

STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

The Honorable G. Edward Welmaker, Trial Judge  
The Honorable R. Markley Dennis, Jr., Post-Conviction Relief Judge

S.C. Supreme Court

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Appellate Case No. 2013-000426

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James E. Waiters, Jr., ..... Respondent,

v.

State of South Carolina, ..... Petitioner.

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**PETITION FOR WRIT OF CERTIORARI**

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ALAN WILSON  
Attorney General

KAREN C. RATIGAN  
Senior Assistant Deputy Attorney General  
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ATTORNEYS FOR PETITIONER

**TABLE OF CONTENTS**

QUESTION PRESENTED .....2

STATEMENT OF THE CASE.....3

STANDARD OF REVIEW .....4

ARGUMENT

    The PCR judge erred in finding Respondent met his burden  
    of proving a violation of his constitutional right to trial by an  
    impartial jury.....4

CONCLUSION.....7

## QUESTION PRESENTED

1. Did the PCR judge err in finding Respondent met his burden of proving a violation of his constitutional right to trial by an impartial jury?

## STATEMENT OF THE CASE

The July 2006 term of the Greenville County Grand Jury indicted Respondent for three counts of armed robbery (2006-GS-23-6230, -6231, -6232) and possession of a weapon during commission of a violent crime (2006-GS-23-6233). (App.pp.332-34; pp.336-38; pp.339-40). C. Timothy Sullivan, Esquire represented Respondent.

After the State called the case to trial, Respondent was found guilty of two counts of armed robbery<sup>1</sup> and possession of a weapon during commission of a violent crime. On March 12, 2008, the Honorable G. Edward Welmaker sentenced Respondent to concurrent terms of seventeen years for each count of armed robbery and five years for possession of a weapon during commission of a violent crime. (App.pp.240-41; pp.343-45).

A notice of appeal was filed at the South Carolina Court of Appeals. J. Falkner Wilkes, Esquire perfected the appeal. (App.pp.252-64). The Court of Appeals affirmed Respondent's convictions and sentences. State v. Waiters, Op. No. 2010-UP-296 (S.C. Ct. App. filed May 27, 2010). (App.pp.280-81).

Respondent filed an application for post-conviction relief (PCR) on December 23, 2010 (2010-CP-23-10380). (App.pp.282-88). A hearing was convened at the Greenville County Courthouse on November 1, 2012. (App.pp.294-324). Respondent was present and represented by R. Mills Ariail, Jr., Esquire. Karen C. Ratigan, Esquire of the South Carolina Attorney General's Office represented the State. The Honorable R. Markley Dennis, Jr. granted relief in an order filed February 18, 2013. (App.pp.326-29).

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<sup>1</sup> 2006-GS-23-6230, -6231.

## STANDARD OF REVIEW

The proper standard for review of a PCR evidentiary hearing is whether “any evidence of probative value” exists to sustain the post-conviction relief judge’s findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). In a post-conviction relief proceeding, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

## ARGUMENT

**The PCR judge erred in finding Respondent met his burden of proving a violation of his constitutional right to trial by an impartial jury.**

The PCR judge found Respondent met his burden of proving a violation of his constitutional right to trial by an impartial jury. Certiorari is warranted in this case because this ruling is in error.

After jury selection in this case, the trial judge made some preliminary remarks to the jury and excused them. (App.p.29, line 21 – p.40, line 1). After granting trial counsel’s motion to sequester witnesses, the trial judge stated the trial would start after a ten-minute break. (App.p.40, line 2 – p.41, line 22). After the jury reentered the courtroom, the assistant solicitor made his opening statement. (App.p.41). There is no statement or notation in the trial transcript indicating the jury was sworn.

In granting Respondent’s application for post-conviction relief, the PCR judge found Respondent “demonstrated that [his] trial failed to comport with the South Carolina Code of Laws § 14-7-1100 jury oath requirement.” The PCR judge cited Article I, section 14 of the South Carolina Constitution and found that “[b]ased on the absence of

notation or comparable evidence in the record, [Respondent] has demonstrated a violation of his constitutional right to trial by an impartial jury as provided by the South Carolina Constitution.” (App.p.327).

“The right of trial by jury shall be preserved inviolate. Any person charged with an offense shall enjoy the right to a speedy and public trial by an impartial jury.” S.C. Const. art I, § 14. “In impaneling juries in criminal cases, the jurors must be called, sworn, and impaneled anew for the trial of each case, according to the established practice.” S.C. Code Ann. § 14-7-1100 (Supp. 2012). However, “[p]roceedings in a court of general jurisdiction will be presumed regular absent evidence to the contrary.” State v. Bultron, 318 S.C. 323, 329, 457 S.E.2d 616, 619 (Ct. App. 1995). The “presumption is always that a public officer has faithfully and correctly performed his official duties.” State v. Hollman, 232 S.C. 489, 501, 102 S.E.2d 873, 878-79 (1958) overruled on other grounds by Stevenson v. State, 335 S.C. 193, 516 S.E.2d 434 (1999).

The PCR judge erred in finding Respondent was denied the constitutional right to a trial by an impartial jury because the trial transcript lacked a notation that the jury was sworn. The absence of a notation that the jury was sworn is not sufficient to overcome the presumption of regularity of a trial. This Court addressed this issue in State v. Mayfield, 235 S.C. 11, 109 S.E.2d 716 (1959). In Mayfield, this Court found “[a]bsence of affirmative statement in the transcript that the jury was sworn furnishes no factual support for appellant’s contention that it was not. Appellant’s statement that the jury was not sworn stands alone, and is, in our opinion, insufficient to overcome the contrary presumption.” Id. at 23, 109 S.E.2d at 723 (citation omitted).

Furthermore, other states have addressed the issue of whether the absence in the record that the jury was sworn renders the trial a nullity. In Montgomery v. State, 47 A.3d 1140 (Md. App. 2012), the Maryland Court of Appeals noted there was an absence of a notation in the transcript that the jury was sworn. That court held, however, the presumption of regularity of convictions applies to the issue of whether or not the jury was sworn and concluded that since there was no affirmative indication the jury was unsworn, the presumption had not been rebutted. In Hill v. State, 728 S.E.2d 225 (Ga. 2012), the Georgia Supreme Court noted the mere failure of the record to reflect whether the jury was sworn does not constitute reversible error. In Allen v. State, 945 So.2d 422 (Miss. App. 2006), the holding of the Mississippi Court of Appeals basically combined these findings. In Allen, that court held there was a rebuttable presumption that the trial court properly performed its duties and there was nothing in the record that the jury was, in fact, not sworn. That court held the absence in the transcript of a notation the jury was sworn was not enough to constitute error.

Accordingly, the absence of a notation in the trial transcript did not overcome the presumption that Respondent's trial was conducted in the regular manner. Respondent failed to demonstrate his constitutional right to trial by an impartial jury was denied in his case. As Respondent failed to meet his burden of proving that he is entitled to a new trial, the PCR judge erred in granting Respondent's application for post-conviction relief. See Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) ("The burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.").

## CONCLUSION

For the reasons stated above, this Court should grant the Petition for Writ of Certiorari and reverse the lower court's ruling. If this Court grants certiorari, the State asks permission under the rules to brief the issue discussed above fully.

Respectfully submitted,

ALAN WILSON  
Attorney General

KAREN C. RATIGAN  
Senior Assistant Deputy Attorney General  
S.C. Bar # 68331

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By:   
ATTORNEYS FOR PETITIONER

November 25, 2013

STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

The Honorable G. Edward Welmaker, Trial Judge  
The Honorable R. Markley Dennis, Jr., Post-Conviction Relief Judge

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James E. Waiters, Jr., .....Respondent,

v.

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**CERTIFICATE OF SERVICE**

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I, Karen C. Ratigan, certify that I have today served the within Petition for Writ of Certiorari upon Respondent by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

Robert M. Dudek, Esquire  
South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
Post Office Box 11589  
Columbia, South Carolina 29211-1589

I further certify that all parties required by Rule to be served have been served.  
This 25th day of November, 2013.

  
KAREN C. RATIGAN  
S.C. Bar # 68331  
Office of Attorney General  
Post Office Box 11549  
Columbia, SC 29211  
(803) 734-3737  
ATTORNEY FOR PETITIONER



ALAN WILSON  
ATTORNEY GENERAL

November 25, 2013

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S.C. Supreme Court

The Honorable Daniel E. Shearouse  
Clerk of Court  
South Carolina Supreme Court  
Post Office Box 11330  
Columbia SC 29211

**Re: James E. Waiters, Jr. v. State of South Carolina**  
**Appellate Case No. 2013-000426**

Dear Mr. Shearouse:

I am enclosing the original and six (6) copies of the **Petition for Writ of Certiorari** in the above referenced case. The Appendix was filed on August 23, 2013.

Sincerely,

Karen C. Ratigan  
Senior Assistant Deputy Attorney General  
S.C. Bar #68331

KCR/jacc  
Enclosures

cc: Robert M. Dudek, Esquire  
Trisha Allen, Victim Services