

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Greenville County

Honorable Letitia H. Verdin, Circuit Court Judge

Appellate Case No. 2018-001988

RECEIVED

DEC 16 2019

S.C. SUPREME COURT

WALTER TERRAN GAINES,

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.....8

ARGUMENT.....9

 The PCR court properly concluded that Petitioner failed to demonstrate trial
 counsel was constitutionally ineffective in failing to request a mental competency
 evaluation of Petitioner because trial counsel reasonably relied upon his
 meaningful, substantive conversations with Petitioner that gave counsel no reason
 to question Petitioner’s mental competency and because Petitioner failed to
 demonstrate that he was not competent at the time of his trial.....9

 A. Trial counsel reasonably relied upon his meaningful,
 substantive conversations with Petitioner that gave counsel no
 reason to question Petitioner’s mental competency.....10

 B. The evidence presented at the PCR hearing indicated Petitioner
 was competent at the time of the murder13

CONCLUSION.....14

STATEMENT OF ISSUES ON CERTIORARI

Petitioner's Issue Presented

Did the PCR court err in denying Petitioner relief where trial counsel was ineffective by failing to request a competency evaluation in light of Petitioner's severe mental illness and hospitalizations resulting from his mental illness just months before the crime for which he was charged?

Respondent's Issue Presented

Did the PCR court properly conclude Petitioner failed to demonstrate his trial counsel was constitutionally ineffective in failing to request a mental competency evaluation when counsel testified he relied upon meaningful and substantive conversations with Petitioner in not questioning Petitioner's competency and when Petitioner solely relied upon medical records from before the murder and during his pre-trial confinement to support his argument that he was not competent at the time of trial, but when those records were considered by the examiners in concluding Petitioner is not incompetent now.

A. Trial counsel reasonably relied upon his meaningful, substantive conversations with Petitioner that gave counsel no reason to question Petitioner's mental competency.

B. Petitioner failed to demonstrate that he was not mentally competent at the time of his trial or explain how he has since regained competency..

STATEMENT OF THE CASE

During its February of 2006 term, the Greenville County Grand Jury indicted Walter Terran Gaines (Petitioner) for armed robbery and murder. John P. Abdalla, Esquire, (trial counsel) represented Petitioner, and Assistant Solicitors Kristie Bjorndal Hodge and Charles Ashton Bondurant of the Thirteenth Circuit Solicitor's Office prosecuted the case. On May 19, 2008, through May 22, 2008, Petitioner proceeded to a jury trial with the Honorable G. Edward Welmaker, (trial court) presiding. At the conclusion of trial, the jury convicted Petitioner as indicted. The trial court sentenced Petitioner to imprisonment for thirty years for armed robbery and for life for murder. The State later dismissed additional charges of willful injury to courthouse of jail and escape. Trial counsel filed a notice of appeal, but the Court of Appeals dismissed the case because the notice had not been timely filed. The Remittitur was issued on October 9, 2008.

Petitioner filed his first application for post-conviction relief on April 2, 2009, alleging "perjury", trial counsel was constitutionally ineffective for convincing Petitioner not to present a defense and failing to properly perfect a direct appeal, "proof issues", prosecutorial misconduct, and "hearsay and confrontation rights." Petitioner was represented in that action by Carolina M. Horlbeck, Esquire. Following an evidentiary hearing, the Honorable Robin B. Stilwell found, pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974), that Petitioner did not knowingly and voluntarily waive his right to appellate review of his direct appeal issues and dismissed with prejudice Petitioner's application as to all other issues. Horlbeck timely filed a notice of appeal. Appellate Defender Katherine H. Hudgins of the Office of Appellate Defense – South Carolina Commission on Indigent Defense perfected Petitioner's appeal, filing a petition for a writ of

certiorari and a brief pursuant to White. Petitioner argued in his petition for a writ of certiorari that Judge Stilwell properly found that Petitioner did not knowingly and voluntarily waive his right to a direct appeal and erred in not finding trial counsel ineffective for failing to object to the notetaking of jurors when counsel later learned the notes were incorrect. After Respondent conceded Judge Stillwell properly found Petitioner did not knowingly and voluntarily waive his right to a direct appeal, the South Carolina Court of Appeals granted certiorari on that question only. Gaines v. State, S.C. Ct. App. filed October 10, 2013. The South Carolina Court of Appeals found there was sufficient evidence to support Judge Stilwell's finding that Petitioner did not knowingly and voluntarily waive his right to a direct appeal. Gaines v. State, S.C. Ct. App. Order filed October 10, 2013. In his direct appeal, Petitioner argued the trial court erred in denying Petitioner's motion for a mistrial. In an unpublished opinion, the Court of Appeals affirmed Petitioner's convictions. Gaines v. State, Op. No. 2014-UP-194 (S.C. Ct. App. filed May 14, 2014).

Petitioner then filed this second and present application for post-conviction relief on October 14, 2015, alleging he was entitled to relief because his Due Process rights had been violated, the trial court lacked jurisdiction, newly discovered evidence, he was not indicted by the Grand Jury, and his mental issues should have prevented him from standing trial. Petitioner filed an amended application on September 8, 2016, alleging his Due Process rights had been violated, the trial court lacked subject matter jurisdiction, newly discovered evidence, and the ineffective assistance of trial counsel for failing to request a competency evaluation. On October 18, 2016, the Respondent made its return, moving for the summary dismissal of Petitioner's second application due to its being filed after the statute of limitations had expired and due to its

successiveness. On November 17, 2016, Petitioner made a reply to Respondent's motion, arguing the PCR court should deny Respondent's motion to dismiss because Petitioner's continued mental illness and legal unsophistication prevented him from raising the issue of his mental incompetency during his first PCR action. The Honorable Perry H. Gravely denied Respondent's motion to dismiss. Gaines v. State, No. 15-CP-23-06217 (Greenville, S.C., Ct. Common Pleas, April 20, 2017) (citing Council v. Catoe, 359 S.C. 120, 597 S.E.2d 782 (2004); (Ferguson v. State, 382 S.C. 615, 677 S.E.2d 600 (2009)). After a hearing on Petitioner's motion for a competency evaluation, Judge Stilwell granted the motion and ordered the South Carolina Department of Mental Health to evaluate Petitioner. An evidentiary hearing was convened before the Honorable Letitia H. Verdin (PCR court) on June 18, 2018, at the Greenville County Courthouse. Petitioner was represented by James H. Price, III, Esquire, and Respondent was represented by Assistant Attorney General DeShawn H. Mitchell. After the conclusion of the hearing, the PCR court issued an Order of Dismissal on October 19, 2018, denying Petitioner's application for post-conviction relief with prejudice, finding Petitioner failed to establish that he currently or previously lacked the requisite mental capacity to stand trial and that trial counsel reasonably relied upon his own perceptions as to Petitioner's competence when he did not request a competency evaluation of Petitioner before trial. This appeal follows.

STATEMENT OF FACTS

On November 9, 2005, the victim's son discovered the victim's dead body in the victim's home. App. 85, 93-94. The victim's wife and son testified as to the victim's habit of carrying a wallet full of cash. App. 97-100, 113, 117-18. The cause of victim's death was homicide by blunt force trauma, with indications consistent with manual strangulation, with contribution from the victim's advanced heart disease. App. 135-38. During a hearing pursuant to Jackson v. Denno, 378 U.S. 368 (1964), conducted during Petitioner's trial, a law enforcement witness testified to Petitioner's waiver of his rights under Miranda v. Arizona, 384 U.S. 436 (1966), stating that Petitioner did not appear to be suffering from any mental impairment at the time and appeared to be in control of his decision to waive his rights and clear and coherent of speech. App. 52-53. The trial court found Petitioner's verbal statements to police had been voluntary and denied trial counsel's motion to suppress them. App 59-62. During the State's case-in-chief, the law enforcement witness testified Petitioner met with her initially and informed her he knew the victim but had never been to the victim's home and had not been involved in the victim's death. App. 376. The witness interviewed Petitioner a second time approximately twenty-three days after the murder, at which point Petitioner was under arrest for the crime. App. 388-89. Petitioner waived his Miranda rights during that interview, and the witness testified that Petitioner did not indicate to her that he had any learning disability or impairment. App. 393-94. The witness testified Petitioner told her during that second interview, upon being confronted with information that two eyewitnesses say him entering the victim's home on the day of the murder, admitted to being in the home but claimed that the victim was already deceased upon his entry. App. 396.

Dashia Atkinson testified at trial that she knew the victim and would see him every morning at the local bus stop. App. 172. She testified she saw Petitioner, on the morning of the murder, entering the victim's home, after being let inside by a woman. App. 173-79. K. Atkinson, Dashia's sister, also testified at trial. App. 201. K. testified she was standing with her sister at the bus stop on the morning of the murder when she saw Petitioner knock on the door of the victim's home and enter therein after being admitted by a woman. App. 202-07. Petitioner's uncle testified at trial about Petitioner's having money to buy drugs for the uncle, Petitioner, and others, and testified Petitioner said he had gotten the money, \$350.00 specifically, by "hit[ting] a lick" App. 233, 243-44. Petitioner's uncle interpreted the phrase to mean Petitioner had come by the money through some criminal scheme. App. 244-45. Petitioner boasted to him that he had come into possession of a car, which was identified at trial as the victim's missing car. App. 89, 97, 102, 248-49.

At the PCR hearing, Petitioner testified he had been involuntarily hospitalized in May of 2005 due to his suffering from bipolar disorder, hallucinations, multiple personalities, and depression. App. 1006. He testified he had not been taking his prescribed medications in November of 2005, after being released from hospitalization, and continued to suffer from the same mental conditions. App. 1006-07. He testified the murder for which he was tried was committed in that November, and that he was later arrested for that crime in early December of 2005. App. 1008. At that time, according to Petitioner, his mental condition had not improved. App. 1008. Petitioner waived his rights under Miranda and provided a verbal and written statement to police. App. 1008-09. Petitioner testified he informed trial counsel of his mental condition after counsel was appointed and told counsel he was taking prescribed psychotropic

medications, although trial counsel never had Petitioner's mental health evaluated. App. 1009-11. Petitioner testified trial counsel told him they could not present Petitioner's mental condition in his case because "they'll use it against us." App. 1011, 1018. Petitioner testified a law enforcement witness testified at trial as to the statement Petitioner gave after being arrested, and the State referenced Petitioner's statement during the trial. App. 1012-13. Petitioner testified he believed he would probably not have been convicted if his verbal statement to law enforcement had not been admitted at his trial. App. 1014. On cross-examination, Petitioner testified he did not raise the issue of his mental health in his first PCR action because the fact that he had not been able to take a polygraph exam and trial counsel's remarks to him about the State using Petitioner's mental health against him at trial had caused him to believe that "mental health was a bad thing . . .," and that he had decided to raise the issue after a mental health counselor told him that he should use the issue in court. App. 1018-19. When being questioned on redirect, Petitioner testified he did not realize he could use his mental condition as a defense because he "thought it was a bad thing . . .," and affirmed he did not realize he could raise the issue of his having a mental illness because he was suffering from mental illness at the time. App. 1019-20.

At the PCR hearing, trial counsel testified he met with Petitioner on multiple occasions and met with Petitioner's family. App. 1021-22. Trial counsel testified he had no memory of Petitioner or Petitioner's family ever informing him Petitioner had been suffering from mental problems in 2005. He testified he had no notes in his defense file about the issue. App. 1022. Trial counsel affirmed that the admission of Petitioner's verbal statement at trial was detrimental to his defense. App. 1026. On cross-examination, trial counsel affirmed Petitioner gave him no reason to question his mental competency during their interactions, and testified Petitioner

appeared to understand their conversations, understand the charges against him, understand the State's evidence against him,, was able to participate in trial counsel's investigation, affirmed that Petitioner never made a statement or asked a question that caused trial counsel to question his competency, and testified he thought Petitioner understood what was happening before and during his trial. App. 1027-28.

No expert witness testified at the PCR hearing, but both parties stipulated to the admission of the South Carolina Department of Mental Health's evaluations of Petitioner's mental health, which were admitted into evidence collectively as Court's Exhibit One. The written report of the evaluation reports the evaluators' conclusions that Petitioner had the capacity to be tried at the time of his evaluation in May of 2018, was criminally responsible for his actions at the time of the murder, and had the capacity to confirm his actions to those required by law at the time of the murder. App. 1032-48.

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 concluded that Petitioner failed to demonstrate trial counsel was constitutionally ineffective in failing to request a mental competency evaluation of Petitioner because trial counsel reasonably relied upon his meaningful, substantive conversations with Petitioner that gave counsel no reason to question Petitioner's mental competency and because Petitioner failed to demonstrate that he was not competent at the time of his trial.

Petitioner argues the PCR court erred in finding trial counsel was not constitutionally ineffective for failing to request a competency evaluation of Petitioner before trial because Petitioner's medical records would have justifiably caused a reasonable defense attorney to question Petitioner's competency and support the conclusion that Petitioner was not competent at the time of trial. Petitioner's argument fails because trial counsel's testimony at the PCR hearing indicated he had meaningful, substantive conversations with Petitioner about the case and reasonably relied upon those conversations in not questioning Petitioner's competency and because Petitioner has failed to show that he was not competent at the time of his trial.

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. Trial counsel reasonably relied upon his meaningful, substantive conversations with Petitioner that gave counsel no reason to question Petitioner's mental competency.

Petitioner argues the PCR court erred in finding Petitioner failed to establish the reasonable probability that Petitioner was mentally incompetent at the time of trial. The PCR

court properly found trial counsel's performance was reasonably effective and within prevailing professional norms. In order for a defendant to be competent to stand trial, he must have "sufficient present ability to consult with his lawyer with a reasonable degree of relational understanding . . ." and must have a "rational as well as factual understanding of the proceedings against him." Dusky v. United States, 362 U.S. 402 (1960) (per curiam) (internal quotations omitted); Ramirez v. State, 413 S.C. 351, 366, 776 S.E.2d 101, 110 (S.C. Ct. App. 2015) (citing Jeter v. State, 308 S.C. 230, 417 S.E.2d 594 (1992)), rev'd on other grounds, Ramirez v. State, 419 S.C. 14, 22, 795 S.E.2d 841, 845 (2017). A defense attorney may reasonably rely upon his own perceptions in determining whether a mental competency evaluation is required. Jeter, at 233, 417 S.E.2d at 596.

In this case, trial counsel testified at the PCR hearing that he had no memory of being informed by Petitioner or any member of Petitioner's family that Petitioner struggled with mental illness. Trial counsel's testimony indicated he did not have any notes in his criminal defense file that indicated he had been informed at any time about any mental illness on Petitioner's part. Trial counsel testified he was able to have meaningful conversations with Petitioner about the nature of the State's evidence of Petitioner's guilt, the facts of the case, and nature of the charges Petitioner was facing. Trial counsel testified he believed Petitioner understood the substance of their conversations and that Petitioner never gave any indication, made any statement, or asked any question that caused counsel to doubt Petitioner's mental competency. The PCR court found trial counsel's testimony credible. Petitioner claimed his family members informed counsel of Petitioner's mental health challenges, but Petitioner did not produce any witness to confirm that such a conversation took place. Cf. Bannister v. State, 333

S.C. 298, 303, 509 S.E.2d 807, 809 (1989) (requiring an applicant for post-conviction relief to produce the testimony of a witness at the PCR hearing in order to establish prejudice from that witness's absence at trial) (citing Pauling v. State, 331 S.C. 606, 503 S.E.2d 468 (1998)).

Furthermore, Petitioner's explanation as to why he did not raise the claim in his first PCR that trial counsel was constitutionally ineffective in failing to request a competency evaluation of Petitioner undermines his claim to have informed trial counsel of his mental health issues. Petitioner affirmed at the PCR hearing at his counsel's prompting that he did not raise the claim in his first PCR because his mental illness prevented him from being aware that he was incompetent and had been so. If this was true during the course of his first PCR action, then it reasonably would have been the case that Petitioner would have similarly been unaware of any mental health issues on his part at the time of the murder and trial. Yet Petitioner testified he informed trial counsel he had been receiving treatment for mental health issues. Petitioner even testified at the PCR hearing he did not raise the issue in his first PCR action because he had come to believe that discussing his mental health in the context of his legal proceedings was a bad thing. This contradiction in Petitioner's testimony supports the PCR court's finding that trial counsel's testimony about his dealings with Petitioner was credible.

The PCR court properly found Petitioner failed to demonstrate trial counsel was deficient in failing to request a mental competency evaluation. The testimony of trial counsel at the PCR hearing demonstrated that Petitioner did not give him any indication during their interactions that his mental competency was questionable, and trial counsel reasonably relied upon these impressions in not requesting an evaluation. Additionally, Petitioner's testimony calls into question his credibility as his explanation for not raising the issue of his mental competency in

his first PCR action undermines his testimony that he was aware of his mental health issues before his trial and informed trial counsel of the fact.

B. Petitioner failed to demonstrate that he was not mentally competent at the time of his trial or explain how he has since regained competency.

Once an applicant for post-conviction relief has established his trial counsel's performance was deficient due to counsel's failing to request a mental competency evaluation, the applicant must demonstrate that there is a reasonable probability he was incompetent at the time of trial in order to be entitled to relief. See Ramirez, 419 S.C. at 22, 795 S.E.2d at 845 (applying this prejudice standard in a case in which applicant pleaded guilty but mentally ill after one mental evaluator concluded he was competent to stand trial but another concluded applicant was severally mentally retarded) (citing Jeter v. State, 308 S.C. 230, 417 S.E.2d 594, (1992)). The PCR court properly found Petitioner failed to meet this burden. A competency evaluation was performed upon order of Judge Stilwell, in accordance with State v. Blair, 275 S.C. 529, 273 S.E.2d 536 (1981), and S.C. Code Ann. § 44-23-410 (1976). The examiners opined that Petitioner had the requisite mental capacity to stand trial and proceed with his PCR action. App. 1033, 1039. Petitioner argued at the PCR hearing that the records showing his mental issues before the commission of the crime and during his pre-trial confinement are evidence that he would not have been mentally competent at the time of trial; however, the examiners' report indicates that its authors reviewed the records referenced by Petitioner at the PCR hearing during their consideration of Petitioner's mental competency. App. 1034-37. Additionally, Petitioner has offered no explanation for why his mental status has supposedly improved from

incompetency at the time of trial to competency during his PCR hearing. The PCR court properly found Petitioner failed to demonstrate he was not mentally competent at the time of trial.

CONCLUSION

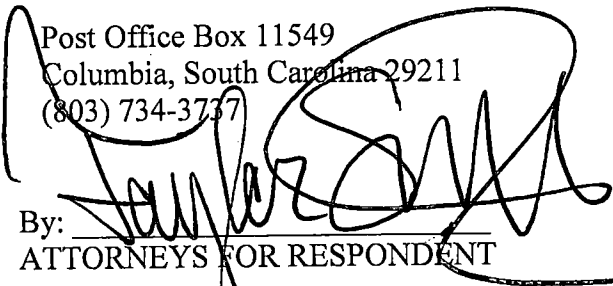
The PCR court properly concluded that Petitioner failed to demonstrate trial counsel was constitutionally ineffective in failing to request a mental competency evaluation of Petitioner because trial counsel reasonably relied upon his meaningful, substantive conversations with Petitioner that gave counsel no reason to question Petitioner's mental competency and because Petitioner has failed to show that he lacked competency at the time of trial. 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

December 15, 2019

STATE OF SOUTH CAROLINA

In The Supreme Court

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CERTIORARI TO GREENVILLE COUNTY
Court of Common Pleas
Honorable Letitia H. Verdin, Circuit Court Judge

S.C. SUPREME COURT

Appellate Case No. 2018-001988

Walter Terran Gaines, 240407,Petitioner,

v.

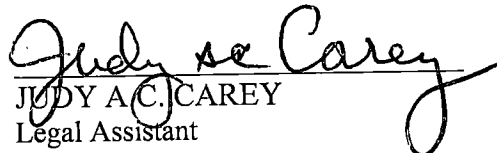
State of South Carolina, Respondent.

CERTIFICATE OF SERVICE

I, Judy A.C. Carey, certify that I have today served the within **Return to Petition for Writ of Certiorari** upon Petitioner by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

**Susan B. Hackett, 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 16th day of December, 2019.


JUDY A.C. CAREY
Legal Assistant

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



ALAN WILSON
ATTORNEY GENERAL

December 16, 2019

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DEC 16 2019

S.C. SUPREME COURT


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

Re: Walter Terran Gaines, 240407 v. State of South Carolina
Appellate Case No. 2018-001988
Lower Court Case 2015-CP-23-6217

Dear Mr. Shearouse:

Enclosed for filing please find an original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above-captioned case. If there are any questions or comments, please do not hesitate to contact me at any time.

Sincerely,


per Taylor Z. Smith

Assistant Attorney General
SC Bar #103282

TZS/jacc
Enclosures

cc: Susan B. Hackett, Esquire
Victim Advocacy Division (without enclosure)