

ORIGINAL

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Marlboro County  
J. Michael Baxley, Circuit Court Judge  
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**RECEIVED**

AUG 14 2013

**S.C. Supreme Court**

BRANDON L. RAY,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-000588  
\_\_\_\_\_

PETITION FOR WRIT OF CERTIORARI  
\_\_\_\_\_

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### **ISSUE PRESENTED**

Whether the PCR court erred in finding that trial counsel provided effective assistance of counsel where trial counsel failed to preserve for appellate review an objection under Crawford v. Washington, 541 U.S. 36 (2004) to the admission of an out-of-court statement by alleged accomplice Rondell Knight when the statement was inadmissible because Knight, having invoked his Fifth Amendment rights, was unavailable and Petitioner had not had a prior opportunity to cross-examine Knight?

## STATEMENT

### **Indictments**

On July 9, 2007, Petitioner Brandon L. Ray was indicted by the Marlboro County Grand Jury for (1) murder; and (2) possession of a weapon during the commission of a violent crime. App. 598-600; 604-605.

### **Trial and Sentence**

On September 10-13, 2007, Petitioner Ray was tried before the Honorable Howard P. King and a jury. App. 1. Ray was represented by Michael Holt, and the State was represented by Assistant Solicitor Elizabeth R. Munnerlyn. Id.

The jury found Ray guilty of voluntary manslaughter – rejecting self-defense – and possession of a weapon during the commission of a violent crime. App. 507, l. 23 – 508, l. 7. Judge King sentenced Ray to twenty-two years imprisonment for voluntary manslaughter, and he imposed a five-year concurrent sentence for the weapons offense. App. 523, ll. 17-24.

### **Direct Appeal**

Ray timely filed a direct appeal to the South Carolina Court of Appeals. Chief Appellate Defender Robert Dudek filed an appellant's brief pursuant to Anders v. California, 386 U.S. 738 (1967) and raised the issue of whether the Trial Court erred by admitting the statement of alleged accomplice Rondell Knight into evidence where Knight invoked his Fifth Amendment rights thereby refusing to testify and be cross-examined such that the statement should have been excluded under Crawford v. Washington, 541 U.S. 36 (2004) which bars out-of court statements by witnesses that are testimonial unless the

witness is unavailable and the defendant had a prior opportunity to cross-examine the witness. App. 526-538.

In footnote two of the brief, Ray's appellate counsel noted that trial counsel had not objected to the statement under Crawford. App. 535.

On February 3, 2010, the Court of Appeals dismissed the appeal after a thorough review of the record and counsel's brief. App. 539-540.

### **PCR Application and Evidentiary Hearing**

On November 1, 2010, Ray filed an application requesting post-conviction relief ("PCR"). App. 541-547. The State filed its Return on March 25, 2011. App. 548-552.

On December 14, 2011, Ray filed an Amended PCR Application in which he alleged that his trial counsel was ineffective by failing to object to the admissibility of Rondell Knight's statement under Douglas v. Alabama, 380 U.S. 415 (1965) and Crawford v. Washington, 541 U.S. 36 (2004). App. 553-557.

An evidentiary hearing was held on September 10, 2012 before the Honorable J. Michael Baxley. App. 558-589. Ray was represented by Charles T. Brooks, and the State was represented by Assistant Attorney General T. Andrew Johnson. App. 558.

At the hearing, Ray testified that he was entitled to relief because his trial counsel did not make an objection to the admissibility of Rondell Knight's statement on the ground that the admission of the statement violated his Sixth Amendment right to confront witnesses. App. 563, l. 21 – 575, l. 21.

Ray's trial counsel also testified and gave the following justification for not objecting to the statement on Sixth Amendment grounds:

I don't remember who the co-defendant's lawyer was, but we were not sure if he would testify or not. I was more concerned about him taking the stand

and offering testimony that might create further problems for my client. And in hindsight, the statement was the lesser of two evils, at least from a trial strategy standpoint.

App. 582, ll. 5-11.

At the close of the hearing, Judge Baxley denied Ray's application for post-conviction relief, finding (1) the South Carolina Court of Appeals, in dismissing the Anders appeal, found there were no meritorious issues before the court after reviewing the entire record, including the Crawford v. Washington issue; and (2) trial counsel had a valid trial strategy for not making the specific objection. App. 586, l. 22 – 588, l. 13.

### **Order of Dismissal**

Judge Baxley's Order denying Ray's PCR application was filed on December 6, 2012. App. 591-596. In this Order, Judge Baxley again ruled that trial counsel had a valid strategy for any failure to make a proper objection and further found that trial counsel's objection to Rondell Knight's statement was sufficiently specific in nature to apprise the Trial Court that he was objecting under Crawford. App. 594. The Court also ruled that the South Carolina Court of Appeals dismissed Ray's appeal on this very point. App. 595.

This petition for a writ of certiorari follows.

## ARGUMENT

**The PCR court erred in finding that trial counsel provided effective assistance of counsel where trial counsel failed to preserve for appellate review an objection under Crawford v. Washington, 541 U.S. 36 (2004) to the admission of an out-of-court statement by alleged accomplice Rondell Knight when the statement was inadmissible because Knight, having invoked his Fifth Amendment rights, was unavailable and Petitioner had not had a prior opportunity to cross-examine Knight.**

### **Relevant Facts**

McColl police officer Tommy Langley testified that on October 14, 2006, he was dispatched to an apartment complex in response to a shooting. App. 37, l. 4 – 39, l. 4. Langley arrived at the apartments at 1:51 p.m. and found decedent, Maurice McRae, lying in the parking lot in front of one of the apartment buildings. App. 39, l. 16 – 40, l.2.

Multiple witnesses to the shooting testified at trial. Vula Davis lived in the apartment complex and recalled that as she was looking out her window, she saw McRae walking towards a car that was backing up in his direction. Davis testified that someone in the car said “I got you. And he [McRae] said, yeah man, you got me. And he shot him and drove off.” App. 67, l. 7 – 69, l. 20. Davis remembered there were two people in the car, but she could only identify them as “black males.” Davis said she saw the passenger shoot McRae. App. 71, l. 9 – 73, l. 23.

Walter Blake Wilkes claimed to be an eyewitness to the shooting. He and McRae were standing in front of one of the apartment buildings when he said that Rondell Knight and Petitioner Brandon Ray walked up to them. App. 118, l. 3 – 119, l. 24. Wilkes recalled that McCrae told Knight he needed to get Ray “out of here, take him home somewhere because he pull a gun on him a couple of weeks before at a football game.” App. 120, ll. 1-10.

Wilkes testified that McCrae then said to Ray “hold on a second, stay right here because I got something for your ass upstairs.” App. 132, ll. 1-4. At that point, McCrae walked upstairs, and Ray and Knight immediately walked backed to their car rather quick, looking backwards over their shoulders the whole time. App. 120, ll. 21-24; 132, l. 24 – 133, l. 6. Wilkes acknowledged at trial that Ray came up to McCrae and Wilkes, remained silent, then left and went back to the car without saying anything to McCrae. App. 142, ll. 19-22.

According to Wilkes, McCrae went back up to Shayna Whaley’s apartment. App. 120, l. 24 – 121, l. 6. Shayna was McCrae’s girlfriend. App. 114, ll. 17-24. McCrae was in Shayna’s apartment for a couple of seconds and then came back out, walking down the stairs. App. 121, ll. 7-10.

At this time, Rondell Knight got in the driver’s seat, and Ray sat down in the passenger seat. Wilkes testified that Knight backed up the car and “then just sat there for a second and that’s when [McCrae] stepped up to the car.” App. 122, ll. 8-14.

Wilkes said McCrae “came across the parking lot from here and walked through here and was about to step up to the side of the car” and that was when Wilkes heard a gunshot ring out. App. 123, ll. 1-6.

In a statement to police, Wilkes said that before the shooting, he heard McCrae tell Ray “let me holler at you a minute” and then say “yeah, you got me, yeah, you got me” right after the gunshot. App. 124, ll. 14-25. Wilkes claimed that nothing was in McCrae’s hands as he was approaching the car. App. 126, ll. 4-6.

Several other individuals who claimed to be eyewitnesses also testified at the trial, including Willie Covington, Jonathan Covington, Darius Hailey, and McCrae’s brother

Charles and each provided a similar account of the events that day. App. 202, l. 2 –215, l. 24; 239, l. 18 – 241, l. 1; 266, l. 23 – 274, l. 14; 313, l. 22 – 315, l. 24.

Jonathan Covington said when McCrae approached Knight's car, he confronted Ray, asked Ray to get out of the car, and said to Ray, 'Let me holler at you, let me talk to you.' App. 256, ll. 13-20. Covington described McCrae's approach as hostile. App. 257, ll. 4-10.

Ray testified in his defense. He was riding in the car with Knight on the day of the incident, and Knight told Ray that he saw Ray's ex-girlfriend, Shayna Whaley, the other day. Knight said he would take Ray by the apartment complex where Shayna was now living. App. 397, l. 20 – 398, l. 9.

Knight stopped by the apartments where Shayna lived. Ray testified that he did not even know that McCrae would have been at the apartment complex that day. While he knew that McCrae and Shayna were in a previous relationship, he did not know they were back together in a relationship. App. 402, l. 6 – 406, l. 25.

Knight pulled the car into the parking lot, and Knight and Ray got out of the car and walked toward the building where Knight said Shayna lived. Ray was not carrying any sort of weapon. App. 408, l. 11 – 409, l. 14.

As the two walked toward one of the buildings, they walked up to Walter Blake Wilkes and McCrae who had his back turned to Ray. Ray did not even know that the individual with his back turned was McCrae until McCrae turned around and "verbally assaulted" Ray. App. 410, ll. 1-6.

Ray testified that McCrae turned to Knight and said, “why did you bring this slob ass . . . out here?” App. 410, ll. 23-24. Ray said he was shocked at this statement and did not know what was going on. App. 411, ll. 5-9.

McCrae kept telling Knight that Ray did not belong out there. According to Ray, McCrae then said “I’m going to my house and get my gun, your ass better be gone by the time I get back.” App. 412, ll. 11-15. Ray felt threatened and afraid that his life was in danger. App. 412, ll. 16-23.

Ray started walking back to the car, looking over his shoulder. He could see McCrae walking up into an apartment. App. 413, ll. 4-25. Ray was ahead of Knight and walking to the car very fast and kept telling Knight, “come on, let’s go man, let’s get out of here.” App. 414, ll. 1-25. The two got in the car and Knight backed up the car. As the car was backing out, Ray saw McCrae walking really fast in their direction. App. 415, l. 25 – 416, l. 7.

Ray testified that McCrae approached the car and the following happened:

[McCrae] walked up to the car, say yo, holler at me, you know what I’m saying, what’s up, holler at me, where you going? And then he [McCrae] reaches into his back pocket and comes around and bringing his arms around. And I leaned over in the seat and grabbed the gun and fired one shot, sir.

App. 419, ll. 17-23.

Ray said he shot McCrae to keep McCrae from shooting him. Ray thought McCrae was about to shoot him where McCrae was raising his hand and went into the back pocket. App. 420, ll. 2-11. Ray did not even know if the shot he fired had actually hit McCrae, and he told Knight to just get out of there. App. 421, ll. 5-20.

There was evidence at trial that a crowd – as many as twenty-five to thirty people – surrounded McCrae after he was shot, and it was undisputed that certain items were taken from him, allegedly for safekeeping. No one would acknowledge that a gun was one of the items removed from McCrae’s possession. App. 140, ll. 1-25; 217, ll. 1-21; 228, ll. 19-23; 247; 1. 1 – 248, l. 5; 276, l. 8 – 277, l. 10; 323, l. 15 – 324, l. 11; 328, ll. 16-19.

At trial, Rondell Knight invoked his Fifth Amendment right against self-incrimination and refused to answer any questions by the State or the defense upon this ground. App. 297, l. 9 – 303, l. 2; 380, l. 11 – 391, l. 24. The State then sought to introduce Rondell Knight’s statement given to the police hours after the shooting into evidence under Rule 804(a)(1), SCRE that Knight was unavailable as a witness and therefore, his statement was not hearsay under Rule 804(b)(3) because the statement was against penal interest. App. 305, ll. 8-21; 357, ll. 3-15.

When asked his position on the issue, trial counsel informed the Trial Court: “This is all kind of happening fast, Judge. I’m not - - I’d like to be able to at least do a little bit of research on that issue. I do think I’m going to at least initially object for the record, but I would like an opportunity to have read over that and offer the Court a more thorough opinion.” App. 303, ll. 11-12.

Court recessed until the next morning, whereupon the issue of the admissibility of Knight’s statement was argued before testimony began. App. 304, l. 21 – 305, l. 7. Trial counsel made the following objection to the admission of Knight’s out-of-court statement:

Please the Court, Your Honor, it’s our position with regard to the statement that it would be – any probative value would be outweighed by the prejudicial effect it would have on my client. Mr. Knight is not – was here yesterday. He’s one of our witnesses that we would still wish to call. We believe it’s our opportunity so he’s still sort of in the wings and it may be premature, but nevertheless, there was some language in the statement that

we find – we find could be misleading to the jury. There’s no basis for it in this case. In pretrial conversations I indicated that there was a reference to a gang in there; that there’s no basis for that the case, no evidence suggesting that. And we would object in whole as to the statement but part as to the reference to the gang. I think it’s just one sentence that I would specifically object to as far as the offending language.

App. 305, l. 24 – 306, l. 13.

The Trial Court admitted the statement, finding it fell within a hearsay exception and its prejudicial effect did not outweigh its probative value. App. 307, l. 10 – 308, l. 17. The Trial Court did rule that one part of the statement – the gang reference to “in blue town” – would be redacted, but the rest of the statement would be admissible as evidence. App. 308, ll. 10-17.

Knight’s statement was read into evidence by the officer who took the statement. In the statement, Knight conveyed to the police that McCrae told him he better get Ray – “that slob ass” – out of the apartments. Knight said that McCrae told him that he was going to go get his gun and that “you better be gone.” Knight claimed in his statement that McCrae “never had anything in his hands when he was walking up” and that Knight “saw Brandon shoot [McCrae] with the gun.” Knight “pulled off fast” and took Ray from the scene. App. 361, l. 2 – 364, l. 15.

## **Discussion**

Ray’s trial counsel erred in failing to object to the admission of Knight’s out-of-court statement under Crawford v. Washington, 554 U.S. 36 (2004) and not preserving this meritorious issue for appellate review.

To establish ineffective assistance of counsel, Petitioner must satisfy the two-prong test set forth in Strickland v. Washington, 466 U.S. 668 (1984). “First, a defendant must show that counsel's performance was deficient. Under this prong, [t]he proper

measure of attorney performance remains simply reasonableness under prevailing professional norms.” Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (internal citations omitted). “The second prong of the Strickland test requires a showing that the deficient performance prejudiced the defendant to the extent that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. The defendant is required to overcome the presumption that counsel was effective in order to receive relief.” Id. at 117-18, 386 S.E.2d at 625 (internal citations omitted).

“The Confrontation Clause of the Sixth Amendment, which was extended to the states by the Fourteenth Amendment, guarantees the right of a criminal defendant to confront witnesses against him, and this includes the right to cross-examine witnesses.” State v. Holder, 382 S.C. 278, 283, 676 S.E.2d 690, 693 (2009). In Crawford v. Washington, 551 U.S. 36 (2004), the United State Supreme Court held that testimonial out-of-court statements are not admissible under the Confrontation Clause unless the witness is unavailable **and** the defendant had prior opportunity to cross-examine the witness.

In Crawford, the state introduced the statement of the defendant’s wife to the police that she led the defendant to the victim’s apartment and facilitated the assault on the victim. The state argued her statement to the police after the crime was a statement against her penal interest, and therefore it was admissible against the defendant even though his wife would not -- or could not -- testify, and was consequently unavailable. Id. at 40.

The defendant argued that notwithstanding the state hearsay exception that this would violate his constitutional right to be confronted with the witnesses against him. The

Supreme Court agreed and held that the admission of the wife's statement to the police implicating the defendant, without the opportunity to cross-examine her, violated the defendant's rights under the Confrontation Clause. Id. at 53-54, 68-69.

The Court in Crawford v. Washington noted where testimonial statements are involved, the Framers did not mean to leave the Sixth Amendment protection and guarantee of the right to confrontation to what state court rules of evidence deemed to be "reliable statements" in the absence of the right to confrontation. Id. at 61-62.

Here, Rondell Knight invoked his Fifth Amendment right against self-incrimination. The State sought therefore to introduce Knight's statement given to the police only hours after his arrest, and while under questioning, into evidence under Rule 804(b)(3), SCRE – a statement against penal interest. This statement was inadmissible under Crawford v. Washington, and it was patent error for the Trial Court to admit Knight's statement to the police without Ray having the opportunity to confront and cross-examine Knight. See State v. Mitchell, 378 S.C. 305, 662 S.E.2d 493 (Ct. App. 2008).

The admission of Knight's statement was also not harmless. While the PCR judge found that Knight's statement was merely cumulative to the testimony of the other witnesses to the shooting, this is not correct. Knight was the only witness who observed the shooting from the same vantage point as Ray – from inside the car. Knight, having asserted his Fifth Amendment rights, could not be questioned about his statement that McCrae "never had anything in this hands when he was walking up" to the car and could not be questioned if he, like Ray, saw McCrae reach into his back pocket and bring his arms around as if he were about to shoot.

The admission of Knight's statement without any ability of Ray to be able to cross-examine Knight about this testimony significantly damaged Ray's self-defense argument where to establish self-defense the defendant must show, among other things, "that a reasonably prudent person of ordinary firmness and courage would have entertained the belief that he was actually in eminent danger and that the circumstances were such as would warrant a person of ordinary prudence, firmness, and courage to strike the fatal blow in order to save himself from serious bodily harm or the loss of life." State v. Slater, 373 S.C. 66, 70, 644 S.E.2d 50, 52 (2007).

It cannot be said that the admission of Knight's out-of-court statement did not affect the result of Ray's trial where Knight was the driver of the car and witnessed the events from Ray's perspective. Therefore, this out-of-court statement, admitted without any ability of Ray to cross-examine Knight about the contents in the statement, was inadmissible under Crawford.

Accordingly, Ray's trial counsel was ineffective for failing to object to Knight's out-of-court statement under the Confrontation Clause and the principles set forth in Crawford. Trial counsel's failure to object to Knight's statement on this ground prejudiced Ray because this reversible error was not preserved for appeal and Ray could not therefore obtain a new trial for the erroneous admission of Knight's statement.

In its Order of Dismissal, the PCR judge denied Ray any relief for two primary reasons. First, the PCR judge found that trial counsel's objection to Knight's statement was "sufficiently specific in nature to apprise the Court of the nature of the objection" and that the Court of Appeals dismissed Ray's appeal on this point. App. 594-595.

There is no evidence to support this ruling by the PCR judge. The objection made by trial counsel was based on the prejudicial effect of the statement outweighing any probative value. Trial counsel further argued that the statement should not be admitted because Knight was “one of our witnesses that we would still wish to call.” App. 305, l. 24 – 306, l. 4. This is quite opposite of an objection under the Confrontation Clause that a statement should not be admitted because the maker of the statement is unavailable for cross-examination.

The objection made by trial counsel in no manner directed the Trial Court’s attention to the problems attendant to admission of an incriminating statement when the declarant is unavailable for cross-examination by the accused. See State v. McDonald, 400 S.C. 272, 280, 734 S.E.2d 167, 171 (Ct. App. 2012) (holding argument that admission of co-defendant’s statement violated the Confrontation Clause under Crawford was not preserved for appellate review where at the time the statement was redacted and admitted, counsel only objected under Bruton v. United States, 391 U.S. 123 (1968)); cf. State v. Mitchell, 378 S.C. 305, 312-14, 622 S.E.2d 493, 497-98 (Ct. App. 2008) (finding defense counsel’s argument that the statement at issue was “a blanket statement that there’s some culpability of my client” and he had “no opportunity to test [the declarant’s] credibility” sufficiently apprised the trial court of an objection based on the Confrontation Clause and Crawford such that the issue was preserved for the appellate court’s review of whether the defendant was denied his Sixth Amendment right of confrontation).

Trial counsel clearly did not object to Knight’s out-of-court statement on the ground its admission violated the Confrontation Clause under Crawford, and the ruling by the PCR judge that trial counsel did is erroneous.

Erroneously finding trial counsel made a Crawford objection, the PCR court ruled the Court of Appeals dismissed Ray's appeal on this point, suggesting that Ray was not prejudiced by his trial counsel's failure to object on this ground because the Court of Appeals rejected this argument.

Ray's appellate counsel filed an Anders brief with the Court of Appeals. "Under the Anders procedure, an appellate court is required to review the entire record, including the complete trial transcript, for any *preserved* issues with potential merit." McHam v. State, No. 27287, 2013 WL 3723690, at \*5 (S.C. Sup. Ct. July 17, 2013) (emphasis in original); see also State v. Lawrence, 349 S.C. 129, 130, 561 S.E.2d 633, 634 (Ct. App. 2002) (stating "[a]fter a thorough review of the record in accordance with Anders v. California and State v. Williams, we find the only *preserved* issue at trial is whether the trial court erred in denying Lawrence's motion for a directed verdict on the charge of discharging a firearm into an occupied structure") (emphasis added).

It is clear in this case that the Court of Appeals did not consider the merits of the Crawford issue because it was not preserved by trial counsel. To the extent the PCR judge concluded otherwise and based his finding of a lack of prejudice on this conclusion, the PCR judge was in error.

Second, the PCR judge also found that trial counsel had a valid strategy for not making the Crawford objection because trial counsel "was more concerned about the possibility of the co-defendant taking the stand, as his proposed testimony was much more damaging than the statement." The PCR judge further ruled that Ray "was actually in a better position because the co-defendant did not testify, and counsel did his best to minimize the potential harm from the co-defendant's statement." App. 594.

There is absolutely no support in the record for this ruling by the PCR judge. Knight refused to testify to any questions by the State or the defense, invoking his Fifth Amendment right against self-incrimination. App. 297, l. 9 – 303, l. 2; 380, l. 11 – 391, l. 24. Trial counsel had no reasonable belief to think that Knight would take the stand and give “much more damaging” testimony had trial counsel properly objected to the admission of Knight’s out-of-court statement under Crawford. Knight was not going to testify and did not testify, and Ray was significantly prejudiced by the admission of Knight’s out-of-court statement where Ray could not question Knight about that statement.

Trial counsel had no strategy whatsoever in not making a Crawford objection. Trial counsel’s purported reason for not making a Crawford objection and the PCR judge’s acceptance of this reason borders on the absurd.

Trial counsel was ineffective in failing to preserve the Crawford issue for appellate review. Ray was prejudiced by counsel’s deficient performance. As discussed above, the out-of-court statement of Rondell Knight was inadmissible under Crawford. If counsel had objected to the admissibility of Knight’s statement under Crawford, the appellate court could have reached the merits of this issue, corrected the Trial Court’s error in admitting the Knight’s out-of-court statement and granted a new trial.

**CONCLUSION**

Based on the above argument, Petitioner Brandon L. Ray's petition for writ of certiorari should be granted to allow further briefing on the issue with the ultimate relief of a new trial.

Respectfully submitted,



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Carmen V. Ganjehsani  
Appellate Defender

ATTORNEY FOR PETITIONER

This 14th day of August, 2013.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Marlboro County

J. Michael Baxley, Circuit Court Judge

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BRANDON L. RAY,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

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CERTIFICATE OF SERVICE

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I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Tyson Andrew Johnson, Sr., Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Brandon Ray, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 14th day of August, 2013.




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Carmen V. Ganjehsani  
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 14th day  
of August, 2013.

 (L.S.)  
Notary Public for South Carolina  
My Commission Expires: July 3, 2023.