

STATE OF SOUTH CAROLINA  
In the Supreme Court

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CERTIORARI TO Horry COUNTY  
Court of Common Pleas  
Michael G. Nettles, Circuit Court Judge

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Appellate Case No. 2017-001615

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Stefano Tyshawn Brooks,

Petitioner,

v.

State of South Carolina,

Respondent.

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**RETURN TO PETITION FOR WRIT OF CERTIORARI**

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S.C. SUPREME COURT

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## **RESPONDENT'S ISSUES PRESENTED**

Did the lower court properly deny post-conviction relief where the record is devoid of evidence to show Petitioner pled due to the alleged misadvice regarding standing to challenge the validity of a license checkpoint, or any compelling evidence to show plea counsel's judgment regarding the validity of the checkpoint was incorrect?

## STATEMENT OF THE CASE

### Summary of Procedural History

Petitioner is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. Petitioner was indicted at the January 2011 term of the Horry County Grand Jury for trafficking cocaine base, 100-200 grams (2011-GS-26-00218). Clifford L. Welsh, Esq. represented Petitioner, and Laura Richardson, Esq., of the Fifteenth Circuit Solicitor's Office, prosecuted the case. On May 15, 2012, Petitioner pled guilty to the lesser offense of trafficking in cocaine, 28-100 grams. The Honorable Benjamin H. Culbertson qualified and accepted the plea, deferred sentencing until June 14, 2012, and did not take Petitioner into custody. Petitioner did not appear before Judge Culbertson again until February 14, 2014. Judge Culbertson rejected the original recommendation of the State for a 12 year sentence and instead sentenced Petitioner to imprisonment for a term of 25 years.

Petitioner timely filed a motion for reconsideration of the sentence on February 24, 2014. Petitioner appeared again before Judge Culbertson on March 24, 2015, for a hearing on his motion, again represented by attorney Welsh. Thomas Groom Terrell, III, Esq., of the Fifteenth Circuit Solicitor's Office represented the State. Judge Culbertson denied the motion from the bench at the conclusion of the hearing. Petitioner did not appeal his plea or sentence.

Petitioner, by and through PCR counsel, filed his application for post-conviction relief on January 13, 2015 (2015-CP-26-00259). He alleged the following grounds for relief in his application:

1. "Ineffective Assistance of Counsel"
  - a. "Defense counsel failed to conduct an adequate investigation into the Applicant's case."
  - b. "Defense counsel failed to adequately advise the Applicant of all possible defenses and legal and factual claims that could be made at trial, and failed to adequately advise the Applicant of all available plea offers."

2. “Involuntary Guilty Plea”

- a. “The Applicant’s pleas of guilty were not knowingly, voluntarily, or intelligently entered.”

Respondent made its return on July 31, 2015, and an evidentiary hearing into the matter was convened on February 7, 2017, before the Honorable Michael G. Nettles. Petitioner was present at the hearing and represented by L. Morgan Martin, Esq. Ralph Prioleau, a third-year student at the Charleston School and Law, under the guidance of Rutledge Johnson, Esq., on behalf of the South Carolina Attorney General’s Office, represented Respondent. Petitioner testified on his own behalf. Clifford L. Welsh, Esq., and William M. Clemmons also testified. By written order dated March 21, 2017, and filed March 24, 2017, Judge Nettles denied and dismissed the application.

This appeal follows.

**Summary of Facts Adduced at Plea**

The facts around the underlying arrest were succinctly summarized in the plea proceeding:

On July 30, 2010, police responded to the Little River section of Horry County. Your Honor, it was a license check point. During that check point they observed an alcoholic beverage in the vehicle, they asked [Petitioner] to step out, at which time he did. When he stepped out of the car, Your Honor, a clear plastic bag fell between the door and the seat. Your Honor, that did test positive for cocaine. It came back at 102 grams.

(Appx. 9, ll. 9-18). Petitioner thereafter affirmed those facts. (Appx. 9, ll. 22-24).

## STANDARD OF REVIEW

The post-conviction relief court's findings of fact receive great deference during appellate review and will be upheld if "any evidence of probative value" exists in the record to support the lower court's findings. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). Questions of law are reviewed *de novo*, and appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Id.; Smalls v. State, 422 S.C. 174, 180-81, 810 S.E.2d 836, 839 (2018).

## ARGUMENT

### **THE PCR COURT PROPERLY DENIED RELIEF BECAUSE PETITIONER PLED GUILTY FOR NUMEROUS REASONS OTHER THAN THE ALLEGED FAILURE TO INVESTIGATE STANDING, AND BECAUSE PETITIONER FAILED TO PRESENT ANY COMPELLING EVIDENCE THAT COUNSEL WAS WRONG IN JUDGING THE LEGALITY OF THE CHECKPOINT.**

The Court properly denied post-conviction relief because Petitioner failed to meet his burden of showing prejudice by showing that, but for the alleged deficiency, he would not have pled guilty but would have gone to trial. To the contrary, there is considerable evidence in the record to show that Petitioner pled guilty for a panoply of other reasons. Furthermore, Petitioner failed to present any compelling evidence of what Petitioner would have found had he more thoroughly investigated the legality of the checkpoint.

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRPC; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she 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, 686 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Strickland at 687. “There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case.” Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

Judicial scrutiny of counsel’s performance must be highly deferential, as it is all too tempting for a defendant to second guess counsel’s assistance after conviction or adverse

sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. Strickland, 466 U.S. at 689. "[E]very effort be made to eliminate the distorting effects of hindsight" and to evaluate counsel's decisions at the time they were made. Id. Accordingly, courts must be wary of second-guessing counsel's tactics. Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that 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. In the context of a guilty plea, in order to satisfy the prejudice requirement, "the defendant must show there is a reasonable probability that, but for counsel's errors, he would not have pled guilty and would have insisted on going to trial." Frierson v. State, 423 S.C. 257, 262, 815 S.E.2d 433, 436 (2018) (quoting Hill v. Lockhart, 474 U.S. 52, 59 (1991)).

Petitioner additionally claimed his plea was not entered knowingly or voluntarily. To find a guilty plea is voluntarily and knowingly entered into, the record must establish Applicant had a full understanding of the consequences of his plea and the charges against him. See Boykin v. Alabama, 395 U.S. 238, 243 (1969); Dover v. State, 304 S.C. 433, 434, 405 S.E.2d 391, 392 (1991). In determining guilty plea issues, it is proper to consider the guilty plea transcript as

well as evidence presented at the PCR hearing. See Harris v. Leeke, 282 S.C. 131, 134, 318 S.E.2d 360, 361 (1984).

Because a guilty plea is a solemn, judicial admission of the truth of the charges against an individual, the PCR applicant's right to contest the validity of such a plea is usually, but not invariably, foreclosed. See Blackledge v. Allison, 431 U.S. 63, 73-74 (1977). Statements made during a guilty plea should be considered conclusively, unless an Applicant presents valid reasons why he should be allowed to depart from the truth of his statements. See Crawford v. U.S., 519 F.2d 347, 350 (4th Cir. 1975) (overruled on other grounds by U.S. v. Whitley, 759 F.2d 327 (4th Cir.1985)).

An applicant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of the plea by showing that trial counsel's representation fell below an objective standard of reasonableness, and that there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty, but would have insisted on going to trial instead. See Roscoe v. State, 345 S.C.16, 20, 546 S.E.2d 417, 419 (2001); see also Richardson v. State, 310 S.C. 360, 362 426 S.E.2d 795, 797 (1993).

- a. Petitioner pled because he was guilty, and because he was pursuing a deal for a lesser charge, a favorable sentencing recommendation, and dismissal of numerous other serious charges.**

Petitioner briefly testified at the evidentiary hearing. (Appx. 55-62). Despite only taking the stand for a few minutes, Petitioner promptly tanked his credibility by contesting the presence of an open container to which he admitted during the plea, and which was relied upon by law enforcement in conducting the subsequent search. (Appx. 56, ll. 19-24; Appx. 59-60). Petitioner expressed his lack of familiarity with his case and that he broadly asked Counsel to file any necessary motions, after which PCR Counsel led Petitioner to agree he would have wanted Counsel to file "any motion that would have led to . . . the dismissal of the charges against

[him.]” (Appx. 57-58). When confronted with his admission of facts on cross-examination, Petitioner noted his “lawyer told [him] it was in [his] best interest to take the plea.” (Appx. 58-59).

Petitioner’s testimony at the evidentiary hearing, even if one sets aside his absolute lack of credibility, fails to get over the prejudice bar as articulated in Frierson and Hill, especially when considered in the context of the entire record. The plea court specifically asked Petitioner:

THE COURT: Are you pleading guilty to this crime because you committed this crime?

THE DEFENDANT: Yes, sir.

(Appx. 9, ll. 2-4). Furthermore, the possibility of challenging the validity of the stop at trial was specifically brought to Petitioner’s attention during the plea, and Petitioner affirmed he understood he would be waiving that defense by pleading guilty. (Appx. 9-10). In lieu of mitigation, as sentencing was to be deferred, Counsel noted his concern about standing, but additionally noted his belief that “a lot of the problems that the Highway Patrol would normally have in a check point were not present here.” (Appx. 11, ll. 3-8). Counsel thereafter very briefly summarized some weaknesses in any potential motion to suppress. (Appx. 11, ll. 8-17). At the evidentiary hearing, Counsel conceded he may have been inaccurate as to standing, but reaffirmed his opinion that a suppression motion would not be successful. (Appx. 68, ll. 16-23; Appx. 70, ll. 15-17). Counsel additionally noted he did not file any motion to suppress because he “was afraid that the deal that we finally did get would be taken off the table. It’s kind of an unspoken rule in criminal prosecution that, okay, you can file your motion, but forget the plea offer. And he was looking at a lot of time.” (Appx. 70-71).

Additionally, Petitioner did not plead straight-up. Rather, despite the discovery of 102 grams of cocaine, Petitioner was offered the opportunity to plead guilty to trafficking between 28

and 100 grams. (Appx. 2, ll. 3-9; Appx. 9, ll. 9-24). Petitioner was also facing charges for attempted murder, trafficking MDMA, a charge for marijuana, and a charge for an unrelated assault and battery. (Appx. 69-70). These facts and the testimony by Counsel at the evidentiary hearing provide “any evidence” for the Order of Dismissal’s conclusion that Petitioner “did not plead guilty because Counsel failed to make a winning motion for suppression, but rather, he pled guilty because Counsel negotiated the deal of a lifetime for Applicant.” (Appx. 112).

These facts compare favorably to those in Smith v. State, 369 S.C. 135, 631 S.E.2d 260 (2006). In Smith, the felony DUI applicant asserted in his application that, but for counsel’s errors, he would not have pled guilty but would have proceeded to trial, but subsequently failed to assert as much in his testimony at the PCR hearing. The Court noted “that the undisputed testimony of a PCR applicant is sufficient to warrant relief[,]” but distinguished Smith from prior cases by observing that applicant failed to offer the necessary testimony and found “that the averment in a PCR application that the applicant would not have pled guilty is insufficient to warrant relief.” Id., 369 S.C. at 138, 631 S.E.2d at 261. In the present matter, we don’t even have an averment in the application—Applicant *never* asserted he wouldn’t have pled guilty. As such, the PCR Court was correct to deny relief, and its denial of relief should be affirmed.

- b. Petitioner failed to meet his burden of proof beyond “mere speculation” where, rather than call any witnesses with actual knowledge of the checkpoint in question, he only offered testimony of an uninvolved officer who could find no records about the checkpoint some six-and-a-half years after the fact.**

Additionally, beyond the law as it pertains to standing,<sup>1</sup> Petitioner failed to show what, if anything, Counsel would have found to change the outcome had he investigated the case more thoroughly. In order to prevail upon a claim that counsel did not adequately prepare or investigate a case, an applicant must present evidence of what counsel could have discovered or what other defenses applicant could have requested counsel develop and present had counsel been more prepared. Harris v. State, 377 S.C. 66, 75-76, 659 S.E.2d 140, 145-46 (2008) (citing Jackson v. State, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998)). Furthermore, an applicant must also present evidence to show how the discoverable matters or defenses would have resulted in a different outcome. Id. (citing Davis v. State, 326 S.C. 283, 288, 486 S.E.2d 747, 749 (1997); Skeen v. State, 325 S.C. 210, 214, 481 S.E.2d 129, 132 (1997)). Mere speculation as to how the alleged lack of preparation prejudiced an applicant is not sufficient to support a grant of relief. Id., 377 S.C. at 75, 659 S.E.2d at 145 (citing Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995)).

At the evidentiary hearing, Petitioner offered the testimony of Mr. William Michael Clemmons,<sup>2</sup> of the South Carolina Highway Patrol, in an effort to satisfy his burden. (Appx. 81-

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<sup>1</sup> Petitioner obviously had standing to challenge the validity of the checkpoint and resulting seizure, and any uncertainty Counsel may have had on the subject was unjustified. See Brendlin v. California, 551 U.S. 249 (2007). Any person who has ever been the passenger in a stopped car can reasonably conclude that if they were to simply hop out and start walking down the highway, the almost certain outcome would be their immediate detention. See Id. at 255 (“[W]e have said over and over in dicta that during a traffic stop an officer seizes everyone in the vehicle, not just the driver.”). Any search is a different issue, however, as law enforcement immediately identified an open container in plain view and when Petitioner stepped out of the vehicle, drugs tumbled out after him. Suffice it to say, any searching was at that point valid.

<sup>2</sup> The State objected on grounds that it had no notice of the witness. (Appx. 78-81).

87). Clemmons testified that, in response to Petitioner’s subpoena for “[a]ny and all South Carolina Department of Public Safety records, data or other documentation utilized in the vehicle license checkpoint operation that was carried out on July the 30<sup>th</sup>, 2010, at the intersection of SC secondary road 111 and Highway 57 North in the Little River section of Horry County[,]” he checked SCHP’s records and found nothing. (Appx. 82-83). However, Clemmons immediately indicated he didn’t even know if such records were kept by SCHP. (Appx. 83-84). Clemmons noted that procedures at the time of the evidentiary hearing utilized a pre-checkpoint list, but acknowledged he found no such records on file at SCHP for the checkpoint in question. (Appx. 84, ll. 7-21). On cross-examination, Clemmons admitted he was not involved in the checkpoint, was not stationed in the area at the time of the checkpoint, had no personal knowledge of the checkpoint, and weakly agreed he was a records custodian. (Appx. 85, ll. 6-20). Upon further questioning by the Court as to whether there was a particular need for the road block in the area at the time, Clemmons offered his personal knowledge that “[i]t’s a very heavily traveled area up there, and we do have a lot of crashes, DUI crashes and stuff in that general area.” (Appx. 86-87).

Clemmons testimony boils down to two key points, neither of which satisfy Petitioner’s burden—he couldn’t find a piece of paper from a license checkpoint staged some six-and-a-half years prior, and he articulated his own reasoning to justify the checkpoint. Despite knowing “Captain Nell” of the SCHP was present at and ostensibly supervised the checkpoint, and despite subpoenaing him for records, Petitioner didn’t bother to have him personally testify on the subject at the hearing where his personal knowledge could have resolved any questions as to the validity of the checkpoint. Instead, only Clemmons testified about paperwork the SCHP is not required to keep for any particular period of time under South Carolina law.

Petitioner argues the absence of records of pre-existing empirical data to justify the checkpoint means the checkpoint was *ipso facto* unconstitutional. Petitioner offers no citation to any regulation, statute, or holding that requires law enforcement to keep particular records for any discrete period of time. Instead, in presenting this argument, Petitioner erroneously reads his desired conclusion from State v. Vickery, 399 S.C. 507, 732 S.E.2d 218 (Ct. App. 2012).

Petitioner asserts:

The Vickery court held that under [the] second prong of [Brown v. Texas, 443 U.S. 47 (1979)], “empirical data on the effectiveness of the checkpoint” must be used to balance the other two prongs set forth.”

(Petition for Writ of Certiorari at 10). However, Vickery in no uncertain terms holds the exact opposite:

*Vickery* argued and the trial court found the State presented no evidence of empirical evidence that led to the determination of the location of the checkpoint. However, *the cases on point do not require the State to present pre-existing empirical data to justify setting up the checkpoint*. The case law does require some basis for the location of the checkpoint. Here, Officer Byrd testified the checkpoint was placed in that location due to citizen complaints about speeding and loud music. Major Mitchell also testified he had personal knowledge of the problems at the intersection before the checkpoint was set up from seeing incident reports, traffic tickets, and statistics. Additionally, the Traffic Enforcement Activity Reports for dates prior to April 26 show that license checkpoints in the same area resulted in thirty to sixty traffic and criminal offenses on each occasion. Therefore, the trial court committed an error of law in requiring the State to present empirical data to justify the authorization and implementation of the checkpoint.

Vickery, 399 S.C. at 520, 732 S.E.2d at 224 (emphasis added, footnote omitted). The omitted footnote observed favorably that, as was evidently the case here as observed by Counsel in the form of Captain Nell’s presence, “[t]he checkpoint was not established by the officers conducting it but rather by their supervisors.” Id., 399 S.C. at 520 n.1, 732 S.E.2d at 224 n.1.

Petitioner requires temporal gymnastics on the part of law enforcement, demanding a “record of

effectiveness of the checkpoint before they set it up.” (Petition for Writ of Certiorari at 11). The SCHP are human law enforcement, constrained to observe time in its ceaseless march in one direction like anybody else. The requirement under Brown, as observed in Vickery, is more limited than conceived of by Petitioner—there must be some justification before establishing a highway checkpoint, but law enforcement can’t be held to a “record of effectiveness” of a thing before it exists.

Petitioner strongly implies in its argument that Respondent failed to meet some burden of validating the checkpoint at the evidentiary hearing, but this being a post-conviction relief action, the burden of proof falls upon Petitioner. See Butler, 286 S.C. at 442, 334 S.E.2d at 814. Petitioner does not get over the hump of “mere speculation” by vaguely waving at the absence of records law enforcement are not obliged to keep, while tactically ignoring the continued existence of witnesses who could actually answer the questions he raises. Petitioner attempts to compare the present case to State v. Groome, 378 S.C. 615, 664 S.E.2d 460 (2008), arguing he should benefit from the dearth of testimony from Clemmons to justify the checkpoint, but again fails to recognize that Clemmons was *his witness*, offered without notice to the State, based on a vague allegation of failure to investigate, and that the burden of showing a different outcome is entirely on Petitioner. Petitioner’s critique of Clemmons is as plain an example of a “straw man” as may well exist—Petitioner purposefully called a witness with no personal knowledge, now dings the State for it, and nakedly objected to the PCR Court’s effort to check for personal knowledge.

If anything, the law and limited record would point in the direction of the checkpoint’s validity. Counsel, an experienced attorney with, in particular, 15 years of experience as a municipal court judge in Horry County, was more than qualified to use his personal experience

and judgment to determine the likely validity of the established checkpoint, especially upon his repeated observations that supervisory figures with the SCHP were present and administering the license checkpoint, eliminating any defense that the roadblock was the arbitrary and unconstitutional use of unfettered discretion by individual troopers. (Appx. 62-63; Appx. 64-65). Clemmons, though only assigned to Horry after the date of the checkpoint in question, was able to offer his personal knowledge of DUI-related incidents in the area of the checkpoint. (Appx. 86-87). Each witness' testimony provides evidence to justify Counsel's cautious decision to not pursue a motion to suppress, or at the least fails to constitute anything that would serve to satisfy Petitioner's burden of showing some different outcome. As such, Applicant failed to present evidence to show what, if anything, different Counsel would have discovered had he further investigated the validity of the checkpoint and accordingly has not met his burden of showing prejudice.

**CONCLUSION**

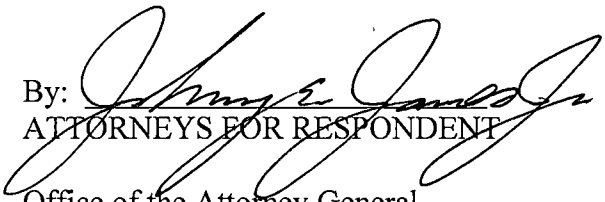
For the foregoing reasons, this Court should deny this Petition for Writ of Certiorari. Should this Court grant the petition, the State seeks permission to more fully brief the issues herein.

Respectfully submitted,

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28 Aug, 2018

STATE OF SOUTH CAROLINA  
In the Supreme Court

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CERTIORARI TO Horry COUNTY  
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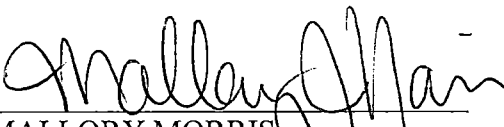
**CERTIFICATE OF SERVICE**

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The undersigned hereby certifies that a true copy of **Return to Petition for Writ of Certiorari** has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

**Victor R. Seeger, Esquire**  
**1330 Lady Street, Ste. 401**  
**Columbia, SC 29201**

This 28<sup>th</sup> day of August, 2018.

  
MALLORY MORRIS  
Legal Assistant for Respondent



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S.C. SUPREME COURT

ALAN WILSON  
ATTORNEY GENERAL

August 28, 2018

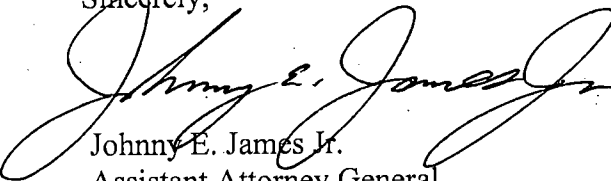
The Honorable Daniel E. Shearouse  
Clerk, South Carolina Supreme Court  
Post Office Box 11330  
Columbia, South Carolina 29211

**RE: Stefano T. Brooks v. State of South Carolina**  
**Appellate Case No. 2017-001615**  
**Lower Court Case No. 2015-CP-26-0259**

Dear Mr. Shearouse:

Enclosed for filing are the original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above-referenced case. By copy of this letter we are serving opposing counsel today.

Sincerely,



Johnny E. James Jr.  
Assistant Attorney General  
S.C. Bar No. 101260

JEJ/mm  
Enclosures

cc: Victor R. Seeger, Esquire