STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Supreme Court County

Honorable John C. Hayes, Circuit Court Judge

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S.C. SUPREME COURT

THE STATE,

RESPONDENT,

V.

DEMETRICE ROOSEVELT JAMES,

PETITIONER

APPELLATE CASE NO 2017-000700

BRIEF OF PETITIONER

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ISSUE PRESENTED

Did the Court of Appeals err in affirming the trial judge's refusal to declare a mistrial when the foreman of the jury expressly and unequivocally admitted on the record that he and members of the jury discussed the testimony that had been presented before the State rested its case-in-chief, before Petitioner presented his defense, and before the trial judge charged the jury on the law and the judge refused to inquire about the nature of the premature deliberations, depriving Petitioner of his constitutional right to a fair trial?

STATEMENT

On February 13, 2013, the Richland County Grand Jury indicted Petitioner for murder, two counts of attempted murder, attempted armed robbery, and first degree burglary. On September 29, 2014, Petitioner proceeded to jury trial before the Honorable John C. Hayes, III. Anastasia Walker and Tracy Pinnock represented Petitioner at trial. Nicole Simpson and Meghan Walker prosecuted the case. The jury found Petitioner guilty of both counts of attempted murder, attempted armed robbery, and first degree burglary. The jury was unable to reach a verdict on the murder charge and Judge Hayes declared a mistrial on that charge.

Judge Hayes sentenced Petitioner to thirty (30) years concurrent for both counts of attempted murder and the first degree burglary and twenty (20) years concurrent for the attempted armed robbery charge. A timely notice of intent to appeal was filed and the direct appeal perfected. On January 11, 2017, the South Carolina Court of Appeals, in an unpublished opinion without oral argument, affirmed the convictions and sentence. The petition for rehearing was filed and then denied on February 23, 2017. A petition for writ of certiorari was filed on March 21, 2017. The State filed a return on April 20, 2017. On November 15, 2017, this Court granted the petition for writ of certiorari. This brief of petitioner follows.

ARGUMENT

The Court of Appeals erred in affirming the trial judge's refusal to declare a mistrial when the foreman of the jury expressly and unequivocally admitted on the record that he and members of the jury discussed the testimony that had been presented before the State rested its case-in-chief, before Petitioner presented his defense, and before the trial judge charged the jury on the law and the judge refused to inquire about the nature of the premature deliberations, depriving Petitioner of his constitutional right to a fair trial.

During the State's case-in-chief, a bailiff and the court coordinator informed the trial judge that they "both heard some conversations through the door" which "alerted [them] that there was some discussion regarding, if not the case, at least a witness." (R. p. 395, line 23 – p. 396, line 3). Prior to opening statements, the trial judge had instructed the jury:

> While you're on the jury, do not discuss the case among yourself or try to make up your mind until I instruct you to jointly deliberate and return a unanimous verdict. Prior to that time, you don't have all of the tools you need to make a fair and reasoned decision. Do not discuss the case. Do not try to make up your own mind until I tell you to jointly deliberate and return a unanimous verdict.

(R. p. 153, lines 16 – 24).

The judge advised the attorneys that based upon his reading of State v. Aldret, 333 S.C. 307, 509 S.E.2d 811 (1999), he intended to hear from the bailiff and the court coordinator about what they overheard and then bring the jurors in one at a time and question them about whether or not they could still be fair and impartial. (R. p. 396, lines 4-10).

Prior to the judge questioning the bailiff and the jury foreman, counsel for Petitioner asked, "And, Your Honor, are you going to ask the nature of the conversation?" (R. p. 397, lines 6-7). The judge answered, "I'm going to ask what was heard, and I'm not going to go into great detail. Well, I will get the foreman in and get him to give us some idea of what the conversation was. As I understand it from the bailiff, it had to do with the fact – well, I better not speculate. But I'll find

out from the foreman what was the nature. But as to my questioning, do you have any comments?" (R. p. 397, lines 8-14). Petitioner then moved for a mistrial. (R. p. 397, line 19 – p. 398, lines 1-14). The judge took the mistrial motion based on premature jury deliberations under advisement. (R. p. 399, line 18 – 25).

The bailiff informed the judge that the jurors "were discussing the two prisoners that came in." (R. p. 400, lines 11 – 12). The bailiff, however, "couldn't hear the rest of the discussion." (R. p. 400, lines 15 – 17).

The trial judge then called the foreman of the jury to the courtroom. The judge inquired:

> It's been reported to me that some of the staff that's been working with the jury overheard some of the jurors discussing the case yesterday. Particularly, they were discussing, it appears, something about some witnesses. Did any discussions in the jury room take place regarding this case?

(R. p. 401, line 24 – p. 402, line 4). The foreman responded, **"We're discussing the testimony that we've heard so far."** (R. p. 402, lines 5 – 6). (emphasis added).

After the jury foreman admitted that the jury had engaged in premature deliberations by discussing the testimony, the judge asked the foreman if he could still be impartial. (R. p. 402, lines 10-25). The foreman, not surprisingly, answered, "Yes. I think we can be impartial or I can; yes, sir." (R. p. 402, lines 19-20). The judge did not ask any further questions in regard to the nature of the improper discussions by the jury. Before the judge questioned the other jurors about their ability to remain impartial, Petitioner asked:

> If we could, before the next juror comes in. If I may, based on what Mr. Crowell said that they've been discussing the testimony that they've heard up to this point, would Your Honor be willing to ask them what they were talking about? Because there's been a lot of testimony from a lot of different people.

(R. p. 403, line 21 – p. 404, line 1). The judge refused to ask the jurors what testimony in particular they had been discussing. The judge stated:

> Well, we could be here 'til 12 – no, I'm not going to ask that. We have 13 people and two, three days almost of testimony, two full days. If they've been discussing it, we can assume they've discussed a little bit of all of it, and from my perspective I'm treating it as though they've been discussing everything. So – and I think if we bring them in and ask each one what they've been discussing, we'll be here 'til midnight tonight.

(R. p. 404, lines 2-9). The judge then noted, "So – but you're on the record as to that." (R. p. 404, line 11). The judge then questioned the remaining jurors about their ability to remain impartial. (R. pp. 404-416). The judge did not ask about the nature of the prior discussions.

After the judge questioned all of the jurors, Petitioner again moved for a mistrial. (R. p. 416, line 23 –p. 417, lines 1-20). Counsel argued:

> Your Honor, I think there are serious concerns with this jury's ability to follow instructions. They have already blatantly disregarded the order of the Court to not discuss this case and not deliberate. They have already been discussing this case without being instructed on the law. The foreman came forward and said they have been discussing, as we can assume, all the testimony that they've heard thus far. We are now on the fourth day of trial. I understand testimony only started on Tuesday, so we can assume that what's been going on to this point has already been a two-day conversation. Your Honor, that bell has already been rung. I don't think that the jury has the ability to forget that conversation and move on from here. I think that they have already violated the order of the Court and their oath. I have serious concerns with them being able to follow further orders from this Court, especially following instructions on the law at the end of this trial, and I think that it further violates my client's right to a fair trial and his due process rights. I have serious concerns about this jury's ability to follow instructions and to give my client a fair trial.

(R.p. 416, line 23 – p. 417, line 20). The judge denied the mistrial motion stating, "I deny the motion. I find that there's not any manifest necessity. I don't believe – the case law, the Aldret case, says it is up to the party alleging premature deliberations to establish prejudice. We're not alleging premature deliberation; we know there was premature deliberation. But I think the prejudice factor is still one that the Court must consider and the courts have set forth the procedure and – to voir dire

the jurors, as I have, and it says, 'If practicable, tailor a cautionary instruction to correct the ascertained damage.'"" (R. p. 417, line 23 – p. 418, lines 1-7). The trial judge could not have tailored a cautionary instruction without knowing the nature of the prior discussions.

Counsel for Petitioner responded, "Just without further information about what they were discussing, especially with Mr. – with the bailiff indicating that specifically what he heard was the two prisoners, that they were discussing that testimony in particular which were basically the two factual witnesses that have come in against my client, I believe the concern is without more information that I can only assume that they've formed opinions at this point." (R. p. 419, lines 5-12). The State also asked the trial judge to conduct additional inquiry. (R. p. 421, lines 1-19). The judge declined to conduct further inquiry. (R. p. 421, line 20 – p. 422, lines 1-3).

Counsel for Petitioner further stated, "Just very briefly, Your Honor, just for record purposes, of course, that I would like to put on the record that we've asked Your Honor to further inquire exactly what the discussions were and I know that Your Honor said that you just assumed that it was everything. I just would like to put on the record that you denied that we inquire further on that issue specifically." (R. p. 422, lines 6-12).

At the close of the State's case, counsel renewed her mistrial motion. Counsel contended:

> I don't believe we can get a fair trial at this point. I think the jury has violated the oath that they took when you swore them in on Monday or Tuesday. They started discussing the case before you instructed them on the law. I don't think it's too far to assume that they have formed opinions based on this.

(R. p. 508, lines 16 – 18). Counsel continued:

> However, based on the disregard of their previous order not to do that, I don't think it can be entrusted to them to follow any more of Your Honor's orders. They have shown us very clearly that they are not going to follow instructions. So I do think Mr. James is being denied a fair trial, and his due process rights are being violated because he cannot get a fair trial at this point.

(R. p. 509, lines 1 – 7). The trial judge, again, denied counsel's mistrial motion. (R. p. 509, lines 13 – 14). The trial judge erred in refusing to question the jurors about what they discussed during the premature deliberations. The trial judge's error prevented Petitioner from establishing prejudice.

The Sixth and Fourteenth Amendments to the United States Constitution guarantee a criminal defendant the right to a fair trial by an impartial jury. U.S. Const. amend. VI; U.S. Const. amend. XIV. A jury should not begin discussing the case, nor deciding the issues, until all the evidence has been introduced, the arguments of counsel complete, and the applicable law charged. State v. Joyner, 289 S.C. 436, 346 S.E.2d 711 (1986); State v. Gill, 273 S.C. 190, 255 S.E.2d 455 (1979). Premature deliberations may affect the fundamental fairness of a jury trial. State v. Aldret, 333 S.C. 307, 313, 509 S.E.2d 811, 814 (1999). In State v. McGuire, 272 S.C. 547, 552, 253 S.E.2d 103, 105 (1979), the South Carolina Supreme Court explained:

> The human mind is constituted such that when a juror declares himself, touching any controversy, he is apt to stand by his utterances to the other jurors in defiance of evidence. A fair trial is more likely if each juror keeps his own counsel until the appropriate time for deliberation.

The party moving for a mistrial based on premature deliberations must demonstrate prejudice to be entitled to a new trial. See State v. Aldret, 333 S.C. 307, 509 S.E.2d 811 (1999). In Aldret the South Carolina Supreme Court wrote:

> Accordingly, we hold the burden is on the party alleging premature deliberations to establish prejudice. Further, to assist the trial courts of this state, we set forth the following suggested procedure to follow in cases in which an allegation of premature deliberations arises.
>
> If such an allegation arises **during trial**, the trial court should conduct a hearing to ascertain if, in fact, such premature deliberations occurred, and if the deliberations were prejudicial. If requested by the moving party, the court may *voir dire* the jurors and, if practicable, "tailor a cautionary instruction to correct the ascertained damage." United States v. Resko, 3 F.3d at 695. If the trial

> court determines the deliberations were prejudicial, such findings should be set forth on the record, and a new trial ordered.

333 S.C. at 315, 509 S.E.2d at 815 (emphasis in original)(footnote #6 omitted).

The trial judge in the present case failed to follow the procedure outlined by this Court in Aldret. By refusing to question the jurors about the specific nature of the premature deliberations, the trial judge was unable to determine if the premature deliberations were prejudicial, as required by Aldret. Petitioner moved for the mistrial based on the premature deliberations and was required to demonstrate prejudice in order to be entitled to a new trial.[1] In order to demonstrate prejudice, Petitioner needed to know the nature of the premature deliberations and what the jury discussed. In refusing to question the jurors about what they discussed, the trial judge prevented Petitioner from establishing prejudice. The general questioning of the jury about their ability to remain impartial was insufficient without knowing what the discussions were about.

In United States v. Resko, 3 F.3d 684, 691 (3d Cir. 1993), a case very similar to the present case with regard to premature jury deliberations and cited by this Court in Aldret, the Third Circuit Court of Appeals wrote:

> We conclude that the district court erred by declining to engage in further inquiry-such as individualized voir dire-upon which it could have determined whether the jurors had maintained open minds. By failing to do so, the district court allowed the jurors, in effect, to be the judge of whether or not they had been influenced by their premature discussions. In this way, the district court effectively ceded to the jury its responsibility for determining whether or not the defendants would be prejudiced by the jurors' misconduct. Our holding comports with the approach of the First Circuit, which has specified that when jury misconduct (including improper intra-jury influences) has been alleged, the district court should: ascertain whether the misconduct actually occurred; if it did, determine whether it was prejudicial; and if there are no grounds for a new trial, specify the reasons it decided that misconduct did not occur, or occurred but was non-prejudicial. See United States v. Richman, 600 F.2d 286, 295 (1st Cir.1979).

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[1] The judge seemed to indicate that if the State moved for a mistrial, that the motion would be granted. (R. p. 421, lines 2-7).

In Resko a juror told a court officer that, despite the district court's instruction to the contrary, the jury had been discussing the case. Rather than conducting an individualized voir dire of the jurors, the district court "summoned the jurors en masse, informed them of the problem, and then gave each a written questionnaire" asking if they had discussed the facts of the case and if they had formed an opinion as to the guilt or innocence of the defendants. As to the first question, all twelve jurors answered, yes, they had participated in discussing the facts of the case with one or more jurors during trial. As to the second question, all twelve jurors answered, no, they had not formed an opinion about the guilt or non-guilt of either defendant as a result of the discussions with other jurors. The Third Circuit Court of Appeals found the questionnaire insufficient.

In the present case, the general questioning of the jurors about their ability to remain impartial was insufficient without further inquiry as to the nature of the premature deliberations, as requested. The judge asked the individual jurors three general questions: 1.) Would the discussions that took place affect your ability to be fair and impartial to Mr. James?; 2.) Would you be prejudiced against Mr. James based on the discussions that have taken place?; and 3.) Would you be able, at the end of the trial, to take all the evidence and the law that I charge you at the time and return a fair and impartial verdict? (R. pp. 404-416). The questioning of the jurors in the present case was insufficient for the judge to determine prejudice. As noted by the Ninth Circuit Court of Appeals in a pre-trial publicity case, "We agree with the language of the en banc majority in United States ex rel. Bloeth v. Denno, 313 F.2d 364 (2d Cir.), cert. denied, 372 U.S. 978, 83 S.Ct. 1112, 10 L.Ed.2d 143 (1963) that in the absence of an examination designed to elicit answers which provide an objective basis for the court's evaluation, 'merely going through the form of obtaining jurors' assurances of impartiality is insufficient (to test that

impartiality).' 313 F.2d at 372." Silverthorne v. United States, 400 F.2d 627, 638 (9th Cir. 1968).

The general questioning in the present case was insufficient in the same way the questionnaire in Resko was insufficient. The trial judge abandoned his responsibility to determine if the prior discussions were prejudicial by refusing to question the jurors about the specific nature of the discussions. As noted by the Third Circuit Court of Appeals in Resko, "By failing to do so, the district court allowed the jurors, in effect, to be the judge of whether or not they had been influenced by their premature discussions. In this way, the district court effectively ceded to the jury its responsibility for determining whether or not the defendants would be prejudiced by the jurors' misconduct." 3 F.3d at 691.

As in Resko, neither the trial judge nor the Court of Appeals knew the nature of the prior discussions. Without knowing the nature of the discussions, the trial judge could not determine prejudice. The appellate court cannot review the trial court's finding of no prejudice resulting from the prior discussions without a record of the specific nature of the prior discussions. When asked to question the jurors about the specific nature of the prior discussions, the judge refused. Asking the jurors if they were prejudiced against Petitioner as a result of the prior discussions, without knowing the nature of the discussions, is not sufficient. While the bailiff advised that the jurors were discussing the "two prisoners" who came in and this may have been a reference to State's witnesses who testified against Petitioner, Jwaun Duckett and Vincent Nelson, there is no other information in regard to the discussions or what additionally may have been discussed. As to the lack of information about the premature deliberations in Resko, the Third Circuit Court of Appeals wrote:

> We simply have no way to know the nature of the jurors' discussions and whether these discussions in fact resulted in prejudice to the defendants. We appreciate the

> discretion that is generally afforded the district court in these situations and its superior ability to assess the jury's demeanor. However, the absence of information and the consequent inability of the district court meaningfully to assess the nature and extent of the jurors' premature discussions in order to ascertain whether there has been any prejudice to the defendants creates a highly problematic situation.
>
> Simply put, the questionnaire raised more questions than it answered. Based on the results of the questionnaire, we know that every juror engaged in premature discussions. Yet there is no way to know the nature of those discussions-whether they involved merely brief and inconsequential conversations about minor matters or whether they involved full-blown discussions of the defendants' guilt or innocence. The government asserts that the jurors were only discussing the facts of the case and not the guilt or innocence of the defendants. Yet the very crux of the problem here is that neither we nor the district court know anything about the nature of the jurors' discussions.

3 F.3d at 690–91.

The Third Circuit Court of Appeals distinguished Resko from United States v. Clapps, 732 F.2d 1148 (3d Cir.1984) and United States v. Pantone, 609 F.2d 675 (3d Cir.1979). In Clapps and Pantone the Third Circuit found that the district court did not abuse its discretion in refusing to grant a mistrial based on premature jury deliberations. In both cases, the district court judge and the appellate court knew the nature of the premature deliberations. In Resko and the present case neither the trial court nor the appellate knew the nature of the prior discussions. The trial judge in the present case erred in refusing to question the jurors about the specific nature of the prior discussions.

In affirming Petitioner's convictions the South Carolina Court of Appeals found that Petitioner failed to demonstrate prejudice writing:

> As to whether the trial court erred in refusing to grant a mistrial after the jury engaged in premature deliberations: State v. Harris, 340 S.C. 59, 63, 530 S.E.2d 626, 627–28 (2000) ("The granting or refusing of a motion for a mistrial lies within the sound discretion of the trial court and its ruling will not be disturbed on appeal absent an abuse of discretion amounting to an error of law."); State v. Aldret, 333 S.C. 307, 313, 509 S.E.2d 811, 814 (1999) (finding in cases in which a jury prematurely deliberates without an invitation to do so by the trial court, the

> defendant must demonstrate he or she was prejudiced by the premature deliberations in order to be entitled to a new trial); id. at 315, 509 S.E.2d at 815 ("If such an allegation arises **during trial**, the trial court should conduct a hearing to ascertain if, in fact, such premature deliberations occurred, and if the deliberations were prejudicial. If requested by the moving party, the court may *voir dire* the jurors and, if practicable, 'tailor a cautionary instruction to correct the ascertained damage.' " (footnote omitted) (quoting United States v. Resko, 3 F.3d 684, 695 (3d Cir. 1993))).

State v. James, Op. no. 2017-UP-028 (S.C. Ct. App. Jan. 11, 2017)(App. pp. 1 – 2).

Based on the holding by the Court of Appeals that Petitioner failed to demonstrate prejudice, Petitioner submits that under the specific facts of this case, he should not have to demonstrate prejudice. Petitioner was prevented from demonstrating prejudice stemming from the premature jury deliberations by the trial judge's refusal to question the jurors about the nature of the premature deliberations. Upon learning of premature jury deliberations, Aldret directs the trial judge to determine if the deliberations were prejudicial. The trial judge's questions in the present case, like the questionnaire in Resko, were insufficient to determine prejudice.

As to showing prejudice, the Court in Resko wrote:

> Although ordinarily a defendant must establish prejudice before a new trial will be ordered, in the circumstances here, in which there is unequivocal proof of jury misconduct discovered mid-trial coupled with a failure by the district court to evaluate the nature of the jury misconduct or the existence of prejudice, we conclude that a new trial is warranted. Given the importance of the Sixth Amendment rights at stake and the relative ease with which the district court here could have properly assessed the impact of the jury misconduct, it would be unfair to penalize the defendants for the lack of evidence of prejudice. We are thus willing, in these limited circumstances, to carve out an exception to the rule that a defendant must demonstrate prejudice before a new trial is warranted.

In the present case, as in Resko, there was unequivocal proof of juror misconduct in the form of premature deliberations. The judge failed to evaluate the nature of the jury misconduct as requested by counsel for Petitioner. The judge could not have evaluated the existence of prejudice, as required by Aldret, without knowing the nature of the jury's discussions. The trial

judge could not have tailored a cautionary instruction without knowing the nature of the prior discussions. As the trial judge in the present case prevented Petitioner from showing prejudice by failing to inquire about the nature of the premature deliberations, this Court should not require Petitioner to show prejudice in order to grant a new trial.

In United States v. Zimny, 846 F.3d 458 (1st Cir. 2017), the district court refused to question all of the jurors after learning that two jurors posted about the trial on a blog. Juror No. 8 admitted posting comments on a blog but testified it was only after she had been dismissed from jury service due to illness. Juror No. 8 claimed that she had not discussed the blog with other jurors. The blog contained extremely negative comments about the defendant. The following was also posted anonymously on the blog:

> Boy this is getting comical. I've been following it on and off, and was also on the jury. Mama June, and those who were there know what I'm talking about, was spouting about the "shots in the dark" blog since day one. Its [sic] why she conveniently got 'sick' and didn't finish her service. Several other jurors told her to stfu and got annoyed. '[I]diot' doesent [sic] describe the half of it.

846 F.3d at 464 (footnotes #5 and #6 omitted). The First Circuit Court of Appeals found that the district court failed to adequately investigate potential juror misconduct in Juror No. 8, contrary to her testimony, discussing the blog with other jurors. The First Circuit, however, did not grant a new trial. Instead, the First Circuit remanded the case for further investigation. In Resko the Third Circuit addressed the difficulty with a remand writing:

> We nonetheless believe that we must vacate and remand for retrial. We do not remand for further investigation into prejudice to the defendants because it is over a year since the trial occurred, and it would be extremely difficult for the district court to now reassemble the jury in order to inquire further into whether the jurors were influenced by their premature discussions. Given the passage of time, a juror may no longer recall what his or her state of mind was before the conclusion of the trial. While we consider the need to order a new trial unfortunate, we do not anticipate that these circumstances, to which our holding is limited,[10] will recur. We are confident that district courts will be careful to explore more fully the

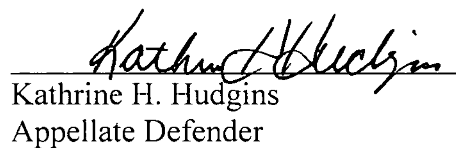
ramifications of such situations should they arise again.

3 F.3d at 695.

In the present case the trial was held over three years ago making a remand to determine the specific nature of the prior discussions very difficult if not impossible. Under the narrow facts of this case where the trial judge was unable to determine prejudice, as required by Aldret, because he refused to question the jurors about the specific nature of the prior discussions, Petitioner is entitled to a new trial.

CONCLUSION

Based on the above argument, this Court should reverse the conviction and sentence and remand for a new trial.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 15th day of December, 2017.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Richland County

Honorable John C. Hayes, Circuit Court Judge

THE STATE,

RESPONDENT,

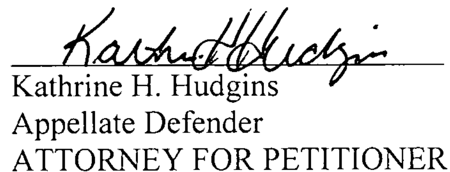
V.

DEMETRICE ROOSEVELT JAMES,

PETITIONER

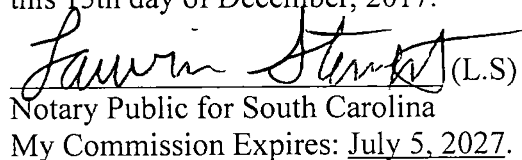
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Brief of Petitioner in the above referenced case has been served upon V. Henry Gunter, Jr., Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Brief of Petitioner has been served on Demetrice R. James, #361608, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 15th day of December, 2017.



Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me this 15th day of December, 2017.


(L.S)

Notary Public for South Carolina
My Commission Expires: July 5, 2027.