

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

 ORIGINAL

Certiorari to Supreme Court County

Honorable Clifton Newman, Circuit Court Judge

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S.C. SUPREME COURT

THE STATE,

RESPONDENT,

V.

JO PRADUBSRI,

PETITIONER

APPELLATE CASE NO 2017-002061

BRIEF OF PETITIONER

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ISSUE PRESENTED

The Court of Appeals erred in affirming petitioner's convictions by upholding the trial judge's erroneous ruling that reasonable suspicion existed to justify a traffic stop of petitioner's vehicle that was based on uncorroborated information provided by the informant.

STATEMENT

On February 9, 2009, the Lexington County Grand Jury indicted petitioner Jo Pradubsri for trafficking in crack cocaine (28-100 grams), possession with intent to distribute crack cocaine within the proximity of a school, and unlawful carrying of a pistol. R. 387.

On January 13, 2015, Petitioner proceeded to a jury trial¹ before the Honorable Clifton B. Newman. Dayne C. Phillips and David M. Mauldin again represented petitioner and Assistant Solicitors Lester M. Bell, Jr. and Casey N. Rankin represented the State. The jury found petitioner guilty as charged. R. 347, ll. 17 - 348, ll. 5. The trial court sentenced petitioner to twenty-five years imprisonment. R. 356, ll. 1-6.

Petitioner filed a timely notice of appeal. Appellate Defender John H. Strom represented petitioner on appeal. Assistant Attorney General William Blich, Jr. represented the State. The Court of Appeals affirmed petitioner's convictions in a published opinion issued on July 19, 2017. *State v. Pradubsri*, ___ S.C. ___, 803 S.E.2d 724 (Ct. App. 2017).

Petitioner filed a timely petition for rehearing on July 28, 2017. The Court of Appeals denied the petition for rehearing on August 18, 2017. A petition for writ of certiorari requesting review of the Court of Appeals' decision was filed with this Court on October 5, 2017. Per Order of this Court dated February 16, 2018, granting review of Question II from the petition, this Brief of Petitioner follows.

¹ Petitioner previously stood trial on the same charges in February 11, 2010. His convictions were reversed by the South Carolina Court of Appeals in an opinion filed on May 1, 2013. *State v. Pradubsri*, 403 S.C. 270, 743 S.E.2d 98 (Ct. App. 2013).

On November 4-5, 2014, Petitioner stood trial again with the Honorable Donald B. Hocker presiding. David M. Mauldin represented Petitioner. The second trial ended in a mistrial.

ARGUMENT

The Court of Appeals erred in affirming petitioner's convictions by upholding the trial judge's erroneous ruling that reasonable suspicion existed to justify a traffic stop of petitioner's vehicle that was based on uncorroborated information provided by the informant.

On November 9, 2008, petitioner and his girlfriend, Melissa Martin, were stopped while pulling out of the Kroger parking lot in Irmo, South Carolina, by Sgt. John Finch of the Lexington County Sheriff's Department. R. 136, ll. 18 - 137, ll. 24. The stop was the culmination of months of fruitless searching by Finch. Once stopped, Finch stated that petitioner and Martin made "furtive" movements as he and a back-up officer, Deputy Kevin Blake, approached the vehicle. R 69, ll. 7 - 74105, ll. 24. Finch claimed, inconsistently, that either as he was walking up to the vehicle or, after he opened the driver's side door that he saw the handle of a pistol protruding from the gap between the driver's side seat and center console. *Id.* Deputy Blake, who assisted Finch in the traffic stop, stated that when Martin made her exit from the car, it was revealed that she had small packages of crack cocaine in her hand and in the waistband of her pants and in the crotch of her pants. R. 180, ll. 2-24; R 190, l.1 – p. 192, l. 23; R. 179, ll. 16 - 181, ll. 11. R. 193, ll. 16 - 198, ll. 23. Further, law enforcement discovered a pistol in Martin's purse. R. 182, ll. 1-6. After reaching an understanding with the State, Martin repudiated her ownership of the drugs found on her person and would testify at trial that the drugs belonged to petitioner. R. 271, ll. 4 - 274, ll. 23. Petitioner was charged with possession within intent to distribute within close proximity of a school, trafficking in crack cocaine, and unlawful carrying of a pistol.

Prior to trial, petitioner moved to suppress the crack cocaine and guns seized during the traffic stop on the grounds that law enforcement officers did not have reasonable suspicion to justify the stop. R. 79, ll. 20 - 80, ll. 23; (Court's Exhibit No.: 4). Defense counsel stressed that because the

police were completely reliant on the uncorroborated information provided by the informer, they lacked reasonable suspicion that petitioner was engaged in criminal activity. R. 84, ll. 5-15. Counsel argued that no corroboration was attached to the informer's information and that information from the informer was the sole basis for law enforcement's reasonable suspicion to initiate the traffic stop. R. 51, ll. 4 - 64, ll. 24; R 85, ll. 3-24. Petitioner had not committed a traffic violation to justify the traffic stop and any post-stop confirmation of the accuracy of the informer's tip was irrelevant to the existence of reasonable suspicion at the time the stop was initiated. R. 85, ll. 3 - 87, ll. 4.

Sgt. Finch's testimony regarding the informer's reliability was contradictory as he simultaneously claimed that the informer was "totally reliable" while conceding that it took police three months and many failed attempts to locate petitioner based on information provided by the informer. R. 47, ll. 1 - 50, ll. 21. *Finch was completely reliant on the informer's information when he initiated the investigatory traffic stop.* R. 6, ll. 25 - 12, ll. 3 (*emphasis added*). Finch conceded that law enforcement had *conducted no independent investigation into the informer's allegations*, no attempted controlled buys, and only conducted cursory surveillance of petitioner's residence. R. 63, ll. 18 - 65, ll. 24.

Finch's testimony from the record revealed that in the three months prior to the stop, Finch had been in regular communication with an informer, who had identified petitioner and Martin as drug dealers. R. 47, ll. 5 - 50, ll. 9. Finch said he had used the informer, a prostitute with past drug convictions, "informally" over the past six to eight years. R. 46, ll. 4-25; R. 55, ll. 4-23. *Based solely on the informer's information*, Finch had issued multiple "be on the lookout" orders to his deputies and other county law enforcement agencies. R. 47, ll. 5 - 50, ll. 9 (*emphasis added*). Finch alleged that the informer, whom he knew was a drug addict, had personally observed petitioner and

Martin making crack cocaine in their residence. *Id.* Finch further conceded that the informer's telephone calls were the sole basis for his knowledge of petitioner's alleged drug dealing prior to the traffic stop. *Id.*

Despite being provided supposedly detailed information on the location, times of day, and method of sale; law enforcement had been unable to locate petitioner in the three months leading up to the stop. *Id.* Law enforcement never observed any drug sales and police surveillance of petitioner's residence and the same did not yield any incriminating evidence. R. 62, ll. 22 - 64, ll. 24. At trial, Finch candidly admitted, petitioner had committed no traffic violations and the stop was only based on the information supplied by the prostitute informer. R. 66, ll. 2-18.

Finch stated that the informer had been used by law enforcement since 2006 and had never provided false or inaccurate information. R. 43, ll. 2 - 46, ll. 25. He alleged that the informer had help police locate and arrest a series of persons from "Midland's Most Wanted" lists. *Id.* However, Finch was unable to identify those individuals by name or to recall the details of their charges. *Id.* Instead he simply concluded that: "[t]here's been a lot of cases of wanted individuals, especially more special like Midlands Most Wanted-type individuals." R. 44, ll. 16-25.

According to Finch, the informer seemed able to regularly provide police with the same type of information on many different individuals. For example, Finch recollected that the informer had provided information on persons residing at an Executive Inn:

"I've gotten several different people. In that case, let's see, those two different Midland's Most Wanted subjects based on intelligence received from the informant, very specific about the room, the dates and times they would be there, all of the identifiers, you know, everything just matched up perfectly in that case, and that was two at just the Executive Inn alone."

Id. The informer had also apparently provided almost identical information on two different "wanted subjects" residing at a Red Roof Inn and a Motel Six respectively. R. 45, ll. 1-8.

Likewise, the informer had previously told police about “an individual that was wanted for trafficking heroin.” R. 43, ll. 2-17. On this occasion, she allegedly identified a co-defendant, the car being used, and the area and time that the targets sold drugs. *Id.* Oddly given that the informer provided police with the time and area of drug sales, Finch recalled that “I started working on that case. *Subsequently*, we did locate the individuals.” *Id.* (*emphasis added*).

Finch claimed that he received from ten to twenty telephone calls from the informer. R. 42, ll. 17-22. She described petitioner’s car; claimed that petitioner allegedly sold drugs in the Irmo-St. Andrews area of Columbia during nights and evenings; and – incredibly – the informer knew the make, model, and caliber of guns that petitioner and Martin carried. R. 55, ll. 2 - 59, ll. 23.

After stressing that the informer had detailed personal knowledge of petitioner’s alleged drug dealing; on cross-examination Finch became more reticent and skeptical of whether petitioner and the informer had a personal connection. A suddenly less certain Finch demurred, that “I don't know about how close of a personal relationship it was, but I'm saying that they knew each other on the street.” R. 55, ll. 25 - 56, ll. 18.

When asked what benefits the informer had received from her long association with law enforcement, Finch adamantly denied that informer had received any benefits. He underlined the lack of motive conjecturing that the informer:

“[K]new that if she committed a crime that I would lock her up and then that's -- you know, she -- she gave me this information voluntarily and willfully. On the street she developed a level of trust with the folks out there and, you know, after a long period of time it was developed with this individual, you know, so she forwards the information to me and I look into it, and everything she's ever given me has been reliable.

Id. at ll. 5-12. When asked, he again conceded that he never corroborated the informer’s information; never attempted to set-up a controlled buy; never sought a search warrant for

petitioner's residence; and the minimal surveillance conducted did not yield any corroborating evidence of trafficking. R. 63, ll. 22 - 64, ll. 24.

As to reliability, Finch claimed that the informant had always been accurate and reliable in past investigations. R. 44, ll. 14 - 47, ll. 4. However, his testimony on these past instances was conclusory and circular. *Id.* He could not recall the names of those arrested, the dates, or the final disposition of these cases. *Id.*; *see also* R. 30, ll. 5 - 34, ll. 24. All Finch remembered was that on every occasion the informant supplied police with exactly the same quantity of information all of which was "very reliable, very accurate" and the informant never received any benefit for her nearly decade of service to law enforcement. R. 44, ll. 14.

Again, all of this supported petitioner's motion to suppress the crack cocaine and guns seized during the traffic stop on the grounds that law enforcement did not have reasonable suspicion to justify the stop. R. 79, ll. 20 - 80, ll. 23; R. 369. Defense counsel stressed that because the police were completely reliant on the uncorroborated information provided by the informant, they lacked reasonable suspicion that petitioner was engaged in criminal activity. R. 84, ll. 5-15. The trial court denied petitioner's motion to suppress the evidence, ruling that law enforcement had reasonable suspicion based on the past reliability of the informant. R. 87, ll. 16-18.

On appeal, the Court of Appeals found that reasonable suspicion justified the traffic stop, based solely on the information provided by the informant:

We find [the informant's] description of the vehicle, including the color, make, and model; ***the highway and direction the vehicle would be traveling; the location of the vehicle at a specific time***; and that more than one person was in the vehicle, was ***corroborated by officers*** observing a vehicle matching the exact description, traveling in the specified direction, located in the stated area, and containing more than one person. Furthermore, [the informant] was ***not a confidential informant*** and exposed himself to criminal liability should the information he supplied to officers prove to be false.

Id. at 225, 763 S.E.2d at 814 (*emphasis added*); *see also Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317 (1983) (“Our decisions applying the totality of circumstances analysis . . . have consistently recognized the value of corroboration of details of an informant's tip by independent police work”).

In affirming petitioner’s convictions, the Court of Appeals conceded that “the informant did not provide as much predictive information as the tipster in *White*”² and that the informant first gave information on petitioner three months prior to his arrest. *Pradubsri*, 803 S.E.2d at 728. The Court of Appeals concluded that Finch’s characterization of the informant as reliable in prior cases outweighed the three months of uncorroborated tips in Petitioner’s case. *Id.*

The Court of Appeals also discounted law enforcement’s failure to witness a single drug sale and failure to find evidence of crack cocaine manufacturing at petitioner’s residence during their surveillance. *Id.* In concluding reasonable suspicion existed, the Court of Appeals found that the informant’s correct description of Petitioner’s car in the “small identified area at a time when the informant reported drugs and two specified weapons would very likely be in the vehicle” was sufficient for reasonable suspicion. *Id.*

The Court of Appeals erred in upholding the trial court’s determination that reasonable suspicion existed to justify the traffic stop. *Pradubsri*, 803 S.E.2d at 728. The information furnished by the informant was not sufficiently particularized to provide law enforcement with reasonable suspicion to initiate the traffic stop.

The Fourth Amendment to the United States Constitution ensures “the right of the people to be secure. . . [from] unreasonable searches and seizures.” U.S. Const. amend. IV. The “temporary detention” of individuals during an automobile stop by police constitutes a “seizure” within the

² *Alabama v. White*, 496 U.S. 325 (1990).

meaning of the Fourth Amendment. *Whren v. United States*, 517 U.S. 806, 809 (1996). Generally, “the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred.” *State v. Butler*, 343 S.C. 198, 201, 539 S.E.2d 414, 416 (Ct. App. 2000).

However, if an officer has reasonable suspicion that the occupants of an automobile are involved in criminal activity, the officer may stop and briefly detain them. *Id.*; *Knight v. State*, 284 S.C. 138, 325 S.E.2d 535 (1985); *see also State v. Nelson*, 336 S.C. 186, 192, 519 S.E.2d 786, 789 (1999) (quoting *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984)) (“[A] policeman who lacks probable cause but *whose observations lead him* reasonably to suspect that a particular person has committed, is committing, or is about to commit a crime, may detain that person briefly in order to investigate the circumstances that provoke that suspicion.”)(*emphasis added*).

Reasonable suspicion requires “a particularized and objective basis that would lead one to suspect another of criminal activity.” *United States v. Cortez*, 449 U.S. 411, 417 (1981); *State v. Lesley*, 486 S.E.2d 276 (Ct. App. 1997). A court must consider “the totality of the circumstances – the whole picture” when determining whether reasonable suspicion exists. *Cortez*, 449 U.S. at 417; *see also State v. Woodruff*, 344 S.C. 537, 546, 544 S.E.2d 290, 295 (Ct. App. 2001) (“reasonable suspicion requires a particularized and objective basis that would lead one to suspect another of criminal activity. . . the whole picture must be considered.”). Reasonable suspicion “entails. . . something more than an inchoate and unparticularized suspicion or ‘hunch,’ but less than the level of suspicion required for probable cause” *Butler*, 343 S.C. at 202, 539 S.E.2d at 416.

The United States Supreme Court created the exclusionary rule³ to safeguard Fourth Amendment rights. *United States v. Calandra*, 414 U.S. 338 (1974). The exclusionary rule prohibits the use of evidence obtained directly or indirectly through an unlawful search or seizure under the fruits of the poisonous tree doctrine. *See Wong Sun v. United States*, 371 U.S. 471, 484 (1963); *see also State v. Nelson*, 336 S.C. 186, 519 S.E.2d 786 (1999) (evidence not admissible under the "fruit of the poisonous tree" doctrine when police exploit unlawful search to seize evidence that would not have otherwise come to light).

In many respects the informant in the present case was a less precise, less reliable version of the informant in *State v. Pope*, 410 S.C. 214, 763 S.E.2d 214 (Ct. App. 2014). In *Pope*, police received a tip from a non-confidential informant that a black Ford Expedition would be leaving Spartanburg on Highway 176. *Id.* at 224, 763 S.E.2d at 820. In the presence of police officers, the informant called Pope, who was driving the Expedition. *Id.* at 225, 763 S.E.2d at 820. Pope told the informant that he was passing the "Lighthouse Fish Camp," this was confirmed by a trailing police car. After the phone call, law enforcement initiated the traffic stop. *Id.* The non-confidential informant accurately described the Pope's vehicle. He also accurately predicted the highway, Pope's direction of travel at a specific time; and that more than one person was in the vehicle. *Id.* at 225, 763 S.E.2d at 814 (*emphasis added*); *see also Illinois v. Gates*, 462 U.S. 213 (1983) ("Our decisions applying the totality of circumstances analysis . . . have consistently recognized the value of corroboration of details of an informant's tip by independent police work"). Nevertheless, it took law enforcement three months to locate petitioner. In many respects the informant in the present case is a less precise, less reliable version of the informant in *State v. Pope*, 410 S.C. 214, 763

³ The Fourteenth Amendment makes the exclusionary rule applicable to the states. *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

S.E.2d 214 (Ct. App. 2014). Moreover, when law enforcement finally located petitioner, they did not observe any of the illegal activity the informant attributed to petitioner.

The Court of Appeals further held that Appellant's presence in "the small, identified area" where the informant had previously stated Appellant would be gave police additional justification to stop Appellant. This conclusion that reasonable suspicion existed based solely on the informant's information was an error of law. The Court of Appeals misconstrued "the small, identified area" that the informant predicted petitioner would located in during the three months she was in contact with law enforcement. The informant told police that Appellant lived and sold drugs in the Irmo – St. Andrews area. This description encompasses one entire municipality, Irmo, and a densely inhabited portion of another, Columbia. The area spans two counties and has a combined population of over thirty thousand people.

This informant's vague location information coupled with the three months of unsuccessful efforts by law enforcement to corroborate her allegations and the complete lack of incriminating corroborative details when petitioner was finally located meant that it was an error for the Court of Appeals to conclude that the informant's information was sufficiently particularized to provide law enforcement with reasonable suspicion to initiate an investigatory stop. *Cf. State v. Pope*, 410 S.C. 214, 763 S.E.2d 214 (Ct. App. 2014) (reasonable suspicion existed where informant provided a specific time, road, travel direction, confirmed the location with the defendant, and his information confirmed by law enforcement); *State v. Roberts*, 368 S.C. 529, 629 S.E.2d 679 (Ct. App. 2006) (reasonable suspicion existed where informant accurately predicted robbery and police located car matching informant's information after the robbery). The information furnished by this confidential informer was not sufficiently particularized to provide law enforcement with reasonable suspicion to initiate an investigatory stop. Unlike the informant in *Pope*, who provided a specific time, road,

travel direction, confirmed the location with the defendant, and had his information confirmed by law enforcement; the informer in petitioner's case simply alleged that petitioner was selling crack cocaine in the evenings and nights somewhere in the Irmo - St. Andrews area (covering approximately twelve square miles) and about Appellant's working patterns: an approximate area where Appellant sold drugs and the times of day when Appellant usually made sales. Tr. p. 78, ll. 8 - 81, ll. 4. Again, it took law enforcement three months to locate petitioner.

Also, petitioner's case is also distinguishable from *State v. Willard*, 374 S.C. 129, 64 S.E.2d 252 (Ct. App. 2007), and *State v. Roberts*, 368 S.C. 529, 629 S.E.2d 679 (Ct. App. 2006) which were both argued extensively at trial and relied upon by the Court of Appeals. R. 357. In *Roberts*, law enforcement knew that a crime had been committed - based on a police report of a bank robbery - when they initiated the investigatory stop. *Id.* In *Willard*, law enforcement utilized a non-confidential informant to arrange a drug buy via telephone with officers present. 374 S.C. 129, 64 S.E.2d 252. Crucially, Willard also confessed to law enforcement following the traffic stop. *Id.* Likewise, petitioner's case is distinguishable from *Willard and Roberts*,

Moreover, the Court of Appeals' reliance on *Alabama v. White*, is misplaced. 496 U.S. 325 (1990). The informant in *White* provided police with **detailed, current information** regarding White's current location and car and alleged that White was preparing to deliver marijuana to a specific motel. *Id.* at 327-328. Police then **immediately** went to the apartment and observed White leaving from the predicted building, getting into a car matching the description provided by the informant, and driving for four miles on the most direct route to the motel. *Id.* at 331. Despite this informer's and receiving regular updates from the informer, the police were unable to locate petitioner for three months.

Police efforts to corroborate the incriminating details of the informant's information were a complete failure. Despite surveillance and multiple BOLOs, police never found any evidence that Petitioner manufactured crack cocaine at his residence and never saw him make a single drug sale. R. 63, ll. 22 - 65, ll. 24. The only details police corroborated prior to initiating the traffic stop were not overtly incriminating. *Butler*, 343 S.C. 198, 539 S.E.2d 414 (presence of temporary tag on back of car, without more, was insufficient to provide reasonable suspicion that driver was involved in criminal activity). Again, as stated earlier, the Court of Appeals held that reasonable suspicion existed for law enforcement to initiate the traffic stop of petitioner's vehicle based solely on the information provided by a confidential informant, despite the Court of Appeals' concession that "the informant here did not give as much predictive information as" confidential informants had in other cases. Therefore, the informant's record of providing accurate information to law enforcement in unrelated past investigations and her correct information regarding the make and model of petitioner's vehicle, provided a lack of reasonable suspicion.

Also, as stated earlier, reasonable suspicion requires "a particularized and objective basis that would lead one to suspect another of criminal activity." *United States v. Cortez*, 449 U.S. 411, 417 (1981); *State v. Lesley*, 486 S.E.2d 276 (Ct. App. 1997). Reasonable suspicion "entails . . . something more than an inchoate and unparticularized suspicion or 'hunch,' but less than the level of suspicion required for probable cause" *State v. Butler*, 343 S.C. 198, 202, 539 S.E.2d 414, 416 (Ct. App. 2000).

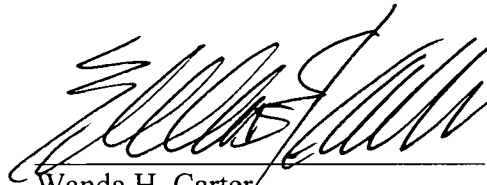
Finally, in determining that reasonable suspicion existed to support the traffic stop, the Court of Appeals ignored that the informant had proven she was unreliable. And, finally, notwithstanding this information, the police were unable to locate Appellant, let alone observe him making any drug sales. Tr. p. 94, ll. 22 - 96, ll. 24. Further, while the informer provided accurate information about

petitioner's car; the car was traveling legally; no citations were issued; there was no evidence of attempted flight; and there was no pre-stop evidence of evasive behavior. *See Butler*, 343 S.C. 198, 539 S.E.2d 414 (presence of temporary tag on back of car, without more, was insufficient to provide reasonable suspicion that driver was involved in criminal activity).

In sum, the information furnished by the informant was not sufficiently particularized or timely so as to provide law enforcement with reasonable suspicion to initiate the traffic stop in this case. Hence, the Court of Appeals erred in affirming the trial judge's denial of the motion to suppress the evidence illegally seized by law enforcement. *See Wong Sun*, 371 U.S. at 484; *see also Nelson*, 336 S.C. 186, 519 S.E.2d 786.

CONCLUSION

Based on the foregoing argument, counsel for petitioner requests that this Court reverse the Court of Appeals' decision affirming petitioner's convictions and sentences based on the above outlined argument.



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 9th day of April, 2018.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Lexington County

Honorable Clifton Newman, Circuit Court Judge

THE STATE,

RESPONDENT,

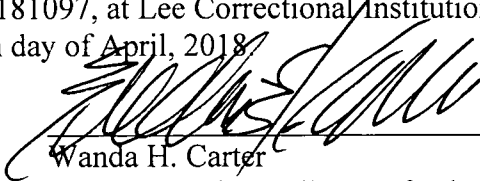
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JO PRADUBSRI,

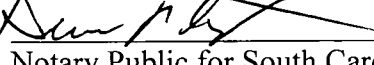
PETITIONER

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 William M. Blich, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Brief of Petitioner have been served on Jo Pradubsri, #181097, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 9th day of April, 2018.


Wanda H. Carter
Deputy Chief Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 9th day of April, 2018.



Notary Public for South Carolina
My Commission Expires: 10/30/2022