

Joshua B. Phillips #335243  
Turbeville Correctional Inst.  
1578 Clarence Coker Hwy., TA-121  
Turbeville, S.C. 29162

2-13-17

The Supreme Court of South Carolina  
P.O. Box 11330  
Columbia, S.C. 29211

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FEB 16 2017

S.C. SUPREME COURT

Dear Clerk,

I need a clocked stamped copy of my MEMORANDUM along with my April 16, 2009 Guilty Plea Transcript, the Order and ORDER TO VACATE PLEA.

I need the April 16, 2009 Guilty Plea Transcript, the Order and ORDER TO VACATE PLEA to be added to the APPENDIX or just keep them together to stabilize my argument.

If you can please assist me in this matter, it will be more than Honorably appreciated.

Respectfully submitted,

Joshua B. Phillips

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Appeal From Lexington County  
Honorable Brooks P. Goldsmith, Circuit Court Judge

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JOSHUA B. PHILLIPS,

PETITIONER

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2016-001288

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MEMORANDUM

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S.C. SUPREME COURT

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ISSUE PRESENTED

Petitioner's guilty plea was unknowing and involuntary because plea counsel failed to fully investigate his original plea agreement in 2009 to make sure it was fulfilled.

## STATEMENT

In 2009, Petitioner entered a plea agreement with the State before the Honorable Michelle Childs to ten (10) years for Armed Robbery and the sentence for the Voluntary Manslaughter was held in abeyance pending cooperation in the testimony against his codefendant. App. 129 and Plea Transcript p. 13, 9-23. Petitioner was never called to the stand due to the state did not think he would have been able to handle testifying very well. App. 132. Then Petitioner filed a PCR application for ineffective assistance of plea counsel Elizabeth C. Fullwood to which the State filed an ORDER TO VACATE PLEA stating that Petitioner refused to cooperate (App. 129) due to plea counsel Arie D. Bax approaching the State Solicitor Rick Hubbard and told him "I would think after the fact that you couldn't use him as a witness in the trial against Mr. Prather and it resulted in a mistrial, you're kind of probably pissed, do you want another bite of this guy, because if you do you can call the AG's office and

tell them -- consent to the PCR and reverse everything and that's -- and he said yeah." App. 90, 2-14. This was without a hearing or a finding of ineffective assistance of counsel by Ms. Fullwood. App. 90, 13-16. The PCR Court vacated Petitioner's pleas. App. 129. In October 2012, Petitioner was indicted again for Armed Robbery and Murder by a Lexington County Grand Jury. App. 146-49. On December 5, 2012, Petitioner pled guilty before the Honorable R. Knox McMahon. App. 1. Samuel R. Hubbard and D. Shawn Graham represented the State. App. 1. Arie D. Bax represented Petitioner. App. 1. Judge McMahon sentenced Petitioner pursuant to a negotiated plea agreement to concurrent terms of twenty (20) years imprisonment for Armed Robbery and Voluntary Manslaughter. App. 34.

On July 12, 2013, Petitioner filed a PCR application. App. 39. On June 8, 2015, the Honorable Brooks P. Goldsmith held a hearing. App. 67. John Walter Whitmire represented the State. App. 67. Aimee J. Zmroczek represented Petitioner. App. 67. On March 14, 2016, Judge Goldsmith denied Petitioner's

application, App. 128. On May 25, 2016, Judge Goldsmith denied Petitioner's Rule 59 (e) Motion. App. 144,

## ARGUMENT

Petitioner's guilty plea was unknowing and involuntary because plea counsel failed to fully investigate Petitioner's original plea agreement in 2009 to make sure it was fulfilled.

In 2009, Petitioner entered a plea agreement with the State before the Honorable Michelle Childs to ten (10) years for Armed Robbery and the sentence on Voluntary Manslaughter was held in abeyance pending cooperation in the testimony against his codefendant. App. 129 and Plea Transcript p. 13, 9-23. Petitioner was never called to the stand due to the State did not think he would have been able to handle testifying very well. App. 132. Then Petitioner filed a PCR application for

ineffective assistance of plea counsel Elizabeth C. Fullwood to which the State filed an ORDER TO VACATE PLEA stating that Petitioner refused to cooperate (App. 129) due to Petitioner's new counsel moved immediately to withdraw the guilty plea without a hearing or a finding of ineffective assistance of counsel by Ms. Fullwood. App. 90, 2-16.

Petitioner was prejudiced by his attorney's failure to obtain the original plea agreement when he stated that he didn't want to go all the way back, he wanted his original plea agreement while questioned by the State. App. 85, 10-16. Santobello v. New York, 404 U.S. 257 (1971). Another prosecutor had replaced the prosecutor who had negotiated the plea. The new prosecutor recommended the mandatory minimum twenty (20) year sentence for Armed Robbery and Voluntary Manslaughter ran concurrent with time served.

On this record, Petitioner "bargained" and negotiated for a particular plea in order to secure dismissal of more serious charges (Plea

Transcript (p. 13, 24-25 and p. 14, 1-20), but also no condition that no sentence recommendation would be made by the prosecutor in 2009. Trial Transcript p. 17, 11-14. It is now conceded that the promise to abstain from a recommendation was made, and at this stage the prosecution is not in a good position to argue that its inadvertent breach of agreement is immaterial. The staff lawyers in a prosecutor's office have the burden of "letting the left hand know what the right hand is doing" or has done. That the breach of agreement was inadvertent does not lessen its impact. This phase of the process of criminal justice, and the adjudicative element inherent in accepting a plea of guilty, must be attended by safeguards to insure the defendant what is reasonably due in the circumstances. Those circumstances will vary, but a constant factor is that when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled. *Id.* 262

Had plea counsel obtained the original

2009 plea agreement, then Petitioner would not have withdrawn his plea and got more time but insisted with the plea agreement.

### CONCLUSION

For the foregoing reasons, this Court should grant certiorari and memorandum to vacate Petitioner's plea to give him the original 2009 plea agreement.

Joshua B. Phillips  
Joshua B. Phillips  
PETITIONER

This 13<sup>th</sup> day of February, 2017.

ORIGINAL

STATE OF SOUTH CAROLINA )  
COUNTY OF LEXINGTON )

COURT OF GENERAL SESSIONS

State of South Carolina, )

PLAINTIFF, )

-VS- )

Joshua B. Phillips, )

DEFENDANT. )

GUILTY PLEA  
2006-GS-32-00790

BEFORE THE HONORABLE MICHELLE CHILDS, JUDGE

APRIL 16, 2009

LEXINGTON, SOUTH CAROLINA

A P P E A R A N C E S:

Charles Dayton Riddle III, Esq.  
For the State

Beth Fullwood, Esq.  
For the Defendant

REMA K. GANTT THOMAS  
CIRCUIT COURT REPORTER

I N D E X

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}

1                   (The defendant, together with counsel, was  
2 personally present in the courtroom.)

3                   CLERK OF COURT: Joshua Brandon Phillips.  
4 Indictment 2008-GS-32-2920, the State versus Joshua  
5 Brandon Phillips, indicted for murder. He is  
6 pleading to manslaughter. This has been true  
7 billed.

8                   Indictment 2008-GS-32-2923, the State  
9 versus Joshua Brandon Phillips, indicted for armed  
10 robbery. He is pleading as charge. This has been  
11 true billed. He is represented by Ms. Fullwood.

12   (The witness was sworn.)

13                   THE COURT: Okay, and just for corrections  
14 on the record, I note that the Clerk mentioned that  
15 he is pleading manslaughter. But we do understand  
16 it's voluntary manslaughter?

17                   MR. RIDDLE: That's correct.

18                   MS. FULLWOOD: That's correct, Your Honor.

19                   THE COURT: All right, okay. Ms.  
20 Fullwood, you represent Mr. Joshua Brandon Phillips?

21                   MS. FULLWOOD: Yes, Your Honor.

22                   THE COURT: And have you explained to him  
23 the nature of his charges, his maximum possible  
24 punishment, as well as his constitutional rights?

25                   MS. FULLWOOD: I have, Your Honor.

1 THE COURT: Do you believe that he  
2 understood your conversations?

3 MS. FULLWOOD: Yes, Your Honor.

4 THE COURT: Are you aware of any physical  
5 or mental disabilities affecting his ability to  
6 proceed today --

7 MS. FULLWOOD: No, Your Honor.

8 THE COURT: -- or any other impairments in  
9 that regard?

10 MS. FULLWOOD: No, ma'am.

11 THE COURT: Do you believe if these cases  
12 were to go to trial that conviction would be  
13 probable?

14 MS. FULLWOOD: Yes, Your Honor.

15 THE COURT: And this is upon your  
16 investigation as well as your review of the State's  
17 evidence?

18 MS. FULLWOOD: That's correct, Your Honor.

19 THE COURT: Is it your client's desire to  
20 plead guilty with respect to these charges?

21 MS. FULLWOOD: Yes, Your Honor.

22 THE COURT: Do you agree with that  
23 decision?

24 MS. FULLWOOD: I do, Your Honor.

25 THE COURT: Okay. And, Mr. Phillips, are

1 you under the influence of any alcohol, drugs, or  
2 medication?

3 MR. PHILLIPS: No, ma'am.

4 THE COURT: Have you ever been evaluated  
5 for your mental health -- any mental or  
6 psychological issues?

7 MR. PHILLIPS: No, ma'am.

8 THE COURT: No, okay. And that's okay. I  
9 just wanted to clarify that. You do understand that  
10 we have two indictments, one for murder in which  
11 you'll be pleading to voluntary manslaughter,  
12 correct?

13 MR. PHILLIPS: Yes, ma'am.

14 THE COURT: Okay. And then the other one  
15 for armed robbery, that one particularly indicating  
16 that it occurred in Lexington County on or about  
17 April 22, 2005, in which you knowingly and willfully  
18 while armed with a deadly weapon, essentially, a  
19 knife, you feloniously took from the person or  
20 presence by means of threat, force, or intimidation  
21 certain goods or money from Gerald Mitchell Stewart,  
22 particularly, a Coca-Cola 75th anniversary box set  
23 collectible coins and the victim's wallet. How do  
24 you wish to plead as to armed robbery? Do you wish  
25 to plead guilty or not guilty to that offense?

1 MR. PHILLIPS: Guilty.

2 THE COURT: Okay. And then for the  
3 indictment for murder, it's related to the same  
4 incident occurring in Lexington County on or about  
5 April 22, 2005, and that's essentially that you did  
6 actions which resulted in the death of a Mr. Gerald  
7 Stewart, that you basically beat him about the head  
8 and/or smothered him, and then as a proximate result  
9 of injuries that were inflicted by yourself along  
10 with a co-defendant, Robert Jared Carother, is that  
11 correct?

12 MR. PHILLIPS: Yes, ma'am.

13 THE COURT: How do you wish to plead?

14 MR. PHILLIPS: Guilty.

15 THE COURT: Do you understand that by  
16 pleading guilty you're giving up your constitutional  
17 rights?

18 MR. PHILLIPS: Yes, ma'am, Your Honor.

19 THE COURT: These include your right but  
20 are not limited to your rights to remain silent as  
21 well as to a jury trial. You're aware of that?

22 MR. PHILLIPS: Yes, ma'am, Your Honor.

23 THE COURT: You do understand that at the  
24 jury trial you could have challenged any of the  
25 State's evidence based on their investigation or

1 otherwise, as well as their testimony of witnesses  
2 and just any of the State's evidence. You're aware  
3 of that?

4 MR. PHILLIPS: Yes, ma'am, Your Honor.

5 THE COURT: You do understand that the  
6 State has to prove you guilty. You're never  
7 required to prove yourself innocent.

8 MR. PHILLIPS: Yes, ma'am, Your Honor.

9 THE COURT: And they have a higher burden  
10 of proof based upon a reasonable doubt to convince  
11 12 jurors that you, in fact, are guilty. You  
12 understand that --

13 MR. PHILLIPS: Yes, ma'am.

14 THE COURT: -- and that you could  
15 challenge that evidence. You are not required to  
16 put up evidence on your own, but you could have at a  
17 trial.

18 MR. PHILLIPS: Yes, ma'am, Your Honor.

19 THE COURT: But you waive all  
20 constitutional rights and all abilities to challenge  
21 the State's evidence pre-trial or during the trial  
22 by pleading guilty here today.

23 MR. PHILLIPS: Yes, ma'am, Your Honor.

24 THE COURT: You realize these will be  
25 felonies on your record?

1 MR. PHILLIPS: Yes, ma'am.

2 THE COURT: And you also understand that,  
3 with respect to the armed robbery, it is a minimum  
4 sentence of ten years --

5 MR. PHILLIPS: Yes, ma'am.

6 THE COURT: -- and the Court cannot give  
7 you any less than that amount?

8 MR. PHILLIPS: Yes, ma'am, Your Honor.

9 THE COURT: You also understand that for  
10 both of these offenses they are considered violent  
11 and most serious categorical offenses?

12 MR. PHILLIPS: Yes, ma'am, Your Honor.

13 THE COURT: And when I say most serious  
14 categorical, not meaning just that the crime in and  
15 of itself could be defined as most serious, but it's  
16 a strike against you.

17 MR. PHILLIPS: Yes, ma'am, Your Honor.

18 THE COURT: To the extent that you got  
19 additional strikes for serious or most serious, you  
20 could find yourself facing life without the  
21 possibility of parole. You're aware of that?

22 MR. PHILLIPS: Yes, ma'am, Your Honor.

23 THE COURT: And that means that by plea or  
24 a conviction, if you had other serious or most  
25 serious categorical strikes on your record, that

1 would be the only sentence that the Judge could hand  
2 down. In other words, there's no discretion.  
3 You're aware of that?

4 MR. PHILLIPS: Yes, ma'am, Your Honor.

5 THE COURT: Do you still wish to plead  
6 guilty knowing that those are consequences of the  
7 plea?

8 MR. PHILLIPS: Yes, ma'am, Your Honor.

9 THE COURT: You're also aware that you  
10 would be serving a minimum of 85 percent on these  
11 things?

12 MR. PHILLIPS: Yes, ma'am, Your Honor.

13 THE COURT: Okay. Do you feel like you've  
14 had enough time to speak with your attorney about  
15 the State's investigation, what's involved in terms  
16 of what you'll be facing at trial?

17 MR. PHILLIPS: Yes, ma'am, Your Honor.

18 THE COURT: And has she been responsive to  
19 your questions, concerns, just any issues you needed  
20 to know to make an informed and an intelligent  
21 decision about whether you should plead guilty or go  
22 to trial?

23 MR. PHILLIPS: Yes, ma'am, Your Honor.

24 THE COURT: Do you feel like you need any  
25 additional time with her?

1 MR. PHILLIPS: No, ma'am, Your Honor.

2 THE COURT: Has she been satisfactory in  
3 terms of representing you?

4 MR. PHILLIPS: Yes, ma'am, Your Honor.

5 THE COURT: And you did the special  
6 constitutional rights, as well?

7 MR. PHILLIPS: Yes, ma'am, Your Honor.

8 THE COURT: Okay. The Court would find a  
9 factual basis to accept the plea, based on the  
10 indictments and the facts indicated to you to which  
11 you have responded by a plea of guilty. The Court  
12 would also find that your plea is knowing,  
13 voluntary, and intelligent and that you have  
14 indicated you are satisfied with your counsel. Is  
15 that still the case?

16 MR. PHILLIPS: Yes, ma'am, Your Honor.

17 THE COURT: Okay. You would have ten days  
18 to appeal any guilty plea and/or sentence, all  
19 right?

20 MR. PHILLIPS: Yes, ma'am.

21 THE COURT: Okay, just answer the  
22 question. You have ten days to appeal any guilty  
23 plea and/or sentence. You understand that, right?

24 MR. PHILLIPS: Oh, yes, ma'am.

25 THE COURT: The State is going to give me

1 further facts in support of the case, as well as  
2 your prior record. And you and anyone on your  
3 behalf will have an opportunity to respond.

4 MR. RIDDLE: Your Honor, if it please the  
5 Court, this incident did -- both these indictments  
6 stem from one incident which took place on the 26th  
7 day of April of 2005. Mr. Phillips, along with the  
8 co-defendant, were over at the victim's house.

9 During the course of that evening,  
10 Mr. Phillips ended up getting significantly drunk.  
11 The co-defendant, Mr. Prather, was with the victim  
12 during that time. Later on in the evening, Your  
13 Honor, a dispute erupted, and Mr. Prather and Mr.  
14 Phillips assaulted the victim in this particular  
15 case.

16 Your Honor, during the course of that  
17 assault, Mr. Stewart died as a result of the  
18 injuries inflicted. Later on, shortly thereafter,  
19 certain items were stolen from the victim, to  
20 include his wallet, some commemorative coins or  
21 collectible coins.

22 The victim's father was a longtime  
23 employee of Coca-Cola, and the victim had a whole  
24 lot of I guess Coca-Cola memorabilia, for lack of a  
25 better way to put it. Some of that was stolen, as

1 well. Your Honor, the police became involved in  
2 this.

3                   They went and found the victim at the  
4 house. Mr. Phillips was questioned about it, and  
5 he, in fact, gave a statement to law enforcement at  
6 that time. It was to a certain extent  
7 self-protective. I don't think it was the complete  
8 truth.

9                   Be that as it may, Mr. Phillips has  
10 indicated that he is willing to assist the State in  
11 the prosecution of the co-defendant, Mr. Prather,  
12 whose attorney is sitting in the courtroom with us.  
13 That is the factual basis I'll put up on the record.

14                   Obviously, when we go to trial,  
15 there's going to be a lot more factual basis coming  
16 out. But that's the factual basis for the plea.  
17 Your Honor, what we're requesting that the Court do  
18 at this time is to give Mr. Phillips a ten-year  
19 sentence on Indictment 2923, which is the armed  
20 robbery charge, and leave the sentence held in  
21 abeyance on the voluntary manslaughter indictment --  
22 that's 2920 -- pending his cooperation in the trial  
23 of Mr. Prather.

24                   The balance of the plea negotiations  
25 in this case, Your Honor, there was a filing of

1 false police report -- that's 2008-2921 -- that's  
2 being dismissed in exchange for this plea. There  
3 was a possession of a firearm during the commission  
4 of a violent crime -- that's 2922 -- that's likewise  
5 being dismissed.

6 There was a burglary charge, Your  
7 Honor -- 2924 -- which is being dismissed. Your  
8 Honor, when this case initially came up, Mr.  
9 Phillips was initially charged with accessory after  
10 the fact of murder. Obviously, his murder  
11 indictment or the voluntary manslaughter would  
12 subsume this.

13 And there is two additional  
14 indictments, Your Honor -- 2006-790, 2006-788. Both  
15 of those are earlier indictments on the charges that  
16 I have already mentioned. These indictments  
17 actually have been superseded by some of the 2008  
18 indictments. But these are being dismissed, as  
19 well. But they're the same charges from the same  
20 incident. They're not additional charges.

21 THE COURT: Okay. Sir, do you dispose any  
22 of those statements made by the State?

23 MR. PHILLIPS: Yes, ma'am, Your Honor.

24 THE COURT: Do you dispute, want to change  
25 anything?

1 MR. PHILLIPS: Oh, no, ma'am, Your Honor.

2 THE COURT: Okay, that's okay. What's his  
3 prior record?

4 MR. RIDDLE: Beg the Court's indulgence  
5 for one moment, please. It looks like he had a DUI,  
6 Your Honor. I believe that's the extent of it. But  
7 I don't show a conviction.

8 THE COURT: Okay. Sir, are you aware of a  
9 record that you have?

10 MR. PHILLIPS: No, ma'am, Your Honor.

11 THE COURT: You are contending to the  
12 Court you have no record -- no criminal record?

13 MR. PHILLIPS: Yes, ma'am.

14 THE COURT: Okay.

15 MR. RIDDLE: I agree with that.

16 THE COURT: Okay, that's okay.

17 All right, Ms. Fullwood.

18 MS. FULLWOOD: Thank you. Your Honor,  
19 I'll be brief in light of the posture of the case.  
20 I would ask the Court to accept the negotiations as  
21 to the armed robbery. Joshua is before the Court  
22 this afternoon with his father, John Phillips, who  
23 has been actively involved in looking after his  
24 son's best interest.

25 And he also, along with his son,

1 believes that this is the right thing for him to do,  
2 that it's in his best interest to enter this plea.  
3 As you've heard, he has no prior record. I believe  
4 that he is the type of person who is more of a  
5 follower than a leader and that on his own he would  
6 never have engaged in this type of conduct.

7 THE COURT: Okay. Sir, the Court will  
8 accept the negotiations for the armed robbery  
9 sentence. So you'll be sentenced to the Department  
10 of Corrections for 15 years. With respect to the  
11 voluntary manslaughter, I just do want to put a  
12 couple of things on the record.

13 The State as well as your counsel  
14 have essentially negotiated that you would provide  
15 certain testimony helpful to the conviction of the  
16 co-defendant. You understand that?

17 MR. PHILLIPS: Yes, ma'am, Your Honor.

18 THE COURT: And so essentially they're  
19 leaving open sentencing, and so I don't make any  
20 statements as to what that sentencing might be or  
21 occur, because that's for a later date.

22 But just to keep that in mind, that  
23 was the reason that this left open. We'll be  
24 accepting your plea today, but the sentencing is  
25 deferred, but with you having an understanding that

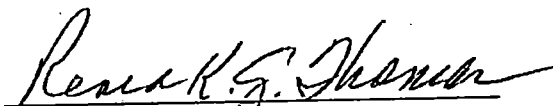
STATE OF SOUTH CAROLINA )  
COUNTY OF LEXINGTON )

COURT REPORTER'S CERTIFICATION

I, REMA K. GANTT, OFFICIAL COURT REPORTER, AND NOTARY PUBLIC IN AND FOR THE STATE OF SOUTH CAROLINA, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE AND COMPLETE TRANSCRIPT OF RECORD OF THE PROCEEDINGS HAD AND EVIDENCE INTRODUCED IN THE ABOVE-CAPTIONED CASE ON APRIL 16, 2009, IN LEXINGTON, SOUTH CAROLINA.

I FURTHER CERTIFY THAT I AM NEITHER OF COUNSEL NOR KIN TO ANY OF THE PARTIES TO THIS CAUSE OF ACTION, NOR AM I INTERESTED IN ANY MANNER IN ITS OUTCOME.

IN WITNESS WHEREOF, I HAVE HEREUNTO SET MY HAND AND SEAL AT LEXINGTON, SOUTH CAROLINA, THIS THE TWENTY-FIFTH DAY OF JUNE, 2010.



REMA K. GANTT THOMAS  
OFFICIAL COURT REPORTER  
NOTARY PUBLIC FOR SOUTH CAROLINA  
MY COMMISSION EXPIRES 11/21/2013

1 they are expecting that you cooperate in that  
2 regard.

3 MR. PHILLIPS: Yes, ma'am, Your Honor.

4 THE COURT: To the extent that you don't,  
5 there may be a difference in the statements made by  
6 the State with respect to what they would be asking  
7 the Court with respect to your sentencing. Do you  
8 understand that?

9 MR. PHILLIPS: Yes, ma'am, Your Honor.

10 MR. RIDDLE: Your Honor, the only other  
11 thing I want to put on the record -- and I may done  
12 that, but I don't recall doing it -- the voluntary  
13 manslaughter sentence, that would be imposed by the  
14 Trial Judge at the --

15 THE COURT: Okay.

16 MR. RIDDLE: -- on Mr. Prather's charge.

17 THE COURT: Okay, great.

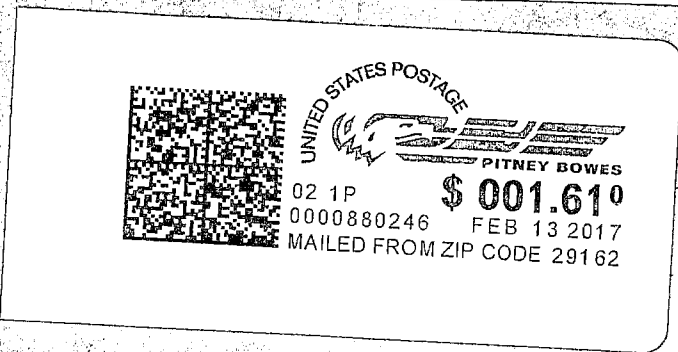
18 MR. RIDDLE: That would be part of the  
19 negotiations.

20 THE COURT: Okay. Thank you so much.

21 MR. RIDDLE: All right. Thank you, Your  
22 Honor.

23 MS. FULLWOOD: Thank you, Your Honor.

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The Supreme Court of South Carolina  
P.O. Box 11330  
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