

STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas (PCR)

S.C. SUPREME COURT

The Honorable Edgar W. Dickson, Post-Conviction Relief Judge

James Livingston,

Petitioner,

v.

State of South Carolina,

Respondent.

Appellate Case No. 2016-000823

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305

ATTORNEYS FOR RESPONDENT

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PETITIONER'S QUESTIONS PRESENTED

- I. Did the PCR court err by denying the Petitioner's application for PCR where the trial attorney failed to investigate the fact that the sole identifying witness in two of Applicant's cases was deceased at the time of the plea?
- II. Did the PCR court err by denying the Petitioner's application for PCR where the trial attorney failed to properly advise the Applicant concerning the law concerning an entrapment defense and dominion and control?
- III. Did the PCR court err by denying the Petitioner's application for PCR where the trial attorney failed to properly advise Applicant of the potential life without parole sentence?
- IV. Did the PCR court err by denying the Petitioner's application for PCR where the probation court failed to inquire with the Applicant fully concerning self representation?

(Petition, p. 2).

RESPONDENT'S COUNTER PRESENTATION OF QUESTIONS PRESENTED

I.

Is there probative evidence in the record supporting the PCR judge's ruling denying a claim of ineffective assistance on failure to investigate and discover the fact that the confidential informant for certain offenses was deceased at the time of the plea bargain where the record shows that counsel was preparing another separate case for trial at the time the favorable bargain was struck and the charges involving the confidential informant who was deceased were merely rolled into the favorable plea deal?

II.

Is there is probative evidence to support the PCR judge's decision to deny relief on a claim that counsel failed to properly advise on an entrapment defense or other defense where counsel correctly advised the facts of the case would not support the defense?

III.

There is probative evidence of record to support the PCR judge's decision to deny relief on a claim that counsel had improperly advised of the possibility of a life without parole sentence when the record shows multiple offense which could have exposed Petitioner to a life sentence without the possibility of parole?

IV.

Whether there is probative evidence of record to support the PCR judge's decision to deny relief on a claim the probation revocation judge failed to advise of the right to counsel when the record shows, in the absence of specific advice, that Petitioner was aware of his right and understood the waiver of same?

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Clerk of Court in Lexington County.¹ A Lexington County Grand Jury indicted Petitioner in January 2006 for two counts of distribution and/or possession of crack cocaine, third offense or more – one in count stemming from a February 2005 crime (2006-GS-32-170) (App. pp. 169-170), the other count stemming from a March 2005 crime (2006-GS-32-172) (App. pp. 177-178). Joshua S. Kendrick, Esq., represented Petitioner on the charges. On April 13, 2009, pursuant to plea negotiations, Petitioner pleaded guilty to the distribution counts and the lesser offense of distribution on the trafficking count. (App. p. 4; p. 10). Additionally, the State dismissed three additional counts of distribution of cocaine, third offense or more, and two counts of distribution within proximity of a school or park. (App. pp. 11-12). The Honorable J.C. Nicholson, Jr., heard and accepted the plea. Judge Nicholson sentenced Petitioner to a total of eighteen years. (App. pp. 20-21). Petitioner did not appeal his plea or sentence.

On May 22, 2009, Petitioner appeared *pro se* before the Honorable R. Knox McMahon for a probation revocation hearing. Petitioner had been on probation at the time of April 2009 plea on a prior drug offense. (App. p. 27). The new drug conviction, however, constituted a violation of the probation. (App. p. 27). Judge McMahon asked if Petitioner wished to have an attorney, and Petitioner responded “No, sir,” and Petitioner was not represented by counsel.

¹ Respondent notes Petitioner has blended procedural history and factual assertions in his statement of the case. Respondent expressly states it does not adopt or concede any part of Petitioner’s statement. Respondent relies on its own statement, and the recitation of facts and argument as presented in this Return. See generally Rule 208(b)(2) (“If a respondent does not include his own statement of the case, he shall be bound by the matters stated or alleged in appellant’s statement of the case.”).

(App. p. 26). Petitioner pleaded guilty to the violation. (App. p. 26). Judge McMahon found Petitioner “willfully and intentionally violated the terms and conditions of his probation,” revoked probation in full, and ordered the remaining sentence be run concurrently to the April 2009 sentence. (App. p. 27). Petitioner did not appeal the revocation proceedings.

On October 28, 2009, Petitioner, through counsel Robert W. Mills, Esq., filed a PCR application contesting his representation for the April 2009 plea. (App. p. 30). Petitioner alleged plea “[c]ounsel failed to properly advise Applicant, failed to investigate the facts and law, [and] failed to show Applicant all of the evidence.” (App. p. 32). The State filed a return to the application on March 16, 2010. PCR counsel filed an addendum to the application on May 16, 2011, and made the following allegations:

...This Applicant and Addendum is based upon many failures of the Applicant’s trial counsel to fully inform him of all of the facts of the case; failure of trial counsel to review evidence with applicant before the court date; failure of trial counsel to fully investigate the facts; failure of trial counsel to advise Applicant of the full nature of the sentence; failure of trial counsel to advise the applicant of the full nature of the chemical analysis; failure of trial counsel to properly advise applicant on the choices of pleading to a lesser offense; failure of trial counsel to properly advise Applicant about the possible sentence if Applicant chose to go to trial; failure of trial counsel to file a Motion of Reconsideration as he told the Applicant he would; failure of trial counsel to advise Applicant of his right to challenge any statements made to law enforcement and failure of the trial judge in the probation violation hearing to properly warn the Applicant of proceeding without counsel.

(App. p. 43).

An evidentiary hearing was held August 16, 2013, before the Honorable Edgar W. Dickson. (App. p. 46). At the conclusion of the hearing Judge Dickson took the matter under advisement. (App. p. 116). A formal written order of dismissal dated May 13, 2015, filed May 19, 2015, followed. (App. pp. 122-133). Petitioner filed a motion to alter or amend pursuant to

Rule 59 motion on June 12, 2015, (App. pp. 134-140), and, on that same day also filed a Motion for a New Trial and Motion for Relief from Judgment, (App. pp. 142 and 144). On February 3, 2016, Respondent filed a return to the motion for relief from judgment, for a new trial, and the Rule 59 motion to alter or amend. (App. pp. 147-149; pp. 152-154; and pp. 157-158). By Order dated March 9, 2016, filed March 18, 2016, Judge Dickson denied the motion to alter or amend, along with the motions for a new trial and for relief from judgment. (App. pp. 160-162).

Petitioner appealed the denial of relief and filed his petition for writ of certiorari on April 13, 2017. This return follows.

STATEMENT OF FACTS

The solicitor recited the following facts in support of the guilty plea:

... The first of these incidents that Mr. Livingston is pleading to occurred on February 17, 2005. Your Honor, on that date investigators with the West Columbia Police Department, along with the aid of a confidential informant, conducted a controlled purchase of crack cocaine from Mr. Livingston at **** H***** Street in the West Columbia area of Lexington County.

Your Honor, in exchange for \$40, the confidential informant received .34 grams of crack cocaine. This transaction was under continuous electronic surveillance by West Columbia investigators, and Livingston was recorded on video making this transaction.

The incident report indicates this transaction occurred within a one-half mile radius of Saluda River Elementary School, located at 1520 Duke Street in West Columbia.

Your Honor, then on March 12, 2005, once again involving West Columbia investigators and with the aid of a confidential informant, they conducted another controlled purchase of crack cocaine from Livingston, once again at the same location, **** H***** Street, West Columbia here in Lexington County.

At that time in exchange for \$40, the confidential informant received .29 grams of crack cocaine. Once again, this transaction was under continuous electronic surveillance.

This time, Your Honor, the informant identified Livingston in a photo lineup subsequent to the transaction. Once again, this occurred as mentioned previously within a half mile radius of Saluda River Elementary School.

Then, Your Honor, the offense that Mr. Livingston was actually going to be tried on this week occurred on February 27, 2008. Your Honor, on that date agents with S.L.E.D., with the aid once again of a confidential informant, conducted a controlled purchase of power cocaine from Mr. Livingston at Livingston's residence located at ****, Highway 6, in the Gaston area of Lexington County.

Your Honor, at that time in exchange for \$1,625, the informant received 228 grams of powder cocaine from Mr. Livingston. The \$1,625 constituted the first of four payments that were to be made to Mr. Livingston for the cocaine.

Mr. Livingston was essentially fronting six of the approximately eight ounces of cocaine involved in the transaction. This transaction was once again under continuous audio electronic surveillance by S.L.E.D. agents and an officer with the Lexington County Narcotics Enforcement Team.

Livingston was recorded also on video making this transaction. Your Honor, also present during the transaction were Livingston's two daughters, both of whom were eating in Livingston's kitchen where the purchase was taking place. At least one of the daughters was caught on video at that time, Your Honor.

A search warrant was executed at Livingston's residence on March 4, 2008. As a result of that search, S.L.E.D. agents and officers with the Lexington County N.E.T. team discovered \$10,751 in cash in a briefcase hidden above Livingston's closet.

None of this money was identified as the money that was used in the February 27th transaction. A Lexington County canine unit alerted on both the brief case and the currency.

After being Mirandized, Livingston was interviewed at S.L.E.D. headquarters. At that time he admitted his involvement in

dealing cocaine. Following the interview, Mr. Livingston was transported to L.C.D.C. for booking.

(App. pp. 13-16).

Judge Nicholson made specific inquiry of Petitioner to confirm those facts:

THE COURT: All right. Mr. Livingston, are those facts correct?

THE DEFENDANT: Yes, Sir.

THE COURT: Any of those facts you disagree with?

THE DEFENDANT: No, Sir.

(App. p. 16).

Petitioner's revocation was based solely on the fact that he had entered a guilty plea to the above charges. (See App. p. 27).

RELEVANT LAW

Standard of Review

"On certiorari in a PCR action, the Court applies the 'any evidence' standard of review." *Terry v. State*, 394 S.C. 62, 66, 714 S.E.2d 326, 328 (2011) (quoting *Cherry v. State*, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989)). The reviewing court "will affirm if any evidence of probative value in the record exists to support the findings of the PCR court." *Id.* See also *Holden v. State*, 393 S.C. 565, 573, 713 S.E.2d 611, 615 (2011) ("In reviewing the PCR judge's decision, an appellate court is concerned only with whether any evidence of probative value exists to support that decision.").

Ineffective Assistance Regarding Plea Offers

"The Sixth Amendment requires effective assistance of counsel at critical stages of a criminal proceeding." *Lafler v. Cooper*, 566 U.S. 156, 165 (2012). This includes advice on "the

plea-bargaining process.” *Id.*, at 162 (citing *Missouri v. Frye*, 566 U.S. 133 (2012)). To be entitled to relief, a convicted defendant must show ineffective assistance of counsel pursuant to the test in *Strickland v. Washington*, 466 U.S. 668, 673 (1984). *Id.* That is, he must show “counsel’s performance was deficient, and that the deficiency prejudiced the defense.” *Wiggins v. Smith*, 539 U.S. 510, 521 (2003) (citing *Strickland*, 466 U.S. at 673).

In particular, “[i]n the context of pleas a defendant must show the outcome of the plea process would have been different with competent advice.” *Lafler v. Cooper*, 566 U.S. at 163. Where the advice formed the basis for the convicted defendant to reject a plea offer, the convicted “defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea officer would have been presented to the Court (*i.e.*, that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer’s terms would have been less severe than under the judgment and sentence that in fact were imposed.” *Id.*, at 164.

The “strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case” applies equally to evaluation of counsel’s performance in the plea bargaining process. *Davie v. State*, 381 S.C. 601, 607, 675 S.E.2d 416, 419 (2009) (citing *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 596, *cert. denied*, — U.S. —, 128 S.Ct. 370, 169 L.Ed.2d 247 (2007)). “An attorney’s performance is not deficient if it is reasonable under professional norms.” *Dempsey v. State*, 363 S.C. 365, 369, 610 S.E.2d 812, 814 (2005) (citing *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989)).

A PCR “applicant has the burden of establishing his entitlement to relief by a

preponderance of the evidence.” Rule 71.1 (e), SCRCP.

When the questions presented are analyzed within the proper legal framework as outlined above, and in light of the record before the PCR court, the record well-supports relief was not warranted. There is probative evidence supporting the PCR judge’s determination Petitioner failed to demonstrate the necessary deficient performance and/or prejudice to be entitled to relief. The petition for writ of certiorari should be denied.

ARGUMENT

I.

There is probative evidence in the record supporting the PCR judge’s ruling denying a claim of ineffective assistance on failure to investigate and discover the fact that the confidential informant for certain offenses was deceased at the time of the plea bargain where the record shows that counsel was preparing another separate case for trial at the time the favorable bargain was struck and the charges involving the confidential informant who was deceased were merely rolled into the favorable plea deal.

The PCR judge credited plea counsel’s testimony that he would not have received the confidential informant’s name for those charges that Petitioner was not then going to trial upon. (App. p. 128; see also p. 97; p. 104). Though Petitioner testified at the PCR hearing that he knew who the informant was, he did not testify that he shared that with counsel. (See App. p. 128 n. 3; pp. 55-58; p. 60). However, Petitioner was in line to be tried on the separate trafficking charge. (App. p. 96). The PCR judge found “[c]ounsel had well-founded concerns that Applicant would be convicted during a jury trial” and since “Trafficking carried a far greater sentence exposure than the Distribution charges, Counsel noted that the inclusion of the two counts of Distribution had little practical effect in terms of sentence for Appellant.” (App. p. 128; see also pp. 18-21 and 100). In extra benefit to Petitioner, the judge also considered that the plea bargain included the dismissal of several other pending drug charges....” (App. p. 128; see also pp. 11-12). The

PCR judge reasoned: “Given the benefits of the plea deal, Counsel would have drastically affected his client’s sentence exposure had he insisted on going to trial and having the CI revealed.” (App. pp. 128-129). Further, the judge rejected Petitioner’s contention that if the CI was deceased no evidence of identification would have been available to the State. (App. p. 129). This was especially so where the State had both audio and video surveillance tapes from the two crimes. (App. p. 129; see also pp. 13-14). Moreover, the PCR judge concluded, “even if those two charges were not brought to trial, the other *nol proseed* charges could have been brought to trial.” (App. p. 129). Given these facts, the PCR judge reasoned counsel was not ineffective and Petitioner failed to show he would have refused to the generous plea deal. (App. p. 129).

The PCR judge credited counsel’s testimony, specifically about the protection of the CI name until such charges are to be called to trial, in considering Petitioner’s claim of ineffective assistance. (See App. p. 124 (PCR judge noting opportunity to “closely pass” on witness “credibility and weigh their testimony accordingly.”)). “This Court gives great deference to a PCR judge’s findings where matters of credibility are involved.” *Simuel v. State*, 390 S.C. 267, 270, 701 S.E.2d 738, 739 (2010) (citing *Drayton v. Evatt*, 312 S.C. 4, 11, 430 S.E.2d 517, 521 (1993)); *Lucero v. State*, 414 S.C. 238, 777 S.E.2d 409 (Ct.App. 2015) (review court will “give great deference to the PCR court’s findings of facts and conclusions of law”) (quoting *Porter v. State*, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006)). Moreover, counsel’s understanding is consistent with case law. See, e.g., *State v. Bernotas*, 277 S.C. 106, 109, 283 S.E.2d 580, 581 (1981) (“the State is privileged to withhold the names of informers” and “... disclosures should only be made when the informer’s identity would be relevant to the accused’s defense.”).

Additionally, Respondent would also submit Petitioner’s failure to share knowledge of

the CI's identity with counsel does not show ineffective assistance where counsel was prevented from otherwise discovering that fact without Petitioner's disclosure. *See Strickland v. Washington*, 466 U.S. 668, 691 (1984) ("The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant."). At any rate, it must be again noted that counsel was preparing the trafficking case – not the previous distribution cases – for trial when the plea opportunity occurred. (See App. p. 96).

In sum, though, the record fully supports the PCR judge's ruling. The petition for writ of certiorari should be denied as there is no cause to disturb the well-reasoned and well-supported ruling.

II.

There is probative evidence to support the PCR judge's decision to deny relief on a claim that counsel failed to properly advise on an entrapment defense or other defense where counsel correctly advised the facts of the case would not support the defense.

The PCR judge first reviewed the facts of the crime as recited at the plea, and also considered the Petitioner admitted the accuracy of those facts. (App. pp. 125-126; see also pp. 13-16). He then considered Petitioner's own testimony at the PCR hearing that he declined to sell the drugs at the house as the drugs were not of sufficient quality. Petitioner testified that he was returning the drugs to the CI. (App. p. 126; see also pp. 65-67; p. 69; p. 73; p.92). The PCR judge then considered trial counsel's testimony. The PCR judge found:

Counsel explained that the defense of entrapment would not be successful at trial. One problem with a defense of entrapment in Appellant's case was that when the Informant arrived informant mad his appearance under control of law enforcement officers. Because [Petitioner] had cocaine in his

house, under his dominion and control, prior to the informant approaching him under government surveillance, Counsel rightly had doubt that a jury would believe [Petitioner] had no predisposition to participate in drug activity but for the government inducement.”

(App. p. 127). He considered, in addition, counsel’s testimony he was concerned over Petitioner’s prior history of drug business and the fact that Petitioner had given a statement to investigating officers. (App. p. 127; p. 110 (plea counsel’s testimony concerning he was aware of the issue with drug history and predisposition as well as the fact Petitioner’s statement “would have come up”). Petitioner admitted at the PCR hearing that he gave not just a statement, but “a confession at SLED headquarters admitting that [he] was dealing cocaine.” (App. p. 87).

In light of the totality of these facts, and the case law on the defense of entrapment, (see App. p. 127 citing *U.S. v. McLaurin*, 764 F.3d 372 (4th Cir. 2014), the PCR judge found “Counsel’s assessment of the matter to be reasonable,” that further there was no reasonable probability the defense would likely have been accepted at trial. (App. p. 127).

The PCR judge was correct that there is no need for counsel to advise of a defense that appears unlikely to fit with the facts of the case. (See App. p. 128; see also p. 56 (plea counsel’s testimony at the PCR hearing not only did the facts not fit, the only benefit of the defense was a charge to the jury, and, on these facts, he was not likely to be able to convince a jury to acquit)). See *Arnette v. State*, 306 S.C. 556, 557–58, 413 S.E.2d 803, 804 (1992) (reversing grant of relief finding counsel ineffective in not advising defendant of defense of accident where facts of the case counsel not show the defendant was acting lawfully, and accident defense required a showing defendant was acting lawfully).

As there is probative evidence support the PCR judge’s decision, Petitioner has failed to show certiorari review is warranted. The petition should be denied.

III.

There is probative evidence of record to support the PCR judge's decision to deny relief on a claim that counsel had improperly advised of the possibility of a life without parole sentence when the record shows multiple offense which could have exposed Petitioner to a life sentence without the possibility of parole.

The PCR judge found that counsel's testimony on sentencing was not tied to the service of a notice of intent to seek life without parole, but rather as a global assessment of sentencing options facing Petitioner in light of his multiple drug offenses. (App. p. 129; see also pp. 100, 111 and 114-115 (plea counsel's testimony from the PCR hearing outlining multiple offenses and sentence exposure)). As the PCR judge found, "this was a legitimate concern." (App. p. 129). In fact, Petitioner's own testimony at the PCR hearing indicated his understanding of the possibility of a life sentence was based on his background of multiple drug offenses. (See App. p. 81). Moreover, Petitioner was constrained to admit on cross-examination that he was facing over 90 years on the plea charges, and had other offenses dismissed. (App. pp. 85-86; see also pp. 4-5 and 11-12).

As there is probative evidence support the PCR judge's decision, Petitioner has failed to show certiorari review is warranted. The petition should be denied.

IV.

There is probative evidence of record to support the PCR judge's decision to deny relief on a claim the probation revocation judge failed to advise of the right to counsel when the record shows, in the absence of specific advice, that Petitioner was aware of his right and understood the waiver of same.

The PCR judge agreed that the probation revocation judge's interaction with Petitioner on the question of whether he wished to proceed without counsel was brief. (App. p. 130-131; see also pp. 26-27). However, the probation revocation was "less than one month from his guilty plea," where he had admitted prior involvement with the criminal system, and Petitioner had

admitted sufficient education and understanding of his constitutional rights and the effect of a plea. (App. p. 131). Further still, the PCR judge considered Petitioner's testimony at the PCR hearing that had retained counsel for representation for all of his charges, indicating a specific understanding of his right to counsel. (App. p. 131).

The PCR judge concluded that the record demonstrates a sufficient understanding of the right to counsel. (App. p. 132). *See Salley v. State*, 306 S.C. 213, 215, 410 S.E.2d 921, 922 (1991) ("The requirements for waiving right to counsel in a probation revocation hearing are the same requirements as apply when a defendant desires to waive right to counsel in a trial" and "this Court will look to the record to discern whether there are facts to show the defendant had sufficient background or was apprised of his rights by some other source so as to constitute a knowing and intelligent waiver of the right to counsel."); *Bridwell v. State*, 306 S.C. 518, 519, 413 S.E.2d 30, 31 (1992) ("In the absence of a specific inquiry by the trial judge addressing the disadvantages of proceeding *pro se*, this Court will look to the record to determine whether petitioner had sufficient background or was apprised of his rights by some other source.").

Respondent also notes that Petitioner carefully avoided testifying in his direct examination at the PCR hearing as to whether he understood his right to counsel. Instead, he testified that the revocation judge failed to explain his right to counsel, and no one else informed him on the record, not even his probation agent. (See App. pp. 53-54). However, on cross-examination he admitted he understood he could have had an attorney if he had wanted on. (App. p. 90). That is consistent with his background. And, of particular note, Petitioner had retained counsel for his drug plea. (App. p. 90; see also p. 95 (plea counsel confirming Petitioner retained him)). Counsel would likely not have been appointed for an individually who was not indigent.

Lastly, though Petitioner testified he would not have pleaded guilty to the violation without counsel had he been advised of his right to counsel, (see App. p. 85), the assertion is simply not credible. The revocation was based solely on the fact of the counseled plea. (App. p. 132; see also p. 27). Not only was that fact not contested, he received concurrent terms. (App. p. 27 (revocation to run concurrent with “active sentence”). Petitioner wholly failed to show any prejudicial error. *See Weaver v. Massachusetts*, ___ U.S. ___, ___, 137 S. Ct. 1899, 1913 (2017) (what would be structural error on direct appeal does not support reversal in collateral proceedings absent proof of prejudice).

At any rate, the PCR judge reasonably found the record supported Petitioner did understand his right to counsel. As there is probative evidence support his decision, Petitioner has failed to show certiorari review is warranted. The petition should be denied.

CONCLUSION

For the reasons stated above, this Court should deny the petition for writ of certiorari.

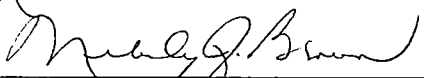
Respectfully submitted,

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

Post Office Box 11549
Columbia, South Carolina 29211
(803)734-6305

By: 

MELODY J. BROWN

SC Bar No. 14244

ATTORNEYS FOR RESPONDENT

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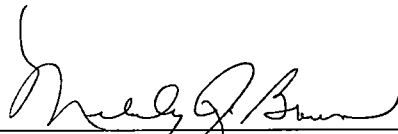
Appellate Case No. 2016-000823

PROOF OF SERVICE

I, Melody J. Brown, counsel for the Respondent, certify that I have served the within Return to Petition for Writ of Certiorari on the Petitioner by depositing two (2) copies of the same via U.S. mail, first class, postage prepaid to his attorney of record, Robert W. Mills, 1728 Main Street, Columbia, SC 29201

I further certify that all parties required by Rule to be served have been served.

This 14th day of August, 2017.



MELODY J. BROWN
Office of Attorney General
P. O. Box 11549
Columbia, South Carolina 29211
(803) 734-6305

ATTORNEY FOR RESPONDENT