STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO CHALRESTON COUNTY
Court of Common Pleas
R. Markley Dennis, Jr., Circuit Court Judge

RECEIVED

SEP 22 2017

S.C. SUPREME COURT

Appellate Case No. 2015-001397

DION O. TAYLOR, Petitioner,

vs.

STATE OF SOUTH CAROLINA, Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

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

ATTORNEYS FOR RESPONDENT

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ISSUE PRESENTED

Did the post-conviction relief court err in summarily dismissing Petitioner's second PCR application without conducting an evidentiary hearing to determine if the issues raised therein could not have been raised in Petitioner's first post-conviction relief action, in which Petitioner represented himself, due to Petitioner's mental incompetence, cf. Ferguson v. State, 382 S.C. 615, 677 S.E.2d 600 (2009); Council v. Catoe, 359 S.C. 120, 597 S.E.2d 782 (2004)?

STATEMENT OF THE CASE

Petitioner is confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Charleston County Clerk of Court.[1] During the January 2009 term, the Charleston County Grand Jury indicted Petitioner for criminal domestic violence (2nd or subsequent offense)[2] (2009-GS-10-0031) and armed robbery (2009-GS-10-0030) stemming from two separate incidents. The criminal domestic violence incident arose out of an assault of his pregnant girlfriend, whom Petitioner struck in the face with his fist. (App. 13). The armed robbery occurred at a Maxway on Rivers Avenue and involved Petitioner threatening the store manager with a utility knife and demanded she open the cash register; Petitioner took $444 and fled on foot before being apprehended a short distance away with the money and knife in his pocket. The victim identified Petitioner, who gave a signed confession. (App. 14). He was represented on both charges by Trip Riesen, Esquire. Assistant Solicitor Cody Groeber prosecuted the case on behalf of the State. (Supp. App. 48-62).

On June 3, 2009, Petitioner, alongside counsel, appeared before the Honorable Roger M. Young, Sr., circuit court judge, to plead guilty to both offenses. At the start if the plea proceeding, Judge Young explained to Petitioner that he would not be able to plead guilty but mentally ill:

> Now, talking to your lawyer earlier, he told me that you want to plead guilty but mentally ill, but the problem that you have is that you had an evaluation done by the doctors at MUSC, and they did not believe, based on their evaluation of you, that you fit the criteria for guilty but mentally ill, because essentially, under the statute, you have—you had the capacity to distinguish right from wrong, but the critical part on the guilty but mentally ill part of the

[1] According to records from the South Carolina Department of Corrections, Petitioner's projected release date is November 24, 2017. See https://public.doc.state.sc.us/scdc-public/inmateDetails.do?id=%2000335089 (last accessed 9/20/17).

[2] This is Petitioner's fourth criminal domestic violence conviction. He was previously convicted in 1998, 1999, and 200. (App. 13-14).

> statute says that because of a mental disease or defect you lack capacity to conform your conduct to the requirements of the law.
>
> They said, well, they don't feel like you meet that second criteria, that while you do, perhaps, have some aspects of mental illness, you did have the capacity to conduct or conform your conduct to the requirements of the law. So you don't fit under a guilty but mentally ill. At the lunch break, I took the evaluation that your lawyer provided with me, I read it, and I said look, I don't have any basis for disagreeing with these psychiatrists. All right? They evaluated you. They're professionals in that.
>
> I said, you got something like another psychiatrist or some other testimony other than what is on the basis that they put in their report, I don't have any way of saying that you meet the statute. So I can't accept a plea of guilty but mentally ill.

(App. 4). However, Judge Young explained to Petitioner that the State had offered to allow him to plead to both offenses for a negotiated ten year sentence for armed robbery and three year sentence for criminal domestic violence to be served concurrently, the minimum possible sentence he could receive. (App. 5). Judge Young further explained that armed robbery was a no parole offense and he would be required to serve at least eight-five percent of his sentence before becoming eligible for early release. (App. 5). Petitioner told Judge Young he understood and wanted to plead guilty. (App. 6-7). Petitioner told Judge Young he was under the influence of two prescription medications (Tegretol and Prozac) and had been taking them in the prescribed amounts. (App. 9). He further told Judge Young these medications helped him "understand what [he] was doing better." (App. 10). He told Judge Young he was satisfied with his attorney and that they had reviewed the charges, evidence, and law. (App. 11). Petitioner told Judge Young he attended junior college and was a supervisor for a hardware flooring company before he was arrested on these charges. (App. 12). Counsel informed Judge Young he had no problems communicating with Petitioner, whom he described as "definitely articulate," and he stated he believed Petitioner was competent and was "absolutely" able to assist in his defense. (App. 13).

In mitigation, counsel told Judge Young that "at different times [Petitioner]'s been diagnosed with bipolar, as having major depressive disorder, intermittent explosive disorder." (App. 15). He described Petitioner as "an intelligent, articulate man" and stated the "armed robbery was the fruit of absolute desperation." (App. 16). Petitioner took responsibility for his actions and again admitted his guilt. (App. 17-18). Judge Young then sentenced Petitioner to ten years for armed robbery and to a concurrent three years for criminal domestic violence in accordance with negotiations. (App. 18).[3] Petitioner did not appeal his guilty plea or convictions.

On October 6, 2009, Petitioner filed his first application for post-conviction relief. (2009-CP-10-6320). In that application, Petitioner raised the following grounds for relief:

1. Ineffective assistance of counsel.
   a. Gave erroneous evidence.
   b. Failed to investigate.
   c. Failed to get another mental evaluation for Applicant.
   d. Failed to inform plea judge that Applicant was not on medication at time of the offense.

Respondent made its Return on February 1, 2010. John T. Chakaris, Esquire, was appointed to represent Petitioner. On June 21, 2011, through counsel, Petitioner made a request to amend his application. In the proposed amendments, counsel attached Petitioner's *pro se* pleading alleging these additional grounds for relief:

I. Pleas counsel deprived mentally ill defendant his Sixth and Fourteenth Amendment rights when ineffective counsel:
   A. Counsel was ineffective when counsel provided me erroneous, inaccurate and untrue to get me to plead guilty.
   B. Counsel withheld evaluation reports that was considered prior to 9/24/08 from myself, from judge show transcript.
   C. Provided state evaluation report to the judge while Applicant was medicated for mental illness.
   D. Failed to withdraw applicant's guilty plea.

[3] At the time of the plea, Petitioner was on probation for failure to stop for a blue light; Judge Young also revoked Petitioner's probation in full and ordered him to serve a concurrent two year sentence on this charge. (App. 15, 18; Supp. App. 63)

E. Failed to request a Blair hearing to decide whether mentally ill Applicant was competent during the time at criminal act when I was not medicated.

F. Failure to investigate and contact witnesses and discover exculpatory evidence and get witnesses who would testify and to present evidence showing applicant mental state, just months before crime.

G. Failure to consult with Defendant (i.e. direct appeal, about state eval, etc.).

H. Failure to advise defendant about a potentially affirmative defense to charged crime.

I. State evaluation discrepancies, issues, prove incompetence, prejudicial by never being.

2. Rule 11 (B).
3. Judge Abused his discretion.
4. Transcript discrepancies.
5. State return - no direct appeal, no statement of confession.

On November 18, 2010, Chakaris was relieved as counsel by the Honorable Kristi Harrington. On December 7, 2010, Florence Scarborough, Esquire, was appointed to represent Petitioner. (Supp. App. 30-36).

An evidentiary hearing into the matter was convened on March 1, 2011, at the Charleston County Courthouse before the Honorable R. Markley Dennis, Jr. At the outset of the hearing, Petitioner moved to relieve counsel. Judge Dennis granted Petitioner's motion and Petitioner proceeded forward *pro se*. Assistant Attorney General Matthew J. Friedman of the South Carolina Attorney General's Office represented Respondent. At the evidentiary hearing, Petitioner and his plea attorney both testified, with the vast majority of the testimony focusing on Petitioner's mental health and competency. Following the hearing, Judge Dennis denied and dismissed the application by written order signed on April 5, 2011, and filed on April 13, 2011. In this order, Judge Dennis specifically addressed Petitioner's mental health claims, finding the plea court and plea counsel were aware of any potential mental health concerns and that plea counsel performed reasonably and effectively. (Supp. App. 30-26).

On March 14, 2011, before any order of dismissal was signed or filed, Petitioner filed a premature notice of appeal. On April 12, 2011, the South Carolina Supreme Court dismissed the appeal, citing Petitioner's failure to provide final order of dismissal to the Court. Petitioner then filed a "Motion to Alter and/or Amend Judgment," wherein he argued he had provided the Court with an unsigned and undated copy of the order of dismissal[4]; the Court construed as a motion to reinstate the appeal. By order dated April 21, 2011, the Court denied Petitioner's request to reinstate the appeal, but noted Petitioner had thirty days for the receipt of the Court's order to serve and file another notice of appeal. (App. 34-35).

On May 13, 2011, Petitioner filed a second notice of appeal challenging Judge Dennis's order of dismissal; however, Petitioner failed to attach the order of dismissal. On May 16, 2011, the Court requested a copy of the order of dismissal from Petitioner. Thereafter, on August 3, 2011, the Court dismissed the appeal for failure to order the transcript from the lower proceeding, but stayed the order for fifteen days. On August 22, 2011, the Court issued its Remittitur. (App. 35).

Thereafter, Petitioner filed a federal habeas corpus action challenging his convictions and sentence in the United States District Court. Respondent moved for summary judgement, and on November 14, 2011, United States Magistrate Judge Paige J. Gossett entered the Report and Recommendation that the petition be dismissed and that Respondent's motion for summary judgement be granted. In the Opinion and Order filed December 19, 2011, United States District Court Judge Cameron McGowan Currie denied the petition. Petitioner subsequently appealed to the United States Court of Appeals for the Fourth Circuit. On April 3, 2012, the Fourth Circuit Court of Appeals dismissed the appeal in an unpublished per curiam opinion. The Mandate was issued on July 5, 2012.

[4] At the court's request, Respondent submitted a proposed order of dismissal to Judge Dennis and copied Petitioner.

On December 11, 2012, Petitioner filed a second application for post-conviction relief (2012-CP-10-8090). (App. 20-30). In this application, Petitioner alleged a prosecutorial misconduct/Brady[5] violation and various grounds of ineffective assistance of counsel. (App. 20-30). On March 31, 2014, Respondent moved to dismiss this second application as untimely and successive. (Supp. App. 1-64). On July 17, 2014, the Honorable Stephanie P. McDonald, acting in her capacity a Chief Administrative Judge for Common Pleas for the Ninth Judicial Circuit, signed a Conditional Order of Dismissal, provisionally dismissing the application as untimely and successive, but allowing Petitioner twenty days from service to provide sufficient reasons why the application should not be dismissed; this Conditional Order of Dismissal was filed on July 2, 2014. (App. 43-49).

On April 22, 2014, Petitioner filed a response to the motion to dismiss and the proposed Conditional Order of Dismissal. (App 51-69). In this response, Petitioner asserted he "was not in a lucid state when he refused to go forth w/out counsel nor when he subsequently represented himself pro se at initial hearing." (App. 51). He further asserted he "suffers from multiple mental health illnesses in which he is prescribed different psychotropics promoting lucidity & competence." (App. 51). He asserted, "Due to malfeasance & negligence the Applicant wasn't medicated by mental healthcare persons at Institution he was & is housed at (Allendale Correctional Institution)."(App. 51). In support of these allegations, Petitioner attached a grievance form dated February 28, 2011, wherein he mentions he stopped receiving medication during the week of February 23, 2011, when he was placed on Special Management Unit for disciplinary reasons. (App. 66). Petitioner also attached the Warden's response to the grievance, dated March 7, 2011, wherein the warden indicated Petitioner's bed assignment and name had been placed on the pill issuance list so he would once again receive his mediations. (App. 67).

[5] Brady v. Maryland, 373 U.S. 83 (1963).

On May 15, 2015, Judge Dennis, acting in his capacity as Chief Administrative Judge for the Ninth Judicial Circuit, signed a Final Order of Dismissal denying and dismissing the application with prejudice. (App. 70-72). In this order, the court acknowledged Petitioner's argument that he was not in a lucid state of mind when he elected to represent himself at his prior post-conviction relief hearing, but rejected that it was a valid reason to overcome the statute of limitations or bar on successive applications. (App. p. 70-72).

On June 25, 2015, Petitioner filed a notice of appeal. On November 24, 2015, Appellate Defender Benajmin J. Tripp of the South Carolina Commission on Indigent Defense—Office of Appellate Defense filed a Johnson[6] Petition for a Writ of Certiorari and Appendix, seeking to be relieved as counsel for Petitioner. Thereafter, Petitioner filed a *pro se* response to the Johnson petition. On March 24, 2017, this Court denied appellate counsel's request to be relieved and directed the parties to address the following question:

> Did the post-conviction relief (PCR) judge err in summarily dismissing petitioner's second PCR application without conducting an evidentiary hearing to determine if the issues raised therein could not have been raised in petitioner's first PCR action, in which petitioner represented himself, due to petitioner's mental incompetence, cf. Ferguson v. State, 382 S.C. 615, 677 S.E.2d 600 (2009); Council v. Catoe, 359 S.C. 120, 597 S.E.2d 782 (2004)?

Petitioner filed a petition for a writ of certiorari on May 11, 2017. This Return follows.

[6] Johnson v. State, 294 S.C. 310. 364 S.E.2d 201 (1988).

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 of a post-conviction relief decision is whether "any evidence of probative value" exists to sustain the lower court's findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). However, appellate courts will reverse the decision of the post-conviction relief 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).

"When reviewing an order granting summary judgment, an appellate court employs the same standard applied by the trial court under Rule 56, SCRCP." Roe v. Bibby, 410 S.C. 287, 292, 763 S.E.2d 645, 648 (Ct. App. 2014) (quotations omitted). "Rule 56 provides the trial court shall grant summary judgment if there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Id. (quotations omitted). When considering on appeal a motion for summary dismissal of an application for PCR, the Court must assume facts presented by an applicant are true and view those facts in the light most favorable to the applicant. Pelzer v. State, 378 S.C. 516, 520, 662 S.E.2d 618, 619 (Ct. App. 2008).

ARGUMENT

The post-conviction relief court did not err in summarily dismissing Petitioner's second PCR application without conducting an evidentiary hearing, where Petitioner failed to present sufficient reasons why the issues raised therein could not have been raised in Petitioner's first post-conviction relief action.

The post-conviction relief court properly dismissed Petitioner's second application for post-conviction relief as procedurally barred as untimely and successive. On appeal, Petitioner asserts he "proved that for at least a week before his PCR hearing [on his first application] . . . he had not received his psychotropic medications, which helped to manage his severe mental illness[,]" and therefore, "he was mentally incompetent at the time of his hearing and, as a result, was unable to effective and with specificity set forth his claims of ineffective assistance of counsel, and other meritorious claims." (PWC 6). Petitioner asserts that he therefore established he was denied his " 'one full bite at the apple' during his first PCR action in which he represented himself" and requests that this Court remand the case for a hearing to determine whether his mental incompetence prevented Petitioner from raising the claims in his second application during his prior PCR action. (PWC 9). However, Petitioner's argument fails for a crucial reason—Petitioner has failed to establish he was incompetent during his initial post-conviction relief action or at any other time during the pendency of his case at any stage. Therefore, Petitioner had failed to show why the court's dismissal of his second application based on the statute of limitations and the bar against successive applications was in error.

Courts disfavor successive applications and place the burden on applicants to establish that any new ground raised in a subsequent application could not have been earlier raised in a previous application. Foxworth v. State, 275 S.C. 615, 274 S.E.2d 415 (1981); Arnold v. State, 309 S.C. 157, 420 S.E.2d 834 (1992). Section 17-27-90 of the South Carolina Code states:

> All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental, or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily, and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental, or amended application.

Under this statute, successive post-conviction relief applications are forbidden unless an applicant can indicate a "sufficient reason" why new grounds for relief were not raised or were not properly raised in previous applications. Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991). Any new ground raised in a subsequent application is limited to those grounds that "could not have been raised . . . in the previous application." Id. at 450, 409 S.E.2d at 394. If the applicant could have raised these allegations in a previous application, then the applicant may not raise those grounds in successive applications. Id. In a PCR action, the applicant bears the burden of showing the allegations could not have been previously raised. Land v. State, 274 S.C. 243, 262 S.E.2d 735 (1980).

Additionally, the Uniform Post-Conviction Procedure Act requires as follows:

> An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision on appeal, whichever is later.

S.C. Code Ann. § 17-27-45(A). The South Carolina Supreme Court has held that the statute of limitations shall apply to all applications filed after July 1, 1996. Peloquin v. State, 321 S.C. 468, 469 S.E.2d 606 (1996).

In the present case, Petitioner filed this second application more three years after he entered his guilty pleas. The PCR court found Petitioner's application was barred by the statute

of limitations and was successive to his prior application. Nonetheless, Petitioner asserts neither procedural bar should apply to his case because he was incompetent at the time of his evidentiary hearing on this first application, where he represented himself after relieving two previously appointed attorneys. However, Petitioner failed to establish he was incompetent during his initial post-conviction relief proceeding (or at any other time during the pendency of his case before the General Sessions court or during his various collateral attacks on his convictions).

"In assessing a defendant's competency, this Court has recognized that there is a presumption of continued competency once a judicial determination of a defendant's competency has been established." State v. Motts, 391 S.C. 635, 652, 707 S.E.2d 804, 812–13 (2011) (citing State v. Drayton, 270 S.C. 582, 243 S.E.2d 458 (1978) (holding failure of trial judge to order further examination and a hearing to determine defendant's competency to stand trial did not violate statute authorizing trial judge to order such examinations nor deprive defendant of due process where previous presiding judge had found, about two and a half months prior, that defendant was fit to stand trial and there were no additional facts to warrant further examination or hearing)); see also State v. Weik, 356 S.C. 76, 81, 587 S.E.2d 683, 685 (2002) (the defendant bears the burden of proving his lack of competence by a preponderance of the evidence) (citing Dusky v. United States, 362 U.S. 402 (1960)); Medina v. California, 505 U.S. 437 (1992) (statute providing that defendants were presumed to be competent to stand trial did not violate defendant's procedural due process).

"The test for competency to stand trial or continue trial is whether the defendant has the sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational, as well as a factual, understanding of the proceedings against him." State v. Nance, 320 S.C. 501, 504–05, 466 S.E.2d 349, 351 (1996)

(internal citations and quotations omitted). A defendant bears the burden of proving his or her incompetence by a preponderance of the evidence. State v. Lee, 274 S.C. 372, 264 S.E.2d 418 (1980).

This Court has held the PCR court erred in granting relief on the basis that the defendant was not competent to stand trial when (1) counsel testified at the PCR hearing that he had no trouble communicating with the defendant; (2) the trial transcript showed that the defendant clearly understood the questions asked and responded in an appropriate manner; and (3) a forensic psychiatrist evaluated the defendant prior to trial and found the defendant's medical conditions did not affect his mental state. Hall v. Catoe, 360 S.C. 353, 360, 601 S.E.2d 335, 339 (2004) (citing McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003)).

In the present case, the trial court found Petitioner competent to enter his guilty plea, which Petitioner himself acknowledges. See PWC 2 ("After he was found competent to stand trial, Petitioner ultimately pled guilty on June 3, 2009 before the Honorable Roger M. Young, Sr."). This determination was made by the trial court after reviewing evaluations from numerous psychiatrists who evaluated Petitioner, observed Petitioner in the courtroom, and heard from Petitioner's plea counsel, who described Petitioner as "definitely articulate," "absolutely" able to assist in his defense, and "an intelligent, articulate man". (App. 13-16).

Petitioner has not established he became incompetent since his guilty plea. Rather, Petitioner had merely established he was not receiving various medications during an approximately one week period in the spring of 2011, during which his evidentiary hearing was held. Additionally, all the references to Petitioner's purported mental illness that have been made so far have been made solely by counsel and Petitioner as opposed to mental health experts, and thus, do not establish he was actually incompetent at any point

. See Sellers v. State, 362 S.C. 182, 192, 607 S.E.2d 82, 87 (2005) (noting mental illness is insufficient to rebut the presumption of competency). The record strongly supports a presumption that Petitioner was competent when he entered his guilty plea and remained competent throughout his initial post-conviction relief proceeding.

As Petitioner has failed to establish he was incompetent during his initial post-conviction relief action, his reliance on Council v. Catoe, 359 S.C. 120, 597 S.E.2d 782 (2004) is misplaced. In Council, a capital post-conviction relief action, the post-conviction relief court found, and this Court agreed, that Council was incompetent at the time of his initial post-conviction relief proceeding, citing his diagnosis of Schizophrenia, Undifferentiated type and his belief "the murder victim was still alive and that he was part of a cult responsible for keeping the earth spinning on its axis." Id. at 123, 597 S.E.2d at 784. The Court determined Council's incompetency could not stay proceedings until he was deemed competent. Id. at 130, 597 S.E.2d at 787. However, the Council Court held, "For issues requiring the petitioner's competence to assist his PCR counsel, such as a fact-based challenge to his defense counsel's conduct at trial, the PCR judge may grant a continuance, staying the review of those issues until petitioner regains his competence. All other PCR claims will not be subject to a continuance based on a petitioner's incompetence." Id. at 130, 597 S.E.2d at 787. As Petitioner has failed to establish he was incompetent at the time of his initial post-conviction relief proceeding, Council is not applicable. Moreover, assuming Petitioner had established incompetency, Petitioner has failed to set forth what "fact-based challenge to his defense counsel's conduct at trial" he could not have raised during his initial post-conviction relief proceeding.

Similarly, any reliance on Ferguson v. State, 382 S.C. 615, 677 S.E.2d 600 (2009), is also misplaced. In Ferguson, this Court held the tolling of the statute of limitations was warranted if

an applicant's mental incompetency prevented timely filing of his initial application for post-conviction relief. Id. Here, unlike in Ferguson, Petitioner timely filed his initial application for post-conviction relief and was granted an evidentiary hearing on this application, during which he elected to represent himself after firing two appointed attorneys. Thereafter, his **second** application was dismissed as both beyond the statute of limitations and successive to his initial application—a much different scenario then the one this Court was presented with in Ferguson. Additionally, as discussed above, Petitioner had failed to establish any incompetency at any point during his various proceedings.

The post-conviction relief court properly dismissed Petitioner's second application for post-conviction relief as successive and untimely because Petitioner failed to present the court with any reasons why he could not have timely raised these allegations in his first post-conviction relief action.

CONCLUSION

Because the PCR Court properly held that Petitioner's application is untimely, successive, and because Petitioner failed to establish any incompetency at any point during his various collateral challenges to his convictions, this Court should deny this Petition for a Writ of Certiorari. Should this Court grant the petition, the State seeks permission to more fully brief the issues herein.

Respectfully submitted,

ALAN WILSON
Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy 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

Sept. 22, 2017

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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:

Appellate Defender Lara M. Caudy
South Carolina Commission on Indigent Defense—Division of Appellate Defense
P.O. Box 11589
Columbia, South Carolina 29211-1589

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

This 22nd day of Sept., 2017.

Megan Harrigan Jameson

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General
S.C. Bar No. 101260
Office of Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737