

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Williamsburg County
George C. James, Jr., Circuit Court Judge

Appellate Case No. 2017-001243

DENNIS WRIGHT,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

**RETURN TO PETITION FOR WRIT OF CERTIORARI
PURSUANT TO AUSTIN V. STATE**

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S.C. SUPREME COURT

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RESPONDENT'S ISSUES PRESENTED

- I.** Whether probative evidence supports the PCR court's finding that Trial Counsel articulated a valid trial strategy in choosing not to cross-examine the victim at trial and that Petitioner failed to prove any resulting prejudice.

- II.** Whether the PCR court properly found Trial Counsel was not ineffective where Petitioner failed to present credible evidence that counsel was deficient for failing to investigate the possibility of dementia in the victim and that he was prejudiced by the failure to investigate.

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Williamsburg County Clerk of Court. The Williamsburg County Grand Jury indicted Petitioner at the July 2009 term for criminal sexual conduct, first degree and abuse of a vulnerable adult (2009-GS-45-199). The charges arose from an incident in February of 2009, when Petitioner was living with the victim, Azalee Mouzon, an elderly woman who required the services of a caregiver. Petitioner was a friend of the victim's grandson and had lived with the victim for a few months acting as her caregiver and assisting her with daily tasks and medical care. App. 66-68.

On the evening of February 19, 2009, Petitioner asked the elderly victim to rub his back. After she finished and attempted to leave, Petitioner grabbed her and pulled her back to kiss her and then demanded she perform oral sex on him. App. 50-51; 127. When the victim struggled to get away from him, Petitioner pulled her down to the foot of the bed and bent her legs up. App. 50-51. Petitioner then anally raped the victim while bending her feet back to her head. App. 52-53. After the elderly victim told Petitioner he was hurting her, Petitioner took the victim to the floor. She was able to get away from him and get to the bathroom. App. 54-56.

Charles David Barr, Esquire, represented Petitioner on the charges. Assistant Solicitor Kimberly Barr, Esquire, prosecuted the case. On October 14, 2010, Petitioner pled guilty as indicted to both charges before the Honorable Clifton Newman. Judge Newman sentenced Petitioner to twenty years' imprisonment for criminal sexual conduct and five years for abuse of a vulnerable adult. The sentences run concurrently.

A timely notice of appeal was filed. The South Carolina Court of Appeals affirmed Petitioner's convictions and sentences, finding the trial court did not err in denying Petitioner's motion for a directed verdict because the State presented evidence of the required elements of

first degree criminal sexual conduct, and that the trial court did not err in allowing the doctor to testify to his impressions regarding the witness. State v. Wright, Op. No. 2012-UP-408 (S.C. Ct. App. filed July 11, 2012). The Remittitur was sent on July 27, 2012.

2012-CP-45-0403

Petitioner filed an application for post-conviction relief (PCR) on July 21, 2012, alleging he was being held in custody unlawfully based on the following allegations:

1. Prosecutorial Misconduct
 - a. Solicitor vouched for witness stating: "At her age 90 years-old, because this is the down side of her life. She is preparing herself one day to meet her maker. You mean to tell me the same God that she is going to see in Heaven, she is going to put her hand on the Bible and swear to him and lie about that."
2. Ineffective assistance of counsel
 - a. "Counsel failed to object to improper vouching as to bring in religion to prove a fact there by failing to preserve for Appellate Court review. This is a violation of defendants 6th and 14th admendment (sic) rights."
 - b. "Failed to call expert witness. Neg DNA based on witness testimony DNA testing would have shown nothing happened. DNA expert needed to explain to Jury this also being a violation of defendants 6th and 14th admendments (sic) rights."

On September 19, 2013, PCR Counsel filed an amended application on Petitioner's behalf. In this amended application, Petitioner alleged the following allegations:

1. Ineffective Assistance of Counsel
 - a. Failing to review discovery and explain complete discovery materials
 - b. Failure to conduct an independent investigation in the case
 - c. Failure to question witnesses whose testimony was vital to clients defense.

An evidentiary hearing on the matter was convened on April 13, 2015, at the Sumter County Courthouse before the Honorable George C. James, Jr. Petitioner was present at the hearing and was represented by Casey Cornwell, Esquire. Respondent was represented by

Assistant Attorney General Daniel Gourley of the South Carolina Attorney General's office. Judge James denied Petitioner's application for post-conviction relief on June 26, 2015.

On November 23, 2015, Petitioner filed a *pro se* notice of intent to appeal Judge James's Order of Dismissal. After Petitioner's attorney failed to provide proof that the notice of appeal was timely served, the Supreme Court of South Carolina dismissed Petitioner's appeal on March 1, 2016. Petitioner filed a motion for reconsideration and a motion to appoint new counsel. Both motions were denied on June 15, 2016. The Remittitur was issued on June 15, 2016.

2016-CP-45-00292

Petitioner filed his second application for post-conviction relief on July 1, 2016 (2016-CP-45-00292). In his application, Petitioner alleged that he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of PCR Counsel
 - a. "PCR counsel failed to file the 59(e), upon the judge's Order of Dismissal. Applicant expressed to his PCR counsel thru letters dated May 26, 2015 that he wanted PCR counsel to file the Rule 59(e) (Exhibit 1) against the Order of Dismissal, so all of Applicant's issues would be preserved. Applicant also sent several letters to PCR Counsel to Amend his PCR application, which PCR Counsel never amended Applicant application. See Exhibits (Exhibit 2 & 3). This is in violation of his rights to due process of law and effective assistance of Counsel. See Austin v. State, 305 S.C. 453; 409 S.E.2d 395 (1991)."

Respondent filed it Return and Partial Motion to Dismiss on March 3, 2017, requesting an evidentiary hearing be convened solely on the issue of whether Petitioner was entitled to an appellate review of his first post-conviction relief action pursuant to Austin. A hearing was held on March 27, 2017, before the Honorable D. Craig Brown at the Sumter County Courthouse. Petitioner was present and represented by Lance S. Boozer, Esquire. Assistant Attorney General Julie A. Coleman of the South Carolina Attorney General's Office represented Respondent.

At the outset of the evidentiary hearing, Respondent renewed its Motion to Dismiss All Claims Beyond Austin Review of the First PCR. Judge Brown granted the motion and the hearing proceeded on the claim of Austin relief. Respondent then indicated to Judge Brown that the State consented to the grant of Austin relief.

Following the hearing, Judge Brown issued a “Consent Order Granting an Appeal Pursuant to Austin v. State,” signed on April 7, 2017, and filed on May 4, 2017, denying and dismissing the application with prejudice and granting an appeal of Petitioner’s original PCR application, 2012-CP-45-0403, pursuant to Austin.

Petitioner filed a timely Notice of Appeal on May 31, 2017. Petitioner’s Appendix, Petition for Writ of Certiorari, and Petition for Writ of Certiorari Pursuant to Austin v. State were filed on October 24, 2017. This Return to the Petition for Writ of Certiorari Pursuant to Austin v. State follows.

STANDARD OF REVIEW

The post-conviction relief court's findings of fact and conclusions of law receive great deference during appellate review. Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000). The proper standard of review of a post-conviction relief evidentiary hearing is whether "any evidence of probative value" exists to sustain the post-conviction relief judge's findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). In a post-conviction relief proceeding, the petitioner bears the burden of proving the allegations in his or her application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

In a post-conviction relief action, the applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRPC; Butler, at 441, 334 S.E.2d at 814. Where ineffective assistance of counsel is alleged as a ground for 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 v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. at 442, 334 S.E.2d at 814. The applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625.

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance

must have prejudiced the applicant such that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

ARGUMENT

I. Probative evidence supports the PCR court's finding that Trial Counsel was not ineffective for failing to cross-examine the victim at trial where he articulated a valid trial strategy in choosing not to do so.

Petitioner argues the PCR court erred in finding Trial Counsel was not ineffective for failing to cross-examine the victim at trial. However, this issue is meritless, as probative evidence supports the PCR court's ruling that Trial Counsel articulated a valid trial strategy in choosing not to cross-examine the victim and that Petitioner failed to present any credible evidence that he was prejudiced by Trial Counsel's decision.

At trial, the State presented testimony from Azalee Mouzon, the elderly victim who was raped by Petitioner while he served as her caregiver. Her testimony included a detailed account of the event in question, as well as an explanation of how she knew Petitioner and how he came to live with her as her caregiver. App. 44-61. Trial Counsel did not ask her any questions on cross-examination. App. 61. As part of his closing argument, Trial Counsel argued to the jury that the victim seemed to have memory issues, pointing out the testimony that her own children and grandchildren did not believe her accusations of rape when she first told them. Trial Counsel argued:

I genuinely believe with every ounce of energy in me, that if any of them thought that allegation was true, Dennis would have been gone. And I might have been running behind him with my gun...And I wouldn't say, continue living in the grandmother's house because nobody believes it. Nobody took her serious. So whatever happened, it is to the extension that even the nine children wherever they are, didn't believe it, because certainly he didn't believe it. If they had believed it, they would have called someone and said look, this man down here raped my mom. Or raped by (sic) grandmother. Come get him. But that didn't happen.

App. 347-48. Trial Counsel then argued that the victim could not even recall the exact date she was raped:

The indictment says sometime between February 19th and February 20th. Well my lord, if somebody raped you, you ought to be at least be able to get the date right. Officer Lail testified that she told me that it happened on the 19th. The officer got on the witness stand yesterday and in his own statement, in one statement on two different dates. Now if I got a rape, I ought to at least know whether or not it happened on the 19th, 20th, or the 21st.

App. 348. He further pointed out the fact that the victim was never taken to the doctor and she showed no physical evidence of rape. App. 349.

At the evidentiary hearing, Trial Counsel testified that the victim's testimony at trial was "powerful." App. 440, line 9-11. Trial Counsel explained why he did not cross-examine the victim:

Q: I noticed you didn't cross examine the victim in this case. Is there any specific reason?

A: Yes, sir. I most certainly. I did not cross examine her, because I felt like given her direct testimony, she had been very persuasive. I didn't see where there were inconsistencies in her testimony. I had a statement that she had given previously. She did not contradict herself on the witness stand. She didn't contradict herself on the witness stand. She did not contradict herself by any prior inconsistent statement. She was very, she was emotional. She testified in detail to a description of how she claimed Mr. Wright forcible raped her. I wanted – I was glad to see her go.

App. 440, line 12-25. When asked about the issue again later in the hearing, Trial Counsel testified:

Q: Now Ms. Azalee, you had some, one of you – the thrust of your defense was that she had problems with recall. Was there a reason why you didn't cross examine her to try to flesh that out?

A: Yes, sir.

Q: And why was that?

A: Well just because you have a notion in a trial that there is a possibility that something might happen, that don't mean that you always run the risk. Because it's been my experience that 9 times out of 10, when you open up a can that you don't know what in it, you wind up getting hurt by it. Now if I was going to make an error, I was going to error on the side of where I knew I was, as opposed to

allowing something to come up that would have caused me more harm or done more damage than good. And under the circumstances, I just, as I said, I saw no reason to think that in keeping her on the witness stand any longer than she has been on there, would have been helpful for us.

And if I'm not mistaken, I believe I may have argued that to the jury in terms of one of the reasons why we chose not to cross examine the alleged victim. The thing about it from a trial standpoint, in a lot of instances when the State has put up a good witness, and you know that they have put up a good witness, and you can feel where you are in the trial. You know they put up a good witness, you can get more evidence in, regarding that witness and that witness' testimony, by closing. And sometimes I must say to the extent that the solicitor allows you to go a little further than you ordinarily or the rules require you to go, that's just, you know, that just taking advantage of what you've got in a situation and trying to use it to the best of your ability. There's a lot of it is just calculation.

App. 447 line 21 – 449 line 8.

The PCR court found Trial Counsel was not ineffective for failing to cross-examine the victim because he articulated a valid trial strategy in choosing not to do so. In its order, the PCR court held:

Trial Counsel testified that he decided not to cross-examine the Victim because her testimony was so powerful and because she was so persuasive, emotional, detailed, and consistent with her prior statements. Trial Counsel explained that in his opinions, the best way to attack such a strong witness is to wait until closing argument. This Court has reviewed the Victim's trial testimony and finds Trial Counsel's assessment and decision to be a valid and appropriate decision based on the dynamics of the trial as he reasonably saw them at the time.

App. 484. Based on this testimony, the PCR court found Trial Counsel was not deficient because he articulated a valid trial strategy.

Strickland requires that trial counsel must be given leeway to make reasonable strategic decisions. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Strickland v. Washington, 466 U.S. 668, 688-689 (1984). "Representation is an art, and an act or omission that is unprofessional in one

case may be sound or even brilliant in another.” Id. at 691. Therefore, judicial scrutiny of counsel’s performance must be highly deferential. Id. at 689. Where counsel articulates a valid strategic reason for his action or inaction, counsel’s performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). Courts must be wary of second guessing counsel’s trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992).

Trial Counsel’s testimony is clearly probative evidence supporting the PCR court’s ruling. His strategy was valid under reasonable professional norms, and he employed his strategy to attack the victim’s credibility through cross-examination of other witnesses and in his closing argument. Accordingly, because Trial Counsel articulated a valid trial strategy and attacked the victim’s credibility in other ways throughout the trial, particularly in his closing argument, he cannot be deficient for choosing not to cross-examine the victim at trial.

Furthermore, the PCR court held in its order that Petitioner “failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland – that he was prejudiced by Trial Counsel’s performance.” App. 484 - 485. Petitioner showed no specific testimony that could have been presented to the jury if Trial Counsel had cross-examined the victim. Petitioner now speculates that there is a reasonable probability the jury’s verdict would have been different if they had seen some lack of memory or evidence of dementia, but has failed to prove that lack of memory or evidence of dementia would have been brought out if she had been cross-examined. Trial Counsel credibly testified¹ that the victim’s testimony was powerful, detailed, emotional, and did not contradict any prior

¹ The PCR court made a finding in its order that Trial Counsel’s testimony was credible. App. 480.

statements. Absent a showing that the victim would have testified or behaved in any other manner on cross-examination, this Court cannot speculate that any cross-examination would have changed the outcome of the trial. Therefore, Petitioner can show no prejudice from Trial Counsel's decision not to cross-examine the victim.

Based on the evidence above, the PCR court properly found Petitioner failed to prove either prong of the Strickland test. Because the PCR court's holding was properly based on the probative evidence presented, its ruling should be affirmed.

II. The PCR court correctly found Trial Counsel was not ineffective for failing to investigate the possibility of the victim suffering from dementia where Petitioner failed to present evidence to prove the victim actually suffered from dementia, thus failing to prove deficiency or prejudice.

Petitioner alleges the PCR court erred in finding Trial Counsel was not ineffective for failing to investigate the possibility that the victim suffered from dementia. However, Petitioner failed to present any evidence that the victim did suffer from dementia or that Trial Counsel would have discovered any proof of dementia if he had investigated further. Therefore, the Trial Counsel cannot be ineffective, and the PCR court's finding should be upheld.

At trial, Trial Counsel argued to the jury that the victim was not credible because of her advanced age and related memory recall struggles. App. 346-348. There was no mention at trial that the victim suffered from dementia.² Dr. Kenneth Faile testified at trial as an expert in the field of family medicine. App. 112. Dr. Faile testified that he had been the victim's family medicine physician for about eight or nine years, since April of 2002. He stated that Ms. Mouzon suffered from physical ailments such as high blood pressure, arthritis, occasional sinus infections, some anxiety, and occasional back, leg, and hip pain. App. 114. He did not testify about any history of mental illness such as dementia.

Dr. Faile testified that the victim came to see him in March of 2009 and told him she had been raped. App. 130. He stated that, during the more than fifty times he treated her and on that specific date, she was able to answer his questions appropriately, she seemed to understand what he was saying, and he could understand what she was saying. App. 130. When asked if he had enough time since 2003 to develop an opinion about her ability to remember certain facts and her

² The only reference to dementia in the trial record was in Petitioner's voluntary statement to law enforcement, when he stated in an inadmissible hearsay statement that "[t]he nurse just said something this morning. [The victim] seemed like she had dementia." App. 145, line 21-23. This portion of the statement was not presented to the jury at trial.

thought process in March of 2009, Dr. Faile testified that he had, and “She was very clear spoken. Very easy to understand her. When I asked the medical questions she gave real good answers.” App. 131, line 9-11. Dr. Faile also gave a statement to an investigator on April 3, 2009, stating that the victim’s “thought process, her ability to recall facts, her ability to articulate seemed normal and appropriate for her.” App. 132, line 19-22.

Petitioner claimed at the evidentiary hearing that the victim had suffered from dementia since 2002, but he never discussed this with Trial Counsel. App. 429. Trial Counsel testified that he did not investigate whether the victim suffered from dementia “beyond the witnesses that were familiar with her” because “the women (sic) didn’t appear to have any dementia to me.” App. 451, line 18-24. He stated that he was not aware of any past allegations that she suffered from any dementia. App. 452, line 2-3.

In its order, the PCR court held Trial Counsel was not ineffective for failing to investigate this issue because Petitioner failed to prove Trial Counsel was deficient for not doing so or that his failure to do so prejudiced him. App. 487. Specifically, the PCR court noted Trial Counsel examined witness Gloria Hannah at trial about the victim’s ability to recall details of the events. App. 487. The PCR court further held Petitioner failed to prove prejudice under Strickland because he presented “no credible evidence to support his allegation that the Victim actually suffered from dementia.” App. 487. The PCR court cited to Skeen v. State, 325 S.C. 210, 481 S.E.2d 129 (1997), in which this Court held the applicant was not entitled to post-conviction relief where no evidence was presented at the PCR hearing to show how additional preparation would have had any possible effect on the result of the trial.

“[C]riminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation

of the facts and circumstances of the case.” Walker v. State, 397 S.C. 226, 235, 723 S.E.2d 610, 615 (Ct. App. 2012) (reversed on other grounds by Walker v. State, 407 S.C. 400, 756 S.E.2d 144 (2014)). Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to result. Porter v. State, 368 S.C. 378, 385-86, 629 S.E.2d 353, 357 (2006) (citing Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998)). In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.” Wiggins v. Smith, 539 U.S. 510, 521-22 (2003).

Trial Counsel credibly testified he was not aware of any allegations of dementia against the victim, and she did not appear to him to have dementia. Although Petitioner accused the victim at the evidentiary hearing of having dementia, he admitted that he never spoke to Trial Counsel about the issue or told him to investigate it. Under these circumstances, there was no reason for Trial Counsel to investigate this issue any further than he already had. Counsel had already spoken to the victim's family members and apparently did not see any reason to pursue any further search into her medical history. Trial Counsel's actions were reasonable under the circumstances, and he should not be found deficient for failing to explore an issue that did not arise until the PCR hearing. Most importantly, Petitioner did not present any evidence that any further investigation by Trial Counsel would have been fruitful or would have changed the outcome of the trial. Notably, the testimony at trial from Dr. Faile contradicted any potential allegations of dementia and showed the jury that the victim's ability to recall facts and articulate seemed “normal and appropriate for her.” This evidence strongly cuts an argument that the victim suffered from dementia and shows it was unlikely that Trial Counsel could have found

evidence of dementia by investigating further. Accordingly, Petitioner cannot meet his burden of proving either prong of the Strickland test.

The testimony presented and the lack of evidence that would support the accusation that the victim suffered from dementia support the PCR court's holding that counsel was not deficient for failing to investigate and that Petitioner was not prejudiced by the failure to investigate. Therefore, the PCR court's findings should be affirmed.

CONCLUSION

For the foregoing reasons, this Court should deny the Petition for Writ of Certiorari. Should this Court grant the Petition for Writ of Certiorari, Respondent requests permission to more fully brief the issues herein.

Respectfully submitted,

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By: 
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March 14, 2018

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Williamsburg County

The Honorable George C. James, Circuit Court Judge

DENNIS WRIGHT, #343201

Petitioner,

STATE OF SOUTH CAROLINA

Respondent.

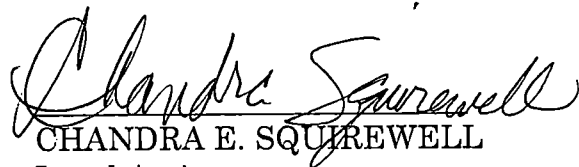
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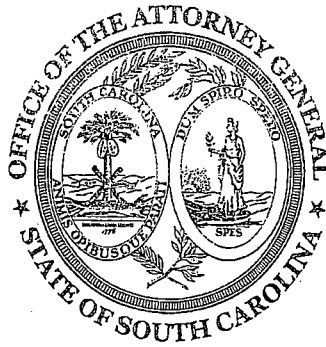
I, CHANDRA E. SQUIREWELL, certify that I have served the Return to Petition for Writ of Certiorari on opposing counsel by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

LaNelle C. DuRant, Esquire
Post Office Box 11589
Columbia, SC 29211

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

This 14TH day of March 2018.


CHANDRA E. SQUIREWELL
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ALAN WILSON
ATTORNEY GENERAL

RECEIVED

MAR 14 2018

S.C. SUPREME COURT

March 14, 2018

The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

Re: **Dennis Wright v. State of South Carolina**
Appellate Case No. 2017-001243
Lower Court Case No. 2016-CP-45-0292

Dear Mr. Shearouse:

I am in receipt of the Petition for Writ of Certiorari in the above-captioned case which has been filed pursuant to Austin v. State, 305 S.C. 453, 246 S.E.2d 295 (1991). Respondent does not oppose the Petition, as it consented to Austin relief at the evidentiary hearing before the Honorable D. Craig Brown. Please accept this letter in lieu of a formal brief.

I am also in receipt of the Petition for Writ of Certiorari Pursuant to Austin v. State. I am enclosing the original and six (6) copies of the Return to Petition for Writ of Certiorari Pursuant to Austin v. State.

Sincerely,

Julie A. Coleman
Assistant Attorney General

JAC:ces
Enclosures

cc: LaNelle C. DuRant, Esquire
Trisha Allen, Victim Services (letter only)