STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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APR 18 2018

S.C. SUPREME COURT

Appeal from Florence County
The Honorable William H. Seals, Circuit Court Judge

Appellate Case No. 2017-001050

Anthony Tyrone Williamson,

Petitioner,

v.

State of South Carolina,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

LINDSEY A. MCCALLISTER
Assistant Attorney General
S.C. Bar #79054

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

ATTORNEYS FOR RESPONDENT

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RESPONDENT'S QUESTIONS PRESENTED

I. Is there probative evidence in the record to support the PCR court's finding Petitioner waived his right to counsel in his first trial, and, therefore, has no basis now to assert ineffective assistance, and in any event, Counsel was not deficient nor was Petitioner prejudiced by Counsel's failure to object to Petitioner being tried without counsel and *in absentia*?

II. Is there probative evidence in the record to support the PCR court's finding Counsel was not deficient and Petitioner was not prejudiced by Counsel's failure to move for a continuance of Petitioner's second trial where Counsel knew the motion would not be successful and where Petitioner has failed to show prejudice from the lack of a continuance?

STATEMENT OF THE CASE

Petitioner is currently incarcerated in the South Carolina Department of Corrections pursuant to the Florence County Clerk of Court's orders of commitment. Petitioner was indicted at the January 2008 term of the Florence County Grand Jury for trafficking in cocaine base and possession of cocaine base with intent to distribute within proximity to a school or park (2008-GS-21-0317). App. 568-69. Petitioner was also indicted at the March 2009 term of the Florence County Grand Jury for distribution of cocaine base, distribution of cocaine base within proximity of a park, trafficking in cocaine base, possession of cocaine base with intent to distribute, and possession of cocaine base with intent to distribute within proximity of a park (2009-GS-21-0334). App. 570-71.

On April 13, 2009, Petitioner was tried *in absentia* and without counsel before the Honorable Ralph King Anderson, Jr, on the charges contained in indictment number 2008-GS-21-0317. App. 1, 3-4. The jury found Petitioner guilty, and Judge Anderson sealed Petitioner's sentences. App. 71-72. On April 29, 2009, Petitioner was again tried *in absentia*, this time before the Honorable Michael G. Nettles, on the trafficking charge contained in indictment number 2009-GS-21-0334. App. 75, 90-91. The remaining charges in that indictment were dismissed *nolle prosequi*. App. 570. Petitioner was represented by Vick Meetze, Esquire, at the second trial. App. 75. The jury convicted Petitioner of trafficking in cocaine base – third offense, and Judge Nettles sealed Petitioner's sentence. App. 212-15.

On October 29, 2009, Petitioner appeared before Judge Anderson for sentencing from both trials. App. 218, 220. Counsel represented Petitioner at the hearing, at which time he requested to be appointed to Petitioner's first case for purposes of the sentencing hearing only. App. 220-21. Judge Anderson unsealed the verdict forms and sentenced Petitioner to concurrent terms of ten years' imprisonment for possession with intent to distribute and fifteen years'

imprisonment for trafficking on indictment number 2008-GS-21-0317. App. 230. Petitioner was also sentenced to a concurrent twenty-five year term of imprisonment for the conviction on indictment number 2009-GS-21-0334. App. 230-31.

Petitioner filed a timely Notice of Appeal. An appeal was perfected by Elizabeth A. Franklin-Best, Esquire, formerly of the South Carolina Commission on Indigent Defense – Division of Appellate Defense. App. 234, 259. The South Carolina Court of Appeals affirmed Petitioner's convictions and sentences. State v. Williamson, 2012-UP-089 (filed February 22, 2012). App. 282. Petitioner filed a Petition for Rehearing which was denied by Order filed May 4, 2012. App. 284-93.

Petitioner subsequently filed a Petition for a Writ of Certiorari with the South Carolina Supreme Court. App. 302. Petitioner was represented by Dayne C. Phillips, Esquire, formerly of the South Carolina Commission on Indigent Defense – Division of Appellate Defense. App. 302. By Order dated October 18, 2013 and filed October 21, 2013, the South Carolina Supreme Court denied the Petition. App. 337.

Petitioner then filed a Petition for a Writ of Certiorari in the Supreme Court of the United States on January 16, 2014. App. 338. Petitioner's counsel of record was Carmen V. Ganjehsani, Esquire, also formerly of the South Carolina Commission on Indigent Defense – Division of Appellate Defense. App. 338. By Order dated June 16, 2014, the Supreme Court denied Petitioner's petition. App. 477.

Petitioner timely filed his application for post-conviction relief (PCR) on July 14, 2014. App. 478. An evidentiary hearing was convened on August 10, 2016, at the Florence County Courthouse before the Honorable William H. Seals, Jr. App. 492. Jonathan D. Waller, Esquire, represented Petitioner. App. 492. Johanna Valenzuela, Esquire, of the South Carolina Attorney

General's Office, represented Respondent. App. 492. At the hearing, Petitioner testified on his own behalf. App. 493. Counsel also testified. App. 493. The PCR court found Petitioner received effective assistance of counsel and dismissed Petitioner's application by order filed February 15, 2017. App. 550. Petitioner filed a Petition for a Writ of Certiorari to this Court on December 18, 2017. This Return to the Petition for a Writ of Certiorari follows.

ARGUMENT

Petitioner asserts Counsel was deficient in failing to object to Petitioner being tried in his absence at both trials and without the benefit of counsel at his first trial because Counsel's lack of objection rendered the issues unpreserved for direct appellate review. Petitioner also contends Counsel was ineffective for failing to move for a continuance of Petitioner's second trial when Counsel wasn't appointed until after jury selection had taken place, and Counsel did not have adequate time to prepare for trial.

I. There is probative evidence in the record to support the PCR court's finding Petitioner waived his right to counsel in his first trial, and, therefore, has no basis now to assert ineffective assistance. There is also probative evidence in the record to support the PCR court's finding Counsel was not deficient nor was Petitioner prejudiced by Counsel's failure to object to Petitioner being tried without counsel and *in absentia.*

a. Petitioner waived his right to counsel through his conduct, and therefore, he has no basis to assert ineffective assistance with regard to his first trial.

"'The Sixth Amendment guarantees criminal defendants a right to counsel.'" State v. Fairey, 374 S.C. 92, 103, 646 S.E.2d 445, 450 (Ct. App. 2007) (quoting State v. Gill, 355 S.C. 234, 243, 584 S.E.2d 432, 437 (Ct.App.2003)). This right, however, may be waived. Id. (citing Gill, 355 S.C. at 243, 584 S.E.2d at 437). "Courts have recognized three ways in which a defendant may relinquish his right to counsel: (1) waiver by an affirmative, verbal request; (2) waiver by conduct; and (3) forfeiture." State v. Roberson, 382 S.C. 185, 187, 675 S.E.2d 732, 733 (2009). In the instant case, Petitioner admits he fled the jurisdiction. App. 506-07. He was also notified he needed to hire an attorney and failed to do so. Supp. App. 8.

Petitioner waived his right to counsel by his unexcused dilatory conduct in absenting himself from the state and failing to maintain contact with his attorney despite knowing these charges were still pending. Upon Petitioner's arrest on the charges in the 2008 indictment,

Petitioner posted a bond and was provided copy of his bond paperwork which informed him of the need to appear at court starting on October 15, 2007, and every subsequent term until final disposition of his case. Supp. App. 1. Petitioner was also informed of "his right and obligation to be present at trial and that trial [would] proceed in his absence if he fail[ed] to attend," acknowledged by his signature on the form. Supp. App. 3. Petitioner retained the services of private counsel to represent him in his first trial on the charges from the 2008 indictment. App. 499; Supp. App. 4. However, Petitioner failed to keep in contact with that attorney, and the attorney made a motion to be relieved on the ground that he "lost all contact" with Petitioner. Supp. App. 4.

Petitioner contends he cannot be found to have waived his right to counsel verbally or by conduct specifically because he was not present at trial. PWC p. 8. Petitioner also asserts, citing Faretta,[1] he can only properly waive the right to counsel "knowing the dangers and disadvantages of the absence of counsel's assistance at trial." PWC p. 8. These assertions are clearly contrary to established case law. "[A] waiver of the right to counsel can be inferred from a defendant's actions." State v. Cain, 277 S.C. 210, 210, 284 S.E.2d 779, 779 (1981). Furthermore, Farretta is irrelevant to the issues raised in Petitioner's petition because Petitioner never indicated he wished to represent himself and instead simply failed to present himself for trial. Roberson, 382 S.C. at188, 675 S.E.2d at 733–34 ("In the instant case, Respondent gave no indication that he wished to proceed *pro se* and instead failed to appear for trial. Consequently, the Faretta requirements are irrelevant and pose no bar to waiver.").

At the PCR hearing, Petitioner admitted he had signed the bond forms acknowledging his need to be present at trial and admitted his absence from the state was voluntary. App. 505-07.

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[1] Faretta v. California, 422 U.S. 806 (1975).

Petitioner's conduct and the circumstances of his absence from trial are clearly analogous to Roberson, in which this Court found "that given Respondent's criminal history, his disregard for the instructions of the court, and his inexcusable absence from trial, a waiver by conduct of the right to counsel is inferable." 382 S.C. at 188, 675 S.E.2d at 733. Additionally, Petitioner has a lengthy criminal history and was familiar with the court process and the need to keep in contact with his attorney during the pendency of his case. App. 509-12. More specifically, because Petitioner failed to fulfill conditions of his bond by failing to be present at his trial and neglected to keep in contact with his retained attorney or the court although he knew his trial was imminent, the trial court was entitled to infer Petitioner had waived his right to counsel. See State v. Cain, 277 S.C. 210, 210–11, 284 S.E.2d 779, 779 (1981) ("In this case, the appellant failed to fulfill the conditions of his appearance bond and neglected to keep contact with his attorney, although he knew his trial was imminent. We think a waiver of the right to counsel is inferable (sic) from these omissions."). Because Petitioner waived his right to counsel, the PCR court correctly found his ineffective assistance claims were also waived. State v. Jacobs, 271 S.C. 126, 128, 245 S.E.2d 606, 608 (1978) ("We conclude that, by his conduct, appellant waived his right to counsel. Thus, it is unnecessary for the Court to consider the adequacy of the assistance afforded appellant by the public defender who sat with him during trial.").

In any event, Counsel was not deficient for failing to make a motion regarding Petitioner's representation by counsel when Counsel had paperwork indicating Petitioner was not eligible for a public defender on these charges, Counsel knew Petitioner previously hired private counsel to represent him on the charges but failed to keep in contact with that counsel, and Counsel knew Petitioner had failed to communicate with him regarding a third set of charges to which Counsel had previously been appointed. App. 514-16, 519-20, 527-28. Further, the

transcript of the sentencing hearing reflects Counsel raised the issue of Petitioner being unrepresented on the 2008 indictment at sentencing and asked to be appointed *solely* to assist Petitioner with filing an appeal. App. 220-21. Petitioner himself spoke at length to the sentencing judge and never asked for a new trial or asserted his right to counsel. App. 227-30. Instead, Petitioner merely attempted to justify his absence, and in the process, admitted his guilt to these charges. App. 227-30 ("I was just selling drugs to use drugs, actually.").

b. Counsel was not deficient nor was Petitioner prejudiced by Counsel's failure to object to Petitioner's trials *in absentia*.

As an initial matter, Respondent contends this issue was waived at the PCR hearing and is not properly before this Court. PCR counsel explicitly stated at the evidentiary hearing, "I'm not making any claims regarding Mr. Williamson being tried in his absence. It's only the conduct of the attorney represented (sic) at trial that I think is at issue today." App. 529-30. In closing arguments, PCR counsel stated, "I believe [Counsel] was deficient in not making a motion for a new trial based on being tried in his absence and without counsel – that, I believe, is the bigger issue. At that point the Court of Appeals would have done their analysis based on whether it was actually waived. . . ." App. 540. However, because the issue was vaguely argued at the evidentiary hearing and tangentially addressed in the Order of Dismissal, out of an abundance of caution, it is addressed below.

Respondent incorporates its argument outlined above that Petitioner waived his right to claim ineffective assistance of counsel as to his first trial. As to Petitioner's second trial, there is probative evidence in the record to support the PCR court's finding Counsel was not deficient because Counsel had no basis to object to the trial *in absentia* where the trial court made the appropriate findings on the record that Petitioner had notice of his impending trial, and he had been advised the trial would proceed in his absence should he fail to appear.

It is well established that, although the Sixth Amendment of the United States Constitution guarantees the right of an accused to be present at every stage of his trial, this right may be waived, and a defendant may be tried in his absence. Fairey, 374 S.C. at 99, 646 S.E.2d at 448. In order to claim the protection afforded by this rule of law, a criminal defendant may be tried in his absence only upon a trial court's finding (1) the defendant has received notice of his right to be present, and (2) he was advised the trial would proceed in his absence if he failed to attend. State v. Williams, 292 S.C. 231, 232, 355 S.E.2d 861, 862 (1987). Notice of the term of court in which a defendant will be tried is sufficient notice to enable the defendant to make an effective waiver of his right to be present at his trial. Ellis v. State, 267 S.C. 257, 261, 227 S.E.2d 304, 306 (1976); Fairey, 374 S.C. at 99, 646 S.E.2d at 448. Further, a bond form that provides notice that a defendant may be tried *in absentia* may serve as the requisite warning that he may be tried in his absence should he fail to appear. Fairey, 374 S.C. at 101, 646 S.E.2d at 449.

At Petitioner's first trial, the State presented the testimony of the Clerk of Court who testified to the condition of Petitioner's bond issued September 14, 2007, requiring him to appear at the October 15, 2007 term of court and any term thereafter until his case was resolved and that Petitioner had acknowledged that condition by his signature. App. 15-16. The Clerk also testified a bench warrant was issued for Petitioner's arrest after he failed to appear at the March 10, 2009 term of court.[2] App. 16. The trial court then explicitly found Petitioner was noticed to appear for court and failed to do so, and he had been advised the trial would proceed in his absence. App. 17-18.

[2] Petitioner's private attorney appeared during the March 10, 2009, term and made his motion to be relieved on the basis Petitioner had failed to keep in touch with him, and he had lost all contact with Petitioner at that time. Supp. App. 4-5.

At Petitioner's second trial, the trial court requested the State place into the record the justification for proceeding with a trial in Petitioner's absence. App. 90-91. The State called the Deputy Clerk for the Criminal Division who testified Petitioner's bond issued October 9, 2008, required him to appear at the December 8, 2008, term of court and any term thereafter until his case was finally disposed. App. 92-93. The Deputy Clerk further testified Petitioner acknowledged those requirements by initialing the first page of the bond form and signing the back page. App. 93-94. She also testified a bench warrant was issued for him on December 18, 2008, due to his failure to appear. App. 94. In addition, the solicitor asserted the State made efforts to locate and contact Petitioner through his prior counsel, and the bail bondsman had traveled to Washington D.C. to attempt to locate Petitioner, all without success. App. 94. The court then allowed the trial to proceed *in absentia*, though he did appoint Counsel due to the mandatory minimum sentence Petitioner was facing upon conviction. App. 96-97.

At both trials, the trial court received the evidence necessary to make the findings required by Fairey, and thus, Counsel had no basis to object.[3] In addition, at the time, Counsel

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[3] The Court of Appeals' recent decision of State v. Stanley Lamar Wrapp, Op. No 5510 (S.C. Ct. App. filed Aug. 16, 2017), is not controlling on this case for several reasons. Initially, the Wrapp decision, which was decided more than six years after Applicant's trial, represents a stark contrast from longstanding precedent in South Carolina of affirming convictions where trial courts in South Carolina proceeded with trials *in absentia* based on the "actual notice" given in bond forms which are effectively identical to the one in Applicant's case. See, e.g. State v. Wright, 304 S.C. 529, 531, 405 S.E.2d 825, 826 (1991) (holding the trial court's denial of defense counsel's request for continuance, based on counsel's recent contact with defendant and belief that defendant could be located, was not an abuse of discretion, as defendant was aware of term of court and knew he would be tried in absentia if he failed to appear); State v. Fairey, 374 S.C. 92, 101, 646 S.E.2d 445, 449 (Ct. App. 2007) ("A bond form that provides notice that a defendant can be tried in absentia may serve as the requisite notice."). Because the Court of Appeals panel in Wrapp has adopted a new standard for required notice before a defendant has been tried in his absence and this opinion comes more six years after Applicant's trial, it can be used to hold Applicant's counsel deficient in the present case. See Frierson v. State, 417 S.C. 287, 299 n. 7, 789 S.E.2d 762, 768 n. 7 (Ct. App. 2016), reh'g denied (Aug. 18, 2016) (quoting Gilmore v. State, 314 S.C. 453, 457, 445 S.E.2d 454 (1994) overruled on other grounds by

knew Petitioner had failed to contact him on the third, unrelated set of charges for which Counsel was previously appointed and that Petitioner had been gone from the state since before that appointment. App. 97-98, 519-20, 527-28. Counsel also knew Petitioner had hired private counsel who was relieved earlier in the term on the basis of Petitioner failing to keep in contact with that attorney. App. 514-16. Accordingly, Counsel did not have a meritorious basis to object to Petitioner being tried *in absentia*, and therefore, he was not deficient for failing to do so.

Petitioner also failed to meet his burden of establishing the requisite prejudice for relief because he did not present any evidence at the PCR hearing to show he was prejudiced as a result of being tried in his absence. See Davis v. State, 326 S.C. 283, 486 S.E.2d 747 (1997) (finding where Applicant presented no witnesses or any specific testimony establishing he would have had a defense if he had had additional time to prepare for trial that he failed to prove prejudice as required by Strickland). Petitioner did not call any witnesses or introduce any evidence that he was unable to present at trial due to his absence. Therefore, Petitioner cannot show he was prejudiced because there is no evidence in the record establishing a reasonable probability the result of either trial would have been different but for Petitioner's absence.

Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999) ("Our courts have 'never required an attorney to be clairvoyant or anticipate changes in the law which were not in existence at the time of trial.' ")); see also Robinson v. State, 308 S.C. 74, 77–78, 417 S.E.2d 88, 91–92 (1992) (holding defense counsel was not ineffective in failing to present evidence of battered woman's syndrome in support of wife's self-defense claim where trial took place six years before our supreme court recognized battered woman's syndrome as relevant to a claim of self-defense)). Finally, because Wrapp is not yet final, reliance on it in Applicant's case would be misplaced.

II. <u>There is probative evidence in the record to support the PCR court's finding Counsel was not deficient and Petitioner was not prejudiced by Counsel's failure to move for a continuance of Petitioner's second trial where Counsel knew the motion would not be successful and where Petitioner has failed to show prejudice from the lack of a continuance.</u>

Petitioner further contends Counsel was ineffective for failing to request a continuance of his second trial because Counsel was appointed after jury selection and did not have adequate time to prepare. PWC p. 9.

Petitioner contends Counsel should have made a motion for a continuance specifically on the ground that he was unprepared for trial, and it would have been an abuse of discretion to deny such a motion. PWC pp. 9-11. However, Counsel made a motion to be relieved on the basis he had never met Petitioner and indicated he had not had a chance to look at all of the evidence in the case, and the trial court denied the motion. App. 97-98. There is no reason to believe a motion for a continuance, on the same or similar basis, would have obtained a better result.

Petitioner relies on <u>State v. Morris</u>,[4] asserting it "held that the ineffectiveness of counsel is likely to be found in cases where counsel fails to move for a continuance when a defendant is tried *in absentia*." PWC p. 9. Although this Court has held that trial counsel's failure to request a continuance, in some circumstances, will be considered ineffective assistance of counsel, Petitioner's case is easily distinguishable. In <u>Morris</u>, the defendant had accepted a favorable plea offer, but left the courthouse before the guilty plea could be put on the record. 371 S.C. at 280-81, 639 S.E.2d at 54. This Court found the defendant was prejudiced by his counsel's failure to request the continuance because he received a significantly longer sentence after he was tried in his absence than he would have received under the plea. <u>Id.</u> at 281, 639 S.E.2d at 54.

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[4] 371 S.C. 278, 639 S.E.2d 53 (2006).

In this case, however, Petitioner failed to show up for trial all together, knowing that his failure to appear would result in a trial in his absence, and Petitioner did not present any evidence of some sort of benefit he lost due to Counsel's failure to make a continuance motion. Further, the Court of Appeals has since analyzed the holding in Morris, and determined that reading Morris "to require a trial judge to grant a continuance anytime a defendant intentionally absents himself from trial of which he has notice would subvert the rule and case law specifically allowing a trial *in absentia* under the proper circumstances…." State v. Ravenell, 387 S.C. 449, 458, 692 S.E.2d 554, 559 (Ct. App. 2010). This case is an example of a trial *in absentia* occurring "under the proper circumstances," and therefore, Counsel was not deficient for failing to request a continuance.

Finally, Counsel testified at the evidentiary hearing that he had previously reviewed at least some of the discovery on this case because he received documentation for all of Petitioner's pending cases when he was appointed on the third, unrelated case. App. 514-15, 520. Additionally, Counsel noted he needed to be able to speak with Petitioner in order to prepare a defense. App. 530-31. Petitioner did not introduce any evidence or testimony at the PCR hearing that he was unable to present at trial due to the lack of a continuance or that Counsel could have discovered with further preparation. This was a short trial in which only three pieces of evidence were introduced, and the witnesses were limited to the law enforcement officers who conducted the search of Petitioner's home and the SLED agents who analyzed the evidence. App. 76-77. Therefore, Petitioner has failed to meet his burden of establishing he was prejudiced by Counsel's failure to request a continuance. See Davis, 326 S.C. 283, 486 S.E.2d 747 (1997) (finding where Applicant presented no witnesses or any specific testimony establishing he would

have had a defense if he had had additional time to prepare for trial, Applicant failed to demonstrate prejudice as required by Strickland).

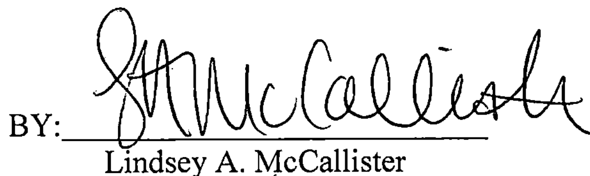
CONCLUSION

For the reasons stated above, this Court should deny the Petition for Writ of Certiorari and affirm the PCR court's finding Counsel was not deficient and Petitioner's guilty plea was freely and voluntarily given. Should this Court grant Certiorari, Respondent requests permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

ALAN WILSON
Attorney General

LINDSEY A. MCCALLISTER
Assistant Attorney General

BY: 

Lindsey A. McCallister

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

ATTORNEYS FOR RESPONDENT

April 18, 2018

STATE OF SOUTH CAROLINA

In The Supreme Court

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CERTIORARI TO FLORENCE COUNTY
Court of Common Pleas

The Honorable William H. Seals, Circuit Court Judge

Appellate Case No. 2017-001050

ANTHONY TYRONE WILLIAMSON,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

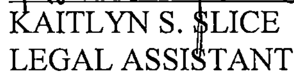
Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Return to Petition for Writ of Certiorari**, has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

Wanda H. Carter, Esquire
S.C. Commission on Indigent Defense
Post Office Box 11589
Columbia, South Carolina 29201

This 18th day of April, 2018



KAITLYN S. SLICE
LEGAL ASSISTANT

ALAN WILSON
ATTORNEY GENERAL

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APR 18 2018

S.C. SUPREME COURT

April 18, 2018

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

Re: **Anthony T. Williamson, #303726 v. State of South Carolina**
Appellate Case No. 2017-001050
Lower Court Case No. 2014-CP-21-01938

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the Return to Petition for Writ of Certiorari. By copy of this letter we are serving opposing counsel today.

Sincerely,

Lindsey A. McCallister
Assistant Attorney General
SC Bar No. 79054

LAM/ks
Enclosures

cc: Wanda H. Carter, Esquire (2 copies)

REMBERT C. DENNIS BUILDING • POST OFFICE BOX 11549 • COLUMBIA, SC 29211-1549 • TELEPHONE 803-734-3970 • FACSIMILE 803-253-6283