

STATE OF SOUTH CAROLINA
In The Court of Appeals

Ex Parte: Tara Dawn Shurling, Attorney, Appellant,

In Re:
State of South Carolina, Respondent,

v.

Bejay Harley, Defendant

Appellate Case No. 2013-001298

RECEIVED

NOV 14 2013

SC Court of Appeals

Appeal from Richland County
L. Casey Manning, Circuit Court Judge
Court of General Sessions
Trial Court Case No.: 2003-GS-40-6670

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE ISSUES ON APPEAL

I.

At the time Counsel completed her representation in this case, did S. C. Code Ann. § 17-3-50, (C) require advance approval of fees in excess of the statutory cap?

II.

Did the Chief Administrative Judge who signed the initial funding orders in this case err in concluding that any additional requests to exceed the caps set by his orders would have to be addressed specifically to him personally as opposed to the presiding judge pursuant to S. C. Code Ann. § 17-3-50, (C)?

III.

Did the Chief Administrative Judge who signed the initial funding orders in this case properly modify his previous Orders approving increased fee and expense caps pursuant to S. C. Code Ann. § 17-3-50(C) to remove the provisions authorizing the presiding judge to determine if any additional increases in the caps were warranted at the conclusion of the case?

IV.

Did the Chief Administrative Judge who signed the initial funding orders in this case err in revoking his previous Orders approving an increased fee cap pursuant to S. C. Code Ann. § 17-3-50, (C) where judge who presided over the guilty plea proceeding in this matter had already signed an order approving Counsel's total fees, including those in excess of the cap previously set by the Chief Administrative Judge in question, based upon the original Order approved and signed him?

V.

Did the presiding judge in this murder case err in revoking his previous orders approving Counsel's fees and expenses where the Orders of the Chief Administrative Judge in place at the time he signed his orders were proper and supported the authority of the presiding judge to make the final determination on fees and expenses in accordance with S. C. Code Ann. § 17-3-50, (C) and previous rulings of the Supreme Court of South Carolina?

VI.

At the time the presiding judge initially approved Counsel's billing requests for fees and expense, did he in fact have authority to do so pursuant to S. C. Code Ann. § 17-3-50 (C), independent of any previous Order from the Chief Administrative Judge?

VII.

Having authority to approve Counsel's fee and expense bills in excess of the caps set forth in S. C. Code Ann. § 17-3-50, (A) and (B) at the end of this case, did the presiding judge err in revoking that approval in the absence of any specific objections to the amount of time Counsel expended in this particular case or the expenses incurred in building a defense to the charges brought against her client?

STATEMENT OF THE CASE

Counsel was court-appointed in this case by Order dated March 30, 2009. By Order issued by Judge Clifton Newman, then Chief Administrative Judge for the Richland County Court of General Sessions, on December 1, 2011, the fee rate for court-appointed counsel in this murder case, Tara Dawn Shurling, was set at \$70.00 per hour for both out-of-court and in-court services. In addition, that Order set a cap of \$10,000.00 for attorney fees which could be submitted to SCCID¹ for payment without further approval of the Court. Counsel's fee rate and the fee cap in this matter were set by Judge Newman at a hearing held on May 23, 2011. ROA. _____, Transcript May 23, 2011 hearing. Counsel had also requested funding approval for a second chair for the upcoming trial of this complex murder case and had additionally asked for funding for three expert witnesses inasmuch as the State had announced its intent to produce between three and seven expert witnesses on the issue of proximate causation of death. Judge Newman denied Counsel's request for funding for a second chair for this trial and limited Counsel to funding for one expert witness. The fee rate and fee caps approved by Judge Newman were likewise lower than those requested by Counsel in her funding motions. See, ROA _____, Motions for Attorney Fees and Motions for Expenses. SCCID was represented at this hearing by its Director, Patton Adams and Deputy Director and Chief Counsel, Hugh Ryan. Despite having prevailed on the majority of the funding issues before the Court on that date, SCCID never provided Judge Newman with proposed orders documenting his ruling from the bench on that date. After this case resolved in a guilty plea on the morning a trial was set to begin, Counsel discovered that no orders had even been signed by Judge Newman concerning the matters ruled upon by him on May 23, 2011.

¹ South Carolina Commission on Indigent Defense.

Counsel then drafted proposed orders documenting the rulings made by Judge Newman at the May 23, 2011 proceeding as she understood them to be. In so doing, Counsel drafted proposed orders which not only reflected the rulings of Judge Newman from the bench but, also reflected the language found in S. C. Code Ann. § 17-3-50, (C) and previous rulings of the Supreme Court of South Carolina on the subject of attorney fee rates and caps. Counsel did not realize until much later that her proposed orders were inadvertently not sent to SCCID at the time they were forwarded to Judge Newman in November, 2011. Judge Newman adopted and filed the proposed orders as sent by Counsel on December 1, 2011. Counsel submitted her final requests for payment of fees and expenses to the presiding judge in this case, L. Casey Manning, for his approval. His orders approving both Counsel's total fees and total expenses were signed on December 5, 2011. After Judge Manning signed Orders approving her fees and expenses, Counsel submitted them to SCCID for payment. SCCID then raised objections to certain language in Judge Newman's Fee Order dated December 1, 2011. A hearing was held in this matter on December 28, 2011. SCCID was represented at this hearing by its Director, Patton Adams and Deputy Director and Chief Counsel, Hugh Ryan. ROA_____, Transcript of December 28, 2011 hearing.

During the December 28, 2011 hearing Judge Newman indicated that he intended to issue an Amended Order modifying the Order signed on December 1, 2011. He expressed the view that when he said any fees in excess of the cap authorized by him would be subject to "*further approval of the Court*" he meant that any increase in the cap would have to be approved by him personally and not the Court in the global sense of the phrase. He indicated that he would not have signed the orders in question had he noticed that they contained certain language which permitted the presiding judge to exceed the cap at the end of the case. Throughout this proceeding he also expressed concern that he really didn't know enough

about the case to making the decisions he was being called upon to make. ROA____, December 28, 2011 hearing. .He expressed his frustration with the system and his hope that an appeal in this matter might yield more guidance to the bench and bar concerning these matters. ROA_____, December 28, 2011 hearing.

At the conclusion of that proceeding, Counsel inquired as to whether the Court wished for her to draft the amended Order the Court had announced intentions to enter. Counsel's offer was declined by Judge Newman who noted that he and his law clerk had my original orders from when they were emailed to the Court and they could easily modify them. ROA_____, Dec. 28, 2011 hearing, pg._____. Thereafter, Counsel received a message from Judge Newman, through his law clerk, that he wanted her to draft an amended order for the Court after all. Counsel did so and forwarded a proposed order, with the corrections instructed by the court, on January 5, 2012. ROA, Ltr to Judge Newman dated January 5, 2012 and ROA, Proposed Order.

Counsel never received a signed copy of the amended order requested by the Court and provided by Counsel, or any other order purporting to modify the funding orders previously entered in this matter. On February 15, 2012 , Judge Newman orally advised Counsel that he had decided not to issue an Amended Order in this matter. On that date, Counsel had two PCR cases before Judge Newman in Richland County. During a break in those proceedings, Counsel approached Judge Newman, in the presence of his law clerk, and inquired about the status of his amended order in this billing matter. Counsel simply asked the status of the order and expressed her concern that the Court might have executed an order that she had not received for some reason. Judge Newman responded that *he wasn't going to issue an amended order*. He said he had decided that since his term as Chief Administrative Judge was over, he did not have the authority to rule on the issues any longer, and stated that he really didn't feel

like he knew enough about the case anyway. He said he had decided to just leave the matter to Judge Manning and Judge Cooper to decide. By letter dated February 21, 2012, Counsel advised SCCID of this development and expressed the position that this billing matter had then returned to the status it was in when her vouchers were submitted to SCCID for payment. Counsel provided both Judge Manning and Judge Newman a copy of this correspondence on that same date in order to document that she had advised SCCID and Judge Manning of her conversation with Judge Newman. Counsel affirmatively asked Judge Newman to contact SCCID if she had in any way misstated the conversation in question. Counsel heard no response from Judge Newman following that correspondence.

On March 13, 2012 Counsel wrote SCCID and requested payment on the Orders entered by Judge Manning in December, 2011. ROA _____, email dated March 13, 2012. That same date, Hugh Ryan emailed Counsel a Reply to her request for payment. ROA. _____, Email dated March 13, 2012. On December 11, 2012 Counsel wrote Judge Newman a long letter and requested that he please issue an order documenting what he had advised Counsel of orally on February 15, 2012. Counsel explained that she was not getting paid anything on this case and that confusion apparently remained over the status of Judge Manning's Orders dated December 5, 2011. ROA. _____ Ltr to Judge Newman dated December 11, 2012.

On January 24, 2013 Counsel wrote Judge Manning a long letter explaining the current status of her payment requests. ROA. _____, Letter to Judge Manning, copied to Judge Newman and Hugh Ryan, SCCID. On February 12, 2013, having heard nothing further from Judge Newman, Counsel sent an email to Judge Manning asking for assistance in getting a resolution in this matter. ROA _____, Email dated February 12, 2013 to Judge Manning and copied to Judge Newman and Hugh Ryan at SCCID. On February 12, 2013 Hugh Ryan

wrote the parties by email and indicated his view that Judge Newman had orally modified his original orders in this case and further expressing the desire to be heard at a hearing on this matter. ROA_____Return Email from Hugh Ryan at SCCID dated February 12, 2013. Counsel received a letter from Judge Newman's Law Clerk dated February 12, 2013 in which the Law Clerk indicated that Judge Newman was aware of Counsel's concerns, but stated Judge Newman did not believe he has anything further to offer. ROA. _____, Letter dated February 12, 2013.

On February 26, 2013 the parties received an email from Judge Manning's law clerk indicating that Judge Manning declined to hold a hearing in this matter and asked that the parties submit proposed orders in lieu of a hearing. ROA._____, Email from Adam Ribock, then law clerk to Judge Manning, dated February 26, 2013. On March 11, 2013 Hugh Ryan, on behalf of SCCID, submitted a Proposed Order to Judge Manning. ROA_____, Proposed Order of SCCID. On March 12, 2013 Counsel submitted her Proposed Order for the Payment of Fees and Expenses in this matter to Judge Manning, along with her Memorandum in Support. ROA_____, Proposed Order submitted by Counsel on March 12, 2013 and ROA_____, Memorandum in Support. Counsel submitted a Reply to the Proposed Order submitted by SCCID on March 14, 2013. ROA_____, Reply to SCCID Proposed Order.

By Order dated March 15, 2013, Judge Manning changed the rulings found in his orders dated December 5, 2011 and limited Counsel's authorization for payment of fees to \$10,000.00 and her reimbursement for all general expenses to \$750.00. ROA_____, Order dated March 15, 2013. Counsel subsequently filed a Motion to Reconsider on March 25, 2013. ROA_____, Motion to Reconsider dated March 25, 2013. On April 28, 2013 Judge Manning's law clerk advised the parties by email that "Judge Manning is prepared to rule on Ms. Shurling's Motion to Reconsider in the matter of Bejay Harley without a formal hearing.

Both sides may submit a proposed order for his consideration.”...ROA_____, Email from Judge Manning, April 28, 2013. On April 29, 2013 Counsel submitted her Proposed Order granting Reconsideration. ROA_____, Proposed Order submitted April 29, 2103. On May 6, 2013, Hugh Ryan submitted a Proposed Order denying Reconsideration. ROA_____, SCCID Proposed Order Denying Reconsideration. Said order was adopted by Judge Manning and was filed on May 23, 2013, ROA_____, Order Denying Reconsideration. The Appellant’s Notice of Appeal from the rulings below was filed on June 3, 2013.

ARGUMENT

Issues I – VII

The total fees claimed by Counsel in this matter totaled \$18,431.00. This case was set for trial three times and only resolved in a plea after the selection of a jury on the third trial date set in this matter. The case itself involved complex questions of proximate causation of death. Counsel was originally appointed to represent the Defendant in his Post-Conviction Relief action. As a result of her work in that collateral matter, the Defendant was granted a new trial. ROA, PCR Order. The Respondent ultimately decided not to appeal that ruling. Counsel herein was appointed to represent the Defendant due to the conflict of interest arising from the finding of ineffective assistance of counsel against the Richland County Public Defender’s Office which had previously represented the Defendant.

Prior to the scheduled retrial of this matter, Counsel became aware of the State’s intention to impeach the expert witness used by Counsel in the PCR matter based on personnel issues having nothing to do with the science behind his opinion as expressed during the PCR action. In addition, the prosecution advised Counsel of its intention to call at least two additional medical experts in addition to the original pathologist whose work had been the subject of the PCR action in this matter. Counsel was put on notice that the prosecution might

use all the pathologists currently working for the coroner's office as their witnesses if this matter went to trial.

As a result of Counsel's efforts in this matter, the Defendant was finally offered a last minute plea deal which resulted in him serving approximately three more months in prison and his being allowed to enter and *Alford*² plea. While this case did ultimately result in a guilty plea, Counsel had to prepare for three times before the State finally agreed to the resolution ultimately reached in this matter. Counsel would respectfully submit that the degree of her preparation in this matter in no small way contributed to the final outcome in this case. With this background in mind, she respectfully asserts that the total fees requested in this case were reasonable and supported by her time records as submitted to Judge Manning, as the presiding judge at the conclusion of this case. It is worthy of note that SCCID has never raised any specific objections to the time expended by Counsel in this case beyond their vague statements concerning the fact that Counsel had already had this case in a PCR and their belief that the fees were not appropriate where the case eventually ended in a plea. They have never raised any specific objection to any particular time expended in the preparation of a defense for this client.

S. C. Code Ann. § 17-3-50 (C) *did not* require advance approval of fees in excess of the statutory cap for fees at the time Judge Manning's Orders dated December 5, 2011, were signed. That provision states,

Payment in excess of the hourly rates and limits in subsection (A) or (B) is authorized only if the court certifies, in a written order with specific findings of fact, that payment in excess of the rates is necessary to provide compensation adequate to ensure effective assistance of counsel and payment in excess of that limit is appropriate because the services provided *were* reasonably and necessarily *incurred*. (Emphasis added).

² *North Carolina v. Alford*, 400 U. S. 25 (1970)

The language of that section requires that approval of fees in excess of the cap set forth therein be supported by a detailed order with findings as to why “the services *provided were* reasonably and necessarily *incurred.*” (Emphasis added) Thus, the relevant statutory provision clearly envisioned approval of total fees in excess of the cap of the conclusion of the case. It would be impossible for the Court to issue the required order finding that fees in excess of the cap provided by §17-3-50(A) *were reasonably and necessarily incurred* until after the conclusion of the case. The fact that this statutory provision is worded in the past tense gives credence to the fact that the legislature recognized as much in drafting this provision. This interpretation of S. C. Code Ann. § 17-3-50 (C) is consistent with the previous rulings of this Honorable Court in which the Court has found that an award of attorney fees in excess of the section 17-3-50 cap is “**within the sound discretion of the trial judge.**” *Ex Parte Brown*, 393 S.C. 214, 220, 711 S.E. 2d 899, 902 (2011), citing, *Bailey v. State*, 309 S. C. 455, 464, 424 S.E.2nd 503, 508 (1992).

Counsel is aware that SCCID has succeeded in getting a budget *proviso* added to this section which requires advance approval of any increase in fee rates or caps over those found in the statute itself. That *proviso* however, which applies to subsequent budget years, was not in place at the time Counsel was appointed in this case or when she originally submitted her bill to the presiding judge for approval.

Counsel has no desire to impose on this Honorable Court with lengthy arguments restating the positions she has taken in the lower court for the last nearly three years. Counsel therefore incorporates, and relies upon by reference, all the arguments and authorities presented by her in the numerous documents referenced herein all of which will be included in the Record on Appeal. Counsel would note that she had every reason to expect SCCID to prepare proposed orders for Judge Newman following the May 23, 2011 hearing inasmuch as they

prevailed upon Judge Newman to rule in their favor on virtually every issue addressed by the Court that day. It was only when the case was concluded, and about to be billed, that she discovered that they had not done so and Judge Newman's rulings from the bench had not been formalized by written Order. Then, and only then, did she presume to submit proposed Orders to Judge Newman to formalize his rulings so she could submit her bill in this case. Counsel's failure to send the proposed order to SCCID was a clerical oversight. The fact remains however, that the Orders sent to Judge Newman were in complete harmony with his rulings from the bench during that proceeding. While Judge Newman ultimately stated during the December 28, 2011 hearing, at the urging of SCCID, that he *meant* something beyond what he said on the record during that proceeding, he did not make any such requirements clear from the bench during the earlier hearing on these issues. Likewise, the proposed orders sent to Judge Newman were completely consistent with the language found in S. C. Code Ann. § 17-3-50 (C) and, as previously noted, were in compliance with the prior holdings of the Supreme Court of South Carolina on this subject.

As a practical matter, Judge Manning, as presiding judge in this case, had the authority to sign the orders he entered on December 5, 2011 approving payment of Counsel's fees and expenses. The orders signed by him in this case made the specific finding required by S. C. Code Ann. § 17-3-50 (C), in order to justify exceeding the fee rates and caps and expense caps set by S. C. Code Ann. § 17-3-50 (A) and (B). As found by Judge Manning in his December 5, 2011 Fee and Expense Orders, the time expended in this case, and the expenses incurred, were necessary to insure the Defendant received effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, in this most serious case.

CONCLUSION

The Appellant now respectfully asks this Court to find that, at the time this matter was submitted to the presiding judge for billing approval, §17-3-50(C) did not require the advance approval of fees in excess of the rates or statutory limits set by §17-3-50(A) or expenses in excess of the limits set forth in §17-3-50(B). Appellant seeks this Court's finding that, at the time this matter was submitted to Judge Manning for billing approval, the language of the Order entered by Judge Newman did not limit the trial judge's ultimate authority to decide whether the payment of her fees in excess of the statutory caps, as requested by Appellant at the conclusion of this case, was reasonable and necessary under the terms of §17-3-50(C).

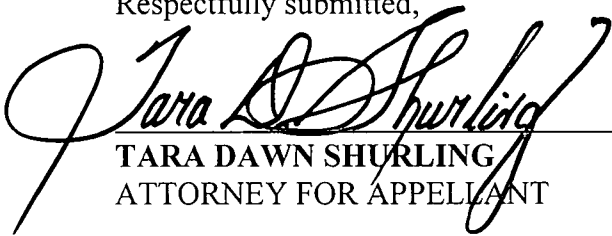
In addition, the Appellant asks this Court to find that §17-3-50 (C) permitted the trial judge to authorize the reimbursement of court-appointed Appellant for expenses in excess of the cap set by §17-3-50 (B), at the conclusion of the case where the trial judge found the expenses were reasonably and necessarily incurred. Likewise, Appellant seeks a ruling by this Court that nothing in the expense order signed by Judge Newman prohibited the trial judge from approving expenses, in excess of the limits pre-approved by that Order, at the conclusion of this case. Counsel notes that certain language found in §17-3-50 (B) suggests that expenses for certain professional services or experts should be approved in advance of retaining such individuals on behalf of the defense. The expenses in dispute however, do not involve the hiring of such expert witnesses or investigators. Those expenses in this case were in fact authorized by separate orders not the subject of this appeal. ROA_____, Expense Orders for Investigator and Expert Witness.

Appellant asks this Court to find that the total fees and expenses submitted for payment in this case were necessary and appropriate on the facts of this extremely complex

murder case and to direct SCCID to pay Appellant's bills as originally approved by the presiding judge, Judge Manning, on December 5, 2011. Counsel seeks this Court's finding that Judge Manning's original orders approving both her fees and expenses were entered within the authority of Judge Manning at the time they were signed and should not have been modified at a later date based upon the position advanced by Judge Newman during the December 28, 2011 hearing *well after the original orders were entered*.

Based upon all the reasons and authorities set forth herein, as well as those advanced by Counsel in all the documents referenced herein, Counsel asks that this Honorable Court not only to find that the orders entered by Judge Manning on December 5, 2011 were proper and within his authority to enter but, further that they should not have been changed based upon a position not taken by the former Chief Administrative Judge until well after the orders were signed and filed.

Respectfully submitted,


TARA DAWN SHURLING
ATTORNEY FOR APPELLANT

This 12th day of November, 2013.

STATE OF SOUTH CAROLINA
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Ex Parte: Tara Dawn Shurling, Attorney, Appellant,

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Appellate Case No. 2013-001298

Appeal from Richland County
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Trial Court Case No.: 2003-GS-40-6670

DESIGNATION OF MATTER
TO BE INCLUDED IN RECORD ON APPEAL

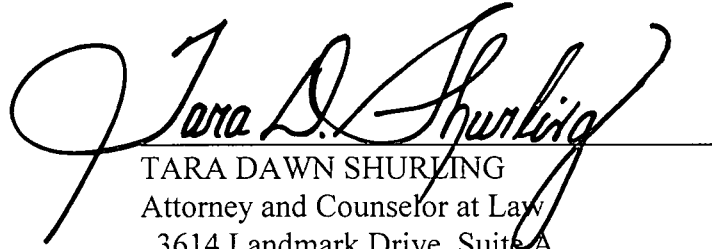
The Appellant proposes the following be included in the Record on Appeal:

1. Transcript of Hearing on May 23, 2011 before Judge Newman.
2. Motions for Attorney Fees and Motion for Expenses.
3. Transcript of December 28, 2011 hearing before Judge Newman.
4. Letter to Judge Newman dated January 5, 2012.
5. Proposed Amended Order sent to Judge Newman, January 5, 2012.
6. Email dated March 13, 2012 to SCCID.
7. Email dated March 13, 2012 from Hugh Ryan .
8. Letter to Judge Newman dated December 11, 2012.
9. Letter to Judge Manning dated January 24, 2013.
10. Email dated February 12, 2013 to Judge Manning.
11. Email dated February 12, 2013 from Hugh Ryan.
12. Letter from Judge Newman's Law Clerk dated February 12, 2013.
13. Email dated February 26, 2013 from Adam Ribock, then law clerk to Judge Manning.
14. Proposed order of SCCID on March 11, 2013.
15. Proposed order submitted by Counsel on March 12, 2013.
16. Memorandum in Support submitted on March 12, 2013.
17. Reply to SCCID proposed order submitted on March 14, 2013.
18. Order of Judge Manning dated March 15, 2013.

19. Motion to Reconsider dated March 25, 2013.
20. Email from Judge Manning dated April 28, 2013.
21. Proposed order granting reconsideration dated April 29, 2013.
22. SCCID proposed order denying reconsideration dated May 6, 2013.
23. Order Denying Reconsideration filed May 23, 2013.
24. Post-Conviction Relief Order.
25. Expense Orders for Investigator and Expert Witness.

I certify that this designation contains no matter which is irrelevant to this appeal.

November 12, 2013.

A handwritten signature in cursive script, reading "Tara D. Shurling", written over a horizontal line.

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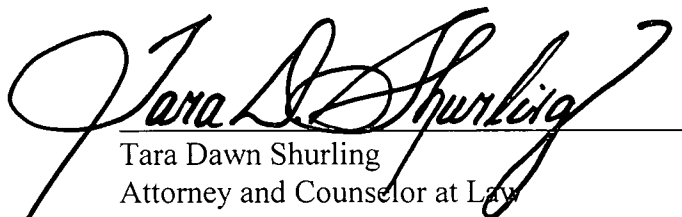
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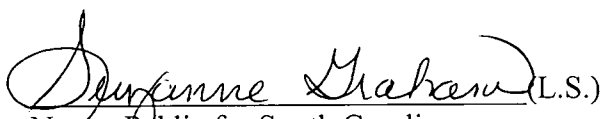
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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Appellant's Initial Brief and Designation of Matter and Motion to File Initial Brief & Designation of Matter Out of Time in the above-entitled case have been served upon opposing counsel, J. Hugh Ryan, III, Deputy Director and General Counsel, SCCID, by depositing in the U.S. Mail, postage prepaid, this 12th day of November, 2013.


Tara Dawn Shurling
Attorney and Counselor at Law

SWORN TO BEFORE me this 12th day
of November, 2013.


Notary Public for South Carolina
My Commission Expires: 2/28/2023