

STATE OF SOUTH CAROLINA

 ORIGINAL

IN THE SUPREME COURT

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Certiorari to Laurens County

Honorable G. Thomas Cooper, Circuit Court Judge

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JUN 11 2018

RICKY DALE PACE,

S.C. SUPREME COURT

PETITIONER

V.

STATE OF SOUTH CAROLINA,

APPELLATE CASE NO 2017-002004

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PETITION FOR WRIT OF CERTIORARI

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TAYLOR D GILLIAM  
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**ISSUE PRESENTED**

Did the PCR Court err in denying Petitioner relief where trial counsel provided ineffective assistance of counsel by failing to object to multiple improper remarks by the assistant solicitor during closing arguments, including outright references to him as a child molester, a comparison of Petitioner to an animal preying on the weak, boldly proclaiming that Petitioner lied on the stand, and suggesting that the jury find Petitioner guilty to keep the community safe, where counsel admitted that objections should have been made?

## STATEMENT

A Laurens County grand jury indicted Petitioner for five counts of lewd act upon a child. App. 330 – 339. The indictments listed alleged offense dates of October 2010 through February 2011. Id. The State called Petitioner’s case to trial before the Honorable Eugene C. Griffith and a jury on May 13, 2014. App. 1. Lance Sheek represented the State, and Chip Howe and Chelsea McNeil represented Petitioner. App. 1.

At the conclusion of trial, the jury found Petitioner not guilty on three of the charges and guilty on two. App. 261 l. 20 – App. 262 l. 7. Prior to sentencing, the assistant solicitor opined that Petitioner should be sentenced harshly for maintaining his innocence. App. 269 l. 21 – App. 270 l. 24. Judge Griffith sentenced Petitioner to ten years’ imprisonment on each charge for which he was found guilty, to run concurrently. App. 271 ll. 17 – 24.

Petitioner’s convictions and sentences were affirmed by this Court. State v. Pace, Op. No. 2016-MO-010 (S.C. Sup. Ct. filed April 13, 2016). He filed a timely application for post-conviction relief. App. 273 – 280. It contained allegations of ineffective assistance of counsel, including claims that his trial attorneys failed to object to “prosecutor’s prejudicial remarks.” App. 280. It similarly contained allegations of prosecutorial misconduct “from early in the trial [when] prosecutor Sheek exhibit[ed] lack of concern for [a] fair trial.” Id.

The State made its Return on or about October 17, 2016. An evidentiary hearing was conducted on June 6, 2017 before the Honorable G. Thomas Cooper. App. 286. Justin Hunter appeared on behalf of the State, and Ashley McMahan represented Petitioner. Petitioner and both defense attorneys testified during the hearing.

On August 21, 2017, Judge Cooper issued his order denying Petitioner relief. App. 319 – 329. In particular, he found that “Counsel was not ineffective for failing to object because the solicitor’s remark was not objectionable.” App. 323.

This Petition follows.

## ARGUMENT

**The PCR Court erred in denying Petitioner relief where trial counsel provided ineffective assistance of counsel by failing to object to multiple improper remarks by the assistant solicitor during closing arguments, including outright references to him as a child molester, a comparison of Petitioner to an animal preying on the weak, boldly proclaiming that Petitioner lied on the stand, and suggesting that the jury find Petitioner guilty to keep the community safe, where counsel admitted that objections should have been made.**

The assistant solicitor in this case gave a closing argument that violated established law in several respects, yet neither attorney representing Petitioner objected. Trial counsel's failure to object to several egregious remarks by the assistant solicitor prejudiced Petitioner and requires reversal of his convictions. Strickland v. Washington, 466 U.S. 668 (1984).

Petitioner never wavered in professing his innocence. Faced with charges involving alleged actions that supposedly took place three to four years before his trial, he testified in his own defense. Petitioner's wife testified against him as the State's first witness. App. 82. She never witnessed any improper touching between Petitioner and either of the minor children. App. 85 ll. 10 – 16; App. 94 l. 16 – App. 95 l. 19. Both children, Minor 1 and Minor 2, also testified. The older child, Minor 1, testified about Petitioner's alleged lewd acts and offered a timeframe of four years before trial. App. 101 ll. 4 – 16. Minor 2 offered a similar version during direct examination. App. 129 l. 12 – App. 131 l. 17. The State's expert witness conceded that there were no physical indications of trauma to Minor 2. App. 162 l. 12 – App. 163 l. 21. As argued by defense counsel, there was no physical evidence in this case. App 221 ll. 20 – 24.

The crux of Petitioner's argument in the post-conviction relief stage is that he received ineffective assistance of counsel, namely when defense counsel failed to object to the assistant solicitor's prejudicial, improper, and objectionable remarks during closing arguments.

### Closing Argument

Throughout the State's closing argument, the following objectionable statements were made:

There is not a cat or mouse in the box. There is a man holding the box and [he] is a child molester. We can talk all we want, we can use legal terms, we can play our games. But when the rubber meets the road one question you have got to answer, who is telling me the truth. Somebody sits in that chair and swore to tell the truth and then [bald] faced lied to you.

App. 231 ll. 18 – 24.<sup>1</sup>

And Ricky Dale pace then got on that stand and looked at the and said, they are liars. All you have got to do is decide who is telling you the truth.

App. 232 ll. 9 – 10.

[On a National Geographic show] there [was] a leopard that killed a water buffalo. My gosh, that water buffalo is a great big two ton beast. Because they don't go after the healthy and strong. **They find the weak, they find the children, they cut them away where they are unprotected and they get them. The child molester goes after the weak, they go after the children when they are not protected,** that is when they do it because they know, the worse is going to happen if she tells.

App. 238 ll. 14 – 24. (emphasis added).

Ricky Dale Pace is a person, he lives here, **he is a child molester.** You are not going to be able to go to that room and change **the fact that he is a person or that he molested these children.**

...

You come back with a verdict of guilty because that speaks the truth in this case. And that is all we want is, for you to speak the truth. You don't have somebody

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<sup>1</sup> The cat and mouse language was in response to defense counsel's analogy of reasonable doubt which consisted of situations involving a cat and mouse in a box. App. 220 ll. 2 – 17.

to reward, you don't have somebody to punish. This isn't me versus them, this is not the State versus the defense, **this is about doing right**. ... [t]his is about justice, this is about our community, this is about these little girls that shouldn't have to grow up experiencing what they did. You can't change what they have experienced. **But we can protect our community now.**

App. 242 ll. 5 – 24. (emphasis added).

Neither one of Petitioner's attorneys objected to any of the above remarks, although they both conceded at the evidentiary hearing that the statements were objectionable and that they should have objected.

#### Evidentiary Hearing

At the evidentiary hearing, Petitioner spoke regarding the assistant solicitor's remarks: "Mr. Sheek, during the course of closing arguments, offered up to the jury his personal opinions, the validity of the evidence of guilt or innocence. And that is improper." App. 290 ll. 13 – 18. In his application for post-conviction relief, Petitioner sought relief under two theories: ineffective assistance of counsel and prosecutorial misconduct. App. 276. In a handwritten attachment, he clarified that counsel failed to object to the above prejudicial remarks and that the assistant solicitor committed misconduct in commenting in the first place. App. 280; App. 290 l. 23 – App. 291 l. 2.

Trial Counsel McNeil was appointed to represent Petitioner and worked with co-counsel Chip Howe. App. 296 l. 20 – App. 297 l. 21. According to Counsel McNeil, Petitioner "was adamant that he [wanted] a trial or the charges dismissed outright." Id. Both members of Petitioner's legal team therefore prepared a "defense based on [Petitioner's] complete denial that anything had ever happened." App. 298 ll. 5 – 16. The strategy was accurately described as "pure acquittal." Id.

Regarding the assistant solicitor's improper remarks, Counsel McNeil conceded that an objection should have been raised:

[The assistant solicitor] does tend to say a lot of objectionable things in his closing arguments. And reviewing the trial transcript I do think that I probably should have objected to some of the things that he said. But I didn't think, I still don't think that he went on and on and on to the point where, you know, it would have made an additional point to the jury that they didn't have already have in front of them to consider. But I do think that there are some things I the closing argument I should have objected to.

App. 305 l. 21 – App. 306 l. 16. Counsel McNeil disagreed with the notion that the multiple references of Petitioner as a child molester did not make a difference, citing the three not guilty verdicts. App. 306 ll. 17 – 19.

In addition to the child molester remarks, Counsel McNeil admitted that language about “the jury being the true seekers, the seeker of truth” was improper and should have been objected to. App. 308 l. 24 – App. 310 l. 13.

Counsel Howe testified that Petitioner was cooperative during pretrial meetings. App. 311 ll. 19 – 21. Regarding the assistant solicitor's improper remarks, Counsel Howe did not recall Petitioner being called a child molester at trial but did not doubt that it happened. App. 314 ll. 17 – 24. He agreed with Counsel McNeil that they should have objected “probably more than once when [the assistant solicitor] was giving his closing argument, no question.” Id.

When asked whether the failure to object would have changed the outcome of the trial, Counsel Howe replied: “I don't know. I can't say, I wish I could, have some kind of magic solution to say that this caused the way the verdict came down or not but I can't say that.” App. 314 l. 25 – App. 315 l. 4.

Counsel Howe disclosed that a mistrial had been granted once before in Petitioner's case following the revelation that the State had not provided a video to defense counsel. App. 316 ll. 7 – 25.

### Discussion

This Court gives deference to the PCR judge's findings of fact, and “will uphold the findings of the PCR court when there is any evidence of probative value to support them.” Miller v. State, 379 S.C. 108, 115, 665 S.E.2d 596, 599 (2008) (citing Suber v. State, 371 S.C. 554, 558–59, 640 S.E.2d 884, 886 (2007)). However, this Court reviews questions of law *de novo*, and “will reverse the decision of the PCR court when it is controlled by an error of law.” Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012) (quoting Lomax v. State, 379 S.C. 93, 101, 665 S.E.2d 164, 167-68 (2008)).

To establish a claim of ineffective assistance of counsel, a PCR applicant must prove counsel failed to render reasonably effective assistance under prevailing professional norms, and the deficient performance prejudiced the applicant's case. McKnight v. State, 378 S.C. 33, 40, 661 S.E.2d 354, 357 (2008). “The PCR applicant has the burden of proving both prongs.” Caprood v. State, 338 S.C. 103, 109-10, 525 S.E.2d 514, 517 (2000). To show prejudice, the applicant must show that but for counsel's errors, there is a reasonable probability the result of the trial would have been different. Cherry v. State, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). “A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial.” Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997).

“A solicitor's closing argument must be carefully tailored so as not to appeal to the personal biases of the jury.” Von Dohlen v. State, 360 S.C. 598, 609, 602 S.E.2d 738, 744 (2004). “The argument must not be calculated to arouse the jurors' passions or prejudices, and its

content should stay within the record and reasonable inferences that may be drawn therefrom.” Id. at 609–10, 602 S.E.2d at 744.

A solicitor’s argument that appeals to the personal biases of the jury and arouses their passions and prejudices violates due process. Tappeiner v. State, 416 S.C. 239, 250-51, 785 S.E.2d 471, 477 (2016); Donnelly v. DeChristoforo, 416 U.S. 637, 642 (1974). A solicitor’s closing argument must not appeal to the personal biases of the jurors nor be calculated to arouse the jurors’ passions or prejudices, and its content should stay within the record and reasonable inferences to it. State v. Copeland, 321 S.C. 318, 468 S.E.2d 620 (1996). In this case, the assistant solicitor capitalized not only on the jury’s desire to protect the community, but also on the jury’s emotions regarding an alleged child molester.

The PCR court’s Order of Dismissal examined Petitioner’s request for relief regarding the assistant solicitor’s improper remarks only under a claim of ineffective assistance of counsel. App. 322 – 324. Quite inexplicably, and in contravention to the admission of both defense attorneys, the PCR court found that “Counsel was not ineffective for failing to object because the solicitor’s remark was not objectionable.” App. 323. Immediately thereafter, the PCR court cited to State v. Webb, 389 S.C. 174, 697 S.E.2d 662 (Ct. App. 2010) for the notion that “[i]mproper comments do not require reversal if they are not prejudicial to the defendant.” App. 323. These conclusions by the PCR court are errors of law.

The PCR court reasoned that the improper comments—contending that Petitioner lied and referring to Petitioner as a “child molester”—did not rise to the level of impropriety as to warrant a new trial, especially because the trial judge “properly informed the jury of the presumption of innocence and the burden of proof.” App. 323. The PCR court found “that an

objection would not have changed the outcome of the trial, especially considering the fact that [Petitioner] was acquitted on three of the give lewd act charges.” App. 323 – 324.

The assistant solicitor’s argument asked the jury to focus on the irrelevant factor of Petitioner’s future dangerousness, not his guilt or innocence. A “jury is not free to convict a defendant simply because he poses a future danger; nor is a defendant’s future dangerousness likely relevant to the question whether each element of an alleged offense has been proved beyond a reasonable doubt.” Simmons v. South Carolina, 512 U.S. 154, 163 (1994).

The solicitor’s argument in this case is similar to the argument that caused reversal in State v. White, 246 S.C. 502, 144 S.E.2d 481 (1965). In White, the solicitor told the jury, “Let him go, let him come back to Williamsburg County. Let him come in your wife’s bedroom or your mother or daughters, any of them, what would you do?” Id. at 504, 144 S.E.2d at 482. The Court reversed, holding that the effect of such an argument is to “completely destroy and nullify all sense of impartiality in a case of this kind.” Id. at 506, 144 S.E.2d at 482. The Court criticized the solicitor for injecting “into the case considerations foreign to the record and calculated to take from the trial the necessary element of impartiality.” Id. at 507, 144 S.E.2d at 483.

Such theatrics have been condemned by our Supreme Court. State v. Northcutt, 372 S.C. 207, 641 S.E.2d 873 (2007). In Northcutt, the solicitor threatened the jury that it would be “on your heads” if the defendant killed anyone else, that it would be “open season on babies,” and conducted a funeral procession for the infant victim. Id. at 222-23, 641 S.E.2d at 881-82. The Court reversed because of the inflammatory closing argument. Id.

The assistant solicitor’s remark to the jury about “protect[ing] our community” evokes the improper argument that the jury is tasked with keeping the community safe rather than deciding whether the State had met its burden of proof. It invited the jurors to decide Petitioner’s

guilt based on potential yet unsubstantiated future concerns rather than on the facts of the case; it was not addressed to the evidence in Petitioner's trial. A solicitor's argument is bound by rules of fairness and may not be calculated to arouse a juror's passions or prejudice. Vasquez v. State, 388 S.C. 447, 458, 698 S.E.2d 561, 566 (2010); State v. Linder, 276 S.C. 304, 278 S.E.2d 335 (1981).

In a criminal case, the State cannot attack the character of the defendant unless the defendant first places his character in issue. Mitchell v. State, 298 S.C. 186, 379 S.E.2d 123 (1989) (per curiam). "A necessary corollary to the presumption of innocence is that a defendant must be tried for what he did, not for who he is." State v. Nelson, 331 S.C. 1, 15, 501 S.E.2d 716, 723 (1998) (citing State v. Melcher, 140 N.H. 823, 678 A.2d 146, 151 (1996)).

The above remarks, objectionable, prejudicial, and improper, contravened the assistant solicitor's position during opening statements that the State does not provide any evidence in this case. App. 73 ll. 1 – 12. Such a remark notwithstanding, the seed for convicting Petitioner was planted soon thereafter:

And I have a jury system that punishes wrongdoers when they are brought to court and the evidence is presented ... [b]ecause if the community has an interest, not only in seeing that [Petitioner's] rights are protected and they should be but we also have an interest in knowing that our children don't grow up being molested by somebody in their house. They don't have to suffer through something like that. So there is all kinds of rights and y'all keep that in mind.

App. 75 ll. 11 – 24.

Later on, the assistant solicitor would interject additional "seek the truth" language: "only you, the jury, can actually determine what happened back in 2011 with these two children." App. 77 ll. 22 – 25. Defense counsel responded to the assistant solicitor's remarks in opening statements:

Now, you heard about punishment, you heard about kids in the community, you heard about the fact that [the assistant solicitor] has children. Y'all probably got children or some of you do, some of you don't, you have got grandchildren, you got nieces and nephews. Mr. Pace even has a child. So let's get that out in the open, **the reference there was fear**. Y'all don't go back there and decide this case based on fear, fear that if you decide that the State has not proven to each and every one of your satisfaction beyond a reasonable doubt that Mr. Pace has not committed these crimes that you should be fearful and worried that the community is not safe or anything like that. [ ] And it puts, it kind of almost really does even though the law doesn't say so, it kind of shifts [the burden] to [Petitioner].

App. 80 l. 20 – App. 81 l. 16. (emphasis added).

Don't be fearful, don't think you have got to do a certain way or this community is not safe. That is not why you are here. You are here to sit and listen to the facts and apply the law that the Judge gives you. Again, Ricky Pace is a person, he is not just a defendant. He says he is not guilty of this charge and he says he wants you, his jury, to decide whether or not the State has proved him guilty of this charge beyond a reasonable doubt where all of you go back there and y'all decide.

App. 82 ll. 1 – 10.

Much like in Mitchell v. State, 298 S.C. 186, 379 S.E.2d 123 (1989), the State's case at Petitioner's trial hinged on a credibility determination. In Mitchell, this Court found trial counsel ineffective for failing to object to the admission of character evidence elicited from witnesses regarding alleged devil worship and Mafia membership. 298 S.C. 186, 188, 379 S.E.2d 123, 124-5 (1989).

As defense counsel articulated in Petitioner's case stated, this case was a "classic he said, she said case." App. 221 ll. 20 – 23. Therefore, Petitioner's credibility was one of the main issues before the jury. The assistant solicitor improperly suggested that Petitioner lied. Had his character not been placed into issue, the outcome may have been different.

The assistant solicitor's comment to the jury about protecting "our community" was the last remark heard in closing arguments. Under State v. Liberte, this statement can be construed

to “specifically inflame the passions and prejudice of the jury.” Protection of the community is not a task assigned to the jury; the assistant solicitor therefore injected an arbitrary factor into the jury’s deliberations. Trial counsel should have raised an objection.

The decision to find Petitioner guilty did not appear to be an easy one for the jury. The jury reached an impasse while deliberating. App. 257 l. 12 – App. 261 l. 3. The trial judge gave an Allen charge, and the jury resumed deliberating.<sup>2</sup> Following the jury’s verdict, Judge Griffith sentenced Petitioner to ten years for each conviction, concurrent to one another. App. 261 l. 20 – App. 262, l. 7; App. 271 ll. 17 – 24. Notably, the trial court heard from both minor children before sentencing, even though Petitioner was found not guilty on three indictments, all of which pertained to Minor 1. App. 271 ll. 1 – 13.

The remarks by the assistant solicitor completely destroyed and nullified all sense of impartiality in Petitioner’s case. The statement that “[w]e can talk all we want, we can use legal terms, we can play our games” injected an arbitrary and irrelevant factor into the jury’s deliberations. A solicitor cannot inject material outside of the evidence or the judge’s charge, but must confine himself to the record in the case presented to the jury. See Vaughn v. State, 362 S.C. 163, 169, 607 S.E.2d 72, 75 (2004) (“The State’s closing arguments must be confined to evidence in the record and the reasonable inferences that may be drawn from the evidence.”); State v. Copeland, 321 S.C. 318, 486 S.E.2d 620 (1996); State v. McAlister, 133 S.C. 99, 130 S.E. 511 (1925) (holding it is improper in closing argument for the State to refer to and comment about facts of other cases to indicate or suggest the same results).

In Vaughn, the solicitor informed the jury she did not present additional witnesses because the rules of evidence did not permit the presentation of duplicative testimony. Vaughn at 168, 607

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<sup>2</sup> Allen v. U.S., 164 U.S. 492, 17 S.Ct. 154, 41 L.Ed. 528 (1896).

S.E.2d at 74. This Court reversed, in part, because of trial counsel’s failure to object to the solicitor’s misleading argument. *Id.* Just as in Vaughn, the solicitor in Petitioner’s case introduced arbitrary and speculative matter outside of the jury’s province with his improper argument about unspecified “legal terms” and “play[ing] our games.” App. 231 ll. 16 – 24.

The assistant solicitor’s comments “so infected the trial with unfairness as to make the resulting conviction a denial of due process.” Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974). This determination requires the Court to look to “the nature of the comments, the nature and quantum of the evidence before the jury, the arguments of opposing counsel, the judge’s charge, and whether the errors were isolated or repeated.” Bennett v. Angelone, 92 F.3d 1336, 1345–46 (4th Cir. 1996) (internal quotation marks omitted).

Both members of Petitioner’s legal counsel admitted that they should have objected to the assistant solicitor’s remarks in closing. There was no overwhelming evidence in this case, and the resulting prejudice manifested itself in two convictions. The argument that there was no prejudice contravenes logic—Petitioner was still convicted on two charges. Counsel appeared to have admitted that the failure was prejudicial, but only prejudicial enough as to result in two convictions instead of five.

The State’s improper argument prevented the jury from fairly considering Petitioner’s innocence. In State v. McGee, 268 S.C. 618, 235 S.E.2d 715 (1977), this Court found that an error could not be harmless because remarks to the jury are an important part of the verdict; without proper procedures being followed, the probability of prejudice is great.

The State had last argument. These comments by the solicitor were the last things the jury heard from the attorneys. The solicitor did not just make an isolated remark, but deliberately violated established rules regarding closing arguments. The State’s closing contained at least three

egregiously improper arguments which, when taken as a whole, satisfies the Donnelly standard. As admitted by both attorneys, trial counsel could not and did not have had any reasonable strategy for failing to object to these arguments and giving the trial judge a chance to cure the error.

The Constitution requires only that a defendant receive a fair trial, not a perfect one. U.S. Const. Am. VI; State v. Johnson, 334 S.C. 78, 512 S.E.2d 795 (1999). However, Petitioner's trial was rendered fundamentally unfair by prosecutorial misconduct. See Riddle v. Ozmint, 369 S.C. 39, 631 S.E.2d 70 (2006). No probative evidence sufficient to support the PCR judge's findings and conclusion existed in the record in Riddle, and none exists in the matter *sub judice*.

The assistant solicitor improperly charged the jury with seeking the truth. Petitioner was referred to as a child molester multiple times. He was dehumanized, likened to a leopard that preys on the weak. These highly prejudicial remarks were interjected throughout Petitioner's trial, and they infected the minds of jurors. Had counsel objected, a remedy could have been provided, either in the form of a curative instruction, a second mistrial, or a direct appeal argument. None of that was available to Petitioner, and his resulting two convictions serve as proof that the outcome of his trial was tainted by the assistant solicitor's remarks.

It was incumbent upon Petitioner's trial counsel to object to the assistant solicitor's closing remarks. The improper comments were not isolated in nature; they appeared throughout the trial.

This Court should reverse and grant Petitioner a new trial.

**CONCLUSION**

For the foregoing reasons, Petitioner requests that the Court grant his petition for writ of certiorari and allow full briefing on this issue, reverse the charges against him, and remand the case for a new trial.

A handwritten signature in black ink, appearing to read "Taylor D Gilliam", written over a horizontal line.

Taylor D Gilliam  
Appellate Defender

ATTORNEY FOR PETITIONER

This 11th day of June, 2018.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Laurens County

Honorable G. Thomas Cooper, Circuit Court Judge

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RICKY DALE PACE,

PETITIONER

V.

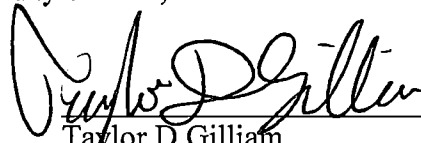
STATE OF SOUTH CAROLINA,

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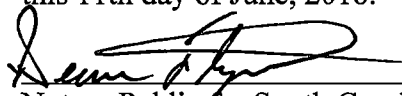
CERTIFICATE OF SERVICE

\_\_\_\_\_

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Megan Harrigan Jameson, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Ricky Dale Pace, ##360027, at MacDougall Correctional Institution, 1516 Old Gilliard Road, Ridgeville, SC 29472, this 11th day of June, 2018.

  
\_\_\_\_\_  
Taylor D Gilliam  
Appellate Defender

SUBSCRIBED AND SWORN TO before me ATTORNEY FOR PETITIONER  
this 11th day of June, 2018.

  
\_\_\_\_\_  
(L.S)  
Notary Public for South Carolina  
My Commission Expires: 10/30/2022