

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Lexington County

Honorable George C. James, Circuit Court Judge

RECEIVED

MAY 02 2019

SC Court of Appeals

Opinion No. 2019-UP-052 (S.C. Ct. App. Filed February 6, 2019)

2016-GS-32-00670

THE STATE,

RESPONDENT,

V.

MICHAEL FULWILEY,

PETITIONER

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS

WANDA H. CARTER
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ATTORNEY FOR PETITIONER

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1. The Court of Appeals erred in upholding the trial judge’s ruling that denied petitioner’s motion to suppress the CVS goods seized by police following a search of the vehicle that led to a shoplifting charge because the search that followed the traffic stop was the equivalent of a fishing expedition that morphed into an improper extended detention that lasted well beyond the scope and purpose of the stop, which was for petitioner’s seatbelt violation, and went on illegally after the discovery of charges against the driver, who police detained (as he was a wanted suspect), when petitioner, who was a mere passenger, should have been simply ticketed and released.4

2. The Court of Appeals erred in upholding the trial judge’s ruling that allowed into evidence petitioner’s statement wherein he identified the goods in the car that were allegedly stolen as belonging to the driver and/or both of them because this admission was given pursuant to circumstances that constituted the equivalent of a custodial interrogation before the Miranda warnings had been given to him, and therefore should have not been admissible at trial.10

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that pursuant to the South Carolina Court of Appeals' opinion issued in this case on February 6, 2019, a Petition for Rehearing was filed on February 21, 2019, which was denied by the South Carolina Court of Appeals on April 8, 2019.

QUESTIONS PRESENTED

- 1.) The Court of Appeals erred in upholding the trial judge's ruling that denied petitioner's motion to suppress the CVS goods seized by police following a search of the vehicle that led to a shoplifting charge because the search that followed the traffic stop was the equivalent of a fishing expedition that morphed into an improper extended detention that lasted well beyond the scope and purpose of the stop, which was for petitioner's seatbelt violation, and went on illegally after the discovery of charges against the driver, who police detained (as he was a wanted suspect), when petitioner, who was a mere passenger, should have been simply ticketed and released.

- 2.) The Court of Appeals erred in upholding the trial judge's ruling that allowed into evidence petitioner's statement wherein he identified the goods in the car that were allegedly stolen as belonging to the driver and/or both of them because this admission was given pursuant to circumstances that constituted the equivalent of a custodial interrogation before the Miranda warnings had been given to him, and therefore should have not been admissible at trial.

STATEMENT OF THE CASE

Petitioner Michael Fulwiley was tried in absentia by jury trial on a shoplifting charge during the August 2016 term of the Lexington County General Sessions Court before Judge George James. Petitioner was found guilty as charged and a sealed sentence was imposed. Attorneys Sally J. Henry and Jael D. Gilreath represented petitioner at trial, and Assistant Solicitors Kate W. Usry and Bradley P. Pogue appeared on behalf of the state.

On March 15, 2017, the sealed sentence was published by Judge William P. Keesley at the Lexington County General Sessions Court. Petitioner was present at the sentencing hearing and represented by Sally Henry, and Assistant Solicitor Casey N. Rankin appeared on behalf of the state. Petitioner was sentenced to imprisonment for a period of eight years.

Petitioner appealed his conviction and sentence. On February 6, 2019, the South Carolina Court of Appeals affirmed petitioner's conviction and sentence. See State v. Fulwiley, Unpublished Opinion No. 2019-UP-052 (S.C. Ct. App. filed on February 6, 2019). App. 1- 3. On February 21, 2019, petitioner filed a Petition for Rehearing in the case. App. 4- 15. On April 8, 2019, the South Carolina Court of Appeals denied the Petition for Rehearing. App. 16. This petition requesting a review of the Court of Appeals' decision in this appeal follows.

QUESTION I

The Court of Appeals erred in upholding the trial judge's ruling that denied petitioner's motion to suppress the CVS goods seized by police following a search of the vehicle that led to a shoplifting charge because the search that followed the traffic stop was the equivalent of a fishing expedition that morphed into an improper extended detention that lasted well beyond the scope and purpose of the stop, which was for petitioner's seatbelt violation, and went on illegally after the discovery of charges against the driver, who police detained (as he was a wanted suspect), when petitioner, who was a mere passenger, should have been simply ticketed and released.

During an in camera hearing held in the case regarding the motion to suppress, Officer Lawler recalled the traffic stop as follows:

1.) Officer Lawler stated that he made a traffic stop of the vehicle in question on Columbia Avenue in Lexington due to a seatbelt violation by the passenger, who was later identified as petitioner. Officer Lawler asked for identification from the driver and the passenger (petitioner). The driver (Butler) had no identification but offered the registration and insurance indicating that the car belonged to his mother. The passenger, i.e. petitioner, presented his identification card.

2.) Officer Lawler went to his vehicle to research the identity of Butler who had no identification and attempted to write up a ticket at the same time (presumably for the seatbelt violation). The driver (Butler) was identified as having his driver's license suspended and he (Butler) had active charges from Charleston. At this point, 15 minutes had passed. Then, petitioner, who wore loose pants, exited to smoke a cigarette, but was told by Officer Lawler to get back in the car. When the information came back that petitioner was not "wanted" on charges like Butler was wanted", nonetheless, Officer Lawler stated that he got both men out of the car because it is obvious that Butler would be arrested.

3.) Officer Lawler then walked around to the front of the vehicle and looked through the window to make sure there was no “loot” property. Officer Lawler knew that the car would be towed because neither of the men could drive the car. Officer Lawler stated that he knew “[petitioner] was not gonna (sic) be getting back in the car,” so Butler was arrested and put in the patrol car and petitioner was asked if anything in the car belonged to him (petitioner) because the car had to be inventoried before it was towed. According to Officer Lawler, petitioner answered that the items belonged to Butler, and then said the items were theirs together and that they were selling the items.

4.) Officer Lawler inspected the car and saw that the items in the car were BC powders and medicines and razors still in hard plastic cases tucked underneath the front seat. Officer Lawler took the items out, and also claimed prior to the stop that petitioner was moving something under the seat of the car. Officer Lawler found a receipt (with the same date and afternoon) from CVS in the car for a pepsi, connected the dots by calling the nearby CVS store, and had a cashier describe the two men who were just in the store to check for missing razors. Petitioner was then handcuffed and his Miranda rights were read to him.

5.) Ultimately, after an hour and ten minutes passed, Officer Lawler released petitioner from the arrest, and took him out of the car, took off the handcuffs, and drove him ten minutes away to get a ride to wherever, but he told them that they were both going to be charged. Tr.109, l. 24 - p. 143, l. 21. Tr. 95, l. 1 – p. 103, l. 3.

Prior to the in camera hearing, defense counsel raised a pretrial motion referencing a motion to suppress the videotape of the stop (state’s exhibit #1 and #6) and the testimony from Officer Lawler regarding the same, and most importantly, the bags of items located in the car that were allegedly contained items taken from CVS, and the statement given to police by petitioner on the ground that all of the above constituted fruit of the poisonous tree per the illegal seizure that resulted from an extended traffic stop (one hour and ten minutes) that went beyond the scope of the stop, which was for a seatbelt violation. Counsel argued during pretrial motions and after the in camera hearing that petitioner was seized illegally when he was told to get back

in the vehicle after he got out to smoke a cigarette, and after he had given up his identification card as required immediately after the car was stopped, and when placed into the patrol car, and while the CVS bags were recovered. Petitioner's detention time went beyond the Officer's goal of ticketing petitioner for the seatbelt violation. The driver (Butler) had charges that led to his detention, but petitioner had no charges and therefore he should have been ticketed and released and not searched beyond what was relevant to the seatbelt violation. Petitioner was seized unlawfully in violation of the Fourth Amendment. The inventory search exception argument was inapplicable in this case because the items were assignable to driver Butler as he possessed the car and had pending charges against him. R. 14, l. 23 R. 30, l. 15; R. 82, l. 4 – 13.

The trial judge ruled that the items would not be suppressed, and that the stop was not unreasonably extended, and that the items would have been discovered ultimately during the inventory search. R. 79, l. 18 – R. 85, l. 3.

On appeal, the following question presented was the first issue raised in the case:

The trial court erred in denying petitioner's motion to suppress the CVS goods seized by police following a search of the vehicle that led to a shoplifting charge because the search that followed the traffic stop was the equivalent of a fishing expedition that morphed into an improper extended detention that lasted well beyond the scope and purpose of the stop, which was for petitioner's seatbelt violation, and went on illegally after the discovery of charges against the driver, who police detained (as he was a wanted suspect), when petitioner, who was a mere passenger, should have been simply ticketed and released.

This Court held as follows on the Fourth Amendment issue:

As to whether the trial court erred in denying Fulwiley's motion to suppress the goods seized: *State v Wright*, 391 S.C. 436, 442, 706 S.E.2d 324, 326 (2011) ("When reviewing a Fourth Amendment search and seizure case, an appellate court must affirm if there is any evidence to support the ruling."); *State v. Pichardo*, 367 S.C. 84, 98, 623 S.E.2d 840, 847 (Ct. App. 2005) ("In carrying out the stop, an officer may request a driver's license and vehicle registration, run a computer check, and issue a citation."); *Rodriguez v. United States*, 135 S.Ct.

1609, 1615 (2015) (“Typically such inquiries involve checking the driver’s license, determining whether there are outstanding warrants against the driver, and inspecting the automobile’s registration and proof of insurance.”); *United States v. Oliver*, 550 F.3d 734, 738 (8th Cir. 2008) (finding that when law enforcement has probable cause to tow a vehicle, a traffic stop is not completed until the tow is accomplished); *United States v. Sharpe*, 470 U.S. 675, 687 (1985) (“The question is not simply whether some other alternative was available, but whether the police acted unreasonably in failing to recognize or to pursue it.”); *State v. Brown*, 389 S.C. 473, 483, 698 S.E.2d 811, 816 (Ct. App. 2010).

However, the scope of the traffic stop went beyond driver’s license check and vehicle registration check and computer check as stated in this Court’s opinion. To the contrary, this scenario morphed instead into a Sikes fishing expedition that led to the Fourth Amendment violation. In the case at bar, Officer Lawler detained driver Butler due to the fact that he was sought on charges. However, petitioner was not wanted on charges and should not have been detained on this fishing expedition. Clearly, petitioner should have been ticketed for the seatbelt violation and allowed to move on while Butler’s car was towed and he (Butler) was saddled with the items inside his (Butler’s) car. The prolonged detention of petitioner for no apparent reason violated the Fourth Amendment.

Also, note that although the scope of the stop may be enlarged, the scope and duration of the seizure must be strictly tied to and justified by the circumstances which rendered its initial undertaking proper, a lawful traffic stop can become unlawful if it is prolonged beyond the time reasonably required to complete its mission. State v. Morris, 395 S.C. 600, 720 S.E.2d 468 (2011); Sikes v. State, 323 S.C. 28, 448 S.E.2d 560 (1994); State v. Adams, 397 S.C.481, 725 S.E.2d 523 (2012), citing to State v. Morris, *supra*, and Illinois v. Caballes, 543 U.S. 405 (2005). Once the purpose of that stop has been fulfilled, the continued detention of the vehicle and occupants would result in a second detention. State v. Morris, *supra*, citing to State v. Pichardo, 367 S.C. 84, 623 S.E.2d 840 (2005). The encounter can only continue if the police have a reasonable suspicion that

other criminal activity would be afoot. State v. Adams, *supra*; State v. Morris, *supra*, State v. Pichardo, *supra*.

In Sikes, a vehicle was stopped because the paper tags aroused suspicion of it being stolen, but after receiving the requested identification information from the driver and the passenger; nonetheless, the passenger was taken from the car while police ran a warrant check on him. The Court reversed in Sikes and held that the officer's further detention of the passenger while going "fishing" for evidence of a crime, i.e., looking for warrants, was unlawful because the scope and duration of the initial seizure must be **tied to and justified by the circumstances which rendered its initiation proper**. In Sikes, the belief that the car was stolen ended upon the receipt of proper identifications. Therefore, there was no reasonable suspicion in existence thereafter to extend the seizure of the passenger by detaining him any further. Also, the Sikes Court cited to State v. Johnson, 805 P.2d 761 (Utah 1991), where the Court held that the leap from asking a passenger's name and date of birth to running warrant checks on the passenger was unlawful as such was an attempt to gather information in support of an unparticularized suspicion or hunch. Compare, State v. Williams, 351 S.C. 591, 571 S.E.2d 703 (2003), where the Court held that since the officer had written the traffic ticket and the traffic stop was complete, it was error for the officer to continue to question the defendant until he (officer) believed the answers were inconsistent as a basis to search the vehicle because there was no prior reasonable suspicion that criminal activity had been afoot.

Going on a "fishing" expedition to find evidence in support an unparticularized hunch of inchoate criminal activity is unlawful because reasonable suspicion is an objective assessment of the circumstances at trial. See State v. Provet, 405 S.C. 101, 747 S.E. 2d 453 (2013), citing to Whren V. United States, *supra*. Reasonable suspicion is more than an inchoate or unparticularized hunch, but rather it is an objective basis that would lead to a suspicion of criminal activity under the

probability of the circumstances. State v. Rogers, 368 S.C. 529, 6219 S.E. 2d 679 (2006) citing to State v. Butler, *supra*. Moreover, once the purpose of the traffic stop has ended, the officer may not extend the duration of the traffic stop without reasonable suspicion that would justify an additional or prolonged seizure. State v. Provet, 405 S.C. 101, 747 S.E. 2nd 453 (2013) citing to Pennsylvania v. Morris, 403 U.S. 106 (1977) and Arizona v. Johnson, 555 U.S. 323 (2009).

In Tindall, *supra*, the Court reversed and held that the officer lacked reasonable suspicion of a crime to continue detaining the defendant beyond the scope of the traffic stop where the officer stopped the defendant for speeding, obtained his license and registration and proof of insurance, did a “felony stretch,” and pulled the defendant out and ordered him to sit in the patrol car, and continued to question him for 6 to 7 minutes, despite the fact that the report returned that there were no problems with the license or vehicle, and extended the process until backup arrived for a dog sniff due to his (defendant’s) nervousness because “the purpose of the traffic stop was accomplished” after the report returned confirming all was well with the defendant’s license and insurance, which meant the ticket should have been issued rather than engage in the continued detention of the defendant since this exceeded the scope of the traffic stop and constituted a seizure in violation of the Fourth Amendment.

Compare State v. Rivera, 384 S.C. 356, 682 S.E.2d 307 (Ct. App. 2009), where the Court upheld the trial judge’s ruling that the defendant was unlawfully detained on a continued detention when the defendant was stopped for following too closely and asked to exit the car and asked a series of questions even though there was no evidence of criminal activity, and when the defendant was told he would receive a ticket, because this fishing expedition went on until back-up police arrived. Lengthening the detention for further questioning beyond that related to the initial stop is acceptable only if the officer has an objectivity reasonable and articulable suspicion

that illegal activity has occurred. State v. Provet citing to State v. Pichardo, supra. In State v. Rodriguez, 323 S.C. 484, 476 S.E.2d 161 (1997).

As for the Court's ruling on the inevitable discovery doctrine¹ is concerned, note that petitioner was a passenger and the car belonged to the driver and the driver owned the goods.

QUESTION II

The Court of Appeals erred in upholding the trial judge's ruling that allowed into evidence petitioner's statement wherein he identified the goods in the car that were allegedly stolen as belonging to the driver and/or both of them because this admission was given pursuant to circumstances that constituted the equivalent of a custodial interrogation before the Miranda warnings had been given to him, and therefore should have not been admissible at trial.

Also, on appeal, the following question was the second issue raised in the case:

The trial judge erred in allowing into evidence petitioner's statement wherein he identified the goods in the car that were allegedly stolen as belonging to the driver and/or both of them because this admission was given pursuant to circumstances that constituted the equivalent to a custodial interrogation before the Miranda warnings had been given to him, and therefore should have not been admissible at trial

This Court addressed the issue as follows:

As to whether the trial court erred by admitting into evidence Fulwiley's statements claiming co-ownership of the goods seized: *State v. Jackson*, 384 S.C. 29, 34, 681 S.E.2d 17, 19 (Ct. App. 2009) ("The admission or exclusion of evidence is a matter within the trial court's sound discretion, and an appellate

¹ ("The inevitable discovery doctrine is an exception to the exclusionary rule and states that if the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means, the information is admissible despite the fact it was illegally obtained."), *rev'd on other grounds*, 401 S.C. 82, 736 S.E.2d 263 (2012); *id* at 483-84, 698 S.E.2d at 817 ("If the police are following standard procedures, they may inventory impounded property, including closed containers, to protect an owner's property while it is still in police custody.").

court may only disturb a ruling admitting or excluding evidence upon a showing of a manifest abuse of discretion accompanied by probable prejudice.”); *State v. Williams*, 405 S.C. 263, 272 747 S.E.2d 194, 199 (Ct. App. 2013) (“An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law.” (quoting *State v. Pagan*, 369 S.C. 201, 208m 631 S.E.2d 262, 265 (2006))); *United States v. Sullivan*, 138 F.3d 126, 130 (4th Cir. 1998) (“Only if the motorist is detained ‘to a degree associated with formal arrest’” will he be entitled to the *Miranda* protections for in-custody interrogations.” (quoting *Berkemer v. McCarty*, 468 U.S. 420, 440 (1984))); *Bradley v. State*, 316 S.C. 255, 257; 449 S.E.2d 492, 493 (1994) (“*Miranda* warnings are required for official interrogations only when a suspect ‘has been taken into custody or otherwise deprived of his freedom of action in any significant way.’” (quoting *Miranda*, 384 U.S. at 444)); *Berkemer*, 468 U.S. at 440 (“[P]ersons temporarily detained pursuant to [ordinary traffic] stops are not ‘in custody’ for the purposes of [*Miranda*].”); *State v. Corley*, 383 S.C. 232, 244, 679 S.E.2d 187, 193 (Ct. App. 2009) (“[E]ven though a motorist in a routine traffic stop may be detained and is not free to leave, such a motorist is not ‘in custody’ for *Miranda* purposes.”).

Clearly, the traffic stop resulted in the detention of petitioner to the degree that it was akin to a formal arrest and petitioner was deprived of his freedom of action. The traffic stop went beyond a driver’s license check, and vehicle registration check, and computer check as it morphed into a custodial interrogation based on the Sikes fishing expedition status of the traffic stop; and this Court may have overlooked the evidence indicating that the traffic stop morphed into an interrogation because of the Sikes fishing expedition nature of the stop and that petitioner’s initial non-custodial status was elevated to an in-custody status.

During pre-trial hearing, defense counsel moved to exclude petitioner’s statement made claiming coownership of the items from CVS in the vehicle on the grounds that the statements were not given voluntarily because the answers given by petitioners were submitted during a custodial interrogation where he was not free to leave and where he had not been given his Miranda² warnings as this violated the privilege against self-incrimination found under the

² 384 U.S. 436 (1966).

Fifth Amendment and article 1, §12 of the South Carolina State Constitution. R. 88, l. 22 – R. 89, l. 9.

A Jackson v. Denno³ hearing was held prior to trial in the matter. Officer Lawler stated that petitioner was not free to leave at the time of the initial approach at the beginning of the traffic stop, and that he (petitioner) was not free to leave when he got out to smoke a cigarette and was told to get back in the car, and that he (petitioner) was not free to leave when he investigated the CSV items in the car before he was arrested and placed in the patrol car and then given his Miranda warnings at that time. R. 89, l. 24 – R. 97, l. 1. After the dispatch showed Butler was a wanted suspect (R. 91, l. 18), petitioner was soon arrested, but Officer Lawler admitted in effect previously asking petitioner if he had something illegal in the car and what he was doing leaning over in the vehicle (presumably prior to the Miranda warnings), and that petitioner responded to the effect that (it's Butler's) and then (it's both of ours). R. 97, l. 4 – R. 105, l. 24. Defense counsel argued that petitioner was not free to leave from the time he was “pulled over until the time he was permitted to leave with the ticket,” and thus the statements in question were inadmissible and involuntarily given. R. 106, l. 13 – R. 107, l. 2. The trial judge ruled as follows:

This was a routine traffic stop. The questions asked of the officer, whatever they may have been, did not rise to the level and the situation involved did not rise to the level to a degree associated with a formal arrest....[petitioner] was obviously not free to leave, but Miranda is nonetheless not triggered based on my review of the circumstances. R. 109, l. 24 – R. 110, l. 5.

A suspect may not be subjected to a custodial interrogation absent an explanation of his rights under Miranda v. Arizona, 384 U.S. 436 (1966). The rule is that Miranda warnings are required for interrogations when the suspect has been taken into custody, i.e., “custodial

³ 378 U.S. 368 (1964).

interrogations.” See State v. Easler, 327 S.C. 121, 489 S.E.2d 617 (1997), citing to Minnesota v. Murphy, 465 U.S. 420 (1984), and Rhode Island v. Innis, 446 U.S. 291 (1980). The term “in custody” is defined as one who has been deprived of his freedom (not free to leave) per Minnesota v. Murphy, *supra*; and an “interrogation” has been defined as questions reasonably likely to elicit a response per Rhode Island v. Innis; *supra*. In Easler, the Court held that since the officers knew an accident had occurred and someone fitting Easler’s description left the scene, then any questioning of Easler after learning he left the scene of an accident were such that were likely to elicit an incriminating response. Nonetheless, although Easler was in custody without having been given his Miranda warnings, the issue of “in custody” was resolved in Easler to the extent of overwhelming evidence of Easler’s guilt otherwise.

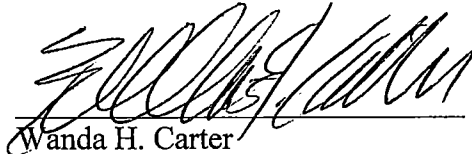
In the case at bar, petitioner was not free to leave during the entire stop and was not given his Miranda warnings until after the bag had been seized from the car and questions asked regarding ownership of the bag. Therefore, petitioner’s statement regarding co-ownership of the items in the vehicle should not have been admitted into evidence in violation of the Fifth Amendment as his status became “in custody” since the stop was extended and morphed into a Sikes fishing expedition that resulted in a custodial interrogation of petitioner due to the character and nature of the stop.

Clearly, the fishing expedition that occurred in the case sans probable cause or reasonable suspicion led to an illegal detention of petitioner and the illegal search of his vehicle based on an extended detention beyond the scope of the stop, all of which violated the Fourth and Fifth Amendments to the United States Constitution.

CONCLUSION

Based on the foregoing argument, counsel for petitioner requests that this Court grant this petition and allow full briefing on the above raised points.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'Wanda H. Carter', is written over a horizontal line.

Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 2nd day of May, 2019.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Lexington County
Honorable George C. James, Circuit Court Judge

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THE STATE,

RESPONDENT,

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MICHAEL FULWILEY,

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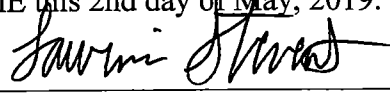
CERTIFICATE OF SERVICE

I certify that a copy of the Petition for Writ of Certiorari and a copy of the Appendix in this case has been served on Joshua A. Edwards, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; the South Carolina Court of Appeals; and Michael Fulwiley, at Alston Wilkes Veterans Home, 3519 Medical Drive, Columbia, SC 29203, this 2nd day of May, 2019.


Wanda H. Carter

Deputy Chief Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO BEFORE
ME this 2nd day of May, 2019.



Notary Public for South Carolina
My Commission Expires: July 5, 2027.



SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

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May 2, 2019

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MAY 02 2019
SC Court of Appeals

Joshua A. Edwards, Esquire
Assistant Attorney General
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Columbia, SC 29211

Re: The State v. Michael Fulwiley

Dear Mr. Edwards:

Enclosed are two copies of the Petition for Writ of Certiorari and the Appendix in the above case that I have filed with the South Carolina Supreme Court today.

If you have any questions concerning this matter, please contact me.

Sincerely,

Wanda H. Carter
Deputy Chief Appellate Defender

WHC/lb

Enclosures

cc: Court of Appeals