carries up to ten (10) years in prison; burglary in the first degree, which carries fifteen (15) years to life. (App. 12-13). Petitioner indicated that he understood. (App. 12-13). The plea judge explained to Petitioner that the offenses are classified as violent offenses, and the judge explained to Petitioner the consequences of being convicted of a violent offense. (App. 13-14). Petitioner indicated that he understood. (App. 14). The plea judge also explained that the offenses would count as two strikes under the law. (App. 14). Petitioner indicated that he understood. (App. 14-15).

The plea judge explained to Petitioner that he was pleading guilty to burglary in the second degree, violent, which exposed Petitioner to life in prison. (App. 16). Petitioner indicated he

understood. (App. 16). The plea judge explained to Petitioner that he was pleading guilty to grand larceny, which carries up to five (5) years. (App. 12). Petitioner indicated that he understood. (App. 12). The plea judge asked Petitioner how he wished to plead knowing the nature of the offenses and the possible penalties and consequences; Petitioner responded “guilty” to all charges (App. 17-18).

The plea judge also explained that by pleading guilty, Petitioner was waiving his constitutional rights including his right to remain silence, right to a jury trial, and right to confront witnesses. (App. 19-20). Petitioner indicated that he understood and wished to waive his constitutional rights. (App. 20-21). The PCR court correctly found that Petitioner pled guilty knowingly and intelligently.

B. The record establishes Petitioner pled guilty freely and voluntarily.

Petitioner alleges his guilty plea was made involuntarily due to Petitioner’s age and mental illnesses. However, the record also refutes this assertion. Petitioner committed the crimes when he was sixteen (16) and pled guilty when he was eighteen (18).¹ *State v. Pittman*, 373 S.E.2d 527, 546, 647 S.E.2d 144, 153 (2007) (“a criminal defendant is presumed to have the requisite capacity to be held responsible for the commission of a crime” and is “presumed sane”). Counsel testified that, during representation, there was nothing about Petitioner that made Counsel think Petitioner was incompetent. (App. 109). Counsel informed the plea court that Petitioner is intelligent and understood the gravity of the guilty plea. (App. 38-39).

Petitioner alleges he felt pressured into pleading guilty and did not have enough time to make a decision about whether to plead or proceed to trial. However, the record also refutes this

¹ Although the transcript states Petitioner told the court that he’s twenty-seven (27), this is a scrivener’s error. There is no prejudice to Petitioner because the sentence sheets correctly state Petitioner’s age at the time of the plea as eighteen (18) years old. (App. 154; 157; 160; 163).

assertion. Petitioner indicated to the plea court that he had enough time to make up in his mind regarding his decision to plead guilty. (App. 28). Petitioner indicated that he had enough time to speak with Counsel and understood the conversations. (App. 29). Petitioner indicated that no one forced or threatened him to plead guilty. (App. 27-28). Petitioner also indicated to the plea court that no one promised him anything to plead guilty. (App. 27). Petitioner indicated that he understood the plea court's questions and answered them candidly and correctly. (App. 30-31).

Petitioner also alleges that he was told to be dishonest with the plea court. However, Petitioner's assertion is refuted by the record. Counsel testified that he did not tell Petitioner to misrepresent anything to the court. (App. 108). Counsel testified that he typically advises clients to answer the judge's questions with "yes" or "no" ma'am. (App. 108). *Moorehead v. State*, 329 S.C. 329, 496 S.E.2d 415 (1998) (holding an applicant's claim that he answered the judge's questions affirmatively regarding a plea based on counsel's advice that the questions are meaningless does not support a grant of PCR or invite an applicant to answer untruthfully). Further, Petitioner indicated to the plea judge that "each and every answer" he gave was "absolutely candid and correct." (App. 31). Petitioner failed to present a valid reason for why he should be allowed to depart from the truthfulness of the statements he made to the plea court. Thus, the PCR court correctly found that Petitioner's guilty plea was made freely and voluntarily.

CONCLUSION

Based on the foregoing argument, the PCR court correctly found Petitioner failed to meet his burden. Accordingly, the State respectfully requests this court to affirm the PCR court's rulings and deny Petitioner's writ for certiorari.

Respectfully submitted,



BRYAN T. HALL
Assistant Attorney General

S.C. Bar No. 106039
Post Office Box 11549
Columbia, S.C 29211
(803) 734-3737

ATTORNEY FOR RESPONDENT

August 28, 2024