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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

CERTIORARI TO YORK COUNTY
Court of Common Pleas
The Honorable William A. McKinnon, Circuit Court Judge

Appellate Case No. 2018-001737

RICKY EUGENE PASSMORE,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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INDEX

PETITIONER'S STATEMENT OF ISSUE ON APPEAL

Whether the PCR court erred in denying relief, where trial counsel failed to object to the admission of a prejudicial recorded telephone call Petitioner made to his daughter, where the call was so offensive that it caused the trial judge to sever Petitioner's case from his co-defendant's?

RESPONDENT'S COUNTER-STATEMENT OF ISSUE ON APPEAL

Did the post-conviction relief court properly determine Petitioner failed to establish Counsel was constitutionally ineffective for failing to suppress a recorded call between Petitioner and his daughter because, as Counsel testified, he had no legal basis to keep the recorded call from being introduced at trial as it was highly probative evidence of Petitioner's motive and intent to commit the offenses for which he was charged and, further, Petitioner's own testimony was consistent with the offensive language Petitioner alleges should have been suppressed in the recorded call.

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the York County Clerk of Court. In August 2013, the York County Grand Jury indicted Petitioner for burglary in the first degree (2013-GS-46-2903) and criminal domestic violence of a high and aggravated nature (2013-GS-46-2902). Petitioner was subsequently indicted in January 2014 for kidnapping (2014-GS-46-209) and possession of a weapon during the commission of a violent crime (2014-GS-46-219). Daniel Hall, Esquire (Counsel) represented Applicant. Assistant Solicitor Jessica Holland of the Sixteenth Circuit Solicitor's Office prosecuted the case. On March 31 and April 1, 2014, Petitioner proceeded to trial before the Honorable John C. Hayes, III. The jury found Petitioner guilty as indicted on the charge of burglary in the first degree and not guilty on the other charges. Judge Hayes sentenced Petitioner to imprisonment for a term of thirty years.

Petitioner filed a timely notice of appeal. Chief Appellate Defender Robert Michael Dudek, Esquire, of the Office of Appellate Defense perfected the appeal. The South Carolina Court of Appeals affirmed Petitioner's conviction on March 2, 2016. State v. Passmore, Op. No. 2016-UP-097 (S.C. Ct. App. filed March 2, 2016). Petitioner filed a petition for writ of certiorari to the South Carolina Supreme Court on June 13, 2016. The Supreme Court denied the petition on October 20, 2016. The remittitur was sent on October 25, 2016.

Petitioner filed his application for post-conviction relief on February 16, 2017, alleging he was being held unlawfully for the following reasons:

1. Ineffective Assistance of Counsel:
2. Multiple U.S. Constitutional violations including but not limited to Amend #6, #14, Due Process violations, Brady violations, denial of right to trial by jury.
3. Lack of Subject Matter Jurisdiction.

An evidentiary hearing into the matter was convened on August 1, 2018, at the Moss Justice Center before the Honorable William A. McKinnon. Petitioner was present at the hearing and represented by Steven W. Fowler, Esquire. Assistant Attorney General Julie A. Coleman of the South Carolina Attorney General's Office represented Respondent. At the hearing, Petitioner testified on his own behalf. Counsel also testified. By order filed September 14, 2018, Judge McKinnon denied Petitioner's application in its entirety finding Petitioner failed to demonstrate how Counsel's performance was unreasonable under prevailing professional norms. Petitioner filed a timely notice of appeal. Thereafter, Petitioner filed his petition for writ of certiorari.

STATEMENT OF FACTS

On June 18, 2013, Petitioner and his teenage daughter (Daughter) had a phone conversation around midnight. Daughter recorded about twenty minutes of her conversation with Petitioner. Daughter took the recording to her mother, Julia Coleman (Victim), and she listened to a few minutes of it and "just blew it off." (App. 121.) The recording was approximately twenty minutes of Petitioner "expressing great displeasure about the ex-wife's relationship with this African-American boyfriend." (App. 377.) This recorded call was introduced at trial by the State and played for the jury. (State's Exhibit No. 9.)

On June 19, 2013, about five hours after the recorded phone call, Petitioner shows up at Victim's residence. Shortly thereafter, Officers of the Clover Police Department were dispatched to Victim's residence after one of Victim's children called 911 from a neighbor's residence. (App. 51-52.) Upon arrival, Sgt. Hawkins (Hawkins) was told by one of Victim's children that there was a "crazy man" in the house with a sword. (App. 53.) One of the children told Hawkins the man was their father and that he did not live at the residence. (App. 53.) Hawkins made contact with Victim and she said Petitioner "came into the residence, pushed her down on the couch and as she was trying to get up he told her that he was going to kill her if she moved, and then proceeded through the back of the house looking for her boyfriend who was not at the residence at that time." (App. 53-54.) Victim was dating Chip, an African-American man, at the time of the incident. Victim knew Petitioner did not approve of Chip because during a phone conversation with Petitioner he asked if she was dating a n****r. (App. 95.) Petitioner had also left Victim approximately four "very, very derogatory, nasty" voicemails regarding her relationship with Chip. (App. 95.) Victim testified at trial that Petitioner told her about two

weeks before the incident that he would come to her house and said, "let that n****r be there when I get there, we'll see who the real man is." (App. 96.)

On the night of the incident, Victim testified she was sleeping on the couch playing video games when there was a knock at the door. (App. 96.) One of the children went to the door and told Victim that Chip was at the door. (App. 97.) Victim told the child to open the door, which he did slightly, and then told Victim it was in fact Petitioner at the door, not Chip. (App. 98.) Victim stated Petitioner was "already coming through the door" by the time she realized it was not Chip. (App. 98.) Victim also testified Mickey Passmore, Petitioner's twin brother, was directly behind him when Petitioner entered the home. (App. 98.)

Once Petitioner entered the home, Victim testified he was looking for Chip and she told him Chip was not there. (App. 98.) Victim went to get off the couch to find her phone and Petitioner pushed her back down on the couch and pulled out a sword and said, "b**ch if you move, you die." (App. 98.) As Petitioner made his way around the residence looking for Chip, he learned one of his children had fled the residence to call 911 at a neighbor's house. (App. 99.) Once Petitioner and Mickey learned police had been called they fled the residence. (App. 100.) Victim told Hawkins that Petitioner left in an older model burgundy Lincoln that was being driven by a female. (App. 57.) Hawkins put that information out over the radio and forwarded it to the York County Police Department and York County Sheriff's Office. (App. 58.) About ten minutes later, dispatch notified Hawkins that York County police officers had located and stopped the vehicle. (App. 58.) Hawkins and Sgt. Miller, also with Clover Police, responded to the traffic stop. (App. 58.) During a search of the vehicle, Hawkins located the sword, a crowbar, some rope, a paint scraper, a loaded assault rifle with bayonet attached, and a "wooden

handle with a pool ball tied on with a rope."[1] (App. 59, 64.) Brass knuckles were also located by the York Police Department officers and turned over to Clover Police Department. (App. 63.)

STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). On appellate review, courts give great deference to a post-conviction relief court's findings of fact and will uphold them if there is any evidence in the record to support them. Id. at 179 (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013); Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Id. Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she must prove "counsel's conduct so undermined the proper functioning of the adversarial process that the [proceeding] cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." Ard v. Catoe,

[1] Petitioner called this weapon "pool ball mace" that he hand made for Victim to carry in her purse. (App. 185.)

372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. 668.

ARGUMENT

The post-conviction relief court properly found Petitioner failed to establish Counsel was constitutionally ineffective for failing to suppress a recorded call between Petitioner and his daughter because, as Counsel testified, he had no legal basis to keep the recorded call from being introduced at trial as it was highly probative evidence of Petitioner's motive and intent to commit the offenses for which he was charged and, further, Petitioner's own testimony was consistent with the offensive language Petitioner alleges should have been suppressed in the recorded call.

Petitioner alleges the post-conviction relief court erred in refusing to find Counsel constitutionally ineffective for failing to object to the admission of a recorded telephone call between Petitioner and his daughter that he classifies as "highly prejudicial."[2] As the post-conviction relief court properly found, Counsel did not have a legal basis to object to or suppress the recorded call from being introduced at trial and there was no legal basis to exclude the recorded call at trial. Additionally, Petitioner failed to establish any requisite prejudice because other evidence of Petitioner's intent to commit the burglary was introduced at trial, and inflammatory language similar to that from the recorded call was consistent with Petitioner's

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[2] While not included in his issue statement or raised to the post-conviction relief court, Petitioner appears to be arguing on appeal that Counsel was also ineffective for failing to move to redact the recorded call. "Based on the offensive nature of the audio recording, trial counsel should have sought to suppress it or redact the offensive portions" (PWC. 8.) This issue is not properly before this Court because only a matter that has been ruled on below can be reviewed, otherwise, the appellate court would be exercising original jurisdiction. State v. Gee, 262 S.C. 373, 204 S.E.2d 727 (1974). The same standard applies in post-conviction relief actions—for an issue to be properly before an appellate court on post-conviction relief review, it must have been presented to and ruled upon by the post-conviction relief court. Winkler v. State, 418 S.C. 643, 662, 795 S.E.2d 686, 697 (2016), reh'g denied (Feb. 9, 2017) (citing Herron v. Century BMW, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011). As Petitioner did not argue below that Counsel was ineffective for failing to move to redact the recorded call, such an argument is not properly before this Court. Moreover, as will be addressed fully within this return, Petitioner suffered no prejudice from the entire recorded call coming into evidence as it had no impact on the jury's verdict because the jury was already exposed to Petitioner's inflammatory language and ideology through his testimony at trial and the intent element of burglary was established through other evidence. Additionally, at the post-conviction relief hearing, Counsel testified, "[Petitioner] wanted the Court to hear every word of the recorded call." (App. 377.) This is a valid trial strategy for not moving for redactions because Petitioner made it clear to Counsel that he wanted the court to hear the entire recorded call, not just portions.

own testimony at trial. Therefore, Petitioner cannot point to the recorded call as the sole source of inflammatory language that created the alleged prejudice in his trial. The post-conviction relief court's finding is supported by credible testimony from Counsel and should be affirmed.

As an initial matter, Petitioner failed to introduce the recorded call of which he complains into evidence at the post-conviction relief hearing. As the recording was never introduced to the post-conviction relief court, it is inconceivable that Petitioner could have satisfied his burden of proof as to this allegation. See Rule 71.1(e), SCRCP (an applicant has the burden of proving the allegations in his or her application); Caprood, 338 S.C. at 109, 525 S.E.2d at 517 (an applicant has the burden of proving both deficiency and prejudice). See also State v. Decker, 275 Kan. 502, 507, 66 P.3d 915, 920 (2003) (internal citations omitted). Petitioner has also failed to present the content of the "highly prejudicial" recording that "shocked the conscience" to this Court to substantiate this allegation. "The appellant bears the burden of furnishing a record which affirmatively shows that prejudicial error occurred in the trial court." Pate v. Riverbend Mobile Home Village, Inc., 25 Kan.App.2d 48, 52, 955 P.2d 1342 (1998) (without photographs, court was unable to conclude there was material error); White v. State, 41 Ala. App. 54, 56, 123 So. 2d 179, 181 (Ala. Ct. App. 1960) ("The omission of photographs and blackboard drawings from the appellate record precludes our review as to the sufficiency of the evidence."). Petitioner has failed to meet his burden of providing a record that substantiates this allegation as he has not provided this Court with the recorded call he is alleging created the prejudicial effect in his case.

A. The post-conviction court properly found Counsel was not deficient for failing to move to suppress the recorded call as there was no legal basis upon which to move for suppression of the recorded call as it established motive and intent on Petitioner's behalf to commit the burglary of Victim's residence.

Notwithstanding Petitioner's failure to provide the recorded call to the post-conviction relief court, it is not likely the result of Petitioner's proceeding would have been different as Counsel did not have a legal basis to keep the recording from being introduced at trial. "As a general rule, statements or declarations made by one accused of a crime are admissible against him." State v. Plyler, 275 S.C. 291, 270 S.E.2d 126 (1980). Petitioner's statement is also admissible as a statement against interest under Rule 804(b)(3), SCRE and under Rule 803(3), SCRE to prove Petitioner's motive and intent to commit the burglary since the call occurred only five hours before the incident. Petitioner alleges that had Counsel challenged the admissibility of the recorded call, the trial court would have suppressed it under a Rule 403, SCRE analysis as unfairly prejudicial. However, that outcome is unlikely as the recorded call was highly probative to show Petitioner's motive and intent.

"Rule 403 provides that, 'although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.' 'Probative' means '[t]ending to prove or disprove.' . . . 'Probative value' is the measure of the importance of that tendency to the outcome of a case. It is the weight that a piece of relevant evidence will carry in helping the trier of fact decide the issues. '[T]he more essential the evidence, the greater its probative value.'" State v. Gray, 408 S.C. 601, 609-610, 759 S.E.2d 160, 165 (2014) (quoting United States v. Stout, 509 F.3d 796, 804 (6th Cir. 2007)).

In State v. Beck, 342 S.C. 129, 536 S.E.2d 679 (2000), Appellant was convicted of murdering a woman who worked for an escort service and was sentenced to life imprisonment. On appeal, Beck argued the trial court erred in admitting a statement he made to Larry Barlow

(Barlow) four months before the murder where he told Barlow he planned to call an escort service for dates and then have sex with and rob the escort service employee. Id. at 133-134, 536 S.E.2d at 661-682. This Court held the statement was properly admitted by the trial court despite being made four months prior to the murder because it was "highly probative as to a manifestation of [Beck's] intent" to commit a fatal attack upon a woman like the victim. Id. at 135, 536 S.E.2d at 682. This Court held the "probative value of Barlow's testimony far outweighed any possibility of undue prejudicial effect." Id.

As in Beck, the statements Petitioner made to Daughter during that recorded call just five hours before he "barged" through the front door of Victim's home, armed with a samurai sword, looking for Chip, were highly probative of Petitioner's motive and intent. (App. 152.) The recorded conversation provides the jury with a full picture of why the incident occurred. The recorded call clearly establishes Petitioner's intent and motive to commit the burglary and, as Counsel testified at the post-conviction relief hearing, the State's position was that the statement "was important to show motive and intent [as to] why [Petitioner] went there." (App. 378). If this Court found a singular statement by Beck *four months* prior to the murder of an escort was more probative than prejudicial in his case, it is unreasonable to think Petitioner's twenty minute rant regarding his disdain for Chip just *five hours* before forcing entry into the residence where he believed Chip to be while armed with a sword would not also be found to be substantially more probative than prejudicial. Clearly that is the evaluation Counsel had of the recorded call as he credibly testified that he had no legal basis to keep Petitioner's statement from being introduced at trial.

Petitioner asserts that if Counsel had been successful in excluding the recorded call, the jury would not have heard why Petitioner went to Victim's residence and Petitioner would

therefore not have been found guilty of burglary. (PWC. 9.) This argument is flawed for several reasons. First, this statement proves the earlier argument that the recorded call was more probative than prejudicial as it establishes Petitioner's intent and motive for going to Victim's residence five hours after the recorded call. Second, the recorded call is not the only evidence the State presented that showed Petitioner forced entry into Victim's residence. Victim testified there was a knock at her door, her son got up and believed he saw Chip standing at the door through the window. (App. 97.) Victim testified her son opened the door slightly, realized it was Petitioner, and told Victim, "it's daddy." (App. 98.) Victim testified, "by that time Ricky was already coming through the door." (App. 98.) Victim also testified that she had a phone conversation with Petitioner where he told Victim, "let that n****r be there when I get there, we'll see who the real man is." (App. 96.) At that time, Victim told Petitioner, "don't show up at my f*****g house." (App. 96.) Yet, it is undisputed that Petitioner did go to Victim's residence on the morning of the incident even though he was clearly not welcome. (App. 97, 121, 163.) Finally, Counsel moved for a directed verdict at the close of the State's case and the trial court denied the motion as it pertained to the burglary stating, "As to the burglary, his testimony if not direct at least substantial circumstantial evidence that he entered without consent. The only reason the door was opened is because the young man felt that it was somebody other than his father and there was no non-consent, that is he wasn't told to stay out. He just barged in and I certainly think that's a jury question." (App. 152.) It is clear from the record that the State had evidence Petitioner was guilty of the burglary aside from the recorded call and, therefore, Petitioner's argument that he would not have been found guilty of the burglary had Counsel successfully suppressed the recorded call is meritless.

B. The post-conviction relief court properly found Petitioner was not prejudiced by Counsel's failure to suppress the recorded call because the inflammatory language Petitioner claims aroused the passion of the jury was consistent with Petitioner's own testimony at trial and the recorded call was not the only evidence presented by the State showing Petitioner's motive and intent to commit the burglary; consequently, Petitioner cannot establish the outcome of his trial would have been different had Counsel successfully suppressed the recorded call.

Petitioner has also failed to show this Court that he was prejudiced by Counsel's failure to suppress the recorded statement as he has failed to show how the outcome of his trial would have been different had Counsel successfully suppressed the recorded call. Petitioner alleges the "offensive nature" of the recorded call "was calculated to arouse prejudice of the jury[.]" (PWC. 9.) However, during Daughter's testimony she testified that Petitioner called the "pool ball mace" weapon located in the vehicle a "n****r beater." (App. 127.) When Petitioner testified, he said Daughter was lying and, "If I said that, I will tell you I said that, 'cause I don't care if you don't like the fact that I don't like certain people." (App. 189.) During the entirety of Petitioner's testimony he referred to Chip as a "crack dealer" and Chip's friends as "thugs," "little armed thugs," or "little crack thugs" and told the jury that Chip "is a street name for crack rock, 'cause it chips off in pieces." (App. 159, 161, 179.) Petitioner also testified that Victim told him she does not love Chip, but needs her bills paid and Petitioner told her, "Well, there's plenty of white men out there that would help you pay your bills, why didn't you find one of them?" (App. 160.) Petitioner went on to testify that he had a sword in his hands when he went to Victim's house to send Chip a message that, "if it come to it then I would get violent with him to keep him away from my children." (App. 165.) During the State's cross-examination of Petitioner, the following exchange occurred:

> State: Didn't you say that part of the reason that you believed this black man was in your house, this African-American, was to get to your daughter?
>
> Petitioner: Exactly. You think he's looking at [Victim].

State: And what evidence do you have at that?

Petitioner: He's looking at the - What evidence do I have? Because I know plenty of them. I've listened to them talk.

State: You've listened to them talk?

Petitioner: Yes

State: By them you mean?

Petitioner: I mean, street thug African-Americans. I know how many times I cannot tell you I've heard, "Yeah, white girl," this, "Yeah, white girl," that, and just because I recognize that, you want to call me a racist.

(App. 183.) Petitioner went on to testify that he would not have had as bad of a problem if Victim had been dating a white man. (App. 201.)

It is very clear from the record that the recorded call was not the only source of offensive language, racist remarks, or profanity the jury heard during Petitioner's trial. The State's evidence certainly showed Petitioner's disdain for Chip was due, at least in part, to Chip's race. However, Petitioner's own testimony clearly echoed the same inflammatory language and viewpoints he feels Counsel should have pointed to in order to suppress the recorded call. Based on Petitioner's testimony, it is clear the jury would have heard Petitioner's offensive ideology with or without the recorded call being used at trial and, therefore, Petitioner cannot establish he was prejudiced by the recorded call being used at trial.

Further, Petitioner cannot establish any resulting prejudice as it relates to his burglary conviction, because, as noted in the previous analysis, the recorded call was not the only evidence presented by the State showing Petitioner's motive and intent to commit the burglary at Victim's residence.

The post-conviction relief court properly found Counsel was not deficient and Petitioner has failed to meet his burden as set forth in Strickland, 466 U.S. 668. It is evident from Counsel's credible testimony at the post-conviction relief hearing that there was no legal basis to suppress the recorded call from being introduced at trial as it established Petitioner's motive and intent to commit the burglary of Victim's residence. Further, the inflammatory language Petitioner claims aroused the prejudice of the jury was consistent with Petitioner's own testimony at trial, and, clearly did not "arouse" the jury to the extent Petitioner alleges as he was found not guilty on three of his four charges. Petitioner was properly denied relief by the post-conviction relief court and this Court should deny certiorari.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied. Should this Court grant the petition for writ of certiorari, Respondent requests permission to more fully brief the issues herein.

Respectfully submitted,

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STATE OF SOUTH CAROLINA

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Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Return to Petition for Writ of Certiorari**, has been served upon opposing counsel by placing two (2) copies for hand delivery addressed to:

Taylor D. Gilliam, Esquire
SC Commission on Indigent Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201

This 17th day of July, 2019

CAROLINE COLLINS
Administrative Coordinator

ALAN WILSON
ATTORNEY GENERAL

RECEIVED
JUL 17 2019
S.C. SUPREME COURT

July 17, 2019

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

Re: **Ricky Eugene Passmore, #315667 v. State of South Carolina**
Appellate Case No. 2018-001737
Lower Court Case No. 2017-CP-46-0505

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the Return to Petition for Writ of Certiorari. By copy of this letter we are serving opposing counsel today.

Sincerely,

Janell H. Gregory
Assistant Attorney General
SC Bar No. 103176

JHG/cc
Enclosures

cc: Taylor D. Gilliam, Esquire (2 copies)