STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Spartanburg County

Honorable Robin B. Stilwell, Circuit Court Judge

Opinion No. 2019-UP-386 (S.C. Ct. App. Filed December 18, 2019)

2015-CP-42-3806

JOHN WILLIE MACK, SR.

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2020-000329

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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INDEX

CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on January 23, 2020.

QUESTION PRESENTED

Whether the Court of Appeals erred in affirming the PCR court's dismissal of Petitioner's application for a belated appeal from the denial of his application for DNA testing where Petitioner did state a cognizable claim under the Post-Conviction Relief Act, where the PCR application was not successive, where Petitioner complied with the statute of limitations in filing the application, and where this was the only avenue for Petitioner to obtain review of the DNA court's decision after DNA counsel failed to file an appeal?

STATEMENT OF THE CASE

In September of 2005, LaRhonda Moss spent the Labor Day weekend holiday out of town. App. 46-47. When she returned home on September 6, 2005, she discovered her front door ajar, her personal items strewn about her home, and several pieces of electronics and personal property missing. App. 47-48. Moss called 911 to report the break-in. App. 48.

Investigator John David Burgess and officer Eric Almond responded to the call and began to process the scene. App. 59; 61. Almond dusted for fingerprints on various items and surfaces but was unable to recover any usable fingerprints. App. 61. Burgess searched the house for DNA evidence and found what he believed to be blood in three separate locations: on the entertainment center in the living room, on a bookshelf in the hallway, and by a light switch in one of the bedrooms. App. 61-62. Burgess took swabs of the suspected blood which were then sent to SLED for testing. App. 61-63. Burgess said that the photographs showing the locations of the suspected blood were taken but that the photographs were subsequently lost[1]. App. 70, ll. 3-25.

Petitioner was arrested in February 2006 after the swabs taken from the scene were matched to him through a CODIS (combined DNA index system) hit. App. 318. The state obtained a confirmatory buccal swab from Petitioner in April 2009 that was sent to SLED for comparison. SLED issued a report in October 2009 stating that the DNA from the scene and the DNA from the buccal swab of Petitioner were a match. App. 318.

A Spartanburg County grand jury indicted Petitioner for burglary, first degree, and grand larceny in April 2006. App. 364-367. Prior to trial the state served Petitioner with notice of intent to seek a life sentence pursuant to S.C. Code § 17-25-45. App. 161, ll. 9-22. On February

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[1] Burgess testified at trial that the photographs were lost after being uploaded to a computer. Petitioner and defense counsel never saw the alleged photographs. App. 71-72; App. 239

22, 2011, the state represented by Barry J. Barnette and Anthony C. Leibert called the case to trial before the Honorable J. Derham Cole and a jury. App. 1. Petitioner was represented by Roger Poole. App. 1. Petitioner was found guilty as indicted. App. 157, ll. 14-25. Judge Cole sentenced Petitioner to life without parole on the burglary charge, pursuant to the life without parole notice, and five years imprisonment on the grand larceny charge. App. 168, ll. 14-25.

Direct Appeal and PCR

Petitioner appealed his convictions and sentences. While his direct appeal was pending, Petitioner filed a *pro se* application for retesting of the DNA in his case under the Access to Justice Post-Conviction DNA Testing Act (hereinafter referred to as the DNA Act) on September 27, 2012. App. 294-295. On April 17, 2013, the Court of Appeals affirmed Petitioner's convictions in State v. Mack, Op. No. 2013-UP-161(Ct. App. filed April 17, 2013).

Petitioner then filed a PCR application on May 6, 2013. App. 174-186. The state filed a return dated March 18, 2014. App. 187-192. An evidentiary hearing to address Petitioner's PCR application was held on January 14, 2015. App. 193. The Honorable Deadra Jefferson presided over the PCR hearing. The state was represented by Suzanne White. Petitioner was represented by Leah Moody. App. 193.

At the start of the hearing Petitioner moved for a continuance stating that he needed to obtain a ruling on the DNA Act application before proceeding with the PCR hearing as the outcome of the DNA Act application could impact his PCR claims. App. 198; 256-257. The court denied Petitioner's continuance request stating that the results of the DNA Act application would have no bearing on Petitioner's burden of proving ineffective assistance of trial counsel. App. 257. Further, the court stated that any rulings made on his PCR application would not

impact any possible relief or rulings that would come from the adjudication of Petitioner's pending DNA Act motion. App. 257-258.

Petitioner and trial counsel Roger Poole testified at the hearing. App. 194. At the conclusion of the PCR hearing the court denied Petitioner's PCR application. App. 250. An order of dismissal was filed on April 10, 2015. App. 253-281. Petitioner immediately filed an appeal of the PCR court's decision. On February 1, 2018, this Court denied certiorari. Supp. App. 12.

DNA Act Application and Second PCR

As stated above, Petitioner filed a *pro se* application for retesting of the DNA in his case while his direct appeal was still pending. On October 31, 2014, two years after Petitioner had filed the application under the DNA Act, a hearing was convened before the Honorable J. Derham Cole. Barry Barnette and Anthony Leibert represented the state. Petitioner was again represented by Leah Moody. App. 299.

At the DNA hearing Petitioner argued that he was entitled to have the three tangible items where his blood was allegedly found submitted for testing. Petitioner had asserted his actual innocence, stating he had never been inside the home that was burglarized, and argued testing of the actual items would show that his DNA was not present on them. Importantly, there was no corroborating evidence that the swabs submitted for DNA testing came from the home as the pictures of the locations where the alleged blood was found were lost prior to trial. App. 304-306.

The order denying Petitioner's request for DNA testing was filed on May 19, 2015[2]. Judge Cole found that the items Petitioner wanted tested "were previously subjected to DNA testing and further testing would not provide a more probative result." App. 317-320. DNA counsel, who had also been counsel for Petitioner during his initial PCR, did not file an appeal. Petitioner filed a notice of appeal of the DNA court's denial. On July 16, 2015, the Court of Appeals dismissed Petitioner's appeal as not timely served. App. 330; App. 356.

On September 10, 2015, Petitioner filed a second PCR application where he alleged that DNA counsel was ineffective for failing to appeal the decision of the DNA court and for failing to have Judge Cole, who had presided over Petitioner's trial, recuse himself from the DNA hearing when requested by Petitioner. App. 321-332. The state filed a return and motion to dismiss on March 23, 2017 arguing that Petitioner had failed to state a cognizable claim under the PCR Act, that the application was not filed within the statute of limitations and that the application was successive to Petitioner's initial PCR application. App. 333-339.

A hearing was held on June 29, 2017, before the Honorable Robin B. Stilwell, solely to address the state's motion to dismiss[3]. App. 341-352. Petitioner was represented by Rodney Richey. The state was represented by Valerie Giovanoli. The court heard argument from both parties before granting the state's motion to dismiss. The judge reasoned that the law was "contrary to Petitioner's position" and that a PCR application was not the venue for challenging DNA counsel's performance. The judge also stated that the appeal of the DNA courts decision

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2 The order from the DNA Act hearing was filed one month after the initial PCR court's order of dismissal.

3 No evidentiary hearing was ever held on the merits of Petitioner's PCR application which is the focus of this appeal.

would not be productive as the items Petitioner sought to have tested had already undergone DNA testing. App. 350, ll. 11-24.

On July 7, 2017, the PCR judge filed an order denying Petitioner's second PCR application and dismissing it with prejudice. App. 354-361. The order provided that Petitioner's PCR application had to be dismissed because Petitioner had failed to state a cognizable claim under the PCR act, had filed the PCR application outside of the statute of limitations, and the application was successive in that Petitioner could have raised these claims in his prior PCR application. App. 354-361.

Petitioner's second PCR counsel, Rodney Richey, filed an appeal of Judge Stilwell's order. Counsel also provided a separate accompanying explanation which provided that Petitioner had filed the second PCR application as the only means to appellate review of the order issued by the DNA court. App. 362-363.

Former Appellate Defender LaNelle Durant filed a petition for writ of certiorari on March, 16, 2018, arguing that "[t]he PCR court erred in denying Petitioner Mack a belated appeal from the denial of his application for DNA testing and for failing to find his DNA attorney ineffective for not filing an appeal timely; instead, the PCR judge denied Petitioner's second PCR due to Petitioner's failure to state a cognizable claim under the Post-Conviction Procedure Act because Petitioner asked for a belated appeal; Petitioner's failure to comply with the statute of limitations; and as being successive which was prejudicial to Petitioner because this was his only avenue for the DNA appeal." The state filed it's return on July 12, 2018.

The case was transferred to the Court of Appeal on July 25, 2019, and certiorari was granted on March 6, 2019. Briefing by both parties was completed in August of 2019. The Court of Appeals affirmed the second PCR court's decision in an unpublished decision on

December 18, 2019. Petitioner petitioned for rehearing on December 20, 2019. The Court of Appeals denied the petition for rehearing on January 23, 2020. This petition for writ of certiorari follows.

ARGUMENT

The Court of Appeals erred in affirming the PCR court's dismissal of Petitioner's application for a belated appeal from the denial of his application for DNA testing where Petitioner did state a cognizable claim under the Post-Conviction Relief Act, where the PCR application was not successive, where Petitioner complied with the statute of limitations in filing the application, and where this was the only avenue for Petitioner to obtain review of the DNA court's decision after DNA counsel failed to file an appeal.

As a threshold matter, and explained below, the DNA Act does not preclude Petitioner from filing for post-conviction relief due to ineffective assistance of DNA counsel. The Court of Appeals affirmed the PCR court's dismissal of Petitioner's second PCR application by relying on a single sentence within a section of the DNA Act combined with the "plain meaning" rule of statutory construction. Respectfully, that ruling failed to consider the entirety of the DNA Act and the other pertinent rules of statutory construction.

In dismissing Petitioner's current PCR application the PCR court, and subsequently the Court of Appeals, focused on the last sentence of S.C. Code Ann. § 17-28-60 which states, "[t]he performance of counsel pursuant to this article shall not form the basis for relief in any post-conviction relief proceeding." However, when the DNA Act is read in full it is apparent that Petitioner was not foreclosed from pursing this avenue of relief. S.C. Code Ann. § 17-28-110(B) states "*Nothing in this article prohibits a person from filing an application for post-conviction relief pursuant to Chapter 27, Title 17*" [4] (emphasis added).

The language in these two sections creates an inherent conflict within the statute. While each section, taken on its own, is clear and unambiguous, statutes are not intended to be read in a

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[4] Title 17 Chapter 27 of the South Carolina Code is the Uniform Post-Conviction Procedure Act.

piecemeal fashion, taking only those parts which best serve a party's particular position. Citizens for Quality Rural Living, Inc. v. Greenville County Planning Commission, 426 S.C. 97, 825 S.E.2d 721 (2019) (The intention of the legislature when enacting a statute must be gleaned from the entire section and not simply clauses taken out of context). Courts, when interpreting a statute, *should not concentrate on isolated phrases within the statute*; a statute must be read as a whole and sections that are part of the same general statutory law must be construed together and each one given effect. Id. (emphasis added).

Furthermore, if a court cannot reconcile the conflict within the statute then the "last legislative expression" rule applies. Under that rule, where it is impossible to harmonize two sections of a statute, the subsequent section must prevail over the prior one, being the last in point of time or order of arrangement. See, Feldman v. South Carolina Tax Commission, 203 S.C. 49, 26 S.E.2d 22 (1943) (under the principle that the last expression of the legislative will is the law, where conflicting provisions are found in the same statute, or in different statutes, the last in point of time or order of arrangement prevails); See also Jolly v. Atlantic Greyhound Corp, 207 S.C. 1, 35 S.E.2d 42 (1945). Applied to the present case, Petitioner would not be barred from filing a PCR claim of ineffective assistance of counsel for failing to file an appeal under the DNA Act because the subsequent section of the DNA Act specifically states that "*nothing in this article prohibits a person from filing an application for post-conviction relief*" pursuant to the PCR Act. See, S.C. Code § 17-28-110(B) (emphasis added).

Additionally, situated between these two conflicting portions of the DNA Act is another section which supports Petitioner's right to bring post-conviction relief actions against ineffective DNA Counsel. S.C. Code Ann § 17-28-90(A) states in relevant part that "[*a*]*ll rules and statutes applicable in criminal proceedings are available* to the applicant and the solicitor or

Attorney General, as applicable." (emphasis added). This further supports the contention that Petitioner is not statutorily barred from raising an ineffective assistance of DNA counsel claim as *all rules and statutes applicable in criminal proceedings are also applicable in proceedings commenced under the DNA Act.* See S.C. Code Ann. § 17-27-20 (Uniform Post-Conviction Procedure Act); Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991) (creating a right to a belated appeal of PCR denial when PCR counsel fails to file a timely appeal).

In interpreting the statute to resolve the conflict, it is apparent that PCR claims are not barred in their entirety. The language relied on by the Court of Appeals, that performance by counsel appointed pursuant to the DNA Act "shall not form the basis" for a PCR action is removed from the context of the entire DNA Act. While it could be interpreted to mean that performance by counsel appointed pursuant to the DNA Act shall not be the *sole basis for an initial application* for PCR, it cannot be interpreted as a complete bar on PCR actions when read with the remainder of the DNA Act. The language expressed later in the DNA Act makes it clear that a PCR application could include ineffective assistance of DNA counsel.

Petitioner's second PCR application stated a cognizable claim under the PCR Act

In the order dismissing Petitioner's second PCR application the PCR court stated that an allegation of ineffective assistance of counsel raised pursuant to the DNA Act "does not form a collateral attack on the validity of the conviction or sentence and may not form the basis for relief in any post-conviction relief action." App. 358. However, Petitioner's conviction hinged on DNA evidence presented at trial. It logically follows then that a challenge to the DNA is a direct challenge to the validity of Petitioner's conviction and sentence. Without the alleged DNA match to Petitioner the state would not have been able to charge Petitioner, must less convict him at trial.

While Petitioner's case presents a novel issue for this Court to consider, it is not the first time that this Court has been asked to extend PCR actions. This Court was asked to extend PCR actions to cover alleged ineffectiveness of PCR counsel in the Aice and Austin cases when dealing with this precise issue. In Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991) this Court held that a second PCR application filed on the ground that the first complete PCR application was insufficient due to ineffective PCR counsel was not proper. This Court simultaneously handed down Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991) which extended PCR actions to cover ineffective assistance of PCR counsel in the *limited situation* in which PCR counsel failed to file an appeal. In distinguishing these two cases this Court reasoned,

> "We have held that the PCR rules "contemplate an adjudication on the merits of the original petition, one bite at the apple as it were." Gamble v. State, 298 S.C. 179, 178, 379 S.E.2d 118, 119 (1989). This phrase aptly delineates the distinction between the Austin and Aice cases. Austin never received a full "bite" at the apple, as he was prevented from seeking any review of the denial of his PCR application. We therefore provided him with a remedy in order to effectuate the purposes of the Uniform Act and of the PCR rules. Conversely, Aice seeks to have more than one procedural "bite" at the apple. Aice has filed an original PCR application and has been allowed to seek review of the ruling against him. We refuse to grant his request for a second chance, and again we do so in order to effectuate the purpose of the Act and rules."

Aice at 452.

Petitioner's current situation is on all fours with Austin and not Aice. The Court, in handing down Austin, stated it "must craft a remedy to correct the unfairness which has occurred." Austin. at 454. Petitioner finds himself in a situation where an unfairness has occurred but where there is currently no remedy to correct the unfairness. It is axiomatic then that when every other route to relief is foreclosed, it is proper that this Court be asked to craft a remedy.

The state, in its initial return, relied on Lance v State, 279 S.C. 144, 303 S.E.2d 100 (1983), as an example of this Court refusing to extend PCR actions to judgments made pursuant

to other sections of the South Carolina Code. In Lance the petitioner submitted an application for post-conviction relief contesting the fact that he had been adjudicated a habitual offender. In that case, this Court refused to extend PCR actions to *civil* determinations made under the Habitual Offender Act. This Court noted that "the determination by a circuit judge that a person is a habitual offender is not a criminal conviction, and the consequent loss of the privilege to drive is not a sentence." Id at 145.

Unlike the defendant in Lance, Petitioner does not seek to extend PCR actions to a civil determination that does not have an impact on his conviction. Actions taken under the DNA Act are only ever initiated as the *direct result of a criminal conviction.* The application for retesting is filed in the General Sessions courts of this state, is in no way a civil procedure, and deals with a challenge to the applicant's conviction and resulting sentence. The granting of an application under the DNA Act can result in new evidence that would require the applicant's conviction and sentence to be vacated. Also, the DNA Act creates an absolute right to appeal, contemplates PCR actions based on ineffective assistance of DNA counsel and specifically states that all rules and statutes applicable in criminal proceedings are available to parties in actions taken under the DNA Act. See, S.C. Code Ann §§17-28-90 and 17-28-110(B).

In Austin it was noted that the right to seek appellate review of the denial of PCR is expressly authorized by state law. The same is true of rulings from applications filed under the DNA Act. S.C. Code § 17-28-90(G) expressly and explicitly authorizes the right of either the applicant or the state to appeal a final order under the Act through a writ of certiorari. Here, as in Austin, the failure of counsel to seek review correctly supported a claim for ineffective assistance of counsel on the narrow ground of failing to appeal. Under exceptional circumstances such as these, the only way to correct the unfairness is to craft a remedy that

allows Petitioner to move forward with his belated appeal of the denial of his request for DNA testing.

Petitioner's second PCR application was not successive

As stated in Aice S.C. Code Ann. § 17-27-90 "forbids a successive PCR application unless an applicant can point to a "sufficient reason" why the new grounds for relief asserted were not raised or were not raised properly." In summarily dismissing Petitioner's application as successive the PCR court reasoned that Petitioner "could have raised the new grounds for relief in his prior post-conviction relief application" and was therefore barred from raising them in a later application. App. 360. However, at the time of his original PCR hearing the DNA court had not made a ruling on the DNA Act application nor had that court even indicated at the hearing which way it would rule.

Stated plainly, Petitioner had no way of knowing if he would have any claims of ineffective assistance of DNA counsel during the pendency of his first PCR application because the DNA Act matter had not been finally adjudicated. Petitioner could not have anticipated that his DNA counsel, who was also his PCR counsel at the time, would fail to file an appeal of the DNA court's decision, the issue at the heart of Petitioner's current appeal. Absent an ability to predict the future, no one in Petitioner's situation could have raised the new grounds for relief as they relate to the DNA Act application at the time of the initial PCR application. Accordingly, the grounds raised in Petitioner's second PCR application were not successive.

It should be noted that at the time of the initial PCR hearing Petitioner properly sought a continuance for the explicit purpose of having the DNA Act application resolved. Petitioner argued that the DNA Act application needed to be ruled upon prior to the PCR hearing so that any possible PCR claims arising from adjudication of the DNA Act application could be

included in his initial PCR action. Unfortunately, the initial PCR Court denied the motion for continuance and Petitioner was forced to proceed on his PCR application without a ruling from the DNA court. Had the initial PCR court granted Petitioner's request to continue the PCR hearing until the resolution of the DNA Act application, which occurred a mere month after the PCR court issued the order of dismissal, Petitioner would not have found himself in the present situation.

Procedurally, Petitioner did everything correctly. He recognized the need to continue the initial PCR hearing so that he could consolidate any claims against DNA counsel into his then pending PCR application. However, the initial PCR court erred when it did not continue the evidentiary hearing, effectively ensuring that Petitioner would have to file a second PCR application if there were any claims of ineffective assistance of DNA counsel. To bar Petitioner's current application as successive would be fundamentally unfair.

Petitioner's second PCR application was filed within the Statute of Limitations

In granting the state's motion for summary dismissal the PCR court found that Petitioner's application raising ineffective assistance of DNA counsel for failure to file an appeal was filed outside of the one-year statute of limitations set for in S.C. Code Ann. § 17-27-45(A). However, the PCR court did not take into account the jurisprudence of this state that relaxes the one-year statute of limitations on claims that allege unjust procedural defects.

In Odom v. State, 337 S.C. 256, 523 S.E.2d 753 (1999) this Court addressed a situation analogous to what Petitioner currently faces. In that case, Odom's first PCR application was summarily dismissed as being filed outside of the statute of limitations. Odom subsequently filed a second PCR application seeking review of the dismissal of his first application pursuant to Austin, *supra*. The second application was also summarily dismissed as being filed outside of

the statute of limitations. This Court held that the "one-year statute of limitations for PCR applications is not applicable to appeals filed pursuant to Austin." Odom at 263-264, 523 S.E.2d at 757.

In Odom this Court stated that "Austin appeals are considered "belated appeals" and are used to rectify unjust procedural defects, *such as when an attorney does not file a timely appeal.*" Id. (emphasis added). Therefore, under Austin "a defendant can appeal a denial of a PCR application after the statute of limitations has expired if the defendant *either requested and was denied an opportunity to seek appellate review or did not knowingly and intelligently waive the right to appeal.*" Id at 259-260, 523 S.E.2d at 755 (emphasis added). As this Court importantly noted, the policy of Austin would be frustrated if the one-year statute of limitations applied to unjust procedural errors as Austin is intended to act as a final safe guard against such errors. Id at 263-264, 523 S.E.2d at 757.

Importantly, Petitioner is not seeking a full-scale review of the performance of DNA Counsel. He is merely requesting that the Court consider the *very limited issue* of whether DNA counsel was ineffective for failing to file an appeal. The DNA Act explicitly creates the right to an appeal by any party to the application. See S.C. Code Ann. § 17-28-90(G). Petitioner should not be foreclosed from pursuing this path due to actions and circumstances beyond his control.

A ruling in Petitioner's favor would not "open the floodgates" to PCR claims based solely on ineffective assistance of DNA counsel because Petitioner has presented an extremely narrow issue to this Court. Petitioner, like the complainant in Austin and Odom, *supra*, is merely seeking the appellate review that he is entitled to under the law. In Austin it was noted that the right to seek appellate review of the denial of PCR is *expressly authorized* by state law. The same is true of rulings coming from applications filed under the DNA Act. S.C. Code § 17-28-

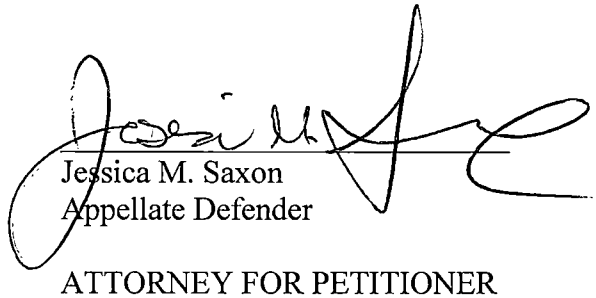
90(G) *expressly and explicitly authorizes the right of either the applicant or the state to appeal* a final order under the Act through a writ of certiorari.

Finally, expanding the Austin procedure to this discrete situation does not run afoul of the last sentence of S.C. Code § 17-28-60. Petitioner is not attacking the merits of his sentence, but *the procedure used in his case*. Petitioner was denied his right to appeal which was a procedural error that prevented him from getting his "one fair bite" at the apple. *See*, Odom at 263, 523 S.C. at 757.

CONCLUSION

Based upon the foregoing, Petitioner respectfully requests that this Court grant his petition for writ of certiorari to the Court of Appeals to allow full briefing on the issue presented.

Respectfully Submitted,



Jessica M. Saxon
Appellate Defender

ATTORNEY FOR PETITIONER

This 3rd day of March, 2020.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Spartanburg County
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JOHN WILLIE MACK, SR.

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

I certify that a copy of the Petition for Writ of Certiorari and a copy of the Appendix in this case has been served on Megan Harrigan Jameson, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and John Willie Mack, #257219, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899; and the Court of Appeals, at 1220 Senate Street, Columbia, SC 29201, this 3rd day of March, 2020.

Jessica M. Saxon
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO BEFORE
ME this 3rd day of March, 2020.

(L.S)
Notary Public for South Carolina
My Commission Expires: May 12, 2027.