

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Kristi L. Harrington, Circuit Court Judge

Case No. 2008-CP-10-0057

Anthony Mann, 242498,

Petitioner,

v.

State of South Carolina,

Respondent.

REPLY

J. Wesley Locklair III
LOCKLAIR LAW FIRM
2007 Lincoln Street
Columbia, SC 29201
(803) 254-9007

Joshua Snow Kendrick
KENDRICK & LEONARD, P.C.
P.O. Box 886
Columbia, SC 29202
(803) 667-3186

Attorneys for the Petitioner

Other Counsel of Record:

Ashleigh Wilson, Esquire
South Carolina Attorney General's Office
P.O. Box 11549
Columbia, SC 29211
(803) 734-3970
Attorney for the Respondent

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S.C. Supreme Court

ARGUMENT

Petitioner replies to Respondent's Return as follows:

1. THE PCR COURT ERRED BY NOT FINDING PETITIONER'S RIGHT TO A PUBLIC TRIAL WAS DENIED THROUGH CLOSED HEARINGS INCLUDING AN EX PARTE MEETING BETWEEN THE SOLCITOR AND THE JUDGE

Even Respondent admits that there was one hearing concerning allegations by the defense that the State was attempting to pressure defense witnesses not to show up at trial. While Respondent states that this hearing did not specifically address the substance or merits of Petitioner's case, that is simply not a fair statement. It did affect the merits of his case, and it was and is substantial right that his attorney gave up.

Trial counsel testified at the PCR hearing that she did not know why the Court did not make specific findings on the record to support the closure of the hearing to the public. (APP. 1730, lines 3-13). When asked why she did not request that specific findings be made on the record to justify the closed proceedings or object to the failure of the judge to do so, counsel for Petitioner stated that she did not know how to answer. (APP. P. 1730, lines 3-12). No other findings were made on the record to support the closing of the other three hearings either.

The South Carolina Constitution provides that "all courts shall be public" S.C. Const Art 1, § 9. The Sixth Amendment to the United States Constitution states that "in all criminal proceedings the accused shall enjoy the right to a speedy and public trial." The United States Supreme Court has made it clear that this right extends to the states. In re Oliver 333, U.S. 257, 273, 68 S.Ct. 499, 92 L.Ed. 682 (1948).

The U.S. Supreme Court in Waller v. Georgia, 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984), clearly outlined standards to be applied prior to excluding the public from any stage of a criminal trial. "The party seeking to close the hearing must advance an overriding interest

that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider the reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure.” *Id* at 511. This Court has held that the “exclusion of the press and the public from judicial proceedings is a drastic measure calling for a careful weighing of interests affected.” *Steinle v. Lollis*, 279 S.C. 375, 376-377, 307 S.E.2d 230, 231 (1983).

The record shows that the trial court weighed no interests, considered no alternatives to closure, did not identify any overriding interest likely to be prejudiced absent closure, and did not make any findings justifying closure to allow for appellate review of the decision.

Trial counsel was clearly ineffective for failing to object to the closures and for failing to request that the Court make specific findings on the record to justify the closing. Petitioner should not be required to prove specific prejudice in this matter due to its overwhelming importance and significance to the very foundation of our entire judicial system. “The harmless error rule is no way to gauge the great, though intangible, societal loss that flows from closing the courthouse doors.” *Presley v. Georgia*, 558 U.S. ___, 130 S.Ct. 721, 175 L.Ed.2d 675 (2010); *Waller v. Georgia* 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984).

2. THE PCR COURT ERRED BY NOT FINDING TRIAL COUNSEL INEFFECTIVE FOR FAILING TO OBJECT TO OR MOVE TO SUPPRESS EVIDENCE RELATED TO A SHOTGUN.

During Petitioner’s trial, a random, completely unrelated shotgun was introduced into evidence at trial that Detective Walker testified was found in the bushes at a McDonald’s restaurant on Ashley Phosphate Road. (APP. P. 1155, lines 10-17). The shotgun was moved into evidence with no objection from trial counsel. (APP. P. 1166, lines 13-19). No chain of custody

for the shotgun was ever shown at trial. And, when the shotgun was sent off for expert ballistics tests and examinations, it was found to be inconsistent with the bullets fired at the scene of the alleged crime. (APP. P. 1155, lines 20-22).

During the closing arguments by the State, the solicitor picked up this unrelated, irrelevant weapon and pranced around in front of the jury with the shotgun while stating that Petitioner had this weapon with no objection from trial counsel. (APP. P. 1592, line 2). Trial counsel testified at the PCR hearing that she had no independent recollection of this weapon at Petitioner's trial. (APP. P. 1712, lines 10-13).

In Hollman v. State, 644 S.E.2d 171 (2009), the Court found that the admission of bullets and a pistol unconnected to the crime was erroneous and prejudicial and that trial counsel was ineffective for failing to object to the admission of the gun and bullets into evidence. This is exactly the same factual scenario as occurred in this case.

There was absolutely no evidence offered at trial linking the shotgun to the Petitioner, the alleged victims, or anyone else in the case. There was no evidence offered linking the shotgun to the victim's residence or to any alleged robbery that occurred. In short, there was no evidence whatsoever offered at trial to link this shotgun in any way, shape, manner or form to the crimes for which Petitioner was being tried.

This case is directly on point with Hollman. There was no evidence whatsoever offered to link this particular shotgun to the Petitioner and the crimes for which he was being prosecuted. While there was evidence admitted at trial that Petitioner had a shotgun at various times, there was no evidence linking the shotgun introduced into evidence to the shotgun that Petitioner allegedly had. In Hollman, like here, there was testimony about the Petitioner having a handgun, but there was no testimony linking the handgun admitted at trial to the handgun allegedly used in

the shooting for which Hollman had been tried. The only differences between this case and Hollman is that in this case it was a shotgun and not a handgun, and in Hollman the State admitted the gun was not connected to the shooting. While the State did not concede in this case that the shotgun was unrelated, that is not necessary nor is it dispositive if the issue. The issue here is that trial counsel was ineffective for failing to object to the admission of the shotgun when it was never linked to Petitioner in any way.

3. THE PCR COURT ERRED BY NOT FINDING TRIAL COUNSEL INEFFECTIVE FOR FAILING TO OBJECT TO THE PRESENCE OF PRISON GUARDS AT TRIAL AND THE JURY'S KNOWLEDGE OF PETITIONER'S DETENTION IN LIEBER CORRECTIONAL INSTITUTION AT THE TRIAL.

Respondent asserts that Petitioner's reliance on Estelle is misplaced. First, Petitioner's argument is that the failure of counsel to object to the repeated references to Petitioner being in prison and the conditions in the courtroom, and counsel to continue to bring out that Petitioner was in prison during her cross examination is **the equivalent** of marching Petitioner into the courtroom in prison garb and handcuffs with shackles and leg irons. The United States Supreme Court has stated that where a defendant is forced to wear prison clothes when appearing before a jury, "the constant reminder of the accused's condition implicit in such distinctive, identifiable attire may affect a jury's judgment." Estelle v. Williams, 425 U.S. 501, 96 S.Ct. 1691 (1976). "One accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody or other circumstances not adduced at trial. Taylor v. Kentucky, 436 U.S. 478, 485, 98 S.Ct. 1930 (1978). It has been previously held that certain practices pose such an enormous threat to the "fairness of the fact finding process" that they must be subjected to "close, judicial scrutiny." Estelle, supra at 425 U.S. 501, 503-504.

It is the combination of factors here that created an inherently prejudicial situation. Inherent prejudice occurs when “an unacceptable risk is presented of impermissible factors coming into play.” Hollbrook v. Flynn, 445 U.S. 560, 572, 106 S.Ct. 1340, 1346-1347, 89 L.Ed.2d 525, 535 (1986); State v. Tucker, 324 S.C. 155, 478 S.E.2d 260, 271 (1996). Counsel sat idly by while all of this impermissible character evidence was shown to the jury, and she even admitted bad character evidence against her own client. Petitioner did not testify or place his character into evidence during this trial, yet it was shown to the jury that he was a convicted felon, at a maximum security prison who requires two additional guards wearing bulletproof vests (in addition to the numerous armed deputies already present) just to protect the people in the courtroom.

The argument that Respondent makes that “everyone in the courtroom was fully aware that Petitioner was on trial for two counts of murder and had been in custody at some point” is without merit. In EVERY criminal trial, the people in the courtroom know what the defendant is on trial for, and almost everyone knows that anyone arrested was in custody at some point. It is the impermissible character evidence that he is in custody for something else other than these charges is the problem.

4. THE PCR COURT ERRED BY NOT FINDING TRIAL COUNSEL INEFFECTIVE FOR FAILING TO OBJECT TO OR MOVING TO LIMIT IMPROPER CHARACTER EVIDENCE.

The record reflects clearly the evidence that counsel allowed to come in to trial. And while Trial counsel eventually did move for a mistrial, this was done after all of the evidence had already been put before the jury. Furthermore, Counsel failed to make contemporaneous objections to the testimony during the trial. The Court eventually gave a curative instruction much later in the trial. The failure to contemporaneously object was prejudicial and affected the

outcome of the trial. Contemporaneous objections allow the judge to deny the admission of the evidence and allow for a curative instruction and to request items be stricken from the record, but most critically they let the jury know that something is trying to be admitted into evidence that should not be admitted. Counsel's blatant inattention to the testimony occurring during the trial, her failure to contemporaneously object and her failure to immediately seek a curative instruction clearly demonstrate ineffective assistance of counsel in this case.

5. THE PCR COURT ERRED BY NOT FINDING TRIAL COUNSEL INEFFECTIVE FOR FAILING TO PROPERLY CHALLENGE THE ADMISSION OF PETITIONER'S STATEMENT.

Trial Counsel's ineffectiveness goes to several levels as far as the admission of Petitioner's statement at trial. While there was a Jackson v. Denno hearing held, trial counsel was not prepared for it, nor did she handle it properly. At the PCR hearing, trial counsel testified that she did not recall any discussions with Petitioner about his statement (APP. P. 1743, lines 20-25), that she did not recall him telling her about the sexual assault that occurred in the interrogation room (APP. 1831, lines, 11-18), that she did not remember being told about the threats against his girlfriend and her children (APP. 1829, lines, 5-10), and that she had no recollection of why she did not place Petitioner on the stand during his Jackson v. Denno hearing. (APP. P. 1745, lines 13-19). Dale Davis, the investigator for the public defender, testified at the PCR hearing that Petitioner had informed her of the threats against Petitioner's girlfriend and her children. (APP. P. 1815, lines 6-11).

The fact that a trial attorney did not bring out any threats, and that she failed to place her client on the stand during the hearing clearly show she was ineffective.

6. THE PCR COURT ERRED BY NOT FINDING TRIAL COUNSEL INEFFECTIVE FOR FAILING TO CALL AN EXPERT WITNESS.

The trial and PCR hearing record clearly establish Trial Counsel's ineffectiveness as it relates to the failure to call an expert witness. Trial counsel's failure to call an expert to refute the State's testimony was clearly ineffective. Counsel even admitted that the alleged time of death for Beverly Blake was in dispute and part of their trial strategy was "to show that she had not been killed on the evening in question but, in fact, later." (APP. p. 1717, lines 2-3). While counsel gets great latitude in trial strategy, the way that strategy is executed must provide effective assistance of counsel. Trial Counsel defined her trial strategy concerning Beverly Blake during her testimony at the post-conviction relief hearing, so that is not in question. Her failure to execute that strategy at trial, however, constitutes ineffective assistance of counsel.

7. THE PCR COURT ERRED BY NOT FINDING TRIAL COUNSEL INEFFECTIVE FOR FAILING TO REQUEST A JURY CHARGE ON THE VOLUNTARINESS OF THE STATEMENT AND FOR FAILING TO OBJECT TO NO FINDING THAT THE STATEMENT WAS TAKEN IN ACCORDANCE WITH MIRANDA.

While the Court held a Jackson v. Denno hearing, there were no findings on the record that the statement was taken in compliance with Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L. Ed 2d 694 (1966). Respondent argues that the Court's findings are in compliance with South Carolina law. However, South Carolina has found that for a statement to be admitted, it must be found that the statement was voluntary and that it was taken in compliance with Miranda. See State v. Middleton, 288 S.C. 21, 339 S.E.2d 692 (1986); State v. Adams, 277 S.C. 115, 283 S.E.2d 382 (1981); State v. Callahan, 263 S.C. 35, 208 S.E.2d 284 (1974). Counsel failed to object to this lack of finding on the record.

Trial Counsel did not request a jury instruction on voluntariness nor did she object to the trial court's failure to give such an instruction when the judge charged the jury. "When an issue of fact is in dispute the matter must be submitted to the jury." State v. Linnen, 278 S.C. 175, 293 S.E.2d 851 (1982).

Trial counsel testified at the PCR hearing that she had no recollection of requesting a jury charge on voluntariness of a defendant's statement (APP. P. 1772, lines 1-8), but admitted if the judge failed to give the proper jury instructions it was incumbent on her to make sure it was done. (APP. P. 1799, lines 2-19). It is evident from a review of the record that no instruction was ever given, nor was any objection to the lack of the charge ever entered by trial counsel. Even trial counsel admits that this is clearly an error by her and prejudiced the Petitioner.

The failure of counsel to request proper jury instructions constitutes ineffective assistance of counsel. Battle v. State, 305 S.C. 460, 409 S.E.2d 400 (1991). In this case, it is indisputable that the proper charge was not given and the counsel did not request such a charge nor did she object to the lack of such a charge being given. The failure to request this charge was inexcusable and highly prejudicial to Petitioner.

8. THE PCR COURT ERRED BY NOT FINDING TRIAL COUNSEL INEFFECTIVE FOR FAILING TO OBJECT TO THE INTRODUCTION OF A GRAPHIC CRIME SCENE VIDEO.

First, this issue was not abandoned by Petitioner because it is not supported by authority. Petitioner submits that there is no direct authority on a trial attorney introducing such horrible evidence against his or her own client. Trial counsel has broken new ground with her ineffectiveness, and Petitioner urges this court to grant certiorari to create authority for this particular issue.

Second, Respondent asserts that Petitioner asserts that counsel failed to object to the introduction of the video. This is not the case at all. Trial counsel introduced the video herself!!! During trial, counsel for Petitioner chose to enter a graphic crime scene video into evidence. (APP. P. 1716, lines 16-18). This was a video of law enforcement personnel recovering the body of Beverly Blake, aka Brownie. (APP. P. 1716, l. 20.). According to petitioner's counsel, there

was steam coming from the body when it was moved and there was insect activity on the body. (APP. P. 1717, lines11-18).

While many decisions can amount to trial strategy, the introduction of this graphic video goes well beyond strategy and into the realm of ineffective assistance of counsel. Any evidence the defense wanted to be put before the jury was already done through law enforcement witnesses and other witnesses, or could have been brought in through the defense hiring their own expert. To introduce a video that would have been inadmissible had the state attempted to offer it is clearly unreasonable and presented what are normally impermissible reasons to convict the defendant, mainly inciting the passion and emotion of the jury. Based on counsel's ineffectiveness in introducing evidence to be used to convict her client and taint the jury with emotion, Petitioner should be awarded a new trial.

Respondent argues that when counsel can articulate valid reasons for employing certain strategy, counsel's choice of tactics will not be deemed ineffective assistance. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 530 (1992). Petitioner would certainly agree that when counsel can articulate a valid reason this is true. But a valid reason must be reasonable under the professional norms and the prejudice from this video far outweighs any probative value that counsel may have thought it had. Just because trial counsel articulates a reason does not make it valid nor does it alleviate her from the burden of providing effective assistance of counsel.

9. THE PCR COURT ERRED BY NOT FINDING TRIAL COUNSEL INEFFECTIVE FOR FAILING TO OBJECT TO WITNESS' HEARSAY STATEMENTS AND CORROBORATION.

Respondent argues that the statements were not hearsay because they were not offered for the truth of the matter asserted. The record clearly reflects that they were specifically offered for the truth of the matter asserted, as there was no other reason for them to have been offered.

Respondent argues that there is no prejudice due to overwhelming evidence of Petitioner's guilt. However, in this case, there is not overwhelming evidence of Petitioner's guilt if all of trial counsel's errors were corrected.

Furthermore, erroneously admitted corroboration testimony is not considered harmless just because it is cumulative; "it is precisely this cumulative effect which enhances the devastating impact of improper corroboration." See State v. Saltz, 346 S.C. 114, 551 S.E.2d 240 (2001). This Court has previously held trial counsel ineffective for failing to object to hearsay and improper corroboration testimony. Jolly v. State, 314 S.C. 17, 443 S.E.2d 566 (1994).

Finally, counsel failed to request a curative instruction when the Solicitor made references to the victim's family and told a witness to look at one of the victim's parents, even after an objection that was sustained. (APP. P. 1349, lines 23-15, P. 1350, lines 1-6). Playing on the emotions and passions of the jury infected the trial process with such unfairness that it affected the outcome of the trial.

10. THE PCR COURT ERRED BY NOT FINDING TRIAL COUNSEL INEFFECTIVE FOR FAILING TO PRESENT AN ALIBI DEFENSE OR REQUEST AN ALIBI INSTRUCTION FROM THE COURT.

The record reflects that had counsel properly prepared, an alibi defense could have been presented through Petitioner and Kristy Bunch. Counsel failed to pursue this alibi defense as to the murder of Beverly Blake, and her failure to do so prejudiced the Petitioner.

11. THE PCR COURT ERRED BY NOT FINDING TRIAL COUNSEL INEFFECTIVE FOR FAILING TO OBJECT TO THE PROSECUTION'S IMPROPER COMMENTS ON PETITIONER'S EXERCISE OF HIS RIGHT TO A JURY TRIAL AND FAILURE TO CALL CERTAIN WITNESSES.

Respondent argues that the comments made by the Solicitor do not call in any constitutional implications; however, the record is clear that there were impermissible comments made no the

Petitioner's exercise of his constitutional rights. During closing arguments, the solicitor stated, "If a crime is committed by two or more persons . . . the act of one is the act of all. This is true if there are two people or more than two people involved in the crime. Eric Zack and Michael Crumb pleading guilty. The hand of one is the hand of all (emphasis added) (APP. P. 1496, lines 3-10). The prosecutor further stated that "The defendant went to rob Dante Tobias. He went to pick up Beverly Blake. It was a mixed motive, no doubt, but on he felt like he needed a gun for. And one that Eric Zack and Michael Crumb have taken responsibility for." (Emphasis added) (APP. P. 1529, lines 1-4).

It is impermissible to emphasize the guilty pleas of witnesses as substantive evidence of guilt of a defendant charged with the same or a similar crime. See U.S. v. Mitchell, 1 F.3d 235 (4th Cir. 1993). The United States Supreme Court has held that improper use of a co-conspirator's conviction infringes upon the principle that the "central aim in a criminal trial is to decide the factual question of the defendant's guilt or innocence." Delaware v. Van Arsdale, 475 U.S. 673, 681, 106 S.Ct. 1431, 1436 (1986). By emphasizing the pleas of two codefendants, the solicitor interjected improper evidence into the case hoping to convict Petitioner based not on the evidence presented at trial towards his guilt or innocence, but instead sought a conviction based on the idea if his codefendants are guilty, he must be guilty too, thus striking an impermissible "foul blow". See Berger v. U.S., 295 U.S. 78, 55 S.Ct 629 (1935).

Clearly the solicitor stating that Petitioner had not "taken responsibility" for the crimes was an improper reference to Petitioner exercising his constitutionally guaranteed right to a jury trial and to put the state to the burden of proving his guilt beyond a reasonable doubt. "It is impermissible for the State to comment upon a defendant's exercise of a constitutional right."

See Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240 (1946); State v. Brown, 347 S.E.2d 882 (1986); State v. Johnson, 360 S.E.2d 317 (1984); State v. Sloan, 298 S.E.2d 92 (1982).

Unfortunately for Petitioner, his trial counsel testified at the PCR hearing that she did not hear or think of those comments by the solicitor as being improper. (APP. P. 1764, lines 5-20).

The United States Supreme Court has made it very clear that these types of comments are impermissible. While the Solicitor can argue within the record of evidence and the reasonable inferences therefrom, there are a lot of limits.

It is reasonable to argue that if someone was arrested, they are likely guilty. It is reasonable to argue that if the Defendant does not take the stand to testify in his own defense that he must have something to hide and is guilty. It is reasonable to argue that we need to get this man off the street to protect you, the jurors, and your families from future crimes. It is reasonable to ask, if these victims were your son or daughter, wouldn't you want this man convicted. It is reasonable to argue that if Petitioner killed Tobias, then he must have killed Blake too. But reasonable and proper are two different things. The Solicitor's comments were improper and highly prejudicial and clearly called into question Petitioner's right to have a jury trial and remain silent.

12. THE PCR COURT ERRED BY NOT FINDING APPELLATE COUNSEL INEFFECTIVE FOR FAILING TO ORDER CERTAIN TRANSCRIPTS, MAINTAIN CONTACT WITH PETITIONER AND PROPERLY ADVISING HIM OF HIS RIGHTS AND CORRECT PROCEDURES.

Petitioner has shown as much prejudice as possible without the missing transcripts being available to him. When Petitioner filed his direct appeal, his appellate counsel did not order these transcripts and obviously did not read them. (APP. p. 1867, lines 7-15). Petitioner had specifically advised appellate counsel of the sealed transcripts and requested that he file a motion to unseal the transcripts, which was never done. (APP. p. 1872, lines 1-6). Due to counsel never

ordering these transcripts, they were destroyed prior to Petitioner having a post-conviction relief hearing so they were unavailable to Petitioner.

Appellate counsel never contacted Petitioner about his case, other than serving him a copy of the brief. (APP. p. 1868, lines 13-17). Appellate counsel failed to advise Petitioner of his right to file a petition for a writ of certiorari to this Court, nor did he advise him that he could lose all federal habeas corpus rights by failing to do so. (APP. p. 1869, lines 4-16). In fact, Petitioner specifically wrote to appellate counsel instructing him to file a petition for rehearing on his appeal and if that was denied to file petition for writ of certiorari with the South Carolina Supreme Court, and neither of those were done by appellate counsel in spite of instructions from his client to do so. (APP. p. 1870, lines 22-25, p. 1871, lines 1-9).

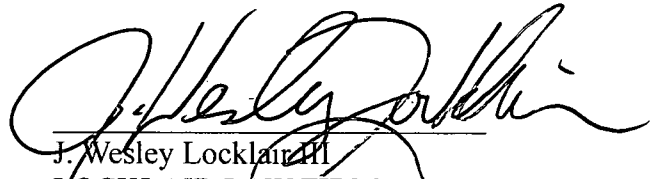
The prejudice comes from losing out on appellate arguments based on these hearings; not having them available for his post-conviction relief hearing or any federal habeas action; and from specifically raising the issues of ineffectiveness or possible government tampering with witnesses. Additionally one would normally have witnesses to recall to speak about the lost transcripts; however, in this case, the one available witness was Petitioner's lawyer who developed very selective memory at the PCR hearing.

CONCLUSION

Petitioner reasserts the arguments made in his original Petition for a Writ of Certiorari and supplements them with this Reply. This Court should grant the Petition for a Writ of Certiorari as to all issues in this case.

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Respectfully submitted,

A handwritten signature in black ink, appearing to read "J. Wesley Locklair III", written over a horizontal line.

J. Wesley Locklair III
LOCKLAIR LAW FIRM
2007 Lincoln Street
Columbia, SC 29201
SCBN 15621
(803) 254-9007

Joshua Snow Kendrick
KENDRICK & LEONARD, P.C.
P.O. Box 886
Columbia, SC 29202
(803) 667-3186

Attorneys for the Petitioner

November 4, 2013

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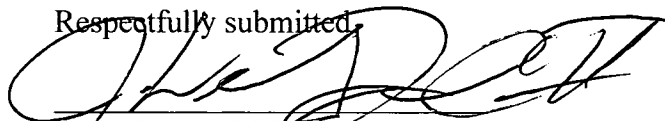
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Respondent.

CERTIFICATE OF SERVICE

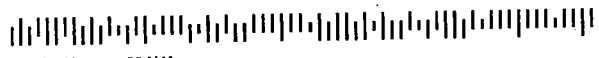
On November 4, 2013, I personally served a copy of Petitioner's Reply on Respondent by hand-delivering a copy to the attorney of record, Ashleigh Wilson, Esquire, South Carolina Attorney General's Office, 1000 Assembly Street, Room 519, Columbia, SC 29211.

Respectfully submitted,



J. Wesley Locklair III
LOCKLAIR LAW FIRM
2007 Lincoln Street
Columbia, SC 29201
SCBN 15621
(803) 254-9007

November 4, 2013



J. Falkner Wilkes
 Attorney at Law
 114 Whitsett Street
 Greenville, SC 29601

UNITED STATES POSTAGE
 189
 8880 \$ 07.45⁰ PB8773112
 4128 GREENVILLE, SC OCT 27 13
 29601



Daniel E. Shearouse
 Clerk of Court
 Supreme Court
 P.O. Box 11330
 Columbia, SC 29211