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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM BARNWELL COUNTY
Court of Common Pleas
R. Scott Sprouse, Circuit Court Judge

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Appellate Case No. 2018-001629

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Sammie Lee Gerrick, ..... Petitioner,

v.

State of South Carolina, ..... Respondent.

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**Petition for Writ of *Certiorari***

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## QUESTIONS PRESENTED

Was Sammie Gerrick denied the right to effective assistance of counsel, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution" in one or more of the following particulars:

I. Not moving for Judge Early to recuse himself when the prosecution planned to present evidence that Judge Early was mentioned in a "root." Under the circumstances, Judge Early presiding over the case conveyed to the jurors the trial court's opinion about the "root" evidence and constituted a conflict of interest.

II. Failing to investigate and present available evidence explaining the "root."

III. Failing to object to the trial judge's opening comments and final instruction on the law, instructing the jurors to find the "true facts," including but not limited to the opening instruction, "[A]t the conclusion when you 12 acting collectively as one determine what those true facts are, then you apply those facts to the law as I give it to you and you will be in a position to render a verdict;" and the final instructions to the jurors, "It is your sole responsibility to determine what the true facts are in the case and apply those true facts to the law as I give it to you and render a verdict;" "That is your sole responsibility, your sole duty to determine what the true facts are in this case;" and "You're here to give careful consideration and deliberation of the evidence presented to you, to decide what the true facts are, and apply those facts to the law as I've given it to you."

IV. Failing to object to the trial judge excluding Mr. Gerrick from hearings to determine whether to retain or excuse juror numbers 9 and 23 in violation of Mr. Gerrick's constitutional right to be present during all critical stages of his jury trial.

V. Failing to object to or make an offer to stipulate to graphic photographs of the victim's body when those photographs were so prejudicial, inflammatory, and intended to arouse sympathy, passion, and prejudice in the jurors' minds as to deny Mr. Gerrick due process.

VI. Failing to move to exclude the testimony of Charlene Gerrick that was obtained in violation of the spousal privilege and as a result of improper witness intimidation.

VII. Failing to object to improper victim impact evidence that was not relevant and which were intended to arouse sympathy, passion, and prejudice in the jurors' minds.

VIII. Failing to object to impermissible character testimony that violated Rule 404, SCRE.

IX. Failing to object to the prosecutor's statements in closing argument that were not supported by the evidence in the case and misstated testimony presented at trial when those statements amounted to a violation of due process.

X. Failing to request the trial judge allow defense counsel an opportunity to respond to the prosecutor's statements in closing argument that were not supported by the evidence in the case and misstated testimony presented at trial when those statements amounted to a violation of due process.

XI. Failing to object to statements by the prosecutor during closing argument which were intended to arouse sympathy, passion, and prejudice in the jurors' minds and urged the jurors to seek justice for the victim rather than to determine whether the State met its burden of proof.

XII. Failing to object to inflammatory statements by the prosecutor which were intended to arouse sympathy, passion, and prejudice in the jurors' minds and were so defamatory to Mr. Gerrick that it denied him due process.[1]

XIII. Failing to move to quash the indictment when it was discovered that one of the grand jurors that indicted Mr. Gerrick was also a witness in the case, which denied Mr. Gerrick's right to a fair and impartial grand jury presentment.

XIV. Failing to investigate, develop, and present evidence that someone other than Mr. Gerrick killed the victim.

XV. Failing to federalize the objections related to the three issues briefed by appellate counsel on the direct appeal.

XVI. The cumulative effect of trial counsel's errors requires a new trial.

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[1] In this petition, Mr. Gerrick raises multiple issues regarding the prosecution's closing argument. In *Korey Love v. State*, Appellate Case No. 2016-002233, this Court granted a petition for writ of *certiorari* to consider the following similar issue:

> Did the PCR court err by not allowing Korey Love to amend his PCR application to allege prejudicial, ineffective assistance of trial counsel for not objecting to the Solicitor's "Golden Rule" argument urging the jurors to "be instruments of justice for Isaac Bass?"

## STATEMENT OF THE CASE

The State of South Carolina arrested Sammie Gerrick for the murder of Tyrone Donaldson. The Barnwell County Grand Jury indicted him for Murder. A. 853-54. The State tried Mr. Gerrick before the Honorable Doyet A. Early, III and a jury. Creighton Waters and Jason S. Anders represented the State. Daniel W. Williams represented Mr. Gerrick. The Jurors convicted Mr. Gerrick of murder. Judge Early sentenced Mr. Gerrick to life imprisonment without the possibility of parole. A. 768.

Mr. Gerrick appealed. Lara M. Caudy of the South Carolina Commission on Indigent Defense represented Mr. Gerrick. A. 858-99. Caroline M. Scrantom represtend the State. A. 902-57. The Court of Appeals affirmed Mr. Gerrick's conviction and sentences. *State v. Gerrick*, Op. No. 2016-UP-092 (filed February 24, 2014). A. 960-62. The Remittitur issued on March 25, 2015. A. 963.

On March 15, 2016, Mr. Gerrick filed an application for post-conviction relief ("PCR"). A. 964-73. On September 30, 2016, the State served its return. A. 974-78. On May 3, 2018, Mr. Gerrick amended his PCR application alleging numerous grounds of prejudicial, ineffective assistance of trial counsel. A. 980-85.

On May 9, 2018, the Honorable R. Scott Sprouse convened an evidentiary hearing on the amended application. A. 986-1113. Charles Grose represented Mr. Gerrick. Julie A. Coleman and Caroline Scrantom represented the State. On June 15, 2018, the parties submitted post-hearing briefs. A. 1115-85. On June 20, 2018, Mr. Gerrick submitted a repose to the State's post-hearing brief. A. 1187-1200. On June 22, 2018, the state submitted a response to Mr. Gerrick's post-hearing brief. A. 1202-27. By written order dated July 27, 2018, Judge Sprouse dismissed Mr. Gerrick's PCR application. A. 1222-1307.

On August 16, 2018, Mr. Gerrick served a Rule 59(e), SCRCP motion. A. 1308-49. By written order dated August 24, 2018, Judge Sprouse denied this motion. A. 2350-52. This petition for writ of certiorari follows.

## STATEMENT OF FACTS

A comprehensive statement of facts can be found in Mr. Gerrick's Post-Hearing Brief in Support of his Application for Post-Conviction Relief, found at A. 1118-33.

## STANDARD OF REVIEW

Under the first prong of *Strickland v. Washington*, the defendant "must show that counsel's representation fell below an objective standard of reasonableness," which must be judged under "prevailing professional norms." 466 U.S. 668, 688 (1984). "The first prong—constitutional deficiency—is necessarily linked to the practice and expectations of the legal community: The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010) (internal quotations omitted). "If the State contends the alleged deficiency resulted from a strategic decision made at trial, counsel must articulate a valid reason for employing a certain strategy." *Freiburger v. State*, 413 S.C. 243, 247, 775 S.E.2d 391, 393 (Ct. App. 2015). *And see Ingle v. State*, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002). "Decisions made in ignorance of relevant, available information cannot be characterized as strategic." *Weik v. State*, 409 S.C. 214, 236, 761 S.E.2d 757, 768 (2014).

The second prong of *Strickland*, requires a defendant establish that this deficiency prejudiced him. "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A reasonable probability is a probability sufficient to undermine confi-

dence in the outcome. *Id.* "In determining whether the applicant has proven prejudice, the PCR court should consider the specific impact counsel's error had on the outcome of the trial." *Smalls v. State*, 422 S.C. 174, 188, 810 S.E.2d 836, 843 (2018) (citing *Strickland*, 466 U.S. at 695-96 (explaining that the court must analyze how individual errors of counsel affect the important factual findings in a particular case)). "In addition, the PCR court should consider the strength of the State's case in light of all the evidence presented to the jury." *Id.* (citing *Jones v. State*, 332 S.C. 329, 333, 504 S.E.2d 822, 824 (1998) ("In deciding whether Jones was prejudiced, we must bear in mind the strength of the government's case ...," and "we must consider the totality of the evidence before the jury.")). "In general, the stronger the evidence presented by the State, the less likely the PCR court will find the applicant met his burden of proving prejudice." *Id.* "Ordinarily, the existence of 'overwhelming evidence' does not automatically preclude a finding of prejudice." *Id.* 422 S.C. at 189, 810 S.E.2d at 844. "[F]or the evidence to be 'overwhelming' such that it categorically precludes a finding of prejudice . . . the evidence must include something conclusive, such as a confession, DNA evidence demonstrating guilt, or a combination of physical and corroborating evidence so strong that the *Strickland* standard of 'a reasonable probability ... the factfinder would have had a reasonable doubt' cannot possibly be met." *Id.* 422 S.C. at 191, 810 S.E.2d at 845.

On appeal, this Court "defer[s] to a PCR court's findings of fact and will uphold them if there is any evidence in the record to support them." *Mangal v. State*, 421 S.C. 85, 91, 805 S.E.2d 568, 571 (2017). "Questions of law are reviewed *de novo*, and [this Court] will reverse the PCR court's decision when it is controlled by an error of law." *Id.*

## ARGUMENTS

**I. Not moving for Judge Early to recuse himself when the prosecution planned to present evidence that Judge Early was mentioned in a "root." Under the circumstances, Judge Early presiding over the case conveyed to the jurors the trial court's opinion about the "root" evidence and constituted a conflict of interest.**

The prosecution relied heavily on evidence of a "root" as evidence of Mr. Gerrick's consciousness of guilty. *E.g.,* A. 36-38, 41, 42, 44, 45, 46, 78, 132, 133, 340, 342, 343, 415-17, 425, 621, 732-33, 743. State's witness Melissa Skipper Wallace testified about collecting the two items when processing Mr. Gerrick's Dodge Ram truck. One item "was a taped-up package that we opened and it was later determined to be – it was told to me it was a witchcraft root."[2] The other item was a "container titled Law Stay Away." A. 423-28. Investigator Shaun E. Harley read the note contained in the "root" to the jurors:

> Set me Sammie Gerrick free from murder and revoke bond. Jack Early set me free now. Jack Early set me free now. Jack Early set me free now. Sammie Gerrick, Sr. Sammie Gerrick, Sr. Sammie Gerrick, Sr. So shall it be. So shall it be. So shall it be. Amen. Amen. Amen.

A. 346. On cross-examination, Investigator Harley acknowledged SLED handwriting experts determined Mr. Gerrick did not write the note, and law enforcement did not know how the note got into Mr. Gerrick's vehicle. A. 387-89.

Regardless of favorable or unfavorable beliefs about the "root," reasonable jurors would have concluded Judge Early declined to "help" Mr. Gerrick keep the law away or obtain his freedom. Presiding over the trial conveyed to the jurors Judge Early's belief

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[2] Trail counsel recognized the damaging nature of this evidence when he moved to exclude it from the trial. A. 771-74. The trial judge denied these motions but subsequently instructed the jurors to "[d]isregard" Ms. Wallace's testimony about witchcraft. Trial counsel moved for a mistrial noting a curative instruction "just draws more attention to it." The trial judge denied this motion. A. 423-28.

that Mr. Gerrick's trial should proceed. Trial judges are prohibited from communicating their personal beliefs about the facts of the case to the jurors. S.C. Const. Art. V, § 21. *And see, e.g., State v. Stukes*, 416 S.C. 493, 787 S.E.2d 480 (2016) (instructing the jury on statute, providing that testimony of the victim need not be corroborated in prosecutions for criminal sexual conduct, was an impermissible charge on the facts); *State v. Hartley*, 307 S.C. 239, 414 S.E.2d 182 (Ct. App. 1992) (requested charge on motive constituted impermissible charge on fact); *State v. Dawkins*, 268 S.C. 110, 232 S.E.2d 228 (1977) (where the jury returned to the courtroom after deliberating for a short time and inquired about the distance between the cars, the trial judge's response that he did not think there was any testimony of the distance 'in inches and feet' constituted an impermissible comment on the testimony given in the case requiring reversal).

Additionally, the jurors could have viewed the "root" as an attempt to cast a spell on Judge Early or otherwise improperly influence him. Regardless of whether the jurors believed Judge Early discounted the root or was somehow influenced of the root, the influence of witchcraft or the "root" on anyone other than the accused is inadmissible. *State v. Mattison*, 276 S.C. 235, 239, 277 S.E.2d 598, 600 (1981) ("The trial judge excluded testimony as to the general effect of the fear of witchcraft or 'roots' on people, but permitted such testimony directed solely to its effect upon appellant. The testimony in question was properly excluded as irrelevant.") *overruled on other grounds by State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009).

The State's case against Mr. Gerrick was not overwhelming. *See Smalls, supra.* Because credibility was the central issue for the jurors to determine, Judge Early presiding over Mr. Gerrick's trial, thereby conveying his beliefs about the "root," prejudiced

Mr. Gerrick. *See e.g. State v. Anderson*, 413 S.C. 212, 776 S.E.2d 76 (2015) (prejudice found when case turned solely on credibility and there was "no physical evidence of sexual abuse"); *State v. Jennings*, 394 S.C. 473, 716 S.E.2d 91 (2011) (prejudice found when "credibility was the most critical determination of this case"); *State v. Berry*, 332 S.C. 214, 503 S.E.2d 770 (1998) ("These credibility questions and inconsistencies in the witnesses' testimony make it impossible for this Court to conclude that, without reference to the Polite incident, the evidence of Berry's guilt is overwhelming or that Berry's guilt is the only rational conclusion that could be reached from the evidence presented.").

**II. Failing to investigate and present available evidence explaining the "root."**

The prosecution relied heavily on the "root" to show Mr. Gerrick's consciousness of guilt, even though Investigator Harley acknowledged SLED handwriting experts determined Mr. Gerrick did not write the note, and law enforcement did not know how the note got into Mr. Gerrick's vehicle. A. 387-89. Trial counsel did not interview Charlene Gerrick who was responsible for placing the "root" in her husband's automobile. Mr. Gerrick's PCR testimony additionally explained that there was talk in the community about Mr. Gerrick being investigated for murder—something that would be upsetting to anyone regardless of guilt or innocence—which further undermined the prosecution's claim the evidence demonstrated Mr. Gerrick's consciousness of guilt. A. 993-1006.

Trial counsel has "an obligation to conduct thorough a**nd independent** investigations." *Ard v. Catoe*, 372 S.C. 318, 332, 642 S.E.2d 590, 597 (2007) (emphasis supplied by court). A new trial is warranted when trial counsel's failure to investigate prejudices and accused. *See, e.g., Walker v. State*, 407 S.C. 400, 756 S.E.2d 144 (2014) (trial counsel's failure to interview accused's former girlfriend as a potential alibi witness warranted

a new trial); *McKnight v. State*, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008) (trial "counsel was ineffective in failing to investigate medical evidence contradicting the State's experts' testimony); *Council v. State*, 380 S.C. 159, 670 S.E.2d 356 (2008) (Trial counsel's failure to adequately investigate and present mitigating evidence during penalty phase was deficient performance); *Cobbs v. State*, 305 S.C. 299, 408 S.E.2d 223 (1991) (defendant convicted of forgery and burglary was denied effective assistance of counsel due to defense counsel's failure to investigate possible defenses); *Bagwell v. State*, 410 S.C. 259, 266, 763 S.E.2d 630, 634 (Ct. App. 2014) ("trial counsel's failure to conduct DNA testing on the glass prior to trial constituted ineffective assistance of counsel").

Because the State's case against Mr. Gerrick was not overwhelming, *see Smalls, supra*, and credibility was the central issues for the jurors to determine, *see Anderson, Jennings,* and *Berry, supra*, trial counsel's ineffectiveness prejudiced Mr. Gerrick.

**III. Failing to object to the trial judge's opening comments and final instruction on the law, instructing the jurors to find the "true facts," including but not limited to the opening instruction, "[A]t the conclusion when you 12 acting collectively as one determine what those true facts are, then you apply those facts to the law as I give it to you and you will be in a position to render a verdict;" and the final instructions to the jurors, "It is your sole responsibility to determine what the true facts are in the case and apply those true facts to the law as I give it to you and render a verdict;" "That is your sole responsibility, your sole duty to determine what the true facts are in this case:" and "You're here to give careful consideration and deliberation of the evidence presented to you, to decide what the true facts are, and apply those facts to the law as I've given it to you."**

During opening remarks to the jurors, the trial judge instructed the jurors to "determine what the *true facts* are, and at the conclusion when you 12 acting collectively as one determine what those *true facts* are." A. 145, lines 7-11 (emphasis added). During the final instruction on the law, the trial judge informed the jurors, "It is your sole responsibility to determine what the *true facts* are in the case and apply those *true facts* to the

law as I give it to you and render a verdict;" "That is your sole responsibility, your sole duty to determine what the *true facts* are in this case;" and "You're here to give careful consideration and deliberation of the evidence presented to you, to decide what the *true facts* are, and apply those facts to the law as I've given it to you." A. 748-49, 756-57 (emphasis added).

This Court long ago disfavored instructions like the one involved in this case, prohibiting trial judges from telling jurors "to seek some reasonable explanation of the circumstances proven other than the guilt of the Defendant." *State v. Manning*, 305 S.C. 413, 416, 409 S.E.2d 372, 374 (1991). "Rather than conveying to the jury the principle that the State must affirmatively establish appellant's guilt by probative evidence beyond a reasonable doubt, this charge could mislead a reasonable juror to focus exclusively on appellant's explanation of the evidence to determine the existence of reasonable doubt." *Id.* 305 S.C. at 417, 409 S.E.2 at 374-75. This Court consistently reaffirms this rule. *State v. Beaty*, 423 S.C. 26, 813 S.E.2d 502 (2018);[3] *State v. Daniels*, 401 S.C. 251, 256, 737 S.E.2d 473, 475 (2012); *State v. Cherry*, 361 S.C. 588, 596, 606 S.E.2d 475, 479 (2004); *State v. Needs*, 333 S.C. 134, 151-52, 508 S.E.2d 857, 866 (1998); *State v. Raffaldt*, 318 S.C. 110, 115-16, 456 S.E.2d 390, 393 (1995).

Additionally, in *Cage v. Louisiana*, 498 U.S. 39 (1990), a unanimous United States Supreme Court held that the jury instruction in that case was contrary to the "beyond a reasonable doubt" requirement articulated in *In Re Winship*, 397 U.S. 358 (1970)

[3] Although decided after Mr. Gerrick's trial, *Beaty* did not articulate a new rule of law. *Daniels, Cherry, Manning, Needs, Raffaldt,* and *Aleksey* placed trial counsel on notice to object to this jury instruction, but trial counsel was not aware of this line of cases, meaning he did not make a valid strategic decision. A. 1048-49. *See Weik, Freiburger,* and *Ingle, supra.*

(holding that the accused is protected against conviction under the Fourteenth Amendment except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged). The words "substantial" and "grave" suggested a higher degree of doubt than is required for acquittal under the reasonable doubt standard. When those statements were taken in conjunction with the court's reference to a "moral" rather than evidentiary certainty, a reasonable juror could have interpreted the instruction to allow a finding of guilt based on a degree of proof below that required by the Due Process Clause.

"It is error to give instructions which may confuse or mislead the jury. The test is what a reasonable juror would understand the charge to mean." *State v. Rothell*, 301 S.C. 168, 169-70, 391 S.E.2d 228, 229 (1990) (citations omitted). "In order to make this determination, the challenged instruction must be examined in the context of the trial court's entire charge to the jury and not in isolation." *Lowry v. State*, 376 S.C. 499, 505, 657 S.E.2d 760, 763 (2008). "Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity." *Id.*, 376 S.C. at 506, 657 S.E.2d at 64 (quoting *Francis v. Franklin,* 471 U.S. 307, 322 (1965)). "Where the charge contains both the correct and incorrect law, an appellate court must assume the jury followed the incorrect charge." *State v. Buckner*, 341 S.C. 241, 247, 534 S.E.2d 15, 18 (Ct. App. 2000). "A jury charge is no place for purposeful ambiguity." *State v. Belcher*, 385 S.C. 597, 611, 685 S.E.2d 802, 809 (2009).

Trial counsel, therefore, was ineffective for not objecting the trial judge's opening remarks and final instruction on the law. *See Gibson* and *Lowry, supra.* The trial judge's final instruction, "That is your sole responsibility, your sole duty to determine what the

true facts are in this case," rendered the entire instruction invalid. *See Beaty, Daniles,* and *Aleksey, supra.*

These instructions prejudiced Mr. Gerrick. Reasonable jurors could have concluded they had to determine the "truth," rather than applying the burden of proof. Because the State's case against Mr. Gerrick was not overwhelming, *see Smalls, supra*, and credibility was the central issues for the jurors to determine, *see Anderson, Jennings,* and *Berry, supra*, trial counsel's ineffectiveness prejudiced Mr. Gerrick.

## IV. Failing to object to the trial judge excluding Mr. Gerrick from hearings to determine whether to retain or excuse juror numbers 9 and 23 in violation of Mr. Gerrick's constitutional right to be present during all critical stages of his jury trial.

The trial judge convened two off-the-record hearings outside the presence of Mr. Gerrick regarding the retention or dismissal of sitting jurors, removing juror 9 and retaining juror 23. A. 139-41, 481-83. "[T]he Sixth Amendment of the U.S. Constitution guarantees the right of the accused to be present at every stage of his trial." *Ellis v. State*, 267 S.C. 257, 260, 227 S.E.2d 304, 305 (1976) (citing *Illinois v. Allen*, 397 U.S. 337 (1970)). *See also In Interest of Dwayne M.*, 287 S.C. 413, 414, 339 S.E.2d 130, 130 (1986) (An accused "has a constitutional right to be present at every stage of the criminal proceeding against him."); *State v. Taylor*, 261 S.C. 437, 442, 200 S.E.2d 387, 389 (1973) ("By virtue of their constitutional rights, persons accused of crimes are entitled to be present at every stage of the trial."). *And see United States v. Runyon*, 707 F.3d 475, 517 (4th Cir. 2013) ("district court erred in deciding to dismiss [Jury] Foreman with neither Runyon nor his lawyer present); *United States v. Rolle*, 204 F.3d 133 (4th Cir. 2000) (defendant's absence from individual voir dire of certain prospective jurors satisfied error and plain error prongs of plain error analysis); *United States v. Camacho*, 955 F.2d 950

(4th Cir. 1992) (accused had constitutional and statutory right to be present at his trial, including empaneling of jury). "The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense." *Faretta v. California*, 422 U.S. 806, 819 (1975). In *United States v. Hanno*, the Fourth Circuit Court of Appeals held "dismember[ing a jury] without giving notice to and in the absence of the defendant" violates "the defendant's due process right to be present under the constitution." 21 F.3d 42, 46 (4th Cir. 1994). *See also United States v. Camacho*, 955 F.2d 950 (4th Cir. 1992) (trial judge erred in removing juror during in camera proceeding in absence of defendant and his counsel). The Fourth Circuit further held the trial "court erred in not recording the proceedings in which Hanno's jurors were removed." *Hanno at 48.* South Carolina courts have recognized the right of an accused to be present when the trial judge makes decisions involving jurors. *See, e.g., State v. Elmore*, 279 S.C. 417, 422, 308 S.E.2d 781, 785 (1983), *overruled on other grounds by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991) (trial judge entering jury room with prosecutor and defense counsel "runs counter to the requirement that in a death case the defendant be present at all stages of trial"); *State v. James*, 116 S.C. 243, 107 S.E. 907, 908 (1921) (accused had right to be present when trial judge provided additional instructions to jurors).

The retention of Juror Number 23 was particularly prejudicial because she knew State's witness Taylor White. As evidenced by the closing argument, the prosecution considered Ms. White a major witness. The prosecutor argued, falsely, that Ms. White witnessed Mr. Gerrick take a shower, which was circumstantial evidence of concealing

his guilt. A. 222-23, 722. Juror Number 23, no doubt, was influenced by her knowledge of Ms. White.

Because the State's case against Mr. Gerrick was not overwhelming, *see Smalls, supra*, and credibility was the central issues for the jurors to determine, *see Anderson, Jennings,* and *Berry, supra*, trial counsel's ineffectiveness prejudiced Mr. Gerrick.

**V. Failing to object to or make an offer to stipulate to graphic photographs of the victim's body when those photographs were so prejudicial, inflammatory, and intended to arouse sympathy, passion, and prejudice in the jurors' minds as to deny Mr. Gerrick due process.**

The prosecution introduced a number of "graphic" photographs through the testimony of SLED Agent Wallace. A. 411-18. "Photographs which are calculated to arouse the sympathies or prejudices of the jury should be excluded from the guilt phase of a capital case if they are irrelevant or not substantially necessary to show material facts or conditions." *State v. Kornahrens*, 290 S.C. 281, 288, 350 S.E.2d 180, 185 (1986) (citing *State v. Middleton,* 288 S.C. 21, 339 S.E.2d 692 (1986)). *See also State v. Torres*, 390 S.C. 618, 624, 703 S.E.2d 226, 229 (2010) (Use of horrendous photographs during the sentencing phase of a capital trial is "an area of growing concern" for our Supreme Court that has strongly encourage[d] all solicitors to refrain from pushing the envelope.").

Here, the prosecution's stated purpose for introducing these photographs was to demonstrate the decedent's bond was buried in a shallow grave, the ligatures were still around his wrists and ankles, and the body was in a moderate to severe state of decay. None of these facts were disputed. As this Cout has held:

> There was no dispute as to these facts. All of them were fully established both by uncontradicted medical and lay testimony. These pictures were calculated to inflame and arouse the passions of the jury and their introduction was wholly unnecessary to establish the facts claimed. They should have been excluded.

*State v. Waitus*, 224 S.C. 12, 27, 77 S.E.2d 256, 263 (1953) (citing *State v. Edwards*, 194 S.C. 410, 10 S.E.2d 587, 588 (1940) ("[P]hotographs which are calculated to arouse the sympathies or prejudices of the jury are properly excluded if they are entirely irrelevant or not substantially necessary to show material facts or conditions."). Trial counsel was deficient for not objecting to these photographs or offering to stipulate to their contents.

Because the State's case against Mr. Gerrick was not overwhelming, *see Smalls, supra*, and credibility was the central issues for the jurors to determine, *see Anderson, Jennings,* and *Berry, supra*, trial counsel's ineffectiveness prejudiced Mr. Gerrick.

## VI. Failing to move to exclude the testimony of Charlene Gerrick that was obtained in violation of the spousal privilege and as a result of improper witness intimidation.

Charlene Cerrick's testimony that she helped her husband move Tyrone Donaldson's white Honda Civic from a secluded area on a dirt road in the woods to the China Express in Orangeburg was an important piece of circumstantial evidence for the prosecution. A. 47-51, 293-98, 302-10, 743-44. Ms. Gerrick testified at the PCR hearing that her statement was obtained in violation of her spousal privilege and as the result of law enforcement threatening to place the Gerricks' special needs child in foster care. A. 995-96. Trial counsel was not aware of this information because he did not interview Ms. Gerrick, meaning he could not make a strategic decision about a motion to suppress this statement. A. 1001. *See Weik, Ingle* and *Freiburger supra.* Threatening to place the Gerricks' special needs child into foster care rendered Ms. Gerrick's statement involuntary. *State v. Corns*, 310 S.C. 546, 426 S.E.2d 324 (Ct. App. 1992) (threat to arrest wife and place children in foster care rendered accused's statement involuntary).

Because the State's case against Mr. Gerrick was not overwhelming, *see Smalls, supra*, and credibility was the central issues for the jurors to determine, *see Anderson, Jennings,* and *Berry, supra*, trial counsel's ineffectiveness prejudiced Mr. Gerrick.

**VII. Failing to object to improper victim impact evidence that was not relevant and which were intended to arouse sympathy, passion, and prejudice in the jurors' minds.**

The prosecutor introduced evidence about Mr. Donaldson being a family man, being "Mr. Mom" to his children that lost their mother in an automobile accident. The prosecutor emphasized these character traits during his closing argument and contrasted Mr. Donaldson's good character with Sammie Gerrick's bad character as a "classic liar." A. 708, 742-43. This testimony was prohibited by the South Carolina Victims' Bill of Right, which provides, "*The victim impact statement and its contents are not admissible as evidence in any trial.*" S.C. Code Ann. § 16-3-1550(F) (emphasis added). *See also State v. Hill*, 331 S.C. 94, 105, 501 S.E.2d 122, 128 (1998) ("This section merely limits the victim impact evidence in non-capital cases."). *And see State v. Langley*, 334 S.C. 643, 515 S.E.2d 98 (1999) (Murder victim's sister's testimony about victim's family, how victim acquired his nickname, "Bunny," and that victim had played drums in high school band, was not relevant to issue of defendant's guilt in murder prosecution).

Because the State's case against Mr. Gerrick was not overwhelming, *see Smalls, supra*, and credibility was the central issues for the jurors to determine, *see Anderson, Jennings,* and *Berry, supra*, trial counsel's ineffectiveness prejudiced Mr. Gerrick.

**VIII. Failing to object to impermissible character testimony that violated Rule 404, SCRE.**

Both the prosecutor and defense counsel elicited testimony about Mr. Gerrick's bad character, which the prosecutor emphasized in closing argument. *E.g.* A. 205, 210,

216, 236, 269, 333, 708, 742-43, 669, 707, 712, 721-27, 734-44. This testimony implied Mr. Gerrick's guilt and was improper character evidence pursuant to Rule 404(a), SCRE. Some of this evidence implied Mr. Gerrick had a prior criminal record or was incarcerated for other offenses. "[E]vidence introduced for the sole purpose of implying a defendant has a prior criminal record is improper." *Geter v. State*, 305 S.C. 365, 367, 409 S.E.2d 344, 345 (1991) (citing *State v. Tate,* 288 S.C. 104, 341 S.E.2d 380 (1986)). *See also Deck v. Missouri*, 544 U.S. 622 (2005); *Estelle v. Williams*, 425 U.S. 501 (1976); *State v. Lawson*, 424 S.C. 51, 817 S.E.2d 509 (Ct. App. 2018) (admitting evidence of an accused's prior criminal record required reversal).

Trial counsel was ineffective for not objecting to this improper character evidence. *See, e.g., Mitchell v. State*, 298 S.C. 186, 379 S.E.2d 123 (1989) (failure to object to improper character evidence was prejudicial ineffective assistance of counsel warranting a new trial). Trial counsel did not have a strategic reason for not objecting. A. 1030-33. *See Ingle* and *Freiburger, supra.* Reasonable jurors would view Mr. Gerrick as less credible because of his prior criminal record and unspecified long-term incarceration.

Because the State's case against Mr. Gerrick was not overwhelming, *see Smalls, supra*, and credibility was the central issues for the jurors to determine, *see Anderson, Jennings,* and *Berry, supra*, trial counsel's ineffectiveness prejudiced Mr. Gerrick.

## IX. Failing to object to the prosecutor's statements in closing argument that were not supported by the evidence in the case and misstated testimony presented at trial when those statements amounted to a violation of due process.

During closing argument, the prosecutor argued facts that were not supported by the evidence. First, the prosecutor claimed Taylor White testified she witnessed Mr. Gerrick take a shower, arguing this testimony to be circumstantial evidence Mr. Gerrick was

covering up the crime. The prosecutor's claim misstated Ms. White's testimony, as she expressly denied witnessing Mr. Gerrick taking a shower. Second, the prosecutor advanced a theory of the forensic evidence that was not supported by the state's own forensic pathologist, Dr. Janice Ross. *See* Post-hearing Brief, A. 1127-32.

Trial counsel was ineffective for not objecting to the prosecutor's misstating Ms. White's testimony. *See, e.g. Tappeiner v. State*, 416 S.C. 239, 251, 785 S.E.2d 471, 477 (2016) ("some of the solicitor's statements regarding Victim's credibility were not only damaging to Tappeiner, but misrepresented the evidence adduced at trial").

Because the State's case against Mr. Gerrick was not overwhelming, *see Smalls, supra*, and credibility was the central issues for the jurors to determine, *see Anderson, Jennings,* and *Berry, supra*, trial counsel's ineffectiveness prejudiced Mr. Gerrick.

**X. Failing to request the trial judge allow defense counsel an opportunity to respond to the prosecutor's statements in closing argument that were not supported by the evidence in the case and misstated testimony presented at trial when those statements amounted to a violation of due process.**

This Court recently reminded, "[W]ith the repeal of Circuit Court Rule 58 by Rule 85(c), SCRCP, [on July 1, 1985] and with the adoption of Rule 39, SCRCrimP, there is no codified or otherwise duly adopted court rule governing the content and order of closing arguments in criminal cases in which a defendant introduces evidence." *State v. Beaty*, 423 S.C. 26, 40, 813 S.E.2d 502, 509 (2018). This Court then observed, "[A]bsent a published court rule or a defined common law rule, individual trial judges have developed their own practices governing closing argument in cases in which a defendant introduces evidence. *Id.* 813 S.E.2d at 509. Thus,

> trial judges must, on a case-by-case basis, ensure that a defendant's due process rights are not violated during the closing argument stage. Absent authority to formally adopt procedural rules, our authority—and the au-

> thority of the trial court—is but to address due process considerations as they arise. In cases in which a defendant introduces evidence, trial judges clearly have the authority to require the State to open in full on the facts and the law and have the authority to restrict the State's reply argument to matters raised by the defense in closing. This authority remains in keeping with the trial judge's authority to ensure that a defendant's due process rights are not violated during a criminal trial.

*Id.* 813 S.E.2d at 513.

Although decided after Mr. Gerrick's trial, *Beaty* did not announce a new rule of law. This Court merely observed that the lack of a formal rule required trial judges to exercise discretion to protect the due process rights of an accused. At the PCR hearing, trial counsel testified Mr. Gerrick's trial judge exercised a strict rule of not allowing a defendant who presented evidence to respond to the prosecutor's closing arguments on the facts. A. 1036-38. "A failure to exercise discretion amounts to an abuse of that discretion." *State v. Hawes*, 411 S.C. 188, 191, 767 S.E.2d 707, 708 (2015). The prosecutor made a powerful closing argument that misstated important facts, advanced a theory of the forensic evidence not endorsed by Dr. Ross, emphasized the good character of Mr. Donaldson, and attacked Mr. Gerrick's character as a "classic liar." Trial counsel not only failed to object to any of these arguments, but also did not ask for an opportunity to respond to the false statements and character assignation. Trial counsel did not offer a valid strategic reason for not requesting an opportunity to respond. A. 1036-38.

Because the State's case against Mr. Gerrick was not overwhelming, *see Smalls, supra*, and credibility was the central issues for the jurors to determine, *see Anderson, Jennings,* and *Berry, supra*, trial counsel's ineffectiveness prejudiced Mr. Gerrick.

## XI. Failing to object to statements by the prosecutor during closing argument which were intended to arouse sympathy, passion, and prejudice in the jurors' minds and urged the jurors to seek justice for the victim rather than to determine whether the State met its burden of proof.

The prosecutor introduced evidence about Mr. Donaldson being a family man, being "Mr. Mom" to his children that lost their mother in an automobile accident. The prosecutor emphasized these character traits during his closing argument and contrasted Mr. Donaldson's good character with Sammie Gerrick's bad character as a "classis liar." *E.g.* A. 205, 210, 216, 236, 269, 333, 708, 742-43, 669, 707, 712, 721-27, 734-44. These arguments were intended to arouse sympathy, passion, and prejudice in the jurors' minds and urged the jurors to seek justice for the victim rather than to determine whether the State met its burden of proof. Trial counsel was ineffective for not objecting. *See, e.g., Tappeiner v. State*, 416 S.C. 239, 252, 785 S.E.2d 471, 478 (2016) ("[T]he solicitor's remarks regarding whether the jurors would want Tappeiner babysitting their children or relatives improperly appealed to the jurors' emotions, rather than the evidence in the record."); *Brown v. State*, 383 S.C. 506, 517, 680 S.E.2d 909, 915 (2009) ("trial counsel was deficient in failing to object to the challenged portion of the solicitor's closing argument because it constituted a "Golden Rule" argument which impermissibly appealed to the passion of the jurors by asking them to "speak up" for the child victim"); *Von Dohlen v. State*, 360 S.C. 598, 602 S.E.2d 738 (2004) (trial counsel formed deficiently by failing to object to solicitor's "golden rule argument" at penalty phase); *State v. McDaniel*, 320 S.C. 33, 462 S.E.2d 882 (Ct. App. 1995) (prosecutor's use of "you" some 45 times in closing argument, asking jury to put themselves in place of victim, constituted reversible error).

Because the State's case against Mr. Gerrick was not overwhelming, *see Smalls, supra*, and credibility was the central issues for the jurors to determine, *see Anderson, Jennings,* and *Berry, supra*, trial counsel's ineffectiveness prejudiced Mr. Gerrick.

**XII. Failing to object to inflammatory statements by the prosecutor which were intended to arouse sympathy, passion, and prejudice in the jurors' minds and were so defamatory to Mr. Gerrick that it denied him due process.**

The prosecutor introduced evidence about Mr. Donaldson being a family man, being "Mr. Mom" to his children that lost their mother in an automobile accident. The prosecutor emphasized these character traits during his closing argument and contrasted Mr. Donaldson's good character with Sammie Gerrick's bad character as a "classic liar." The prosecutor repeatedly called Mr. Gerrick a liar. This "[C]ourt has previously held it is improper to call a party a liar in closing argument." *State v. Blurton*, 342 S.C. 500, 512, 537 S.E.2d 291, 297 (Ct. App. 2000), *reversed on other grounds by State v. Blurton,* 352 S.C. 203, 573 S.E.2d 802 (2002). *See also Major v. Alverson,* 183 S.C. 123, 190 S.E. 449 (1937). Trail counsel was not aware of this line of precedent, and his "ignorance" of the law "cannot be characterized as strategic." A. 1039-43. *See Weik, supra.* Additionally, trial counsel's decision not to object in order not to call attention to the insult must be rejected because the prosecutor's comments were not isolated, but rather an "in-your-face" attack of Mr. Gerrick's character that was emphasized over-and-over again.

Because the State's case against Mr. Gerrick was not overwhelming, *see Smalls, supra,* and credibility was the central issues for the jurors to determine, *see Anderson, Jennings,* and *Berry, supra*, trial counsel's ineffectiveness prejudiced Mr. Gerrick.

**XIII. Failing to move to quash the indictment when it was discovered that one of the grand jurors that indicted Mr. Gerrick was also a witness in the case, which denied Mr. Gerrick's right to a fair and impartial grand jury presentment.**

During a pre-trial hearing, the prosecutor disclosed the State "push[ed] through . . . a new indictment" because "one of the individuals on the grand jury [] was a witness in

the case." Trial counsel did not move to quash the indictment. A. 136-37. Trial counsel based his lack of objection on his understanding that an indictment is a notice document. A. 0114-15, 1082-83. *State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005). An indictment, however, is not merely a notice document as the State is required to present testimony to the grand jury establishing probable cause. The right of an accused to have a grand jury review the charges against him is a Constitutional right enumerated in the Fifth Amendment to the United States Constitution as well as in Article I, §11 of the South Carolina Constitution. "It is the right of the accused to have the question of his guilt decided by two competent juries before he is condemned to punishment." *State v. Rector*, 158 S.C. 212, 236, 155 S.E. 385, 394 (1930) (quoting *Crowley v. United States*, 194 U.S. 461, 473 (1904)).

It is well settled an accused "may question the propriety of the accusation, the manner in which it has been presented, the source from which it proceeds, and have these matters promptly and properly determined." *State v. Faile*, 43 S.C. 52, 20 S.E. 798 (1895). *See also, State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991). This Court has recognized that questions about the fairness and impartiality of the grand jury are "so closely analogous" to questions regarding the qualification of jurors, that questions of the latter have bearing on considering questions related to the former. *Rector*, 158, S.C. at 240, 155 S.E. at 395 (citing *State v. Richardson,* 149 S.C. 121, 146 S.E. 676 (1928)).

A defendant must challenge the legality and sufficiency of the process of the grand jury ***before*** the jury renders a verdict in order to preserve the error for direct appellate review. *See Evans v. State*, 363 S.C. 495, 509 (2005) (citing *State v. Gen-*

*try*, 363 S.C. 93, 610 S.E.2d 494 (2005)). "Grand jury proceedings are presumed to be regular unless clear evidence indicates otherwise." *State v. Moses*, 390 S.C. 502, 521, 702 S.E.2d 395, 405 (Ct. App. 2010) (citing *State v. Thompson,* 305 S.C. 496, 501, 409 S.E.2d 420, 424 (1991)). This Court has recognized the incredible burden this standard places on defendants. "It is usually difficult for a defendant to make such a claim ... [because] speculation about 'potential' abuse of grand jury proceedings cannot substitute for evidence of *actual* abuse as grounds for quashing an otherwise lawful indictment. Fortunately, given the nature of State Grand Jury proceedings, there is a complete record available for analysis." *State v. Thrift,* 312 S.C. 282, 302-303, 440 S.E.2d 341, 352 (1993) (quoting *State v. Thompson*, 305 S.C. at 502, 409 S.E.2d at 424 (emphasis in the original)). Mr. Gerrick's case, however, was not a State Grand Jury case, meaning there is not record of the proceedings.

In this case, a grand juror that was also a witness in Mr. Gerrick's case participated in the presentment and probable cause determination. Once the grand juror discussed the case with the other grand jurors, empaneling a new grand jury was the only way to cure the error.

## XIV. Failing to investigate, develop, and present evidence that someone other than Mr. Gerrick killed the victim.

At the PCR hearing, trial counsel testified he was aware of evidence establishing that someone other than Sammie Gerrick killed Tyrone Donaldson. A. 1083. Trial counsel as ineffective for not presenting this evidence to the jurors. *Holmes v. South Carolina*, 547 U.S. 319 (2006).

Because the State's case against Mr. Gerrick was not overwhelming, *see Smalls, supra*, and credibility was the central issues for the jurors to determine, *see Anderson, Jennings,* and *Berry, supra*, trial counsel's ineffectiveness prejudiced Mr. Gerrick.

**XV. Failing to federalize the objections related to the three issues briefed by appellate counsel on the direct appeal.**

On appeal, appellate counsel briefed the following three issues:

> 1) Whether the court erred by admitting into evidence a "root" associated with witchcraft and a can of "Law Stay Away" that were seized from the center console of Appellant's truck pursuant to a search warrant because this evidence was not relevant and any probative value of this evidence was substantially outweighed by the danger of unfair prejudice to Appellant?
>
> 2) Whether the court erred by denying Appellant's motion for a mistrial after law enforcement characterized the "brown piece of paper bag" that was "taped up" to form some sort of "capsule" with weeds, twigs, and a penny inside and the words "Set me Sammie Gerrick free from murder and revoked bonds" written on the outside as a "witchcraft root" in front of the jury since this testimony was highly prejudicial and the court's curative instruction failed to cure the prejudice suffered by Appellant?
>
> 3) Whether the court erred by refusing to grant a mistrial when the state showed a videotape of Appellant's interview with law enforcement before his arrest with a polygraph machine clearly visible on the table since this was unduly prejudicial and denied Appellant a fair trial.

A. 862.

Trial counsel did not federalize these issues by arguing the error deprived Mr. Gerrick of his due process right to a fair trial. The failure to federalize these issues denies Mr. Gerrick the right to present these in a federal habeas corpus petition, should that need ever arise. *See* 28 U.S.C. § 2254.

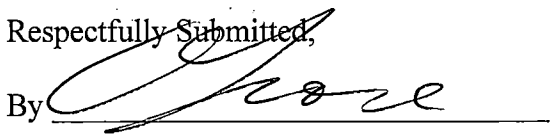
## XVI. The cumulative effect of trial counsel's errors requires a new trial.

This Court must also apply a cumulative prejudice analysis.[4] *Kyles v. Whitley*, 514 U.S. 419, 436 (1995) (the prejudice must be "considered collectively, not item-by-item"). The United States Supreme Court's opinion in *Williams v. Taylor*, 529 U.S. 362, 399 (2000), reveals that the Court considered "the entire postconviction record . . . as a whole and cumulative of mitigation evidence presented originally" in conducting its prejudice analysis and finding counsel ineffective for failing to adequately prepare and present mitigation evidence. "[A]s a whole" implies a cumulative analysis. Likewise, in *Strickland*, the Court stated, "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional *errors*, the result of the proceeding would have been different." 466 U.S. at 694 (emphasis added).

## CONCLUSION

For the foregoing reasons, this Court should grant the writ and consider the issues.

Respectfully Submitted,

By 

E. Charles Grose, Jr.
The Grose Law Firm, LLC

***Attorney for Sammie Gerrick***

April 3, 2019

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[4] The "cumulative error doctrine provides relief to a party when a combination of errors that are insignificant by themselves have the effect of preventing a party from receiving a fair trial and it requires the cumulative effect of the errors to affect the outcome of the trial." *State v. Johnson*, 334 S.C. 78, 93, 512 S.E.2d 795, 803 (1999) (citing *Tennant v. Marion Health Care Foundation, Inc.*, 194 W.Va. 97, 459 S.E.2d 374 (1995)). The Court of Appeals applied the cumulative error doctrine in *State v. Blurton*, 342 S.C. 500, 512, 537 S.E.2d 291, 297 (Ct. App. 2000) ("[T]he cumulative effect of this error, when coupled with the exclusion of the previously discussed evidence, warrants reversal.") *overruled on other grounds by State v. Blurton,* 352 S.C. 203, 573 S.E.2d 802 (2002).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APR 05 2019

S.C. SUPREME COURT

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APPEAL FROM BARNWELL COUNTY
Court of Common Pleas
R. Scott Sprouse, Circuit Court Judge

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Appellate Case No. 2018-001629

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Sammie Lee Gerrick, ..... Petitioner,

v.

State of South Carolina, ..... Respondent.

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**Certificate of Service**

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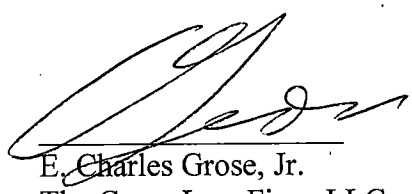
I certify that I have served a copy of the petition for writ of *certiorari* and appendix on the State of South Carolina by placing a copy in the US Mail, postage prepaid, on the date reflected below, addressed to

Julie A. Coleman, Esquire
S.C. Attorney General's Office
PO Box 11549
Columbia, SC 29211-1549

April 3, 2019



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April 3, 2019



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

Re: *Sammie Lee Gerrick v. State of South Carolina*
Appellate Case Number 2018-001629

Dear Mr. Shearouse:

Enclosed please find the original and six copies of Mr. Gerrick's petition to petition for writ of *certiorari* and two copies of the appendix, one of which is not bound, along with a certificate of service.

Thank you for your attention to this matter. Please let me know if you have any questions or if I can provide additional information.

With kindest regards, I am

Yours very truly,

E. Charles Grose, Jr.

cc: Julie A. Coleman, Esquire