

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Certiorari to Aiken County
R. Knox McMahon, Circuit Court Judge

JOSHUA FORREST,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

Appellate Case No. 2015-001045

**RETURN TO PETITION
FOR WRIT OF CERTIORARI**

ALAN WILSON
Attorney General

DAVID SPENCER
Senior Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I.

Counsel was not ineffective for declining to object to an oblique reference to prior incarceration because Counsel stated reasonable trial strategy, the reference provided context and was beneficial res gestae evidence, and Petitioner was not prejudiced by the alleged deficiency.

II.

Counsel was not required to be clairvoyant and anticipate State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009), and in Belcher, this Court decreed, “Our ruling, however, will not apply to convictions challenged on post-conviction relief.” Id. at 613, 685 S.E.2d at 810.

III.

Counsel was not ineffective for failing to argue a novel issue of law and the instruction that malice could be inferred from the circumstances was not burden-shifting. The PCR court did not find the instruction shifted the burden and its ruling is supported by probative evidence.

STATEMENT OF THE CASE

Petitioner Forrest was indicted for murder and possession of a firearm during the commission of a violent crime (2006-GS-02-694, 695). Sherri Stoney Hicks, Esquire, represented Forrest. The first trial before the Honorable Doyet A. Early, III, on December 4-6, 2006, ended with a hung jury and mistrial. The case was tried a second time before the Honorable Michael G. Nettles on June 22-54, 2009, and Forrest was found guilty as charged. Judge Nettles sentenced Forrest to life imprisonment.

Petitioner appealed and the case was dismissed pursuant to Anders v. California, 386 U.S. 738 (1967). State v. Forrest, 2011-UP-254 (S.C. Ct. App. filed June 1, 2011). Petitioner filed an application for post-conviction relief. Following an evidentiary hearing on July 31, 2014, the Honorable R. Knox McMahon denied relief by order by order dated October 3, 2014. Judge McMahon denied Forrest's subsequent Rule 59(e) motion by order dated April 8, 2015.

Petitioner subsequently filed a petition for writ of certiorari to this Court. This return follows.

STATEMENT OF FACTS

Forrest was convicted of murdering Mario Reddish in the parking lot of an Elks club in Aiken County. The homicide occurred on December 4, 2005. The first witness for the State was Latasha Brown, who testified she knew both Reddish and Forrest. She testified Forrest and his quondam girlfriend, Tameka Bussey (at the time of trial, her name was Tameka Campbell), fought inside the Elks club. Forrest pinned Bussey against the wall. Brown testified the fight was over a hat and shoes. She testified Forrest was then in an altercation with Reddish and Jonathon Thomas. This occurred around closing time at the club, and everyone then went outside. App. pp. 68-72.

Outside, there was a commotion. Brown heard a gunshot. She heard Forrest say Reddish was not leaving tonight. Forrest and Reddish walked towards each other. Reddish threw a punch and they “locked up” with each other. Brown testified Forrest pulled out a gun and she then heard two shots. Reddish hit the ground. Forrest then left in a car. App. pp. 72-74.

Sherry Cade testified she knew Forrest for nine years. She testified she saw Bussey fussing with Forrest over a baseball hat and shoes. Then Jonathon Thomas and Reddish tried to break up the altercation between Bussey and Forrest. Cade testified nothing physical occurred when they intervened. After walking out of the club, she saw Forrest pull a gun from out of his pants and say to Reddish “MF, I’m going to kill you tonight” and fire a shot into the ground. Forrest and Reddish ended up in a bear hug. Reddish fell after two more shots were fired. App. pp. 81-85.

Jonathon Thomas testified he knew Forrest all his life and was best friends with Reddish. Thomas testified he attempted to break up an argument inside the club between Forrest and Bussey. Thomas said nothing physical occurred in the club. Thomas explained he approached Forrest outside and they shook hands. He was walking away when he looked back and saw Forrest fire shots at

Reddish. Thomas denied having any personal conflict with Forrest. App. pp. 92-97; p. 103.

Forrest provided a statement to Investigator Cain. Cain testified Forrest told him Bussey grabbed a baseball cap from him and ran into a crowd of people. She also slapped him and threw a drink in his face. Forrest alleged twelve males began to push him inside the club so he went outside. Forrest alleged Bussey and the same group of males approached him outside. Bussey approached Forrest and hit him again. This time, he grabbed her throat and pushed her away. Reddish then approached and hit Forrest in the face, and a physical fight broke out in which Reddish struck Forrest again. Cain observed Forrest had an injury to his lip. Forrest alleged Reddish secured Forrest in a bear hug. While trying to break free, Forrest heard gunshots and Reddish fell to the ground. App. pp. 128-129. Cain asked Forrest to explain how Reddish had two frontal gunshot wounds without Forrest suffering any injury if they were locked in a bear hug. **Forrest responded it was “God’s will” and confirmed he meant divine intervention.** App. p. 130.

No defense witnesses were presented and Counsel utilized the benefit of last closing argument. App. pp. 214-217.

ARGUMENT

I.

Counsel was not ineffective for declining to object to an oblique reference to prior incarceration because Counsel stated reasonable trial strategy, the reference provided context and was beneficial res gestae evidence, and Petitioner was not prejudiced by the alleged deficiency.

Forrest alleges Counsel should have moved in limine to redact Forrest's reference to his prior incarceration. The evidence is admissible as res gestae and is helpful to Forrest. Redaction would be impractical as it would rob the statement of context. Moreover, Counsel articulated reasonable trial strategy in declining to object to the oblique reference. Accordingly, probative evidence supports the PCR court's ruling. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989) (stating the PCR court's findings should be affirmed if supported by probative evidence).

At trial, Investigator Cain published Forrest's statement as follows:

. . . Forrest reported while inside, Bussey, his ex-girlfriend, who had formed a relationship with Mario Reddish during his, Forrest, **recent incarceration**, began a verbal argument over his flirtations with Monique.

Forrest continued to report Bussey took his ball cap and relocated within a group of 12 males toward the rear of the Elk's Club. Forrest reported he approached her to retrieve his cap whereas Bussey threw a drink on him and slapped his face several times.

Forrest reported he ignored Bussey's assault and after obtaining his cap, the 12 males began to shove him and he left the interior of the Elk's Club relocating to the rear driver door of the white-in-color Lincoln operated by James Forrest.

Forrest reported he opened the door to enter, was unable to due to the driver's seat being fully declined and upon relocating to the front of the vehicle observed Bussey and the same group of males approaching him.

Forrest reported Bussey hit his face several times and he grabbed her throat and pushed her away. Forrest reported . . . Mario Reddish then approached him and punched him in the face and a

physical fight erupted whereas Mario Reddish again struck him in the jaw as the fight relocated to the front region of the Lincoln.

App. p. 127, line 10 – p. 128, line 11. Cain testified similarly at the Jackson v. Denno hearing and the first trial. Forrest alleges Counsel should have moved in limine to redact reference to the incarceration.

Counsel testified she did not object to Cain's testimony because she did not want it to appear she was hiding anything from the jury. Additionally, she noted the testimony suggested a short period of incarcerated and did not reference a particular charge. Given this context, she did not think the testimony was prejudicial. App. pp. 386-388. Further, the testimony provides context beneficial to the defense. Bussey was clearly the instigator and clearly was unreasonable. This is underscored by the fact that she broke up with Forrest while he was involuntarily elsewhere and was now jealous that he was flirting with another women, even though she started dating Reddish while Forrest was incarcerated. Her actions were clearly the catalyst for these unfortunate events.

Counsel testified as follows concerning Investigator Cain's testimony:

Q: And I want to turn back to Ms. Campbell again. Is it fair to say that the evidence indicated that she was sort of the instigator of this whole situation.

A: Yes.

Q: And that she was being unreasonable?

A: Yes.

Q: And that fact is that she had left Mr. Forrest while he was otherwise not there and – and – and yet coming back and taunting him?

A: Yes.

Q: All right. And the fact that he is incarcerated and she leaves him then, that kind of, that kind of gives you a bit of the res gestae of that situation, doesn't it?

A: Somewhat, yeah.

Q: And –

A: That's only part of why I didn't object though.

Q: Okay. What's the other reason?

A: I didn't want – well one part, I didn't want the jury focusing on it; if I lost that issue they'd hear it all. The second thing is I didn't want to be removing part of Joshua's statement, like we were trying to hide something.

Q: And actually there's nothing in the record to say what he was incarcerated for.

A: No, and there was nothing in there saying he was incarcerated for a long period of time either.

Q: Now, that could have been like an overnight stay in jail as far as we know?

A: More than likely he left and that was at least a couple of weeks.

Q: Certainly.

A: But I wouldn't think, I don't think it indicated he was in for years or anything like that.

Tr. p. 386, line 22 – p. 388, line 4.

In order to prove counsel was ineffective, a PCR applicant must show counsel's performance was deficient and the applicant was prejudiced by the deficient performance. Strickland v. Washington, 466 U.S. 668, 687 (1984). Counsel's performance will be deemed deficient if it falls "outside the wide range of professionally competent assistance." Id. The applicant is prejudiced by

the deficient performance if “there is a reasonable probability that but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Id. at 694. “When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt.” Id. at 695.

“Judicial scrutiny of counsel’s performance must be highly deferential.” Strickland, at 689. In order to prove a claim of ineffectiveness, “the defendant must overcome the presumption that, under the circumstances, the challenged action ‘might be considered sound trial strategy.’” Id. “[T]he existence of detailed guidelines for representation could distract counsel from the overriding mission of vigorous advocacy of the defendant’s cause.” Id. at 689. Counsel’s articulation of valid trial strategy defeats a claim of ineffective assistance of counsel. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1995); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v. State, 308 S.C. 546; 419 S.E.2d 778 (1992). “Courts must be wary of second guessing counsel’s trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel.” Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992).

Strickland requires extreme deference to counsel’s strategic judgments that are adequately investigated; as Strickland explains: “[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable. . . .” Strickland, 466 U.S. at 690-91.

In the instant case, Forrest’s defense at trial, aside from divine intervention, was he did not shoot Reddish. Of course, he revealed this was a lie at his post-conviction relief hearing.¹ However, the trial court instructed the jury on both murder and voluntary manslaughter, and the statement

makes Bussey look bad, which is good for Forrest.

The quoted portion of Forrest's statement to Investigator Cain shows that Bussey provoked Forrest by taking his hat, throwing beer into his face, and later in the parking lot, slapping Forrest before Reddish hit Forrest. See State v. Knoten, 347 S.C. 296, 305-06, 555 S.E.2d 391, 396 (2001) (finding evidence that victim cut defendant with a knife prior to defendant hitting victim with a pipe constituted sufficient legal provocation to warrant a voluntary manslaughter charge); State v. Lowry, 315 S.C. 396, 399, 434 S.E.2d 272, 274 (1993) (finding voluntary manslaughter charge was warranted where evidence, if believed, showed that decedent and defendant were in a heated argument and decedent was about to initiate a physical encounter when the shooting occurred). Adding more evidence that Bussey was unreasonable in inciting the riotous conditions, and mitigating Forrest's culpability, was the fact that she ended the relationship and started a relationship with the victim while he was incarcerated. This evidence of Bussey's bad character is beneficial in potentially reducing Forrest's culpability and therefore is more helpful than hurtful.

Further, the evidence is admissible as *res gestae* in establishing the motive and source of animosity between Forrest, Bussey, and Reddish. A prior bad act may be admissible under the *res gestae* theory where it is "an integral part of the crime with which the defendant is charged or may be needed to aid the fact finder in understanding the context in which the crime occurred." State v. Owens, 346 S.C. 637, 652, 552 S.E.2d 745, 753 (2001) *overruled on other grounds by State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005); see also State v. Thompson, 352 S.C. 552, 561, 575 S.E.2d 77, 82 (Ct. App. 2003) ("[A] vague reference to a defendant's prior [crimes] is not sufficient to justify a mistrial where there is no attempt by the State to introduce evidence that the accused has

¹ See App. p. 462, lines 7-12.

been convicted of other crimes.”).

Counsel testified in her view, the statement did not indicate the nature of the conviction and suggested a short term of incarceration. She agreed the reference provided context to the events taking place that night. Further, the statement would be difficult to redact in a manner giving it the same probative force establishing the source of animosity that is the motive and cause of Reddish’s death.

Accordingly, probative evidence supports the PCR court’s ruling because the evidence was admissible as *res gestae*, Counsel stated valid strategic reasons for not objecting or moving to redact the statement, and Forrest was not prejudiced by the alleged deficiency because the reference was innocuous and isolated. Note that this statement was published to the jury in the first trial, and yet the first case ended in mistrial rather than conviction. Certiorari should be denied on this issue.

II.

Counsel was not required to be clairvoyant and anticipate State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009), and in Belcher, this Court decreed, “Our ruling, however, will not apply to convictions challenged on post-conviction relief.” Id. at 613, 685 S.E.2d at 810.

Forrest claims Counsel was ineffective for not objecting to the instruction on implied malice from use of deadly weapon in contradiction to the holding in State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009). Forrest acknowledges that the trial occurred before Belcher was issued. This Court was crystal clear in its opinion in Belcher: “Our ruling, however, will not apply to convictions challenged on post-conviction relief.” Id. at 613, 685 S.E.2d at 810.

Nonetheless, Forrest argues Counsel should have argued against precedent because allegedly other defense attorneys were making a Belcher argument prior to the opinion being issued. No evidence in the record supports that contention.

Further, that is not the test. Recently, this Court found that the lower court erred in granting relief on the basis that defense counsel should have objected to an instruction contrary to State v. Daniels, 401 S.C. 251, 254, 737 S.E.2d 473, 474 (2012), five years before Daniels was issued. Nathaniel Teamer v. State, Op. No. 27622 (S.C. Sup.Ct. filed April 13, 2016). This Court held “that the PCR court erred in finding trial counsel ineffective for failing to object to the jury instruction when no case law existed rendering the instruction improper per se.” Id. In reaching this result, this Court declared the following:

This Court has previously held that reasonable representation does not require trial counsel to foresee successful appellate challenges to novel questions of law. E.g., Gilmore v. State, 314 S.C. 453, 457, 445 S.E.2d 454, 456 (1994) (“We have never required an attorney to be clairvoyant or anticipate changes in the law. . . .” (citing Thornes

v. State, 310 S.C. 306, 309-10, 426 S.E.2d 764, 765 (1993))), *overruled on other grounds by Brightman v. State*, 336 S.C. 348, 520 S.E.2d 614 (1999); *Thornes*, 310 S.C. at 309-10, 426 S.E.2d at 765 (“This Court has never required an attorney to anticipate or discover changes in the law, or facts which did not exist, at the time of the trial.”).

Id.

The essence of Forrest’s argument is that if other attorneys are making an argument against precedent, then Counsel is ineffective if not joining in. The Fourth Circuit rejected this argument in *Kornaharens v. Evatt*, 66 F.3d 1350 (4th Cir. 1995). In that case, a Charleston attorney admitted being aware of an issue on appeal to the United States Supreme Court challenging state law in another case, but the Fourth Circuit rejected an argument that he was ineffective for failing to forecast the change in law resulting from that other case, holding “the case law is clear that an attorney’s assistance is not rendered ineffective because he failed to anticipate a new rule of law.” Id. at 1360. The Fourth Circuit concluded, [b]ased on this clear precedent, we cannot say that, under the facts of this case, [counsel’s] trial performance was constitutionally deficient because he followed a long-standing and well-settled rule of South Carolina criminal law—even when that rule was under attack in the United States Supreme Court at the time of trial. Id.

Belcher represents a significant departure from existing precedent. This Court notes it overruled at least twenty-six appellate decisions. Belcher, 385 S.C. at 612 n.10, 685 S.E.2d at 810 n.10. In addressing the challenged instruction, this Court noted the following:

It has long been the practice for trial courts in South Carolina, as sanctioned by this Court, to request juries in any murder prosecution that the jury may infer malice from the use of a deadly weapon. We granted Belcher’s petition to argue against this precedent.

Id. at 600, 685 S.E.2d at 903. Referencing the instruction, this Court commented “[t]he charge given

by the trial court has heretofore been considered textbook.” Id. at 601, 685 S.E.2d at 804. This Court undertook a detailed analysis of South Carolina precedent culminated by recounting:

Thus with this Court’s continuing imprimatur, by the 1970s, juries were routinely charged in any murder prosecution involving a deadly weapon that “malice is presumed from the use of a deadly weapon.” The critical observation is that the charge was proper even where evidence was presented that would reduce, mitigate, excuse or justify the killing.

Id. at 608, 685 S.E.2d at 807. This Court noted “[w]e do not reach our decision lightly. The State understandably urges this Court to honor what has been treated as a settled fixture in our criminal law.” Id. at 611, 385 S.E.2d at 809. This Court further held for purposes of clarity for the bench and bar the following: “Because our decision represents a clear break from our modern precedent, today’s ruling is effective in this case and for all cases which are pending on direct review or not yet final where the issue is preserved.” Id. at 612, 385 S.C. at 810.

The PCR court did not err in following this Court’s clear instructions to not apply Belcher to convictions challenged in PCR. The petition should be denied on this issue.

III.

Counsel was not ineffective for failing to argue a novel issue of law and the instruction that malice could be inferred from the circumstances was not burden-shifting. The PCR court did not find the instruction shifted the burden and its ruling is supported by probative evidence.

While in Issue II, Forrest seeks to have Counsel found ineffective for a novel issue of law at the time of trial; in this issue, Forrest seeks to find Counsel ineffective for an issue that is currently novel. Forrest claims the instruction informing the jury that it can infer malice “from conduct showing total disregard for human life” shifts the burden of proof. Counsel testified she did not object to the instruction because it was a correct statement of law at the time of trial.

In his petition, Forrest incorrectly claims the PCR court found the challenged instruction was burden shifting. However, PCR court ruled as follows:

Applicant further claims that the following portion of the trial court’s instruction to the jury was impermissible burden shifting: “Malice may be inferred from conduct showing total disregard for human life. Inferred malice may also arise when the deed is done with a deadly weapon.” Tr. p. 234, lines 16-18. Despite the use of the permissive term “may” in the instruction, Applicant describes this instruction as a mandatory presumption. This Court disagrees. Counsel testified that she did not consider this instruction to be burden shifting. This Court finds that counsel’s judgment on the matter does not fall below professional norms **and further finds that the instruction does not tend to shift the burden of proof and is an accurate statement of law.** Accordingly, this Court finds counsel was not ineffective.

App. p. 539 (emphasis added). As shown above, the PCR court rejected Applicant’s claim that the instruction was not a mandatory presumption, as speciously claimed by PCR counsel during the evidentiary hearing, and further, found the instruction did not shift the burden of proof. App. p. 539.

At the hearing, Forrest perplexingly contended the trial court charged a mandatory

presumption rather than a permissive inference, relying on, oddly enough, State v. Elmore, 279 S.C. 417, 308 S.E.2d 781 (1983) *overruled on other grounds by* State v. Torrence, 305 S.C. 45, 69 n. 5, 406 S.E.2d 315, 328 n. 5 (1991). In Elmore, this Court found the instruction to be a mandatory presumption rather than a permissive inference and then approved the implied malice from a deadly weapon instruction which announced merely a permissive inference. Elmore, 279 S.C. at 421, 308 S.E.2d at 784; *see* Belcher, 385 S.C. at 608-09, 685 S.E.2d at 807-08 (noting the law now “speaks in terms of ‘permissive inferences,’ not ‘presumptions’” due to the United States Supreme Court holding in Sandstrom v. Montana, 442 U.S. 510, 524 (1979) finding presumptions deprive a defendant of due process).

Contrary to argument presented by Forrest, this Court did not decide Belcher² on the basis that the weapon instruction shifted the burden of proof and was unconstitutional. Instead, this Court decided **under common law** the instruction allowing malice to be inferred from a deadly weapon stated only “a half-truth” because malice does not arise from the intentional use of a deadly weapon in cases of self-defense or voluntary manslaughter. Belcher, 385 S.C. at 609-10, 685 S.E.2d at 808-809.

Now on appeal, Forrest refers to Belcher without citing Belcher, claiming no distinction between language that malice may be inferred from unspecified conduct and the inference of malice from the use of a deadly weapon. First, the use of a weapon is more specific than informing the jury, correctly, that malice may be inferred from unspecified conduct that shows a disregard for human life. Second, Forrest is unable to cite any cases that a permissive inference allowing a jury to infer

²Forrest does not cite Belcher in Issue III, but merely “incorporates” the position stated in Issue II, perhaps attempting to avoid the obvious implication that this argument, if made valid by Belcher, also cannot be retroactively applied to deem Counsel ineffective.

malice from conduct disregarding human life is burden shifting – this is a novel, if not perplexing argument, malice obviously may be inferred from conduct. Finally, the instruction allowing malice to be inferred from unspecified “conduct” does not present the “half-truth” that was this Court’s concern in Belcher.

Counsel’s failure to object to the trial court’s instruction did not fall below professional norms, and her professional judgment in this regard was reasonable. Further, this instruction is acceptable today and not reached by this Court’s holding in Belcher, so Forrest was not prejudiced by the purported deficiency. Accordingly, this petition for writ of certiorari should be denied.

CONCLUSION

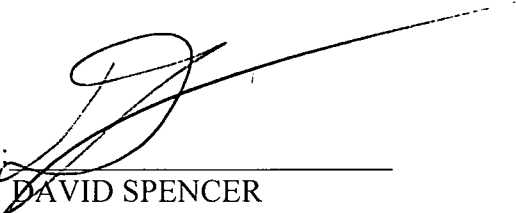
For all of the foregoing reasons, the petition for writ of certiorari should be denied. Should this Court see fit to grant the petition, Respondent respectfully requests permission to more fully brief the issues herein.

Respectfully submitted,

ALAN WILSON
Attorney General

DAVID SPENCER
Senior Assistant Attorney General

BY:



DAVID SPENCER

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

May 4, 2016

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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MAY 04 2016

The Honorable R. Knox McMahan, Circuit Court Judge

SC Court of Appeals

JOSHUA FORREST, # 274525

Petitioner,

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Respondent.

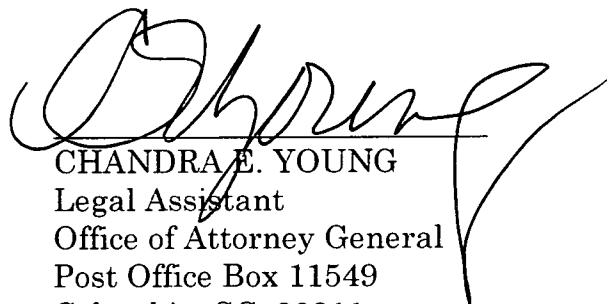
PROOF OF SERVICE

I, CHANDRA E. YOUNG, certify that I have served the Return to Petition for Writ of Certiorari on opposing counsel by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Susan B. Hackett, Esquire
1330 Lady Street; Suite 401
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served.

This 4th day of May 2016.



CHANDRA E. YOUNG
Legal Assistant
Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737



ALAN WILSON
ATTORNEY GENERAL

May 4, 2016

RECEIVED
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SC Court of Appeals

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

**RE: Joshua Forrest, #274525 v. State of South Carolina
2015-001045**

Dear Mr. Shearouse:

I am enclosing the original and six (6) copies of the Return to Petition for Writ of Certiorari in the above case.

Sincerely;

David Spencer
Senior Assistant Attorney General

DS:cey
Enclosures

cc: Susan B. Hackett, Esquire
Trisha Allen, Victim Services