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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Spartanburg County

Honorable G. Thomas Cooper, Circuit Court Judge

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RODERICK GERMAINE WYNN,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-000477

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JOHNSON PETITION FOR WRIT OF CERTIORARI

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## INDEX

## ISSUE PRESENTED

Whether Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel advised Petitioner that he should not testify at trial since such advice was due to counsel's failure to employ a proper trial strategy and utilize her discretion, and where Petitioner was prejudiced because there is a reasonable probability the outcome of Petitioner's trial would have been different if Petitioner had testified and presented evidence that he was acting in self-defense during the altercation with the decedent?

## STATEMENT OF THE CASE

On the afternoon of August 14, 2013, Petitioner was involved in a physical altercation with Curtis Goldsmith in the parking lot of the Money Tree Check Cashing Service in Spartanburg. Goldsmith was fatally injured during the fight. App. 155, ll. 3-25; App. 159, ll. 18-25. The altercation began as a verbal argument when Petitioner approached Goldsmith and asked him about money Goldsmith owed Petitioner. App. 65, l. 11 – 67, l. 5. The testimony from the state's witnesses at trial concerning how the physical fight began and how Goldsmith was ultimately injured differed significantly. None of the witnesses saw the altercation from beginning to end or were close enough to hear the words exchanged between the two.

Despite always maintaining his desire to testify, Petitioner did not testify in his defense based solely on trial counsel's advice during the middle of trial. App. 349, l. 15 – 350, l. 13. If Petitioner had testified, he would have explained how and why the physical altercation began and how Goldsmith was fatally injured. His testimony would have established that he was acting in self-defense. See App. 344, l. 3 – 345, l. 4; App. 347, l. 13 – 349, l. 13. Consequently, if Petitioner had testified, there is a reasonable probability that the outcome of his trial would have been different.

A Spartanburg County Grand Jury indicted Petitioner on January 27, 2014 for the offense of murder. App. 409-410. His case was called to trial on August 27, 2014 before the Honorable R. Keith Kelly, and a jury. App. 1. Assistant Solicitor Derrick Bulsa represented the state, and Mary Stuart Shealy represented Petitioner. App. 1.

Freddie Young, who was living at a motel near the Money Tree, testified he overheard a conversation shortly before the altercation began between a female named Megan and a male who he believed to be Petitioner. He did not see either person because he was on the other side of a

wooden fence, but he heard their voices. Young claimed the female told the male to "leave the situation alone" and the male responded that "he was going to take care of business." App. 59, l. 17 – 62, l. 7.

Shortly thereafter, Young retrieved his bicycle and rode down a "corridor" to the Money Tree parking lot. When he entered the parking lot, Young saw Petitioner and Goldsmith arguing and fighting. The first punch he saw came from Petitioner, but because he rode up during the middle of the fight, Young did not "know if the guy [Goldsmith] throwed a punch first." App. 62, ll. 8-12; App. 64, l. 11 – 66, l. 19.

During the middle of the physical fight, Young rode his bicycle closer to the men and asked "what was going on." Petitioner allegedly told Young that Goldsmith owed him money. App. 66, l. 20 – 67, l. 1. The men continued to fight and argue. Young opined that Petitioner had the advantage over Goldsmith and explained that both men were eventually fighting on the ground. When the two finally stood up, they continued to argue until Goldsmith started "throwing punches." When Goldsmith continued to "throw punches," Petitioner "grabbed him by the legs and got him back down on the ground." Young explained that when Goldsmith fell to the ground, he hit his head on a trash dumpster. App. 67, l. 2 – 70, l. 21. After Goldsmith hit his head, he got up and walked back towards his car. While walking to his car, Goldsmith turned around and said something to Petitioner. Young claimed Petitioner punched Goldsmith one last time and then Goldsmith finally got into his car. Young then rode away on his bicycle. App. 73, ll. 1-18.

Joyce Brewton testified that she saw Goldsmith and Petitioner arguing by the dumpster when she went into the Money Tree that afternoon. When she came back outside, she saw the men physically fighting. She saw Goldsmith punch Petitioner and Petitioner punch him back. App. 123, l. 11 – 125, l. 17. She maintained that she never saw either man on the ground. App. 125, ll. 16-17.

As Brewton was leaving the parking lot, she said she watched Goldsmith walk back to his car, get inside, and sort of "slump down" in the seat. App. 125, l. 19 – 126, l. 11. Brewton testified that Petitioner and a female were standing over Goldsmith as he "was slumped over in the car" and that Petitioner kept saying, "I knocked him out. He all right. He all right." App. 127, ll. 10-21.

Matthew Teamer, who was driving through the Money Tree parking lot that afternoon, testified that he saw Petitioner and Goldsmith arguing, but he could not hear what they were saying because his windows were closed. He said he saw Goldsmith hit Petitioner first and then both men fell to the ground and were "scuffling." The men continued to fight until eventually Petitioner walked off with his book bag and Goldsmith walked towards his car. App. 171, l. 19 – 173, l. 24.

Marion Bridges, who was at the Money Tree with Joyce Brewton, testified that he was waiting in the car with his granddaughter while Brewton was in the store. His granddaughter pointed out that two men were arguing behind them. Bridges looked back and claimed he saw Goldsmith jump out of his car and "slam on Roger [Petitioner]." He said Goldsmith took the first swing at Petitioner and then the two "scuffled a little bit." They were punching each other and wrestling. Bridges never saw either man on the ground. He explained that after the fight ended Goldsmith got back into his car and it looked like he was injured because he was slumped over. App. 186, l. 11 – 189, l. 9.

After the fight ended, Petitioner ran down the street seeking help and ran into Kerri Blanchard who was walking up the sidewalk towards the Money Tree. Blanchard testified that Petitioner was upset and told her "that Curtis [Goldsmith] had swung at him" and that he hit Goldsmith back and Goldsmith "wasn't moving." App. 95, ll. 5-18; App. 101, l. 22 – 102, l. 5. Petitioner and Blanchard walked back to the Money Tree together. When they got to the parking lot, Goldsmith was slumped over in the driver's seat of his car with the door open and the engine

running. Blanchard explained that Goldsmith "was still breathing, but he wasn't breathing normally" and "his heart was beating extremely fast." App. 95, l. 19 – 96, l. 13. Petitioner asked her to call 911. Blanchard told the 911 operator "[t]hat something had happened at Money Tree. I believed there was a fight and that the ambulance needed to come." After Petitioner ensured 911 had been called and that Goldsmith would get the medical attention he needed, he left the scene. App. 97, ll. 2-19.

When EMS arrived, they found Goldsmith unconscious. App. 39, ll. 11-20. He was "slumped over" in the driver's seat of his car and had vomited. App. 39, l. 21 – 40, l. 18. The paramedics could not find a pulse and despite efforts were never able to resuscitate him. App. 40, l. 19 – 41, l. 22. Goldsmith was declared dead at the hospital upon arrival. App. 41, ll. 23-25.

Law enforcement arrested Petitioner four days later and ultimately charged him with murder. App. 143. ll. 5-8.

Dr. David Wren, the pathologist who conducted the autopsy, testified that Goldsmith died of blunt force trauma to the head that was caused by Goldsmith either falling into or being struck by a flat object. App. 155, ll. 3-25. The blunt force trauma caused internal hemorrhaging or bleeding to the brain which led to Goldsmith's death. However, Goldsmith did not suffer a skull fracture. Wren maintained that it does not require a lot of force to cause an injury like Goldsmith's. He explained, "It's just some people are more susceptible than others." App. 158, l. 23 – 159, l. 8. Wren opined that Goldsmith's injuries were not caused by "a blow by a fist" and again were likely caused by Goldsmith being "thrown up against something or he fell and hit something." App. 159, ll. 9-17.

The court charged the jury on murder, the lesser included offenses of voluntary and involuntary manslaughter, self-defense, and mutual combat. App. 240, l. 12 – 246, l. 21. During

deliberations, the jury asked the court for written definitions of voluntary and involuntary manslaughter. App. 249, l. 22 – 250, l. 24. It ultimately acquitted Petitioner of murder, but found him guilty of voluntary manslaughter. App. 250, l. 25 – 252, l. 6. He was sentenced to twenty years imprisonment. App. 271, ll. 19-24.

The Court of Appeals affirmed Petitioner's conviction and sentence. State v. Wynn, 2015-UP-525 (S.C. Ct. App. filed November 18, 2015).

On February 17, 2016, Petitioner filed an application for post-conviction relief. App. 316-322. The state filed a return to this application on October 17, 2016. App. 323-327. An evidentiary hearing was convened on November 13, 2017 before the Honorable G. Thomas Cooper. App. 328. Assistant Attorney General Valerie Giovanoli represented the state, and Rodney Richey represented Petitioner. App. 328. The matter was ultimately continued until November 16, 2017 due to the unavailability of a witness. App. 328; App. 337, ll. 2-25.

Petitioner testified during the evidentiary hearing that he had always planned on testifying. However, during the middle of the trial, counsel told Petitioner that she did not want the jury to learn about his prior record and believed that if his record was introduced it would be harmful to the defense because it would make Petitioner appear as if he was a violent person. Consequently, counsel advised Petitioner not to testify. App. 349, l. 19 – 350, l. 13. Petitioner ultimately followed counsel's advice because he was "nervous" and "afraid" and believed "the best thing for [him] to do was what [counsel] was saying to do." App. 351, ll. 3-10. Therefore, he did not testify.

However, Petitioner's testimony was critical to his defense and, if it were not for counsel's advice, he would have testified. App. 347, ll. 6-12. If counsel had called him as a witness at trial, Petitioner would have testified to matters that no other witness was able to because no one else saw the entire altercation or heard the words exchanged between Petitioner and Goldsmith. App. 350, l.

17 – 351, l. 2. Moreover, Petitioner's testimony would have established he was acting in self-defense and negated the assistant solicitor's argument in closing that Petitioner was at fault in bringing on the difficulty. See App. 222, l. 15 – 226, l. 6.

Specifically, Petitioner would have testified that while he initially approached Goldsmith because Goldsmith owed him money, this conversation is not what led to the physical fight. App. 347, ll. 13-18. Rather, Petitioner explained during the evidentiary hearing that Goldsmith told him he did not have the money on him at that time, but that he would bring the money to the motel where Petitioner was living sometime after five o'clock that evening. App. 347, l. 19 – 348, l. 13. Goldsmith then saw a woman walking across the street and told Petitioner it was a good thing he (Goldsmith) did not have the money because if he did Petitioner would "go over there and spend it on one of the girls." App. 348, ll. 14-18. In response, Petitioner accused Goldsmith of picking up women in the morning and threatened to tell Goldsmith's "old lady." Specifically, Petitioner testified, "And I told him, well, what if I tell your old lady you come over here and pick them up in the morning. That's what you're doing, isn't it? And I looked at him. I pointed to him. I said, yeah, don't pay no money, that's what I'll do, I'll tell your old lady. And I just laughed and walked off." App. 348, ll. 19-24.

After Petitioner walked away, Goldsmith got out of his car and "pursued" him. Petitioner heard what sounded like keys or change, and when he turned around Goldsmith punched him twice. Petitioner grabbed him in return and the two began to wrestle. App. 348, l. 25 – 349, l. 5. While they were wrestling, Goldsmith fell to Petitioner's left and hit his head on the front of his Jeep. App. 349, ll. 4-7. That is how he was fatally injured. When counsel asked Petitioner before trial what caused the indentation on Goldsmith's forehead, which was visible in photographs of the body, Petitioner told her it was caused by Goldsmith striking the front of his Jeep. Specifically, he

said, "And if you take that picture [of Goldsmith] and you put it up against the tag that was on his Jeep, it would match perfectly with it." App. 345, ll. 2-4. Petitioner denied slamming Goldsmith into the dumpster or that Goldsmith ever struck the dumpster as Freddie Young claimed at trial. App. 344, ll. 16-19; App. 345, ll. 15-20.

Glenn Manning, Petitioner's father who is a licensed attorney in South Carolina, testified that before trial Petitioner consistently told him he intended to testify in his defense. App. 365, ll. 2-4. Manning sat through Petitioner's entire trial. When trial counsel told Manning in the middle of trial that Petitioner was not going to testify, he was "shocked." Manning explained, "I said why is he not going to testify. She [counsel] said, well, he doesn't want to testify." However, Manning's "conversation with [Petitioner] was totally the opposite of that." App. 365, ll. 4-9.

Manning believed Petitioner should have testified. He asserted, "No one was there to see what happened but Roderick [Petitioner]. Roderick knows what went on. Nobody could have told the story like Roderick could tell it." App. 365, ll. 13-15.

Mary Shealy, Petitioner's trial counsel, testified that "prior to trial our thought process and preparation with Mr. Wynn [Petitioner] was that he was going to testify." App. 372, l. 20-21. She extensively prepared Petitioner to testify by conducting a mock direct and cross examination with Petitioner at the jail. She explained that she and "our investigator, Curtis Jones - - came to the jail, and we did a mock testimony where I asked him [Petitioner] questions that I would ask him, and then I had Curtis very meanly ask him questions, because that's how the prosecutor would have treated him. So we did a mock presentation of what it would be at trial." App. 373, ll. 2-7. Moreover, Shealy went over with Petitioner which of his convictions she believed the state would be permitted to use to impeach him. Petitioner had several convictions involving dishonesty which Shealy thought the state would be able to introduce. However, his convictions for assault and

battery and criminal domestic violence, among others, were either too remote or not relevant, and she would have argued such at trial. App. 372, l. 21 – 373, l. 1; App. 373, l. 16 – 374, 19; App. 385, l. 13 – 386, l. 6.

Shealy maintained that it was ultimately Petitioner's decision not to testify. During the middle of trial, the judge took a fifteen or twenty minute break. App. 373, ll. 8-15. During this break, counsel advised Petitioner about whether he should testify:

> The conversation was, you know, these would be the good things about testifying, these would be the bad things about testifying.
>
> I told him at this point I think I can get a self-defense instruction based on what's happened. I told him I also think I could get an involuntary manslaughter instruction as well, which I did on both of those, and told him that ultimately it was [up] to him. He said, you know, I'm not sure.
>
> I actually went out, and I spoke to his dad about that because he wanted to know whether his dad thought he should testify. His dad said there was good things and bad things. Ultimately, Mr. Wynn [Petitioner] said he didn't want to take the chance. And it was one hundred percent his decision at that point.

App. 379, ll. 1-21.

The PCR court ultimately denied Petitioner relief. The court found it was Petitioner's decision alone concerning whether or not to testify and that Petitioner's decision not to testify was made "after much discussion and sound advice from [c]ounsel weighing the pros and cons of testifying." App. 405. The court also found Petitioner failed to prove prejudice because the two matters in which Petitioner wanted to testify about, namely that Goldsmith owed Petitioner money and, when he confronted Goldsmith, Goldsmith struck him first, were already "presented to the jury from numerous witnesses." App. 405.

Because Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel advised Petitioner in the middle of trial that he should not testify based on her failure to utilize her discretion and employ a proper trial strategy, and since

there is a reasonable probability the outcome of Petitioner's trial would have been different if Petitioner had testified and presented evidence that he was acting in self-defense, this petition for writ of certiorari follows.

## ARGUMENT

Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel advised Petitioner that he should not testify at trial since such advice was due to counsel's failure to employ a proper trial strategy and utilize her discretion, and where Petitioner was prejudiced because there is a reasonable probability the outcome of Petitioner's trial would have been different if Petitioner had testified and presented evidence that he was acting in self-defense during the altercation with the decedent.

Petitioner had consistently maintained his desire to testify in his defense at trial. Trial counsel even admitted the "thought process" before trial was that Petitioner was going to testify. App. 372, ll. 20-21. However, in the middle of trial, counsel suddenly advised Petitioner that he should not take the stand due to his prior record. See App. 349, l. 19 – 351, l. 10. This constituted deficient performance because, in giving such advice, counsel failed to utilize her discretion and employ a proper trial strategy. Any reasonably competent criminal defense attorney would have known that it would be near impossible to establish Petitioner was acting in self-defense during the physical altercation with the decedent without Petitioner's testimony. Petitioner was prejudiced by counsel's deficient performance because there is a reasonable probability that the outcome of Petitioner's trial would have been different if he had testified in his defense and presented evidence that he was acting in self-defense.

The Sixth Amendment to the United States Constitution guarantees a defendant the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984). In order to show ineffective assistance of counsel as a ground for relief, Petitioner must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Id. at 686; Butler v. State, 286 S.C. 441, 442, 334

S.E.2d 813, 814 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687-688.

The United States Supreme Court has established a two pronged test to evaluate allegations of ineffective assistance of counsel. Petitioner must prove "that counsel's performance was deficient" and fell below reasonable professional norms, and the deficient performance prejudiced Petitioner. Strickland, 466 U.S. at 687. Under the second prong, Petitioner must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different." Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 688). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland, 466 U.S. at 668).

"The decision to testify or not is a perilous one. If a defendant does not testify, he foregoes the opportunity to tell the jury his version of events. On the other hand, if a defendant chooses to testify, he subjects himself to cross-examination, including possible impeachment with prior convictions." Brown v. State, 340 S.C. 590, 594, 533 S.E.2d 308, 310 (2000) (citing Rule 609, SCRE). "A defendant's decision to testify or not must be made with knowledge of the consequences of either choice." Id. (citing State v. Orr, 304 S.C. 185, 403 S.E.2d 623 (1991) (waiver of Fifth Amendment right must be knowing and voluntary), *overruled in part on other grounds by* State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991)).

In Foye v. State, 335 S.C. 586, 518 S.E.2d 265 (1999), this Court held trial counsel was ineffective when he failed to consider the possibility of Foye testifying in his defense given the evidence presented at trial. Foye was charged with trafficking cocaine. Id. at 588, 518 S.E.2d at

266. He was tried jointly with his father. Id. at 591, 518 S.E.2d at 268. After his father told Foye's counsel that he would testify Foye did not know cocaine was in the gym bag, counsel advised Foye not to testify because of his prior convictions. Id. However, at trial, his father testified he told Foye cocaine was in the gym bag as the pair were walking into the hotel to deliver the drugs and that Foye wanted to help his father because he was afraid his father would get hurt. Id. The two passed the bag back and forth before his father insisted Foye should not get involved and took the bag away from him prior to entering the hotel. Id. Foye waited in the lobby while his father delivered the cocaine. Id.

This Court held Foye's counsel was ineffective because he did not consider the possibility of Foye testifying after his father's damaging testimony. Id. at 592, 518 S.E.2d at 268. The Court concluded "counsel failed to use his discretion in employing an appropriate trial strategy in light of the unexpected testimony." Id. The Court emphasized counsel's admission that it may have been proper to put Foye on the stand after his father's damaging testimony. Id.

Here, trial counsel was deficient because she advised Petitioner not to testify based solely on his prior record. In giving such advice, counsel failed to use her discretion and employ a proper trial strategy. Counsel admitted at the evidentiary hearing that usually "the defendant is literally the only one that can . . . allow you to get a self-defense instruction," acknowledging the importance of a defendant's testimony in presenting evidence he or she was acting in self-defense. App. 385, ll. 6-9. Given the importance of a defendant's testimony in presenting evidence of self-defense, any reasonably competent criminal defense attorney would have advised Petitioner to testify in order for him to assert his side of what occurred during the physical altercation with Goldsmith.

Petitioner was prejudiced by counsel's deficient performance because if he had testified there is a reasonable probability the outcome of his trial would have been different. The assistant

solicitor extensively argued in closing that Petitioner was not acting in self-defense because he was at fault in bringing on the difficulty. See App. 222, l. 15 – 226, l. 6. However, Petitioner's testimony would have shown that it was Goldsmith who started the physical altercation after Petitioner had walked away. Based on Petitioner's testimony as presented during the evidentiary hearing, it would have been difficult for the jury to find the state had disproved the elements of self-defense beyond a reasonable doubt. See State v. Wiggins, 330 S.C. 538, 544, 500 S.E.2d 489, 492-493 (1998) (holding "current law requires the State to disprove self-defense, once raised by the defendant, beyond a reasonable doubt). Consequently, the jury would have acquitted Petitioner.

Because there is no evidence to support the PCR court's finding that counsel rendered effective assistance of counsel, Petitioner respectfully requests this Court reverse the order of the PCR court, vacate his conviction and sentence, and remand for a new trial.

## CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and permit full briefing on the issue presented.

Respectfully submitted,

Lara M. Caudy

Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 30th day of August, 2018.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Spartanburg County

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RODERICK GERMAINE WYNN,

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V.

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---

PETITION TO BE RELIEVED AS COUNSEL

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Counsel for Roderick Germaine Wynn states:

1. She is an appellate defender for the South Carolina Office of Appellate Defense, and was appointed to represent Petitioner.

2. She has reviewed the records and transcript of Petitioner's post-conviction relief hearing, which was held on November 16, 2017 before the Honorable G. Thomas Cooper, and, in her opinion, seeking certiorari from the order of dismissal is without merit.

3. She has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed an arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests the Court relieve her as counsel for Roderick Germaine Wynn.

Respectfully Submitted,

Lara M. Caudy

Lara M. Caudy
Appellate Defender

This 30th day of August, 2018.

ATTORNEY FOR PETITIONER

## CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of her ability this Johnson Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

Lara M. Caudy
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

This 30th day of August, 2018.

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CERTIFICATE OF SERVICE

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The undersigned hereby certifies that a true copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case have been served upon Jordan A. Cox, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix have been served on Roderick Germaine Wynn, #257393, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 30th day of August, 2018.

Lara M. Caudy

Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 30th day of August, 2018.

(L.S)

Notary Public for South Carolina
My Commission Expires: July 3, 2023.