

STATE OF SOUTH CAROLINA
In The Supreme Court

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CERTIORARI TO LEXINGTON COUNTY
Court of Common Pleas

NOV 20 2014

The Honorable Edgar W. Dickson, Circuit Court Judge **S.C. Supreme Court**

Appellate Case No. 2014-00694

Rikam Ikkesh Dozier, Petitioner,

v.

State of South Carolina, Respondent.

**RETURN TO PETITION FOR
WRIT OF CERTIORARI**

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Certiorari is not warranted to review whether the PCR Judge erred as a matter of law in declining to apply a cumulative prejudice analysis in denying and dismissing Petitioner’s PCR Application. Notwithstanding the PCR Judge’s apt decision to remain within this Court’s jurisprudence, the justifiably maligned cumulative prejudice analysis is entirely inappropriate in the PCR forum for numerous compelling reasons.5

Certiorari is not warranted where ample probative evidence supports the PCR Judge’s sound finding that Petitioner failed to meet his burden to prove that counsel’s performance in advising him on the terms and conditions of the plea agreement constituted ineffective assistance of counsel.9

Certiorari is certainly not warranted where Petitioner’s argument that counsel’s bizarre ecclesiastical approach to practicing law constituted ineffective assistance of counsel is categorically unsound.15

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QUESTION PRESENTED

Petitioner's Statement of the Issue on Appeal

1. Did the circuit court err in holding that petitioner's trial counsel was not ineffective in the underlying proceeding by finding that the cumulative effect of trial counsel's errors in failing to establish neither counsel nor petitioner had a full understanding of the consequences of his plea and the charges against him, failing to provide full and fair representation or petitioner's rights under counsel's constitutional obligation, and failing to investigate petitioner's mental capacity which resulted in prejudice?

Respondent's Counter Statement of the Issues on Appeal

1. Is Certiorari necessary to review whether the PCR Judge erred as a matter of law in declining to venture outside of this Court's jurisprudence and apply a cumulative prejudice rubric in denying and dismissing the PCR Application?
2. Is Certiorari necessary to review whether probative evidence supports the PCR Judge's finding that Petitioner failed to meet his burden to prove that his plea was rendered involuntary because of counsel's purported ineffective performance in advising him on the terms and conditions of the plea agreement?
3. If Petitioner's argument that counsel was purportedly ineffective for failing to provide full and fair representation pursuant to his constitutional obligation is even facially sufficient, is Certiorari necessary to review whether the PCR Judge erred in rejecting Petitioner's contention that the purported grievance matter entitled Petitioner to PCR relief?

STATEMENT OF THE CASE

The Lexington County Grand Jury indicted Petitioner at the September 2008 term of General Sessions for armed robbery (2008-GS-32-2826) and criminal conspiracy (2008-GS-32-2827). App.pp.32-38. Bradley B. Hansen, Esq., represented Petitioner.

On April 2, 2009, Petitioner entered a guilty plea to armed robbery pursuant to the State's plea agreement. The Honorable R. Knox McMahon accepted Petitioner's plea and sentenced him to a term of fifteen (15) years of imprisonment for armed robbery. App.pp.1-31.

Petitioner did not appeal his sentence or conviction. Yet, Petitioner filed an application for post-conviction relief (PCR) on March 10, 2010. App.pp.39-52. A hearing was convened at the Lexington County Courthouse on November 15, 2012. App.pp.61-96. Petitioner was present and represented by Aimee Zmroczek, Esq., Senior Assistant Deputy Attorney General 'SADAG' Karen C. Ratigan, Esq. of the South Carolina Attorney General's Office represented Respondent. The Honorable Edgar W. Dickson issued a memoranda order denying and dismissing the civil action on July 1, 2013. App.pp.183-84. A formal order was filed March 13, 2014. App.pp.199-212. Petitioner filed a post-trial motion to reconsider pursuant to Rule 59(e), SCRPC. App.pp.195-98. Judge Dickson denied Petitioner's motion in an order. App.pp.199-200.

This discretionary Petition follows.

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

I.

Certiorari is not warranted to review whether the PCR Judge erred as a matter of law in declining to apply a cumulative prejudice analysis in denying and dismissing Petitioner's PCR Application. Notwithstanding the PCR Judge's apt decision to remain within this Court's jurisprudence, the justifiably maligned cumulative prejudice analysis is entirely inappropriate in the PCR forum for numerous compelling reasons.

In denying Petitioner's application for post-conviction relief, the PCR judge found that the "[he] is bound to apply the law as defined, or not defined, [he] cannot find the cumulative effect of [counsel]'s representation has prejudiced [Petitioner]." App.p.209

Effective Assistance of Counsel

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). In order to prove prejudice, an applicant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 300 S.C. at 117-18, 386 S.E.2d at 625. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984)).

Discussion

The PCR judge correctly declined to apply a cumulative prejudice analysis here. Petitioner myopically urges this Court to now employ a cumulative prejudice analysis to ineffectiveness claims, such as employed in Brady cases. See Kyles v. Wheatly, 514 U.S. 419 (1985). In Green v. State, 351 S.C. 184, 196-97, 569 S.E.2d 318, 324-25 (2002), the Court expressly declined to address whether a PCR applicant is entitled to relief based upon the supposed cumulative effect of trial counsel's alleged errors. See also Simpson, 367 S.C. 587, 604, 627 S.E.2d 701, 710 (2006) (recognizing that "[w]hether several errors, which are independently found not to be prejudicial, may cumulatively warrant relief is an unsettled question in South Carolina" and holding that "[b]ecause the PCR court found that only one of Simpson's allegations had merit, there was no need to conduct a cumulative-error analysis"). Such an analysis is not constitutionally required.

Before an alleged error may be considered as a factor contributing to cumulative prejudice, a court first must find that the alleged error is, in fact, constitutional error. Only then can the cumulative prejudice arising from the error be considered. To hold otherwise is to conclude that even non-deficient performance might result in reversal of a conviction. Such a conclusion is manifestly contrary to the analysis set forth in Strickland v. Washington. See Strickland, 466 U.S. at 687 ("Unless a defendant makes both showings [i.e., deficient performance and prejudice] it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable").

Even in the absence of a cumulative prejudice analysis, a reviewing court, quite

properly, analyzes the same class of errors together, such as the failure to present adequate evidence of mitigation. Yet, it is inappropriate to consider the cumulative prejudice from various alleged errors that are not related. (emphasis added). See Strickland, 466 U.S. at 687 (“Unless a defendant makes both showings [i.e., both deficient performance and prejudice –] it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable”).

A number of other jurisdictions, including the Fourth Circuit Court of Appeals, have held a cumulative effect analysis is inappropriate and that the appropriate analysis focuses upon each individual allegation of ineffective assistance. See Fisher v. Angelone, 163 F.3d 835, 852-53 (4th Cir. 1998); Wainwright v. Lockhart, 80 F.3d 1226 (8th Cir. 1996); Jones v. Sotts, 59 F.3d 143, 147 (10th Cir. 1995). As the Fourth Circuit Court of Appeals explained in Fisher v. Angelone, 163 F.3d 835, 852-53 (4th Cir. 1998):

Fisher argues that the cumulative effect of his trial counsel’s individual actions deprived him of a fair trial. We disagree. Having just determined that none of counsel’s actions could be considered constitutional error, see Lockhart v. Fretwell, 506 U.S. 364, 369 n. 2, 113 S. Ct. 838, 122 L. Ed. 2d 180 (1993) (“[U]nder Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), an error of constitutional magnitude occurs in the Sixth Amendment context only if the defendant demonstrates (1) deficient performance and (2) prejudice, it would be odd, to say the least, to conclude that those same actions, when considered collectively, deprived Fisher of a fair trial. Not surprisingly, it has long been the practice of the Fourth Circuit individually to assess claims under Strickland v. Washington.” See, e.g., Hoots v. Allsbrook, 785 F.2d 1214, 1219 (4th Cir. 1986) (considering ineffective assistance claims individually rather than considering their cumulative impact). In fact, in Arnold v. Evatt, 113 F.3d 1352 (4th Cir 1997), cert. denied, ___ U.S. ___, 118 S. Ct. 715 (1998), the Fourth Circuit recently rejected a similar request to review the alleged errors of a trial court cumulatively rather than individually. See id. at 1364 (“Based on the findings of this court

concerning the individual claims of error, we reject this claim.’).

To the extent this Court has not specifically stated that ineffective assistance of counsel claims, like claims of trial court error, must be reviewed individually, rather than collectively, we do so now. In so holding, we are in agreement with the majority of our sister circuits that have considered the issue.

Id. (footnote omitted). See also Meuller v. Angelone, 181 F.3d 557, 586n.22 (4th Cir. 1999) (“Petitioner also urges us to consider the cumulative effect of his ineffective assistance of counsel claims rather than whether each claim, considered alone, establishes a constitutional violation. This argument is squarely foreclosed by our recent decision in Fisher v. Angelone, 163 F.3d [...at] 852-53 [...]”). Therefore, the Federal bench has correctly decided that prejudice must be considered on an individual, not a collective basis. Fisher, 163 F.3d at 852.

Further, and analyzing the various allegations raised by Petitioner cumulatively, the Court finds that it is clear that he is not entitled to relief because the record does not support a finding that he was prejudiced by any or all of the alleged errors. See Westley v. Johnson, 83 F.3d 714, 726 (5th Cir.1996) (claims that are not prejudicial cannot be cumulated, regardless of the number raised). Therefore, further inquiry on the matter is unnecessary.

II.

Certiorari is not warranted where ample probative evidence supports the PCR Judge's sound finding that Petitioner failed to meet his burden to prove that counsel's performance in advising him on the terms and conditions of the plea agreement constituted ineffective assistance of counsel.

At the PCR hearing, Petitioner testified that counsel incorrectly ensured him that he would receive a ten (10) year sentence if he pled guilty. Petitioner stated he hired counsel to negotiate a plea on his three warrants he faced for armed robbery, criminal conspiracy, and kidnapping. Petitioner stated he had two meetings with counsel and they reviewed the evidence and his version of events. Petitioner stated counsel said he was facing a ninety (90) year sentence. Petitioner stated, however, that counsel said he was working out a deal for a ten (10) year offer. Petitioner stated he believed he was pleading guilty in exchange for ten (10) years. Petitioner stated he answered the plea judge's questions as counsel had instructed him. App.pp.80-91.

At the PCR hearing, counsel testified to his course of conduct during the representation. App.pp.64-80. He noted that Petitioner retained him in order to negotiate a plea in this case. Counsel testified he filed discovery motions, received those materials and reviewed them with the Petitioner. Counsel testified they discussed the sentence ranges on the charges. Counsel testified Petitioner admitted his guilt from the beginning and that he engaged in lengthy plea negotiations.

Counsel testified the first assistant solicitor took a hard stance with this case but the second assistant solicitor dropped Petitioner's kidnapping charge. Counsel testified

the State could have brought additional charges of armed robbery for the other individuals but the State agreed not to bring those indictments. Counsel testified the eventual offer was for Petitioner to plead to a range of 10-30 years and that the State would not object to the minimum sentence on armed robbery. Counsel testified he explained the offer to Petitioner, who had 4-6 weeks to consider it. Counsel testified he never promised Petitioner that he would receive a certain sentence and noted Petitioner did not waver at the plea hearing itself.

In denying and dismissing this all too common 'swearing match' allegation of ineffectiveness, the PCR Judge found counsel's testimony credible. App.p.210.

Effective Assistance of Counsel

The two-part test adopted in Strickland also "applies to challenges to guilty pleas based on ineffective assistance of counsel." Hill v. Lockhart, 474 U.S. 52, 58, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). "Plea counsel is ineffective within the meaning of the Sixth Amendment only when the applicant satisfies both requirements." Stalk v. State, 383 S.C. 559, 561, 681 S.E.2d 592, 593 (2009). A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of a plea by showing that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty, but would have insisted on going to trial." Rolen v. State, 384 S.C. 409, 413, 683 S.E.2d 471, 474 (2009).

"To find a guilty plea is voluntarily and knowingly entered into, the record must establish the defendant had a full understanding of the consequences of his plea and the

charges against him.” Roddy v. State, 339 S.C. 29, 33, 528 S.E.2d 418, 421 (2000). “A defendant’s knowing and voluntary waiver of the constitutional rights which accompany a guilty plea may be accomplished by colloquy between the Court and the defendant, between the Court and defendant’s counsel, or both.” Pittman v. State, 337 S.C. 597, 599, 524 S.E.2d 623, 625 (1999).

“In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing.” Holden v. State, 393 S.C. 565, 573, 713 S.E.2d 611, 615 (2011) (internal citation omitted). “Specifically, the voluntariness of a guilty plea is not determined by an examination of a specific inquiry made by the sentencing judge alone, but is determined from both the record made at the time of the entry of the guilty plea, and also from the record of the PCR hearing.” Id. (internal citation omitted).

Discussion

Even the most cursory inspection of the record reveals ample probative evidence in support of the PCR Judge’s finding here. App.pp.9-10; p.37; pp.67-69; p.75. p.120; pp.180-82. First, Petitioner ensured the Plea Judge that he fully understood that he was pleading guilty, straight-up, to armed robbery which afforded the Judge full discretion to impose a prison sentence between 10 and 30 years. App.pp.9-10. Second, correspondence between counsel and the solicitor, and representations at the plea hearing consistently account for the terms of the plea agreement. App.pp.180-82; p.9. Third, Petitioner signed the plea sheet that denoted the plea as “as indicted” and “without negotiations or recommendations” See James v. State, 377 S.C. 81, 85, 659 S.E.2d 148, 150 (2008) (reversing grant of PCR as to applicant’s guilty plea where plea sheet and applicant’s

conduct at plea hearing expressed applicant's desire to plead guilty).

Moreover, counsel's testimony concerning the terms of the plea agreement was corroborated by the General Sessions record. See Wolfe v. State, 326 S.C. 158, 165, 485 S.E.2d 367, 370 (1997) (citing Rayford v. State, 314 S.C. 46, 443 S.E.2d 805 (1994) (where transcript of guilty plea proceeding refuted applicant's claim that he did not understand the terms of a plea bargain, grant of PCR was inappropriate notwithstanding applicant's claim lawyer misadvised him). Alternatively, the corroboration also constituted probative evidence to support the PCR Judge's finding that counsel's testimony was credible on the matter. See Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012) ("The PCR court's findings on matters of credibility are given great deference by this Court."). Simply, the expectation of a certain sentence compared to the hope of a favorable sentence constitutes a distinction with a difference. See Wolfe, 326 S.C. at 165, 485 S.E.2d at 371 ("Wishful thinking regarding sentencing does not equal a misapprehension concerning the possible range of sentences, especially where one acknowledges on the record that one knows the range of sentences and that no promises have been made.").

Although the PCR Judge was justifiably perturbed by counsel's unconventional and ecclesiastical approach to the practice of law, the PCR Judge made the correct and rudimentary decision in finding Petitioner failed to prove he lacked the mental capacity to comprehend the plain terms of the uncomplicated plea agreement. Counsel offered compelling testimony that he fully apprised Petitioner of the terms and conditions of the plea agreement and that Petitioner's demeanor and conduct created an impression that

Petitioner held the present ability and did understand these attorney/client discussions. Counsel explained that his decision to submit Petitioner for a psychological evaluation was twofold: (1) a precautionary measure taken only because of Petitioner's youth; (2) part of his mitigation strategy for sentencing. Thus Petitioner's *post-hoc* posturing on competency is even more incredible.

Yet, Petitioner ventured down the rabbit hole of meritless PCR litigation in now arguing that the PCR Judge erred in not exempting him from truthfulness of his assurances and statements at the plea hearing. Petitioner relies on a psychological evaluation report issued the year prior to Petitioner's guilty plea to support his entirely speculative assertion that he somehow lacked the capacity to appreciate what was a very simple and basic plea agreement. Even Applicant's Exh. Six indicated the solicitor did not convey the accepted plea offer until after the evaluation report was provided to him. App.p.180. "A guilty plea is a solemn, judicial admission of the truth of the charges against an individual; thus, a criminal inmate's right to contest the validity of such a plea is usually, but not invariably, foreclosed." Blackledge v. Allison, 431 U.S. 63 (1977). Therefore, statements made during a guilty plea should be considered conclusive unless a criminal inmate presents valid reasons why he should be allowed to depart from the truth of his statements. Crawford v. United States, 519 F.2d 347 (4th Cir.1975); Edmonds v. Lewis, 546 F.2d 566 (4th Cir.1976).

Petitioner notably did not produce Dr. Cross to testify what if any cognitive deficits were present to have called into question the presumption of truthfulness of the statements and assurances Petitioner made at the plea hearing. See Dempsey v. State, 363

S.C. 365, 370, 610 S.E.2d 812, 815 (2005) (“Dempsey failed to have an expert on child sexual abuse testify at the PCR hearing, we hold that any finding of prejudice is merely speculative.”).

It is of mention that Petitioner’s testimony that “counsel told me what to say” at the plea hearing undercuts the credibility of the PCR allegation itself. App.pp.24-25. See Wolfe, 326 S.C. at 165, 485 S.E.2d at 371 (“A statement that questions are “routine” is not an invitation to answer them untruthfully, nor does it constitute a reason to believe the questions and statements of the judge during a guilty plea proceeding mean nothing.”). Ultimately the PCR Judge weighed the evidence as presented, assigned appropriate evidentiary weight, and rendered a finding that is beyond refutation.

Accordingly, Petitioner failed to prove the first prong of the Strickland test – that counsel failed to render reasonably effective assistance under prevailing professional norms. Similarly, Petitioner also failed to prove the second prong of Strickland – that he was prejudiced by counsel’s performance.

III.

Certiorari is certainly not warranted where Petitioner's argument that counsel's bizarre ecclesiastical approach to practicing law constituted ineffective assistance of counsel is facially unsound.

Petitioner argues that counsel's policy to only negotiate pleas, his contingency that a client confess for taking a case, and his approach to "fair and just" punishment constituted unethical representation.

At the PCR hearing, counsel testified "I work for the Christian Legal Center and we practice law maybe a little bit differently than any attorney in this courtroom." App.p.68, ln. 11-13. He further stated that "once there's an admission and the client is aware of what that means, the admission of guilt is trying to attempt to find a fair and just punishment that is fair to the client." App.p.68, ln.16-19. Counsel's retainer agreement limited the scope of representation to just a plea. App.p.65.

In denying and dismissing Petitioner's PCR Application, the PCR Judge noted that counsel's general policies and procedures were 'unique' and heightened the prospect for deficient and ineffective performance as a matter of general impression. App.p.209. Yet, the PCR Judge found Petitioner failed to meet his burden to prove counsel's performance rendered his plea involuntary in this particular case. App.p.210.

Effective Assistance of Counsel

The breach of an ethical standard does not necessarily make out a denial of the Sixth Amendment right to counsel. Nix v. Whiteside, 475 U.S. 157, 165 (1986). The demand for money by appointed counsel from the client was found unethical but not

ineffective in Kohler v. Kelly, 890 F.Supp. 207, 215-16 (W.D. N.Y. 1994). See Robinson v. LaFleur, 225 F.3d 950, 953 (8th Cir. 2000) (finding that plea offer communicated not overcome by prior disciplinary against attorney for failure to communicate in unspecified circumstances).

Discussion

Petitioner's argument here is facially without merit. "A conclusory unsupported allegation without evidence that a different result is probable is deficient." U.S. v. Popoola, 881 F.2d 811, 813 (9th Cir. 1989). In light of counsel's testimony that Petitioner made a full admission of his culpability at the initial consultation in conjunction with the entire record here where Petitioner's guilt was uncontested, Petitioner neglected to produce any credible testimony or evidence that showed how the manner in which counsel practices law somehow coerced Petitioner into the making the admissions of guilt. Notably, Petitioner confessed to police prior to retaining counsel. Furthermore, counsel evaluated the State's evidence, reviewed discovery materials with Petitioner, submitted Petitioner for a psychological evaluation to ensure competency, and labored in numerous other ways indicative of constitutionally effective counsel.

Similarly, Petitioner entirely neglected to produce any evidence that showed how the manner in which counsel practices law inhibited attorney/client communication, and somehow adversely affected Petitioner's intelligent and voluntary decision to plead guilty. Simply, Petitioner fails to connect his challenge to the propriety of counsel's approach to practice of law in a fashion to implicate his Sixth Amd. right to constitutionally effective counsel. See Montejo v. Louisiana, 556 U.S. 778, 790 (2009)

(the Constitution does not codify ABA Model Rules). Respondent submits that further discussion on the matter is unnecessary.

As Petitioner failed to meet this burden of proving ineffective assistance of trial counsel on this issue, the PCR judge did not err in denying the PCR application. 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 foregoing reasons, Respondent submits this Court should deny the Petition for Writ of Certiorari. However, if this Court grants certiorari, Respondent requests the opportunity to fully brief the issues discussed above.

Respectfully submitted,

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By: 

ATTORNEYS FOR RESPONDENT

Nov 20th, 2014

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Hon. Edgar W. Dickson, Circuit Court Judge
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RIKAM I. DOZIER,

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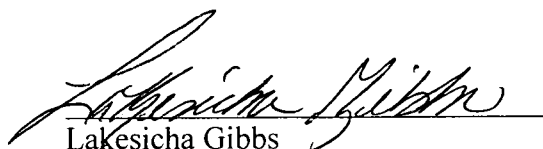
RESPONDENT.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Return to Petition for Writ of Certiorari has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

Aimee J. Zmroczek, Esquire
A.J.Z. Law Firm, LLC.
PO Box 11961
Columbia, SC 29211

This 20th day of November, 2014


Lakesicha Gibbs
LEGAL ASSISTANT for the Respondent



ALAN WILSON
ATTORNEY GENERAL

RECEIVED

NOV 20 2014

S.C. Supreme Court

November 20, 2014

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

RE: Rikam I. Dozier v. State of South Carolina
Appellate Case No: 2014-000694

Dear Mr. Shearouse:

Enclosed for filing is the original Return to Petition for Writ of Certiorari and six copies in the above-referenced case. By copy of this letter we are serving the opposing counsel today.

Sincerely,

J. Walt Whitmire
Assistant Attorney General
SC Bar No: 100793

JWW/lg
Enclosures

cc: Aimee J. Zmroczek, Esquire