STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO ORANGEBURG COUNTY
Court of Common Pleas
Maité Murphy, Circuit Court Judge

RECEIVED
JUL 14 2015
S.C. Supreme Court

Appellate Case No. 2014-002167

JOHNNY WHITE, Petitioner,

vs.

STATE OF SOUTH CAROLINA, Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

MEGAN HARRIGAN JAMESON
SC Bar No. 100108
Assistant Attorney General

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

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ISSUE PRESENTED

Is there evidence of probative value to support the post-conviction relief court's finding that counsel was not ineffective for deciding not to join in Petitioner's *pro se* motion for a competency hearing, where Petitioner fully participated in his defense and counsel had no reason to doubt his competency during her representation of him?[1]

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[1] Petitioner also asserts plea counsel was ineffective for being "dismissive of [his] mental illness" and for failing to introduce mental health records in mitigation during his guilty plea. However, these arguments are not preserved for appellate review because neither was raise to or ruled upon by the post-conviction relief court. See Burgess v. State, 402 S.C. 92, 738 S.E.2d 264 (Ct. App. 2013) (holding an issue must be raised and ruled upon with specificity in order to be reviewed on appeal). The sole issue Petitioner raised regarding competency was whether counsel was ineffective for failing to seek a mental health evaluation.

STATEMENT OF THE CASE

The Orangeburg County Grand Jury indicted Petitioner during the December 2008 term for first-degree burglary (2008-GS-38-1591) and assault and battery with intent to kill (2008-GS-38-1592) stemming from the home invasion and shooting of Timothy Green. Jillian D. Ullman, Esquire, of the Orangeburg County Public Defender's Office represented Petitioner for both charges.

On July 14, 2009, Petitioner appeared before the Honorable William H. Seals, Jr., for a hearing on his *pro se* motion for a mental health evaluation. Counsel did not join in the motion, but the Court allowed Petitioner to present his motion *pro se*. After hearing Petitioner's argument and examining him, the court denied Petitioner's motion.

On July 20, 2009, Petitioner appeared before the Honorable Edgar W. Dickson, where he pled guilty as indicted to both offenses pursuant to a negotiated sentence range of fifteen to twenty-eight years. Judge Dickson sentenced Petitioner to twenty years for assault and battery with intent to kill and twenty-eight years for first-degree burglary, with both sentences to be served concurrently.

Upon Petitioner's request, Ullman filed a notice of appeal on Petitioner's behalf. However, Ullman was unable to provide sufficient explanation as to a meritorious ground to allow the appeal of a guilty plea to proceed forward. Accordingly, the South Carolina Court of Appeals dismissed the appeal for failure to provide a sufficient explanation as required by Rule 203(d)(B)(iv), SCACR. The Remittitur was issued on October 8, 2009.

Thereafter, Petitioner filed an application for post-conviction relief on January 19, 2010. In his application, Petitioner alleged he was being held in custody unlawfully based on the following grounds:

1. Ineffective assistance of counsel;
   a. "Counsel fail[ed] to seek my medical evaluation concerning my mental health;"
   b. "Fail[ed] to file a directed appeal/motion for reconsideration and mollified sentence;"
2. "5th, 6th, 14th Amendment Violations;" and
3. "Due Process Rights."

Respondent made its Return on April 1, 2011, requesting an evidentiary hearing be held.

An evidentiary hearing on Petitioner's application was convened on May 29, 2014, at the Dorchester County Courthouse before the Honorable Maité Murphy. Petitioner was present at the hearing and was represented by counsel, Tommy A. Thomas, Esquire. Assistant Attorney General Megan Harrigan Jameson of the South Carolina Attorney General's Office represented Respondent. Petitioner proceeded forward on the grounds as set forth in his application, as well as an additional claim that plea counsel was ineffective for failing to challenge Petitioner's indictments pursuant to Rule 3(c), SCRCrimP. Petitioner testified on his own behalf and presented testimony from plea counsel, Jillian D. Ullman, Esquire. Over Respondent's objection, Petitioner also introduced uncertified copies of his mental health records from the South Carolina Department of Mental Health and the South Carolina Department of Corrections. After a review of all testimony and materials presented, the post-conviction relief court denied and dismissed Petitioner's application by written order signed August 26, 2014, and filed on September 12, 2014.

Petitioner filed a Notice of Appeal on October 10, 2014. Petitioner filed a Petition for Writ of Certiorari on April 30, 2015. This Return follows.

STANDARD OF REVIEW

The post-conviction relief court's findings of fact and conclusions of law receive great deference during appellate review. Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000). The proper standard of review in a post-conviction relief action is whether "*any* evidence of probative value" exists to sustain the post-conviction relief court's findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989) (emphasis added). The reviewing court will affirm if there is any evidence to support the post-conviction relief court's ruling. Moore v. State, 399 S.C. 641, 646, 732 S.E.2d 871, 873 (2012). This Court will reverse the post-conviction relief court's decision when it is controlled by an error of law. Suber v. State, 371 S.C. 554, 558-59, 640 S.E.2d 884, 886 (2007) (citing Sheppard v. State, 357 S.C. 646, 651, 594 S.E.2d 462, 465 (2004)).

In a post-conviction relief action, an applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, at 441, 334 S.E.2d at 814.

The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, at 689. An applicant must overcome this presumption in order to receive relief. Cherry, at 118, 386 S.E.2d at 625.

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel, and both prongs must be established by an applicant to receive relief. Strickland, at 687. First, an applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland, at 688. Second, counsel's deficient performance must have prejudiced the applicant 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. With respect to guilty plea counsel, the applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52 (1985).

ARGUMENT

There is evidence of probative value to support the post-conviction relief court's finding that counsel was not ineffective for deciding not to join in Petitioner's *pro se* motion for a competency hearing, where Petitioner fully participated in his defense and counsel had no reason to doubt his competency during her representation of him[2].

On January 27, 2008, Timothy Green was at home with his girlfriend in Orangeburg, South Carolina. Shortly after 2:00 a.m., Green heard a knock on his door and opened it, revealing Petitioner and an unknown man. (App. p. 11). Green immediately recognized Petitioner, whom he had known since the fourth grade. (App. pp. 10-11). After he opened the door, Petitioner shot Green once in the leg. (App. p. 11). Green managed to close the door and lock it, but one of the assailants kicked the door open. (App. p. 11). Petitioner shot Green twice more in the leg and once in the left elbow. (App. p. 11). While Green attempted to escape the living room into the carport area, Petitioner shot him yet again before fleeing. (App. p. 11).

During the shooting, Green's girlfriend hid in the bedroom. (App. p. 12). She heard the door being kicked in and the ensuing struggle and gunfire. (App. p. 12). Although she never saw the perpetrators, she heard Victim say "no, Johnny" several times. (App. p. 12).

Greene identified Petitioner as the person who shot him to his brother on the night of the shooting and to public safety officers a few days later while in the hospital. (App. pp. 12-13). Based on Green's identification of Petitioner as his attacked, public safety

[2] As previously noted, Petitioner argues that counsel was ineffective for numerous other reasons, including for failing to investigate Petitioner's mental health problems and for failing to present mitigating evidence as to his mental health to the plea court. These issues are not preserved for appellate review, as they were not presented to the post-conviction relief court and were, therefore, not ruled upon. See Burgess, 402 S.C. 92, 738 S.E.2d 264.

officers attempted to locate Petitioner but were initially unable to find him. (App. p. 13). Petitioner was ultimately apprehended in North Carolina and arrested for the shooting and home invasion. (App. p. 13).

During the plea hearing, Petitioner told the plea court that he understood the potential sentences for both assault and battery with intent to kill and first-degree burglary. (App. p. 4). He informed the court that he had reviewed his charges and constitutional rights with counsel and that he understood them. (App. p. 5). Petitioner told the court that he was taking medication, but was unsure why it had been prescribed. (App. p. 8). He elaborated that the medication did not affect his thinking and that he understood what he was doing by pleading guilty. (App. pp. 8, 21).

Before sentencing, counsel told the court that based on her discussions with family members, Petitioner had a drug problem that affected his decision-making and actions. (App. p. 19). Counsel told the court that Petitioner told her during their first meeting in December 2008 that he had previous received mental health treatment, was taking Seroquel for depression, and had received Haldol shots earlier in life. (App. p. 21). However, she told the court she never had any concern with Petitioner's mental health, as he was coherent during all their meetings and understood their discussions. (App. p. 21). Counsel also stated to the court that mental health was never a concern during the preparation of the case, as Petitioner actively participated in his defense, including providing numerous potential witnesses and defense theories for her to investigate. (App. p. 21). Counsel also told the plea court that another attorney from her office, Peggy Hinds, was present during some of her meetings with Petitioner and agreed with her decision that Petitioner did not need to be evaluated. (App. p. 21).

In the Order of Dismissal, the post-conviction relief court found counsel's had not performed deficiently, as Petitioner was able to discuss his case with counsel, assist in his defense , and his behavior gave counsel had no reason to question his competency. (App. pp. 104-05). Further, the post-conviction relief court found that Petitioner was unable to establish any prejudice from counsel's alleged deficiency, as his *pro* se motion for an evaluation was heard and denied by Judge Seals after an examination of Petitioner (App. p. 105). The findings of the post-conviction relief court are supported by ample evidence in the record and should be affirmed. See Cherry, 300 S.C. at 119, 386 S.E.2d at 626.

At the evidentiary hearing, counsel testified that mental health was one of the first things she discussed with Petitioner during their initial meeting shortly after her appointment. (App. p. 74). She testified that Petitioner told her that he had previously seen mental health professionals and that he used to take Haldol, Seroquel, and Risperdal. (App. p. 75). However, counsel testified that Petitioner neither indicated that he was still seeing mental health professionals nor that he was currently being treated. (App. p. 75). She also testified that he also never informed her of *any* diagnosis[3]. (App. p. 83). She testified that based on her numerous meetings with Petitioner, she was never concerned about Petitioner's mental health and never thought he needed to be evaluated. (App. p.

[3] There is no evidence that Petitioner was diagnosed with any mental disorder at the time of his plea. Petitioner's medical records reflect that during his prior incarceration years before the shooting he had received a diagnosis of Adjustment Disorder with anxiety and depressed mood.(Supp. App. pp. 27, 32). These records further reflect that Petitioner did not experience auditory hallucinations and that his medial team determined that his reports of hallucinations amounted to malingering to obtain certain benefits. (Supp. App. pp. 28-32). Additionally, Petitioner's records from the Department of Mental Health reflect that there was no evidence that Petitioner experienced hallucinations or delusions. (Supp. App. p. 64). Furthermore, Petitioner's records reflect that he was treated for depression and suicidal gestures earlier in life, but nothing indicates these symptoms persisted at the time of representation by counsel. (Supp. App. p. 33).

76). She elaborated that he was able to fully discuss the case, possible defenses, and potential witnesses with him. (App. pp. 81-83).

According to counsel, Petitioner did not begin feigning mental health concerns and requesting a mental health evaluation until he learned of the recorded conversation of him and a friend captured by federal wiretap. (App. p. 77). In this recording, Petitioner, who identifies himself by "Johnny," describes the shooting of Green in detail and boasts of his plans to fabricate an alibi (App. pp. 14-15, 77). Specifically, the caller confessed to this shooting, described the events in detail, and indicated that he and the victim had had a falling out leading to the shooting. (App. p. 15). Essentially, the recording corroborated what Victim relayed to law enforcement as to the events. (App. p. 15). The recording further revealed the alibi the caller was going to use when confronted by law enforcement, which was the exact alibi Petitioner presented to counsel and counsel had provided to the State in her notice. (App. p. 15). Counsel testified that she thinks Petitioner only made his motion for an evaluation after the wiretap recording was discovered to delay his impending trial and secure a more favorable plea offer. (App. p. 77).

Counsel testified that she did not join in Petitioner's motion because she did not think he was incompetent and had no good faith basis to join the motion. (App. pp. 77, 80-81). Furthermore, counsel testified that Petitioner never indicated that he was having any symptoms of schizophrenia, hearing voices, or having memory problems. (App. p. 77). She testified that if he had told her that he had these symptoms, she would have moved to have him evaluated. (App. p. 77). Counsel testified that there were other factors contributing to her decision not to have Petitioner evaluated, including the fact that he

had his GED, he had been working, and he was paying child support. (App. p. 83). She further testified that Petitioner was actively involved in in his defense during the entire time that she represented him, including filling in timeline information, providing potential alibi witnesses, and developing case theory with her. (App. pp. 81-82). However, she testified that she appeared alongside Petitioner at the hearing on his *pro se* motion before Judge Seals and allowed him to present his motion to the court. She testified that Judge Seals examined and questioned Petitioner before ultimately denying his motion. (App. p. 80).

In his Petition, Petitioner now asserts that his diagnosis of schizophrenia and his mental health history are undisputed. However, this is a mischaracterization of the record. The State objected to both the Department of Corrections records and the Department of Mental Health records coming into the record on several grounds. (App. p. 94). First, the State objected on hearsay and double hearsay grounds, as the records reflect what Petitioner told personnel from the Department of Corrections or the Department of Mental Health. (App. p. 94). Second, the State objected that the records were cumulative because Petitioner had already testified to his prior history and counsel had testified to what Petitioner told her about his history. (App. p. 95). To now be asserting that these records are without challenge and are a valid substitute for the medical testimony Petitioner needs in order to establish his burden is a mischaracterization of the lower proceeding.

Additionally, a review of the records reflects that Petitioner was not diagnosed as schizophrenic until September 23, 2009, ***after*** he pled guilty. (Supp. App. p. 25). On September 22, 2009, Petitioner denied ever being diagnosed with any mental health

issues while being treated at the Orangeburg Mental Health Center. (Supp. App. p. 26). Petitioner also reported on August 4, 2009, that he did have a history of depression but that he was never clinically diagnosed with any specific mental health disorder. (Supp. App. p. 26). He further reported that his previous hospitalization in Columbia was due to suicidal attempts. (Supp. App. pp. 26, 33). In 2009, Petitioner also reported taking Haldol and Seroquel for hallucinations and depression. (Supp. App. p. 26). Moreover, Petitioner consistently denied having any side effects from the medications he was taking during his current incarceration and also denied having any medical problems during his prior incarceration[4]. (Supp. App. pp. 7-10, 14-15, 17-20, 28). To state that Petitioner has a widely documented diagnosis of schizophrenia is a mischaracterization of the record.

Additionally, Petitioner's records from the Department of Corrections in 2005 and 2006 reflect a repeated denial of auditory hallucinations or ideations by Petitioner. (Supp. App. pp. 28-31). In fact, when Petitioner did report auditory hallucinations on October 28, 2005, medical personnel reported that Petitioner "seemed to be engaging in these behavior[s] in an effort to be sen[t] from Kershaw. [Petitioner] seemed to know what he [was] doing." (Supp. App. p. 32). Medical personnel further noted that "although [Petitioner] is having difficulty adjusting, he knows full well what he is doing[;] and his complaints of auditory hallucination[s] seemed to be a coping method." (Supp. App. p. 32). The records also indicate that mental health personnel at the Department of Corrections questioned if Petitioner actually suffered from a mental illness or was merely malingering. (Supp. App. p. 32). In fact, the Department of Corrections reported in 2005 that Petitioner "doesn't appear[] mentally ill but seemed unmotivated at present to use

[4] Petitioner testified contradictory to these records at the evidentiary hearing when he alleged that he suffered from memory loss. (App. pp. 48, 55-56).

prosocial skills. He seemed to be displaying manipulative behavior in order to get his needs met." (Supp. App. p. 32). Essentially, treating medical personnel documented Petitioner's malingering in an attempt to get a desired result. Furthermore, Petitioner's records from the Department of Corrections reflect that Petitioner was diagnosed with Adjustment Disorder with anxiety and depressed mood during his prior incarceration, never with schizophrenia as he now asserts. (Supp. App. pp. 27, 32). The records further reflect that Petitioner was taking Haldol, Zoloft, Buspar, and Congentin in 2006, all for his diagnosis of Adjustment Disorder with Anxiety and Depressed Mood. (Supp. App. pp. 27, 32).

Petitioner further alleges that his Department of Mental Health records indicate that he was suffering from symptoms of schizophrenia[5]. In support of this allegation, he cites to page sixty-four of the Supplemental Appendix. This assertion, however, is wholly unsupported by the record. Petitioner's Department of Mental Health records indicate that during his assessment on December 18, 2006, Petitioner suffered from *some* memory loss and poor decision making, but he exhibited *no evidence* of hallucinations or delusions. (Supp. App. p. 64) (emphasis added). His records further reflect that he was conscious of person, place, time and situation. (Supp. App. p. 64). The same report indicates that the criteria for a diagnosis of schizoaffective disorder[6] include hearing voices, seeing things, disorganized thinking, and inability to remember things but that *no diagnosis was made*. (Supp. App. p. 65) (emphasis added). Moreover, the only evidence of Petitioner's

[5] Petitioner further asserts that counsel was ineffective for not obtaining, reviewing, and introducing these records as mitigation. As previously stated, this issue was neither presented to nor ruled upon by the post-conviction relief court and is, therefore, not preserved for appellate review. See Burgess, 402 S.C. 92, 738 S.E.2d 264.

[6] Schizoaffective Disorder and Schizophrenia are two distinct disorders, the former being diagnosed when criteria for both schizophrenia and a mood disorder are met. See generally American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 105-09 (5th ed. 2013).

symptoms that he experienced during this assessment were those that he self-reported, including disorganized thinking, inability to remember things, and hearing voices. (Supp. App. p. 65). As previously asserted, the Department of Mental Health reported that there was no evidence of hallucinations or delusions and a general level of consciousness on the part of the Petitioner. (Supp. App. p. 64).

Petitioner's records further show that Petitioner was referred to the Department of Mental Health because he began to hear voices and that he was feeling bad about himself. (Supp. App. p. 58). When asked what the cause of these symptoms was, however, Petitioner stated: "I think it [was] because I was incarcerated." (Supp. App. p. 58). Furthermore, Petitioner stated that one of his objectives of the adult outpatient program at the Department of Mental Health was: "I don't want to be depressed because then I see things." (Supp. App. p. 49). He reported another objective as: "I don't want to drink or [do] drugs." (Supp. App. p. 49). These objectives do not indicate a presence of schizophrenia, particularly in light of Petitioner's widely documented malingering to previous mental health professionals. In sum, Petitioner's medical records, introduced over Respondent's objections, do not support his claims of a long-standing and well-documented diagnosis of schizophrenia. Counsel was not ineffective for electing not to join in his *pro se* motion for an evaluation.

Petitioner cites to various cases to support his position. See Wiggins v. Smith, 539 U.S. 510 (2003) (finding trial counsel ineffective for not presenting mitigating evidence at sentencing when he had evidence of petitioner's troubling background and that evidence would reasonably lead trial counsel to believe that further investigation was necessary); Walker v. State, 407 S.C. 400, 756 S.E.2d 144 (2014) (finding Applicant was

prejudiced when trial counsel failed to interview alibi witnesses); Rosemond v. Catoe, 383 S.C. 320, 680 S.E.2d 5 (2009) (finding trial counsel ineffective for not presenting evidence of a *known* mental illness during sentencing) (emphasis added); Nance v. Ozmint, 367 S.C. 547, 626 S.E.2d 878 (2006) (finding trial counsel ineffective when he failed to provide an adversarial challenge to the prosecution). However, Petitioner's case is readily distinguishable, as the only evidence of Petitioner's mental health disorder was that which Petitioner self-reported, contrasted by well-documented reports of malingering.

Rather, Petitioner's case is similar to Jeter v. State, 308 S.C. 230, 417 S.E.2d 594 (1992). In Jeter, this Court held that trial counsel was not ineffective for failing to request a mental health examination where counsel relied on his own perceptions of the petitioner and when the petitioner responded appropriately to the trial judge's inquiries. Id. at 231-33, 417 S.E.2d at 595-96. Furthermore, the Jeter Court noted that the medical records given were of little probative value, as "the opinions given are contradictory and do not directly relate to the petitioner's ability to consult with his attorney or to understand the proceedings." Id. at 232, 417 S.E.2d at 596. The Court further noted that there was no medical testimony introduced at the evidentiary hearing and that the medical records that were introduced at the hearing were dated after the crime to one month after the petitioner's plea. Id. at 231, 417 S.E.2d at 595.

Similar to Jeter, Petitioner responded to all of the plea court's inquiries appropriately when he pled guilty, including his assertion that he neither knew what his medication was for nor experienced any adverse mental issues from this medication. Counsel consistently asserted that Petitioner never had any problems consulting her about

his case and assisted in his defense by providing valuable timeline details and possible alibi witnesses to be used at trial. Counsel testified adamantly that she never thought a mental health evaluation was necessary, as Petitioner was fully competent and engaged during all of their meetings. Additionally, Petitioner's medical records reflect that he was not diagnosed with schizophrenia until well after he pled guilty. Moreover, the records introduced at the evidentiary hearing show that there was no evidence to diagnose Petitioner as schizophrenic prior to his plea. Finally, Petitioner presented no medical testimony at the evidentiary hearing to support his position that he suffered from mental illness. Therefore, the absence of a mental evaluation as well as the lack of introduction of mental health issues at sentencing had no impact on Petitioner's case. Petitioner cannot establish the requisite prejudice required for relief.

Based on the foregoing, it is clear that counsel made well-reasoned, thoughtful, and informed decisions regarding her decision not to join in Petitioner's motion for a competency hearing. As counsel articulated valid logic behind her decision, the post-conviction relief court correctly denied relief. These findings are supported by more than ample evidence of probative value and should be affirmed. See Cherry, 300 S.C. at 119, 386 S.E.2d at 626.

CONCLUSION

For the foregoing reasons, this Court should deny this Petition. Should this Court grant the Petition for Writ of Certiorari, Respondent requests permission to more fully brief the issues herein.

Respectfully submitted,

ALAN WILSON
Attorney General

MEGAN HARRIGAN JAMESON
SC Bar No. 100108
Assistant Attorney General

By: Megan Harrigan Jameson
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
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JOHNNY WHITE, Petitioner,

vs.

STATE OF SOUTH CAROLINA, Respondent.

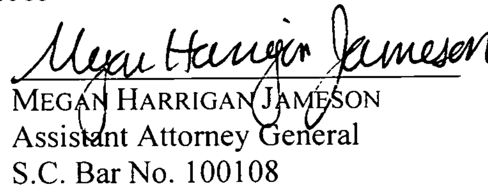
PROOF OF SERVICE

I, Megan Harrigan Jameson, certify that I have served the within **Return to Petition for Writ of Certiorari** on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

John Strom, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211

I further certify that all parties required by Rule to be served have been served.

This 17th day of July, 2015



MEGAN HARRIGAN JAMESON
Assistant Attorney General
S.C. Bar No. 100108

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

ALAN WILSON
ATTORNEY GENERAL

July 14, 2015

RECEIVED
JUL 14 2015
S.C. Supreme Court

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

Re: Johnny White v. State of South Carolina
Appellate Case No. 2014-002167

Dear Mr. Shearouse:

I am enclosing the original and six copies of the **Return to Petition for Writ of Certiorari** in the above case.

Sincerely,

Megan Harrigan Jameson
Assistant Attorney General
S.C. Bar No. 100108

MHJ
Enclosures

cc: John Strom, Esquire
Trisha Allen, Victim Services