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Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

April 11, 2014

The Honorable Daniel E. Shearouse
Clerk, S.C. Supreme Court
PO Box 11330
Columbia, SC 29211

Re: James Waiters v. State of South Carolina

Dear Mr. Shearouse:

Attached are an original and six copies of the Petition to File Supplemental Appendix in the above-captioned case. Thank you for your assistance in this matter.

Sincerely,

Robert M. Dudek
Chief Appellate Defender

cc: Karen Ratigan, Esquire

RMD/brr

Enclosures

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APR 11 2014

S.C. Supreme Court

~~RECEIVED~~

~~APR 10 2014~~

~~S.C. Supreme Court~~

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Greenville County
R. Markley Dennis Jr., Circuit Court Judge

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APR 10 2014

S.C. Supreme Court

JAMES WAITERS,

RESPONDENT,

RECEIVED

APR 11 2014

S.C. Supreme Court

v.

STATE OF SOUTH CAROLINA,

PETITIONER

Appellate Case No. 2013-000426

PETITION TO FILE
SUPPLEMENTAL APPENDIX

Pursuant to Rule 212, SCACR, the undersigned counsel requests that the Petitioner file a supplemental appendix to include respondent's "supplemental brief" on the failure of the jury to be sworn, and the failure to object to the jury being sworn prior to trial issue. In support of this motion, counsel submits the following facts.

1. Respondent was indicted by the Greenville County Grand Jury for three counts of armed robbery, and possession of a weapon during a violent crime. App. 332-333; app. 336-337; app. 339-340; 345.

2. His case came on for trial on March 11-12, 2008 before the Honorable Edward G. Welmaker, and a jury. Respondent was represented by Timothy Sullivan, and Douglas Webb was

the Assistant Solicitor. App. 1. On March 12, 2008, the jury found respondent guilty on two counts, and not guilty on one count of armed robbery. The jury also issued a guilty verdict on the possession of a weapon during the commission of a violent crime count. App. 241, ll. 1-22. Defense counsel Sullivan moved to set aside the verdicts on the grounds “inconsistent verdicts.” “I don’t understand it. Under the facts he either robbed them all or he didn’t rob anybody.” App. 244, ll. 7-18. The motion was denied. App. 246, ll. 15-16.

3. Judge Welmaker sentenced respondent to concurrent sentences of seventeen years imprisonment on the armed robbery counts, and he imposed a five year term of the gun charge. App. 250, ll. 10-21.

4. Respondent filed a notice of intent to appeal. He was represented on appeal by J. Falkner Wilkes. He argued, *inter alia*, that State v. Alexander, 303 S.C. 377, 401 S.E.2d 146 (1991), on the doctrine of inconsistent verdicts, violated appellant’s right to due process under the State Constitution. Article I, §3. App. 252-279. The Court of Appeals affirmed respondent’s convictions in State v. James Waiters Jr., 2010-UP-296 (May 27, 2010).

5. Respondent filed an application for post-conviction relief on December 23, 2010. App. 282-288. The state filed its return dated April 12, 2011. App. 289-292.

6. An evidentiary hearing was convened on November 1, 2012 before the Honorable Markley Dennis. R. Mills Arial, Jr. represented respondent. Senior Deputy Attorney General Karen Ratigan represented the state. App. 294.

7. At the commencement of the post-conviction hearing PCR counsel Arail noted that “[t]here is no record that the jury was sworn in this case prior to the trial beginning. I cannot find it anywhere in the record *and he filed a supplemental brief in regards to it and I filed it yesterday* and let Ms. Ratigan know that we were going to raise that issue.” The state acknowledged it was on

notice of the issue, and the PCR judge ruled: “[I]t [the PCR record] is supplemented to include that additionally.” App. 298, ll. 8-21.

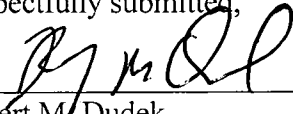
8. However, Petitioner failed to include this brief raising the jury not being sworn, or ineffectiveness for not objecting to the jury being sworn matter in its Appendix. In addition, while working on the Return in the present action undersigned counsel also noticed that the “initial brief” attachment to respondent’s PCR application was also not included in the Appendix even though it was referenced in his PCR application. App. 284.

9. Judge Dennis granted relief on the jury not having been sworn ground. App. 326-329.

10. Respondent has *no interest in delay*. Undersigned counsel understands that opposing counsel is involved in training today but she did leave a message consenting or giving her non-opposition to this motion. *Undersigned counsel will file the Return within three business days of receiving the supplemental Appendix.*

WHEREFORE, undersigned counsel requests that the petitioner be ordered by this Court to file a Supplemental Appendix including the PCR supplemental brief filed by PCR counsel as referenced above, and the attachment to respondent’s PCR application referenced above. Respondent requests that the time limits for filing his Return be held in abeyance pending a ruling on this motion.

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender

Attorney for Respondent

April 11, 2014

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County

R. Markley Dennis, Jr., Circuit Court Judge

JAMES E. WAITERS,

RESPONDENT,

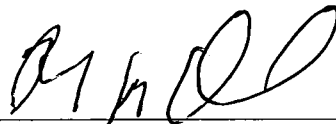
V.

STATE OF SOUTH CAROLINA,

PETITIONER

CERTIFICATE OF SERVICE

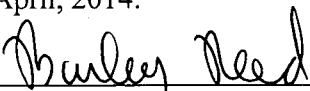
I certify that a true copy of petition to file supplemental appendix in this case have been served on Karen Ratigan, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 this 11th day of April, 2014.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR RESPONDENT

SWORN TO BEFORE ME this 11th day
of April, 2014.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: October 24, 2021