STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

ORIGINAL

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Certiorari to Beaufort County

Honorable Michael G. Nettles, Circuit Court Judge

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DEANGELO CHRISTOPHER MICKELL,

PETITIONER

RECEIVED
JUN 12 2019
S.C. SUPREME COURT

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-001933

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# PETITION FOR WRIT OF CERTIORARI

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TAYLOR D GILLIAM
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

## INDEX

## ISSUE PRESENTED

Whether the PCR court erred in denying relief, where plea counsel was ineffective in advising Petitioner to enter into a plea agreement which contained a waiver of Petitioner's right to direct appeal and collateral attack in a state grand jury matter, where the waiver was not knowingly made, where plea counsel discovered during the evidentiary hearing that a discrepancy existed in search warrants containing handwritten language expanding the scope of the search and an original warrant omitting said language was not turned over in discovery, and where the waiver was therefore made without full knowledge of the evidence against Petitioner?

## STATEMENT

On May 13, 2009, Petitioner was indicted by a State Grand Jury on the charges of conspiracy to traffic more than four hundred grams of cocaine and trafficking between two hundred and four hundred grams of cocaine. App. 292 – 300.

On the day he was scheduled to go to trial, January 25, 2010, Petitioner pleaded guilty to the lesser-included charge of trafficking between twenty-eight to one hundred grams of cocaine by conspiracy and trafficking the same amount before the Honorable Carmen T. Mullen. App. 4 ll. 2 – 7; App. 8 ll. 11 – 13. He was represented by Anthony Dore, and Susan Porter served as the Assistant Attorney General. The facts as alleged by the state were that Petitioner supposedly supplied drugs to Ophelia Mickell for her to sell. App. 3 l. 5 – App. 4 l. 4.

As part of the plea agreement, Petitioner seemingly waived his right to a direct appeal and post-conviction relief. App. 10 ll. 9 – 17. Without inquiring with counsel as to whether Petitioner understood these rights, the plea judge asked Petitioner two questions and appeared satisfied with his answers in the affirmative. Id.

The plea judge found a factual basis for the plea and found that it had been freely, voluntarily, knowingly, and intelligently made. App. 10 l. 22 – App. 11 l. 4. Sentencing was deferred until April 29, 2010. App. 13 At that time, Petitioner appeared again before Judge Mullen with the same counsel present. Petitioner was sentenced to eighteen years on each charge, concurrent. App. 33 ll. 7 – 17.

Petitioner initially filed an application for post-conviction relief on or about March 28, 2011. App. 35 – 38. The state made its Return on or about September 27, 2012. An amended application for post-conviction relief was filed on August 19, 2013. App. 43 – 46. An amended return and motion to dismiss based upon the plea agreement was filed by the state on or about

March 26, 2013. App. 47 – 49. A telephone hearing was held with the Honorable Perry M. Buckner, III on May 7, 2014 and an in-person hearing was held the day after. App. 55. Jim Brown appeared on behalf of Petitioner and Ashley McMahan appeared on behalf of the state. After entertaining motions to quash subpoenas directed at SLED and the County of Beaufort, the PCR court granted the state's motion to dismiss. App. 97 l. 23 – App. 99 l. 19. This followed a request from PCR counsel that Petitioner be allowed the opportunity to prove that he did not knowingly waive his right to review and collateral attack. App. 92 ll. 1 – 16. The PCR court did not "reach the issue ... of the voluntariness of the waiver because ... the transcript speaks for itself. That does not mean, however, that that issue cannot be raised if appropriate and if timely in the future. I make no comment about that for purposes of today's ruling." App. 100 ll. 2 – 6.

Judge Buckner signed an Order of Dismissal with Prejudice which was filed on May 21, 2014. App. 106 – 108. This Order was appealed and reversed. Mickell v. State, Op. No. 2015-MO-037 (S.C. Sup. Ct. filed June 24, 2015).

A hearing was then held before the Honorable Michael G. Nettles on October 19, 2016. App. 109. Jim Brown represented Petitioner, and Clay Mitchell appeared on behalf of the state. Petitioner, his mother, a police officer with Beaufort County, and plea counsel testified at the hearing.[1] At the conclusion of the hearing, the PCR court requested proposed orders from both parties. App. 196 ll. 22 – 25. An Order of Dismissal was filed on December 8, 2017. App. 270 – 280. Petitioner filed a motion to alter or amend the judgment under Rule 59(e), SCRCP on December 28, 2017. App. 281. The state filed a return to the motion on April 16, 2018. App. 286. The PCR court denied the motion via Form 4 Order on October 1, 2018. App. 290.

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[1] The police officer, Chris Sankowski, was called by the state to discuss a search warrant from Petitioner's case after a cognizable Brady violation regarding the withholding of the warrant was discovered at the hearing. Brady v. Maryland, 373 U.S. 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

This petition follows.

## ARGUMENT

**The PCR court erred in denying relief, where plea counsel was ineffective in advising Petitioner to enter into a plea agreement which contained a waiver of Petitioner's right to direct appeal and collateral attack in a state grand jury matter, where the waiver was not knowingly made, where plea counsel discovered during the evidentiary hearing that a discrepancy existed in search warrants containing handwritten language expanding the scope of the search and an original warrant omitting said language was not turned over in discovery, and where the waiver was therefore made without full knowledge of the evidence against Petitioner.**

Relevant facts

Deciding to plead guilty based upon the advice of deficient counsel does not prevent collateral attack of that advice, even if the plea agreement contained a waiver of such rights. Especially in a matter such as this one where evidence which would have changed the outcome of the case was withheld, the right to post-conviction relief is of paramount importance. Because Petitioner was improperly advised, he could not have made the decision to enter into the plea agreement knowingly or intelligently. Petitioner would not have pleaded guilty had he known there existed a meritorious challenge to the evidence used against him, but counsel did not perform an adequate enough investigation to discover undisclosed discrepancies in search warrants which would have served as grounds for a successful suppression motion.

This was plea counsel's first state grand jury case. App. 154 ll. 7 – 9. Plea counsel indicated at the evidentiary hearing that the primary evidence tying Petitioner to any crime was cocaine found in a Dodge Intrepid. App. 144 ll. 5 – 7; App. 155 ll. 5 – 12. The search warrant giving rise to the discovery of the cocaine was therefore "the whole case" according to plea

counsel. App. 161 ll. 17 – 22. When presented with a search warrant from Petitioner's case, counsel agreed that it was devoid of probable cause relating to a car. App. 145 ll. 3 – 23. Furthermore, the warrant did not contain language concerning the reliability or veracity of an informant. App. 145 l. 21 – App. 146 l. 2. Notably, the warrant did not mention anything regarding a controlled buy that had supposedly been conducted within seventy-two hours before the warrant had been signed. App. 146 ll. 3 – 6.

Counsel's discussions with Petitioner never contained advice or information regarding the requirements of a search warrant:

> Q: Now, did you ever discuss with Mr. Mickell whether or not there needed to be some indicia of reliability or [veracity] of the informant before it developed probable cause?
> A: I did not.
> Q: And did you ever discuss with him that the cause may not exist to search a car based on that?
> A: Did not.

App. 146 ll. 12 – 19.

Counsel remarked on a handwritten note which seemingly allowed for the search of a car, although it does not specifically describe which car. App. 147 ll. 3 – 8. According to counsel, "any vehicle on that property… no matter who owned it [and] whether it had been there before] could theoretically be searched based upon the handwritten language. App. 147 ll. 6 – 25. Counsel then admitted that he never discussed with Petitioner "the particularity requirement of the Fourth Amendment and South Carolina Constitution that requires the place to be searched to be described with particularity." App. 147 ll. 12 – 16.

Quite remarkably, counsel then testified that two different signatures appeared to exist on the various warrant exhibits (Applicant's Exhibit 1 versus Applicant's Exhibit 3), and counsel stated he had not been provided an original version of the search warrant that had been signed in

blue ink and also contained the handwritten vehicle search permission. App. 146 l. 1 – App. 147 l. 1; App. 154 ll. 23 – 24. Following this revelation, counsel agreed the discrepancy "raised a question." App. 146 ll. 19 – 21. A copy with blue ink from the magistrate, stipulated to by the state, did not give permission to search any cars. App. 148 l. 2 – App. 149 l. 5. Plea counsel commented that he had never witnessed a situation like that in his almost twenty years of practice. App. 161 ll. 1 – 10.

Regarding the plea itself, counsel recalled discussing with Petitioner "what a plea meant." App. 152 l. 18 – App. 153 l. 4. At the time, counsel advised Petitioner to accept the plea agreement. App. 155 ll. 16 – 18. Counsel characterized the paragraph in the agreement waiving direct appeal and PCR as "very unfair." App. 157 ll. 2 – 5. He stated that he and Petitioner only spoke "briefly" about what post-conviction relief was. App. 157 ll. 18 – 24. Following the revelations from the half-dozen exhibits entered by PCR counsel, plea counsel agreed that his opinion regarding a challenge to the search warrant differed from when he first advised Petitioner. App. 153 ll. 5 – 9. Counsel straightforwardly commented "I don't think that the search warrant issue should [have] been waived. I think there's definitely an issue that should [have] been raised." App. 153 ll. 10 – 15. Had counsel had all of the documents in Petitioner's case, he would have advised Petitioner of that. App. 153 ll. 16 – 20. After all, "[t]here is some question about whether … the vehicle was searched before there was a search warrant obtained." App. 164 ll. 7 – 20. Had counsel recognized that a strong argument existed to suppress the drugs used to convict Petitioner, he would have advised Petitioner on that. App. 166 ll. 12 – 23.

Petitioner agreed that if plea counsel had advised him of a possible challenge to the search of the car, he would not have pleaded guilty. App. 168 l. 18 – App. 169 l. 6. As a result, if he would not have pleaded guilty, he would not have signed the waiver. Id.

Inexplicably, plea counsel initialed each page of the plea agreement rather than Petitioner, although Petitioner signed the final page. App. 50 – 54; App. 176 l. 24 – App. 177 l. 2. Petitioner noted that he and counsel did not have a time to go over the agreement, and he was unable to remember some of its contents. App. 177 ll. 3 – 20. Petitioner repeatedly stated that if he had the information regarding the search warrants and consent to search the house that he would have elected to go to trial. App. 178 ll. 7 – 19; App. 181 l. 2 – App. 182 l. 3.

According to the Rule 59(e) motion filed by Petitioner, the Order of Dismissal was a wholesale adoption of the proposed order submitted by the state. App. 281. Included in the motion were nine objections to language in the Order of Dismissal. Notable was the discrepancy between the PCR court's characterization of plea counsel's advice as reasonable under the professional norms versus plea counsel's testimony at the evidentiary hearing that had he known about a challenge to the search warrants, he would have advised Petitioner differently. App. 282. Additionally, the motion pointed out why Petitioner would have had standing to challenge the search warrant. App. 284. Furthermore, PCR counsel argued the casual reference to Petitioner's mother vaguely testifying belied the testimony that she had signed a blank consent form and that the Dodge Intrepid had been searched before the was asked to sign a vehicle consent form. App. 284. The remaining objections importantly distinguish the actual testimony from the evidentiary hearing from the incorrect conclusions contained in the Order of Dismissal.

Discussion

A criminal defendant, who has been convicted of, or sentenced for a crime, has a statutory right to seek post-conviction relief of his conviction and sentences. S.C. Code Ann. § 17-27-20(a). "A defendant's knowing and voluntary waiver of statutory or constitutional rights must be established by a complete record, and may be accomplished by a colloquy between the

court and defendant, between the court and defendant's counsel, or both." Moore v. State, 399 S.C. 641, 732 S.E.2d 871 (2012)(citing Roddy v. State, 339 S.C. 29, 34, 528 S.E.2d 418, 421 (2000)); see also, Brannon v. State, 345 S.C. 437, 548 S.E.2d 866 (2001).

The plea agreement in Petitioner's case contained language regarding Petitioner's direct appeal and post-conviction relief:

> The Defendant, DeAngelo Christopher Mickell, agrees that as a part of the consideration for this plea he will not appeal his plea of guilty or any sentence he receives in General Sessions Court in South Carolina. The Defendant, DeAngelo Christopher Mickell, acknowledges that he understands that he has a right of direct appeal of his guilty plea or sentence and that he knowingly, voluntarily and expressly waives this right of direct appeal. Additionally, the Defendant, DeAngelo Christopher Mickell, understands that he has a right to file a post conviction relief (PCR) action in this case but agrees to knowingly and voluntarily waive any post conviction relief action.

App. 52.

In Spoone v. State, 379 S.C. 138, 665 S.E.2d 605 (2008), this Court held a criminal defendant may waive his right to appellate and post-conviction review as long as the waiver is knowing and voluntary. Recognizing the issue was novel in South Carolina, this Court turned to federal precedent for guidance. First, this Court explained the Fourth Circuit Court of Appeals held a defendant may waive his federal statutory right to appeal just as he may waive his right to counsel and right to a jury trial. Id. at 142, 665 S.E.2d at 607 (quoting United States v. Wessells, 936 F.2d 165, 167 (4th Cir. 1991)). Turning to the issue of collateral review, this Court recognized the Fourth Circuit's holding that there was "'no reason to distinguish the enforceability of a waiver of direct-appeal rights from a waiver of collateral-attack rights' in a plea agreement." Id. (quoting United States v. Lemaster, 403 F.3d 216, 220 (4th Cir. 2005)). Nevertheless, such waivers are only valid if entered into knowingly and voluntarily by the defendant. Id. This Court adopted the test announced by the Fourth Circuit to determine the

validity of a waiver of direct appeal and post-conviction relief rights: the reviewing court examines the particular facts and circumstances surrounding the case, including the background, experience, conduct of the accused, and whether the issue sought to be appealed falls within the scope of the waiver. Id. at 143, 665 S.E.2d at 607. Spoone concerned the general enforceability of a plea agreement in which a defendant waived his right to collaterally attack his conviction. Conversely, Spoone did not address whether a waiver of post-conviction relief remedies included waiving the right to challenge ineffective assistance of counsel as it affected the waiver itself.

This Court held in Moore, supra, that the waiver of Moore's right to a jury trial was unsupported by the record. 339 S.C. 641, 732 S.E.2d 871 (2012). In that case, the state claimed Moore waived his right to a jury trial on an armed robbery charge. Id. at 641, 399 S.E.2d at 872. In a subsequent post-conviction relief action, Moore alleged that his waiver was unknowing and involuntary, but the PCR court denied relief. Id. at 641, 399 S.E.2d at 872-4. This Court noted that both the trial and PCR courts conducted a deficient analysis of Petitioner's waiver:

> The Record is devoid of any evidence to support the PCR court's finding that trial counsel's discussions regarding the waiver were at "length" or "detailed." Petitioner's trial counsel could not testify that he definitely explained to Petitioner the differences between a jury trial and a bench trial. He also could not recall whether Petitioner had any questions regarding that distinction, but was inexplicably able to testify that Petitioner definitely wanted to move forward with a bench trial. The Record reflects that there were *no* colloquy between the court and Petitioner's trial counsel or Petitioner regarding the waiver.

Moore v. State, 399 S.C. 641, 732 S.E.2d 871, 874 (2012). (emphasis in original) (footnote omitted). As a result, this Court held that the PCR court erred in finding that Moore made a knowing and voluntary waiver of "a sacrosanct right found in both the state and federal constitutions." Id. at 641, 732 S.E.2d 875.

Soon thereafter this Court decided Sanders v. State wherein the PCR court erred in failing to allow Sanders to present evidence that his waiver of his right to a jury trial and further judicial

review (to include direct appeal, PCR, and habeas corpus proceedings) was entered into upon the advice of constitutionally ineffective trial counsel. 412 S.C. 611, 773 S.E.2d 580 (2015). As was the case in Spoone, supra, the trial court engaged in a "lengthy" colloquy with Sanders. Id. at 612, 773 S.E.2d at 581. Sanders said to the plea court that he "had discussed the PCR statute with his lawyers and wanted to waive that right." Id. Following his post-conviction relief application, the PCR court entertained the state's motion to dismiss based upon the plea agreement. Id. at 613, 773 S.E.2d at 581. Sanders argued that he could not have knowingly and voluntarily entered into the agreement because his counsel did not adequately apprise him of the rights he was waiving, and he requested an evidentiary hearing. Id. The PCR court dismissed the application. Id.

On appeal, this Court "agree[d] with the wealth of federal jurisprudence which allows for ineffective assistance of counsel claims to proceed despite a waiver of collateral review where the challenge directly attacks the effectiveness of the advice to that waiver." Id. at 615, 773 S.E.2d at 582. Citing the United States Court of Appeals for the Seventh Circuit, this Court stated that it "cannot countenance a rule in which a defendant is precluded from challenging the very advice he received in agreeing to that waiver":

> Justice dictates that a claim of ineffective assistance of counsel in connection with the negotiation of a cooperation agreement cannot be barred by the agreement itself—the very product of the alleged ineffectiveness. To hold otherwise would deprive a defendant of an opportunity to assert his Sixth Amendment right to counsel where he had accepted the waiver in reliance on delinquent representation.

Id. at 615-6, 773 S.E.2d at 582 (citing Jones v. United States, 167 F.3d 1142, 1145 (7th Cir. 1999)) (footnote omitted).

Despite a knowing and voluntary waiver, a plea agreement that waives the right to collaterally attack a conviction and sentence is unenforceable with respect to an ineffective

assistance of counsel claim that challenges the voluntariness of the plea. United States v. Johnson, 410 F.3d 137, 151 (4th Cir. 2005)("[E]ven if the court engages in a complete plea colloquy, a waiver ... may not be knowing and voluntary if tainted by the advice of constitutionally ineffective trial counsel."); see also, United States v. Attar, 38 F.3d 727, 732 (4th Cir. 1994)(holding "a defendant's agreement to waive appellate review of his sentences is implicitly conditioned on the assumption that the proceedings following entry of the plea will be conducted in accordance with constitutional limitations").

In Johnson, the Fourth Circuit explained that an appeal waiver pursuant to a plea agreement "cannot be knowing and voluntary when the plea agreement itself is the result of advice outside the range of competence demanded of attorneys in criminal cases." Johnson, 422 F.3d at 151 (internal quotations omitted); see also Washington v. Lampert, 422 F.3d 864, 871 (9th Cir. 2005)(holding that a plea agreement that waives the right to file a federal habeas petition pursuant to 28 U.S.C. § 2254 is unenforceable with respect to an ineffective assistance of counsel claim that challenges the voluntariness of the waiver); United States v. White, 307 F.3d 336, 339 (5th Cir. 2002)(holding that a waiver of a right to file a petition for federal habeas corpus does not apply to a claim that the waiver was tainted by ineffective assistance of counsel); United States v. Cockerham, 237 F.3d 1179, 1183-1184 (10th Cir. 2001)(holding although a waiver of collateral review rights is generally enforceable, such a waiver is unenforceable against a claim of ineffective assistance in connection with the negotiation of the waiver itself because it would deprive the defendant the opportunity to assert his Sixth Amendment right to counsel where he had accepted the waiver in reliance on delinquent representation); DeRoo v. United States, 223 F.3d 919 (8th Cir. 2000)("A defendant's plea agreement waiver of the right to seek section 2255 post-conviction relief does not waive defendants' right to argue, pursuant to that

section, that the decision to enter into the plea was not knowing and voluntary because it was the result of ineffective assistance of counsel."); Jones v. United States, 167 F.3d 1142, 1145 (7th Cir. 1999)("Justice dictates that a claim of ineffective assistance of counsel in connection with the negotiation of a cooperation agreement cannot be barred by the agreement itself – the very product of the alleged ineffectiveness."); United States v. Henderson, 72 F.3d 463, 465 (5th Cir. 1995)(holding that a dismissal of an appeal based on a waiver in the plea agreement was improper where the motion to withdraw the plea incorporated a claim that the defendant's waiver of appeal was tainted by ineffective assistance of counsel).

This Court has previously held that a defendant received deficient performance when counsel was unaware of information which would have not only affected the outcome of the case but also altered the advice counsel would have given the defendant. In Robinson v. State, the defendant pleaded guilty to criminal sexual conduct with a minor based upon the advice of counsel following actions which allegedly occurred between 1998 and 2000. 422 S.C. 78, 810 S.E.2d 32 (2018). Plea counsel was unaware of the inapplicability of sentence enhancements from the CSC statute and recommended that Robinson accept the offer. Id. This Court held that "[i]t is clear that Petitioner would not have pled guilty but for counsel's erroneous sentencing advice." Id. at 86, 810 S.E.2d at 86.

"A defendant has the right to the effective assistance of counsel under the Sixth Amendment to the United States Constitution." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). "Where, as here, a defendant is represented by counsel during the plea process and enters his plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel's advice 'was within the range of competence demanded of attorneys in criminal cases.' " Hill v. Lockhart, 474 U.S. 52, 56, 106 S.Ct. 366, 88 L.Ed.2d 203

(1985) (quoting McMann v. Richardson, 397 U.S. 759, 771, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970) ). "[T]he defendant can show prejudice by demonstrating a 'reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.' " Lee v. United States, 137 S.Ct. 1958, 1965, 198 L.Ed.2d 476 (2017) (quoting Hill, 474 U.S. at 59, 106 S.Ct. 366).

As was the case in Robinson, supra, Petitioner received deficient advice. Plea counsel admitted this at the evidentiary hearing, and Petitioner testified that he would not have pleaded guilty had he realized there existed meritorious challenges to the evidence. These defenses could have been discovered by plea counsel, potentially following a thorough review of the discovery materials. Had the differing magistrate signatures not existed in the discovery materials, a Brady violation occurred, and Petitioner was entitled to relief in that manner. Regardless, through no fault of his own, Petitioner did not have the knowledge that he could have fought to suppress the drugs found in the car which was the only evidence against him. Petitioner had standing to challenge the warrant: Petitioner testified that he drove the Dodge Intrepid three to four times per week, he had a key and the ability to let people into and out of the car, he could exclude people from the car, and his mother did not establish any limitations regarding the use of the car. App. 169 l. 7 – App. 170 l. 7. As outlined by his testimony at the evidentiary hearing, Petitioner would not have pleaded guilty and would have insisted on going to trial. Plea counsel's deficient performance caused him to accept a plea and thereby prejudiced Petitioner.

But for plea counsel's deficient advice, Petitioner would not have pleaded guilty. The waiver of the right to bring a collateral challenge contained in the plea agreement should be rendered invalid because the guilty plea itself was based upon deficient advice given without full knowledge of the evidence and therefore also invalid.

## CONCLUSION

Based on the foregoing, Petitioner respectfully requests that the PCR court's decision to deny relief be reversed, that the charges be dismissed, and that a new trial be granted.

Taylor D Gilliam
Appellate Defender

ATTORNEY FOR PETITIONER

This 12th day of June, 2019.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Beaufort County

Honorable Michael G. Nettles, Circuit Court Judge

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DEANGELO CHRISTOPHER MICKELL,

PETITIONER

V.

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RESPONDENT

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CERTIFICATE OF SERVICE

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The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Megan Harrigan Jameson, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on DeAngelo Christopher Mickell, #340668, at Goodman Correctional Institution, 4556 Broad River Road, Columbia, SC 29210, this 12th day of June, 2019.

Taylor D Gilliam
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me this 12th day of June, 2019.

(L.S)

Notary Public for South Carolina
My Commission Expires: 10/26/2019