STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to the Court of Appeals
Appeal From Sumter County
Hon. R. Ferrell Cothran, Circuit Court Judge
Appellate Case Tracking No. 2019-001579

The State, Respondent,

v.

Jermaine Antonio Hodge, Petitioner.

Opinion No. 2019-UP-169 (S.C. Ct. App. filed May 8, 2019)

RETURN TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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ATTORNEYS FOR RESPONDENT

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II. The Court of Appeals correctly affirmed the trial court's finding the closing argument was not improper when the solicitor did not ask the juror's to decide the case based on anything other than the evidence presented and never made a "Golden Rule" type argument.

STATEMENT OF THE CASE

Procedural History

The Sumter County Grand Jury indicted Petitioner for attempted murder and possession of a weapon during the commission of a violent crime. (Indictment; R.295-296). On May 25-26, 2016, he proceeded to trial before the Honorable R. Ferrell Cothran and a jury. The jury found him guilty of the lesser included offense of assault and battery of a high and aggravated nature and the possession of a weapon charge. The court sentenced him to fifteen years in prison on ABHAN and five years, concurrent, on the possession charge.

The Court of Appeals affirmed Petitioner's convictions and sentences. See State v. Hodge, Op. No. 2019-UP-169 (S.C. Ct. App. Filed May 8, 2019). Petitioner timely filed a Petition for Rehearing, which was denied by the Court of Appeals. (App.14). He filed a Petition for Writ of Certiorari and this Return follows.

Factual Background

Petitioner and his girlfriend Lyvonnia Copeland spent the day together on April 21, 2015.[1] (T.20; R.9). He was an occasional overnight guest in Ms. Copeland's home, but did not have his own key. (T.24-25; R.13-14). In the evening, the two began arguing, and Ms. Copeland called her cousin, Lawrence Cooley, to come and talk with Petitioner because Petitioner was "getting on nerves." (T.21; R.10). He arrived in about twenty to twenty-five minutes from her call. (T.22; R.11). Ms. Copeland did not see what happened after Mr. Cooley (the victim) arrived, but he told her he had been stabbed. (T.22-23; R.11-12). Ms. Copeland also did not know where Petitioner was once she got outside. (T.23; R.12).

[1] At the time of trial, the two were no longer in a relationship. (T.25; R.14).

Petitioner claimed he lived with Ms. Copeland, but admitted he did not have a key to the house. (T.32; R.21). He indicated Ms. Copeland got upset with him about a girl at his place of employment and that "she started arguing with [Petitioner] for no reason right." (T.34; R.23). According to Petitioner, Ms. Copeland called her cousin, the victim, and told Petitioner the victim was "going to come over here and beat your ass." (T.35; R.24). Instead of leaving, Petitioner took a knife from the kitchen and put it in his pants pockets and then waited outside for twenty minutes for the victim to arrive. (T.35-36; 44; R.24-24; 33).

Petitioner stated when the victim arrived he got out of the car and pushed Petitioner and said something to the effect of "what the f is going on." (T.38; R.27). Petitioner described the first push as a "little shove." (T.40; R.29). Petitioner told the victim not to do it again. (T.40; R.29). According to Petitioner, the victim then pushed him again. The push was harder this time, but it did not cause Petitioner to fall to the ground. (T.41; R.30). Petitioner "just responded" to the second push by stabbing the victim. (T.41; 48; R.30, 37).

After stabbing the victim, Petitioner fled the scene. (T.49; R.38). He went to his Aunt's house but acknowledged he never called the police. (T.49-50; R.38-39). For over two weeks, Petitioner avoided arrest, including leaving through the back of a home when police arrived looking for him. (T.51; R.40).

The trial court considered Petitioner's immunity request and the testimony presented at the pre-trial immunity hearing. The court found both Petitioner and the victim were invited guests on the property. (T.57; R.46). He found the victim is not on Ms. Copeland's property unlawfully and is not breaking into the home or doing anything unlawful. (T.57; R.46). The court concluded Petitioner was not reasonably in fear of his life or great bodily injury because his testimony was only that he was shoved twice. He held a reasonable person would not believe

that their life was in danger or that deadly force was warranted. (T.58; R.47). "Simply shoving somebody to the point that they knock him down doesn't put, and reasonable person believes that their life was in danger or sever [sic] injury at that point. It just hadn't gotten there." (T.59; R.48). As a result, the court denied Petitioner's request for directed verdict/immunity. (T.59; R.59).

ARGUMENT

I. The Court of Appeals correctly affirmed the trial court's denial of Petitioner's motion for immunity as the facts and circumstances did not support immunity under the Protection of Persons and Property Act and there is evidence to support the trial court's decision.

The Court of Appeals correctly found Petitioner failed to establish by a preponderance of the evidence that he was reasonably in fear of sustaining serious bodily injury or for his life. There was evidence presented to support the trial court's determination so the court did not abuse its discretion in denying Petitioner's motion for pre-trial immunity.

Standard of Review

The question of whether a defendant is entitled to immunity under the Act must be decided prior to trial if either party moves for a determination regarding the Act's application to a defendant's case. State v. Duncan, 392 S.C. 404, 410, 709 S.E.2d 662, 665 (2011). "[W]hen a party raises the question of statutory immunity prior to trial, the proper standard for the circuit court to use in determining immunity under the Act is a preponderance of the evidence." Id. at 411, 709 S.E.2d at 665. The South Carolina Supreme Court clarified consideration of immunity under the Act does not require a trial court to accept a defendant's version of the underlying facts. State v. Curry, 406 S.C. 364, 371, 752 S.E.2d 263, 266 (2013).

In an appeal from a circuit court judge's pre-trial determination regarding a claim of statutory immunity, the appellate court reviews the circuit court judge's ruling for an abuse of discretion. Curry, 406 S.C. at 370, 752 S.E.2d at 266. "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." State v. Pittman, 373 S.C. 527, 647 S.E.2d 144 (2007). The abuse of discretion standard does not allow the evidence to be reweighed or allow for a reassessment of

the trial court's assessment of witness credibility or lack thereof. Cf. State v. Mitchell, 382 S.C. 1, 675 S.E.2d 435 (2009) (equating the "any evidence" standard of review in criminal cases to the abuse of discretion standard of review and emphasizing that, under this standard, the appellate court "does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial court's ruling is supported by any evidence").

Merits

Pursuant to the Act:

> A person who uses deadly force as permitted by the provisions of this article or another applicable provision of law is justified in using deadly force and is immune from criminal prosecution and civil action for the use of deadly force, unless the person against whom deadly force was used is a law enforcement officer acting in the performance of his official duties and he identifies himself in accordance with applicable law or the person using deadly force knows or reasonably should have known that the person is a law enforcement officer.

S.C. Code Ann. § 16-11-450(A) (Supp. 2014). The Act addresses the presumption of fear by establishing:

> (A) A person is presumed to have a reasonable fear of imminent peril of death or great bodily injury to himself or another person when using deadly force that is intended or likely to cause death or great bodily injury to another person if the person:
>
> (1) against whom the deadly force is used is in the process of unlawfully and forcefully entering, or has unlawfully and forcibly entered a dwelling, residence, or occupied vehicle ...; and
>
> (2) who uses deadly force knows or has reason to believe that an unlawful and forcible entry or unlawful and forcible act is occurring or has occurred.
>
> (B) The presumption provided in subsection (A) does not apply if the person:

> (1) against whom the deadly force is used has the right to be in or is a lawful resident of the dwelling, residence, or occupied vehicle including, but not limited to, an owner, lessee, or titleholder;
>
> . . . .

S.C. Code Ann. § 16–11–440 (Supp. 2014).

Subsection (A) does not apply in the instant case because the victim was not in the process of unlawfully and forcefully entering the residence, already unlawfully or forcefully entered the residence, or acting in a manner in which it was reasonable to believe an unlawful and forceful entry was occurring. Additionally, as the trial court found and is supported by the testimony of Ms. Copeland, both the victim and Petitioner were invited guests at the property so the victim had a right to be at the residence—the same right as Petitioner.[2] As a result, Subsection (B) prevents application of the presumption of fear in this case. See Curry, 406 S.C. at 370, 752 S.E.2d at 266 (finding "the presumption of subsection (A) does not apply if the victim has an equal right to be in the dwelling or residence" and concluding "[b]ecause Collins was a social guest and rightfully in the apartment, subsection (A) is inapplicable to Petitioner"). Curry is controlling and so the presumption applicable under Subsection (A) is not applicable.

The Act further provides:

> A person who is not engaged in an unlawful activity and who is attacked in another place where he has a right to be, including, . . ., his place of business, has no duty to retreat and has the right to stand his ground and meet force with force, including deadly force, if he reasonably believes it is necessary to prevent death or great bodily injury to himself or another person or to prevent the commission of a violent crime as defined in Section 16-1-60.

S.C. Code Ann. § 16-11-440(C) (Supp. 2014) (emphasis added).

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[2] Petitioner maintained at the hearing he lived with Ms. Copeland; however, she disagreed and indicated he stayed there two or three times a week, and she considered him a guest in her home. (T.18; 24; 32; R.7; 13; 21). Significantly, both Petitioner and Ms. Copeland indicated Petitioner did not have a key to the residence. (T. 18; 25; 32; R.7; 14; 21). The trial court specifically found both the victim and Petitioner were "two invited guests." (T.57; R.46).

In analyzing the interplay between sections 16-11-440(C) and 16-11-450, the South Carolina Supreme Court explained: "Consistent with the Castle Doctrine and the text of the Act, a valid case of self-defense must exist, and the trial court must necessarily consider the elements of self-defense in determining a defendant's entitlement to the Act's immunity. This includes all elements of self-defense, save the duty to retreat." Curry, 406 S.C. at 371, 752 S.E.2d at 266. The Court further articulated: "immunity is predicated on an accused demonstrating the elements of self-defense to the satisfaction of the trial court by the preponderance of the evidence." Id. at 372, 752 S.E.2d at 267.

As a result, in addition to establishing application of section 16-11-440(C), Petitioner must also the elements of self-defense:

> First, the defendant must be without fault in bringing on the difficulty. Second, the defendant must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger. Third, if his defense is based upon his belief of imminent danger, a reasonably prudent man of ordinary firmness and courage would have entertained the same belief. If the defendant actually was in imminent danger, the circumstances were such as would warrant a man of ordinary prudence, firmness and courage to strike the fatal blow in order to save himself from serious bodily harm or losing his own life. Fourth, the defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance.

State v. Davis, 282 S.C. 45, 46, 317 S.E.2d 452, 453 (1984) (emphasis added). The fourth element of self-defense—the duty to retreat—is excused under the Act if the defendant can establish entitlement to its consideration under Subsection (C).

The circuit court in the instant case did not abuse his discretion in denying Petitioner's motion for immunity. Initially, this case is similar to the case of State v. Manning, 418 S.C. 38, 791 S.E.2d 148 (2016). In Manning, the victim who was an invited guest and the defendant got

into a physical and verbal argument. The victim originally pulled a weapon on the defendant, who was able to take the weapon from the victim. Id. at 41, 791 S.E.2d at 149. The defendant then fired when the victim approached him, shooting the victim in the head. At the hearing, the State maintained because the victim was unarmed at the time of the shooting, the defendant was not reasonably in fear of great bodily injury or death at that time. In affirming the denial of immunity, the South Carolina Supreme Court explained: "the victim was unarmed at the time she was shot, meaning we cannot say that the trial judge abused his discretion in denying Respondent immunity under subsection (C)." Id. at 45, 791 S.E.2d at 151.

In this case, the victim pushed Petitioner twice. At that time, Petitioner was armed with a knife he had retrieved right before the victim arrived and the victim was unarmed. This fact is not in controversy. (T.49; R.38). In Manning, this Court held the trial court did not abuse its discretion in denying immunity when one party was armed, and the other was not, regardless of the other facts presented. The instant case does not present the same level of apprehension experienced by the defendant in Manning, who disarmed his girlfriend of the gun originally pointed at him. In this case, the victim merely pushed Petitioner twice, even based on Petitioner's own testimony. (T.48; R.37). Here, the victim was never armed, never drew or presented a weapon, never threatened Petitioner with a weapon. The only party armed in this altercation was Petitioner, and he never used the knife as a deterrent, but instead immediately stabbed the victim without warning. The trial court correctly determined Petitioner was not reasonably in fear of his life or serious bodily injury at the time of the shooting, especially in light of the fact he was the only person wielding a weapon. As a result, the circuit court did not err in denying Petitioner's motion for immunity.

Additionally, the objective evidence presented in this case does not establish Petitioner's fear of imminent harm was reasonable. Petitioner acknowledged he knew the victim and that they had never had "bad blood" or "any beef" between them. (T.43-44; R.32-33). The two had no prior history of difficulties the day of the incident or at any point in their past.

This case is clearly distinguishable from State v. Douglas, 411 S.C. 307, 768 S.E.2d 232 (Ct. App. 2014) and State v. Jones, 416 S.C. 283, 786 S.E.2d 132 (2016), in which the appellate courts found the evidence supported a determination the defendants were entitled to immunity under the Act. In Douglas, the victim taunted the defendant by refusing to give him back a bottle of prescription medicine. When the defendant yelled at the victim, the victim "snapped." The victim grabbed the defendant and threw him up against the refrigerator, causing Douglas to hit his head. Douglas, 411 S.C. at 313, 768 S.E.2d at 236. The victim held him there until the defendant felt his knees buckle underneath him. When the victim released the defendant, Douglas fell on the floor and hit his head again. The victim then got on top of the defendant and struck him in the eye. Douglas told the victim several times to leave him alone and to leave his house, but the victim refused. After biting the defendant in the leg, the victim went into the dining room and started laughing. The victim advanced on Douglas and "looked like a man possessed." The defendant was "terrified" and fired a shot killing the victim. Id. at 314, 768 S.E.2d at 236. The circuit court in Douglas found by a preponderance of the evidence that (1) the defendant reasonably believed shooting the victim was necessary to prevent great bodily injury to himself, and (2) Douglas acted in self-defense. The Court of Appeals explained: "The evidence supports these findings. [Douglas] presented several photographs showing severe bruising on [his] upper arms, a black eye, a scraped knee, and several marks on his legs and chest." Id. at 319, 768 S.E.2d at 239.

In Jones, the defendant and the victim were involved in a physical altercation over a cell phone that the victim purchased and gave to the defendant. According to the defendant, the victim began pushing her and punching her as she began to leave their apartment. The defendant stated that, while she was outside the apartment, the victim pulled her hair and attempted to force her back inside. During this confrontation, some of the defendant's hair weave was removed from her head as the victim dragged her down the street. Jones, 416 S.C. at 287, 786 S.E.2d at 134. The defendant claimed the victim continued to try and force her back into the apartment. After she threw the phone on the ground, the defendant was able to flee the apartment Id. at 288, 786 S.E.2d at 134.

The defendant reentered the apartment when she believed things had cooled down to collect her things. The victim started yelling and pushing the defendant again telling her to get out. The victim then grabbed her, asked her if she was mad, and began shaking her while telling her "It's over. It's your fault." Id. at 288, 786 S.E.2d at 135. The Court found the defendant believed the victim was getting ready to hit her again, so she "grabbed the knife out of [her] shirt and stabbed him" one time in the chest. Id.

In the instant case, there is no prior altercation between the parties and not reason justifying Petitioner's alleged belief he was in fear for his life. The victim in this case arrived after being called by his cousin, Petitioner's girlfriend at the time. According to Petitioner's version of events, after his Ms. Copeland called the victim to come over and allegedly "beat [his] ass,[3]" Petitioner retrieved the knife from the kitchen[4] and just waited outside on the front porch.

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[3] Ms. Copeland testified she called the victim to come and talk with Petitioner because she and Petitioner were having an argument. (T.20-21; R.9-10).

[4] Petitioner testified he grabbed the knife "like about a minute before [the victim] came" and that he did not know why he grabbed the knife. He stated: "No reason at all. Just got it for no reason. I didn't intend to do nothing with it really." (T.44; R.33). His own testimony clearly indicates he did not obtain the knife out of fear of the victim or because he needed it for protection like the testimony in Jones established.

(T.35; 44; R.24; 33). The victim arrived, got out of his car, stated: "what the f is going on" and pushed Petitioner. (T.38; R.27). Petitioner described it as a "little shove." (T.40; R.29). He testified he told the victim not to do it again, but the victim pushed him "hard" that time. (T.40-41; R.29-30). Petitioner stated he "almost fell" as a result of the push. It was after this push that Petitioner pulled out the knife and stabbed the victim. (T.48; R.37).

After he stabbed him, Petitioner did not remain at the scene. Instead, he fled the scene and then further evaded police while they were looking for him. (T.49-51; R.38-40). On one incident, when the police arrived he went out the back because he knew they were there for him. (T.51; R.40). Over two weeks later, officers finally caught Petitioner to arrest him. (T.51; R.40).

The evidence in this case supports the trial court's determination Petitioner failed to demonstrate he was in reasonable fear for his life or of serious bodily injury at the time he stabbed the victim. Instead, the evidence indicates Petitioner did not fear the victim, harbored no reason to believe the victim would significantly harm him, suffered no injury at all from the two pushes from the victim, and then fled the scene and evaded arrest. The trial court's denial of Petitioner's motion for immunity should be affirmed because there is evidence to support the finding Petitioner failed to establish the requisite elements of self-defense because he could not have reasonably feared for his life or feared he would suffer serious bodily injury at the time of the stabbing.

II. The Court of Appeals correctly affirmed the trial court's finding the closing argument was not improper when the solicitor did not ask the juror's to decide the case based on anything other than the evidence presented and never made a "Golden Rule" type argument.

The Court of Appeals correctly found State's closing argument was proper and was not the type of "Golden Rule" argument frowned upon by the Court. Further, the argument did not suggest to the jury to make its determination based on any factor other than the evidence presented at trial. Finally, Petitioner's argument should be deemed abandoned because it is argued in an incredibly conclusive manner.

Argument Abandoned

First, Petitioner's issue is addressed in a conclusive manner and as a result should be deemed abandoned by this Court. See, e.g., Brouwer v. Sisters of Charity Providence Hosps., 409 S.C. 514, 520 n.4, 763 S.E.2d 200, 203 n.4 (2014) (refusing to consider an argument in the appellant's brief that was "conclusory" and "not supported by any authority"); State v. Jones, 344 S.C. 48, 58–59, 543 S.E.2d 541, 546 (2001) (stating an argument is deemed abandoned on appeal when conclusory and without supporting authority); First Sav. Bank v. McLean, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (noting a claim is deemed abandoned when the appellant fails to support it with arguments or citations to authority). Petitioner's one citation involves a case in which the oath presented to the jury was challenged and he references no cases involving closing arguments. The argument is entirely conclusive with no analysis provided. As a result, this Court should deem the issue abandoned and refuse to address the merits.

Standard of Review

"A trial court is vested with broad discretion in dealing with the range and propriety of a closing argument." State v. Harris, 382 S.C. 107, 120, 674 S.E.2d 532, 539 (Ct. App. 2009). "An

appellate court will not disturb a trial court's ruling regarding a closing argument unless the trial court commits an abuse of discretion." Id. In assessing the propriety of remarks made during the State's closing argument, appellate courts must determine "whether the solicitor's comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" Vaughn v. State, 362 S.C. 163, 169-170, 607 S.E.2d 72, 75 (2004) (quoting Donnelly v. DeChristoforo, 416 U.S. 637, 642 (1974)).

Merits

Even if this Court considers the argument, the issue is without merit. "In keeping their closing arguments within the record, solicitors additionally must tailor their remarks 'so as not to appeal to the personal biases of the jury' or 'arouse the jurors' passions or prejudices.'" Tappeiner v. State, 416 S.C. 239, 250, 785 S.E.2d 471, 477 (2016) (quoting Von Dohlen v. State, 360 S.C. 598, 609, 602 S.E.2d 738, 744 (2004)). Solicitors should avoid comments that ask jurors to place themselves in the victim's—or another party's—shoes, because those types of comments tend to "'completely destroy all sense of impartiality of the jurors.'" Brown v. State, 383 S.C. 506, 515-16, 680 S.E.2d 909, 914 (2009) (quoting State v. Reese, 370 S.C. 31, 38, 633 S.E.2d 898, 901 (2006)). This Court has prohibited "golden rule argument," in which jurors are urged to place themselves in the position of a party, a victim, or a victim's family member and decide the case from that perspective because it causes "jurors to decide a case based on passion and prejudice instead of a reasoned, impartial consideration of evidence presented to them." Von Dohlen, 360 S.C. at 609, 602 S.E.2d at 744.

The State never asked the jury to decide this case based on anything other than the evidence and testimony presented. During the closing argument, the solicitor stated:

> The final thing is the presumption of innocence. . . . . He is presumed innocence [sic] unless and until you the jurors **make a**

> **determination that he's guilty beyond a reasonable doubt**. That stays with him. It's like a robe, it's like a nice warm shirt . . . . As soon as you get to the jury room and **you start looking at the pictures and weighing the evidence and start weighing the inconsistences of the defendant, you can start taking that robe off. That's what the law says.** You can take off that presumption of innocense [sic]. The shirt of righteousness. And I submit to you that when you go over this evidence you will take it off.

(T.328-329; R.264-265) (emphasis added). The solicitor is making it clear that the jury is to decide its verdict beyond a reasonable doubt after looking at and weighing the evidence and testimony. He is not telling them to decide the case on anything other than the evidence before the jury. He then states:

> And usually, save it, save, that shirt, that clothe of innocents and when you come back in here with your verdict **which we submit should be based on the evidence**, Attempted Murder, malicious attempt and intent to kill [Lawrence Cooley.] [W]hen you come back in with that verdict, bring the shirt in symbolically. Bring it in symbolically because the only innocent person in this room is Lawrence Cooley. And with your verdict symbolically give him that shirt, that cloak and let it keep him warm.

(T.329; R.265) (emphasis added). Again the solicitor has reminded the jury that their verdict should be based on the evidence.

The State, even in the portion cited by Petitioner, never asked that the verdict be issued symbolically as opposed to on the basis of the evidence. The State asked the jury to consider the evidence, remove Petitioner's cloak or shirt metaphorically serving as the presumption of innocence, and give that cloak or shirt to the victim after rendering their verdict of guilty. The State did not ask the jury to step into the shoes of the victim, but instead asked the jury to serve its function as fact finder and, ultimately, return a guilty verdict. Additionally, any error is entirely harmless in light of the evidence against Petitioner and the fact the comments by the

solicitor did not infect the trial with unfairness. In light of the entirety of the closing argument, the trial court did not err in overruling Petitioner's objection to a portion of the State's argument.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Court should deny the Petition for Writ of Certiorari to the Court of Appeals.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

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v.

Jermaine Antonio Hodge, Petitioner.

PROOF OF SERVICE

I, Caroline Collins, certify that I have served the within Return to Petition For Writ of Certiorari to the Court of Appeals by having delivered copies of the same addressed to:

Wanda H. Carter, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211

I further certify that all parties required by Rule to be served have been served.
This 8th day of October, 2019.

CAROLINE COLLINS
Administrative Coordinator
Office of the Attorney General
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Columbia, South Carolina 29211
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ALAN WILSON
ATTORNEY GENERAL

October 8, 2019

Wanda H. Carter, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211

Re: State v. Jermaine Hodge
Appellate Case Tracking No. 2019-001579

Dear Ms. Carter:

I am enclosing two (2) copies of the Return to Petition for Writ of Certiorari to the Court of Appeals in the above-referenced case.

If you have any questions concerning this matter, please contact me.

Sincerely,

William M. Blitch, Jr.
Senior Assistant Deputy Attorney General
S.C. Bar No. 15608

cc: Honorable Daniel E. Shearouse (original and six enclosed)
Honorable Jenny A. Kitchings
Victim Advocacy Division (enclosure)