

ORIGINAL

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Spartanburg County  
Robin B. Stilwell, Circuit Court Judge  
\_\_\_\_\_

S.C. Supreme Court

RODNEY ALEXANDER SIMMONS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-000676

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PETITION FOR WRIT OF CERTIORARI  
\_\_\_\_\_

LARA M. CAUDY  
Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589  
(803) 734-1343

ATTORNEY FOR PETITIONER

INDEX

INDEX.....1

ISSUE PRESENTED .....2

STATEMENT .....3

ARGUMENT .....4

CONCLUSION .....17

ISSUE PRESENTED

Whether Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to object when the solicitor impeached Petitioner with his prior conviction for "assault on a female" and capitalized on it during her closing argument since this was improper under Rule 609(a), SCRE, and since Petitioner did not open the door to this improper impeachment through his testimony?

## STATEMENT

A Spartanburg County Grand Jury indicted Petitioner at the August 4, 2008 term of General Sessions for criminal sexual conduct with a minor, second degree. App. 341-342. His case was called to trial on November 29, 2010 before the Honorable J. Derham Cole, and a jury. App. 1. Assistant Solicitors Susan Shaver Reese and Jennifer Jordan represented the state, and Richard Whelchel represented Petitioner. App. 1. On November 30, 2010, the jury found Petitioner guilty as indicted. App. 249, l. 22 – 250, l. 7. He was sentenced by Judge Cole to eighteen years imprisonment. App. 253, ll. 15-20.

Petitioner's appellate counsel filed a brief pursuant to Anders v. California, 386 U.S. 738 (1967). Supp. App. 1-20. However, Petitioner later chose to drop his direct appeal before the Court of Appeals issued an opinion. See App. 257 and App. 263.

On January 10, 2012, Petitioner filed an application for post-conviction relief (PCR). App. 256-262. The state filed a return to this application dated August 24, 2012. App. 263-267. The matter proceeded to an evidentiary hearing on June 26, 2013 before the Honorable R. Lawton McIntosh. Supp. App. 21. Assistant Attorney General Suzanne H. White represented the state, and Mark Alan Nowell represented Petitioner. Supp. App. 21. Judge McIntosh ultimately granted a continuance to allow Mr. Nowell sufficient time to meet with Petitioner and investigate his allegations of ineffective assistance of counsel. Supp. App. 26, ll. 2-11. A second evidentiary hearing was held on November 15, 2013 before the Honorable Robin B. Stilwell. App. 268. By order dated March 5, 2014, Judge Stilwell denied Petitioner relief. App. 332-340.

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 object when the solicitor impeached Petitioner with his prior conviction for "assault on a female" and capitalized on it during her closing argument since this was improper under Rule 609(a), SCRE, and since Petitioner did not open the door to this improper impeachment through his testimony.

### **Facts at Trial**

Petitioner knew Kimberly Brown for approximately thirty years. App. 189, ll. 4-16. He met Brown through Brown's first cousin and his friend, Scott Tate. App. 88, l. 25 – 89, l. 6. Petitioner was a carpenter and painter in North Carolina, and frequently helped Brown repair and maintain her two houses in South Carolina: her first home in Cowpens and then, when they moved, her home in Spartanburg. App. 89, ll. 7-12.

On the "countless times" when Brown needed Petitioner's help, she would contact him through Scott Tate. Brown would then arrange to pick up Petitioner, and sometimes Tate, from North Carolina and drive him to her home, where he would stay until the work was completed. Brown would take Petitioner back to his home in High Point, North Carolina, usually a week to a week and a half later. App. 89, l. 13 – 91, l. 3; App. 181, l. 3 – App. 182, ll. 7.

When Petitioner and Tate stayed at Brown's first house in Cowpens, Petitioner met Brown's children, including Minor. App. 177, ll. 5-20. Brown never had any concerns regarding Petitioner and the children. App. 90, ll. 8-11. In fact, when Petitioner was asked to help work on Brown's house in Spartanburg, he also helped Brown with the children by looking after them and by doing activities with them like playing basketball and videogames and taking them swimming. App. 90, ll. 1-7; App. 180, ll. 1-11; App. 182, ll. 10-18; App. 191, ll. 23-24.

Petitioner stated that the last time he stayed at the Browns' house in Spartanburg was in 2003 or 2004 when he painted their foyer and laid hardwood flooring down in their kitchen. App. 184, ll. 11-21; App. 187, ll. 7-25. He later moved to Thomasville, North Carolina in 2004 or 2005, and became engaged. Petitioner testified that in 2005, he remodeled the home of an older gentleman originally from Mississippi named Mr. Jackson. He took the proceeds from that job, paid off outstanding balances to the North Carolina Department of Motor Vehicles, and obtained his commercial drivers' license to begin a new, better paying career in trucking. App. 184, l. 18 – 185, l. 16.

Minor's testimony differed regarding the summer of 2005. He indicated that both Petitioner and Tate were at the Brown home in Spartanburg to paint the dining room, living room, and kitchen, and, sometime while they were there, Petitioner sexually assaulted him in his bedroom during the day. App. 71, l. 19 – 72, l. 3; App. 75, l. 19 – 78, l. 10. Two years later, Minor told his mother, Brown, about the alleged sexual assault. App. 79, ll. 1-5; App. 84, ll. 3-10. The following day, Brown took him to the police, and then to the Children's Advocacy Center in Spartanburg (CAC). App. 94, l. 21 – 97, l. 3.

Although Brown maintained Minor exhibited troubling behavior between 2005 and 2007, such as scowling, bedwetting, and keeping knives under his pillow at night, she also acknowledged he had disciplinary and behavioral problems prior to 2005. App. 92, l. 8 – 94, l. 5; App. 104, ll. 1-16. Further, Brown testified that she thought Minor's behavior problems were due to her recent divorce from his father in 2006, and that he was a "withdrawn child." App. 94, ll. 15-17; App. 99, l. 24 – 100, l. 19.

The state also elicited testimony from Dr. Nancy Henderson, the pediatrician who examined Minor at CAC on June 8, 2007. App. 107, ll. 18-20; App. 111, ll. 15-18. Dr. Henderson physically

examined Minor, and took a “history” from both Minor and his mother regarding the alleged incident. App. 111, l. 19 – 113, l. 18. The physical examination of Minor was normal, meaning there was no physical evidence of a sexual assault. App. 113, ll. 19-20. Dr. Henderson further testified that Minor’s physical examination and her findings based on the examination were “consistent with the report that he made to [her].” App. 115, ll. 12-15. On cross-examination, Henderson also conceded that her findings were also “**consistent with nothing happening**” as well. App. 115, ll. 21-24 (emphasis added).

Licensed social worker Wiley Garrett was the forensic interviewer at CAC who evaluated and assessed Minor. App. 141, ll. 19-21; App. 147, ll. 12-14. He was qualified as an expert in “child sexual abuse assessment and therapy” without objection. App. 144, ll. 3-8. Garrett was permitted to testify to the “three rules” for children during these interviews, all of which are geared towards ensuring the child is telling the truth. App. 145, ll. 5-13. He also testified to the time and place the incident occurred based on Minor’s allegations. App. 148, ll. 3-12.

Moreover, Garrett claimed that, based on Minor’s behavior and the information he received from Minor and his family, Minor’s disclosure was consistent with a child who has been “sexually traumatized.” App. 154, l. 20 – 155, l. 2. However, Garrett finally admitted on cross-examination that he did not have anything to which he could testify to independent of what Minor said to him. App. 155, ll. 18-21.

Minor’s therapist, Bomar Evans, also testified on behalf of the state. He was qualified as an expert in “child sexual abuse therapy” without objection. App. 161, ll. 1-5. Evans testified that he saw Minor on numerous occasions from August 15, 2007 through April 30, 2008. App. 161, ll. 13-16. In addition to corroborating where and when the alleged incident occurred, he also testified that

the “feelings, thoughts, [and] assessments were all consistent with . . . trauma symptoms of a child who has been sexually abused.” App. 161, ll. 17-24; App. 163, ll. 21-25.

Finally, the state called Harold London, a federal inmate who spent one to two months in the same high-security pod as Petitioner at the Spartanburg County Detention Center during 2010.<sup>1</sup> App. 121, ll. 1-7; App. 124, ll. 5-15. London alleged that Petitioner came across the prison pod on some unknown day at an unknown time to London’s cell, and confessed through the door to London, a complete stranger, that he had “sexually assaulted the kid.” App. 122, ll. 5-24; App. 127, l. 24 – 128, l. 17.

Petitioner emphatically denied the allegations at trial. App. 185, l. 17 – 186, l. 8; App. 188, ll. 9-17. The jury found Petitioner guilty as charged, and he was sentenced to eighteen years imprisonment. App. 249, l. 22 – 250, l. 2; App. 253, ll. 15-20.

### **Impeachment with Prior Conviction for Assaulting a Female**

Before Petitioner testified in his own defense at trial, it was agreed by all parties that the solicitor would only impeach Petitioner with his prior convictions for larceny and breaking and entering. The solicitor noted that Petitioner had a prior conviction for “assault on a female, Your Honor, but we can’t tell how much time it was [it carries]. So, we’re not going to ask him about that. We’re just going to ask him about the larceny and the breaking and entering.” App. 170, ll. 14-24.

During direct examination, trial counsel questioned Petitioner about his 2007 convictions for larceny and breaking and entering. App. 184, ll. 6-10. The following colloquy then took place between Petitioner and trial counsel:

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<sup>1</sup> London testified that Pod Five contained solitary confinement cells, and the inmates were permitted to leave their cells for only one hour per day. App. 124, l. 13 – 125, l. 10.

Q: Okay. Did you assault Minor in their [the Brown's] home during the summer of 2005?

A: I want to say that **I've never in my life assaulted anyone's kid**. I have a daughter that's 22 years old. Her name is Shaquoa Ray Michelle Miller. And until this day right now - - she's a grown - - she's grown now. But if somebody put their hands on my kid, and she's 22 years old, and I mean this out of my heart, if someone put their hands on my kid right now out of order, the police better get me first, and I mean that out of my heart.

Q: Yes, sir. Let me ask you another question, Minor. Did you assault - - excuse me. Rodney [Petitioner]. Did you assault Minor as he claims you did, in the summer, some time during the Summer of 2005?

A: I never put my hands on Minor nor any member of Kim's children. I never touched any one of them. Never.

App. 185, l. 17 – 186, l. 8 (emphasis added).

At the end of direct examination, trial counsel asked Petitioner again whether he had sexually assaulted Minor. Petitioner responded, "**I never in my life touched anyone's kid on a sexual assault**. Not Minor, not J.B. [Minor's sibling] or any of them, R.B. [Minor's other sibling] or any of them. I never touched any one of your kids, Kim [Brown, Minor's mother]. Never. And I can, I can look at you in your eyes, straight in your eyes and won't bat not one time." App. 188, ll. 9-17 (emphasis added).

On cross examination, despite the court's ruling that Petitioner could only be impeached with his convictions for larceny and breaking and entering, the solicitor asked Petitioner whether he had been convicted of "assaulting a female." The exact exchange was:

Q: And you told Mr. Whelchel [trial counsel], in a question a while ago, I never assaulted anybody's child, I have a 22 year old?

A: Uh-huh (Affirmative)

Q: If anybody assaulted her, I've never assaulted anybody, but *you were convicted of assaulting a female*, is that correct?

A: Yes, ma'am, that's correct, Ms. Reese [the solicitor].

App. 193, l. 21 – 194, l. 2 (emphasis added).

Trial counsel did not object under Rule 609(a), SCRE, to this improper impeachment.

During her closing argument, the solicitor went through Petitioner's testimony with the jury putting her own spin on it. She stated, "The last job was the foyer. That was the last job I did. Well, wait a minute, I can't really remember the last job I did. I can't remember. I don't want to be inconsistent. I wouldn't want that. I'm telling you right now I've never assaulted anybody's child. I've never assaulted anybody. Well, wait a minute, *you were convicted for assaulting a female.*" App. 229, ll. 19-25 (emphasis added).

Trial counsel likewise did not object to the solicitor's improper closing argument.

### **PCR Hearing**

Petitioner testified at the PCR hearing that before he testified at trial, the court ruled the solicitor could only impeach him with his prior convictions for larceny and breaking and entering. App. 291, l. 15 – 292, l. 18. However, on cross-examination, the solicitor impeached him with his conviction for "assault on a female" in violation of the court's order. App. 293, l. 21 – 294, l. 4. Petitioner maintained that Mr. Whelchel [trial counsel] should have objected to that." App. 314, ll. 19-21.

He testified that trial counsel asked him on direct examination whether he "assault[ed] Minor in their home during the summer of 2005" and that he responded, "I want to say that I never in my life assaulted anyone's kid." He explained that he believed at that time that trial counsel was asking him whether he had *sexually* assaulted Minor and that, when he responded that he had never in his life assaulted anyone's kid, he meant that he had never *sexually* assaulted anyone's child. App. 293, ll. 1-20.

Moreover, Petitioner explained that his conviction for assault on a female stemmed from an incident that occurred at his friend's house. He said he "stepped inside the house and was speaking with her [the friend's] daughter." He and the daughter "had a confrontation and she asked me . . . to leave. And I said, wait a minute, ma'am. And as she - - as she was pointing to the door at me and everything, I just smacked her hand away from me." App. 295, l. 22 – 296, l. 2. He testified that "there was no sexual element to that offense." App. 296, ll. 7-8.

Trial counsel, Richard Welchel, testified that he did not object to the state impeaching Petitioner with his prior conviction for assault on a female because "[i]t was a very general question" and "I didn't want to call attention to the assault anymore than had already been brought out before the jury." He also maintained that the state had "a record to prove that [Petitioner had] a prior conviction of that [assault on a female]." App. 320, l. 24 – 321, l. 14.

On cross-examination by Petitioner's PCR counsel, Welchel testified that when he asked Petitioner whether he assaulted Minor he meant whether Petitioner had *sexually* assaulted Minor because "[t]hat's what he was charged with." App. 324, ll. 13-16. Welchel also testified that when Petitioner responded that he had never "assaulted anyone's kid," Petitioner clearly meant that he had never *sexually* assaulted anyone's child. He maintained that that is what the jury would have inferred from Petitioner's testimony as well. App. 324, l. 17 – 325, l. 2.

Additionally, Welchel explained that the solicitor announced before Petitioner testified that she was not going to impeach him with his prior conviction for assault on a female. He admitted that the solicitor never established when Petitioner was convicted of assault on a female or how much that offense carried sentence-wise.<sup>2</sup> App. 325, ll. 3-20.

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<sup>2</sup> During sentencing, the solicitor informed the trial court that Petitioner's conviction for "assault on a female" was from 2007. App. 251, l. 16.

Whelchel claimed that the solicitor's questioning of Petitioner about his conviction for assault on a female was proper impeachment because Petitioner "opened the door" when he put his good character in question through his testimony that he "never assault anyone's kid." App. 325, l. 21 – 326, l. 7. Whelchel also claimed that he did not object because he "wanted to move past that" and "any objection in my opinion at that point would bring that back to the jury, make an emphasis or emphasize that to the jury." App. 326, ll. 8-12.

### **Order of Dismissal**

The PCR court stated in its order of dismissal that trial counsel maintained he believed the impeachment of Petitioner was proper because Petitioner "opened the door" to the impeachment through his own testimony. The court also noted that trial counsel testified "he did not object at the time of the impeachment or during closing [argument] because he did not want to call any more attention to the assault [on a female conviction]." App. 336.

The PCR court found, "The failure of Counsel to object to the questioning of [Petitioner] regarding his prior record was not deficient and would not have materially affected the outcome of the trial. [Petitioner's] testimony on direct examination opened the door for the objectionable question, and Counsel reasonably calculated that an objection would simply draw more attention to the conviction." Therefore, the court found Petitioner "failed to meet his burden as to this claim" and that trial counsel's "performance was sufficient and reasonably calculated in the best interests of [Petitioner]." App. 338.

### **Discussion**

Trial counsel was ineffective for failing to object when the solicitor impeached Petitioner with his 2007 conviction for "assault on a female" during his testimony and when she used the conviction during her closing argument to suggest Petitioner had previously sexually assaulted a

woman. This was improper under Rule 609(a), SCRE. Further, Petitioner did not open the door to this improper impeachment through his testimony that “I’ve never in my life assaulted anyone’s kid.” See App. 185, ll. 19-20.

The solicitor’s use of Petitioner’s prior conviction was highly prejudicial because the jury likely assumed by the title of this offense, and the solicitor’s suggestion during her closing argument, that Petitioner had *sexually* assaulted a woman and thus convicted him on an improper basis. In short, the solicitor improperly used Petitioner’s prior conviction to show his propensity to commit CSC with a minor. This was particularly damaging in this case where no physical evidence was presented and Petitioner’s credibility before the jury was critical.

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).

Under Rule 609(a), SCRE, “For the purpose of attacking the credibility of a witness (1) evidence that a witness other than an accused has been convicted of a crime shall be admitted . . . if

the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and (2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.” Assault on a female is not a crime of dishonesty and, as will be seen *infra*, the offense carries a maximum of 150 days imprisonment. Additionally, the trial court never conducted a balancing test to determine whether the probative value of Petitioner’s prior conviction was outweighed by its prejudicial effect.

Furthermore, “[e]vidence of a defendant’s character is generally not admissible to show a propensity to act accordingly.” State v. Young, 378 S.C. 101, 106, 661 S.E.2d 387, 389 (2008) (citing Rule 404(a)(1), SCRE). “However, when the accused offers evidence of his good character regarding specific character traits relevant to the crime charged, the solicitor has the right to cross-examine him as to particular bad acts or conduct.” Id. (citing State v. Major, 301 S.C. 181, 391 S.E.2d 235 (1990)). “The State is restricted to showing bad character **only for the traits initially focused on by the accused**, and impeachment may be done by introducing prior convictions with extrinsic evidence.” Id. (citing Major, 301 S.C. at 185, 391 S.E.2d at 238) (emphasis added).

While the record never directly indicates, Petitioner’s conviction for “assault on a female” is presumably from North Carolina where he lived. Under N.C. Gen. Stat. Ann. § 14-33(c), “any person who commits any assault, assault and battery, or affray is guilty of a Class A1 misdemeanor if, in the course of the assault, assault and battery, or affray, he or she: (2) **Assaults a female**, he being a male person at least 18 years of age.” (emphasis added). Under N.C. Gen. Stat. Ann. § 15A-1340.23(c)(2), the “sentence of imprisonment” for a Class A1 misdemeanor is 1-60 days for an

individual with no prior convictions, 1-75 days for an individual with one to four prior convictions, and 1-150 days for an individual with five or more prior convictions. Therefore, under North Carolina statutory law, the most one can be sentenced to for a conviction of “assault on a female” is 150 days, which is significantly less than a year. See United States v. Johnson, 114 F.3d 435, 445 (4th Cir. 1997) (citing N.C. Gen. Stat. § 14-33) (noting that in 1994 “the North Carolina legislature amended the assault on a female offense and others, reclassifying them as class A1 misdemeanors carrying a maximum period of incarceration of 150 days.”).

Because “assault on a female” under North Carolina law is not a “crime punishable by death or imprisonment in excess of one year,” it cannot be used for impeachment purposes under Rule 609(a)(1). Additionally, because it is clearly not a crime involving “dishonesty or false statement,” it also cannot be used for impeachment purposes under Rule 609(a)(2). Furthermore, the trial court never conducted a balancing test to determine whether the probative value of this conviction outweighed its prejudicial effect to Petitioner. Therefore, the state would only have been permitted to impeach Petitioner with his conviction for assault on a female if Petitioner “opened the door” to this impeachment by testifying about his “good character” specifically related to a physical assault on a woman. See Young, 378 S.C. at 106, 661 S.E.2d at 389.

In Young, this Court held that the defendant’s “testimony that he hated to see a woman cry did not open the door for the admission of his prior CDV [criminal domestic violence] and CSC [criminal sexual conduct] convictions.” Id. The Court found that “Young was not offering evidence of a specific character trait towards women in general. Rather, the isolated statement used to justify the admission of the prior CDV and CSC convictions was simply part of Young’s narrative recounting his version of the events that occurred on the night in question.” Id. The Court held that “[f]or this reason, the State was limited to presenting evidence admissible under Rule

609(a)(1), such evidence is limited to prior convictions for crimes punishable by imprisonment in excess of one year, subject to Rule 403. Additionally, Rule 609(a)(2) permits evidence of convictions for crimes involving dishonesty.” Id.

In this case, Petitioner’s testimony that “I’ve never in my life assaulted anyone’s kid” did not open the door for the admission of his prior conviction for assault on a female. See App. 185, ll. 19-20. As this Court held in Young, when an accused offers evidence of his good character, the state is restricted to showing bad character **only for the traits initially focused on the by accused**. Petitioner’s testimony focused only on his character involving the sexual assault of a minor, not on the physical assault of an adult female. Therefore, Petitioner did not open the door to his conviction of “assault on a female” through his testimony.

Because Petitioner’s conviction for assault on a female was inadmissible under Rule 609(a), SCRE, and because Petitioner did not open the door to this bad character evidence, trial counsel was ineffective for failing to object to the solicitor’s improper impeachment of Petitioner during his testimony and her capitalization of this improper impeachment during her closing argument.

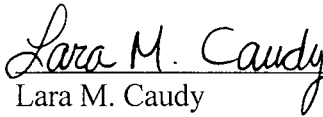
Petitioner was prejudiced by trial counsel’s failure to object to this improper impeachment because the state, as evidenced by the solicitor’s closing argument, used Petitioner’s 2007 conviction for assault on a female to attempt to show his propensity to commit a CSC with a minor, rather than sincerely attempt to impeach his credibility. See Young, 378 S.C. at 106, 661 S.E.2d at 390. Moreover, Petitioner was prejudiced because the jury likely assumed, simply by the name of the offense, that Petitioner had been convicted of *sexually* assaulting a female. As a result, the jury likely convicted Petitioner on an improper basis, namely that he had sexually assaulted a person before, so he likely did it again. Furthermore, there was no physical evidence presented in this case. Thus, **Petitioner’s credibility before the jury was critical.**

As a result of trial counsel's ineffectiveness and the resulting prejudice, Petitioner's conviction and sentence should be reversed and this case remanded for a new trial.

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 22nd day of December, 2014.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Spartanburg County  
Robin B. Stilwell, Circuit Court Judge

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RODNEY ALEXANDER SIMMONS,

PETITIONER,

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RESPONDENT

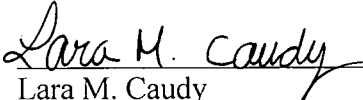
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CERTIFICATE OF SERVICE

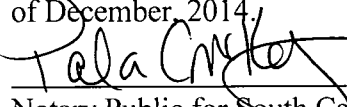
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I certify that a true copy of the petition for writ of certiorari, a copy of the appendix, and a copy of the supplemental appendix in this case have been served on Suzanne H. White, Esquire at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 22nd day of December, 2014.

  
Lara M. Caudy  
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 22nd day  
of December, 2014.

  
\_\_\_\_\_  
(L.S.)  
Notary Public for South Carolina

My Commission Expires: July 24, 2022.