

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Greenville County

Honorable Alex Kinlaw, Jr., Circuit Court Judge

Appellate Case No. 2018-002278

RECEIVED

NOV 22 2019

S.C. SUPREME COURT

SYLVESTER KEEJUAN KING,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

TAYLOR ZANE SMITH
Assistant Attorney General
S.C. Bar No. 103282

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-0904

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

STATEMENT OF ISSUES ON CERTIORARI.....ii

STATEMENT OF THE CASE.....1

STATEMENT OF FACTS.....4

STANDARD OF REVIEW.....7

ARGUMENT.....8

The PCR court properly found that trial counsel was not constitutionally ineffective in failing to object to the trial court’s instruction that the jury should render a verdict that “speaks the truth” because the instruction was not given so as to modify the charges on reasonable doubt or the burden of proof, Petitioner failed to demonstrate that the jury interpreted the instruction as an admonition to remove the burden of proof from the State, and Petitioner failed to demonstrate that there is a reasonable likelihood that the outcome of trial would have been different had trial counsel objected..8

A. The PCR court correctly found that Counsel was not deficient because the trial court used the language while charging the jury to limit its deliberation to the evidence admitted at trial, and not with the reasonable doubt or burden of proof charges.....10

B. Petitioner failed to demonstrate the instruction affected the outcome of trial.....12

CONCLUSION.....15

STATEMENT OF ISSUES ON CERTIORARI

Petitioner's Issue Presented

Whether the PCR court erred by ruling defense counsel had no duty to object to the improper jury charge that the jury abides by its oath when it returns a verdict that “speaks the truth,” since this Court has repeatedly, including in State v. Aleskey, 343 S.C. 20, 26-27, 538 S.E.2d 248, 251 (2000), warned trial court’s to avoid “seeking the truth” language because it can be interpreted as lessening the beyond a reasonable doubt burden of proof, a Due process violation, and the PCR court’s conclusion that defense counsel had no duty to object to an invalid jury instruction was an untenable error of law?

Respondent's Issue Presented

Did the PCR court properly find that Petitioner failed to establish trial counsel was constitutionally ineffective for failing to object to the trial court’s instruction that the jury was to render a verdict that “speaks the truth” where the instruction was not given in the context of reasonable doubt or the burden of proof and where Petitioner has failed to show that the jury interpreted the instruction as an admonition to shift the burden of proof or that the outcome at trial would have been different had trial counsel objected?

A. The PCR court correctly found that Counsel was not deficient because the trial court used the language while charging the jury to limit its deliberation to the evidence admitted at trial, and not with the reasonable doubt or burden of proof charges.

B. Petitioner failed to demonstrate the instruction affected the outcome of trial.

STATEMENT OF THE CASE

During its August of 2014 term, the Greenville County Grand Jury indicted Sylvester Keejuan King (Petitioner) for murder and possession of a weapon during the commission of a violent crime. Alex Kornfeld, Esquire, (trial counsel) represented Petitioner, and Assistant Solicitors Judith Mary Munson and Brittany Danielle Scott of the Thirteenth Circuit Solicitor's Office prosecuted the case. On November 30, 2015, through December 2, 2015, Petitioner proceeded to a jury trial with the Honorable Victory C. Pyle, Jr., presiding. At the conclusion of trial, the jury convicted Petitioner as indicted. Judge Pyle sentenced Petitioner to life imprisonment for murder and imprisonment for five years for the weapon offense. Trial counsel filed a timely notice of appeal in Petitioner's behalf, and Petitioner's appeal was perfected by Chief Appellate Defender Robert M. Dudek of the South Carolina Commission on Indigent Defense – Office of Appellate Defense. On appeal, Petitioner argued the trial court erred in admitting hearsay testimony from two law enforcement witnesses. In an unpublished opinion, the South Carolina Court of Appeals affirmed Petitioner's convictions, finding that Deputy Suber's hearsay testimony was properly admitted as an excited utterance and that the issue of Investigator Peebles's hearsay testimony had not properly been preserved for appellate review. State v. King, Op. No. 2018-UP-195 (S.C. Ct. App. filed May 9, 2018). The Remittitur was issued on May 25, 2018.

Petitioner then filed a timely application for post-conviction relief on May 24, 2018, alleging trial counsel was constitutionally ineffective for failing to investigate the case, failing to prepare Petitioner to testify at trial, failing to investigate the crime scene to as to be ready for direct and cross-examination, failing to interview and call relevant witnesses at trial, failing to

request a preliminary hearing so that Petitioner could be informed about the case, failing to review discovery with Petitioner, failing to challenge the State's witnesses, failing to object and preserve objections to witness testimony, failing to cross-examine witnesses, failing to move for a directed verdict, failing to move for the suppression of evidence, failing to move to quash the indictment, failing to provide a valid defense at trial, failing to request a competency hearing for Petitioner, failing to move for a speedy trial, failure to object to hearsay and circumstantial evidence admitted at trial. App. 440-41. Respondent made its return on September 4, 2018, requesting the convening of an evidentiary hearing regarding the allegations in the application. App. 470. On October 23, 2018, Petitioner filed a supplemental application for post-conviction relief, alleging trial counsel was constitutionally ineffective for failing to make a hearsay objection to testimony of Investigator Shawnee Peoples, failing to request jury voir dire as to whether any prospective jurors had been the victim of a violent attack, failing to object to testimony from Raquan Lewers that the victim had been trying to get away from Petitioner, failing to correct Lewers' testimony that Petitioner and the victim had been separated for two years when they had been separated for four years, failing to investigate a clarify for the jury whose phones were found at the crime scene and used to call police, DNA evidence, and shoe print evidence, improperly advising Petitioner not to testify at trial, and failing to secure or advise Petitioner of a plea offer. App. 473.

An evidentiary hearing was convened before the Honorable Alex Kinlaw, Jr., (PCR court) on October 24, 2018, at the Greenville County Courthouse. Susannah C. Ross, Esquire, was present on behalf of Petitioner, and Assistant Attorney General Deshawn H. Mitchell represented Respondent. The PCR court denied Petitioner's application for post-conviction relief

and dismissed the action with prejudice in an Order of Dismissal issued on November 5, 2018. App. 538-74. The PCR court found Petitioner had failed to establish any constitutional violations requiring the grant of post-conviction relief and, with respect to the allegation that trial counsel was ineffective for failing to object to the trial court's instruction that the jury should render a verdict that "speaks the truth", found that trial counsel had no duty to object to the instruction because the remarks concerned generally the jury's role as the factfinder and did not shift the burden of proof from the State, and that there was not a reasonable probability of a different outcome if trial counsel had objected to the instruction. On November 16, 2018, Petitioner moved to alter or amend the judgment, alleging that the PCR court erred by misunderstanding the nature of Petitioner's allegation that trial counsel failed to advise Petitioner to testify at trial and that the court had erred in its findings as to Petitioner's allegation that trial counsel was ineffective in failing to conduct an adequate investigation of the physical evidence found at the scene of the murder. App. 575. The PCR court denied the motion in an Order to Alter or Amend the Judgment, which was issued on December 11, 2018. Petitioner's appeal follows.

STATEMENT OF FACTS

Deputy Jonathon Horne testified he responded to a 911 call from the victim's home. App. 46. He found three people at the scene and the victim's body. App. 48. He described the bloody scene at the victim's home, with the blood running from the driveway through the carport, kitchen, hallway, and into the victim's bedroom. App. 48-49. The deputy did not see any signs of forced entry into the victim's home. App. 50.

Quianna Fernandez, Shakia Prease, and Raquan Lewers testified as to their activities on the day of the victim's murder. Fernandez was dating Lewers, the victim's son, at the time. App. 61. She testified that she rode with Prease to the victim's home in order to meet Lewers. App. 62. Fernandez noticed a car driving by the victim's home suspiciously, although she was not able to identify the driver. App. 65. She rode to a convenience store with Prease and Lewers and then went to a nearby apartment complex so that Lewers could make a marijuana sale. App. 66, 75. Upon their return to the victim's home, Lewers came back outside to tell Fernandez and Prease that he had discovered his mother's lifeless body lying on her bed. App. 69. Prease confirmed the timeline of events concerning the trio's trip from the victim's home to the convenience store, the nearby apartments, and then back to the victim's home. App. 80-83. Lewers testified Petitioner had dated his mother for a substantial period of time, and that they had all lived together for a time, with the addition of Petitioner's son. App. 93-95.

Deputy Ronald Suber responded to the victim's home after Lewers' 911 call on the night of the murder. App. 300-03. Lewers told Suber that he believed that Petitioner had killed his mother because Petitioner was hiding from him. App. 305. He testified his father, who was

married to but separated from the victim at the time, had been visiting him at the victim's home earlier in the day on the date of the murder. App. 103.

Sheila Martin was a girlfriend of Petitioner at the time of the murder, and she mistakenly believed that she and Petitioner were in an exclusive relationship. App. 132, 156. She testified Petitioner visited her unexpectedly at approximately 2:00 a.m. on the morning after the attack on the victim. App. 138. Petitioner had a severe wound on his hand and cried while lying down on Martin's floor, and he said that that he had injured in a fight. App. 140, 156. Martin's car, which Petitioner had borrowed days before, contained a substantial amount of blood in the driver's area of the interior. App. 134, 143. The injury and the resulting bleeding was of such concern that Martin drove Petitioner to an emergency room in Anderson County for treatment. App. 140-42. A police officer called Martin to ask some questions about Petitioner, and this prompted Petitioner to want to leave Martin's home to drive around. App. 149. When Martin and Petitioner saw police near her home upon their return, Petitioner suddenly bailed out of the car and ran away. App. 151.

Investigator Michael Fortner testified at trial as to his investigation into the victim's murder. Fortner testified, after Petitioner's arrest, Petitioner told him that he was lying down with the victim when a black man forcibly entered the victim's bedroom and attacked them both. App. 260. Fearing for his life, Petitioner supposedly fled the victim's home without her and hitched a ride to Martin's home. App. 261-62.

Petitioner called his sister, Sentoria Wilson, as his sole witness. She testified she knew that she had plans with Petitioner on the night of the victim's murder, but that she was forced to cancel their plans due to a scheduling issue. App. 344. She blamed herself at trial, testifying that

Petitioner would not have been in his present situation had she not canceled their plans. App. 345. She also testified, after the victim's murder, Petitioner told her that the victim had accused him of spying on her. App. 352.

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, 180, 810 S.E.2d 836, 839 (2018). When reviewing factual findings, the appellate courts defer to the PCR court's factual findings and will uphold them if there is probative evidence in the record to support them. Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018); Smalls, 422 S.C. at 180-81, 810 S.E.2d at 839-40 (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)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Smalls, 422 S.C. at 180-81, 810 S.E.2d at 839-40. Appellate courts will reverse the decision of the PCR 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).

ARGUMENT

The PCR court properly found that trial counsel was not constitutionally ineffective in failing to object to the trial court's instruction that the jury should render a verdict that "speaks the truth" because the instruction was not given so as to modify the charges on reasonable doubt or the burden of proof, Petitioner failed to demonstrate that the jury interpreted the instruction as an admonition to remove the burden of proof from the State, and Petitioner failed to demonstrate that there is a reasonable likelihood that the outcome of trial would have been different had trial counsel objected.

Petitioner argues the PCR court erred in finding that trial counsel was not constitutionally ineffective for failing to object to the trial court's instruction that the jury was to render a verdict that "speaks the truth" because the instruction shifted the burden from the State and diluted the reasonable doubt charge and the evidence against Petitioner at trial was not overwhelming. The PCR court properly rejected this argument, finding that trial counsel's failure to object to the instruction did not constitute deficient performance, Petitioner failed to demonstrate prejudice because the instruction did not address the burden of proof, and there was not a reasonable probability of a different outcome had trial counsel objected. App. 565-66. The PCR court properly decided this issue, as Petitioner's argument trial counsel's performance was deficient fails because the trial court's instruction that the jury should render a verdict that "speaks the truth" was not part of the charges on reasonable doubt or the burden of proof, and Petitioner has failed to show that there is a reasonable probability that the trial would have gone differently had trial counsel objected to the language.

Petitioner has a right to the assistance of effective counsel as provided by the Sixth Amendment to the United States Constitution. Strickland v. Washington, 466 U.S. 668 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008). Petitioner has the burden of proving the allegations in his PCR action, and when alleging that trial counsel was constitutionally

ineffective, he must prove that “counsel’s conduct so undermined the proper functioning of the adversarial process that it cannot be relied upon as having produced a just result.” Strickland, 466 U.S. at 686.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668. First, Petitioner must prove that Counsel’s performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney’s performance by its “reasonableness under prevailing professional norms.” Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). “Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” Id. (citing Strickland, 466 U.S. at 690). Petitioner must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, Counsel’s deficient performance must have prejudiced Petitioner 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. Strickland does not require a finding of ineffectiveness merely for deviation from some rigid rule of representation. Rather, Strickland requires the PCR applicant to prove “counsel made errors so serious that

counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” Id. at 697.

A. The PCR court correctly found that Counsel was not deficient because the trial court used the language while charging the jury to limit its deliberation to the evidence admitted at trial, and not with the reasonable doubt or burden of proof charges.

Petitioner argues that the PCR court improperly found that the position of the instruction that the jury should render a verdict that speaks the truth within the charges as a whole discounted the seriousness of the instruction. The PCR properly found that the placement of the instruction did not shift the burden of proof from the State to Petitioner. In State v. Alesky, 343 S.C. 20, 538 S.E.2d 248 (2000), the trial court gave sufficient instructions on reasonable doubt, the presumption of Alesky’s innocence, and the State’s burden of proof, and then instructed the jury regarding its role as the factfinder as follows:

Obviously you do not determine the truth or falsity of a matter by counting up on the number of witnesses who may have testified on one side or the other.

Ladies and gentlemen, throughout this entire process, you have but one single objective, and that is to seek the truth, to seek the truth regardless of from what source that truth may be derived.

Now, all of these things, ladies and gentlemen, you will consider, bearing in mind that you must give the defendant the benefit of every reasonable doubt.

Id. at 26, 538 S.E.2d at 251.

This Court noted that it had urged trial courts to avoid instructing the jury to “seek” in charging jurors on circumstantial evidence or reasonable doubt, and then found that the instruction, which was an instruction on juror credibility and not reasonable doubt or circumstantial evidence, properly conveyed the law and did not create a reasonable probability that the instruction caused the jury to convict Alesky on less than proof beyond a reasonable doubt. Id. at 27-29, 538 S.E.2d

at 252-53. This Court approvingly cited United States v. Gonzalez-Balderas, 11 F.3d 1218 (5th Cir. 1994), in determining that there was not a reasonable likelihood that the trial court's instruction lessened the state's burden of proof, noting that the instruction was given in the context of witness credibility, and was prefaced by a sufficient instruction on reasonable doubt and followed by an instruction about the State's heavy burden of proof. Id.

In the present case, after instructing the jury that Petitioner enjoyed the presumption of innocence that could only be overcome if the State presented evidence of Petitioner's guilty beyond a reasonable doubt, the trial court instructed the jury as follows:

Ladies and Gentlemen, if, from the evidence in this case, you have a reasonable doubt about whether or not this defendant was guilty as charged in this indictment, it is, as I told you, your duty to acquit. Under the oath that you took in this case, you swore to try this case based solely on the testimony and evidence presented in this courtroom. I charge you that it is your duty to lay aside all outside opinions, bias or prejudice or sympathy you may have in reaching your verdict. The word verdict, Ladies and Gentlemen, is taken from the Latin word "veredicto". It means to speak the truth. You have no friends to reward or enemies to punish in this case. I charge you to abide by your oath and return a verdict that speaks the truth.

App. 411-13.

The trial court's instruction is an exhortation that the jury render its verdict upon the evidence presented at trial, and not in reliance upon improper prejudice. The court informed the jury that it would be its duty to acquit if it has a reasonable doubt about Petitioner's guilt. App. 413. The court instructed the jury that its oath bound it to make its decision upon the evidence presented, and not "outside opinions, bias or prejudice or sympathy" App. 413. The court then charged the jury "to abide by [its] oath and return a verdict that speaks the truth." App. 413. When these sentences are taken together, along with the jury charge as a whole, the trial court's instruction that the jury should render a verdict that "speaks the truth" is better understood as an instruction

that the jury had to abide by its oath in returning such a verdict by making its decision upon the evidence before it and not improper grounds, like the bias and prejudice articulated by the court a few breaths earlier. Whereas in Alesky, the trial court had given its “seek” instruction in the context of witness credibility, the trial court here used the “seek” language while exhorting the jury to case aside improper considerations and to focus only upon the evidence admitted at trial. Petitioner takes issue with the PCR court’s emphasis upon the position of the “seek” instruction within the context or the surrounding charges, but the PCR court was following the pattern of this Court in analyzing the meaning of the instruction and its affect upon the other charges given. See Aleskey, at 28-29, 538 S.E.2d at 252 (noting the context in which the trial court had given its “seek” instruction).

The PCR court properly found that trial court’s instruction was not objectionable under Aleskey, and Petitioner has failed to show that the instruction concerned the burden of proof or reasonable doubt charges.

B. Petitioner failed to demonstrate the instruction affected the outcome of trial.

The PCR court found that the instruction was not prejudicial because it spoke generally to the jury’s role as the factfinder. App. 565-66. Petitioner argues that the PCR court erred in finding that trial counsel’s failure to object to the instruction because, according to Petitioner, the evidence of guilt “was not so overwhelming. . . .”

In its Order of Dismissal, the PCR court cited State v. Beaty, 423 S.C. 26, 813 S.E.2d 502 (2018), in which this Court held that Beaty had failed to demonstrate prejudice from the trial court’s preliminary instructions to the jury that it was to search for the truth, determine which

facts were true, and render a true and just verdict. While giving his preliminary remarks, the trial court in Beaty stated:

This trial is a search for the truth in an effort to make sure that justice is done. Searching for the truth and ensuring that justice is done is often slow, deliberate, and repetitive.

The attorneys are sworn to uphold the integrity and the fairness of our judicial system and to help you as jurors to search for the truth.

You also just took an oath to listen to the evidence in this case and reach a fair and just verdict and you are expected to be professional, reasonable and ethical.

You the jurors find the facts from the testimony from a witness from the witness stand or any other evidence, and after hearing that evidence you will deliberate and render a true and just verdict under the solemn oath that you just took as jurors.

In determining what the true facts are in this case you must decide whether or not the testimony of a witness is believable.

After argument of counsel and the charge on the law by me, you will then be in a position to determine what the true facts are and apply those facts to the law and thus render a true and just verdict.

Id. at 32-33, 813 S.E.2d at 505.

Beaty argued that the trial court's remarks were improper because the State had supposedly misstated the nature of circumstantial evidence and reasonable doubt in its opening statement and then informed the jury that it would have to select between competing theories in its deliberations. Id. at 33, 813 S.E.2d at 505.

The trial court's instruction in this case had less potential for affecting the outcome of Petitioner's trial than did the instruction given in Beaty. The trial court in Beaty used the disfavored language in one form or another in each of the seven sentences quoted above. Further, Beaty argued that the damage done by the language used by the trial court was heightened by the

State's alleged misstatement when explaining circumstantial evidence and reasonable doubt to the jury. Id. In this case, the trial court used the disfavored language in only three sentences.

The trial court did not instruct the jury that it was a seeker of truth or that it was to discover true facts. The court's instruction was tied with the court's instruction that the jury was to impartially consider the evidence presented at trial. App. 413. Immediately before giving the relevant instruction, the trial court cautioned the jury that its duty was to consider only the evidence at trial without bias. In between the two relevant sentences, the trial court again warned the jury against taking sides in its deliberations. The court's exhortation that the jury should adhere to its oath in rendering a verdict was a callback to its previous charge that the jury's oath bound it to consider only the evidence admitted at trial. Petitioner has failed to show that there is a reasonable likelihood that the jury understood the trial court's instruction that they were to render a verdict that speaks the truth as an admonition for them to remove the State's burden of proving Petitioner's guilty beyond a reasonable doubt. See Aleskey, at 28-29, 583 S.E.2d at 252 (approving of the reasoning of the Fifth Circuit's prejudice analysis when it held that a trial court's instruction that the jury's "sole interest [was] to see the truth" did not shift the burden of proof).

The PCR court found that there was not a reasonable probability of a different outcome at trial even if trial counsel had objected to the language. App. 566. Lewers, the victim's son, established that Petitioner and the victim had had a tumultuous relationship for years throughout his youth. Petitioner was with the victim at the time of her murder, confirmed both by the presence of his DNA at the victim's home, the knife wound on his hand, and his own statement to police. Martin, one of Petitioner's romantic partners, testified that he came to her home,

bleeding profusely from a knife wound, on the night of the murder. Petitioner told her that he had been attacked by some men at a liquor store, and he dramatically avoided interaction with the police while in her company. After later being arrested at the home of Mitchell, his fiancée, Petitioner explained the origin of his knife wound and the presence of his DNA at the scene of the victim's murder to police by telling them that he had been with the victim when an unidentified man forced his way into the victim's bedroom; according to Petitioner, he abandoned the victim to her attacker and fled the scene, making his way to Martin's home. Petitioner's defense at trial consisted of arguing that the victim's son and her long-estranged husband murdered her in order to gain control of Lewer's conservatorship. App. 381.

Petitioner stated at the PCR hearing that the trial court's instruction that the jury should return a verdict that "seeks the truth" was "especially harmful for [Petitioner's] case." App. 531. Petitioner, though, failed to demonstrate that there is a reasonable likelihood that the outcome of his trial would have been different had Counsel objected to the remarks. The PCR court properly found that Petitioner failed to show prejudice.

CONCLUSION

Petitioner has failed to demonstrate that trial counsel was deficient in not objecting to the trial court's jury instruction because the instruction did not shift the burden of proof from the State and has failed to demonstrate prejudice in light of the limited nature of the court's instruction and the evidence against Petitioner at trial. The PCR court properly found that Counsel was not ineffective in not objecting to the jury instruction. This Court should deny the

petition for a writ of certiorari.

Respectfully submitted,

ALAN WILSON
Attorney General

TAYLOR ZANE SMITH
Assistant Attorney General
S.C. Bar No. 103282

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

By: 
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

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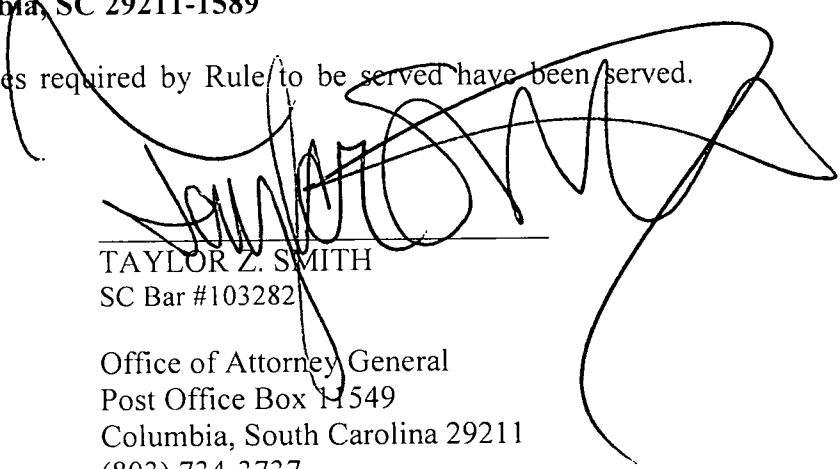
State of South Carolina, Petitioner.

CERTIFICATE OF SERVICE

I, Taylor Z. Smith, certify that I have today served the within **Return to Petition for Writ of Certiorari** upon Respondent by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

**Robert M. Dudek, Esquire
SC Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211-1589**

I further certify that all parties required by Rule to be served have been served.
This 22nd day of November, 2019.


TAYLOR Z. SMITH
SC Bar #103282

Office of Attorney General
Post Office Box 14549
Columbia, South Carolina 29211
(803) 734-3737

ATTORNEY FOR PETITIONER