

# The Supreme Court of South Carolina

The State, Respondent,  
v.  
Theodore David Wills, Petitioner.

The Honorable Steven H. John  
Horry County  
Trial Court Case No. 2006-GS-26-01652

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## ORDER

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For good cause shown, the request for an extension to serve and file the Brief of Petitioner and Appendix is granted and extended until May 14, 2012. Pursuant to this Court's order dated March 18, 2009, any further extension request must be based on a showing of good cause and must be signed by the appropriate attorneys.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY *Brenda J. Shealy*  
Chief Deputy Clerk

Columbia, South Carolina

April 16, 2012

cc: Chief Appellate Defender Robert M. Dudek  
Assistant Attorney General S. Creighton Waters  
John Gregory Hembree, Esquire

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Appeal from Horry County  
Steven H. John, Circuit Court Judge

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APR 13 2012

S.C. Supreme Court

(2)

THE STATE,

RESPONDENT,

V.

THEODORE WILLS,

PETITIONER

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MOTION FOR AN EXTENSION OF TIME  
IN WHICH TO FILE THE BRIEF OF PETITIONER AND  
APPENDIX

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Counsel for Theodore Wills respectfully requests an extension of thirty (30) days in which to file the brief of petitioner and appendix in this case. This motion is made pursuant to the Order of the South Carolina Supreme Court dated March 18, 2009. This is a second request for an extension. In support of this request, counsel shows:

1. The brief of petitioner and appendix are due to be served and filed with the Court today.
2. Counsel for Mr. Wills respectfully submits that extraordinary circumstances exist which warrant the granting of an additional extension of time. Given the number of extensions previously granted and the order in which counsel attempts to manage his caseload, counsel hopes that no further extension requests will be required.
3. Counsel is preparing to file the brief of petitioner in the case of State v. Marques Hudson and the petition for writ of certiorari to the Court of Appeals and appendix in the case of State v. Tarus Henry today, April 13, 2012. On April 12, 2012, counsel filed the Motion to Remand for

Reconstruction of the Record in the case of State v. Dameon Myers, the petition for rehearing in the case of State v. Dominic Legette, and the petition for writ of certiorari and appendix in the case of Antwan Jones v. State. On April 10, 2012, counsel had an oral argument in the case of State v. Kevin Hardy in the Court of Appeals. On April 6, 2012, counsel filed the initial brief of appellant and designation of matter in the case of State v. Trey Williams. On April 4, 2012, counsel filed the brief of petitioner in the case of State v. Jeffery Evans, the petition for writ of certiorari and appendix in the case of Janice Clasby v. State and the petition for rehearing in the case of State v. Joel Robinson. On March 28, 2012, counsel filed the petition for writ of certiorari, the Johnson petition for writ of certiorari pursuant to Austin v. State and appendix in the case of Donald Hulon v. State and the initial brief of appellant and designation of matter in the case of State v. Eric Spratt. On March 22, 2012, counsel filed the petition for rehearing in the case of State v. Shane Epting. On March 19, 2012, counsel filed the initial brief of appellant and designation of matter in the case of State v. Clarence Logan and the petition for writ of certiorari, the Johnson petition for writ of certiorari pursuant to Austin v. State and appendix in the case of Jerry Galbreath v. State. On March 14, 2012, counsel had an oral argument in the case of State v. Cameron Hammonds in the Court of Appeals. On March 13, 2012, counsel had an oral argument in the case of State v. Bennie Golston in the Court of Appeals. On March 8, 2012, counsel filed the petition for rehearing in the cases of State v. Andre Massey and State v. Jake Wilson. On March 7, 2012, counsel had an oral argument in the case of In the Matter of the Care and Treatment of Bobby Manigo in this Court. On March 6, 2012, counsel had an oral argument in the case of State v. Patrick Herb in this Court.

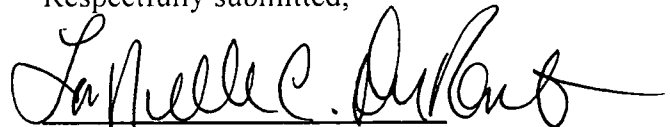
4. Counsel makes this request in good faith and not for purpose of delay. Counsel intends to continue to work on the cases with more than three extensions first so that the caseload will

hopefully become more manageable in the near future, and less extensions will need to be requested.

5. Counsel for the Attorney General's office has been informed of this request.

WHEREFORE, the undersigned counsel would respectfully request an additional thirty (30) day extension in which to file the brief of petitioner and appendix in this case based upon the above exigent circumstances.

Respectfully submitted,

A handwritten signature in cursive script, reading "LaNelle C. Durant". The signature is written in black ink and is positioned above the printed name.

LaNelle C. Durant  
Appellate Defender

Attorney for Petitioner

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

---

Appeal from Horry County  
Steven H. John, Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

THEODORE WILLS,

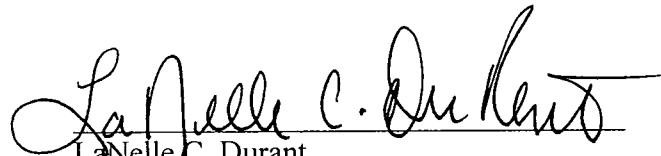
PETITIONER

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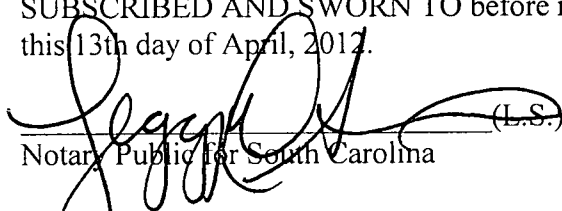
CERTIFICATE OF SERVICE

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I certify that a true copy of the Motion for an Extension of time in which to file the Brief of Petitioner and Appendix in the above referenced case has been served upon S. Creighton Waters, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 13th day of April, 2012.

  
LaNelle C. Durant  
Appellate Defender

SUBSCRIBED AND SWORN TO before me  
this 13th day of April, 2012.

  
Notary Public for South Carolina (L.S.)  
My Commission Expires: December 4, 2017.

# The Supreme Court of South Carolina

The State,

Respondent,

v.

Theodore David Wills,

Petitioner.

The Honorable Steven H. John  
Horry County  
Trial Court Case No. 2006-GS-26-01652

---

## ORDER

---

The request for an extension to serve and file the Brief of Petitioner and additional copies of the Appendix is granted and extended until April 13, 2012. Pursuant to this Court's order dated March 18, 2009, any further extension request must be based on a showing of good cause.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY

*Lucinda L. Shealy*  
Clerk

Columbia, South Carolina

March 16, 2012

cc: Chief Appellate Defender Robert M. Dudek  
Assistant Attorney General S. Creighton Waters  
John Gregory Hembree, Esquire



# SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense  
1330 Lady Street, Suite 401  
Columbia, South Carolina 29201-3332  
Post Office Box 11589  
Columbia, South Carolina 29211-1589  
Telephone: (803) 734-1330  
Facsimile: (803) 734-1397

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

March 14, 2012

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MAR 14 2012

S.C. Supreme Court

(1)

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

Re: The State v. Theodore D. Wills

Dear Mr. Shearouse:

The brief of petitioner and additional thirteen (13) copies of the appendix in this case are due to be served and filed with the Court today. However, because of my heavy workload at this time, I am requesting an extension for 30 days, in which to serve and file the petition and appendix.

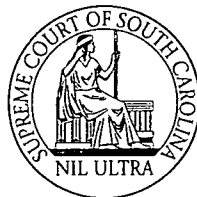
By copy of this letter, I am informing S. Creighton Waters, of the Attorney General's Office, of my request.

Sincerely,

LaNelle C. Durant  
Appellate Defender

LCD/pds

cc: S. Creighton Waters, Esquire



# The Supreme Court of South Carolina

DANIEL E. SHEAROUSE  
CLERK OF COURT

BRENDA F. SHEALY  
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330  
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

February 13, 2012

Chief Appellate Defender Robert M. Dudek  
South Carolina Commission on Indigent Defense  
P O Box 11589  
Columbia, SC 29211

Re: The State v. Wills, Theodore David

Dear Counsel:

Enclosed is the Order granting your Petition for Writ of Certiorari in the above entitled matter.

It will be necessary for you to furnish this office with an additional thirteen (13) copies of the appendix within thirty (30) days from the date of this letter.

Brief of Petitioner should be served and filed on or before March 14, 2012. The brief is not properly filed until we have proof of service.

Brief of Respondent should be served and filed within thirty (30) days after petitioner's brief is filed. We must have proof of service. Any reply brief should be served and filed within ten (10) days after filing of respondent's brief.

Very truly yours,

*Daniel E. Shearouse*  
65

CLERK

DES/lda

Enclosure

cc: Assistant Attorney General S. Creighton Waters  
John Gregory Hembree, Esquire  
The Honorable Tanya Gee

# The Supreme Court of South Carolina

The State,

Respondent,

v.

Theodore David Wills,


Petitioner.


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## ORDER


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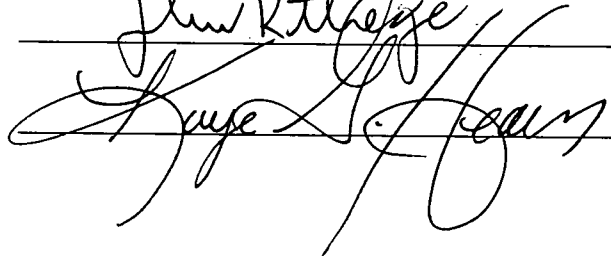
We grant the petition for a writ of certiorari to review the Court of Appeals' decision in *State v. Wills*, 390 S.C. 139, 700 S.E.2d 266 (Ct. App. 2010). The parties shall proceed to serve and file the appendix and briefs as provided by Rule 242(i), SCACR.

  
\_\_\_\_\_  
C. J.

  
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J.

  
\_\_\_\_\_  
J.

  
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J.

Columbia, South Carolina  
February 13, 2012

FILED

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Horry County

Steven H. John, Circuit Court Judge

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Opinion No. 4742 (S.C. Ct. App. filed 9/22/2010)

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 ORIGINAL

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S.C. Supreme Court

THE STATE,

RESPONDENT,

V.

THEODORE DAVID WILLS, JR.,

APPELLANT

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PETITION FOR WRIT OF CERTIORARI  
TO THE COURT OF APPEALS

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Robert M. Dudek  
Chief Appellate Defender

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

ATTORNEY FOR PETITIONER

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1.

The Court of Appeals erred by ruling the trial judge did not commit reversible error by allowing Petitioner Wills’ statement into evidence, since it resulted from a proffer agreement with the State and was thus inadmissible under *Rule 410, SCRE* ..... 5

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on 10/28/2010.

QUESTION PRESENTED

The Court of Appeals erred by ruling the trial judge did not commit reversible error by allowing Petitioner Wills' statement into evidence, since it resulted from a proffer agreement with the State and was thus inadmissible under *Rule 410, SCRE*.

## STATEMENT OF THE CASE

### **Procedural history**

On October 1 through 3, 2007, Petitioner Theodore David Wills, Jr., stood trial in Horry County, before Judge Steven H. John and a jury, on an indictment charging him with murder. Based on a statement Wills provided pursuant to a proffer agreement with the State, it alleged that Wills and Mark Willard tricked the victim, Julian Lee, into participating in a bogus robbery and that Wills and Willard split a \$10,000 bounty on Lee's head after Willard shot Lee twice in the back. The jury found Wills guilty as charged, and the judge sentenced him to imprisonment for forty years.

The Court of Appeals affirmed petitioner's conviction finding that while his statement was unquestionably given in anticipation of a guilty plea pursuant to Rule 410, SCRE, that petitioner Wills waived the protection of that evidentiary rule. App. 1-7. On rehearing petitioner argued this was error since Rule 1102, SCRE leaves the sole discretion to amend the plain meaning of the Rules of Evidence with this Court. App. 8-9. Rehearing was denied. App. 10. This petition for a writ of certiorari follows.

## ARGUMENT

The Court of Appeals erred by ruling the trial judge did not commit reversible error by allowing Petitioner Wills' statement into evidence, since it resulted from a proffer agreement with the State and was thus inadmissible under Rule 410, SCRE.

The prosecution of Petitioner Wills was based almost exclusively upon a taped statement Wills gave as part of his proffer agreement with the State. R. 147, ll. 13-14. Wills agreed to truthfully divulge the events and circumstances surrounding the death of Julian Lee. R. 185-187; App. 2. In return petitioner would receive the State's consideration and a recommended sentence. R. 185-187; App. 2.

The agreement contained several provisions including the implicit purported infallibility of the polygraph examination. If that polygraph examination showed deception, obviously according to the examiner, or if the information was inconsistent with that previously provided or indicated petitioner Wills "is the person or one of the persons that shot the victim, the terms of this proffer are null and void." The agreement also provided any statement given by petitioner could then be used against him for "any legal purpose." R. R. 185-187; App. 2.

At the start of trial, defense counsel objected to its admissibility on the ground that the statement was given "in exchange for participation ... in a plea agreement process. R. 3, l. 21 – 5, l. 17.

SLED agent Rickey Charles testified *in camera* that he determined petitioner was deceptive on the polygraph, although he agreed the polygraph examination results could be erroneous. R. 36, l. 1 – 38, l. 7; r. 63, l. 23 – 64, l. 1. Charles also acknowledged that there was a variance in his scoring of the results of the polygraph examination and that of Sergeant Duff who actually gave the examination. R. 62, l. 18 – 64, l. 1. – 66, l. 17. Petitioner testified during that same hearing that he told the truth during the polygraph examination and he also asserted he was not told if he did not pass that polygraph examination that he would be held "accountable for whatever went on." R. 83, ll. 12-23.

The judge overruled the objection. R. 90, l. 11-93, l. 4. see, also, R. 152, l. 20 – 155, l. 18. Portions of the videotape were then played for the jury. Petitioner told the police that Mark Willard unexpectedly killed the decedent. Legally, therefore, because this was not foreseeable, petitioner was not guilty for Willard's actions.

In his closing argument the solicitor argued petitioner was "a greedy cold bloodied contract killer. For some \$10,000 cash money the defendant betrayed this so called friend of his, the defense was a friend of his, and he set him up, chose the place of execution, *the weapon of choice*, that being Mark Willard, and the time, and the deed was done and Julian was murdered." R. 159, ll. 4-10. (emphasis added).

Petitioner argued "that *Rule 410(4), SCRE*, provided that evidence of "any statement in the course of plea discussions with an attorney for the prosecuting authority which did not result in a plea of guilty or which result in a plea of guilty later withdrawn" is not admissible "in any ... criminal proceeding ... against the defendant who made the plea or was a participant in the plea discussions." See, also, *State v. Compton*, 366 S.C. 671, 623 S.E.2d 661 (Ct. App. 2005).

Petitioner also argued that *Rule 410(4)*, SCRE would appear on its face to exclude Wills inculpatory admissions to the State. Since those admissions were the centerpiece of the State's case at trial, the error could not have been harmless." Brief at 5.

### **Court of Appeals**

The Court of Appeals noted there was not any South Carolina precedent on point on allegedly waiving the protections of Rule 410, SCRE. The Court found petitioner was unquestionably giving his statement in return for a plea agreement and that it was subject to Rule 410, SCRE protection unless that protection could be found to have been expressly waived. The Court then determined that petitioner and his lawyer both signed an agreement stating that if the polygraph examination showed deception or was inconsistent with that previously provided or indicated

petitioner Wills “is the person or one of the persons that shot the victim, the terms of this proffer are null and void.” As seen above, the agreement also provided any statement given by petitioner could then be used against him for “any legal purpose.” R. R. 185-187; App. 2; app. 6.

The Court of Appeals cited United States v. Mezzanatto, 513 U.S. 196, 201 (1995) for the proposition that “absent some affirmative indication that the agreement was entered into unknowingly and involuntarily, an agreement to waive the exclusionary provisions of the plea-statement Rules [Federal Rule 410] is valid and enforceable.” App. 210. The Court determined since petitioner’s attorney signed the agreement and because there “lacks support to the contrary; we find the agreement was knowingly and voluntarily entered.” App. 6-7.

### **Rehearing**

On rehearing appellate counsel Savitz argued that “the Court’s interpretation of Rule 410, SCRE, creates a new exception – waiver – of the rule, in violation of Rule 1102, SCRE, which provides, “Amendments to the South Carolina Rules of Evidence may be made by the South Carolina Supreme Court.” App. 8 Rehearing was denied.

### **Discussion**

Rule 410(4), *SCRE*, provides that evidence of “any statement in the course of plea discussions with an attorney for the prosecuting authority which did not result in a plea of guilty or which result in a plea of guilty later withdrawn” is not admissible “in any ... criminal proceeding ... against the defendant who made the plea or was a participant in the plea discussions.”

In *State v. Compton*, 366 S.C. 671, 623 S.E.2d 661 (Ct. App. 2005), relied on by the Court of Appeals in this case, the Court found that Compton’s statements were not given in furtherance of a plea agreement under Rule 410, *SCRE*. *Compton* was a very strange case where Compton desired to reduce his burglary sentence from fifteen years to seven-and-a-half years – where he had already pled guilty to

that charge – by giving information about an unrelated murder. The Court found the agreement was neither an immunity agreement nor a plea agreement.

Here, conversely, the Court correctly held that petitioner unquestionably gave his statement in return a plea agreement under Rule 410, SCRE. Further, in United States v. Mezzanatto, 513 U.S. 196, 201 (1995), the government caught and determined the defendant was lying because a *videotape* directly contradicted his statement.

Petitioner submits the case is very different here because the insertion of the polygraph examiner as the decision maker on whether petitioner was telling the truth essentially injects an arbitrary factor into the agreement because polygraphs are inherently unreliable. Stated more succinctly, polygraph examinations are generally not admissible in court because they have not been *proved to be reliable*.

Further, petitioner also was not entitled to the protection of Rule 410, SCRE if the government determined his statement was “inconsistent with information previously provided . . .” App. 2. That term is so vague it literally invites solicitors to find ways not to honor a plea agreement.

If this Court allows the present opinion to stand petitioner respectfully submits it will greatly undermine the purpose and policy of Rule 410, SCRE which is to encourage accomplices or co-defendants to cooperate with the government in order that the government can bring the most culpable to justice while ensuring that the cooperating party receives some lesser punishment for his cooperation. See State v. Mathis, 287 S.C. 589, 340 S.E.2d 538 (1986).

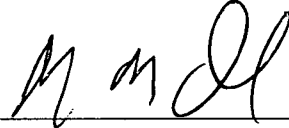
There are always going to be situations where the government receives grief from victims or other interested parties for entering into a plea agreement with a lesser player in a crime to ensure a conviction of the target. However, honoring that contractual plea agreement not only is fundamentally fair, it invites great weariness on the part of any criminal defense attorney and defendant if solicitors are allowed to opt out of them based on reasons that can be correctly argued to be arbitrary – as in this case. See Santobello v. New York, 404 U.S. 257 (1971); State v. Thrift, 312 S.C. 282, 440 S.E.2d 341 (1994).

Petitioner respectfully submits that given the significance of this novel issue on our criminal justice system that this Court should grant certiorari and review the opinion of the Court of Appeals.

CONCLUSION

By reason of the foregoing arguments, this Court should respectfully grant certiorari.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'R M Dudek', written over a horizontal line.

Robert M. Dudek  
Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 27th day of January, 2011

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

\_\_\_\_\_  
Certiorari to Horry County

Steven H. John, Circuit Court Judge

\_\_\_\_\_  
Opinion No. 4742 (S.C. Ct. App. filed 9/22/2010)

**RECEIVED**

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**S.C. Supreme Court**

THE STATE,

RESPONDENT,

V.

THEODORE DAVID WILLS, JR.,

APPELLANT

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CERTIFICATE OF SERVICE  
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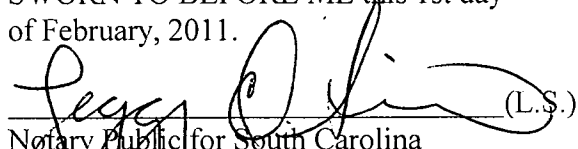
I certify that a true copy of the petition for writ of certiorari and a copy of the appendix, in this case has been served on S. Creighton Waters, Esquire, Mr. Theodore D. Wills, Jr., and the S.C. Court of Appeals, the 28th day of January, 2011.



\_\_\_\_\_  
Robert M. Dudek  
Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 1st day  
of February, 2011.

 (L.S.)  
Notary Public for South Carolina  
My Commission Expires: December 4, 2017.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Horry County  
The Honorable Steven H. John, Circuit Court Judge

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Opinion No. 4742 (S.C. Ct. App. filed 9/22/2010)

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S.C. Supreme Court

THE STATE,

Respondent,

v.

THEODORE DAVID WILLS, JR.,

Petitioner

---

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ALAN WILSON  
Attorney General

JOHN W. McINTOSH  
Chief Deputy Attorney General

DONALD J. ZELENKA  
Assistant Deputy Attorney General

S. CREIGHTON WATERS  
Senior Assistant Attorney General  
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J. GREGORY HEMBREE  
Solicitor, Fifteenth Judicial Circuit  
P.O. Drawer 1276  
Conway, SC 29528-1276  
(843) 915-5460

ATTORNEYS FOR RESPONDENT

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**THE COURT OF APPEALS DID NOT ERR IN FINDING RULE 410, SCRE WAS NOT VIOLATED FROM USE AT TRIAL OF PETITIONER'S STATEMENT GIVEN PURSUANT TO A PROFFER AGREEMENT, WHERE PETITIONER WAIVED ANY PROTECTION OF RULE 410 BY AGREEING THE STATEMENT COULD BE USED UPON HIS BREACH.** ..... 3

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**STATEMENT OF THE ISSUE ON APPEAL**

DID THE COURT OF APPEALS ERR IN FINDING RULE 410, SCRE, WAS NOT VIOLATED FROM USE AT TRIAL OF PETITIONER'S STATEMENT GIVEN PURSUANT TO A PROFFER AGREEMENT, WHERE PETITIONER WAIVED ANY PROTECTION OF RULE 410 BY AGREEING THE STATEMENT COULD BE USED UPON HIS BREACH?

## STATEMENT OF THE CASE

Petitioner, Theodore Wills, was indicted by the Horry County Grand Jury for murder (06-GS-26-1652). Specifically, the indictment alleged that, on October 13<sup>th</sup>, 2001, Petitioner with malice aforethought killed Julian Lee by shooting him. {R. p. 189-90}.

The Honorable Stephen H. John conducted a jury trial from October 1<sup>st</sup> to 3<sup>rd</sup>, 2007. At trial, Applicant was represented by Attorney William I. Diggs, and Assistant Solicitor Bradley C. Richardson prosecuted the case for the State. The jury found Petitioner guilty of murder. A hearing was held on the defense's motions for a new trial on October 29<sup>th</sup>, 2007, and after they were denied, Judge John sentenced Petitioner to forty (40) years.

A timely Notice of Appeal was filed with the South Carolina Court of Appeals. Following briefing, the Court of Appeals affirmed by opinion dated September 22, 2010. State v. Wills, 390 S.C. 139, 700 S.E.2d 266 (Ct. App. 2010). The Petition for Rehearing was denied on October 28, 2010.

## ARGUMENT

**THE COURT OF APPEALS DID NOT ERR IN FINDING RULE 410, SCRE WAS NOT VIOLATED FROM USE AT TRIAL OF PETITIONER'S STATEMENT GIVEN PURSUANT TO A PROFFER AGREEMENT, WHERE PETITIONER WAIVED ANY PROTECTION OF RULE 410 BY AGREEING THE STATEMENT COULD BE USED UPON HIS BREACH.**

Petitioner contends on appeal that use of his videotaped statement given pursuant to the proffer agreement violated Rule 410(4), SCRE. However, the Court of Appeals appropriately found he waived any protection of that provision. In any event, the issue was not preserved and there was no offer to plea anyway.

### **A. Events below**

Petitioner was initially charged with accessory after the fact and obstruction of justice. {R. 108-09}. He then gave a statement pursuant to a proffer agreement, signed by both Petitioner and his attorney. Paragraph One of the agreement provided that Petitioner had to "submit himself to agents of the State for the purpose of debriefing", and that he had to be "completely truthful" in answering "all questions". The agreement noted that the information could be recorded by the State. {R. 185}.

Paragraph Two provided that Petitioner had to submit to a polygraph taken by an examiner selected by the State, and that if his responses "show deception, are inconsistent with information previously provided or [indicate] he is the person or one of the persons who shot the victim", then:

[T]he terms of this proffer are null and void and any statements made by [Petitioner] may be used against him by the State for any legal purpose, including, but not limited to, considerations for charging, bond, disposition of charges through plea or trial of [Petitioner] and impeachment.

{R. 186}.

Paragraph Three required Petitioner to appear as a witness at trial against other involved persons and testify truthfully and completely, or the proffer would be null and void. Petitioner would then be subject to prosecution for perjury as well as “full prosecution on all charges deemed appropriate by the State in connection with this matter; use of statement(s) . . . are the same as provided in Paragraph Two of this Proffer”. **{R. 186}**.

Paragraph Four provided that in return for Petitioner’s “full compliance”, that State would not use statements provided during the debriefing against him in the criminal prosecution then pending against him, and also would not seek any additional charges arising out of the Julian’s murder. **{R. 186}**.

Paragraph Five provided that in return for Petitioner’s full compliance, the State would “take into consideration the materiality of [Petitioner’s] truthful testimony and the degree of cooperation in the election of charge(s) and recommendation of sentencing”. **{R. 186}**.

Paragraph Six provided that the State would inform the court of the cooperation at time of sentencing. **{R. 186-87}**.

Paragraph Seven provided that violation of the Proffer would render it null and void, and the State would be able to “use any information obtained through this proffer in any fashion, whether direct of [sic] collateral to this matter”. **{R. 187}**.

Paragraph Eight provided that the proffer was the complete and full agreement of the parties. **{R. 187}**.

At the taking of the statement, Petitioner was read his Miranda rights and signed a waiver. Of course, during that waiver, he was told anything he said could and would be

used against him in a court of law. **{R. 69-74; 185-187, 188; State's 21}**. After a break in the interview, the officer noted on the tape that Petitioner had talked with his counsel and the terms of the proffer and the Miranda waiver were still in effect. **{State's 21}**. On a couple of occasions during the interview the officers mentioned they would be setting up a polygraph. **{State's 21}**. At one point during questioning, it was noted that Petitioner had an obligation to talk about anything he knew, whether or not the detective has asked about it. At another point it was stated that Petitioner did not have anything to worry about in answering a question since it was part of the proffer. **{State's 21}**.

After the interview was completed, Petitioner was polygraphed. Prior to the polygraph, he waived his Miranda rights again and also signed a polygraph consent form. **{R. 14; 18}**. The polygrapher found Petitioner was deceptive in his answers to some of the relevant questions. **{R. 24-31; 35-36}**.

Given the deception, Petitioner was ultimately charged with murder, and indicted in April 2006. Before presentation of evidence to the jury, the State indicated its intent to use the recorded interview as evidence in its case-in-chief, due to Petitioner's deception on the polygraph examination. **{R. 1-3}**. The defense objected and requested a hearing, arguing:

[B]asically the reason that we are doing that is because we got intertwined here the use of the polygraph, that polygraph procedure, with the voluntariness, the question of the voluntariness of the defendant's statement.

The defense continued, arguing that the process was unfair because Petitioner had given the statement in reliance on the proffer agreement, and the State was refusing to honor it based on the polygraph results. Defense counsel asserted that the jury would be unable to effectively gauge the voluntariness of the statement without knowing all the

circumstances, and concluded:

[B]ecause you cannot extricate the reference to the polygraph from the determination of whether Mr. Wills gave a voluntary statement the statement should be suppressed as being involuntary.

Defense counsel agreed when the court asked if it was the defense's position Petitioner had in fact told the State the truth. {R. 4-5}.

The State pointed out that the polygraph was necessary to prevent the State from being taken by a defendant simply trying to help himself out, and noted that Petitioner had agreed to the express terms of the proffer agreement which included the provision allowing use of the statement if Petitioner showed deception. {R. 7-8}.

The defense responded by contending Paragraph Two did not specifically provide that in the event of a breach State could present the recorded interview to the jury as evidence in chief. The defense again asserted it was inherently unfair to allow the State to alone make the decision of whether Petitioner was telling the truth or not – and asserted a due process violation from allowing “the State to expand beyond the scope of the literal language contained in the agreement”. {R. 10-11}.

Police officers then testified as to the taking of the recorded statement, and the polygraph procedure and results, as previously described. After the recording was played for the judge, Petitioner testified, contending that he only gave the statement because “they gave me an offer”, and claiming he did not understand nor did anyone explain to him he would have to take a polygraph. Petitioner stated he told the truth in the interview. {R. 79-80}. On cross, Petitioner admitted he signed the proffer agreement, but stated he only “skimmed” through it. He also admitted begin given his Miranda rights and understanding

those rights. {R. 81-82}. On redirect, when asked why he showed deception, Petitioner stated he had not been told by the “DA” he would be held accountable if he did not pass the polygraph, and again said he had only skimmed through the proffer. {R. 81-83}.

Following testimony, the defense made two arguments. First, Petitioner argued that Paragraph Two was vague and should be construed against the State to preclude use of the statement at trial. The defense contended neither Petitioner or his attorney made a voluntary and intelligent decision with regard to the agreement if the statement could be used. Next, the defense argued that since an inadmissible factor like a polygraph was inextricably intertwined with the determination of voluntariness, it would be impossible for the jury to make the call without knowing all the circumstances. {R. 84-86}.

The court allowed the statement, ruling that Petitioner “knew the risk of communicating with the police in telling them a story which they had the right to believe or not to believe”. {R. 90-93}.

When the statement before it was played for the jury, Petitioner renewed his objection. {R. 142-145}. He was convicted of murder.

The Court of Appeals affirmed, finding that the proffer agreement waived the protections of Rule 410, SCRE and Petitioner knowingly and voluntarily entered that agreement with the assistance of counsel. State v. Wills, 390 S.C. 139, 700 S.E.2d 266 (Ct. App. 2010).

**B. Any issue as to Rule 410, SCRE, is not preserved.**

As can be seen from the discussion in the preceding subsection, the defense’s argument at trial always centered on voluntariness and the alleged vagueness of the

provisions of the agreement related to the consequences of failing the polygraph. At no time ever did the defense mention "Rule 410, SCRE", or even "the rules of evidence".

Petitioner's argument to the Court of Appeals was that Rule 410(4), SCRE, is applicable and flatly prohibits introduction of the statement taken pursuant to the proffer. This contention based purely in the evidentiary rules is different from the constitutional argument of voluntariness and the contractual argument of vagueness made at trial.

In the petition for rehearing to the Court of Appeals, Petitioner only argued that the Court of Appeals erred in creating a "waiver exception" to Rule 410, SCRE, when Rule 1102, SCRE provides that only this Court can make amendments to the Rules of Evidence. This is of course different from the arguments made both at trial and to the Court of Appeals in the Final Brief of Appellant.

Before this Court in the instant certiorari petition, the issue has morphed once again. Now, Petitioner contends that the provision allowing the State be able to declare the agreement null and void due to deception on a polygraph exam is unfair because polygraphs are inherently unreliable. While the defense at trial did complain some about the State being arbiter of Petitioner's performance under the proffer, it never precisely made this argument, and regardless this is yet a different permutation than the issues that were raised in the Final Brief and in the Petition for Rehearing.

It is axiomatic that one cannot keep changing the issue from trial through each stage of appeal, and cannot keep throwing up a new version of the issue to see if it sticks when prior versions fail. Petitioner's latest version is not preserved for certiorari review.<sup>1</sup>

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<sup>1</sup> See Toal, Vafai, & Muckenfuss, Appellate Practice in South Carolina pp. 77; 293 (2<sup>nd</sup> ed. 2002) (A petition for rehearing does not exist for lawyers of losing parties to

**C. A provision waiving the protection in Rule 410 is enforceable.**

The Court of Appeals correctly followed the reasoning of United States v. Mezzanatto, 513 U.S. 196 (1995) to find Petitioner waived the provisions of Rule 410, SCRE. In Mezzanatto, seven members of the Court held enforceable a prosecutor's insistence prior to a cooperation discussion that any statements could be used to impeach contradictory testimony in event of a trial. The Court first noted that most rights under the Federal Rules of Evidence or Criminal Procedure could be waived, just like most constitutional and statutory rights. The Court also noted that the protection in Rule 410 was not so fundamental that waiver would be abhorrent to justice. If anything, the Court reasoned, allowing examination of a defendant on prior inconsistent statements would *increase* the reliability of the factfinding process.

Further, the Court rejected arguments that waiver would conflict with the policy of encouraging defendants to engage in plea discussions, by noting that there were two sides to the transaction, and prosecutors may be unwilling to bind themselves on charging and plea decisions without some way to verify truthfulness. Id. at 200-208. Ultimately, the Court stated that "it simply makes no sense to conclude that mutual settlement will be encouraged by precluding negotiation over an issue that may be particularly important to

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present points which they may have overlooked or misapprehended, nor does it allow the losing party to try the case in the appellate court for a second time.) (citing Kennedy v. South Carolina Retirement Sys., 349 S.C. 531, 564 S.E.2d 322 (2001)); Kennedy, supra (argument on rehearing will not be considered as it was never presented to the Court prior to the petition for rehearing); See State v. Byram, 326 S.C. 107, 485 S.E.2d 360 (1997) (a party cannot argue one basis in support of motion at trial and another ground on appeal); Rule 221(a), SCACR (A petition for rehearing must "state with particularity the points supposed to have been overlooked and misapprehended by the Court".); Rule 242(d)(2), SCACR (only those questions raised both to the court of appeals and in the petition for rehearing are sufficient for inclusion in a certiorari petition).

one of the parties to the transaction”. Id. at 208. See also United States v. Hardwick, 544 F.3d 565, 570 (3<sup>rd</sup> Cir. 2008) (“[federal] circuit courts that subsequently have considered the question have upheld the use of proffer waivers at trial”); United States v. Burch, 156 F.3d 1315 (D.C. Cir. 1998) (enforcing 410 waiver provision to statements offered in prosecution’s case-in-chief); United States v. Young, 223 F.3d 905 (8<sup>th</sup> Cir. 2000) (reversing trial court’s suppression of affidavit, and enforcing waiver provision to allow it to be used by prosecution in case in chief); United States v. Davis, 166 Fed. Appx. 70 (4<sup>th</sup> Cir. 2006) (finding waiver provision enforceable to allow introduction at trial of statements made during plea negotiations).

Nothing is served in the law by allowing a defendant to get a free shot at attempting to dupe the prosecution, by escaping either full criminal liability if successful, or escaping liability for his lies at trial if the attempt is unsuccessful.

**D. Petitioner waived any complaint under Rule 410.**

It is clear that Petitioner waived any protections from Rule 410 in this case. As noted in State v. Compton, 366 S.C. 671, 623 S.E.2d 661 (Ct. App. 2007), such agreements between prosecutors and defendants are governed by general contract principles, and the courts should not read terms or conditions into the contract.

Here, the agreement was unambiguous. Paragraph one required complete truthfulness, and noted that the interview could be recorded; Paragraph Two specifically noted that if Petitioner showed deception on the polygraph his statements could “be used against him by the State for any legal purpose . . . including but not limited to . . . disposition of charges through plea or trial”; and Paragraph Seven stated that if Petitioner violated any term of the agreement, “the State shall have the right to use any information

obtained through this Proffer in any fashion, whether direct or collateral to this matter”. These provisions could not have been clearer that breach would put the statements in play. And then, on top of that, Petitioner was advised of and waived his Miranda rights – which of course included the admonition that anything he said could be used against him in court.

Moreover, there is no requirement of a specific reference to Rule 410, where the whole point is more than evident from the language of the agreement. See United States v. Young, 223 F.3d 905 (8<sup>th</sup> Cir. 2000) (finding lack of specific reference to Rule 410 inconsequential because the provisions specifically set forth the consequences, and defendant acknowledged he was represented by counsel who has discussed his rights).

Finally, there is no issue with regard to the use of deception on the polygraph to trigger the State’s contractually specified right to use the statements. Like this Court pointed out in Compton, agreements between defendants and prosecutors are governed by contractual principles, and as the United States Supreme Court pointed out in Mezzanatto, there is nothing wrong with letting the parties bargain on and agree to terms that are respectively important to them, since “prosecutors may be unwilling to bind themselves on charging and plea decisions without some way to verify truthfulness”. Here, Petitioner specifically agreed that the prosecution could use the polygraph to assess his truthfulness. While the polygraph may not be admissible in court as a general rule – which is in part due to Rule 403 considerations that it may distract a jury from its fundamental role – it remains a viable, common, and often-used investigative tool. There is nothing inherently unfair about this provision such that it could simply be judicially vitiated long after the agreement was concluded.

As such, there was no violation of Rule 410(4), SCRE, from admission of the

statement.

**CONCLUSION**

For the foregoing reasons, it is respectfully submitted that the judgment and conviction of the trial court should be affirmed.

ALAN WILSON  
Attorney General

JOHN W. McINTOSH  
Chief Deputy Attorney General

DONALD J. ZELENKA  
Assistant Deputy Attorney General

S. CREIGHTON WATERS  
Senior Assistant Attorney General  
Post Office Box 11549  
Columbia, South Carolina 29211  
(803) 734-6305

J. GREGORY HEMBREE  
Solicitor, Fifteenth Judicial Circuit  
P.O. Drawer 1276  
Conway, SC 29528-1276  
(843) 918-5460



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S. Creighton Waters  
ATTORNEYS FOR RESPONDENT.

March 1, 2011.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Horry County  
The Honorable Steven H. John, Circuit Court Judge

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Opinion No. 4742 (S.C. Ct. App. filed 9/22/2010)

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THE STATE,

Respondent,

v.

THEODORE DAVID WILLS, JR.,

Petitioner

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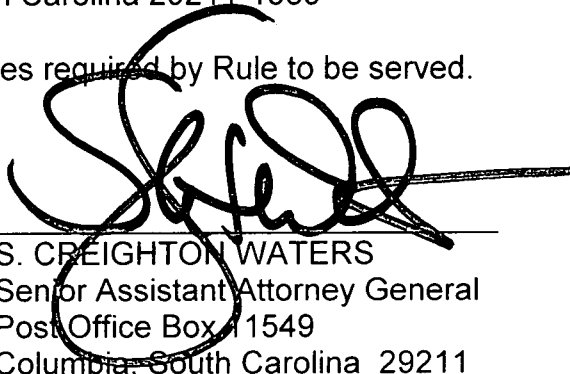
PROOF OF SERVICE

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I, S. Creighton Waters, Counsel for Respondent, certify that I have this date served the **Return to Petition for Writ Certiorari** dated March 1, 2011, on Petitioner by depositing two copies of the same in the United States mail, first class postage prepaid, addressed to his attorney of record:

Robert M. Dudek, Chief Appellate Defender  
South Carolina Office of Appellate Defense  
PO Box 11589  
Columbia, South Carolina 29211-1589

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



---

S. CREIGHTON WATERS  
Senior Assistant Attorney General  
Post Office Box 11549  
Columbia, South Carolina 29211

ATTORNEY FOR RESPONDENT



ALAN WILSON  
ATTORNEY GENERAL

RECEIVED

MAR 01 2011

March 1, 2011

S.C. Supreme Court

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

Re: The State v. Theodore David Wills, Jr.  
Appeal from Horry County

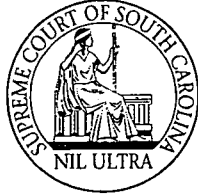
Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above-entitled action, along with a **Proof of Service**. By copy of this letter, I am serving opposing counsel with same.

Sincerely,  
  
S. Creighton Waters  
Senior Assistant Attorney General

SCW/epj

cc: Robert M. Dudek, Esquire  
J. Gregory Hembree, Solicitor, fifteenth Judicial Circuit  
Sandi Wofford, Victim Services



# The Supreme Court of South Carolina

DANIEL E. SHEAROUSE  
CLERK OF COURT

BRENDA F. SHEALY  
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330  
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

January 31, 2011

Chief Appellate Defender Robert M. Dudek  
South Carolina Commission  
on Indigent Defense  
P O Box 11589  
Columbia, SC 29211

Re: The State v. Wills, Theodore David  
Case Tracking No. 2010-178266

Dear Counsel:

This office has received your Petition for Writ of Certiorari and Appendix in the above matter. It has been assigned the Case Tracking Number that appears above. Please use this number on all future correspondence relating to this matter.

I do wish to call the attention of the parties to the attached order relating to the inclusion of personal data identifiers and other sensitive information in documents filed with the Supreme Court of South Carolina and the South Carolina Court of Appeals. Please note that the responsibility for insuring that information is redacted or sealed as required by this order rests with counsel and the parties. This office will not review filings for redaction or to determine if materials should be sealed.

Very truly yours,



CLERK

The State v. Wills, Theodore David  
Page Two  
January 31, 2011

DES/lda

cc: Assistant Attorney General S. Creighton Waters  
J. Gregory Hembree, Esquire  
The Honorable Tanya Gee

# The Supreme Court of South Carolina

The State,

Respondent,

v.

Theodore David Wills,

Petitioner.

The Honorable Steven H. John  
Horry County  
Trial Court Case No. 2006-GS-26-01652

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## ORDER

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For good cause shown, the request for an extension to serve and file Petition for Writ of Certiorari and Appendix is granted and extended until January 28, 2011. Pursuant to this Court's order dated March 18, 2009, any further extension request must be based on a showing of good cause and must be signed by the appropriate attorneys.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY

*Dwenda J. Shaly*  
Chief Deputy Clerk

Columbia, South Carolina

December 30, 2010

cc: Senior Appellate Defender Joseph L. Savitz, III  
Assistant Attorney General S. Creighton Waters  
The Honorable Tanya Gee

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

---

 ORIGINAL

Appeal from Horry County  
Steven H. John, Circuit Court Judge

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RECEIVED

DEC 29 2010

THEODORE D. WILLS,

S.C. Supreme Court

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

(2)

---

PETITION FOR EXTENSION OF TIME IN WHICH TO  
FILE THE PETITION FOR WRIT OF CERTIORARI  
TO THE COURT OF APPEALS AND  
ACCOMPANYING APPENDIX

---

Counsel for Theodore David Wills respectfully requests an additional extension of thirty days, in which to file the Petition for Writ of Certiorari to the Court of Appeals and Appendix in this case. This petition is made pursuant to the Order of the South Carolina Supreme Court dated March 18, 2009. This is a second request for an extension. In support of this request, counsel shows:

1. The petition for writ of certiorari to the Court of Appeals and accompanying appendix are due to be filed with the Court December 29, 2010. The Court has granted counsel one previous extension.

2. This case is currently assigned to Joseph L. Savitz, III. However, this case is in the process of being reassigned. Counsel for Mr. Wills, respectfully submits that extraordinary circumstances exist which warrant the granting of an additional extension of time.

3. On December 21, 2010, counsel filed the petition for rehearing in the case of *State v. Andres Torres*. On December 20, 2010, counsel filed the initial brief of appellant and designation of

matter in the case of *State v. Derrick Harriott*. On December 14, 2010, counsel filed the petition for writ of certiorari and appendix in the case of *Nolan Grant v. State*. ON December 8, 2010, counsel filed the initial brief of appellant and designation of matter in the case of *State v. Oran Smith*. On December 1, 2010, counsel filed the initial brief of appellant and designation of matter in the case of *State v. Larry Brown*.


4. Counsel has not had time to complete the petition for writ of certiorari to the Court of Appeals and accompanying appendix in this case. As a result, counsel respectfully asks this Court for a thirty day extension in which to file the petition for writ of certiorari to the Court of Appeals and accompanying appendix. Counsel is striving to limit the number of extensions requested. Counsel is attempting to complete the cases with the most number of extensions first.

5. Counsel makes this request in good faith and not for purpose of delay.

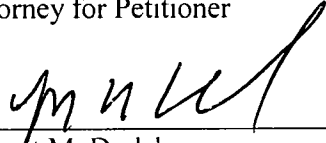
6. Counsel for the Attorney General's office consents to this request shown by signature below.

WHEREFORE, the undersigned counsel would respectfully request an extension of thirty days until January 28, 2010, in which to file the petition for writ of certiorari and appendix in this case based upon the above exigent circumstances. Counsel requests that time limits for filing the brief be held in abeyance pending a ruling on this motion.

Respectfully submitted,

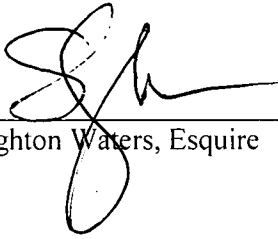
  
\_\_\_\_\_  
Joseph L. Savitz, III  
Senior Appellate Defender

Attorney for Petitioner

  
\_\_\_\_\_  
Robert M. Dudek  
Chief Appellate Defender

December 29, 2010.

I Consent:

A handwritten signature in black ink, appearing to be 'S. Creighton Waters', written over a horizontal line.

S. Creighton Waters, Esquire

# The Supreme Court of South Carolina

The State,

Respondent,

v.

Theodore David Wills,

Petitioner.

The Honorable Steven H. John  
Horry County  
Trial Court Case No. 2006-GS-26-01652

---

## ORDER

---

The request for an extension to file the Petition for Writ of Certiorari and Appendix is granted and extended until December 29, 2010. Pursuant to this Court's order dated March 18, 2009, any further extension request must be based on a showing of good cause.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY



\_\_\_\_\_  
Clerk

Columbia, South Carolina

November 30, 2010

cc: Senior Appellate Defender Joseph L. Savitz, III  
Assistant Attorney General S. Creighton Waters  
The Honorable Tanya Gee



# SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense  
1330 Lady Street, Suite 401  
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Robert M. Dudek, Chief Appellate Defender  
Wanda H. Carter, Deputy Chief Appellate Defender  
Joseph L. Savitz, III, Senior Appellate

November 29, 2010

**RECEIVED**

NOV 29 2010

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

**S.C. Supreme Court**

Re: The State v. Theodore David Wills

Dear Mr. Shearouse:

The petition for writ of certiorari to the Court of Appeals and appendix in this case are due to be served and filed with the Court today, November 29, 2010. However, because of my heavy workload at this time, I am requesting an extension for 30 days, in which to serve and file the petition.

By copy of this letter, I am informing S. Creighton Waters, of the Attorney General's Office, of my request.

Sincerely,

  
Joseph L. Savitz, III  
Senior Appellate Defender

JLS/pds

cc: S. Creighton Waters, Esquire