

**ORIGINAL**

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to Aiken County  
Robert E. Hood, PCR Judge  
R. Knox McMahon, Plea Judge  
Appellate Case No. 2017-000001

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RAPHAEL ALEXANDER WOODEN,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

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**BRIEF OF RESPONDENT**

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ALAN WILSON  
Attorney General

MEGAN HARRIGAN JAMESON  
Senior Assistant Deputy Attorney General  
S.C. Bar No. 100108

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

ATTORNEYS FOR RESPONDENT

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## **STATEMENT OF ISSUE ON APPEAL**

### **Petitioner's Statement of Issue on Appeal**

The post-conviction relief judge erred in finding defense counsel did not give petitioner erroneous advice regarding parole eligibility that induced petitioner's guilty plea.

### **Respondent's Counterstatement of Issue on Appeal**

The post-conviction relief court properly determined Petitioner failed to meet his requisite burden of proof of establishing that plea counsel was constitutionally ineffective when advising Petitioner regarding parole eligibility where counsel properly advised Petitioner he would be required to serve at least eighty-five percent of his sentence before becoming eligible for any early release from imprisonment and the post-conviction relief court found Petitioner's assertions that he would not have pled guilty but for counsel's purported misadvice not credible.

## STATEMENT OF THE CASE

On May 18, 2013, Petitioner Raphael Alexander Wooden, along with an accomplice, shot and killed Zannie Worrell, Jr. during an armed robbery of Island Cuts Barber Shop in Beech Island, South Carolina, and was arrested a shortly thereafter. Subsequently, during its February 2014 term, the Aiken County Grand Jury indicted Petitioner for murder (2014-GS-02-00136), three counts of armed robbery (2014-GS-02-00135, -00138, -00139), and possession of a weapon during the commission of a violent crime (2014-GS-02-00137). Tanya D. Jeffords, Esquire, represented Petitioner. Second Circuit Solicitor J. Strom Thurmond, Jr. prosecuted the case.

On November 10, 2014, Petitioner appeared before the Honorable R. Knox McMahan, circuit court judge, and pursuant to negotiations with the State, entered guilty pleas to the lesser-included offense of voluntary manslaughter and two count of armed robbery. The remaining count of armed robbery and possession of a weapon during the commission of a violent crime were dismissed pursuant to the plea agreement. In accordance with the negotiated terms of the plea agreement, Judge McMahan sentenced Petitioner to imprisonment for twenty-five years for each offense with the sentences to be served concurrently. Petitioner did not pursue a direct appeal challenging his convictions or sentences.

On March 9, 2015, Petitioner filed a timely application for post-conviction relief, which he later amended through counsel, Aimee J. Zmroczek, to include the following grounds for relief:

1. Ineffective Assistance of Counsel
  - a. Failing to properly explain the sentencing collateral affects and parole;
  - b. Failing to mitigate and examine co-defendant sentences;
  - c. Failing to move for a motion to reconsider
  - d. Failing to request a continuance under *Langford*;

- e. Failing to investigate and challenge extradition process and due process violations;
  - f. Failing to object to improper solicitor comments at sentencing and identifying issues with discovery.
2. Prosecutorial Misconduct
- a. Failing to reveal the deal.

On September 23, 2016, an evidentiary hearing was convened at the Aiken County Courthouse before the Honorable Robert E. Hood, circuit court judge. Petitioner was present at the hearing and was represented by counsel Zmroczek. Respondent was represented by Assistant Attorney General Julie A. Coleman of the South Carolina Attorney General's Office. At the evidentiary hearing, Petitioner testified on his own behalf. Respondent presented testimony from Solicitor Thurmond and plea counsel Jeffords.

Following the evidentiary hearing, Judge Hood denied and dismissed the application by written order signed October 28, 2016, and filed November 3, 2016. In this order, the court specifically found Petitioner's testimony that he was actively misadvised about parole eligibility and that this misadvice induced his plea was not credible, while finding plea counsel's testimony that she advised Petitioner he would not be eligible for early release until serving eighty-five percent of his sentence to be credible. Petitioner filed a timely motion to reconsider the denial of relief, and following a return to the motion from Respondent, the court denied the motion to reconsider by order dated December 5, 2016.

Petitioner filed a timely Notice of Appeal. Petitioner, through counsel, filed a Johnson<sup>1</sup> petition for writ of certiorari and appendix. This Court denied counsel's request to be relieved and directed the parties to address the following question: "Did the post-conviction relief judge err in finding defense counsel did not give petitioner erroneous advice regarding parole eligibility that induced Petitioner's guilty plea?" Thereafter, Petitioner filed his petition for

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<sup>1</sup> Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988).

certiorari and Respondent then filed its return to the petition. By written order filed September 21, 2018, this Court granted certiorari and instructed the parties to file briefs pursuant to Rule 243(j), SCACR.

## STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839 (2018). When reviewing factual findings, the appellate courts defer to the post-conviction relief court's factual findings and will uphold them if there is probative evidence in the record to support them. Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018); Smalls, 422 S.C. at 180-81, 810 S.E.2d at 839-40 (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Smalls, 422 S.C. at 180-81, 810 S.E.2d at 839-40. Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

## ARGUMENT

**The post-conviction relief court properly determined Petitioner failed to meet his requisite burden of proof of establishing that plea counsel was constitutionally ineffective when advising Petitioner regarding parole eligibility where counsel properly advised Petitioner he would be required to serve at least eighty-five percent of his sentence before becoming eligible for any early release from imprisonment and the post-conviction relief court found Petitioner's assertions that he would not have pled guilty but for counsel's purported misadvice not credible.**

On appeal, Petitioner argues the post-conviction relief court erred in denying him relief as to his allegation that plea counsel was ineffective for providing him erroneous advice regarding parole eligibility. Specifically, Petitioner argues that plea counsel erroneously advised him he would be parole eligible if he pled guilty to the lesser-included offense of voluntary manslaughter and it was this misadvice regarding parole eligibility that induced his plea. Petitioner argues this misadvice by plea counsel rises to the level of constitutional ineffectiveness and warrants the reversal of his convictions and a remand for retrial. The post-conviction relief court properly found Petitioner failed to establish plea counsel was constitutionally ineffective and denied relief. This Court should affirm the post-conviction relief court's denial of relief.

Petitioner, like all other defendants, has a right to the assistance of effective counsel as provided by the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008). Petitioner has the burden of proving the allegations in his post-conviction relief action, and when alleging that trial counsel was constitutionally ineffective, he must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that it cannot be relied upon as having produced a just result." Strickland, 466 U.S. at 686

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668. First, Petitioner must prove that counsel's performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). Petitioner must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, counsel's deficient performance must have prejudiced Petitioner such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, the applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52 (1985).

"A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of a plea by showing that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty, but would have insisted on going to trial." Holden v. State, 393 S.C. 565, 572, 713 S.E.2d 611, 615 (2011) (citing Rolen v. State, 384 S.C. 409, 413, 683 S.E.2d 471, 474 (2009)).

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. 668.

Moreover, Strickland does not require a finding of ineffectiveness merely for deviation from some rigid rule of representation. Rather, Strickland requires the post-conviction relief applicant to prove "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. at 697. Therefore, the function of the post-conviction relief court is to determine if "in light of all the circumstances, the identified acts or omissions were outside the wide range of professional competent assistance" required of a criminal defense attorney." Id. at 690.

"A guilty plea is a solemn, judicial admission of the truth of the charges against an individual; thus, a criminal inmate's right to contest the validity of such a plea is usually, but not invariably, foreclosed." Dalton v. State, 376 S.C. 130, 137, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing Blackledge v. Allison, 431 U.S. 63, 74 (1977)). "Indeed, where a thorough colloquy is conducted, courts must exercise caution in setting aside the guilty plea." Garren v. State, 423 S.C. 1, 12, 813 S.E.2d 704, 712 (2018); see Jamison v. State, 410 S.C. 456, 469-71, 765 S.E.2d 123, 129-30 (2014) (observing that "guilty plea[s] must be treated as final in the vast majority of cases" and instructing that caution must be exercised so as not to "undermine the solemn nature of a guilty plea and the finality that generally attaches to a guilty plea").

“In order for a defendant to knowingly and voluntarily plead guilty, [a defendant] must have a full understanding of the consequences of his plea and of the charges against him.” Smith v. State, 329 S.C. 280, 283, 494 S.E.2d 626, 628 (1997) (citing Simpson v. State, 317 S.C. 506, 455 S.E.2d 175 (1995)). This Court has previously invalidated pleas where the defendant was not advised of the mandatory sentence for the offense to which he was pleading or when the plea court failed to ask the defendant “any factual questions, nor questioned him about the possibility of a severe sentence, and it was never established that the defendant understood the severity of the crimes or the sentences they carried.” Smith, 329 S.C. at 283, 494 S.E.2d at 628 (citing State v. Hazel, 275 S.C. 392, 271 S.E.2d 602 (1980), Dover v. State, 304 S.C. 433, 405 S.E.2d 391 (1991)).

However, this Court has repeatedly held “parole eligibility has been held to be a collateral consequence of sentencing of which a defendant need not be specifically advised before entering a guilty plea.” Smith v. State, 329 S.C. at 283, 494 S.E.2d at 628 (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)); see also Randall v. State, 356 S.C. 639, 641, 591 S.E.2d 608, 609 (2004) (“This Court has repeatedly acknowledged that normally, parole eligibility is a collateral consequence of sentencing of which a defendant need not be specifically advised before entering a guilty plea.”); Knox v. State, 340 S.C. 81, 530 S.E.2d 887 (2000) (counsel is not ineffective for failing to advise a defendant regarding parole eligibility in connection with his guilty plea because it is a collateral consequence of sentencing). In Brown, this Court elaborated:

The imposition of a sentence may have a number of collateral consequences, however, and a plea of guilty is not rendered involuntary in a constitutional sense if the defendant is not informed of the collateral consequences. Parole eligibility typically is a collateral consequence of sentencing about which a defendant need not be specifically advised before entering a guilty plea. This is because parole

eligibility is not a matter within the jurisdiction of the trial court, but falls within the province of the Board of Probation, Parole, and Pardon Services.

Brown v. State, 306 S.C. 381, 382-83, 412 S.E.2d 399, 400-01 (1991) (emphasis in original) (internal citations omitted). However, if counsel “undertakes to advise the defendant about parole eligibility and gives erroneous advice, the plea may be collaterally attacked.” Smith v. State, 329 S.C. at 283, 494 S.E.2d at 628 (citing Hinson v. State, 297 S.C. 456, 377 S.E.2d 338 (1989), Brown, 306 S.C. 381, 412 S.E.2d 399).

In the present case, Petitioner argues he is entitled to post-conviction relief because plea counsel affirmatively misadvised him regarding parole eligibility where she advised him he would be eligible for parole when the offense to which he pled guilty—voluntary manslaughter—is a no-parole offense. The post-conviction relief court properly rejected this assertion, finding plea counsel had properly advised Petitioner about his possible eligibility for early release following his guilty plea to voluntary manslaughter. This finding is legally correct and supported by the record, as plea counsel properly advised Petitioner that he would be required to serve at least eighty-five percent of his sentence before becoming eligible for any early release from imprisonment.

Petitioner was indicted for murder, which carries either the death penalty or a sentence ranging from a mandatory minimum of thirty years to life without parole. S.C. Code Ann. § 16-3-20(A) (1976). As the State did not seek the death penalty, Petitioner faced a term of imprisonment ranging from thirty years to life without parole. Regardless of the sentence he was given, he would not have been entitled to any form of parole or early release if convicted of murder. S.C. Code Ann. § 16-3-20(A) (“No person sentenced to a mandatory minimum term of imprisonment for thirty years to life pursuant to this section is eligible for parole or any early release program . . .”)

In contrast, voluntary manslaughter carries a potential sentence ranging from two to thirty years imprisonment. S.C. Code Ann. § 16-3-50 (1976). Voluntary manslaughter is classified as a Class A felony offense in South Carolina, which means it is a “no parole offense.” S.C. Code Ann. 1976 § 16-1-90; S.C. Code Ann. 1976 § 24-13-100. An inmate convicted of a “no parole offense” is not eligible for early release, discharge, or community supervision until the inmate has served at least eighty-five percent of the actual term of imprisonment imposed. S.C. Code Ann. § 24-13-150(A). After completing eighty-five percent of the term of imprisonment for a “no parole offense,” an inmate is eligible to participate in a community supervision program operated by the Department of Probation, Parole, and Pardon Services. S.C. Code Ann. § 24-21-560. This community supervision program essentially functions in the same way as parole, where the inmate is released from prison but is supervised by a member of the Department of Probation, Parole, and Pardon Services. See id.

An inmate convicted of a “parole-able” offense is eligible for early release after serving part of his or her sentence. S.C. Code Ann. § 24-21-610 provides that an inmate sentenced for not more than thirty years may be eligible for parole after serving at least one-third of the term of imprisonment. It further provides that an inmate serving more than thirty years for a parole-able offense may be eligible for parole after serving at least ten years. During their parole term, the inmate is supervised by a member of the Department of Probation, Parole, and Pardon Services, and may have to adhere to certain restrictions and terms set for his or her parole, and if he or she does not comply with the terms, he or she is imprisoned. S.C. Code Ann. §24-21-660.

Essentially, the three options for South Carolina convictions are (1) crimes that do not allow any parole at all and must be served day-for-day, such as murder; (2) “no parole” offenses, such as voluntary manslaughter, which do not allow eligibility for parole but, instead, allow for

eligibility in a community supervision program that functions in essentially the same manner as parole upon the service of eighty-five percent of the sentence; and (3) “parole-able” offenses, which allow eligibility for parole after serving portion of the sentence. Accordingly, even though the crime of voluntary manslaughter is not classified as a “parole-able” offense, it still allows for early release from incarceration before the expiration of the inmate’s sentence, whereas a conviction for murder for does not allow for any early release from imprisonment and the inmate would have to be serve the entirety of his sentence day-for-day.

Petitioner asserts plea counsel misadvised him about his parole eligibility if he pled guilty to voluntary manslaughter because counsel advised him that voluntary manslaughter is a “paroleable” offense that would allow him to be released on parole and that this is what induced his guilty plea.

In contrast, plea counsel testified at the evidentiary hearing that she explained Petitioner’s parole eligibility to him in their discussions about whether to accept the State’s plea offer to the lesser-included offense of voluntary manslaughter. Counsel explained how her plea negotiations with the State progressed, eventually securing a plea offer for a negotiated twenty-five year term for voluntary manslaughter on the eve of trial, and that she reviewed the terms of Petitioner’s eligibility for early release with the State and then with Petitioner:

So when [the State] finally -- on that week before, they called me and may have been about a Friday or a Saturday, I don’t remember what it was but we all sat down and they said that they would offer [to] voluntary [manslaughter]. And I think we started out at 30 or something and then it was 25. I think I was saying, well and I hadn’t talked to Mr. Wooden at this point. It was our first opportunity. 20 and they actually -- one of the prosecutors put it on a grid, you know, if he did voluntary manslaughter at least he would be eligible **and have to do 85 percent**. It came out to about 22 or something like that.

That was on a piece of paper. I remember that. I went back. The prosecutor would not go down to 20. I asked for 20 and I think we were fighting about even those five years at that point. And he wouldn’t move. And I wasn’t going to move. And

-- but then at the end we were going to do life without parole versus a five years difference.

I went back. I spoke with Mr. Wooden about it . . . I talked to the family because I think that, you know, it's very difficult for a 19-year-old to make all the decisions. And they assured me. And so I talked to the family about the risks.

(App. 88, line 17 – 89, line 17). She continued:

I think where the confusion may have come in because I knew it was – that for **South Carolina it's a no parole-able offense. We talked about that. But you have to do 85 percent. And there's another statute that said you have to do 85 percent.** To me that is parole-able.

And in Georgia, if you say it's no parole that means you have to do day-for-day. So and me saying parole I'm going over 85 percent. I never indicated it would be a one-third or that sort of thing. **And as discussed that you would have to do at least 85 percent of that charge because that was my understanding of the law.**

And, when he wrote me afterwards I was concerned that I had made a mistake that, you know, absolutely he would have to do every day of 25 years. And, you know, **just confirmed that, no, still you have to do at least 85 percent.** I did explain to him you could do every day or they could let you out earlier.

And so I think that's – maybe that's where the confusion came in with the no parole-able and parole-able sort of situation.

(App. 90, line 15 – 91, line 13).

After a discussion on cross-examination about whether plea counsel could have confused Petitioner in her advice about parole eligibility with the law in Georgia, where she also practices, plea counsel clarified the following:

PCR court: Okay. So you told [Petitioner] prior to him pleading guilty that it was 85 percent, right?

Plea Counsel: I think that I talked to him about the numbers.

PCR court: Right. If he pled to 25, 22 and some change based upon the chart.

Plea Counsel: Yes.

PCR court: And that conversation took place prior to him entering the guilty plea, correct?

Plea Counsel: Yes, but I had always talked about it as a parole-able offense.

PCR court: Sure. Okay.

...

Ms. Zmroczek: So even though you wrote the letter in February of 2015 explaining the 85 percent, it's your testimony that you talked about the 85 percent prior to his pleading?

Plea Counsel: Yes, because I researched it. That's what I looked at.

Zmroczek: I just wanted to clarify that. Thank you.

Plea Counsel: But I did say it was parole-able because I felt like 85 percent was parole-able.

(App. 104, line 6 - 106, line 14).

In denying relief, the post-conviction relief court specifically found plea counsel's testimony regarding her advice on parole eligibility was credible—that counsel had properly informed Petitioner he would be required to serve at least eighty-five percent of his sentence before being eligible for early release from incarceration. (App. 121).

The record establishes that plea counsel correctly advised Petitioner before his guilty plea that he would have to serve at least eighty-five percent of his sentence before becoming eligible for any type of early release if he pled guilty to voluntary manslaughter. While plea counsel may have referred to voluntary manslaughter as a "parole-able" offense because it allowed for the opportunity for early release from incarceration before the expiration of his sentenced on the community supervision program (which essentially functions for all intents and purposes like early release on parole) unlike murder which does not allow for any type of early release and must be served day-for-day, the advice counsel gave was correct under South Carolina law—that Petitioner would be eligible for early release after serving at least eighty-five percent of his sentence. Petitioner's attempts to equate the sole fact that counsel used the term "parole-able" as

the basis for which relief should have been granted but entirely fails to recognize that the actual advice given to Petitioner—that he would have to serve eighty-five percent of his sentence before becoming eligible for any type of early release—was legally correct advice.

Moreover, even if this Court were to determine that counsel was in some way deficient in her explanation to Petitioner of possible early release from imprisonment before the expiration of his sentence, Petitioner has nonetheless failed to establish that he was prejudiced by this purported misadvice. After listening to the testimony presented at the evidentiary hearing, the post-conviction relief court specifically found Petitioner's testimony was **not credible**. (App. 121). This includes a finding that Petitioner's testimony that he would have declined the State's plea offer and proceeded to trial on indictments for murder, three counts of armed robbery, and possession of a weapon for a violent crime but for counsel's purported misadvice regarding parole eligibility to be not credible. These credibility findings must be afforded great weight on appellate review. See Frierson v. State, 423 S.C. 257, 262, 815 S.E.2d 433, 435 (2018) (“[W]e afford great deference to a PCR court's credibility findings.”). Accordingly, Petitioner failed to establish he would not have entered his plea but for this purported misadvice and cannot establish the requisite prejudice necessary for relief.

In conclusion, although counsel was under no obligation to advise Petitioner about the collateral consequence of parole eligibility, plea counsel undertook this responsibility and correctly advised Petitioner that he would have to serve eighty-five percent of his sentence before becoming eligible for any type of early release. Therefore, because plea counsel's advice was correct under South Carolina law, and because the post-conviction relief court's findings are supported by probative evidence in the record, this Court should affirm the post-conviction relief court's findings. Additionally, Petitioner failed to establish that he would not have pled guilty but

for counsel's purported misadvice, and accordingly, failed to establish any requisite prejudice. This Court should affirm the post-conviction relief court's denial of relief.

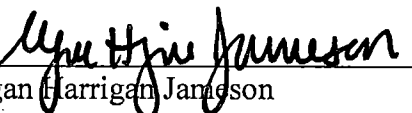
**CONCLUSION**

For all the foregoing reasons, this Court should affirm the post-conviction relief court's denial of post-conviction relief as Petitioner failed to establish any constitutional ineffectiveness of plea counsel.

Respectfully submitted,

ALAN WILSON  
Attorney General

MEGAN HARRIGAN JAMESON  
Senior Assistant Deputy Attorney General  
S.C. Bar No. 100108

BY:   
Megan Harrigan Jameson

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

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—————  
**PROOF OF SERVICE**  
—————

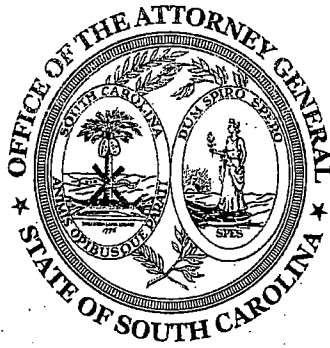
I, Kaitlyn Slice, certify that I have served the within Brief of Respondent on Petitioner by depositing two copies of the same in interagency mail, addressed to:

Chief Appellate Defender Robert Dudek  
S.C. Commission on Indigent Defense – Appellate Division  
PO Box 11589  
Columbia, South Carolina 29211

I further certify that all parties required by Rule to be served have been served.

This 22 day of May, 2019.

  
Kaitlyn Slice  
Legal Assistant  
Office of the Attorney General  
Post Office Box 11549  
Columbia, SC 29211  
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MAY 22 2019

S.C. SUPREME COURT

ALAN WILSON  
ATTORNEY GENERAL

May 21, 2019

The Honorable Daniel E. Shearouse  
Clerk of Court for the South Carolina Supreme Court  
1231 Gervais Street  
Columbia, South Carolina 29201

Re: Raphael Alexander Wooden v State – Appellate Case No. 2017-000001

Dear Mr. Shearouse,

Enclosed please find the original and fifteen copies of the Brief of Respondent in the above-referenced post-conviction relief appeal. Please let me know if I can provide anything additional on this case.

Sincerely,

Megan Harrigan Jameson  
Senior Assistant Deputy Attorney General  
S.C. Bar No. 100108

MHJ/

Enclosures

cc: Robert Dudek, Esquire (2 copies)  
Victim Advocacy Division