

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

The Honorable Letitia H. Verdin, Circuit Court Judge

Appellate Case No. 2019-002003

Lester D. Mosley, Jr., #361397.....Petitioner

v.

State of South Carolina.....Respondent

PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF CONTENTS.....ii

TABLE OF AUTHORITIES.....iii

QUESTION PRESENTED FOR REVIEW.....1

STATEMENT OF THE CASE.....2

ARGUMENT

The PCR court’s findings that Trial Counsel was not ineffective for failing to properly or contemporaneously object to improper accomplice liability jury charges was an error of law.

.....7

The PCR court’s finding that Trial Counsel was not ineffective for failing to object to the jury instruction on malice and felony murder was an error of law.

.....10

CONCLUSION.....14

CERTIFICATE OF COUNSEL.....15

TABLE OF AUTHORITIES

CASES

<i>Arnold v. State</i> , 309 S.C. 157, 420 S.E.2d 834, (1992).....	12
<i>Barber v. State</i> 393 S.C. 232, 712 S.E.2d 436, (2011).....	9
<i>Gore v. Leeke</i> , 261, S.C. 308, 199 S.E.2d 755, (1973).....	12
<i>People v. Aaron</i> , 409 Mich. 672, 689, 299 N.W.2d 304, 307 (1980).....	13
<i>Singletary v. State</i> , 281 S.C. 444, 316 S.E.2d 369 (1984).....	12
<i>State v. Belcher</i> , 385 S.C. 597, 685 S.E.2d 802, (2009).....	12
<i>State v. Fennell</i> , 340 S.C. 266, 531 S.E.2d 512, (2000).....	12
<i>State v. Kinard</i> , 373 S.C. 500, 646 S.E.2d 168, (Ct. App. 2007).....	12
<i>State v. McDaniel</i> , 68 S.C. 304, 47 S.E. 384, (1904).....	12
<i>State v. Norris</i> , 285 S.C. 86, 406 S.E.2d 339, (1985).....	12
<i>State v. Torrence</i> , 305 S.C. 45, 406, S.E.2d 315 (1991).....	12
<i>Wilds v. State</i> , 407 S.C. 432, 756 S.E.2d 387 (Ct. App 2014).....	8

QUESTIONS PRESENTED FOR REVIEW

1. Did the PCR court err in not finding ineffective assistance of counsel where Trial Counsel failed to timely object to the jury charge on accomplice liability?
2. Did the PCR court err in not finding ineffective assistance of counsel where Trial Counsel failed to object to the jury charge that malice can be inferred if one intentionally kills another during the commission of a felony?

STATEMENT OF THE CASE
Procedural History

Petitioner is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Pickens County Clerk of Court. Petitioner was indicted in the July 2014 term of the Pickens County Grand Jury for murder (2014-GS-39-1548), two counts of attempted armed robbery (2014-GS-39-1545 and 2014-GS-39-1547), possession of a weapon during a violent crime (2014-GS-39-1546), and first-degree burglary (2014-GS-39-1597). (App. pp. 632 – 641). Thirteenth Circuit Solicitor William Walter Wilkins, III and Assistant Solicitor William Richardson Timmons, IV prosecuted the case. Scott Robinson represented Petitioner. On September 15-17, 2014, Petitioner proceeded to the jury trial with the Honorable Edward W. Miller presiding. At the conclusion of the trial, the jury convicted Petitioner as indicted on all counts. Judge Miller sentenced Petitioner to imprisonment to fifty years for murder, fifty years for first-degree burglary, twenty years for each count of armed robbery, and five years for possession of a weapon during the commission of a violent crime, with all sentences running concurrently. Petitioner received credit for his time served. (App. pp. 642 – 646).

Petitioner filed a timely notice of appeal.¹ Appellate Counsel submitted a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), on September 10, 2015 and moved to be relieved as counsel. (App. pp. 225). The South Carolina Court of Appeals denied Petitioner's Appellant Counsel's motion to be relieved and directed the parties to brief the following issue: "[w]hether the trial court erred by instructing the jury on accomplice liability in response to the jury's questions during deliberation." (App. pp. 229). After the briefing had been completed in the case, the Court

¹ After the final briefing in the case had been completed, the undersigned, William G. Yarborough, III was retained and the Court issued an order on July 18, 2017 granting the substitution of appellate counsel, thereby relieving former appellate counsel, Katherine Hudgins, from further representation of Petitioner on appeal. Several allegations in this action pertain to the performance of former appellate counsel and Petitioner acknowledged at the PCR hearing that he had waived any allegations of ineffective assistance of appellate counsel against the undersigned only in this action.

granted Petitioner's motion to substitute Mr. Yarborough as his appellant counsel. (See App. pp. 33). The Court of Appeals denied the appeal in per curium opinion based on Trial Counsel's failure to timely object to the jury charge. *State v. Mosley*, 2017-UP353 (Ct. App. filed September 6, 2017) (App. pp. 161-162).

On March 2, 2018, Petitioner filed a post-conviction relief application raising allegations of ineffective assistance of appellate counsel. (App. pp. 126- 134). Respondent filed a return to the Application on August 3, 2018. (App. pp. 138 – 158). Petitioner filed an amended PCR application raising allegations, including:

I. Trial counsel was ineffective pursuant to *Strickland v. Washington* for failing to contemporaneously and properly object, and thus preserve for appeal, to improper jury instructions on the inference of malice and felony murder. The improper instructions diluted the State's burden of proof to prove Applicant's guilt beyond a reasonable doubt and shifted the burden to Applicant.

II. Trial counsel was ineffective for failing to contemporaneously and properly object, and thus preserve for appeal, to improper jury instructions on the "hand of one hand all" accomplice liability jury charge. The improper instruction, both in and of itself and together with the aforementioned jury charges on felony murder and inferred malice was prejudicial to Applicant because it was confusing to the jury because Appellant was not tried with his codefendants, diluted the State's burden of proof to the guilt of Appellant without improper spillover evidence from the guilt of his codefendants, as well as improperly shifted the burden to Applicant, whom raised an alibi defense.

III. Trial counsel was ineffective for failing to subpoena cellphone records which would have supported his alibi defense by showing that Applicant was not at the victim's home the night the charged offenses occurred.

(IV) Trial counsel was ineffective for failing to sufficiently cross-examine Applicant's codefendants on their inherent bias in testifying for the State pursuant to a plea agreement.

(V) Trial counsel was ineffective for failing to request an adequate jury instruction on the credibility and weight of codefendants' testimony in light of their inherent bias.

(VI) Trial counsel was ineffective for failing to object to the admission of evidence of flight and corresponding jury charges.

(VII) Trial counsel was ineffective for failing to request an adequate jury instruction on accident, voluntary manslaughter, and involuntary manslaughter.

(App. pp. 135 – 136).

An evidentiary hearing was held before the Honorable Letitia H. Verdin on August 29, 2019. William G. Yarborough III, Esquire represented Petitioner. Assistant Attorney General Taylor Z. Smith appeared for Respondent. Judge Verdin denied the PCR Application by Order dated October 16, 2019 and filed on November 4, 2019. (App. pp. 1).

This petition follows.

Factual

Other individuals were indicted on the same charges as Petitioner in connection with the charged offenses. (App. pp. 59 line 20-22). Trial Counsel was appointed to represent Petitioner. (App. pp. 36 Line 2). Trial Counsel had an appointed investigator and investigated the Petitioner's alibi defense. (App. pp. 36 Lines 2-25). Trial Counsel's main defense going into the trial was alibi. However, based on testimony at the trial, Trial Counsel also argued accident as an alternate defense. (App. pp. 117 Lines 5-24). At the trial, the co-defendants testified that Petitioner fired the fatal shot. (App. pp. 59 Lines 20-23). However, witnesses testified that the fatal shot was sudden and unexpected. (App. pp. 79 Line 21 – pp. 80 Line 3). During the trial, Petitioner testified that he was not present at the crime, and that he told one of the co-defendants prior to the crime where to go to find weed. (App. pp. 79 Line 19 and pp. 60 Line 20 – pp. 61 Line 3). Judge Miller charged the jury, among other things, on alibi, accident, accomplice liability and the inference of malice. (App. pp. 70 Line 21; pp. 50 Lines 11-14 and pp. 43 Lines 21-22). Trial Counsel received the charges on alibi and accident, and did not object to either the accomplice liability charge or the malice charge. (App. pp. 47 Lines 20-22). After the matter went to the jury, the jury sent questions to the Trial Court. They asked "What is murder?;" "Does the defendant have to pull the trigger to consider it murder?;" and

“Can we have copy of the Law?” (App. pp. 47 Lines 8-13). After the jury’s questions, Trial Counsel did object to a recharge on accomplice liability. (App. pp. 47 Lines 15-19). The court overruled that objection. (App. pp. 58 Line 11 – pp. 59 Line 17). In this Court’s opinion dated September 6, 2017, *State v. Mosley*, after originally requesting the matter briefed after an Anders brief, this Court ruled the matter had not been preserved for Appeal on whether the jury had been charged properly on the charge of accomplice liability. (App. pp. 161).

ARGUMENT

A criminal defendant has the right to effective assistance of counsel under the Sixth Amendment of the United States Constitution. U.S. Const. amend. VI. Relief is warranted for violation of this right when counsel's performance was deficient and the defendant was prejudiced as a result. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064 (1985). Counsel is deficient when his performance falls below an objective standard of reasonableness according to prevailing professional norms. *Id.* at 688, 104 S.Ct. at 2065; *see also Rutland v. State*, 415 S.C. 570, 577, 785 S.E.2d 350, 353 (2016) ("Regarding the deficiency prong, the proper measure of counsel's performance is whether he has provided representation within the range of competence required by attorneys in criminal cases.") (quoting *McHam v. State*, 404 S.C. 465, 474, 746 S.E.2d 41, 46 (2013)). The prejudice prong is satisfied when there is a reasonable probability that but for counsel's errors, the outcome of the proceeding would have been different. *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068; *see also Johnson v. State*, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) ("A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial.") (citing *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068). However, "[w]hen counsel articulates a valid reason for employing a certain strategy, such conduct generally will not be deemed ineffective assistance of counsel. *Stokes v. State*, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992). The validity of counsel's strategy is viewed under an "objective standard of reasonableness." *Lounds v. State*, 380 S.C. 454, 462, 670 S.E.2d 646, 650 (2008) (finding that trial counsel's belief that available witnesses "would not add much to the case" was not an objectively reasonable strategic reason for the failure to call them to testify when the available witnesses would have supported the defense's trial theory).

The PCR Court erred in denying relief. For the reasons discussed herein, this Court should grant the Petition for Writ of Certiorari and reverse the PCR Court's order denying relief.

I. The PCR court's finding that Trial Counsel was not ineffective for failing to properly or contemporaneously object to improper accomplice liability jury charges was an error of law.

Trial Counsel was ineffective for failing to timely object to the jury charge on accomplice liability when the instruction was first given and thus failed to preserve it for further review on direct appeal. Although Trial Counsel did object following the jury's request to the Court for further instruction on the definition of murder, the objection was not contemporaneous. In addition to the appellate issue-preservation ramifications, the failure to timely and properly object was deficient and prejudicial performance on several different fronts. Most apparent is that the "hand of one hand of all" charge logically and inherently cuts against both of Trial Counsel's trial defenses of alibi and accident. One cannot act under "the hand of one hand of all" *by accident* according to the very instructions given. "Hand of one hand of all" is also clearly directly averse to the very logic of an alibi defense. In effect, the failure to object essentially nullified the trial defenses Trial Counsel pursued, as well as the jury charges that he requested. The charge was also particularly confusing to the jury, as demonstrated by its numerous questions relating to "hand of one, hand of all" accomplice liability, particularly in light of the conflicting instructions and the implication of codefendants that had been convicted of the same charges and that were now cooperating with the State. The accomplice liability or "hand of one, hand of all" instruction also overall diluted the State's burden of proof to prove Petitioner guilty of the charges given that his codefendants had already admitted their guilt and pleaded guilty to the crimes for which Petitioner was now on trial. This improper charge impermissibly allowed the State to forge a connection between Petitioner and his codefendants, where their word otherwise would have had little to no substantive corroboration. The jury thus was given permission to fill in the gaps of the State's case and link Petitioner to his codefendants' actions for which they had already admitted guilt and been convicted. The jury charge also garnished another route for which the jury convict Petitioner –by acting alone given the other instructions given or under

“hand of one, hand of all”. Pursuant to the obligations vested in a criminal defendant’s advocate and the expectations of a criminal defense attorney, it was deficient and prejudicial for Trial Counsel to oppose the creation of this link between Petitioner and his codefendants and their crimes, as well as render the State’s case easier to prove in the additional avenue created for which guilt could be found. *See generally Lounds v. State*, 380 S.C. 454, 462, 670 S.E.2d 646, 650 (2008); *Ingle v. State*, 348 S.C. 467, 560 S.E.2d 401 (2002). This error was particularly damning in light of the fact that his codefendants were the only individuals to identify Petitioner as a participant, let alone the shooter, in the crimes. Petitioner had also denied involvement and presence at the scene and he could not be linked to the charges through forensic testing or other investigative means. Through the connection created through accomplice liability, and by virtue of the fact that it gave the jury additional route in which to find Petitioner guilty – either acting individually or under accomplice liability, Trial Counsel essentially “fail[ed] to subject the prosecution’s case to meaningful adversarial testing” and thus made “the adversary process itself presumptively unreliable.” *United States v. Cronin*, 466 U.S. 648, 659, 104 S.Ct. 2039 (1984). Because accomplice liability charge benefited the State’s theory of the case and made the case easier to prove against Petitioner, Trial Counsel’s error in effect actually bolstered the case against his client. *See generally, Nance v. Ozmint*, 367 S.C. 547, 553, 626 S.E.2d 878, 881 (2006), *cert. denied*, 549 U.S. 943, 127 S.Ct. 131, 166 L.Ed.2d 253 (2006).

Counsel’s performance further deficient and prejudicial when following error, he failed to argue the correct law. This clearly was ineffective assistance of counsel, as the Trial Court erred in its instructions to the jury and competence in relevant law to a defendant case is an obligation among prevailing professional norms.

Wilds v. State is instructive here in demonstrating the error in Trial Counsel’s failure to recognize and properly object to the impropriety of the jury charge to the evidence presented at trial

and the error of the charge by the letter of the law. In *Wilds*, the defendant too presented an alibi defense at trial and the Court of Appeals held that because there was no evidence that indicated anyone other than Wilds was the shooter, it was error for the trial court to instruct the jury on accomplice liability. 407 S.C. 432, 440, 756 S.E.2d 387, 391 (Ct. App 2014). Of additional note, our Supreme Court distinguished this applicable scenario in *Wilds* and in Petitioner's case from the factual setting of cases like *Barber*, in which four men committed an armed robbery, and, during the robbery, one of the men shot two of the victims. *Id.* at 234-35, 712 S.E.2d at 437-38. Also, such as here, three of the robbers pled guilty and all testified at Barber's trial that Barber shot the two victims during the robbery. *Id.* at 235, 712 S.E.2d at 438. On appeal, Barber argued the evidence at trial did not support a jury charge on accomplice liability. *Id.* at 438. Our Supreme Court noted "[t]o support an accomplice liability charge in this case, the question is *whether there is any evidence that another co-conspirator was the shooter and Barber was acting with him* when the robbery took place." *Id.* at 237, 712 S.E.2d at 439 (italics added) ("Like a lesser-included offense, an alternate theory of liability may only be charged when the evidence is equivocal on some integral fact and the jury has been presented with the evidence upon which we could rely to find the existence or nonexistence of that fact."). Under this test, the court ultimately found the trial court did not err in instructing the jury on accomplice liability because "the sum of the evidence presented at trial, both by the State and defense, was unequivocal as to who[m] was the shooter." *Id.* at 237, 712 S.E.2d at 439. In so holding, the Supreme Court relied upon evidence presented at trial indicating three of the robbers were armed, two with .380 handguns, which was the type of weapon forensic expert testified fired all the shots during the robbery. *Id.* at 237, 712 S.E.2d at 439. 407 S.C. at 438-39, 756 S.E.2d at 390.

Petitioner's case is dispositive distinguishable from case. Throughout the trial, State's evidence indicated that two of the men who entered the apartment were armed. His codefendants testified that no evidence indicated that anyone other than Petitioner, armed with a 9mm, was the

shooter. Counsel failed to object to the initial charge of hand of one hand of all (See PCR transcript page 10). Trial Counsel failed to object and the jury specifically asked a question regarding guilt if someone else pulled the trigger (App. pp. 39). Therefore, the Trial Court's initial charge was in error and Trial Counsel failed to properly object to the charge from the beginning, thus it was not preserved for Appeal. Petitioner presented an alibi defense and testified that he was not with his co-defendants on the night of the shooting. These facts are identical to the facts in *Wild*. However, Petitioner did testify that he told one of the co-defendants that marijuana could be purchased from the apartment where the deceased was shot. This hearsay evidence should not rise to the level of accomplice liability. However, by allowing the initial charge, and therefore rendering the objection to the recharge ineffective, Trial Counsel allowed a jury charge that created a situation where the jury may have erroneously inferred that Petitioner was guilty of murder, burglary and attempted armed robbery as an accomplice by telling the co-defendant where marijuana could be purchased. This was exasperated by the failure to object to the flight testimony of being in Tacoma, which was obviously placed before the jury to cause confusion by making it seem as if the defendant fled. As this error warrants reversal and cannot be considered harmless, Trial Counsel was ineffective in not objecting to the charges as given by the Trial Court from the beginning. Obviously, this Court was correct when it directed this matter to be briefed and then realized the objection was late; thus, highlighting these issues for PCR.

II. The PCR court's finding that Trial Counsel was not ineffective for failing to object to the jury instruction on malice and felony murder was an error of law.

Trial Counsel performance was deficient and prejudicial for failing to contemporaneously and properly object to the jury charges concerning malice, intent, and felony murder on several different fronts.

When instructing the jury, the Trial Court defined malice as: "[H]atred, ill will or hostility toward another person. It is the **intentional** doing or wrongful act **without just cause or excuse**

and with an intent to inflict an injury or under circumstance that the law will infer an evil intent."

(emphasis added) (App. pp. 649). The trial court then instructed the jury on the felony murder rule:

Now, if one intentionally kills another during the commission of a felony, the inference of malice may arise. If facts are proved beyond a reasonable doubt sufficient to raise an inference of malice to your satisfaction, I again, tell you this inference would simply be an evidentiary fact to be taken into consideration by you along with all the other evidence in the case and you give it the weight you think it should receive. I would tell you that burglary first and attempted armed robbery are felonies.

The emphasized portion of the malice instruction, in conjunction with the instruction on felony murder were not improper statements on the facts and testimony elicited, but also improperly diluted the State's burden of proof.

Trial Counsel was ineffective for failing to object to the Trial Court's jury charge that malice can be inferred if one intentionally kills another during the commission of a felony. This is ineffective assistance of counsel, as the Trial Court erred in its instructions to the jury. During the jury charge, the Trial Court charged that the jury can affirm malice in multiple ways, not just felony murder, and that malice could be inferred from other actions. (App. pp. 82 line 21 – pp. 83 line 14). The Trial Court then instructed the jury on the felony murder rule:

Now, if one intentionally kills another during the commission of a felony, the inference of malice may arise. If facts are preserved beyond a reasonable doubt sufficient to raise an inference of malice to your satisfaction, I again tell you this inference would simply be an evidentiary fact to be taking in consideration by you along with all the other evidence in the case and you give it the way you think it should receive. I tell you that burglary, first, and attempted armed robbery are felonies.

(App. pp. 57 line 15-25, pp. 655). The Trial Court erred in its charges in multiple ways that malice may be inferred from other actions, combined with the instruction on the felony murder rule, rendered the charge an improper statement on the facts and improperly diluted the State's burden of proving malice. This Court has ruled that this objection was not preserved for the record (See page 9) on Appellant Brief on Appeal.

In footnote #5 of *State v. Belcher*, 385 S.C. 597, 601, 685 S.E.2d 802, 809 (2009) this Court provided the proper definition of malice writing:

Under South Carolina law, “[m]alice is a legal term implying wickedness and excluding a just cause or excuse. The term malice indicates a formed purpose and design to do a wrongful act under the circumstances that exclude any legal right to do it.” *State v. Fennell*, 340 S.C. 266, 275 n. 2, 531 S.E.2d 512, 517 n. 2 (2000); *see also State v. McDaniel*, 68 S.C. 304, 312, 47 S.E. 384, 387 (1904) (same). “It is something which springs from wickedness, from depravity, from my heart devoid of social duty and fatally bent on mischief.” *Arnold v. State*, 309 S.C. 157, 163, 420 S.E.2d 834, 837 (1992); *see also Singletary v. State*, 281 S.C. 444, 446, 316 S.E.2d 369, 370 (1984) (same); *State v. Kinard*, 373 S.C. 500, 504, 646 S.E.2d 168, 170 (Ct. App. 2007) (same).

In *Belcher*, this Court held that the “use of a deadly weapon” implied malice instruction has no place in a murder (or assault and battery with intent to kill) prosecution where evidence is presented that would reduce, mitigate, excuse or justify the killing (or the alleged assault and battery with intent to kill).

The implied malice charge in this case derives not from the use of a deadly weapon as in *Belcher*, but instead from the South Carolina common law felony murder rule. *See Gore v. Leeke*, 261, S.C. 308, 315, 199 S.E.2d 755, 757 (1973). In *State v. Norris*, 285 S.C. 86, 92, 406 S.E.2d 339, 343 (1985) *overruled by State v. Torrence*, 305 S.C. 45, 406, S.E.2d 315 (1991) *overruled by State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009) this Court wrote:

A proper charge on implied malice is:

The law says if one intentionally kills another during the commission of a felony, the implication of malice may arise. If facts are proved Beyond a reasonable doubt, sufficient to raise an inference of malice to your satisfaction, this inference would be simply an evidentiary fact to be taken into consideration by you, the jury, along with other evidence in the case, and you may give it such weight as you determine it should receive. *See State v. Elmore* 279 S.C. 417, 308 S.E.2d 781 (1983) (suggested charge on implied malice from use of a deadly weapon).

South Carolina Courts, however, have not addressed the felony murder rule since the decision in *Belcher*. The Supreme Court of Michigan addressed the felony murder rule writing:

Felony murder has never been a static, well-defined rule at common law, but throughout its history has been characterized by judicial reinterpretation to limit the harshness of the application of the rule. Historians and commentators have concluded that the rule is of questionable origin and that the reasons for the rule no longer exists, making it an anachronistic remnant, “a historic survivor for which there is no logical or practical basis for existence in modern law.”

People v. Aaron, 409 Mich. 672, 689, 299 N.W.2d 304, 307 (1980).

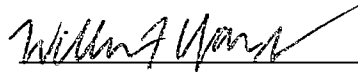
The inference does not come from the use of the deadly weapon (See PCR transcript page 60). It has more to do with the felony murder rule. Our Court has not addressed it as of yet, and it should take this opportunity to look at it here, based on these facts, and because there was not a complete contemporaneous objection.

This Court should reconsider the felony murder rule in light of the decision in *Belcher*. The felony murder charge given in the current case constituted an improper statement on the facts and improperly diluted the State’s burden of proving intent and malice. They are compounded by the additional charges given by the Trial Court on the definition of malice. This is particularly confusing in the present case where multiple witnesses testified the fatal shot was a sudden unexpected thing, implying an accident. The jury notes, asking what murder is and whether someone is guilty if they weren’t there, demonstrates that the jury was confused by the jury charges on murder, malice, and hand of one. Petitioner was thereby prejudicially hurt by this error. As this error warrants reversal, Trial Counsel was ineffective in not objecting to the charges given by the Trial Court. This error is not harmless, and it should be reversed.

CONCLUSION

Based on the above argument, appellant's petition for a Writ of Certiorari to this court should be granted.

Respectfully submitted,



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CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Petition of Petitioner complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive information in Appellant Court Filings."

Respectfully submitted,



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