STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Darlington County

R. Ferrell Cothran, Jr., Circuit Court Judge

RONALD FRANCIS CAMERON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-002761

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Whether Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to properly challenge the state's motion to obtain a DNA standard from Petitioner at a *Schmerber* hearing and then later failed to preserve the issue for appeal when she did not object at trial to the admission of DNA evidence where the state took a buccal swab of Petitioner's saliva without his consent?

STATEMENT

A Darlington County Grand Jury indicted Petitioner at the October 16, 2008 term of General Sessions for first degree burglary and petit larceny. App. 273-276. A Schmerber[1] hearing was held on September 1, 2009 before the Honorable J. Michael Baxley after the state filed a Motion for Collection of Suspect Standards. App. 1-3. By order dated September 2, 2009, Judge Baxley directed Petitioner to give a blood and/or saliva sample to the state for comparison analysis. Supp. App. 1-2.

Petitioner's case was called to trial on September 21, 2009 before the Honorable Howard P. King, and a jury. Assistant Solicitors Patricia McKenzie and John Holt represented the state, and Tonya Copeland-Little represented Petitioner. App. 13. On September 23, 2009, the jury found Petitioner guilty. App. 225, l. 21 – 226, l. 8. He was sentenced by Judge King to twenty-five years imprisonment for first degree burglary and thirty days concurrent for petit larceny. App. 235, l. 25 – 236, l. 5.

On direct appeal, pursuant to Anders v. California, 386 U.S. 738 (1967), Petitioner argued the trial court erred in granting the state's request that he submit nontestimonial identification evidence. The South Carolina Court of Appeals affirmed Petitioner's convictions. State v. Cameron, 2012-UP-254 (filed May 2, 2012).

On July 20, 2012, Petitioner filed an application for post-conviction relief (PCR) raising the issue contained in this petition. App. 238-244. The state filed a return to this application dated October 8, 2012. App. 245-249. The matter proceeded to an evidentiary hearing on July 16, 2013 before the Honorable R. Ferrell Cothran, Jr. App. 250. Assistant Attorney General Karen C.

[1] Schmerber v. California, 384 U.S. 757 (1966).

Ratigan represented the state, and Parker E. Howle represented Petitioner. App. 250. By order dated October 18, 2013, Judge Cothran denied Petitioner relief. App. 267-272.

This petition for writ of certiorari follows.

ARGUMENT

Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to properly challenge the state's motion to obtain a DNA standard from Petitioner at a *Schmerber* hearing and then later failed to preserve the issue for appeal when she did not object at trial to the admission of DNA evidence where the state took a buccal swab of Petitioner's saliva without his consent.

Schmerber Hearing

A Schmerber hearing was held before Judge Baxley on September 1, 2009. The solicitor told Judge Baxley that the state sought "a Schmerber Order for the collection of suspect standards" indicating that either a blood sample or a saliva swab from Petitioner's cheek would be acceptable. App. 3, ll. 8-10. At the start of the hearing, Judge Baxley told Petitioner that the state had asked for the right to take a DNA swab from him in order to compare it with DNA evidence found at the scene of the crime for which Petitioner was charged. App. 4, ll. 2-8.

Captain Daniel Watson of the Darlington City Police Department testified that he responded to a home in the City of Darlington in regards to a burglary. Watson explained that after he entered the home, he noticed spots of blood on the kitchen floor and on the refrigerator. App. 4, l. 21 – 5, l. 2. He told the judge that he collected swabs of this blood and placed the swabs into evidence. App. 5, ll. 2-4. Watson testified that after he finished processing the scene, he went to a nearby pawn shop to see if any of the items reported stolen from the residence had been recently pawned. Watson discovered that a class ring, which was owned by Jordan Cox, a resident of the burglarized home, had been pawned by a Larry Gainey shortly after the burglary. Watson said the ring was "easily identifiable." However, he explained that, after speaking to Gainey, he determined Gainey "probably" was not the burglar because "he was not bleeding from his hands." App. 5, l. 6 – 6, l. 4.

Captain Watson told Judge Baxley that Gainey said Petitioner sold him the ring and that Petitioner's hands were bleeding at the time. Watson explained that Gainey actually presented a handwritten receipt indicating Petitioner sold him the class ring, which was supposedly signed by Petitioner. However, Watson testified that it was later discovered that this receipt, and Petitioner's signature on the receipt, were forged. Despite the fact that law enforcement knew the receipt was fake, Petitioner was charged with the burglary and arrested.

Watson claimed that after Petitioner's arrest, another individual, Dacia Gainey, gave a written statement claiming Petitioner came by her home on the day of the burglary with a class ring with the name "Jordan" on it as well as pay stubs in the name of "Jerry A. Cox." Dacia also claimed in her statement that Petitioner's hands were bleeding. App. 6, l. 4 – 7, l. 1.

Trial counsel argued the proposed swabbing of Petitioner's cheek would be physically intrusive and "would require a foreign object to be placed into the defendant's mouth, in violation of his right to privacy." App. 8, ll. 13-17. Trial counsel further argued that the swabbing would also violate Petitioner's "other constitutional rights," including "his right not to be forced to incriminate himself." Trial counsel concluded the act would be "physically intrusive and unconstitutional." App. 8, ll. 17-20.

Petitioner then informed Judge Baxley that on April 26, 2008, the day after he was arrested, Captain Watson came and "got me from Darlington Detention Center and took me down there to City Jail. And then he done a swab test on me. And, ah, now they realized that they did that without my consent, and now they want another swab test. And I don't feel like they should give him none. I mean he done the first one without my consent, knowing he should have consent or a judge like you to order for one. But, he just took it upon himself to do it without - - I mean, that ain't right." App. 9, l. 20 – 10, l. 5.

Judge Baxley told Petitioner he was "not aware" that a swab had already been collected and that "[t]here is certainly no evidence to that effect." The judge then told the state he was granting its Schmerber motion despite the fact that it would be an invasion of Petitioner's "physical person" because the state had shown "substantial probable cause to tie [Petitioner] to the crime scene." App. 10, ll. 6-16. Judge Baxley signed a written order to this effect on September 2, 2009. Supp. App. 1-2.

Facts at Trial

Angela Cox, a high school guidance counselor, testified that she lives in Darlington with her husband and two children. She explained that on April 25, 2008, she had a doctor's appointment in the afternoon so she took the afternoon off from work. App. 62, l. 3 – 63, l. 8. Before going to her doctor's appointment, Cox testified that she stopped by her house around 11:45 am to "grab a sandwich" and "take care of some business." App. 63, l. 8-9. Upon entering the home, Cox noticed glass on the kitchen floor. She testified that she looked "around to see if one of the kids had knocked over a glass or something" and saw droppings of blood on the floor and on the refrigerator. Cox said she then "looked back at the door and realized that the glass" on the door was broken. She explained that it "[s]till didn't register that someone had broken in." Cox testified that it was not until after she walked farther into the house and noticed that all the drawers in her and her children's bedrooms were opened that she realized someone had broken into her home. Once it "hit [her]," she called the police. App. 63, l. 24 – 64, l. 22.

Cox testified that her family determined several of their belongings were missing from the home, including her son's high school ring, a jar of change, and her jewelry box that was on her nightstand. The jewelry box contained several sentimental items of jewelry that used to belong to her mother and grandmother. App. 65, ll. 11-24.

Larry Gainey testified that he knew Petitioner because the two "had some dealings together" and lived in the same neighborhood. App. 76, ll. 4-8. Gainey claimed that Petitioner stopped by his residence early on the morning of April 25, 2008 and then "came back by . . . late morning, maybe noon at the latest." App. 76, ll. 9-23. According to Gainey, when Petitioner came by the second time, he had a high school ring with "Jordan wrote on the side" and a "burgundy stone on the top." Gainey claimed Petitioner offered to sell the ring and Gainey bought it from Petitioner for nine dollars. App. 77, ll. 4-16. He testified that Petitioner "specifically" told him, "'Whatever you do don't take it to the pawn shop.'" App. 78, l. 22 – 79, l. 1. Despite this request, Gainey said that after Petitioner left he took the ring to the only pawn shop in Darlington and sold it for fifty dollars. App. 79, ll. 2-12. Gainey identified his signature on the pawn shop receipt which indicated the sale occurred on April 25, 2008 at 1:07 pm. App. 79, l. 17 – 80, l. 3.

Gainey also testified that when Petitioner came back the second time with the ring, "he had his hand bandaged up in a towel . . . and he was bleeding." However, Petitioner never told him what happened to his hand. Gainey explained that about ten minutes after he got back from the pawn shop "a deputy and a couple other officers showed up and arrested me and said that I had broken in someone's home and stole his ring." He told the jury he gave the officers a receipt that indicated Petitioner had sold him the ring. However, Gainey admitted this receipt was forged by his brother and that Petitioner did not sign the receipt. App. 80, l. 4 – 82, l. 16.

Before the end of his testimony, Gainey was impeached with his lengthy criminal record, including convictions for numerous forgeries, second degree burglary, breach of trust, escape, and shoplifting. App. 84, ll. 2-25. Gainey was also charged with receiving stolen goods for his involvement with the class ring. However, at the time of trial, that charge was still pending. App. 89, ll. 13-18.

Dacia Gainey, Petitioner's sister-in-law, testified that on April 25, 2008, Petitioner came by her house twice. She claimed that when Petitioner came by the second time "[h]is hands were bleeding." Petitioner allegedly told her that "he had gotten in a fight with somebody," which was why his hands were bleeding. Dacia also claimed that Petitioner had a "gold high school ring" that had a red stone and "Jordan wrote across it." Dacia testified that Petitioner told her he was going to sell the ring. App. 95, l. 6 – 97, l. 13.

At the end of her testimony, Dacia was impeached with her prior convictions for grand larceny and receiving stolen goods and admitted to currently being on probation. App. 97, l. 21 – 98, l. 3.

Captain Danny Watson of the Darlington Police Department testified that when he initially surveyed the outside of the residence "it was obvious that it was a break in. Someone had broken into the house." App. 102, l. 20 – 103, l. 5. He explained that the side door leading into the kitchen "had glass panels in it and one of the glass panels had been punched out or knocked out where an individual could reach in and open the door." App. 104, ll. 2-9. Watson told the jury that there were several drops of blood on the kitchen floor and a drop of blood on the refrigerator. App. 104, ll. 10-23. Watson took five swabs of this blood and later transported the swabs to the evidence room at the police department. App. 105, ll. 18-22. The rest of the home appeared to be "ransacked." App. 105, ll. 4-17.

After Watson finished processing the scene, he went to a local pawn shop to see if any of the items reported stolen from the Darlington home had been recently pawned. He discovered a class ring that belonged to one of the residents of the home had been pawned by Larry Gainey. App. 110, l. 15 – 112, l. 24. Shortly thereafter, law enforcement located Gainey. However, Gainey was not bleeding and did not have any cuts. App. 113, l. 24 – 114, l. 21. After speaking with Gainey,

Watson said Petitioner became a suspect. The police quickly apprehended Petitioner who had cuts on his hands that were still bleeding. App. 114, l. 22 – 115, l. 10.

Michael August, also of the Darlington Police Department, testified that he received a court order from the solicitor's office on September 2, 2009 and brought it to the Darlington County Detention Center where he presented it to Petitioner. August also showed the order to the "jail nurse," Faye Weatherford, who then took buccal swabs of saliva from Petitioner's mouth. App. 135, ll. 2-16. August took custody of these swabs at the jail and placed them in the evidence drop box at the police department. On September 8, 2009, August transported these swabs to SLED in Columbia. App. 135, l. 24 – 136, l. 19.

SLED Agent Lilly Gallman, who was qualified as an expert in DNA analysis, told the jury that the blood on the five swabs submitted to her in this case matched the DNA profile of Petitioner. She claimed that "the probability of randomly selecting an unrelated individual having D.N.A. profile matching these items is approximately one in one quintillion. That's a one and 18 zeros." App. 160, ll. 19-25.

There was no objection to any of Gallman's testimony or to the admission of a blown up version of Gallman's report, which was admitted into evidence and published to the jury. App. 157, l. 17 – 161, l. 14.

Petitioner, who took the stand in his own defense, testified that he has known Larry Gainey all his life and that the two grew up in the same neighborhood. Petitioner said he was with Gainey at Gainey's trailer on the night of April 24, 2008, which was the night before the burglary. Petitioner explained that he and Gainey were smoking crack and "shooting cocaine" all night and that he did not leave Gainey's residence until about four or five o'clock in the morning. App. 182, l. 2 – 183, l. 3.

Petitioner testified that "shooting cocaine" involves using a needle and a syringe to release cocaine into his body. He said, "When you get to shooting drugs and you shooting for so long it makes you jittery. I mean you get to shaking and all and you can't hardly shoot when you sticking yourself in and out of your arm. And [your] needle get clogged up and you just throw it away and get a new one and shoot it . . . And keep trying until you get it." App. 183, ll. 1-24. Petitioner told the jury that he used several syringes that night and, when he was finished with them, he threw them away in Gainey's trash can. Petitioner explained that these used syringes had his blood in them. App. 183, l. 25 – 184, l. 8; App. 189, l. 19 – 190, l. 14.

Petitioner testified that after he left Gainey's trailer during the early morning hours of April 25, 2008, he went home to his camper and went to bed. Once the sun came up, Petitioner said he got up and "went looking for some junk" that he could take to the "steel mill" to make "some money." He told the jury that he does construction work, but that he has "been doing a lot of junk work lately." On the morning on April 25, 2008, he was "looking for junk" beside the railroad track on Mill Road. He looked for about two to three hours and then went to his sister's house which was located in the same trailer park where Gainey lived. While he was at his sister's trailer, the police showed up and arrested him. App. 184, l. 15 – 185, l. 25.

Petitioner denied going back over to Gainey's trailer that morning. He also testified that he did not sell Gainey a ring and that he had never seen the stolen class ring before. App. 186, ll. 1-16. Furthermore, Petitioner explained that the cuts on his hands when he was arrested happened while he was looking for junk. He said, "When I find junk, I'm constantly around steel. I'm constantly -- daily, I get my hands cut all up. I mean pulling junk out of brushes and all. Old junk, you're going to cut your hands." App. 188, l. 10 – 189, l. 3.

Lastly, Petitioner denied that he broke into the Cox residence. He testified, "Only thing I can say is Larry [Gainey] got one of the syringes out of the trash can that had my blood in it, and he broke in there and put my blood in there. I ain't never been in there." App. 189, ll. 4-8.

PCR Hearing

Petitioner testified at the PCR hearing that he "had some issues with how [trial counsel] handled [the] DNA evidence" in his case and that she did not do all that she could have done to have the evidence excluded. Petitioner explained that during the Schmerber hearing, trial counsel refused to tell the judge that the day after Petitioner was arrested law enforcement took a DNA sample from him without his consent. He said, "[S]he didn't bring up the other, the first DNA was done. I had to bring it up." Petitioner testified that because of trial counsel failure to properly challenge the DNA evidence, he should be granted post-conviction relief. He said, "I feel like she just didn't represent me to her best of knowledge. I mean, I believe she could have done better." App. 245, l. 4 – 255, l. 17; App. 258, ll. 7-10.

Trial counsel, Tonya Little, testified that she was aware law enforcement had taken a DNA swab from Petitioner about three days after he was arrested. However, she said, "I was not present. I didn't advise him about that. I found out later that they had taken him for a swab." Little also maintained that it was her understanding Petitioner had "volunteered" to provide the police with a saliva swab. However, she said that Petitioner later told her "he did not consent to giving his saliva so [she] filed a motion to suppress." Little explained that instead of challenging the motion to suppress, the solicitor requested a Schmerber hearing. She said, "Well, basically the solicitor, I think, knew that it [the initial saliva swab] probably wasn't going to come in so they just didn't really fight that [the motion to suppress] but instead asked for a new draw." App. 259, l. 9 – 260, l. 8.

Little testified that during the Schmerber hearing she tried to keep the state from obtaining a second swab. She said she argued that it was an invasion of Petitioner's right to privacy and required a foreign object be placed inside his mouth without his consent. Little said she did not think there were any other arguments she could have made at the hearing. However, she explained that Petitioner "wanted the court to know that he had previously been, had DNA taken without his consent. I just had advised him not to say anything at the hearing, but he wanted to speak so then he let Judge Baxley know that originally saliva had been taken, he said, without his consent by Darlington Police Department." App. 260, ll. 9-24.

Little admitted she did not object to the introduction of the DNA evidence at trial. She said she did not "think [she] had any grounds to object" because the "DNA was taken by court order" and there was a proper chain of custody. App. 261, ll. 3-19.

Order of Dismissal

The PCR court found Petitioner "failed to meet his burden of proving trial counsel did not properly handle the DNA issue because he failed to articulate a legal basis upon which trial counsel could have challenged the admission of the DNA evidence at trial." App. 270. The court also held that Petitioner "cannot prove he was prejudiced by the admission of the DNA evidence at trial" because there was additional evidence of his guilt, specifically that the distinctive class ring was traced back to Petitioner and he had bleeding cuts on his hands. App. 271. Therefore, the PCR court denied Petitioner's PCR application. App. 272.

Discussion

In order to show ineffective assistance of counsel as a ground for relief, Petitioner must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S.

668, 686 (1984); see also Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687-688.

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. Petitioner must prove that counsel's performance was deficient and fell below reasonable professional norms; and there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997).

In order to obtain nontestimonial identification evidence from an individual without his or her consent, "the State must initially show that there is probable cause to believe a crime has been committed, and probable cause to believe that it was committed by a particular suspect. Once the court has found the existence of probable cause on both grounds, the State must then show (1) a clear indication that material evidence relevant to the question of the suspect's guilt will be found, and (2) that the method used to secure this evidence is safe and reliable." State v. Register, 308 S.C. 534, 537-538, 419 S.E.2d 771, 773 (1992) (citing In re: Investigation of the Death of Melinda Renee Snyder, 308 S.C. 192, 417 S.E.2d 572 (1992)).

"Once the State has shown probable cause and the two preceding factors are satisfied, the court must then determine whether the character of the requested search is appropriate. The court must balance the seriousness of the crime, the importance of the evidence to the investigation, and the unavailability of alternative, less intrusive means of obtaining the evidence, on one hand, against concern for the potential witness' constitutional right to be free from bodily intrusion on the other." Register, 308 S.C. at 538, 419 S.E.2d at 773 (citing In re: Snyder, supra and In re: An Investigation

into the Death of Abe A., 56 N.Y.2d 288, 452 N.Y.S.2d 6, 437 N.E.2d 265 (1982)). "*[O]nly* if this stringent standard is met, may the intrusion be sustained." Register, 308 S.C. at 538, 419 S.E.2d at 773 (citing In re: Abe A., supra) (emphasis in original).

In this case, trial counsel was ineffective because she failed to properly challenge the state's request to obtain a DNA standard from Petitioner at the Schmerber hearing. The only argument trial counsel made at the hearing was that taking a saliva swab would violate Petitioner's "right to privacy," "his right not to be forced to incriminate himself," and his "other constitutional rights." Trial counsel failed to argue that the state did not have probable cause to believe that the burglary of the Cox residence was committed by Petitioner. She also failed to require Judge Baxley to balance the seriousness of the crime and the importance of the evidence to the investigation, on one hand, against concern for Petitioner's constitutional right to be free from bodily intrusion on the other. See Register, 308 S.C. at 538, 419 S.E.2d at 773 (citing In re: Snyder, supra and In re: Abe A., supra).

The state did not have probable cause to believe the burglary of the Cox residence was committed by Petitioner at the time of the Schmerber hearing. The evidence presented to Judge Baxley at the hearing was that Larry Gainey sold the class ring to a local pawn shop, Gainey alleged Petitioner originally sold him the ring, Gainey forged a written receipt indicating Petitioner sold him the ring, and Dacia Gainey told the police that Petitioner came by her house on the day of the burglary and allegedly had the class ring in his possession. Additionally, both Larry Gainey and Dacia Gainey alleged Petitioner's hands were bleeding. See App. 5, l. 13 – 7, l. 1. This evidence did not amount to probable cause. Notably, the state failed to inform Judge Baxley of Larry Gainey's and Dacia Gainey's extensive criminal records, which prevented Judge Baxley from properly weighing their credibility.

Furthermore, trial counsel was also ineffective when she failed to object at trial to Lilly Gallman's testimony and the admission of Gallman's report, which indicated that it was Petitioner's blood that was found in the kitchen of the Cox residence, since this evidence was only obtained after the state took buccal swabs of Petitioner's saliva without his consent. By failing to object to this evidence at trial, trial counsel failed to preserve the issue for appellate review.

Petitioner was prejudiced because trial counsel's deficient performance "so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Butler, 286 S.C. at 442, 334 S.E.2d at 814 (quoting Strickland, 466 U.S. at 692). Specifically, Petitioner was prejudiced by the admission of the DNA evidence because the state relied heavily on the results of the DNA comparison testing to establish Petitioner's alleged guilt at trial. For example, the solicitor argued during her closing:

> Then you have the D.N.A. cause when you go back to deliberate there is one thing that you can't forget about. And that's this report that's blown up over here and the swabs that were taken from the crime scene. Five swabs of blood that were taken. Ronnie Cameron was positive. It was a positive D.N.A. match on every instance, and you heard from the D.N.A. expert about the probability of that, about the probability of another individual matching the D.N.A. the way he did; that probability would be one in quintillion. That's 18 zeros behind the number one. That would be the probability, but that was his D.N.A. in the house cause he cut himself and he left that blood on the floor.
>
> That's the one neon sign that's blinking in this case that you can't ignore . . .

App. 204, l. 22 – 205, l. 11.

Besides the DNA evidence, the only other evidence the state presented against Petitioner at trial was the testimony of Larry Gainey and Dacia Gainey, both of whom had lengthy criminal records. Because of their prior criminal records, neither witness was very credible.

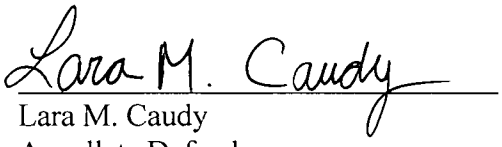
Additionally, because trial counsel failed to object to the DNA evidence at trial, the issue of whether the trial court erred in granting the state's motion to collect a DNA standard from Petitioner was not properly considered by the Court of Appeals on direct appeal because the issue was not preserved for review.

Therefore, the PCR court erred in finding trial counsel provided effective assistance of counsel because "there is a reasonable probability that, but for [trial] counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 118, 386 S.E.2d at 625 (internal citations omitted); See Strickland, 466 U.S. 668.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and permit full briefing on the issue presented.

Respectfully submitted,



Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 19th day of May, 2014.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Darlington County
R. Ferrell Cothran, Jr., Circuit Court Judge

RONALD FRANCIS CAMERON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix and supplemental appendix in this case have been served on Joshua L. Thomas, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 19th day of May, 2014.

Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 19th day of May, 2014.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.