STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

ORIGINAL

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S.C. SUPREME COURT

Certiorari to Kershaw County

Honorable Clifton Newman, Circuit Court Judge

DERRICK MCDONALD, PETITIONER

V.

STATE OF SOUTH CAROLINA, RESPONDENT

APPELLATE CASE NO 2019-000317

PETITION FOR WRIT OF CERTIORARI

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[1] 378 U.S. 368 (1964)

instructed the jury in both its opening remarks and charge on the law that it was to search for the truth?

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STATEMENT

Zack Waltemath, his sister Molly, Melissa Davy, Joshua Zoch, Christopher Whitehead, Robert Cannon, and Petitioner all worked at Sonic on Hard Scrabble Road in Columbia, South Carolina during the 2006 year. App. 504-505; App. 511; App. 543. Melissa and Joshua Zoch, the deceased, had been in a volatile and abusive[2] relationship for three years and lived together at the time of the incident. App. 748, ll. 9-15; App. 749, ll. 1-3. Early Saturday morning, Melissa and Zoch had gotten into an argument because Zoch was using crack cocaine in their house. App. 749, ll. 10-18; App. 779, ll. 18-21; App. 780, ll. 1-5. Melissa slapped the crack pipe out of Zoch's hands then left the house to stay with Molly Waltemath and her family for the next three nights. App. 780, ll. 11-12; App. 750, ll. 9-13; App. 751, ll. 10-12. The following Wednesday afternoon, December 13, 2006, Melissa, Molly, and Zack returned to the home shared by Melissa and Zoch for Melissa to pick up a change of clothes. App. 757-758. Melissa entered the home and found Zoch on the living room floor, beaten to death. App. 760, ll. 4-9. The police were called and an investigation into the death of Zoch began. App. 760, ll. 22.

Police initially spoke with Adrian Duran in connection with the death of Zoch. App. 1028, ll. 13-18. Zoch had burglarized[3] Duran's house two months prior to his death, taking $4,000. App. 986, ll. 20-25. Doran, who was in police custody on an unrelated matter, was given a polygraph test where he was asked if he killed Zoch. App. 1026, ll. 7-23. Doran failed the polygraph test. App. 1029, ll. 2-6. Despite failing the polygraph, the investigation shifted away from Doran and towards Chris Whitehead, Robert Cannon, and Petitioner. Upon speaking

2 Melissa testified that Zoch had only physically abused her once. App. 765, ll. 12-14. However, testimony of other individuals indicated that there had been regular abuse in the relationship. App. 582, ll. 19-21; App. 990, ll. 14-17.

3 After being charged with the burglary Zoch began working for the Richland County Sheriff's Department as a confidential informant. App. 1496, ll. 11-24.

with various employees at Sonic, police learned Petitioner and the co-defendants had been at Sonic around 10 p.m. on December 12, 2010, the evening of Zoch's death. App. 901; App. 905; App. 507.

Police contacted Petitioner, who was eighteen at the time and had no prior criminal record, at his home. Petitioner spoke with them briefly, denying knowledge and involvement in the death of Zoch and asked that they return when his mother was present. App. 906, ll. 21-25 – App. 907, ll. 1-6, 18-25. Police then went to the home of co-defendant Cannon, who was seventeen at the time and had no prior criminal record. Cannon was interrogated by police and denied knowledge and involvement in the death of Zoch. App. 917, ll. 14-25 – App. 918, ll. 1-7. However, after speaking privately with Captain David Thomely[4], Cannon provided a "confession" that implicated himself, Whitehead, and Petitioner. App. 922 -925; App. 1097, ll. 9-15. Based on this "confession" police arrested Petitioner and interrogated him, securing another "confession." App. 940, ll. 8-14; App. 952-654. The entire length of the investigation into Zoch's murder lasted two days.

Petitioner was indicted by a Kershaw County grand jury on February 7, 2007 for burglary, first degree and murder. App. 2062-2065. On May 6-13, 2008, the state, represented by John Meadors, Joanna McDuffie, and Ron Moak, called the case to trial before the Honorable G. Thomas Cooper, Jr. and a jury. App. 1. Petitioner was represented by Marcus Whitlark and Nathan Sheldon. App. 1. Due to Counsel Whitlark's failure to file a motion to sever Petitioner stood trial with co-defendants, Whitehead, represented by Neil Riley and David Reuwer, and Cannon, represented by Joshua Kendrick. App. 1.

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4 Captain Thomley is a high ranking official, currently the third in command, at the Kershaw County Sheriff's Department. App. 1102, ll. 8-11.

Prior to the start of testimony, a Jackson v. Denno hearing was conducted in which Petitioner, Cannon, and various members of their respective families testified that the statements, which were written by Catoe, were given in exchange for leniency and after multiple request for attorneys were ignored. App. 17-122; App. 202-428. The statements were eventually ruled admissible, with redactions to satisfy Bruton. App. 437-444; App. 806-830. In the trial courts opening remarks and charge on the law, the jury was instructed multiple times to seek the truth. App. 451-456; App. 1628-1648.

During deliberations the jury requested a transcript of the testimony of Danny Catoe, Phillip Crawford, and Michael Jenkins. App. 1650-1665. This testimony amounted to two hundred and seventy-one transcript pages. Hearing no objection, the trial judge allowed deliberations to break for four days while the court reporter prepared the transcripts. App. 1655-1656. Upon resuming deliberations on Tuesday, the transcripts were provided to the jury to review, again without objection and the jury was recharged on the law. App. 1659-1678.

After deliberating for most of the day on Tuesday, the jury convicted Petitioner, Whitehead and Cannon as charged. App. 1686-1687. Judge Cooper sentenced Petitioner to concurrent terms of thirty-five years' imprisonment. App. 1735.

Post-trial motions which were heard, and denied, at a hearing on September 3, 2008. App. 1756-1768. Petitioner filed a notice of appeal that was perfected by Robert Dudek. Petitioner raised two issues: (1) the non-testifying co-defendant's statement was not adequately redacted pursuant to Bruton v. United States and its progeny, and (2) the admission of the non-testifying co-defendant's statement violated the holding of Crawford v. Washington[5]. App. 1777. The Court of Appeals affirmed Petitioner's conviction and sentences. State v. McDonald,

[5] 541 U.S. 36 (2004)

400 S.C. 272, 734 S.E.2d 167 (Ct. App. 2012), aff'd as modified, 412 S.C. 133, 771 S.E.2d 840 (2015). Petitioner sought rehearing, which was denied.

Petitioner then sought certiorari from this Court which was granted solely on the Bruton issue. This Court affirmed Petitioner's convictions finding that while the admission of the non-testifying co-defendant's statement redacted with the word "another person" violated Petitioner's rights under the Confrontation Clause, the error was harmless beyond a reasonable doubt due to "overwhelming evidence of guilt" of Petitioner. State v. McDonald, 412 S.C. 133, 771 S.E.2d 840 (2015).

Petitioner filed an application for post-conviction relief on May 8, 2015. App.1769-1776. The state filed its return on September 9, 2015. App. 1777-1783. An amended PCR application containing eleven grounds for relief was filed on October 12, 2017 alleging, inter alia,

(a) Ineffective assistance of counsel for failure to object when the Court analyzed the factual determinations and reached a decision in the Jackson v. Denno hearing using an incorrect burden.
(b) Ineffective assistance of counsel for failure to object when the Court instructed the jury that they would be conducting a "search for the truth."
(c) Ineffective assistance of counsel for failure to file or argue a Motion to Sever.
(d) Ineffective assistance of counsel for failure to object when the Court allowed the jury during deliberations to review the transcripts of testimony of three trial witnesses.
(e) Ineffective assistance of counsel as counsel was ineffective for failing to present evidence before the jury.

App. 1784-1786.

An evidentiary hearing was held on December 12, 2017 before the Honorable Clifton Newman. App. 1787. Petitioner was represented by Kristy Goldberg; the state was represented by Jessica Kinard. App. 1787. Petitioner and trial counsel Marcus Whitlark testified at the hearing. App. 1788. Petitioner proceeded forward on ten of the eleven grounds presented in the amended PCR application. App. 1860 – 1870.

By an order dated April 2, 2018, Judge Newman granted post-conviction relief on all ten grounds asserted by Petitioner. App. 1890-1913. In the original twenty-four-page order granting relief Judge Newman laid out a thoughtful and detailed analysis of the many instances of ineffective assistance Petitioner received from Counsel Whitlark and the resulting prejudices. Id. The state filed a motion to reconsider, alter or amend pursuant to Rule 59(e), SCRCP date April 16, 2018 arguing that the PCR court failed to consider this Court's finding of "overwhelming evidence of guilt" and failed to state specific findings of prejudice. App. 1914-1945.

PCR Counsel Goldberg filed a response to the state's motion on May 9, 2018 noting that the PCR court was "fully aware of the appellate history" of this case and that the "Supreme Court opinion was referenced repeatedly in the evidentiary hearing and in the resulting Order." App. 1946-1949. PCR Counsel Goldberg further argued that "specific prejudice for each allegation has already been asserted and described in the current court Order wherein all allegations are fully described and discussed including *the specific impact counsel's error had on each specific issue alleged and the outcome of the trial.*" Id. A motion hearing was convened on May 17, 2018 in front of Judge Newman. App. 1952. Petitioner was again represented by Kristy Goldberg; the state was represented by Megan Jameson. Id.

The PCR court allowed both parties to file supplemental post-hearing motions prior to issuing its ruling. App. 1997-2032. By order dated February 13, 2019 Judge Newman reversed the original grant of PCR on all ten grounds relying heavily on the fact that this Court had found "overwhelming evidence of guilt" of Petitioner in the direct appeal. App. 2033-2061. This petition follows.

ARGUMENT

Introduction

In the original order granting relief on all ten grounds the PCR judge ruled with specificity that counsel was ineffective, and that Petitioner was prejudiced by counsel's ineffectiveness meeting the high burden set forth in Strickland v. Washington, 466 U.S. 668 (1984). App. 1890-1913. In a dramatic reversal of the order granting relief the PCR court ruled that this Court's finding on direct appeal of "overwhelming evidence of guilt" meant that Petitioner could not show the required prejudice resulting from Counsel Whitlark's errors. App. 2033-2061.

The order reversing the PCR grant failed to consider the holding in Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018) which *requires* PCR courts to take into account not only the strength of the state's case but also *the specific impact of counsel's errors and other relevant considerations* in determining whether an applicant has met his burden of proving prejudice. Id. at 190, 810 S.E.2d at 844. In the order reversing the original grant of relief the PCR court rested its findings on the prior determination of this Court that there was "overwhelming evidence of guilt" rendering the Confrontation Clause violation harmless. However, as PCR Counsel Goldberg noted in the motions hearing,

> "In the State's motion, they repeatedly do cite to the fact that the appellate court found harmless error. As Your Honor asked, I do think that that would be a problematic policy decision in general to say that *just because the appellate court found this to be harmless error, this PCR court should give some deference or to be tied to that in any way. The appellate courts look at only the preserved errors and they essentially look at all the other unchallenged evidence as competent evidence."*

App. 1961, ll. 17-25.

While Smalls does not completely foreclose a finding of "overwhelming evidence of guilt," it must be noted that for the PCR court to rely on such a finding, and thereby forego the requisite prejudice analysis, there must be incredibly strong, competent evidence. "For "overwhelming evidence" to categorically preclude a finding of prejudice, it must include something conclusive "such as a confession, DNA evidence demonstrating guilt, or a combination of physical and corroborating *evidence so strong the Strickland standard of a reasonable probability...that the factfinder would have had a reasonable doubt cannot possibly be met*." App. 1998. In the present action, Petitioner is challenging the manner in which his statement taken, alleging threats, coercion and a violation of his constitutional right to counsel. Additionally, Petitioner is challenging the very basis for admission of the statement and attacking the analysis employed by the court in the Denno hearing. Accordingly, the "strong evidence" in this case against Petitioner must be re-examined through the lens of Smalls and Strickland.

At the PCR hearing, the court is presented with errors that could not be challenged on appeal. The nature of the PCR hearing is to determine, based on the additional testimony and evidence, whether those errors impacted the evidence and outcome of the trial or appeal process. To base the grant or denial of relief on a prior court's decision when that prior court could not consider the errors alleged at the PCR stage is improper.

The PCR court failed to do the essential balancing test required to measure the specific impact counsel's errors had on the outcome of the case. A review of the twenty-nine-page order shows the only mention of Smalls was in the discussions regarding cumulative error and the need to making specific findings of prejudice. At no point is the *required balancing test* that is set out in Smalls *utilized* in denying Petitioner's PCR application. The errors made by Counsel Whitlark during Petitioner's trial, when considered against the strengths of the state's case and

other relevant factors, show not only that Counsel Whitlark was ineffective but that Petitioner suffered prejudice as a result of those errors.

I.

The PCR court erred in reversing its original grant of relief by relying on the Supreme Court's holding in Petitioner's direct appeal that there was "overwhelming evidence of guilt" such that prejudice could not be shown where trial counsel failed to file a motion to sever resulting in a violation of Petitioner's constitutional rights.

Relevant Facts

Counsel Whitlark was retained by Petitioner's mother roughly sixty to ninety days prior to trial. App. 1823, ll. 23-24. He was not sufficiently prepared for the trial and thus worked closely with counsels for the co-defendants in preparation as they had been working on the case for a longer period of time. App. 1824 ll. 15-25. Counsel Whitlark considered filing a motion to sever but did not file one. He admitted that was a mistake. App. 1825, ll. 9-12.

Counsel Whitlark stated that because of the co-defendant's statement, a motion to sever would have been proper to protect Petitioner's constitutional rights. Further, the attorneys for all three co-defendants made "joint decisions" about how to proceed in the trial and decided things in committee. App. 1825, ll. 13-24. This was highly improper as it did not take into account what was best for Petitioner, but what was best for the group as a whole. See, Johns v. Smyth, 176 F.Supp. 949, 952 (E.D. Va. 1959), modified, United States ex rel. Wilkins v. Banmiller, 205 F.Supp. 123, 128 n.5 (E.D. Pa. 1962), aff'd, 325 F.2d 514 (3d Cir. 1963, cert denied, 379 U.S. 847 (1946)[6]. App. 1825, ll. 13-24. Counsel Whitlark thought that had petitioner been tried on his own he stood a very good chance of acquittal. App. 1825, 11. 25 – App. 1826, ll. 1.

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6 "One of the cardinal principles confronting every attorney in the representation of a client is the requirement of complete loyalty and service in good faith to the best of his ability. In a criminal case the client is entitled to a fair trial, but not a perfect one. These are fundamental requirements of due process under the Fourteenth Amendment…The same principles are applicable in Sixth Amendment cases (not pertinent herein) and suggest that an attorney should

Discussion

Counsel Whitlark was ineffective for failing to make a motion to sever Petitioner's trial from that of his codefendant's. This failure resulted in the abrogation of Petitioner's specific trial right. Petitioner was unable to confront his non-testifying co-defendant about the statement that was entered into evidence, in violation of his confrontation clause rights to confront the witnesses against him. The joint trial prevented the jury from making a reliable judgment about Petitioner's guilt separate from that of his co-defendants.

While criminal defendants who are jointly tried are not entitled to separate trials as a matter of right a criminal defendant is *entitled to a trial free from bias and confusion*. Hughes v. State, 346 S.C. 554, 558–59, 552 S.E.2d 315, 317 (2001) (Moore, J., dissenting) (emphasis added). A severance should be granted only when there is a serious risk that a joint trial would compromise a *specific trial right of a co-defendant or prevent the jury from making a reliable judgment about a co-defendant's guilt*. State v. Dennis, 337 S.C. 275, 523 S.E.2d 173 (1999) (emphasis added). A trial judges should be "cautious in allowing joint trials" and must assure protection of a defendant's constitutional rights. State v. Singleton, 303 S.C. 313, 315, 400 S.E.2d 487, 488 (1991) (reversing conviction obtained in joint trial because defendant's Sixth Amendment right of confrontation was violated).

A central point of contention at trial were the "confessions" obtained by law enforcement. The statement given to law enforcement by Cannon directly implicated Petitioner and Whitehead. The court, attempting to satisfy Bruton, ruled that the statement was admissible if redacted to remove the names of Petitioner and Whitehead and replaced with "another person." This Court held the redaction was not sufficient because the statement still facially incriminated

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have no conflict of interest and that he must devote his full and faithful efforts toward the defense of his client."

Petitioner through inference. State v. McDonald, 412 S.C. 133, 141, 771 S.E.2d 840, 844 (2015). Since Cannon did not testify, Petitioner rights under the Confrontation Clause were violated. Id.

Unfortunately for Petitioner, this Court held that the Confrontation Clause violation was harmless error in light of the "overwhelming evidence of guilt," apart from Cannon's confession, presented at trial. Id. Consequently, the PCR court ruled in the order denying post-conviction relief that there was no prejudice in the failure to make the severance motion. Petitioner was distinctively situated entering his PCR as this Court had already found a severe constitutional violation had occurred as a result of the joint trial. Error had been established, the question for the PCR court was one of prejudice. In reversing its original ruling, the PCR court used the benefit of hindsight and failed to look at the impact the error had on the evidence as it was presented at trial against Petitioner.

Outside of the statements made by Cannon and Petitioner, the evidence relied upon at trial related almost entirely to Whitehead and Cannon rather than Petitioner. The only evidence directly related to Petitioner was that he was seen in the company of his codefendants the evening of the incident and that he turned up at a friend's house in the early morning hours after the incident "a little upset." The improper admission of the co-defendant's statement and other evidence entered at trial irrelevant to the issue of Petitioner's guilt show that a specific trial right of Petitioner's was compromised and calls into question whether the jury could have made a reliable judgment about his guilt separate from that of his co-defendants.

Importantly, the standard in Strickland is not only that the outcome would have been different but that *the errors are such that they undermine the proper functioning of the adversarial process such that the trial cannot be relied upon as having a just result.* It follows

then that the admission of Cannon's statement in the joint trial and the resulting prejudice of the violation of Petitioner's rights under the Confrontation Clause, along with the admission of other evidence in the joint trial that did not pertain to Petitioner, must be evaluated in light of the other alleged errors to determine the specific impact the failure to sever the cases had on the outcome of the trial, in accordance with the holding in Smalls, *supra*. Petitioner is challenging not only the admission of his statement but the failure of counsel to mitigate that statement in front of the jury with testimony and evidence of not only the invocation of the right to counsel but the threats of being a witness or defendant in a death penalty case. The failure to move for severance was extremely prejudicial.

Without the statements there was no evidence linking Petitioner to this incident. Further, the "other evidence of guilt" pertained to Whitehead and Cannon, not Petitioner. The testimony was that Whitehead and Cannon had issues with Zoch, but that Petitioner did not really know Zoch. Further it was Whitehead's car that was thought to be heard at the scene, Whiteheads statement that he was going to go to Zoch's house and beat him up and Cannon who had the original ski mask. McDonald, 412 S.C. at 142-143, 771 S.E.2d at 844-845 (2015). Without the admission of such evidence, Petitioner stood a good chance of acquittal. In the present action failure to move to sever the trials fell below the objective standard of reasonableness under prevailing professional norms resulted in a trial full of evidence that did not pertain to Petitioner but resulted in his guilt by association. The prejudice of failing to move to sever the trial is highlighted by this Court's footnote in McDonald cautioning the state to consider all the available alternatives before deciding to pursue a joint trial and to "give due deliberation to the inherent problems, such as redacted statements, which arise from such trials." McDonald, 412 S.C. at 144 n.4, 771 S.E.2d at 845 n.4 (2015).

II.

<u>The PCR court erred in reversing its original grant of relief by relying on the Supreme Court's holding in Petitioner's direct appeal that there was "overwhelming evidence of guilt" such that prejudice could not be shown where counsel failed to object when the trial judge analyzed the factual determinations and reached a decision in the *Jackson v. Denno* hearing by placing the burden on the defense to prove the invocation of the right to an attorney and that promises of leniency were made.</u>

Relevant Facts

Prior to the start of testimony, the trial court conducted an extensive <u>Jackson v. Denno</u> hearing analyzing the voluntariness of the "confessions" made by Cannon and Petitioner. App. 17-122; 202-428; 437-444. During the hearing the state offered testimony that on December 15, 2006 Investigators Catoe and Marthers attempted to contact Petitioner at his home, but no one was there. App. 19, ll. 22-25 – App. 20, ll. 1-7; App. 28, ll. 1-5. They returned a few hours later and made contact with Petitioner, stating they wanted to speak with him about the death of Zoch. App. 26, ll. 18-25.

Petitioner stated he did not have any information about the death of Zoch and that he did not want to continue to speak with police unless his mother was present. App. 27, ll. 1-4. According to investigator's when Petitioner was asked about his whereabouts the night of the incident Petitioner stated he had been at Sonic and slept in a co-worker's car for an hour, that Whitehead and Cannon had also been at Sonic, that Whitehead had made an odd comment about going to "make some moves" and that Cannon had left Sonic in his brother's car. App. 27, ll. 7-25 – App. 28, ll. 1-8.

Officer's left Petitioner's house and went to speak with Cannon at his residence. App. 29, ll. 18-19. During the first hour of interrogation Cannon denied involvement in the incident and told police that he had heard from a friend that Zoch was dead and that Whitehead was responsible for the death. App. 94, ll. 17-21. According to Investigators, after an hour of denying involvement, Cannon asked to speak with them outside, away from his parents. App. 91, ll. 23-24. While outside Captain Thomley arrived at Cannon's residence and had a brief private conversation with Cannon at the back of Catoe's truck. App. 205, ll. 7-8. After this brief conversation, Cannon returned to the house and gave a full statement, which was written by Catoe, in front of his parents, about the incident. App. 101, ll. 8-23; App. 39, ll. 8-9.

Based on Cannon's statement an arrest warrant was taken out on Petitioner and served on him at his home. App. 48, ll. 1-7. Catoe arrested Petitioner and while driving back to the Kershaw County jail alleged that Petitioner voluntarily stated, "this is the way we came back the other night." App. 52, ll. 21-25. Once they reached the Sheriff's department, Catoe had Petitioner sign a waiver of rights form and then wrote out Petitioner's statement. App. 76, ll. 9-12. When asked if he had mentioned the death penalty during interrogation Catoe responded that he did not remember. App. 76, ll. 18-24; App. 85, ll. 4-5. Petitioner testified to a dramatically different encounter with law enforcement.

When investigators initially made contact with Petitioner at his home and told him they were investigating the murder of Zoch, Petitioner stated he requested an attorney. App. 307, ll. 22-25 – App. 308, ll. 1-3. In response, Petitioner asserts that Catoe informed him that he "hoped he wasn't saying that because you watched it on TV, because that's not the way our system works." App. 308, ll. 5-8. After this meeting officers left and eventually obtained a statement from co-defendant Cannon that implicated Petitioner and Whitehead.

Investigators returned to Petitioner's home and placed him under arrest. App. 309, 17-21. According to Petitioner, his mother, and his brother, Petitioner again requested a lawyer and his mother instructed his brother to "call their lawyer." App. 309-311; App. 290-294; App. 295-298. Petitioner, his mother, and brother testified that Petitioner repeatedly requested a lawyer, that his brother attempted to call his lawyer while law enforcement was at the home but was prevented from leaving the room, that Petitioner asked if he would be able to call his lawyer once he was at the jail and that his mother hollered as he was being placed in the police truck that she would get him a lawyer. Id.

While being transported to the jail Catoe verbally mirandized Petitioner. App. 311, ll. 19-25 – App. 312, ll. 1-3. Petitioner acknowledged he understood his rights and when asked if he wanted to talk stated that he did not know anything. App. 312, ll. 1-12. Catoe responded by telling him this was a death penalty case and he could not help him if Petitioner didn't talk, but if Petitioner gave a statement, he would be a witness and not a suspect in the case. App. 312, ll. 12-16.

Despite being told he would be taken to the jail to be booked in, Petitioner was taken to the Sheriff's office and interrogated. App. 313, ll. 14-25 – App. 314, ll. 1-5. Police continued to question Petitioner, telling him this case could carry the death penalty because the murder occurred during a burglary which constituted an aggravating circumstance, that Whitehead was the subject of the investigation and that if Petitioner gave a statement, he would be a witness, not a defendant, and could go home. App. 314-315. Petitioner acknowledged that he signed the statement form that Catoe wrote but that he did not review the statement and that "those weren't his words." App. 316, ll. 6-7

After all testimony was presented the trial court began its analysis by stating "the standard by which I must judge the admissibility of evidence is by a preponderance of the evidence." App. 437, ll. 4-6.

In ruling on the issue of a valid waiver the court focused on whether Petitioner invoked his right to counsel. The court stated, "But I don't find a clear invocation by a preponderance of the evidence on behalf of either of the two defendants who gave statements...So, I say as a preliminary matter I don't find by a preponderance of the evidence a clear invocation of either Robert Cannon or Derrick McDonald." App. 437, ll. 16-19; App. 439, ll. 5-7.

In determining that the statements were made voluntarily without promises or threats the court stated,

> "I don't find again by a preponderance of the evidence that there were promises of leniency. Now, there is certainly *conflicting testimony on this issue, and it's very -- it's somewhat troubling.* But I still don't believe I can find by a preponderance of the evidence that there was a promise of leniency which extracted the confessions...the testimony of the officers say there was *some indication* that they would mention to the Court, mention to the Solicitor's Office that there was cooperation. But I don't -- I can't find that that in and of itself was a determining factor in whether or not these young men would make a -- give a statement to the police...And whether the promise of a recommendation to law enforcement, to the Solicitor's Office or to the Court *that there might be some leniency derived as a result of that cooperation in my mind is not so overbearing...And I can't find that -- although that may be what they believed, I can't -- I mean, based on the evidence that I have heard, I can't find that by a preponderance of the evidence.*

App. 440, ll. 3-9, ll. 21-25; App. 441, ll. 1-2, ll. 12-16, ll. 20-23.

The trial court then ruled the statements admissible. In issuing the ruling the court stated,

> "So based on that analysis of this case, I have carefully considered all the evidence that's been offered by the State and the defendants and am convinced by a preponderance of the evidence – and that's my standard, and I so find -- that before the alleged statements were obtained from the defendants -- and this applies to both defendants, the defendants were fully advised of their rights under the Fifth and Sixth Amendments to the Constitution of the United States, and that the defendants were advised of the Constitutional safeguards required by Miranda

> vs. United States…the alleged statements given by the defendants were freely and voluntarily given, without duress, without coercion, without undue influence, without reward, without promise or hope of reward, without threat of injury, and without compulsion or inducement of any kind; and that such alleged statements were the voluntary product of the free and unconstrained will of the defendants. This Court finds all of the foregoing conclusions by a preponderance of the evidence; and I, therefore, find the statements are admissible into evidence."

App. 422; App. 444.

Discussion

While the trial court couched its ruling in terms of the "preponderance of the evidence" and "voluntariness" of the statement, the preceding analysis used by the court improperly placed the burden of proof on Petitioner and his co-defendants. Counsel Whitlark failed to object to this incorrect burden and as a result Petitioner's statement was improperly admitted against him at trial.

In order to determine admissibility of a statement the trial judge must conduct an evidentiary hearing, outside the presence of the jury, where *the State must show the statement was made voluntarily by a preponderance of the evidence*. Jackson v. Denno, 378 U.S. 368 (1964) (emphasis added). The trial judge's determination of the voluntariness of the statement must be made on the totality of the circumstances, including the background, experience, and conduct of the accused. State v. Rochester, 301 S.C. 196, 200, 391 S.E.2d 244, 247 (1990). *This voluntariness requirement is in addition to the intelligent waiver mandate of Miranda.* State v. Miller, 375 S.C. 370, 380, 652 S.E.2d 444, 449 (Ct. App. 2007). See, State v. Middleton, 288 S.C. 21, 25, 339 S.E.2d 692, 694 (1986) ("In order to secure the admission of a defendant's statement, the State must affirmatively show the statement was voluntary *and* taken in compliance with Miranda.") (emphasis added).

If a suspect is advised of his Miranda rights, but chooses to make a statement, *the burden is on the State* to prove by a preponderance of the evidence that his rights were voluntarily waived. Rochester, *supra.* (emphasis added). A statement "may not be extracted by any sort of threats or violence, [or] *obtained by any direct or implied promises, however slight, [or] by the exertion of improper influence*." Id. (citing Hutto v. Ross, 429 U.S. 28, 30, 97 S.Ct. 202, 50 L.Ed.2d 194 (1976) (brackets in original)) (emphasis added). *"It is now axiomatic...that a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary [statement], without regard for the truth or falsity of the [statement]...even though there is ample evidence aside from the [statement] to support the conviction."* Miller, *supra*, citing Jackson v. Denno, 378 U.S. 368, 376, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964). (emphasis added).

The trial court was faced with two questions regarding the statement of Petitioner: (1) was there valid waiver of the right to counsel? and (2) were there any promises, threats, or coercion used to extract the statement? While Petitioner presented ample and compelling evidence of the involuntariness of his statement, he was not required to do so.

The trial court, in reaching its ruling, incorrectly relied upon the evidence presented by the defense and placed the burden on the defense to prove both invocation and a promise of leniency. The state acquiesced to this point during the PCR hearing. In response to the PCR court asking if the state agreed the wrong standard was used during the Denno hearing the state replied, "*the way he worded his ruling does imply that...he spoke in terms of what the defendant did not show unfortunately.*" App. 1872, ll. 22-23; App. 1874, ll. 9-10

The trial court began its analysis by stating "the standard by which I must judge the admissibility of evidence is by a preponderance of the evidence." App. 437, ll. 4-6. This is a

misstatement of the roll of the court during the Denno hearing. The court was not concerned with the general admissibility of evidence, but with the voluntariness of the alleged waiver of rights and the statements.

In ruling on the issue of a valid waiver the court focused on whether Petitioner invoked his right to counsel. When the ruling is read plainly it shows the court has considered whether Petitioner had proven he invoked his right to counsel when the consideration should have been whether the state had proven that Petitioner knowingly and voluntarily waived his rights.

Of even greater concern is the court's determination regarding the voluntariness of Petitioner's statement, finding that the defense had failed to show any promises of leniency while completely ignoring the testimony about the threat of the death penalty. App. 440, ll. 3-9, ll. 21-25; App. 441, ll. 1-2, ll. 12-16, ll. 20-23. There was testimony at the Denno hearing that Petitioner's statement was induced by a direct or implied promise of leniency. Both Petitioner and Cannon testified that they were told multiple times that this would be a death penalty trial and they could be a witness or a defendant in that trial. Petitioner stated he thought he would be going home if he gave a statement and that if he did not he would end up being a defendant in a death penalty trial.

Importantly, when asked on cross-examination about talking about the death penalty the lead investigator testified not that he did not talk about it but that *he could not remember*.

> Q. And didn't you tell him that he could either be a witness or a participant in a death penalty trial as a defendant?
> **A. I don't -- no.**
> Q. Do you remember saying or talking about the death penalty, trying a death penalty trial?
> **A. No, I don't.**
> ...
> Q. Did you ever mention death penalty to them?
> **A. Not that I recall, no.**

App. 76, ll. 18-24. App. 85, ll. 4-5. There was further testimony that Petitioner was informed they could only help him if he talked to them, that if he gave a statement he would be a witness in the case, that the case would be a death penalty case because the murder occurred during a burglary which constituted an aggravating circumstance and what the penalties for murder were in South Carolina. App.312 ll.11-16; App. 99, ll. 13.

In light of the testimony there was a direct and implied promise of leniency and a threat of facing the death penalty if a statement was not provided. The trial court ruled that in *his mind* the evidence did not overbear the defendants. If the test for an overborne will is not subjective then it as least is ruled by the reasonable person standard and not the mind of the judge. A reasonable person, similar situated to Petitioner, would find that in the circumstances testified too, their will was overborne. Thus, the statement is involuntary.

In the order reversing the grant of PCR the PCR found that while it "appeared" the court may have placed the burden on the defense, the correct standard was used at the conclusion of the Denno hearing. App. 2047. This is problematic in that even if the correct burden is applied at the end of the hearing, the reasoning behind the final ruling, the analysis used by the court, placed the burden on the defense and therefore the final ruling is based on the improper standard. When asked why he did not object Counsel Whitlark stated "It just went over my head. I wasn't listening." App. 1836, ll. 7. He admitted he was deficient in failing to pay attention to the judge's ruling as it was issued from the bench. In the analysis the burden is shifted to the defense multiple times. This is not "cherry picking" out portions of the trial court's ruling but looking at the ruling as a whole, which shows an incorrect burden and flawed logic reached an improper result.

III.

The PCR court erred in reversing its original grant of relief by relying on the Supreme Court's holding in Petitioner's direct appeal that there was "overwhelming evidence of guilt" such that prejudice could not be shown where trial counsel failed to introduce evidence before the jury regarding the voluntariness of Petitioner's statement.

Relevant Facts

As noted above, there was a Denno hearing during which Petitioner's testimony to the events that occurred on the evening of his arrest differed dramatically from the account given by law enforcement. App. 17-122; App. 202-428. Petitioner's testimony of the events that led to his statement tracked more with what Cannon testified to than what Catoe alleged happened. Further, both Petitioner and Cannon had family members offer credible testimony that lined up with the defendant's version of events. In contrast, the state's witnesses could often only state that they "did not recall" certain events occurring, particularly when questioned about whether there was talk of Petitioner being involved in a death penalty trial as either a witness or a defendant.

In his opening statement to the jury Counsel Whitlark stated at numerous points that the jury would be presented with certain evidence about Petitioner. In regards to invoking Petitioner's right to an attorney and the voluntariness of Petitioner's statement, Counsel Whitlark stated,

> [T]he first thing out of my client's mouth, and his mom is there and his brother, *you're going to hear their testimony*, what's this about? And then they arrest him. He says, well, I want a lawyer. I want a lawyer with me. And they say, well, we're just taking you to jail. You can get one later. They didn't let him leave the room and call one...They told his mom, I'm taking him to the jail. They didn't take him to the jail. They took him down to the Sheriffs Department and started questioning him. It was about midnight or so, almost 1:00. *And he tells them, and you'll learn what he told them, and you're going to learn this; he wanted to be not*

> *a defendant in a death penalty trial. He wanted to be a witness.* Those are his choices you get.

App. 489, ll. 13-21.App. 490, ll. 1-9.

Shortly thereafter, Counsel Whitlark promised the jury they would learn about Petitioner stating "Derrick McDonald barely knew this fellow. Derrick was a senior in high school getting ready to graduate. *You'll learn about him.* And he didn't even really know this fellow." App. 491, ll. 20-23.

At the close of the state's case Counsel Whitlark did not present any evidence. At the PCR hearing Petitioner testified that he had wanted to testify before the jury but that Counsel Whitlark had told him that the state did not prove guilt and it was in Petitioner's best interest to let trial counsel for the defendants get the last word in front for the jury through last closing arguments. App. 1803, ll. 4-17; 1855, ll. 7-10. Further, Counsel Whitlark testified that he did not take the necessary time to talk and consult with Petitioner in preparing the case and had he realized what a smart and well-spoken person Petitioner was prior to trial his strategy would have been different. App. 1853, ll. 19-25-App. 1954, ll. 1-8. Most importantly, Counsel Whitlark testified that he had made an agreement with counsel for the codefendants to not present any evidence but immediately regretted the decision and knew it was the wrong strategy for Petitioner. App. 1839-1841.

Discussion

It appears from the record that the jury deliberations focused on the testimony of the three witnesses directly involved with the statements attributed to Petitioner and his co-defendants. However, Counsel Whitlark failed to offer any evidence as to the totality of the circumstances in which the statement of Petitioner was taken, the effect being the statements were presented to the jury uncontested. Counsel Whitlark made this "strategic" decision based on a prior agreement

with counsel for the codefendants to maintain the right for last argument. This decision fell below the objection standard of reasonableness.

Counsel must articulate a valid reason for employing a certain strategy to avoid a finding of ineffectiveness. Ingle v. State, 348 S.C. 467, 560 S.E.2d 401 (2002). Where counsel articulates a strategy, it is measured under an objective standard of reasonableness. Id. In Ingle, counsel for the defendant called a witness to the stand without first interviewing her and elicited extremely harmful testimony form her on direct. Id. At the PCR hearing counsel for Ingle admitted he had not interviewed the witness but relied on Ingle's assertions that the witness would testify truthfully as to what had occurred the morning of the alleged assault. Id. The PCR court originally held this was a sound strategic decision. Id. This Court reversed the PCR court holding that counsel lacked a valid reason for not questioning the witness and that his actions fell below the standard of reasonableness. Id.

This Court has also held counsel ineffective for failing to investigate and present evidence in defense or mitigation. See, Ard v. Catoe, 372 S.C. 318, 332 n.14, 642 S.E.2d 590, 597 n.14 (2007) (affirming PCR courts decision finding counsel ineffective in failing to further investigate gunshot residue evidence in capital murder case); Nance v. Ozmint, 367 S.C. 547, 557 n.8, 626 S.E.2d 878, 883 n. 8 (2006) (concluding defense counsel in capital murder case should have investigated and presented evidence of defendants adaptability to confinement and presented mitigating social history evidence outlining defendants troubled childhood and mental illness); Von Dohlen v. State, 360 S.C. 598, 606-607, 602 S.E.2d 738, 742-43 (2004) (holding that trial counsel in capital murder case was ineffective in failing to adequately prepare and present evidence in the penalty phase that defendant suffered from severe, chronic depression at the time of the murder given trial counsel failed to provide expert witness with crucial medical

records and related information which prevented witness from conveying an accurate diagnosis of defendants mental condition to the jury).

Counsel Whitlark promised the jury in opening statements that they would hear from Petitioner and his family members regarding his statement, but that information was never provided to them. While Counsel Whitlark did cross-examine each witness regarding the statements he failed to present the highly relevant, competent testimony of Petitioner and his family regarding not only Petitioner's invocation of counsel but of the thinly veiled threats of the death penalty and the promise of not being charged that Petitioner received. Failure to present evidence that would mitigate Petitioner's statement was extremely prejudicial, especially considering the juror's focus on the statement testimony during deliberations.

IV.

<u>The PCR court erred in reversing its original grant of relief by relying on the Supreme Court's holding in Petitioner's direct appeal that there was "overwhelming evidence of guilt" such that prejudice could not be shown where counsel failed to object when the trial judge instructed the jury in both its opening remarks and charge on the law that it was to search for the truth.</u>

Relevant Facts

In the opening remarks to the jury, the trial judge instructed them that the trial is "a fundamental part of our democracy, a search for the truth in an effort to make sure that justice is done between the parties before this court. Searching for the truth and making sure that justice is done is often a slow, deliberate and repetitive process." App. 451, ll. 19-22. As the trial judge continued in his opening remarks, he stated that the attorneys, while advocates for their respective parties, where there to help the jury in its "search for the truth." App. 452, ll. 11-15. The court further instructs the jury multiple times that its job will be to determine the "true facts" and render a "true and just verdict." App. 455, ll. 12; App. 458 ll. 12; App. 459, ll. 12-14.

After the closing arguments of the attorneys the court began its charge on the law. During the portion of the charge on witnesses the court stated, "it becomes your duty as jurors to analyze and evaluate the evidence and determine which evidence convinces you of its truth." App. 1634, ll. 15-18. Finally, at the end of its charge on the law the court stated, "*Your sole interest is to seek the truth* from the evidence that's been presented to you in this case." App.1647, ll. 15-17. The jury, after returning from a four-day recess was then entirely recharged on the law being told at the end of the charge that their "sole interest" was to "seek the truth."

App. 1677, ll. 20-22. At no point during the opening remarks or the charge on the law did Counsel Whitlark object to the "search for the truth" language.

Discussion

The appellate courts of this state have repeatedly cautioned the trial courts against using "search for the truth" language. See, State v. Needs, 333 S.C. 134, 155, 508 S.E.2d 857, 867-68 (1998); State v. Aleksey, 343 S.C. 20, 26-27, 538 S.E2d 248 251 (2000). Recently, in State v. Beaty, 423 S.C. 26, 813 S.E.2d 502 (2018), this Court held that the trial judge's preliminary remarks to the jury, that the jury's role was to "search for the truth," determine "true facts," and render a "just verdict," were improper.

When challenged, the jury instructions should be considered as a whole, and if as a whole they are free from error, any isolated portions which may be misleading do not constitute reversible error. State v. Smith, 315 S.C. 547, 446 S.E.2d 411 (1994). The standard for review of an ambiguous jury instruction is whether there is a reasonable likelihood that the jury applied the challenged instruction in a way that violates the Constitution. State v. Aleksey, 343 S.C. 20, 27, 538 S.E.2d 248, 251 (2000).

In the present matter the trial courts use of "search for the truth" language throughout its opening comments and charge on the law is especially troubling. Of particular note is the fact that the last things the jury heard prior to retiring for deliberations, on two separate occasions, was that their "sole interest" was to "seek the truth." The use of such strong language regarding a "search for the truth," "true facts" and a "true and just verdict" had an impact on the jury as evidenced by the note that was sent out from the jury stating they felt they could not "be fair and do justice" to each defendant without being provided the transcripts of certain testimony. App. 1656, ll. 2-5.

Truth and truth searching language suggest to the jury to "determine whose versions of events is more likely true…and thereby intimates a preponderance of the evidence standard." United State v. Gonzalez-Balderas, 11 F.3d 1218, 1223 (5th Cir. 1994). The use of such language in a pervasive manner by a trial judge weakens the states burden of proof and undermines the function of the trial process. As stated in the original order granting PCR, "Given the time and context of these statements…there is a reasonable likelihood that the jury applied the challenged instruction in a way that unconstitutionally shifted the burden of proof." App. 1899.

V.

<u>The PCR court erred in reversing its original grant of relief by relying on the Supreme Court's holding in Petitioner's direct appeal that there was overwhelming evidence of guilt such that prejudice could not be shown where trial counsel failed to object when the trial judge allowed the jury to review the transcripts of testimony of three witnesses during deliberations.</u>

Relevant Facts

After deliberating for close to two hours the jury requested a transcript of the testimony of Danny Catoe. App. 1650. The jury was informed that they could re-listen to the testimony, which was four hours and thirty minutes long, or that the court reporter could have a transcript ready for their review by 10 A.M. the following morning. App. 1653. The jury then sent out a request asking for transcripts of testimony of Danny Catoe, Phillip Crawford and Michael Jenkins, notably the three witnessed who testified about the statements alleged made by the defendants. App. 1655, ll. 4-13. The court reporter stated the transcript could be ready the following Tuesday. App. 1655, ll. 15-22.

The jury then sent a second note stating, "we do not feel we can be fair and do justice to each defendant on each charge without these transcripts." App. 1656, ll. 2-5. Counsel Whitlark did not object to the lengthy recess in deliberations or to the transcripts being sent back to the jury room, thus the court was at ease until the following Tuesday morning. Petitioner and his codefendants were not present in the courtroom while this decision was being made and only found out about it after the court broke for the four-day recess during which the court reporter prepared the transcripts, which totaled two hundred and seventy-one pages. App. 1652.

At the PCR hearing Counsel Whitlark testified that he did not object to allowing the transcripts to be sent back to the jury room but actually agreed to allow the transcripts because he

felt the jury did not believe the investigators in the case. App. 1843, ll. 24-25 – App. 1844, ll. 1. He further testified that they should have played the audio for the jury. App. 1844, ll. 16-17.

Discussion

Counsel Whitlark was ineffective for agreeing, instead of objecting, to the transcripts of testimony being sent to the jury. Allowing the court to recess for four days to prepare the transcripts and then sending the transcripts back to the jury room for their review outside of Petitioner's presence unduly emphasized the evidence in violation of Petitioner's due process.

"The trial judge, in his discretion, may permit the jury at their request to review, *in the defendant's presence*, testimony after beginning their deliberations." State v. Plyler, 275 S.C. 291, 298, 270 S.E.2d 126, 129 (1980) (emphasis added). "The extent of such review is within the discretion of the trial judge to be exercised in the light of the jury's request." Id. In State v. Gulledge, 277 S.C. 368, 287 S.E.2d 488 (1982), a recording of a conversation between two highway patrolmen was entered into evidence and published to the jury. During deliberations a transcript of the recording was sent into the jury room. This Court held that the trial judge abused his discretion in sending back the transcript because it unduly emphasized that evidence.

Similarly, in State v. Hess, 279 S.C. 525, 309 S.E.2d 741 (1983), recordings of a conversations between the defendant and a known organized crime figure were entered into evidence and published to the jury. During deliberations the trial court allowed transcripts of the recordings into the jury room. While there was undue emphasis, the error was found harmless because *there was no dispute as to the essential facts in the matter*. The issue was of defendant's intent, not the facts of his contacts with the organized crime figure.

In the federal courts, the re-reading of trial testimony has been strongly disfavored because of the possibility that the jury might accord that testimony undue emphasis.

Accordingly, judges have been held to act within their discretion to deny jury request to have the testimony reread to them. See United States v. Rodgers, 109 F.3d 1138 (6th Cir.1997); United States v. Mitchell, 584 F.Appx. 44 (4th Cir. 2014).

As the case law shows, sending a transcript into the jury room for deliberations has been held to place undue emphasis on the evidence or testimony sought to be reviewed and is considered error. Consequently, while a jury is free to request to rehear testimony that has been recorded during the trial, and a judge is within its discretion to allow, disallow or limit what is replayed, the trial court should not send back transcripts. It follows then that the actions of the court in the present action in not only sending out the transcripts but being in recess for four days was an abuse of discretion.

Sending back a transcript not only unduly emphasizes the evidence or testimony but it removes the credibility element of live testimony. The jury is deprived of hearing how the witness responded or how the question was presented and can only look at the words on a page. This greatly diminishes the point of live trial testimony.

In the present action Counsel Whitlark agreed to allow the transcripts to go back to the jury room because he thought that the jury did not believe the witnesses who had testified. This is not a valid strategic decision. If in fact the issue was the credibility of the witnesses, then surely the proper action is to have their live testimony replayed so that the nuances of live testimony can be observed.

Summation

Counsel Whitlark made significant errors during the course of Petitioner's trial. These errors were egregious and fell below the reasonable standard resulting in deficient representation. Petitioner was prejudiced by the failure to sever as he had to attempt to defend against evidence

that would not have come in against him if he had been tired alone. Further, he suffered the harm of his codefendants statement being admitted in violation of his Confrontation Clause rights.

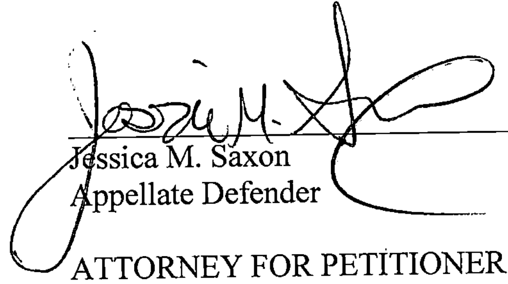
Petitioner was prejudiced by the failure to object to burden shifting during the Denno hearing which had the objection been properly made have resulted in his statement being suppressed or the error being reviewed on appeal. Petitioner was prejudiced again when Counsel Whitlark failed to present any evidence mitigating or defending Petitioner's statement because he had made an agreement with the counsel of codefendants to maintain last argument.

Petitioner was prejudiced by the burden shifting "search for the truth language" that pervaded the judge's opening remarks and charge on the law such that the state's burden of proof was weakened. Finally, Petitioner was prejudiced when the transcripts of testimony were sent to the jury, after a four-day recess, unduly emphasizing the evidence and removing the credibility analysis afforded by live testimony.

Here it is clear there were multiple errors on the part of Counsel Whitlark, and each error resulted in extreme prejudice to Petitioner. Every stage of Petitioners trial was infected with errors that impacted critical evidence, constitutional rights and basic due process safeguards. Such were the errors and resulting prejudice that Petitioner's trial cannot be relied upon as having produced a just result.

CONCLUSION

For the foregoing reasons, this Court should grant Petitioner's writ of certiorari to allow full briefing on these issues.



Jessica M. Saxon
Appellate Defender

ATTORNEY FOR PETITIONER

This 25th day of October, 2019.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Kershaw County

Honorable Clifton Newman, Circuit Court Judge

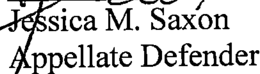
DERRICK MCDONALD, PETITIONER

V.

STATE OF SOUTH CAROLINA, RESPONDENT

CERTIFICATE OF SERVICE

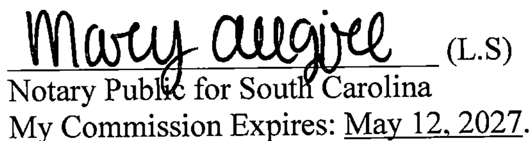
The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Megan Harrigan Jameson, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Derrick McDonald, #328344, at Kershaw Correctional Institution, 4848 Gold Mine Highway, Kershaw, SC 29067-8069, this 25th day of October, 2019.



Jessica M. Saxon
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 25th day of October, 2019.



(L.S)
Notary Public for South Carolina
My Commission Expires: May 12, 2027.