STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

Honorable D. Craig Brown, Circuit Court Judge

THOMAS LEWIS BLOODSAW,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-002496

PETITION FOR WRIT OF CERTIORARI

JOHN H. STROM
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

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ISSUE PRESENTED

Trial counsel provided ineffective assistance of counsel by failing to request a curative instruction or a mistrial in response to the solicitor's closing argument when the solicitor's comments constituted a "Golden Rule" argument which impermissibly appealed to the passions of the jurors and so infected the trial with unfairness as to make the resulting conviction a denial a of due process.

STATEMENT

Indictment

Petitioner was indicted on May 9, 2012 by the Richland County Grand Jury for one count of burglary, first degree, and one count of grand larceny, "value over $1,000 but less than 2,000." App. 542 – 544.

Relevant Facts

On August 24, 2011, Leroy Kelly returned home from his job with the Department of Transportation to find the back door to his house was broken open. App. 141, l. 13 – 142, l. 14. Fearing the burglar was still inside, Kelly briefly looked inside the home, before calling 911 and waiting for the police. App. 143, ll. 14-23.

Kelly's house was thoroughly ransacked. He immediately noticed that his computer and a TV were missing. App. 146, l. 13 – 147, l. 24. Three guns were also missing. App. 149, l. 19 – 150, l. 25. Kelly estimated that "a little over $5,000" worth of personal possessions had been stolen. App. 154, ll. 15-24. Kelly would testify that he did not know Petitioner and that, to his knowledge, Petitioner had never been in Kelly's house before. App. 153, l. 14 – 154, l. 12.

Evidence technicians swabbed for fingerprints throughout the house. Police recovered a single print from the top drawer of a filing cabinet in the master bedroom that had been pried opened. App. 194, l. 2 – 196, l. 8. An additional print was recovered from a box of ammunition also located in the master bedroom. App. 197, l. 11 – 199, l. 21.

The AFIS system matched the two prints recovered from Kelly's house to thirty possible contributors. Petitioner's fingerprint cards were the highest probability match found in the database. App. 246, l. 12 – 247, l. 24. Richland County latent print examiner Diane Cross

testified at trial that, based on her training and experience, the prints recovered from Kelly's house were a match to Petitioner. App. 274, l. 3 – 275, l. 22.

None of the stolen property was ever recovered. App. 296, ll. 1-7. There were no witnesses to the break-in. No DNA evidence was successfully extracted from the crime scene. *Id.* The sole basis for law enforcement suspecting Petitioner of involvement in the burglary was the two fingerprint matches. App. 297, ll. 9-21.

Petitioner was arrested on an outstanding warrant arising from an unrelated simple assault and battery on September 17, 2011. App. 302, l. 11 – 304, l. 20. While Petitioner was being driven from the detention center to the Sherriff's Office for questioning, lead detective in the Kelly burglary, Sgt. Don Robinson questioned Petitioner about the burglary. App. 304, l. – 306, l. 5. In his only statements to police, Petitioner denied any involvement in the burglary. *Id.*

Petitioner testified that another individual, Moses McKnight, had broken into the house and subsequently informed the Petitioner that he should go over to the house because there were still some valuable items to be stolen. App. 362, ll. 11-25; App. 363, ll. 1-22. Prior to the Petitioner testifying, the State had not introduced any evidence that another individual has involved in the robbery.

Petitioner testified in his own defense at trial. He admitted to being in Kelly's residence, denied stealing any guns. App. 362, l. 24 – 367, l. 23. Petitioner explained that an acquantence named Moses McKnight had stolen the guns earlier in the day and then invited Petitioner to steal other additional items of value from Kelly's house

Petitioner admitted to stealing Kelly's computer. *Id.* There was no evidence of any pre-burglary conspiracy between Petitioner and McKnight. Rather, McKnight had simply invited Petitioner to steal items from Kelly's house after McKnight had already broken in. *Id.*

The judge allowed the State to argue "hand of one, hand of all" in their closing argument. App. 388, l. 13 – 402, l. 24. In making his ruling, the judge stated, "Because of the State's theory, I still don't think the "hand of one, hand of all" applies, but as to his motive and his credibility, I can see where a reasonable jury could reach that conclusion to get the gun or guns not only out of his hands, but out of the residence before he's in the residence so that - - unless one of the other aggravating factors, which none of them apply." App. 394, l. 19 –395, l. 1.

The central issue for the jury's consideration was whether Petitioner was guilty of first degree burglary on the basis that either he stole Kelly's guns or conspired with McKnight to commit burglary and during the course of that burglary McKnight stole the guns; or Petitioner guilty of second degree burglary.

The first degree burglary charge rested solely on the State's contention that Petitioner became armed if he stole Kelly's guns during the burglary. App. 428, l. 14 – 430, l. 3. The defense proffered that Petitioner acted independently of McKnight, thus committing a separate, later burglary after McKnight had stolen Kelly's guns. App.408, l. 10 – 413, l. 22.

Given the lack of physical evidence linking Petitioner to the burglary, the State countered that the jury should find Petitioner guilty of first degree burglary because, at a minimum, he participated at the invitation of McKnight, who Petitioner stated stole the guns. App. 420, l. 5 – 422, l. 11. The State also fanned the flames of outrage by deliberately leading jurors through the burglary from Kelly's perspective and stressing the importance of the missing guns:

> We had Leroy Kelly go through each photograph describing everything. Investigator Schroder meticulously going through describing everything. He said they've shown you nothing that showed you what happened.
>
> Well, this is **Leroy Kelly's home** (indicating). This is Leroy Kelly's front door (indicating) that was busted in, the force that was used to break into his home, the deadbolt, the locks laying on the ground

> (indicating). Each and every room that was ransacked in Leroy Kelly's home, as drawer are pulled out, cabinets are pulled out. **His privacy and his sense of security being invaded and broken down.** Each and every photograph, **as Leroy Kelly walked you through his home to tell you about this invasion, invasion of his property and his sense of security.**
>
> His bedroom (indicating), **the place where he lays his head down on the bed at night, torn apart. His privacy invaded.** Photo after photo after photo. **His sense of security being invaded, which is really why there is probably two issues to -- or two sides to this gun issue that's out there. It's because there are people like the Defendant (indicating) who will come into your home and take**
>
> [Defense counsel objects]
>
> [solicitor continues] **--what they want.**

App. 415, l. 9 – 416, l. 8.

Defense counsel objected prior to the State completing its argument, but it was too late to keep the solicitor from getting the poisonous connection to the jurors. The solicitor unambiguously asked jurors to imagine how Kelly felt having "his privacy and his sense of security being invaded and broken down." *Id.*

Inexplicably, defense counsel did not move for a mistrial and never requested a curative instruction. *Id.* Defense counsel also failed to renew his objection following the verdict. App. 448, l. 24 – 449, l. 16. The only guidance given to the jury regarding the role of oral argument was at the onset of closing arguments, well before the State's final argument:

> Please remember my instructions that what the attorneys say is not evidence in the case, but the closing arguments are different from opening statements. They are true arguments. They may comment and argue are the facts, the reasonable inferences to be drown from the facts and the law and how those facts apply to the law in the case.

App. 404, ll. 19-24.

The trial court did not repeat this admonishment at the start of his jury charge. Instead the Court, after defining reasonable doubt, informed that:

> Duties of the trial jury and trial judge. I remind you that during this trial, you and I have certain duties to perform. As the trial judge, it is my responsibility to preside over the trial and I, also, have the duty to rule on the admissibility of evidence offered during the trial. You are to consider only the competent evidence before you. You are to consider only the testimony which has been presented from the witness stand and any exhibits which have been made part of the record. I have the added duty to charge you the law that applies. As the presiding judge, I am the sole judge of the law of this case. And it is your duty as jurors to accept and apply the law as I now state it to you. If you already have any idea as to what the law is or what the law ought to be and it does not agree with what I now tell you the law is, you must set aside, you must abandon your idea because you are sworn, you have taken an oath to accept the law and apply the law exactly as I state it to you.

App. 434, ll. 5-22. As defense counsel did not request a curative instruction or otherwise reiterate his objection, the trial court did not provide a more specific charge instructing jurors to disregard the State's improper closing arguments when deliberating.

Petitioner was found guilty of burglary, first degree, and petite larceny. App. 446, ll. 19-25. The trial court sentenced him to 18 years for burglary, first degree, and 30 days for petite larceny. App. 460, ll. 19-23.

Direct Appeal

Petitioner filed a timely notice of appeal and was represented Austin H. Crosby and Chief Appellate Public Defender Robert Dudek. On February 18, 2014, an *Anders* brief was submitted on Petitioner's behalf. App. 464 - 476 The South Carolina Court of Appeals relieved appellate counsels and dismissed Petitioner's appeal on January 7, 2015. App. 477.

PCR Application

On March 27, 2015, Petitioner filed an application for post-conviction relief alleging that defense counsel was ineffective for failing to object to the State's closing argument. App. 480 – 486. On June 30, 2015, the State filed a Reuturn. App. 487 – 492.

On July 14, 2016, an evidentiary hearing was held before the Honorable D. Craig Brown. Jonathan Waller represented Petitioner. Assistant Attorney General Johnny James represented the State. App. 493 – 527. Petitioner and defense counsel both testified.

Petitioner testified that the main issue at his trial was whether or not the State could prove that Petitioner stole guns from Kelly's house. App. 504, l. 2 – 505, l. 24. Petitioner stated that he wanted to testify at trial and that he turned down a fifteen year plea offer. App. 502, l. 5 – 503, l. 23. Petitioner admitted that he had trouble remembering what he and defense counsel discussed. *Id.*

Defense counsel stated that he was retained by Petitioner's family shortly after Petitioner's initial attorney, a public defender, passed away. App. 508, ll. 7-23. Defense counsel claimed that he met with Petitioner regularly while his case was pending. App. 509, ll. 2-24.

Defense counsel recalled that he developed two, mutually exclusive, potential trial strategies. One option was to dispute the accuracy of the latent fingerprint evidence linking Petitioner to the burglary. App. 509, l. 12 – 512, l. 20. The second option was to have Petitioner testify as to his version of events. App. 513, l. 10 – 518, l. 1.

Petitioner and counsel ultimately decided on the second strategy. *Id.* This required conceding Petitioner was guilty of second degree burglary, in exchange but focusing on strongly denying that Petitioner had stolen Kelly's guns and, thus, "become armed" for the purposes of burglary, first degree. *Id.*

Defense counsel was then asked about his objection to the State's closing argument. App. 518, l. 2 – 520, l. 2. Counsel recollected that he objected because "it was pleading to the passions [of] the jury, violating the Golden Rule. . . . The solicitor had said it's because of people like the defendant that come into your home and take things, speaking directly to the jury." App. 518, ll. 9-15.

When asked if he had a reason when he failed to ask for a mistrial or curative instruction, defense counsel responded, **"There was no strategy. I just missed it."** App. 518, l. 19. "I would have objected – I mean, I should have objected. . . . No strategy behind that." App. 518, l. 21 – 519, l. 2.

Order of Dismissal

The PCR court denied Petitioner's application for PCR relief in a written order of dismissal signed on September 19, 2016. In denying Petitioner relief, the PCR court concluded that defense counsel was not ineffective in handling his objection to the State's improper "Golden Rule" argument. App. 531 – 533.

The Court concluded that, notwithstanding defense counsel's admission that he "just missed" asking for a curative instruction or a mistrial, defense counsel's performance was "within prevailing professional norms." App. 533. "Counsel did indeed object and did so with attentive haste, so as to prevent the solicitor from completing her remark. Any further attention would have done little more than draw further attention to argument that was otherwise at least partially drowned by Counsel's objection." *Id.*

Court further concluded that, even if defense counsel was deficient, Petitioner still failed to prove prejudice because the trial court's admonition prior to opening arguments cured any prejudice to Petitioner. *Id.* Despite the only evidence of Petitioner's participation in the

burglary, apart from Petitioner's testimony, being two partial finger prints, the PCR court determined that there was overwhelming evidence of Petitioner's guilt. *Id.* Therefore, Petitioner could not have been prejudiced by defense counsel's failure to object to the State's improper "Golden Rule" argument. App. 534.

This petition follows.

ARGUMENT

Trial counsel provided ineffective assistance of counsel by failing to request a curative instruction or a mistrial in response to the solicitor's closing argument when the solicitor's comments constituted a "Golden Rule" argument which impermissibly appealed to the passions of the jurors and so infected the trial with unfairness as to make the resulting conviction a denial a of due process.

Trial counsel acknowledged at the PCR hearing that he failed to move for a mistrial after the State made a grossly improper "Golden Rule" argument, appealing for jurors to imagine if Petitioner had broken into their house and stolen their guns. App. 415, l. 9 – 416, l. 8; App. 518, l. 21 – 519, l. 2.

Trial counsel further conceded that he had no strategic reason for failing to move for a mistrial, but "I just missed it." App. 518, l. 19. Accordingly, the PCR court erred in holding that trial counsel provided effective assistance of counsel. App. 533 - 534. See *Strickland v. Washington*, 466 U.S. 668 (1984) (establishing the standard for ineffective assistance of counsel claims: a PCR applicant must show that counsel's performance was deficient and that the deficiency prejudiced the outcome of the proceedings).

Ineffective Assistance of Counsel

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI. To establish ineffective assistance of counsel, the Petitioner must satisfy the two-prong test set forth in *Strickland*, 466 U.S. 668.

"First, a defendant must show that counsel's performance was deficient. Under this prong, [t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Cherry v. State,* 300 S.C. 115, 386 S.E.2d 624 (1989) (internal citations omitted).

"The second prong of the *Strickland* test requires a showing that the deficient performance prejudiced the defendant to the extent that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. The defendant is required to overcome the presumption that counsel was effective in order to receive relief." *Id.* at 118, 386 S.E.2d at 625 (internal citations omitted).

Therefore, where ineffective assistance of counsel is alleged as a ground for PCR relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." *Strickland*, 466 U.S. at 692.

Discussion

In making closing arguments, "[a] solicitor has a right to state his version of the testimony and to comment on the weight to be given such testimony." *Randall v. State,* 356 S.C. 639, 642, 591 S.E.2d 608, 610 (2004). This includes arguing the credibility of the State's witnesses if the argument is based on the record and its reasonable inferences. *State* v. *Caldwell,* 300 S.C. 494, 388 S.E.2d 816 (1990).

However, closing arguments must stay within the record and reasonable inferences drawn therefrom. *State v. Cooper,* 334 S.C. 540, 514 S.E.2d 584 (1999). This Court explained:

> While the solicitor should prosecute vigorously, his duty is not to convict a defendant but to see justice done. The solicitor's closing argument must, of course, be based on this principle. The argument therefore must be carefully tailored so as not to appeal to the personal bias of the juror nor be calculated to arouse his passion or prejudice.

State v. Northcutt, 372 S.C. 207, 222, 641 S.E.2d 873, 881 (2007) (quoting *State v. Linder*, 276 S.C. 304, 312, 278 S.E.2d 335, 339 (1981)).

Further, in keeping with their obligation to seek justice, and not simply a conviction, a solicitor's closing argument must be carefully tailored to avoid appealing to the personal bias of jurors, or to arouse a juror's passion or prejudice. *State v. Linder,* 276 S.C. 304, 312, 278 S.E.2d 335, 339 (1981).

"On appeal, the appellate court will view the alleged impropriety of the solicitor's argument in the context of the entire record, including whether the trial judge's instructions adequately cured the improper argument and whether there is overwhelming evidence of the defendant's guilt." *Simmons v. State,* 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998). "Improper comments do not automatically require reversal if they are not prejudicial to the defendant, and the appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument." *Humphries v. State,* 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002).

"The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Id; See State v. Hornsby,* 326 S.C. 121, 129, 484 S.E.2d 869, 873 (1997) ("A denial of due process occurs when a defendant in a criminal trial is denied the fundamental fairness essential to the concept of justice.").

Based on the State's closing argument, it is clear that the solicitor intentionally and unnecessarily injected prejudicial comments into Petitioner's trial. Contrary to the conclusions of the PCR court, the State deliberately used an impermissible "Golden Rule" closing argument that encouraged jurors to depart from neutrality:

> We had Leroy Kelly go through each photograph describing everything. Investigator Schroder meticulously going through describing everything. He said they've shown you nothing that showed you what happened.
>
> Well, this is Leroy Kelly's home (indicating). This is Leroy Kelly's front door (indicating) that was busted in, the force that was used to break into his home, the deadbolt, the locks laying on the ground

(indicating). Each and every room that was ransacked in Leroy Kelly's home, as drawer are pulled out, cabinets are pulled out. **His privacy and his sense of security being invaded and broken down.** Each and every photograph, **as Leroy Kelly walked you through his home to tell you about this invasion, invasion of his property and his sense of security.**

His bedroom (indicating), the place where he lays his head down on the bed at night, torn apart. His privacy invaded. Photo after photo after photo. His sense of security being invaded, which is really why there is probably two issues to -- or two sides to this gun issue that's out there. It's because there are people like the Defendant (indicating) who will come into your home and take. . .

--what they want.

App. 415, l. 9 – 416, l. 8.

The State wanted jurors imagine how they would feel if Petitioner came into their house and stole their guns. *See State* v. *Reese,* 359 S.C. 260, 271, 597 S.E.2d 169, 175 (Ct. App. 2004) (recognizing that a "Golden Rule" argument which suggests to jurors to put themselves in the shoes of one of the parties is generally impermissible), *aff'd in part and rev'd in part,* 370 S.C. 31, 633 S.E.2d 898 (2006) (affirming that the defendant was entitled to a new trial based on the solicitor's "Golden Rule" closing argument).

Defense counsel had a duty, not only to object, but to move for a mistrial based on the solicitor's improper closing remarks. *See State* v. *McDaniel,* 320 S.C. 33, 462 S.E.2d 882 (Ct. App. 1995) (finding the solicitor's use of the word "you" forty-five times during closing argument asking the jurors to put themselves in the place of the victim constituted reversible error and warranted a new trial); *see also Von Dohlen* v. *State,* 360 S.C. 598, 611, 602 S.E.2d 738, 745 (2004) (noting "Other courts, including our own Court of Appeals, uniformly have condemned and prohibited golden rule arguments in criminal and civil settings").

Counsel failed to properly do either. Trial counsel candidly admitted that he had no strategic reason for failing to move for a mistrial. App. 518, l. 19 – 519, l. 2. Rather, it simply did not occur to him to do so. *Cf. Stokes v. State,* 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992) ("Where ... counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel."); *Whitehead v. State,* 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992) (recognizing that "[c]ourts must be wary of second-guessing counsel's trial tactics; and where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel").

The PCR court erred in finding that the solicitor's "Golden Rule" argument, asking jurors to place themselves in the position of the victim did not prejudice Petitioner. *Northcutt,* 372 S.C. at 222, 641 S.E.2d at 881. Accordingly, defense counsel's failure to request a mistrial or move for a mistrial, to the impermissible statements in closing argument constitutes performance falling below "prevailing professional norms." *Strickland,* 466 U.S. at 687-88.

Prejudice

As to prejudice, counsel's deficient performance "so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." *Strickland,* 466 U.S. at 692. Guns are an emotive cultural fixture in South Carolina. S.C. Const. Art. I, § 20 and § 25. Tellingly, Petitioner's first degree burglary charge was based solely on the State's theory that he stole Kelly's guns during the burglary. App. 408, l. 14 – 413, l. 18; S.C. Code Ann. § 16-11-31(A)(1)(a).

Petitioner did not dispute that he had entered Kelly's house, rather he testified that he only stole Kelly's computer. App. 362, l. 24 – 367, l. 23. Petitioner adamantly denied stealing Kelly's

guns. *Id.* Once the State asked jurors to put themselves in Kelly's position of having his guns stolen, trial counsel had to move for a mistrial. App. 415, l. 15 – 416, l. 8.

The trial judge could not realistically mitigate the prejudice of the solicitor's improper comments with a curative instruction. *Cf: Johnson* v. *State,* 325 S.C. 182,480 S.E.2d 733 (1997) (finding a solicitor's improper comments may be cured by the judge's instructions to the jury). A mistrial was the only viable option for protecting Petitioner's right to a fair trial.

These improper comments had a significant impact on the trial and strengthened the State's suboptimal case. The State's closing argument explicitly asked the jurors to put themselves in Kelly's position:

> His bedroom (indicating), the place where he lays his head down on the bed at night, torn apart. His privacy invaded. Photo after photo after photo. His sense of security being invaded, which is really why there is probably two issues to -- or two sides to this gun issue that's out there. It's because there are people like the Defendant (indicating) who will come into your home and take
>
> --what they want.

App. 415, l. 9 – 416, l. 8.

The solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process. *See Donnelly v. DeChristoforo*, 416 U.S. 637, 94 S.Ct. 1868 (1974). First, the State did not present overwhelming evidence of Petitioner's guilt. The only evidence against Petitioner was the fingerprint match and, depending on how it's is interpreted, Petitioner's admission to second degree burglary.

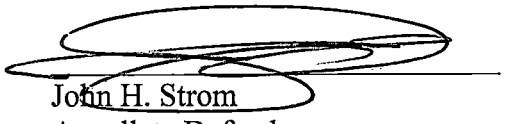
Second, the impermissible comment represented the climax of the State's closing argument. Prior to expressly asking the jurors to place themselves in Kelly's position when rendering a verdict, the State repeatedly stressed the violation Kelly had suffered and how effected he was by the

burglary. Then the State attempted to rhetorically shift from Kelly to the jurors. This provided a powerful, and totally improper, emotional appeal to jurors.

Therefore, the PCR court erred in finding trial counsel provided effective assistance of counsel because "there is a reasonable probability that, but for [trial] counsel's unprofessional errors, the result of the proceeding would have been different." App. 372 – 373; *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625 (internal citations omitted).

CONCLUSION

By reason of the foregoing, Petitioner Thomas Lewis Bloodsaw respectfully requests this Court grant his Petition for writ of certiorari to allow for full briefing on this issue.



John H. Strom
Appellate Defender

ATTORNEY FOR PETITIONER

This 3rd day of July, 2017.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

Honorable D. Craig Brown, Circuit Court Judge

THOMAS LEWIS BLOODSAW,

PETITIONER

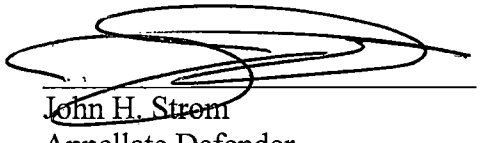
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

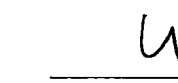
The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Jessica Kinard, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Thomas Lewis Bloodsaw, #354735, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 3rd day of July, 2017.



John H. Strom
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 3rd day of July, 2017.



(L.S)

Notary Public for South Carolina
My Commission Expires: 5/12/2025