

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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APPEAL FROM CHEROKEE COUNTY  
Court of Common Pleas

THE HONORABLE G. THOMAS COOPER, JR.  
Circuit Court Judge

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Appellate Case No.: 2018-000003

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BRIAN LEE DAVIDSON #351872,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

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**RESPONSE TO PETITIONER'S MOTION TO DISMISS APPEAL  
AND REMAND**

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Respondent, in response to Petitioner's Motion to Dismiss the Appeal and Remand, respectfully requests the Court to DENY the motion.

**PROCEDURAL HISTORY**

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Cherokee County Clerk of Court. In August 2014, the Cherokee County Grand Jury indicted Applicant for trafficking in methamphetamine (2014-GS-11-0750), possession of alprazolam, second or subsequent offense (2014-GS-11-0751), possession of clonazepam, second or subsequent offense (2014-GS-11-0752), and possession of marijuana,

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second or subsequent offense (2014-GS-11-0753). William Rhoden, Esquire, represented Applicant. Assistant Solicitor Kimberly Leskanic prosecuted the case. On March 4, 2016, Applicant pleaded guilty to the lesser included offense of possession with intent to distribute methamphetamine (PWID), third offense, before the Honorable R. Keith Kelly. Applicant also pleaded guilty as indicted to the remaining possession charges. Pursuant to a negotiated sentence, Judge Kelly sentenced Applicant to imprisonment for concurrent terms of ten years for PWID methamphetamine and one year for each possession charge. Applicant did not appeal his conviction or sentence.

Applicant filed an application for Post-Conviction Relief on March 3, 2017. In his application, Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. “Ineffective Assistance of Counsel”
  - a. “I was improperly advised when I signed my plea. I was told that I was signing a non-violent sentence eligible for parole, good time, work credit, and work release. All of this was correct until February of 2017. SCDC changed my sentence a year after my plea agreement.”
  - b. “I did not have an issue with my sentence until SCDC changed my maxout and eligibility due to Bolin v. South Carolina.”

An evidentiary hearing was convened on November 16, 2017, before the Honorable G. Thomas Cooper, Jr. in Spartanburg County, South Carolina. Judge Cooper dismissed the application, with prejudice, after determining the Applicant failed to prove any deficiency on behalf of plea counsel or any prejudice from alleged deficiencies on the part of plea counsel. Applicant filed a Notice of Appeal for the ruling of the PCR court on January 3, 2018. Applicant has yet to file a Petition for Writ of Certiorari.<sup>1</sup>

### **MOTION TO DISMISS APPEAL AND REMAND BACK TO PCR COURT**

Petitioner has raised two new issues for Post-Conviction Relief within his Motion to

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<sup>1</sup> As of the filing of this Response to Petitioner’s Motion to Dismiss and Remand, June 25, 2017.

Dismiss and Remand:

1. “The Appellant was improperly advised by plea counsel in regarding whether he would be 85% and parole eligible”; and
2. “That there appears to have been a plea offer to a distribution Methamphetamine, third offense or trafficking 10 to 28 grams.”

Applicant further states in his Motion to Dismiss and Remand, “That Applicant was misadvised by plea counsel to take the drug 3<sup>rd</sup> as it was a non-violent offense over the trafficking which was a violent offense.” In its motion, Applicant admits the issues were not preserved in the Court’s Order nor are they preserved in the transcript of the PCR hearing.

Applicant’s Motion for Remand should not be granted, because Applicant has failed to 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. If the applicant could have raised these allegations in a previous application, then the applicant may not raise those grounds in successive applications. Id. 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). Applicant has failed to establish any sufficient reason why he could not have raised his current allegations in his application for post-conviction relief. Therefore, he has failed to meet the burden imposed upon him. The Motion for Remand should be denied.

Also, Applicant’s Motion for Remand should be denied, because Applicant failed to raise these new allegations to the PCR court prior to or at the evidentiary hearing, and Applicant has not presented “extraordinary circumstances” requiring a remand. Although an applicant for PCR may

fail to raise allegations in a motion to reconsider following a denial of relief, the Court's jurisprudence permits remand under "extraordinary circumstances." Simmons v. State, 416 S.C. 584, 788 S.E. 2d 220 (2016). The Court will grant a remand in post-conviction relief matters if dismissing the claim would be fundamentally contrary to the interests of justice. Id. In Applicant's Motion to Dismiss, Applicant has failed to provide the "extraordinary circumstances" which require a remand to the PCR court. Applicant has not provided why a denial of remand would be fundamentally contrary to interests of justice. Therefore, Applicant's motion should be denied.

### CONCLUSION

**WHEREFORE**, Respondent respectfully requests this Court to DENY Applicant's Motion to Dismiss and Remand, for failing to set forth sufficient reasons of the new allegations.

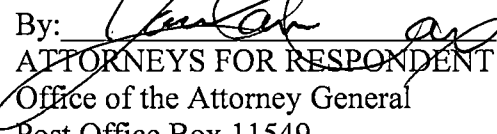
Respectfully submitted,

ALAN WILSON  
Attorney General

W. JEFFREY YOUNG  
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON  
Senior Assistant Deputy Attorney General

JORDAN A. COX  
Assistant Attorney General

By:   
ATTORNEYS FOR RESPONDENT  
Office of the Attorney General  
Post Office Box 11549  
Columbia, SC 29211  
Telephone: (803) 734-3737

June 25, 2018

STATE OF SOUTH CAROLINA  
In The Supreme Court

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CERTIORARI TO CHEROKEE COUNTY  
Court of Common Pleas

Honorable G. Thomas Cooper, Circuit Court Judge

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Appellate Case No. 2017-000003

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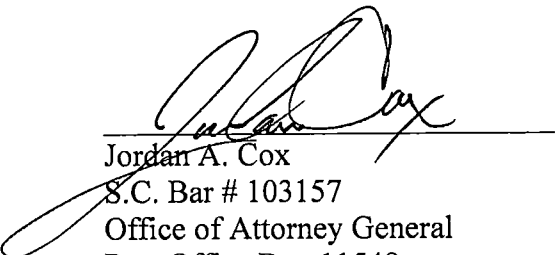
**CERTIFICATE OF SERVICE**

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I, Jordan A. Cox, certify that I have today served the within **Return to Motion to Dismiss Appeal and Remand** upon Appellant by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

**Tommy Arthur Thomas, Esquire**  
**Post Office Box 88**  
**Irmo, South Carolina 29063**

This 25<sup>th</sup> day of June, 2018.

  
\_\_\_\_\_  
Jordan A. Cox  
S.C. Bar # 103157  
Office of Attorney General  
Post Office Box 11549  
Columbia, South Carolina 29211  
(803) 734-3737  
ATTORNEY FOR RESPONDENT



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ALAN WILSON  
ATTORNEY GENERAL

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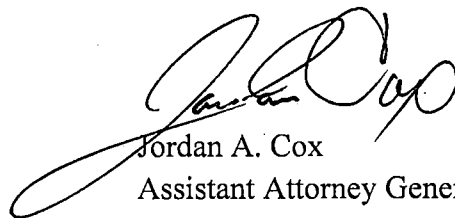
The Honorable Daniel E. Shearouse  
Clerk of Court — SC Supreme Court  
Post Office Box 11330  
Columbia, South Carolina 29211

**Re: Brian Lee Davidson, #351872 v. State of South Carolina**  
**Appellate Case No.: 2018-000003**  
**Lower Court Case: 2017-CP-11-0192**

Dear Mr. Shearouse:

Enclosed for filing please find an original and six (6) copies of the **Return to Motion to Dismiss Appeal and Remand** in the above-captioned case.

Sincerely,



Jordan A. Cox  
Assistant Attorney General  
SC Bar #103157

JAC/lm  
Enclosures

cc: Tommy A. Thomas, Esquire  
Trisha Allen, Director - Victim Advocacy Division