THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM MARION COUNTY
Court of General Sessions
D. Craig Brown, Circuit Court Judge

Appellate Case No. 2016-001962

THE STATE,

RESPONDENT,

v.

MARCO S. SANDERS,

PETITIONER.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR RESPONDENT

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PETITIONER'S QUESTION PRESENTED

Did the Court of Appeals err in finding unpreserved the issue of whether the trial judge erred in refusing to allow cross examination of a witness about the fact that he was fired from the Marion County Sheriff's Department for issues with controlled substances, when the witness placed Petitioner and the co-defendant in a vehicle matching the description of the vehicle seen leaving the crime scene?

RESPONDENT'S COUNTER-QUESTION PRESENTED

Whether the Court of Appeals erred in finding Petitioner's bias argument unpreserved where, at trial, Petitioner's objection was not raised to and ruled upon with enough specificity to comprise a preserved issue and where the basis for the trial court's limitation of former Marion County Sheriff's Deputy Nichols is not the same basis underlying the issue raised on appeal.

STATEMENT OF THE CASE

A Marion County Grand Jury indicted Petitioner Marco Siara Sanders in May 2013 for the murder of Samuel Rowell (Victim), as well as for armed robbery, burglary first degree, attempted murder, possession of a firearm in commission of a violent crime, and conspiracy. (R. pp. 708–10).

Petitioner had three pretrial hearings before the Honorable D. Craig Brown, held May 13, 2013, April 21, 2014, and May 8, 2014. Petitioner's case was called to trial before Judge Brown on May 19, 2014. (R. p. 1). Petitioner was represented by Ralph Wilson, Sr., Esquire, during the four-day trial. (R. p. 1). Petitioner was tried along with his co-defendant, Tyrell Woods, who was represented by Scott P. Floyd and William Vick Meetze, Esquires. (R. p. 1). Solicitor Ed Clements and Deputy Solicitor Dudley Saleeby represented the State. (R. p. 1). On May 22, 2014, the jury returned verdicts of guilty on all counts as charged for both Petitioner and Woods. (R. p. 682, line 23–p. 684, line 24).

Judge Brown sentenced Petitioner to consecutive sentences of life imprisonment for each the murder and the burglary first degree, to thirty years for each the armed robbery and the attempted murder, and to five years for each the criminal conspiracy and the possession of a weapon during the commission of a violent crime. (R. p. 703, line 14–p. 704, line 13).

Petitioner served a timely notice of appeal. (R. p. 707). Following briefing and without oral argument, the Court of Appeals affirmed Petitioner's convictions and sentence in Unpublished Opinion No. 2016-UP-315 (Ct. App. June 22, 2016). (App. pp. 1-2). A Petition for Rehearing followed and was denied on August 18, 2016 (App. pp. 3-13).

Petitioner next timely sought a Petition for Writ of Certiorari, to which Respondent makes the instant Return.

RESPONDENT'S STATEMENT OF THE FACTS

Victim ran a club out of his home for parties and get-togethers. (R. p. 135, line 24–p. 136, line 3). Eddie Godbold, Jr., Victim's friend and neighbor, stopped by Victim's home on July 4, 2012 to borrow a deep fryer. (R. p. 129, line 14–p. 130, line 16). When he arrived, Godbold saw Victim's truck parked outside, but Godbold received no answer when he knocked on the front door and called for Victim. (R. p. 131, lines 4–14). Godbold then walked around to the back and knocked and called for Victim. (R. p. 131, lines 12–16). Again, Godbold received no answer. (R. p. 131, lines 10–16). As Godbold was walking to the front of the home, he passed a side door and heard Victim. (R. p. 131, lines 15–20). According to Godbold, "[Victim] said, 'Eddie.' He says, 'They're trying to rob me.' He said, 'Open the door.'" (R. p. 131, lines 17–18). As Godbold reached for the door, he heard gunshots. (R. p. 131, lines 18–20). He heard about four or five gunshots total, but Godbold believed that three of those shots were fired at him. (R. p. 132, lines 12–14; R. p. 137, lines 16–25) Godbold then ran and hid for a few minutes. (R. p. 131, line 24–p. 132, line 11). He did not see anyone during the ordeal because it was dark outside. (R. p. 131, lines 21–22; R. p. 138, lines 1–3). Eventually, Godbold snuck away and went down the road to call the police. (R. p. 133, line 16–p. 135, line 6). Godbold testified that he told the police he had seen a white SUV, which he told the police was an Escalade, backed up in a driveway between Lafayette Reed's house and the Victim's house. (R. p. 143, line 2–p. 145, line 5).

Lafayette Reed, who lived about a hundred yards from Victim's home, was standing in his yard the night of July 4, 2012, when he heard about three gunshots coming from the direction of Victim's home. (R. p. 341, line 2–p. 342, line 24). He immediately grabbed his own gun and got in his car to head towards Victim's place. (R. p. 342, line 25–p. 343, line 10). As Reed approached Victim's home, he saw Godbold crouched down and getting into his car. (R. p. 343,

lines 11–19). But before Reed could get to Godbold's car, a set of lights from another car turned on and came toward him quickly, causing Reed to run off the road in avoidance. (R. p. 343, line 17–p. 345, line 2). Though Reed did not see who was driving the car, he testified that it was a light-colored vehicle. (R. p. 345, line 3–p. 347, line 13). According to Reed, it "looked like it was a Expedition or a Ford Explorer." (R. p. 345, lines 5–6). Reed attempted to follow the vehicle, but he was unable to find it, so he turned around and went back toward Victim's home. (R. p. 349, line 14–p. 352, line 24).

A group of people, including Godbold and Reed, gathered outside Victim's home. (R. p. 352, line 25–p. 353, line 20). Reed testified that the side door to Victim's home was open and that he could see Victim's feet when he peered through the door. (R. p. 354, lines 9–16). Reed also called Victim's name but did not get a response. (R. p. 354, lines 17–20). According to Reed, he never saw anyone get too close to the house. (R. p. 353, line 13–p. 355, line 13).

An investigation ensured during which officers from the Marion County Sheriff's Office arrived at Victim's home and secured the scene. (R. p. 153, line 11–p. 163, line 13; R. p. 172, line 7–p. 177, line 23). South Carolina Law Enforcement Division (SLED) then processed the scene. (R. p. 227, line 14–p. 291, line 16). The SLED officers found three fired 9 mm cartridge cases in the grass near the side door. (R. p. 234, line 19–p. 236, line 7). The SLED officers found Victim laying on the floor inside the door. (R. p. 236, lines 15–24). SLED Officer Sabrina Fellers described what she saw:

> He was clothed. He did not have shoes on, but he had socks on. The ankle area was bound with duct tape. His hands were behind his back and there was duct tape wrapped around those. And he had a white undergarment stuffed in his mouth with duct tape around his head. There was a blood pool around the head area, and a hat was on the floor kind of towards the front of the residence from his head.

(R. p. 236, lines 18–24). Three of Victim's pockets appeared to have been pulled out. (R. p. 237, lines 2–13). According to Fellers, the door to a storage room in Victim's home had been damaged. (R. p. 243, lines 1–6). The storage room contained tobacco items, liquor, and beer. (R. p. 243, lines 1–6).

The officers noticed surveillance cameras around the outside of Victim's house. (R. p. 238, line 22–p. 239, line 10). There was a monitor at the foot of Victim's bed, and some of the cords to that monitor had been cut. (R. p. 241, lines 13–23; R. p. 257, lines 14–21). The pillows on Victim's bed did not have pillowcases. (R. p. 240, line 23–p. 241, line 1). Fellers found two pillowcases filled with items sitting on the couch in the living room—one contained a Crown Royal box and ten boxes of cigars, and the other contained numerous toiletry items and prescription bottles. (R. p. 242, lines 10–16; R. p. 260, lines 9–23). The officers found the surveillance video recorder box with the cords cut in the dining area. (R. p. 267, lines 1–18; R. p. 417, line 7–p. 418, line 18).

At the end of the first night, the only lead the police had was a white, Expedition-style SUV.[1] (R. p. 412, lines 7–18). Police officers did not get warrants for Petitioner and Woods until July 12, 2012 when they showed Shawn Davis two photo line-ups, one with Petitioner's and one with Woods's. (R. p. 437, line 15–p. 438, line 22). Within the days following the shooting, James Lee, the lead investigator on the case, spoke with Levern "JJ" Nichols, another law enforcement officer, and Nichols told Lee that the day before the shooting he had seen Petitioner and Tyrell Woods, Petitioner's nephew, in a white Expedition. (R. p. 389, line 16–p. 393, line 19; R. p. 412, line 14–p. 413, line 12). The police then started looking for Petitioner and Woods. (R. p. 413,

[1] Officer Neil Rouse testified that he took statements from various people who had gathered near Victim's house the night of the shooting, and those statements drew his attention "to two black males and a white SUV." (R. p. 512, line 20–p. 513, line 16).

lines 7–12). Lee found that Woods had been seeing a woman who lived in Florence, and they learned that she owned a white Expedition, and SLED subsequently searched that Expedition and photographed it. (R. p. 414, line 7–p. 416, line 17; R. p. 445, line 1–p. 447, line 13; State's Exs. 17-A & 17-B).

The surveillance recording box found at Victim's home was taken to SLED, but it had been damaged, and it took some time until law enforcement garnered equipment for viewing the video. (R. p. 417, line 7–p. 418, line 18; R. p. 476, line 20–p. 490, line 23). A portion of the surveillance tape—in particular, a portion comprised of various clips from July 4, 2012, from 7:28 until 8:03 p.m.—was played for the jury. (R. p. 479, line 5–p. 489, line 5; State's Ex. 18). The video shows a white SUV drive by the front of Victim's house around 7:28:20. (State's Ex. 18). A view from a different camera shows the same white SUV drive by the back of Victim's home, going away from the home at 7:29:34. (State's Ex. 18). At 7:36:48 the same white SUV drives by the back of Victim's home going toward the home. (State's Ex. 18). At 7:37:23 a man in a black t-shirt and long pants approaches the front of Victim's home, knocks on the door, and then walks out of view. (State's Ex. 18). At 7:48:15 another man, wearing plaid pants and a white tank top, approaches Victim's front door. (State's Ex. 18). The man in the black t-shirt also approaches the door. (State's Ex. 18). Both men have guns in their hands. (State's Ex. 18). The man in the plaid pants appears to open the front door as the man in the black t-shirt aims his gun at the door. (State's Ex. 18). The two men enter the home at 7:48:41. (State's Ex. 18). The surveillance video recorder stopped recording at 8:03. (R. p. 486, lines 7–15).

Multiple officers testified that when they viewed the surveillance video, they recognized Petitioner on the video. Lee recognized both Petitioner and Woods on the video.[2] (R. p. 438, line 23–p. 441, line 6). Rouse viewed the video in September 2012, and he recognized Petitioner on the video.[3] (R. p. 515, line 12–p. 516, line 24). Rouse testified that he had known Petitioner since December 1993 when Petitioner was twelve years old. (R. p. 516, lines 14–24).

Victim was killed by a close-range gunshot to the head. (R. p. 206, line 14–p. 211, line 25). Dan Defreese, an expert in firearms and tool mark identification from SLED, testified that the bullet fragment removed from Victim's head was a fragment of a .22 caliber bullet. (R. p. 532, line 20–p. 534, line 13). He also testified that the three 9 mm cartridges found at the scene were fired from the same gun, likely a semi-automatic. (R. p. 530, line 1–p. 532, line 19). Defreese testified that the same weapon could not have fired both the .22 and the 9 mm bullets. (R. p. 534, lines 10–18). Defreese also testified that he watched the surveillance video from Victim's home—he identified one of the guns seen in the video as a semi-automatic (State's Exs. 19-H & 19-Q) and the other gun as a revolver with something that appeared to be a homemade silencer attached to the barrel (State's Exs. 19-I & 19-K). (R. p. 538, line 16–p. 545, line 2).

Thomas Darnell, an expert in latent print identification from SLED, testified that he tested multiple items recovered from Victim's house and found both Petitioner's and Woods's prints. In particular, he identified Petitioner's fingerprints on two cigar boxes found in a pillowcase. (R. p. 563, line 9–p. 564, line 1; *see also* R. p. 264, line 16–p. 265, line 15). He also identified Woods's fingerprints on cigar boxes and on a Crown Royal box found in the

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[2] Consistent with his pretrial testimony, Investigator Lee recognized both Petitioner and Woods in the video and had known them since 2007. (R. p. 30, line 8–p. 46, line 24).

[3] Rouse testified pretrial that he did not recognize Woods from the video at first, but he immediately recognized Petitioner, whom he had known for at least fifteen years. (R. p. 15, line 15 – p. 29, line 2).

pillowcase. (R. p. 562, line 3–p. 563, line 7). Woods's fingerprints were also found on the duct tape from Victim's head and feet. (R. p. 565, line 8–p. 568, line 5).

ARGUMENT

I. The Court of Appeals correctly found Petitioner's claim that the trial court erred in limiting the cross-examination of former Marion County Sheriff's Deputy Nichols unpreserved for appellate review because Petitioner's Rule 608(c), SCRE, argument concerning bias was not properly raised to and ruled upon by the trial court.

Petitioner seeks certiorari to determine whether the Court of Appeals erred when it found Petitioner's issue unpreserved. "An issue not raised to or addressed by the trial court or the Court of Appeals is not properly preserved for review by the Supreme Court on certiorari." *Kleckley v. Nw. Nat. Cas. Co.*, 338 S.C. 131, 138, 526 S.E.2d 218, 221 (2000). "An issue that was not preserved for review should not be addressed by the Court of Appeals, and the court's opinion should be vacated to the extent it addressed an issue that was not preserved." *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) (citing *Hendrix v. Eastern Distribution, Inc.*, 320 S.C. 218, 464 S.E.2d 112 (1995)).

The Court of Appeals found Petitioner's "bias argument" unpreserved premised upon the following:

> At trial, Sanders argued his cross-examination was proper because it challenged the employee's in-court identification and the employee's credibility. However, **the record does not indicate Sanders ever argued to the trial court the cross-examination was proper to show bias against him**. *See State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) ("A party need not use the exact name of a legal doctrine in order to preserve [the issue], but it must be clear that the argument has been presented on that ground."); *id.* ("A party may not argue one ground at trial and an alternate ground on appeal.").

(App. p. 2 (emphasis added)).

As cited by the Court of Appeals in its opinion, "[f]or an objection to be preserved for appellate review, the objection must be made at the time the evidence is presented, and with sufficient specificity to inform the [trial] court ... of the point being urged by the objector." *State v. Byers*, 392 S.C. 438, 444, 710 S.E.2d 55, 58 (2011) (citations omitted). Additionally, the

"issue must be raised and ruled upon in the circuit court in order to be preserved for appellate review." *State v. Bryant*, 383 S.C. 410, 418, 680 S.E.2d 11, 15 (Ct. App. 2009). Furthermore, where an appellant argues one ground in support of the challenged evidence at trial and another ground on appeal, the issue is not preserved for appellate review. *State v. Benton,* 388 S.C. 151, 156-57, 526 S.E.2d 228, 231 (2000).

On appeal, Petitioner asserted that pursuant to Rule 608(c), SCRE, the trial court should have permitted the cross-examination of Nichols about his being fired from the Marion County Sheriff's Department for issues with controlled substances. (Br. of Appellant; Cert. Pet.). However, Petitioner did not argue on the record before the trial court that the proffered cross-examination was admissible to demonstrate bias pursuant to that rule. The trial court's ruling did not purport to relate to Rule 608(c), SCRE, either. Instead, in the midst of Nichols' testimony, Petitioner's counsel merely proffered, without argument, cross-examination regarding his being fired from the sheriff's office. (R. p. 383, line 16 – p. 385, line 18). Counsel made no argument regarding the purported admissibility of the proffer, and instead only indicated that he was not comfortable asking some of the questions Petitioner wanted him to ask. (R. p. 383, lines 20–22). After the proffer, the trial court conducted an unrecorded bench conference. (R. p. 389, line 3).

No ruling regarding the proffered cross-examination occurred on the record until the conclusion of Nichols' testimony before the jury.[4] (R. p. 403, line 21 – p. 404, line 12). Only at this time did the trial court indicate that it had limited counsel's cross-examination of Nichols based on *State v. Aleksey*, 343 S.C. 20, 538 S.E.2d 248 (2000) and Rule 609, SCRE. (R. p. 405,

[4] On cross-examination, Petitioner's counsel did not ask the same questions he had asked Nichols during the *in camera* hearing. (R. p. 394, line 17–p. 398, line 4). Instead, he focused on the timing of Nichols's oral and written statements to another law enforcement agent. (R. p. 394, line 17–p. 398, line 4). Petitioner's counsel concluded his questioning by accusing Nichols of making up his story "after the fact in order to inculcate these defendants, . . ." which Nichols denied. (R. p. 398, lines 2–4).

line 15 – p. 406, line 21). The trial court noted that under Rule 609 a witness could be impeached by evidence of conviction of certain crimes, but there was no evidence that Nichols had been convicted of a crime. (R. p. 405, line 23 – p. 406, line 13). The trial court additionally noted that violations of narcotics laws are generally not probative of truthfulness or untruthfulness. (R. p. 406, lines 13–16). The trial court reaffirmed his ruling limiting the cross-examination based on Rules 608 and 609 and on *Aleksey* and noting Petitioner's objection. (R. p. 406, lines 17–21).

Only then did Petitioner's counsel indicate: "just in case I didn't make it clear . . . [his] objection was twofold. One on identification, but also on credibility." (R. p. 406, lines 22–24 (emphasis added)). He offered no further argument or clarification. In response, the trial court reaffirmed his prior rulings. (R. p. 406, line 25–p. 407, line 9). No ruling was made regarding Rule 608(c), SCRE, and no argument pursuant to that rule appears in the record. Moreover, the trial court earlier offered Petitioner a second proffer to delve into additional cross-examination, but trial counsel refused. (R. p. 404, line 13 – p. 405, line 8).

Having at no time argued that the basis for Petitioner's objection was bias under Rule 608(c), SCRE, and the record demonstrating no particular objection or ruling regarding that rule, the record is not preserved in regards to Petitioner's appellate argument. *State v. Byers, supra*; *State v. Bryant, supra*; *State v. Benton, supra.*

However, even on the merits, Petitioner's Rule 608(c), SCRE, argument fails. At trial, Petitioner failed to establish the witness had any bias, prejudice, or motive to misrepresent in connection to his being fired from the Marion County Sheriff's Department. The Confrontation Clause of the Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."

> The right to a meaningful cross-examination of an adverse witness is included in the defendant's Sixth Amendment right to confront his accusers. This does not

> mean, however, that trial courts conducting criminal trials lose their usual discretion to limit the scope of cross-examination. On the contrary, trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, witness' safety, or interrogation that is repetitive or only marginally relevant.

State v. Aleksey, 343 S.C. 20, 33–34, 538 S.E.2d 248, 255 (2000) (internal quotations and citations omitted). Generally, "[t]he admission or exclusion of evidence is left to the sound discretion of the trial court, and the court's discretion will not be reversed absent an abuse of discretion." *State v. Morris*, 376 S.C. 189, 205–06, 656 S.E.2d 359, 368 (2008) (citing *State v. Gaster*, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002)). And even where a court errs in limiting a defendant's cross-examination of a witness, that error is subject to a harmless error analysis. *See State v. Starnes*, 340 S.C. 312, 326 n.11, 531 S.E.2d 907, 915 n.11 (2000).

The information counsel sought to elicit was not proper impeachment under Rule 608, SCRE.[5] Rule 608(c) provides that "[b]ias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced." Petitioner claims that "[t]he fact that Nichols was later fired from the Marion County Sheriff's Department for issues with controlled substances shows that at the time Nichols made the

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[5] Petitioner has only argued in his brief that the trial judge should have permitted the cross-examination of Nichols pursuant to Rule 608(c), SCRE. Nevertheless, Respondent would note that in addition to relying on his reading of Rule 608 in limiting the cross-examination, the trial judge also relied on Rule 609, SCRE and *Aleksey v. State*, 343 S.C. 20, 538 S.E.2d 248. Petitioner notes that the cross-examination testimony that Petitioner's counsel sought to elicit was clearly not proper impeachment under Rule 609, SCRE, because there was no evidence that Nichols was convicted of any crimes involving controlled substances. *See* Rule 609, SCRE.

[6] There is no testimony detailing what Nichols's issues with controlled substances were, but had Nichols been convicted of some crime in connection to his issues with controlled substances, the conviction still may not have been admissible under Rule 609(a)(2). While issues with controlled substances and narcotics violations are not necessarily one and the same, the South Carolina Supreme Court has indicated, "[n]arcotics offenses are generally not considered probative of truthfulness." *Aleksey*, 343 S.C. at 34, 538 S.E.2d at 255. Of additional import, *Aleksey* also recognizes that dismissed narcotics indictments are not necessarily proper impeachment under Rule 608(c). *Id.*

statement implicating Petitioner, he needed to try and stay in the good graces of the investigators." (Br. of Appellant, pp. 8–9). However, Petitioner's inference that Nichols had a motive to misrepresent information provided to other law enforcement agents goes beyond the bounds of the evidence elicited at trial. Nichols's testimony established (1) that Nichols was working for the sheriff's office in July 2012 when he made a statement to another agent identifying Petitioner and Woods and (2) that, as of May 2014 (the time of trial), Nichols had been fired from the sheriff's office for issues with controlled substances. There was no testimony regarding when Nichols was fired, nor was there any testimony regarding whether he even had issues with controlled substances (or whether he was suspected of having issues) in July 2012. The inference that Petitioner makes—that Nichols had a motive to misrepresent in July 2012 because he was fired some time later for issues with controlled substances—goes too far.

This case has similarities to *State v. Burgess*, 408 S.C. 421, 759 S.E.2d 407 (2014), where the South Carolina Supreme Court found a trial court properly limited the cross-examination of a police officer about his personnel records where the evidence contained in those personnel records failed to establish the officer lacked any credibility due to a bias against the defendant. Though the officer had disciplinary problems, the court noted "each of the disciplinary incidents occurred after [the defendant]'s arrest and did not involve [the defendant]. Furthermore, [the officer]'s hostile actions were directed at co-workers rather than subjects of criminal investigation." *Burgess*, 408 S.C. at 442, 759 S.E.2d at 418. Here, too, the evidence does not establish a nexus—temporal or otherwise—between Nichols's statement identifying Petitioner and his dismissal from the sheriff's office. Indeed, the evidence presented at trial did not directly establish that Nichols had any bias, prejudice, or motive to misrepresent, nor can any of those mentalities be inferred from the evidence. Nichols's *in camera* testimony regarding being fired

was not proper impeachment evidence under Rule 608(c), SCRE. Accordingly, the trial court did not err in limiting Petitioner's counsel's cross-examination of Nichols on that issue.

CONCLUSION

Considering the foregoing, the State requests this Court deny the Petition for Writ of Certiorari to the Court of Appeals. For the reasons discussed above, the Court of Appeals was correct in finding Petitioner's issue unpreserved.

Respectfully Submitted,

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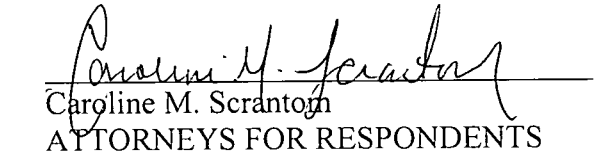

Caroline M. Scrantom
ATTORNEYS FOR RESPONDENTS

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Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
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Appellate Case No. 2016-001962

THE STATE,

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MARCO S. SANDERS,

PETITIONER.

PROOF OF SERVICE

I, Caroline M. Scrantom, counsel for the Respondent, certify that I have served the within Return to Petition for Writ of Certiorari by depositing two (2) copies of the same via inter-agency mail, addressed to his attorneys of record at:

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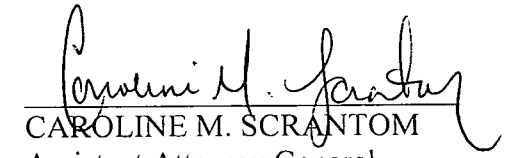
I further certify that all parties required by Rule to be served have been served. This 19th day of October, 2016.



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