

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Oconee County

Honorable Brooks P. Goldsmith, Circuit Court Judge

JAMES TINSLEY,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-001435

PETITION FOR WRIT OF CERTIORARI

Taylor D Gilliam
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

ORIGINAL

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PETITIONER S.C. SUPREME COURT

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ISSUE PRESENTED

Did the PCR Court err in denying Petitioner relief where appellate counsel failed to brief the trial court's refusal to charge the jury on the distinction between larceny and receiving stolen goods, and not instructing as requested at the trial that if the jury found Petitioner was the thief who stole the goods, the jury could not have found him guilty of receiving stolen goods?

STATEMENT

This case has a lengthy and convoluted procedural background. An Oconee County Grand Jury indicted Petitioner for possession of a stolen vehicle and four counts of receiving stolen goods in May 2008.¹ App. 733 – 742. He proceeded to a jury trial in front of the Honorable J.C. Nicholson, Jr. on July 28, 2008. David Wagner represented the State, and Petitioner represented himself with the assistance of standby counsel, R. Daniel Day. The facts giving rise to the indictment are as follows:

On January 25, 2008 Detective Errin Jenkins of the Iredell County Sheriff's Office in Statesville, North Carolina met with an individual who had purchased two "four wheelers" at a price so low that he was concerned they were stolen.² App. 108 line 3 – App. 109 line 23. After checking the VIN/serial numbers, Jenkins concluded that the four wheelers had been stolen. App. 108 lines 18 – 21. The buyer provided Jenkins with a bill of sale for one of the units which listed the seller as Petitioner. App. 109 lines 15 – 23. The bill of sale listed an address for Petitioner in Greenville, South Carolina. Jenkins worked with law enforcement in Greenville County and Oconee County to recover the four wheelers. App. 109 line 24 – App. 111 line 1.

Darrell Slusser, who ran an RV dealership in Spartanburg, South Carolina, filed an incident report with law enforcement after he discovered a camper had gone missing in December 2007. App. 144 line 5 – App. 145 line 17. The following month, January 2008, Eric Spears, the general manager for Carry-On Trailer in Lavonia, Georgia similarly discovered that a

¹ Three counts of receiving stolen goods were consolidated into one at trial. App. 332 lines 11 – 14.

² The four wheelers were valued between \$7,900 and \$12,771; they were sold for \$5,000 each. App. 112 line 25 – App. 113 line 13.

trailer had been stolen from his business. App. 149 line 21 – App. 150 line 22. Around the same time period, Jamal Haddad, the owner of a Polaris dealership by the name of Carolina Power Sports in Waynesville, North Carolina reported eight stolen ATV's. App. 156 line 7 – App. 159 line 16. Three of them were recovered in Oconee County. App. 159 line 17 – App. 160 line 17. An antique shop called Moose Crossing near the Polaris dealership also had a twenty-four foot trailer stolen around the same timeframe. App. 168 line 17 – App. 169 line 1. The trailer and two ATV's from Carolina Power Sports were recovered from a storage unit rented to Petitioner. App. 169 lines 6 – 12.

Officer Russ Conner spoke with Petitioner and his co-defendant, Hogan Hugh Justice on January 30, 2008. App. 173 line 10 – App. 174 line 6. Petitioner stated that he sold three of the ATV's on behalf of his co-defendant who had gotten them at a government auction. App. 174 lines 7 – 11. Justice similarly told Officer Conner that Petitioner had acquired the ATV's at a government auction and "he was just trying to help Mr. Tinsley sell them." App. 174 lines 12 – 14. Petitioner told Conner that it had been over a year since he had been to Waynesville, North Carolina, the location of Carolina Power Sports which had reported ATV's as stolen. App. 174 lines 17 – 20. Petitioner repeatedly maintained his innocence. App. 184 lines 12 – 15.

Justice testified at trial on behalf of the prosecution. App. 222. He claimed that he and Petitioner found a camper in Duncan, South Carolina, stole it, and brought to a gold mine in Oconee County. App. 225 lines 8 – 13. He stated that they also took some trailers from Lavonia, Georgia and ATV's from Waynesville, North Carolina. App. 225 line 21 – App. 226 line 5. All of these items were initially brought back to the gold mine area and then taken to a leased storage unit before being sold. App. 226 lines 6 – 11. Following a sale of any one of

these pieces of equipment, Justice and Petitioner would subtract the expense and split the profit in equal shares. App. 223 lines 6 – 12.

Following Justice's testimony, the State rested. App. 256 line 24 – App. 257 line 2. Petitioner then moved for a directed verdict due to a material variance between the charges and the evidence offered at trial. App. 257 line 20 – App. 258 line 14. He argued that because the State sought to prove the elements of larceny during its case-in-chief, rather than the indicted offenses of receiving stolen goods, Petitioner could not have been found guilty of receiving or possessing stolen property. Id.

The trial judge reviewed case law cited by Petitioner in support of his directed verdict motion and found that the underlying statute pertaining to receiving stolen goods, S.C. Code Ann. § 16-13-180, was amended in 1993 after the publication of the cases offered by Petitioner. App. 258 lines 15 – 19. The trial court's ruling on the issue was as follows:

Looking at the cases that we have addressed, the Court's of the opinion that public policy dictates that a defendant cannot be convicted of both larceny and receiving stolen goods. However, the State should be able to elect whether [it] could try the defendant for larceny or receiving stolen goods or possession of stolen goods. He cannot be convicted of both.

In this case the defendant has not been indicted of larceny or the receiving stolen goods and receiving stolen goods; therefore, there's no way he can be convicted of both. The statute itself refers to possession, and the Court's of the opinion that if you steal it, you can still possess the stolen property. However, the Court agrees with Hamilton and McNeil, if you stole it, you cannot receive it, cannot be charged with receiving. Therefore, I'm going to deny the motion. But the Court does agree he cannot be convicted of - - in this particular case that's not the process, not how this case is set up. Your motion is denied.

App. 264 line 11 – App. 265 line 4. (citing State v. Hamilton, 172 S.C. 453, 174 S.E. 396 (1934) and State v. McNeil, 314 S.C. 473, 445 S.E.2d 461 (Ct. App. 1994)).³

³ At least one case that came out after the amendment of S.C. Code Ann. § 16-13-180 in 1993, State v. Wiles, cites McNeil in a footnote: “[T]he possession of a stolen vehicle statute requires

The jury convicted Petitioner of possession of a stolen vehicle and all four counts of receiving stolen goods. App. 372 lines 12 – 22. Subsequently, Judge Nicholson sentenced Petitioner to a term of ten years, suspended upon the service of seven years along with probation for five years on the consolidated charges of receiving stolen goods. App. 386 lines 4 – 14. Petitioner was also sentenced to ten years' imprisonment suspended to five years upon service of seven years' probation, for the possession of a stolen vehicle charge. App. 386 line 16 – App. 387 line 2. On the remaining receiving stolen goods charge that was not consolidated, Petitioner was sentenced to a term of five years' imprisonment, suspended to probation for five years. App. 387 lines 4 – 14.

Represented on appeal by Appellate Defender Tristian Shaffer, Petitioner's conviction was affirmed by the Court of Appeals. State v. Tinsley, No. 12-UP-32 (S.C. Ct. App. May 30, 2012). Appellate counsel failed to appeal the issue of Petitioner's jury charge request. Petitioner filed a Petition of Rehearing. The South Carolina Court of Appeals denied the Petition on September 19, 2012. Petitioner then filed a Petition for Writ of Certiorari with the South Carolina Supreme Court on October 2, 2012. The South Carolina Supreme Court denied certiorari on February 6, 2014.

Petitioner filed an application for post-conviction relief on April 4, 2013.⁴ App. 389 - 407. Petitioner's application contained allegations of ineffective assistance of appellate counsel and various constitutional violations, including Fifth and Fourteenth Amendment due process violations. App. 392 – 403.

that the defendant receive the goods from someone who actually stole them; he cannot receive the vehicles from himself.” 383 S.C. 151, 679 S.E.2d 172 n.1 (2009)

⁴ At the time of filing, Petitioner's direct appeal was still pending.

The State filed its Return and Motion to Dismiss without Prejudice on July 25, 2013. App. 408 – 410. A Conditional Order of Dismissal signed by the Chief Administrative Judge in the Tenth Judicial Circuit was filed on September 30, 2013, finding that Petitioner's application had been filed prematurely. App. 413 – 415. Petitioner filed an objection to the Conditional Order of Dismissal on October 11, 2013. App. 416 – 419.

Petitioner filed a second application for post-conviction relief which is the subject of this appeal on December 16, 2014 after his direct appeal was finalized. App. 420 – 436. Petitioner's second application contained allegations similar to his first—namely, that his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments were violated by appellate counsel's failure to raise certain issues. App. 423 – 434. The State made its Return on or about March 13, 2015. App. 439 – 445. Petitioner filed a reply brief in opposition to the State's Return and requested to proceed *pro se* on March 30, 2015. App. 449 – 451. Petitioner subsequently filed a "Second Supplemental Issue for Post-Conviction Relief" on June 11, 2015. App. 452 – 459. This filing includes an additional allegation regarding the plea deal of Petitioner's co-defendant. App. 452 – 459.

On June 26, 2015, Petitioner filed a Supplemental Motion for Summary Judgment. App. 460 – 466. Petitioner simultaneously filed an "Affidavit of James Tinsley in Support of Applicant's Supplemental Motion for Summary Judgment". App. 467 – 470. Soon thereafter, on September 22, 2015, Petitioner filed a First Amended Application for Post-Conviction Relief which contained allegations of ineffective assistance of appellate counsel as well as allegations regarding due process violations. App. 471 – 478. On December 10, 2015, the Honorable J. Cordell Maddox, Chief Judge for Administrative Purposes in the Tenth Judicial Circuit, merged

the premature application for post-conviction relief filed April 4, 2013 and the second application filed December 16, 2014. App. 479 - 480.

Petitioner then filed a "Supplemental Issue for Post-Conviction Relief" dated December 16, 2015 wherein he alleges that he was denied effective assistance of counsel on appeal due to appellate counsel's failure to brief the issue of a material variance between the State's evidence and the indictments. App. 481 - 485.

An evidentiary hearing was conducted on February 10, 2016 before the Honorable Brooks P. Goldsmith. App. 486. Hugh Welborn initially represented Petitioner but was relieved at the start of the hearing. App. 495 lines 17 - 18. Patrick Schmeckpeper represented the State. Petitioner, his father, and Petitioner's co-defendant Hogan Justice testified during the hearing. Judge Goldsmith summarily granted judgment in the State's favor regarding two of Petitioner's claims: 1) Petitioner's sentence was disparate from his co-defendant as a result of the trial judge's vindictiveness; and 2) Defects in Petitioner's indictments violated his due process rights. App. 519 lines 3 - 11.

Judge Goldsmith allowed both parties to submit written memoranda following the hearing. Petitioner filed a "Supplemental Affidavit of James Tinsley in Support of Applicant's Motion for Summary Judgment" on February 23, 2016. App. 598 - 602. He also filed an "Objection and Motion for Reconsideration of the Court's Decision to Grant the State Partial Summary Judgment" on March 7, 2016. App. 603 - 612. The State filed a Memorandum of Law on April 4, 2016. App. 613 - 627. Petitioner submitted a response brief on April 13, 2016. App. 628 - 650. The State filed a Return to Applicant's Objection and Motion for Reconsideration on May 4, 2016. App. 651 - 657. Petitioner filed a "Reply Brief to

Respondent's Return to Applicant's Motion for Reconsideration" on May 13, 2016. App. 658 – 668.

On May 10, 2016, Judge Goldsmith issued his order denying Petitioner relief. App. 669 – 690. He ruled that Petitioner failed to meet his burden with respect to each of his allegations of ineffective assistance of appellate counsel. App. 671 – 676. Judge Goldsmith also ruled that Petitioner waived his right to counsel. App. 677 – 681. Regarding Petitioner's allegation that the state failed to disclose information under Brady v. Maryland,⁵ Judge Goldsmith concluded that Petitioner "failed to show that the evidence that was purportedly suppressed was material to guilt or punishment." App. 681. Additionally, Judge Goldsmith ruled that Petitioner failed to support his claim regarding after-discovered evidence because he failed to show that the purported new evidence would probably change the result of a new trial was granted. App. 682.

On May 26, 2016, Petitioner filed a Motion under Rule 59(e), SCRCF, to Alter or Amend the Order of Dismissal. App. 691 – 725. On June 20, 2016, the State filed a Return to Petitioner's Motion to Alter or Amend. App. 726 – 728. On June 21, 2015, Judge Goldsmith issued an Order denying Petitioner's motion. App. 729 – 730. Petitioner filed a Reply Brief on June 27, 2016. App. 731 – 734.

This Petition follows.

⁵ 373 U.S. 83, 90, 83 S. Ct. 1194, 1198, 10 L. Ed. 2d 215 (1963)

ARGUMENT

The PCR Court erred in denying Petitioner relief where appellate counsel failed to brief the trial court's refusal to charge the jury on the distinction between larceny and receiving stolen goods, and not instructing as requested at trial that if the jury found Petitioner was the thief who stole the goods, the jury could not have found him guilty of receiving stolen goods.

Petitioner lacked effective assistance of appellate counsel when counsel failed to brief the trial judge's refusal to charge that if Petitioner was the thief of the stolen property, he could not be found guilty of receiving stolen goods. Petitioner moved for a directed verdict at the close of the prosecution's case based on the fact that the State elicited testimony that Petitioner was the thief rather than the receiver of stolen goods. App. 257 line 20 – App. 258 line 14. After the denial of his motion, Petitioner offered written jury instructions to the trial judge, which read in relevant part: "That if the jury believes [Petitioner] committed the theft of the goods, they must find [him] not guilty of receiving stolen goods and possessing a stolen vehicle." App. 622 – 623. This request was in line with the trial judge's denial of Petitioner's directed verdict motion: "[T]he court agrees with Hamilton and McNeil, if you stole it, you cannot receive it, cannot be charged with receiving." App. 264 lines 23 – 25.

The PCR Court ruled that the issue of jury charges related to larceny and receiving stolen goods was not adequately preserved for appeal, meaning appellate counsel was not deficient for omitting them as an issue on appeal. App. 665. Citing Whipple v. State,⁶ the judge concluded that a jury charge must be requested or objected to on the record in order to remain

⁶ 324 S.C. 43, 476 S.E.2d 683 (1996).

preserved for appeal, even if a proposed charge was submitted to the trial court in writing. However, because the trial judge advised Petitioner that *he was not required to object in order to preserve the record*, this issue was preserved and should have been argued on appeal. App. 78 line 25 – App. 79 line 9. Furthermore, Whipple has been clarified, and the trial judge erred in his interpretation of the preservation standard.

The South Carolina Supreme Court has previously held that a jury charge must be requested or objected to on the record in order to remain preserved for appeal, even if a proposed charge was submitted to the trial court in writing. Whipple, *supra*. However, because Petitioner's case differs from Whipple in multiple ways and because a different preservation rule is applicable to the case *sub judice*, this issue was preserved for appeal.

The defendant in Whipple sought an instruction concerning parole eligibility. 324 S.C. at 52, 476 S.E.2d at 688. The court did not give the requested instructions, and the Supreme Court held that Whipple's failure to object constituted a waiver of his right to complain on appeal. *Id.* Unlike the defendant in Whipple, however, the trial judge in Petitioner's case ruled on the record that he would not give the requested charges. App. 333 line 14 – App. 334 line 9.

Additionally, this Court set out the preservation rule in State v. Johnson: “[W]hen a party requests a jury charge and, after opportunity for discussion, the trial judge declines the charge, it is unnecessary to preserve the point on appeal, to renew the request at conclusion of the court's instruction.” 333 S.C. 62, 66, 508 S.E.2d 29, 31 (1998).

By failing to give the requested charge, the jury was left to assume that there was no distinction between larceny and receiving stolen goods. Petitioner testified at the evidentiary hearing regarding this issue:

The notice part of the indictment placed me on notice to show up in the courtroom and be prepared to defend myself against the claim that I had received the goods

from somebody else. And then when I got to trial, I ended up having to defend myself against the claim that I had actually stolen the goods. So that issue - - charge should have been dismissed on that and raised on appeal and wasn't.

App. 491 lines 8 – 15.

Applicant requested jury charges which were relevant to his case, obtained a ruling on the issue, and therefore preserved this matter for appellate review. A criminal defendant is constitutionally entitled to the effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830 (1985). Appellate counsel is held to the same standard as trial counsel. Generally, in analyzing a claim of ineffective assistance of appellate counsel, a court applies the Strickland⁷ test just as it would when analyzing a claim of ineffective assistance of trial counsel. Southerland v. State, 337 S.C. 610, 616, 524 S.E.2d 833, 836 (1999). Where ineffective assistance of counsel is alleged, the Applicant must show that appellate counsel's performance was (1) deficient; and (2) that there was prejudice from the appellate counsel's deficiency. Id.

To establish a claim of ineffective assistance of counsel, a PCR applicant must prove counsel failed to render reasonably effective assistance under prevailing professional norms, and the deficient performance prejudiced the applicant's case. McKnight v. State, 378 S.C. 33, 40, 661 S.E.2d 354, 357 (2008). "The PCR applicant has the burden of proving both prongs." Caprood v. State, 338 S.C. 103, 109-10, 525 S.E.2d 514, 517 (2000). To show prejudice, the applicant must show that but for counsel's errors, there is a reasonable probability the result of the trial would have been different. Cherry v. State, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997).

⁷ 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

To be effective, appellate counsel must give assistance of such quality as to make appellate proceedings fair. Id., citing Evitts, 469 U.S. 387, 105 S.Ct. 830 (1999). When a claim of ineffective assistance of appellate counsel is based upon failure to raise viable issues, the court must examine the record to determine “whether appellate counsel failed to present significant and obvious issues on appeal.” Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986).

The issue that appellate counsel failed to argue in Petitioner’s case was not frivolous. On the contrary, it was meritorious. Appellate counsel should have known that. Appellate counsel’s decision not to present the issue was not a “deliberate, strategic tactic[],” under Griffin v. Warden, 277 S.C. 288, 286 S.E.2d 145 (1982). The trial judge should have crafted an instruction, based upon the testimony of the prosecution’s witness and Petitioner’s co-defendant, that clarified the law. Justice testified that he and Petitioner stole a camper, some trailers, and some ATV’s. App. 225 line 8 – App. 226 line 19. He further testified that it was a mutual idea to deal in the stolen property. App. 227 lines 6 – 8.

As a result of the State’s witness raising evidence regarding the alleged thefts and accusing Petitioner of being the principal thief, the jury had a right to understand the law that accompanied these facts. The jury needed to understand the law as it related to these facts which were offered by the prosecution’s witness.

A defendant may be convicted of criminally receiving stolen property, even though he was a guilty participant in the stealing of it, **where he took no part in the actual caption and asportation**, but participated only as accessory before or after the fact. State v. Tindall, 213 S.C. 484, 489, 50 S.E.2d 188, 190 (1948) (emphasis added).

There was a close factual question of whether Petitioner was the principal thief or an accessory after the fact who received or possessed stolen goods. An instruction on the law was

required to clarify the dissimilarity. The rule as articulated by this Court in State v. Good is that “a jury instruction on the law of accessory is only required where the evidence points to an exclusionary offense which dictates that different proof is required”. 315 S.C. 135, 139, 432 S.E.2d 463, 466 (1993). For instance, in State v. Collins, 266 S.C. 566, 225 S.E.2d 189 (1976), this Court determined that the defendant was entitled to an accessory before the fact charge when he was in jail at the time of the felony and therefore could only be guilty of accessory before the fact. A similar exclusionary situation existed in Petitioner’s case which prevented his conviction of receiving stolen property if a jury found that he was the thief; namely, he could not have been the thief and then received the stolen property from himself.

The law to be charged to the jury is determined by the evidence presented at trial. Frasier v. State, 306 S.C. 158, 410 S.E.2d 572 (1991). Conversely, a trial court commits reversible error if it fails to give a requested charge on an issue raised by the evidence. Id.; State v. Lee, 298 S.C. 362, 380 S.E.2d 834 (1989). The trial court in Petitioner’s case committed reversible error by refusing to give a charge on the difference between larceny and receipt of stolen goods especially after testimony was elicited on direct examination by one of the prosecution’s witnesses that Petitioner was a thief involved in capturing and transporting the goods. Appellate counsel’s failure to raise this issue on appeal constituted deficient conduct; the presence of a reversible error at the trial level would have allowed an appellate court to reverse Petitioner’s convictions and accompanying sentences. The resulting prejudice is clear—the failure to raise a claim which contained reversible error meant Petitioner’s conviction was affirmed.

Appellate counsel’s decision not to appeal the failure to charge was not a tactical decision based upon counsel’s judgment in selecting the strongest issues. It was based upon

appellate counsel's mistaken belief that the requested charge was improper or that the issue was not preserved.

This issue was sufficiently preserved for review by virtue of the jury charge preservation standard and the trial judge's remark that Petitioner was not required to object to the judge's rulings; appellate counsel should have addressed it on direct appeal. The failure to do so constituted a deficiency, and the resulting prejudice manifested itself in the affirmation of Petitioner's conviction by the Court of Appeals.

In order to prove that he was prejudiced by his counsel's deficiency, an applicant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997).

The failure to instruct the jury in so many words that Petitioner could not have been found guilty had he been found to have stolen the property cannot be considered harmless error. Petitioner's position at trial, abundantly clear from his directed verdict motion, was that there was a variance between the indictments and the proof offered at trial. Petitioner need not prove that he would have won his appeal, had counsel been effective. He only need show that an omitted issue had a reasonable probability of success on appeal. Based on the above, Petitioner received ineffective assistance of appellate counsel when counsel failed to brief the jury instruction issue.

CONCLUSION

For the foregoing reasons, Petitioner requests that the Court grant his petition for writ of certiorari to allow full briefing on this issue.



Taylor D. Gilliam
Appellate Defender

ATTORNEY FOR PETITIONER

This 11th day of January, 2017.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of his ability this Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."



Taylor D Gilliam
Appellate Defender

South Carolina Commission on Indigent
Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

This 11th day of January, 2017.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Oconee County

Honorable Brooks P. Goldsmith, Circuit Court Judge

JAMES TINSLEY,

PETITIONER

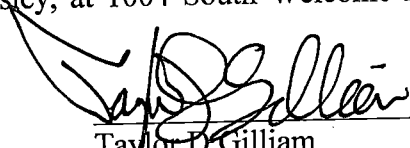
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STATE OF SOUTH CAROLINA,

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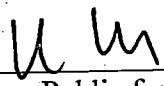
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Patrick Schmeckpeper, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on James Tinsley, at 1004 South Welcome Road, Greenville, SC 29611, this 11th day of January, 2017.



Taylor D. Gilliam
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 11th day of January, 2017.



Notary Public for South Carolina
My Commission Expires:

(L.S)