

**THE STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT**

**RECEIVED**

JAN 26 2017

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**APPEAL FROM AIKEN COUNTY  
Court of Common Pleas**

**S.C. SUPREME COURT**

**The Honorable Doyet A. Early, III, Circuit Court Judge**

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Appellate Case No. 2016-002542

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Coves Darden, LLC, ..... Petitioner,

v.

Francisco Jose Garcia Ibanez, Dori Derr and  
Half Moon Stables, LLC, ..... Respondents.

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**RETURN TO PETITION  
FOR A WRIT OF CERTIORARI  
AND FOR A WRIT OF MANDAMUS**

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## I. COUNTER-STATEMENT OF THE CASE

### A. Relevant Procedural History

The Petition for Certiorari omits significant important details and states others in a misleading fashion. First, Defendants moved for summary judgment in accordance with S.C.R.C.P. Rule 56(b), which provides that “A party against whom a claim . . . . asserted . . . . may, at any time, move *with or without supporting affidavits* for a summary judgment in his favor as to all or any part thereof.” (emphasis added).<sup>1</sup> Plaintiff argued against considering the motion and requested an opportunity for discovery, which the circuit court permitted.

Both sides propounded interrogatories and requests for production of documents. Plaintiff also deposed each of the Defendants. During the course of discovery, it appeared that there was a valid defense based on the statute of frauds. Defendants raised this issue with the court and obtained leave of court to file an Amended Complaint asserting that defense. In later proceedings, Plaintiffs filed affidavits with the court and Defendants filed and relied on Plaintiff’s discovery responses in support of their Motion.

After confirming that the Plaintiff did not require further discovery, the Circuit Court issued an Order granting summary judgment in favor of Defendants on all causes of action.

In short, this was hardly the hasty granting of a motion unsupported by evidence that Petitioner’s statement of the relevant procedural history attempts to portray.

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<sup>1</sup> Ignoring the clear language of Rule 56, Petitioner seems to suggest that Respondents acted improperly in bringing a motion in compliance with the unambiguous language of that Rule.

## **B. Relevant Factual History**

Much of Petitioner's self-serving recitation of facts is not necessary to this Court's disposition of the instant Petition. There is certainly no question that Mr. Ibañez came to the United States pursuant to an O-1 visa obtained for him by Petitioner.<sup>2</sup> It is also undisputed that the visa was for a term of three years. Petitioner admitted in discovery responses that the parties contemplated a term of employment of two or three years, with a possible extension at that time. Additionally, there is no question that Mr. Ibañez chose to leave his employment.<sup>3</sup>

After leaving Coves Darden, Mr. Ibañez undertook employment with Half Moon Stables, LLC, pursuant to a written contract of employment. Half Moon obtained a new O-1 visa, authorizing Mr. Ibañez to work in the United States for three years.

Petitioner respectfully submits that these are the only facts that this Court needs in order to rule on the pending Petition.

## **II. THERE ARE NO GOOD GROUNDS FOR GRANTING THE PETITION**

SCACR Rule 242(d)(2) provides that "Failure of a petitioner to present with accuracy, brevity, and clarity the information and arguments that are essential to a ready and adequate understanding of the points requiring consideration will be a sufficient

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<sup>2</sup> The Defendant's full name is Francisco Jose Garcia Ibañez. In Hispanic countries a person's name includes the surnames of both parents. However, a person is generally referred to by the father's surname. Thus, Defendant is properly referred to as Mr. Garcia. However, since Plaintiff and the courts have continually referred to him as "Mr. Ibañez, Respondents will do likewise in order to avoid confusion.

<sup>3</sup> During his deposition, Mr. Ibañez testified to instances of threats of physical violence and mistreatment by the principal of Coves Darden, Miguel Coves. However, those are not relevant to the issues raised here.

reason for denying the petition.” Petitioner has already pointed out inaccuracies in Petitioner’s recitation of the procedural history of this case, and further instances of substantial inaccuracies are set out in more detail below. The Petition certainly also suffers from a lack of brevity. In fact, it alleges a total of nineteen separate errors purportedly committed by the Court of Appeals in the course of a ten page majority opinion. This is certainly a lot over the course of a ten page opinion.

Respondents also respectfully submit that none of the traditional reasons for granting certiorari are present here, or of only minimal import. With the possible exception of an unprecedented challenge to SCACR Rule 268(d)(2), there really are no novel or constitutional issues presented in the Petition. Even if this Court were to agree with Petitioner, it would not change the outcome of the appeal, but only the manner in which it is reported and cited. The Court of Appeals applied straightforward principles of law regarding formation and enforceability of contracts, and termination of at will employment. And, while there was a partial dissent, it was only with respect to two of the four issues decided by the majority, with the dissenting judge concurring on the other two issues. Finally, while Petitioner complains that the decision conflicts with decisions of this Court, the claimed “conflict” disappears when the decision is examined.

The remainder of this Response will discuss the particular issues raised in the Petition.

**III. THIS IS NOT THE PROPER CASE FOR THIS COURT  
TO CONSIDER THE CONSTITUTIONALITY OF  
SCACR 268(d)(2)**

Petitioner's request for certiorari on this ground is truly baffling. Petitioner lost on appeal, with the Court of Appeals rejecting virtually every argument made. And yet, Petitioner is asking this Court to, in effect, rule that every single disposition of a case on appeal be published and citable, including this one that is unfavorable to him. Leaving aside the intolerable burden that would be placed on the already overworked Court of Appeals, Petitioner attempts to create a constitutional issue where none exists. For example, Petitioner argues that S.C. Code § 14-3-810, S.C. Code § 14-3-820, and S.C. Code 14-3-830 "(imply [the] presumption of [the] General Assembly that all opinions will be published)." Of course, what Petitioner completely ignores is that those code sections only deal with publication of cases decided by this Court, and not by the Court of Appeals. Petitioner also cites to S.C. Code § 18-9-280 as mandating that opinions be published. Again, Petitioner ignores the fact that this code section applies only to decisions issued by the Supreme Court, and even that code section permits this Court to issue memorandum opinions in appropriate circumstances.

The remainder of Petitioner's argument on this point, attempting in some way to conflate or distinguish between "memorandum opinions" and "unpublished opinions" is truly baffling.

In summary, Petitioner's argument in this regard appears to border on the frivolous. In addition to asking this Court to order publication of a decision demonstrating that Petitioner was wrong on the law, it also cites inaccurate statutes in support of its

claim. If Petitioner simply wants the Court of Appeals opinion published, Respondents do not oppose this.

**IV. PETITIONER INCORRECTLY CITES THE SOUTH CAROLINA RULE REGARDING EXPLANATION OF REASONS FOR A DECISION**

Petitioner next argues that the Court of Appeals erred in not addressing in detail every single issue raised in its brief. In support of this dubious proposition, Petitioner cites SCACR 220(b). However, that rule provides no support for Petitioner. That rule provides:

“In every decision rendered by an appellate court, every point distinctly stated in the case *which is necessary to the decision of the appeal* and fairly arising upon the record of the court must be stated in writing and must, with the reason for the court’s decision, be preserved in the record of the case.” (emphasis added)

Thus, contrary to Petitioner’s argument, this rule does not require an appellate court to address in detail every point raised by an appellant. Rather, it only requires discussion of those issues that are necessary to the decision by the court. This principle has been repeatedly recognized by South Carolina courts. *See Whiteside v. Cherokee County School Dist. No. One*, 311 S.C. 335, 428 S.E.2d 886 (1993) (appellate court need not address remaining issues when disposition of prior issue is dispositive); *Futch v. McAllister Towing of Georgetown*, 335 S.C. 598, 613, 518 S.E.2d 591 (1999) (same).

Petitioner is also wrong in its assertion that the Court of Appeals simply ignored nine of the issues it raised. For example, Petitioner claims that the Court of Appeals ignored the standards for summary judgment and its argument regarding the “scintilla”

rule. Petitioner is simply wrong. In fact, the Court of Appeals stated as follows:

“Rule 56(c) of the South Carolina Rules of Civil Procedure provides the circuit court shall grant summary judgment if ‘there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law.’ ‘In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party.’ *Quail Hill, LLC v. Cty. of Richland*, 387 S.C. 223, 235, 692 S.E.2d 499, 505 (2010) (citation omitted). ‘However, it is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine.’ *Town of Hollywood v. Floyd*, 403 S.C. 466, 477, 744 S.E.2d 161, 166 (2013).”

Thus, the Court of Appeals clearly set out the appropriate standard for granting summary judgment, and clearly stated it was viewing all the evidence in the light most favorable to Petitioner. Petitioner also incorrectly cites to *Town of Hollywood*, 403 S.C. 466, 477, 744 S.E.2d 161, 166 (2013) for the question of what is sufficient to create a genuine issue of material fact. In fact, *Town of Hollywood* was decided by this Court four years after it formally adopted the “scintilla” standard, and can only be read as a clarification of that standard. In *Town of Hollywood* this Court made clear that unreasonable inferences or issues that are not genuine do not constitute the “scintilla” necessary to overcome a motion for summary judgment.

Petitioner also claims that the majority failed to address its arguments regarding the appropriate standard for party admissions. Essentially, Petitioner argues that an interrogatory response cannot constitute a party admission. However, that argument is simply irrelevant. The Court of Appeals based its determination regarding the statute of frauds on the Affidavit of Miguel Coves, not on his conflicting discovery responses. As the Court noted:

“Viewing this and all other evidence in the light most favorable to Covés Darden, the parties’ agreement as to the term of the contract was that the term would be a minimum of two years.”

Once again, Petitioner is attempting to create an issue where none exists.

Next, Petitioner claims the Court of Appeals erred in failing to consider its argument regarding the existence of a special relationship. Once again, Petitioner is wrong. The Court of Appeals actually stated:

“The circuit court found ‘there are no fiduciary duties of loyalty owed by a noncontractual, non-fiduciary employee subject only to the rules for common law at-will employment.’ The court stated, ‘South Carolina cases finding a cause of action for breach of the duty of loyalty have all involved upper level managerial employees.’ We agree with the circuit court. We can find no South Carolina authority providing all employees are agents of their employers and owe their employers fiduciary duties. Although it may be true that Ibanez had specialized skills and a close, familial relationship with Miguel Covés, that does not give rise to fiduciary duties.”

Thus, contrary to Petitioner’s claim, the Court of Appeals actually considered and ruled on this issue. Petitioner may be unhappy with the result, but that certainly is not grounds for granting certiorari.

Petitioner then argues that the Court of Appeals ignored its argument regarding “employment at will as *ex contractu*.” This rather cryptic statement must be referring to Issue 8 in Appellant’s brief on appeal: “Even if there had been no written contract, nor detailed oral contract, would a general employment-at-will contract support a claim for either tortious interference with contract or tortious interference with prospective advantage?” Petitioner claims “the Court of Appeals erred in determining that a bare-bones ‘at will’ employment contract was not a ‘contract,’ susceptible to a claim of tortious interference. *Prescott v. Farmer's Telephone Co-op. Inc.*, 335 S.C. 330, 259

S.E.2d 812 (1979). Once again, Petitioner has erroneously - but consistently – cited his authority. What this Court said in *Prescott* is as follows:

“Although this Court has recognized exceptions to employment at will, the doctrine remains in force in South Carolina. We find the policy of employment at-will provides necessary flexibility for the marketplace and is, ultimately, an incentive to economic development. Accordingly, we affirm and adhere to the employment at-will doctrine in South Carolina.

“Of course, an employer and employee may choose to contractually alter the general rule of employment at-will and restrict their freedom to discharge without cause or to resign with impunity.”

Thus, at will employment in South Carolina is non contractual, although the parties are free to alter that relationship with an appropriate contract. There simply was no error in the finding of the Court of Appeals and, in any event, the court did consider the very issue Petitioner claims it “ignored.”

Next, Petitioner asserts that the Court of Appeals ignored its arguments regarding evidence of interference with contract and the failure to prove justification for such alleged interference. Of course, since the Court of Appeals had already found that the relationship between Mr. Ibañez and Coves Darden was non-contractual, consideration of these issues was moot and not “necessary to the decision of the appeal.” SCACR 220(b).

Petitioner’s next claim is that the Court of Appeals ignored his claim regarding whether the existence of a contract was a requirement for a claim of breach of tortious interference. Yet again, Petitioner is completely wrong. The Court of Appeals stated:

“To succeed on a claim of tortious interference with contract, a plaintiff must prove five elements: (1) existence of a valid contract; (2) the wrongdoer's knowledge thereof; (3) his intentional procurement of its breach; (4) the absence of justification; and (5) resulting damages.” (Internal quotes omitted).

The Court of Appeals also cited a decision from this Court in *Eldeco, Inc. v. Charleston Cty. Sch. Dist.*, 372 S.C. 470, 481, 642 S.E.2d 726, 732 (2007), that “Where there is no breach of the contract, there can be no recovery” for tortious interference.

Continuing to argue what the Court of Appeals considered or ignored, Petitioner claims that the Court ignored the following issues:

“Would inducing the employee of another to both breach fiduciary duties to his employer and breach or end his employment with his employer by offering him an illegal compensation arrangement not offered by the present employer present ‘impact on trade or commerce’ (‘public impact’) for purposes of a claim under the SCUTP A, either by presenting a conventional anticompetitive tort, a potential for repetition, or other type of public impact?”  
and

“Does misleading advertising following tortiously interfering with a contract compound the violation of the SCUPT A?”

Notwithstanding the somewhat confusing framing of the first issue, there is no question that the Court of Appeals did consider Petitioner’s public impact and misleading advertising issues when it stated:

“In its complaint, Coves Darden claimed Derr and Half Moon made two allegedly deceptive statements in their advertising: ‘Derr falsely advertised [Ibanez’s] purpose for being in the United States and working for her as his being ‘on an extended teaching sabbatical,’ ‘based at Half Moon Stables.’ However, in its memorandum opposing summary judgment, Coves Darden conceded the statements were ‘technically true.’ The circuit court found Coves Darden could not prove the first element—a deceptive act—because Half Moon’s advertising statements were ‘technically true,’ and it could not prove the third element—the deceptive act affected the public interest—because it offered only ‘vague, unsubstantiated claims that any member of the public was deceived by hearing admittedly true statements.’

We find the circuit court properly granted summary judgment. First, as the

circuit court noted, Ibanez was in the United States on a two-year teaching sabbatical and was based at Half Moon at the time of the advertisements. Therefore, the statements in Half Moon's advertising were true, and Derr and Half Moon did not engage in a deceptive act. Second, Coves Darden argues the advertising was deceptive because it did not disclose to the public that Ibanez originally came to the United States to work for Coves Darden, not Half Moon. However, Coves Darden has offered no evidence to explain how that information affects any member of the public. Accordingly, we affirm the granting of summary judgment as to this issue.”

Once again, there is absolutely no question that the Court of Appeals did actually consider the issues that Petitioner claims it did not.

**V. PETITIONER LONG AGO WAIVED ANY CLAIM TO THE EXISTENCE OF A WRITTEN CONTRACT BY PARTIAL PERFORMANCE**

Petitioner also argues that the Court of Appeals erred in not considering the issue of partial performance: “A written contract may still be recognized as the contract between the parties if there is evidence that the nonsigning party accepted and acted upon it. *Peddler, Inc. v. Rikard*, 266 S.C. 28, 221 S.E.2d 115 (1975).

The problem for Petitioner with this argument is that it was never raised in the Circuit Court and, therefore was waived. As Respondents pointed out in their appellate brief:

“Coves Darden never raised, even in passing, the issue of part performance as an exception to the Statute of Frauds. The issue was never raised in any briefs filed by Coves Darden; it was never asserted during oral argument during the several hearings on the motion for summary judgment; and it was never mentioned in the Motion for Reconsideration. Rather, it appeared for the first time in Appellant’s Initial Brief. Thus, the issue has been waived and should not be considered by this Court.”

The argument was waived by failing to raise it with the Circuit Court, and it

cannot be resurrected on this Petition for Certiorari.

**VI. PETITIONER INCORRECTLY ARGUES THAT THE CIRCUIT COURT MADE A FINDING OF A DISPUTED MATERIAL FACT**

In its never-ending challenge to the Court of Appeals, Petitioner next contends that, in order to reach its conclusion that the term of the oral agreement was for two years, the court made an impermissible finding of fact. Once again, Petitioner is completely wrong.

There is no question that summary judgment must be denied if there is a disputed issue of material fact. However, when there is no dispute over a material or evidentiary fact, then there is no need for a resolution by a jury even if there are disputes as to the conclusions to be drawn from those undisputed evidentiary facts. *Abrams v. Wright*, 262 S.C. 141, 202 S.E.2d 859 (1974).

In determining that the agreement was for a period of two years the Court of Appeals relied on the Affidavit of Miguel Coves and the deposition testimony of Mr. Ibañez. Mr. Coves' Affidavit claimed the term was for either two or three years. Mr. Ibañez's deposition testimony was that it was for a period of two years. While it might be argued that the Court's finding of a two year term constituted a factual determination, that is completely irrelevant. What is important - and undisputed - is that both sides agreed that the term of the agreement was for something in excess of one year, and that is all that is needed to trigger the statute of frauds defense.

Petitioner also claims that the Court of Appeals erred in not considering Petitioner's Supplemental Interrogatory Response as creating a triable issue of fact. As

noted above, Mr. Coves filed an affidavit attesting that the agreed length of employment was between two and three years, and Mr. Ibañez testified in his deposition that the agreed term was two years. In an attempt to create a triable issue of fact, Petitioner filed a Supplemental Interrogatory Response stating:

“[T]he length of the initial term of the special employment contract was for whatever initial duration the 0-1 visa was granted and remained in good standing. This was agreed to be up to three years ... and could also end earlier.”

Based upon this interrogatory response, Petitioner now argues that “[T]he above cited Supplemental Interrogatory Response alone precluded the majority from taking its own view of the facts on summary judgment.”

Once again, Petitioner is simply wrong on the law. In 2004 this Court recognized the “sham affidavit” rule as it had been applied in federal courts. In *Cothran v. Brown*, 592 S.E.2d 629 (S.C. 2004), this Court stated:

“[F]or the benefit of the Bench and Bar, we address the ‘competing affidavit’ rule, also commonly referred to as the ‘sham affidavit’ rule. Brown argues the Court of Appeals erred in affirming the trial court’s grant of summary judgment on the additional sustaining ground that Brown presented no evidence of McFaddin’s negligence. Brown argues, *inter alia*, the court erred in disregarding his second affidavit. Brown signed two affidavits. In his first affidavit, Brown stated he struck McFaddin as a result of his alcohol consumption. In his second affidavit, Brown stated he was not drunk at the time of the accident, although he had been consuming alcohol, and the cause of the accident was his inability to determine the position of McFaddin’s vehicle.

“We find persuasive the reasoning of federal case law. Federal courts, including the Fourth Circuit, have held a court may disregard a subsequent affidavit as a ‘sham,’ that is, as not creating an issue of fact for purposes of summary judgment, by submitting the subsequent affidavit to contradict that party's own prior sworn statement. *See Margo v. Weiss*, 213 F.3d 55, 63 (2nd Cir.2000); *Rohrbough v. Wyeth Labs. Inc.*, 916 F.2d 970, 976 (4th

Cir.1990); *Martin v. Merrell Dow Pharmaceuticals, Inc.*, 851 F.2d 703, 705 (3rd Cir. 1988).”

This Court also articulated the points to be considered in determining if the

Affidavit is sham:

“In distinguishing between a sham affidavit and a correcting or clarifying affidavit, the following considerations provide guidance: (1) whether an explanation is offered for the statements that contradict prior sworn statements; (2) the importance to the litigation of the fact about which there is a contradiction; (3) whether the nonmovant had access to this fact prior to the previous sworn testimony; (4) the frequency and degree of variation between statements in the previous sworn testimony and statements made in the later affidavit concerning this fact; (5) whether the previous sworn testimony indicates the witness was confused at the time; (6) when, in relation to summary judgment, the second affidavit is submitted.

The Supplemental Interrogatory Response fails every one of these tests. First, there was never any explanation offered for the contradictory statement regarding the length of the oral contract. Second, the length of the oral contract was of critical importance to the statute of frauds defense, because if the term was more than one year, it would be barred by the statute. Third, Petitioner had access to this fact prior to the filing of the Affidavit of Miguel Coves. In fact, the Supplemental Response itself indicates that Mr. Coves was aware of this issue well prior to this litigation, and before the contract had ever supposedly been entered into. Fourth, the statement in the Affidavit and the statement in the Supplemental response are completely contradictory. The Affidavit attests to the fact that the term of employment was between two and three years, whereas the Supplemental Response indicates that the term was for whatever the length of the O-1 visa was granted, and could very well be less than one year. In fact, it also contradicts

earlier interrogatory responses from Petitioner even denying the existence of an oral agreement. Fifth, there is nothing in the Affidavit of Miguel Coves that indicates he was confused regarding the term of employment at the time he signed the Affidavit. And finally, the Supplemental response was not filed until *after* the Motion for Summary Judgment had been filed, and *after* Defendants had been given leave to amend their Answer to assert the statute of limitations as an affirmative defense. The Supplemental Interrogatory Response was nothing other than a transparently sham attempt to defeat a Motion for Summary Judgment. It was properly disregarded by the Court of Appeals, and it provides absolutely no basis for the instant Petition.

## VII. CONCLUSION

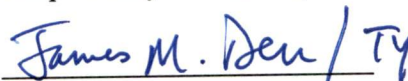
As Respondents pointed out to the Court of Appeals in its brief to that Court, this is a case where the Petitioner itself cannot make up its mind about what kind of contract is at issue here. In the original Complaint, Coves Darden did not specify the type of contract at issue. In response to an interrogatory, it then stated that there was a written contract. When asked to produce a copy of the contract signed by Mr. Ibañez, Coves Darden stated that it did not have a copy, and it has never been able to produce one. Then Coves Darden changed the story and claimed there was actually an oral contract of employment. It filed the Affidavit of its principal, Miguel Coves, attesting that the oral contract was for a term of two to three years. After Defendants were allowed to amend their Answer to assert a statute of limitations defense, Coves Darden again changed its story and filed a Supplemental Interrogatory Response contradicting the earlier Affidavit, now claiming that there was a new contingency regarding the length of the O-1 visa, and

raising the possibility that the visa may have been issued for less than one year.

There can be no doubt that Petitioner's ever-changing factual claims were correctly resolved by both the Circuit Court and the Court of Appeals. Also, as set out in detail above, the instant Petition is based on misrepresentations of fact and misstatements of statutes and the holdings of numerous courts. For each of the foregoing reasons, Respondents respectfully request that the instant Petition be denied.

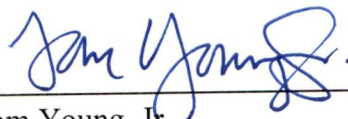
DATED: 1/25/17

Respectfully Submitted,



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THE STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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JAN 26 2017

APPEAL FROM AIKEN COUNTY  
Court of Common Pleas

S.C. SUPREME COURT

The Honorable Doyet A. Early, III, Circuit Court Judge

Appellate Case No. 2016-002542

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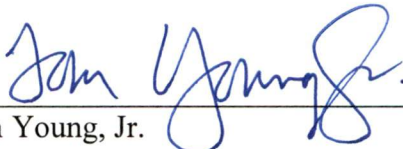
v.

Francisco Jose Garcia Ibanez, Dori Derr and  
Half Moon Stables, LLC, ..... Respondents.

CERTIFICATE OF SERVICE

I, Tom Young, Jr., do hereby certify that I have, on January 26, 2017, served the foregoing **Return to Petition for a Writ of Certiorari and for a Writ of Mandamus** upon Petitioner or attorney(s) for the Petitioner by causing a copy thereof to be mailed with proper postage to the address indicated below and do further certify that the brief complies with Rule 211(b):

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Tom Young, Jr.