

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM MARLBORO COUNTY
Court of Common Pleas

S.C. SUPREME COURT

Roger E. Henderson, Circuit Court Judge
Case No. 2017-CP-34-00064

Appellate Case No. 2019-000064

Gary Locklear, individually and as Personal Representative
Of the Estate of Roy Locklear, Respondent,

v.

Marlboro County, Marlboro County Sheriff's Office, Marlboro
County Detention Center, Dr. Charles Bush, Southern Health
Partners, and South Carolina Law Enforcement Division, Defendants,

Of which, Southern Health Partners and Dr. Charles Bush are Petitioners.

REPLY TO RETURN TO PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

As stated in the Petition for a Writ of Certiorari of Southern Health Partners and Dr. Charles Bush, the question presented is: Did the Court of Appeals err in issuing an Order dismissing Petitioners' appeal? Stated differently, the question is: Should there be an immediate appeal for an immediate harm when a party is compelled to produce confidential, proprietary, or trade secret documents without any protection?

The Petition for a Writ of Certiorari is about whether the Court of Appeals erred in failing to consider the persuasive authority on South Carolina appellate law (quoted below) and issuing an Order dismissing Petitioners' appeal. The persuasive authority relied on by Petitioners is:

If an order requires a party to turn over documents that the party feels are privileged or contain proprietary or confidential matters, and the party does not have a right to an immediate appeal, compliance renders the protections afforded by the privilege or confidentiality a nullity. See *Ex parte Whetstone*, 289 S.C. 580, 347 S.E.2d 881 (1986). Hence, where the appealed order has the effect of revealing the very thing the appellant claims should remain confidential, an immediate appeal may well be warranted and permitted by the appellate courts. See *City of Columbia v. ACLU of S.C., Inc.*, 323 S.C. 384, 475 S.E.2d 747 (1996).

JEAN HOEFER TOAL ET AL., APPELLATE PRACTICE IN SOUTH CAROLINA, 154 (3d ed. 2016)(emphasis added). Petitioners are requesting an immediate appeal for an immediate harm. The immediate harm is the compelled production of confidential, proprietary, and/or trade secret business policies with absolutely no protection and under penalty of immediate sanctions.

The Petitioners have always been willing to produce to Respondent's counsel the confidential information so long as a confidentiality agreement or order was in place to protect the confidential information from being viewed or used outside the parameters of the pending litigation.

Contrary to Respondent's assertion otherwise, Petitioners' confidential information at issue goes to the merits of the case. This has been recently established by an email exchange between Petitioners and Respondent's counsel, which is discussed below.

REPLY

I. Reply to Respondent's Statement of the Case

In reply to Respondent's Statement of the Case, Respondent has improperly included purported facts that are not material to the consideration of the question presented. Though concise introductory statements appear to be permitted along with the facts material to the consideration of the question presented, it is improper to argue the merits of one's case in the Petition, a Return to Petition, or a Reply, if the appellate court has not considered the merits and ruled on appeal. The Court of Appeals dismissal of Petitioner's appeal has prevented any of the merits from being developed or ruled upon. Because Petitioners have not yet been allowed to present the merits of the appeal, the full scope and substance of the appeal has not yet been stated or developed. Thus, the only question now is whether the Court of Appeals erred in issuing an Order dismissing Petitioners' appeal.

Beginning at the last paragraph on page 1 of Respondent's Return with "[t]he factual allegations . . . ," Respondent is arguing the merits of his case to this Court in an attempt to improperly persuade this Court as to the merits of Petitioners' appeal. Respondent's attempt to improperly persuade this Court continues through the second paragraph on page four of Respondent's Return with "[o]n July 13, 2018" Though Petitioners strongly disagree with a number of mischaracterizations by Respondent in the third full paragraph (beginning with "[b]y order signed . . .") on page 4 of Respondent's Return through the third full paragraph (beginning with "[v]ia receipt of USPS correspondence . . .") on page 5 of Respondent's Return, that brief

section contains the only statements related to purported facts material to the consideration of the question presented. In other words, that brief section is the only part of the Respondent's Return that relates to whether the Court of Appeals erred in issuing an Order dismissing Petitioners' appeal. The rest is improper and should not be considered by the Court at this stage of the appeal.

II. Reply to Respondent's Argument I

In reply to Respondent's Argument I, Respondent asserts incorrectly that "Petitioners were seeking to appeal an interlocutory order which did not involve the merits of the case." However, despite Respondent improperly including purported facts that are not material to the consideration of the question presented (*supra*), Respondent neglected to inform this Court that he agrees that the confidential information at issue goes to the merits of the case. When this case recently appeared on the trial roster, counsel for Petitioners asked Respondent's counsel about Respondent's expert witnesses, their opinions, and deposition readiness; Respondent's counsel's emailed answer demonstrates that the confidential information at issue in this Petition is necessary for the opinions of the expert witnesses to testify as to the merits of the case against Petitioners. *See* email attached as Exhibit A.

Respondent demanded Petitioners simply follow the purported "explicit instructions" from *Tucker v. Honda of South Carolina Manufacturing*, 354 S.C. 574, 582 S.E.2d 405 (2005) for "the proper procedure by which a party can appeal a discovery order" Return, p. 6. *Tucker*, citing *Ex parte Whetstone*, 289 S.C. 580, 347 S.E.2d 881 (1986), provides that "[a] party may comply with the order [compelling discovery] and waive any right to challenge it on appeal or refuse to comply with the order, be cited for contempt, and appeal." However, Respondent ignores two realities of Petitioners' position. One, Petitioners are not seeking to circumvent the

established procedure for appealing discovery orders generally, but are seeking an immediate appeal for an immediate harm—the compelled disclosure of confidential, proprietary, and/or trade secret business policies and procedures without any protection. Two, Petitioners have made their appeal based on a well-known and widely recognized persuasive authority in South Carolina—APPELLATE PRACTICE IN SOUTH CAROLINA. Respondent minimizes Petitioners’ reliance on an important section—addressing the appealability of judgments and orders involving discovery of confidential matters—in the treatise, APPELLATE PRACTICE IN SOUTH CAROLINA (3d ed. 2016), authored by former Chief Justice Jean Hoefer Toal, Amelia Waring Walker, and Margaret E. Baker. Respondent mischaracterizes the applicable section in the treatise as a mere “suggestion.”

While Petitioners have worked throughout the briefing process to fully appreciate the treatise’s inclusion of two case citations, it is clear that the authors of APPELLATE PRACTICE IN SOUTH CAROLINA (3d ed. 2016) included both *City of Columbia v. ACLU of S.C., Inc.* and *Ex parte Whetstone* as negative examples of why the appellate court, instead of applying *Tucker*, should permit, as warranted, an immediate appeal of a discovery order involving a requirement to reveal information that is privileged or contains proprietary or confidential matters.

The main point of the applicable section in the treatise, however, is clear and unambiguous:

If an order requires a party to turn over documents that the party feels are privileged or contain proprietary or confidential matters, and the party does not have a right to an immediate appeal, ... [and] where the [discovery] order has the effect of revealing the very thing the [aggrieved party] claims should remain confidential, an immediate appeal may well be warranted and permitted by the appellate courts.

JEAN HOEFER TOAL ET AL., APPELLATE PRACTICE IN SOUTH CAROLINA, 154 (3d ed. 2016)(emphasis added, internal citations omitted).

Ex parte Whetstone is cited in the treatise as a simple negative example of a case in which an order compelling discovery of privileged documents containing proprietary or confidential matters may well have warrant an immediate appeal, even though one may not have been taken. The treatise uses *Ex parte Whetstone* as a negative example, showing the problem merits an immediate appeal option in addition to the *Tucker* option.

City of Columbia v. ACLU of S.C., Inc. is cited in the treatise as another simple example of a case (which is not, as Respondent analyzes, a limitation on the meaning of the applicable section in the treatise [Return, pp. 7,8]), which may well warrant an immediate appeal due to the nature of privileged documents containing proprietary or confidential matters.

Petitioners can only conclude that Respondent believes that this Court should completely disregard the section in the treatise addressing the appealability of judgments and orders involving discovery of confidential matters. Respondent clearly views the discovery issues in the case at hand, and presumably any case involving discovery of privileged documents containing proprietary or confidential matters, as issues involving “merely basic responsive discovery material” and a “basic discovery dispute that comes up routinely in civil litigation.” Return, p. 9. However, according to some very distinguished legal minds, an order compelling discovery of privileged documents containing proprietary or confidential matters is not a basic responsive discovery matter. In instances of the compelled production with no protections of confidential, proprietary, and/or trade secret business policies and pain of immediate sanctions, such orders merit the immediate appeal of an immediate harm.

This Court and the South Carolina Court of Appeals have cited to the treatise—APPELLATE PRACTICE IN SOUTH CAROLINA—on twenty-two (22) occasions to clarify the appellate court’s position on legal issues.¹

In *Brown v. South Carolina Department of Health and Environmental Control*, 348 S.C. 507, 512, 560 S.E.2d 410, 413 (2002), this Court cited to APPELLATE PRACTICE IN SOUTH CAROLINA to explain the three duties of the Administrative Law Judge Division. This Court also cited to APPELLATE PRACTICE IN SOUTH CAROLINA in setting forth the standard of review. See *Brayboy v. WorkForce*, 383 S.C. 463, 467, 681 S.E.2d 567, 568 (2009). The South Carolina Court of Appeals cited to APPELLATE PRACTICE IN SOUTH CAROLINA in stating that actions for injunctive relief are equitable in nature. *Wiedemann v. Town of Hilton Head Island*, 344 S.C.

¹ See, e.g., *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) (discussion on clarifying the law on the presentation and use of additional sustaining grounds in an appeal); *Kennedy v. S.C. Ret. Sys.*, 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001) (“reiterating ‘this Court’s longstanding principle of error preservation’”); *S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 301, 641 S.E.2d 903, 907 (2007) (same). See also *Gottschlich v. Strimpfel Custom Homes, Inc.*, No. 2012-UP-676, 2012 WL 10864566, at *1 (Ct. App. Dec. 19, 2012); *Brayboy v. WorkForce*, 383 S.C. 463, 467, 681 S.E.2d 567, 568 (2009); *Elkachbendi v. Elkachbendi*, No. 2012-UP-479, 2012 WL 10862490, at *2 (Ct. App. Aug. 15, 2012); *Kocaya v. Kocaya*, 347 S.E. 26, 29, 552 S.E.2d 765, 766 n.2 (Ct. App. 2001); *Rainey v. Charlotte-Mecklenburg Hosp. Auth.*, No. 2015-UP-209, 2015 WL 1880212, at *2 (Ct. App. April 22, 2015); *Wiedemann v. Town of Hilton Head Island*, 344 S.C. 233, 236, 542 S.E.2d 752, 753 (Ct. App. 2001); *State v. Rogers*, 361 S.C. 178, 183, 603 S.E.2d 910, 913 (Ct. App. 2004); *State v. Crocker*, 366 S.C. 394, 399, 621 S.E.2d 890, 893 n.1 (2005); *Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.*, 351 S.C. 459, 467, 570 S.E.2d 197, 201 (2002); *Trivelas v. S.C. Dept. of Transp.*, 348 S.C. 125, 132, 558 S.E.2d 271, 274 (Ct. App. 2001); *State v. Hughes*, 346 S.C. 339, 345, 552 S.E.2d 35, 38 n.5 (Ct. App. 2001); *Stinney v. Sumter School Dist. 17*, 382 S.C. 352, 360, 675 S.E.2d 760, 764 (Ct. App. 2009); *Wells Fargo Bank, N.A. v. Fallon Properties South Carolina, LLC*, 422 S.C. 211, 221, 810 S.E.2d 856, 861 (2018); *Walterboro Community Hosp. v. Meacher*, 392 S.C. 479, 491, 709 S.E. 2d 71, 77 (2011); *Gibson v. Ameris Bank*, 420 S.C. 536, 542, 804 S.E.2d 276, 280 n.2 (Ct. App. 2017); *Walbeck v. The I’On Company, LLC*, No. 2015-001590, 2018 WL 3748668, at *11 (Ct. App. Aug. 8, 2018); *State v. Geer*, 391 S.C. 179, 193, 705 S.E.2d 441, 449 (Ct. App. 2010); *Ex Parte Moore*, 346 S.C. 274, 278, 550 S.E.2d 877, 879 (Ct. App. 2001).

233, 236, 542 S.E.2d 752, 753 (Ct. App. 2001). South Carolina appellate courts clearly rely upon APPELLATE PRACTICE IN SOUTH CAROLINA in rendering decisions.

Not only has this Court cited to APPELLATE PRACTICE IN SOUTH CAROLINA, but this Court has explicitly utilized treatises in addressing novel issues rarely addressed before the Court, as was the case in *Simons v. Mark Lift Industries, Inc.*, 366 S.C. 308, 309, 622 S.E.2d 212, 213 (2005). In *Simons*, the United States District Court for the District of South Carolina presented this Court with three certified questions. In dissent, Justice Moore states “[he] has considered the numerous foreign decisions, treatises and law review articles offered by the parties” along with a review of mandatory and persuasive case law. *Id.* at 320, 622 S.E.2d at 220 (Moore, J., dissenting). Justice Moore utilized treatises in a context where “the Court has not previously had the opportunity to determine the meaning” of an exception set forth in case law. *Id.* at 323, 622 S.E.2d at 221.

Like the parties in *Simons*, who offered treatises to the Court, Petitioners offer APPELLATE PRACTICE IN SOUTH CAROLINA, 154 (3d ed. 2016) in support of their position on an issue that is novel and rarely addressed by the appellate courts.

In pages 8-11 of Respondent’s Return, Respondent discusses Petitioners not formally asking the trial court for an *in camera* review of the confidential information, including the medical policies and procedures in place at the subject facility, among other information. Again, Respondent mischaracterizes the point of Petitioners’ statement. Petitioners did assert in one sentence that “the trial court also should have examined the Petitioners’ documents in detail *in camera* in order to assess the claims of confidential, proprietary and/or trade secret information.” Petitioners simply offered the one sentence assertion regarding *in camera* examination as an option the trial court had. Respondent is misguided in his reliance on *Wilson v. Preston*, 378

S.C. 348, 662 S.E.2d 580 (2008) regarding *in camera* requests. *Wilson v. Preston* supports the proposition that Respondent, not Petitioners, should have requested *in camera* review, because it was Respondent (like Ms. Wilson) who requested the confidential information. The logic of Respondent in relying on *Wilson v. Preston* would support an appellate court ruling that the trial court abused its discretion in not reviewing any material *in camera*, because Respondent was granted discovery of requested confidential information apart from an *in camera* review.

The transcript of record (Appendix, pp. 1-47) and the email (Appendix, pp. 48-83) involving then counsel for Petitioners, provides a clearer picture of the good faith efforts of Petitioners to respond to Respondent's discovery requests and to pursue protection of certain confidential information.

The affidavit (Appendix, pp. 79-81; addressed at the hearing, in the Petition for a Writ of Certiorari, and in Respondent's Return) of the chief executive officer of Southern Health Partners established that many of the documents sought by Respondent are confidential and proprietary, and that they have been damaged in the past by former vendors, employees, and at least one opposing litigation expert attempting to use the policies and procedures to obtain business from existing or potential clients.

The whole posture of Petitioners' discovery participation was summed up at the hearing on Respondent's Motion to Compel, when counsel for Petitioners instructed the court that Petitioners will fully produce the material in question, but simply asked the court to issue a confidentiality order.

Mr. Tyler: Yes, Your Honor, we're happy to provide the whole thing [the requested documents].
The Court: Why haven't you already provided the whole thing?
My Tyler: Your Honor, because we've requested a confidentiality order.

Appendix p. 46, lines 4-9.

The affidavit of the chief executive officer of Southern Health Partners and the arguments by counsel for Petitioners during the hearing provided the key reasons for a granting of a confidentiality order. The policies themselves are detailed policies and procedures, the confidential nature of which stems from the work product that went into developing such policies and procedures, the integral use of the policies and procedures in the daily operation of the business, and the measures taken to keep the policies and procedures out of the hands of business competitors.

The question is not whether Petitioners jumped through every hoop before the order compelling discovery was issued, but it is whether an immediate appeal is “warranted and permitted by the appellate courts” (JEAN HOEFER TOAL ET AL., APPELLATE PRACTICE IN SOUTH CAROLINA, 154 (3d ed. 2016)) if the party must reveal the very thing that is confidential.

III. Reply to Respondent’s Argument II

In reply to Respondent’s Argument II, Respondent clearly calls Petitioners liars (“This statement is false.” Return, p. 17) before this Court, in connection with a statement by Petitioners that is 100% true but grossly mischaracterized by Respondent. The statement above which Respondent makes his unfounded, inaccurate claim is:

Petitioners claim these explicit instructions on how such a discovery can be appealed from Tucker create an “eminently unreasonable predicament into which to place a business for the offense of seeking to protect its work product that is confidential, proprietary, and/or a trade secret, especially in this matter where Petitioners have **always** stated the willingness to produce all the requested documents pursuant to a confidentiality order and/or agreement.”

(Return, p. 17; emphasis added by Respondent to portion of quote in Petition at pp. 9-10).

What Respondent improperly attempts to do is directly question Petitioners' honesty by insinuating that Petitioners and Respondents were communicating about the policies and procedures since day one of discovery, May 3, 2017, and finally, on May 18, 2018, Petitioners raised the issue of a confidentiality agreement for the first time. Return, pp. 17-18. What Respondent does not say is that the policies and procedures became an issue on or around May 2018 when, through the supplementing process. It was in May that the discussion of a confidentiality agreement as to the policies and procedures began with Respondent's counsel, because, prior to that time, it had not been determined that the specific policies and procedures, were applicable to Respondent's discovery requests. Once that had been determined, the issue was raised properly as to the policies and procedures on May 18, 2018. In that proper context, Petitioners have always stated the willingness to produce all the requested documents pursuant to a confidentiality order and/or agreement.

IV. Reply to Respondent's Provocation of the Issue of Discovery Abuse

In Respondent's appellate responses in the Court of Appeals and this Court, Respondent does not hesitate to further provoke the issue of whether Petitioners abused the discovery process. Despite a generally good working relationship among counsel for Petitioners and Respondent's counsel since the case began, there was no hint of the tone, degree or frequency Respondent's counsel would argue abuse of discovery by Petitioners until the hearing itself and Respondent's counsel submittal of a proposed Order for consideration by Judge Henderson. Appendix, pp. 48-83. The only issues remaining prior to the hearing on the motion to compel involved the confidentiality of policies and procedures and one other interrogatory. Appendix, pp. 75-76. There were no other unresolved issues as of July 10, 2018. *Id.* And yet the Order and Respondent's appellate responses in the Court of Appeals and this Court attempt to portray these

two discovery issues as among the most egregious of discovery abuses. Prior to the motion to compel hearing, Petitioners and Respondent had resolved every discovery issue except for the policies and procedures and one other interrogatory. And as to those two issues, Petitioners and Respondent agreed that the issue was the response, not any delays in responding and not any abuse in responding to the discovery. *Id.*

V. Reply to Respondent’s Gross Mischaracterization of Petitioners’ Reliance on APPELLATE PRACTICE IN SOUTH CAROLINA

On page 19 Respondent’s Return, Respondent grossly mischaracterizes Petitioners’ reason for relying on the treatise, APPELLATE PRACTICE IN SOUTH CAROLINA, 154 (3d ed. 2016) as an alternative to *Tucker* in the limited circumstances of discovery involving information that is privileged or contains proprietary or confidential matters. Respondent states that the reason Petitioners did not follow *Tucker*

is exactly what Respondent had predicted: they are attempting to avoid the fees and sanctions of the trial court’s order to compel, describing such as “unreasonable coercion” and trying to portray their failure to prevail in the basic discovery dispute as a seminal event that could chill business throughout the state.

Return, p. 19. Respondent insinuates that Petitioners’ argument in their Reply to Respondent’s Return to Appellant’s Petition for Rehearing (Appendix, pp. 197-200) was presented to advance some hidden but predictable agenda to avoid fees and sanctions. To the contrary, this appeal is about the business policies and procedures and their confidential, proprietary nature. Respondent is clearly attempting to improperly influence this Court again as to the character of the Petitioners.

VI. Reply to Respondent's Footnote 2 on Page 21

In reply to Respondent's footnote 2 on page 21, Respondent again improperly attempts to call into question the character of Petitioners and Petitioners' counsel, when he states as follows:

To the extent Petitioners attempt to assure this court that they "have only respect for the court system judges, and orders" and "have no contempt for the court's orders" (Petition p.10), **Respondent would merely note** that the Petitioners have refused to supplement **any** discovery responses since the trial court's July 31, 2018 [Order], despite that order clearly requiring the Petitioners to produce more than the alleged confidential work product material Petitioners[] have been attempting to appeal. (Appendix p.102-105)."

Return, p. 21, fn. 2 (additional emphasis added by Petitioner to "Respondent would merely note"). Respondent's counsel knows full well that Petitioners have appealed the entire Order. Petitioners cannot supplement any discovery responses impacted by the Order or else jeopardize any right to relief requested on appeal. *See* Rule 241(a), SCACR.

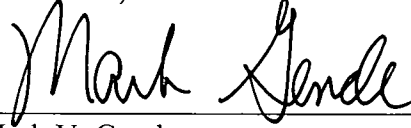
CONCLUSION

Petitioners are seeking an immediate appeal for an immediate harm based upon persuasive South Carolina authority and are not seeking to rewrite or circumvent the standard procedure concerning the appealability of discovery orders generally. For the reasons stated herein and in the Petition, Petitioners ask the Court to grant this Petition for a Writ of Certiorari, reverse the decision of the Court of Appeals to dismiss Petitioner's Notice of Appeal, and reverse the Order of the trial court.

(Signature on Next Page)

Respectfully submitted,

SWEENEY, WINGATE & BARROW, P.A.

A handwritten signature in black ink, appearing to read "Mark V. Gende", written over a horizontal line.

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Attorneys for Petitioners

February 19, 2019

EXHIBIT A

Mark V. Gende

From: Patrick McLaughlin <Patrick@wukelalaw.com>
Sent: Thursday, January 24, 2019 4:42 PM
To: Mark V. Gende
Cc: 'Buddy Arthur'; w davidson@dml-law.com; Martin S. Driggers, Jr.
Subject: RE: Locklear v. Marlboro County, et al

Mark:

My answers are that I do not know the extent they will have opinions about SHP and/or Dr. Bush, nor are they ready to be deposed, as we have yet to receive full responses to our initial discovery requests from SHP and Dr. Bush.

Patrick J. McLaughlin

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If you have received this communication in error or are not sure whether it is privileged, please immediately notify me by return e-mail and destroy any copies, electronic, paper or otherwise, which you may have of this communication.

From: Mark V. Gende [mailto:MVG@swblaw.com]
Sent: Thursday, January 24, 2019 3:44 PM
To: patrick@wukelalaw.com
Cc: Buddy Arthur; w davidson@dml-law.com; Martin S. Driggers, Jr.
Subject: Locklear v. Marlboro County, et al

Patrick:

You have identified two experts: Aubrey Land and Johnathan Fish. Please let me know which of these experts have opinions about Southern Health Partners and/or Dr. Bush. Also, let me whether they are ready for deposition. If they are ready, please give me dates within the next two weeks for their depositions.

Please contact me with any questions.

Thanks.



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THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM MARLBORO COUNTY
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S.C. SUPREME COURT

Roger E. Henderson, Circuit Court Judge
Case No. 2017-CP-34-00064

Appellate Case No. 2019-000064

Gary Locklear, individually and as Personal Representative
Of the Estate of Roy Locklear, Respondent,

v.

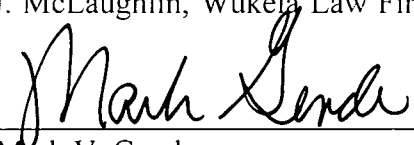
Marlboro County, Marlboro County Sheriff's Office, Marlboro
County Detention Center, Dr. Charles Bush, Southern Health
Partners, and South Carolina Law Enforcement Division, Defendants,

Of which, Southern Health Partners and Dr. Charles Bush are Petitioners.

PROOF OF SERVICE

I certify that I have served the Reply to Return to Petition for a Writ of Certiorari on Gary Locklear, individually and as Personal Representative of the Estate of Roy Locklear, by depositing a copy of the same in the United States Mail, postage prepaid, on February 19, 2019, addressed to his attorney of record, Patrick J. McLaughlin, Wukela Law Firm, Post Office Box 13057, Florence, South Carolina 29504.

February 19, 2018



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