

GERALD A. KELLY, J.D.  
ATTORNEY AT LAW  
4760 Yemassee Hwy  
Varnville, South Carolina 29944  
803-943-0510 office and fax

December 18, 2013 (1:17pm)

Janet Johnson  
Attorney at Law  
South Carolina Supreme Court  
P.O. Box 11330  
Columbia, South Carolina  
29211

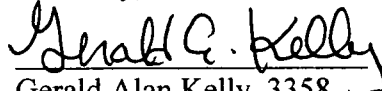
RECEIVED  
DEC 23 2013  
S.C. Supreme Court

RE: Breon J. Alexandre, 340229 v. State of South Carolina, 2012-CP-27-0218; Appellate Case  
No. 2013-002567

Dear Janet:

Thank you for speaking with me by telephone last week on the 15<sup>th</sup> and granting me an extension of ten (10) days to perfect the appeal in Alexandre v. State. Today I have mailed the appropriate documents to all parties to perfect the appeal begun by Breon J. Alexandre.

Sincerely,



Gerald Alan Kelly, 3358  
4760 Yemassee Hwy.  
Varnville, South Carolina 29944  
803-943-0510, office and fax

GERALD A. KELLY, J.D.

ATTORNEY AT LAW

4760 Yemassee Hwy

Varnville, South Carolina 29944

803-943-0510 office and fax

**RECEIVED**

DEC 23 2013

**S.C. Supreme Court**

December 18, 2013 (12:42pm)

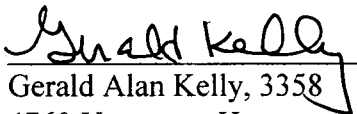
Honorable Daniel E. Shearouse  
Clerk of the South Carolina Supreme Court  
P.O. Box 11330  
Columbia, South Carolina  
29211

RE: Breon J. Alexandre, 340229 v. State of South Carolina, 2012-CP-27-0218; Appellate Case  
No. 2013-002567

Dear Sir:

Please accept for filing the enclosed documents to perfect appeal in the cited case.

Sincerely,



Gerald Alan Kelly, 3358

4760 Yemassee Hwy.

Varnville, South Carolina 29944

803-943-0510, office and fax

Enclosures:

1. Order of Dismissal
2. Notice of Appeal
3. Proof of Service

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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APPEAL FROM JASPER COUNTY  
Court of Common Pleas

Hon. Deadra L. Jefferson, Circuit Court Judge

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Case No. 2012-CP-27-0218

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Breon J. Alexandre, 340229.....Petitioner

v.

State of South Carolina .....Respondent

**RECEIVED**

DEC 23 2013

**S.C. Supreme Court**

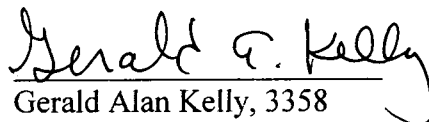
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NOTICE OF APPEAL

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Breon J. Alexandre, 340229 appeals the order of Hon. Deadra L. Jefferson executed on October 28, 2013, and filed October 31, 2013. Petitioner received notice of filing of the Order of Dismissal on November 15, 2013, by receiving a filed copy of the Order from the Clerk of Court of Jasper County, South Carolina.

December 18, 2013

  
Gerald Alan Kelly, 3358  
4760 Yemassee Hwy  
Varnville, SC 29944  
803-943-0510, office and fax  
Attorney for Petitioner

Other Counsel of record:  
Ashleigh R. Wilson  
Assistant Attorney General  
P.O. Box 11549  
Columbia, SC 29211-1549  
803-734-3970

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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APPEAL FROM JASPER COUNTY  
Court of Common Pleas

Hon. Deadra L Jefferson, Circuit Court Judge

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Case No. 2012-CP-27- 0218

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Breon J. Alexandre, 340229..... Petitioner

v.

State of South Carolina .....Respondent

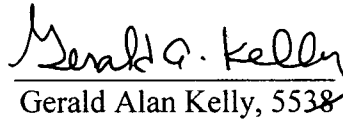
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PROOF OF SERVICE

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I certify that I have served the Notice of Appeal on Ashleigh R. Wilson , Assistant Attorney General, by depositing a copy of it in the United States Mail, postage prepaid, on December 18, 2013, addressed to her at Office of the Attorney General, P.O. Box 11549, Columbia, SC 29211-15490.

December 18, 2013



Gerald Alan Kelly, 5538  
4760 Yemassee Hwy  
Varnville, SC 29944  
803-943-0510, office and fax  
Attorney for Petitioner



## PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Jasper County. The Applicant was indicted at the October 2009 term of the Jasper County Grand Jury for Murder (2009-GS-27-0494),<sup>1</sup> Burglary-First Degree (2009-GS-27-0493),<sup>2</sup> and Armed Robbery (2009-GS-27-0492).<sup>3</sup> Stephen T. Plexico, Esquire, represented the Applicant. The Applicant pled guilty as indicted. On April 12, 2010, the Honorable J. Ernest Kinard sentenced the Applicant to confinement for forty (40) years for Murder and Burglary and thirty (30) years for Armed Robbery. The sentences were to run concurrently. The Applicant did not appeal his convictions and sentences.

## ALLEGATIONS

The Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel.
  - a. Counsel failed to file a direct appeal.
2. Due process and equal protection violations.
3. Illegal sentence.

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<sup>1</sup> The penalty statute for the offense of Murder provides that

A person who is convicted of or pleads guilty to murder must be punished by death, or by a mandatory minimum term of imprisonment for thirty years to life. . . . For purposes of this section, "life" or "life imprisonment" means until death of the offender without the possibility of parole, and when requested by the State or the defendant, the judge must charge the jury in his instructions that life imprisonment means until the death of the defendant without the possibility of parole. . . . No person sentenced to life imprisonment pursuant to this section is eligible for parole, community supervision, or any early release program, nor is the person eligible to receive any work credits, education credits, good conduct credits, or any other credits that would reduce the mandatory life imprisonment required by this section. 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, nor is the person eligible to receive any work credits, education credits, good conduct credits, or any other credits that would reduce the mandatory minimum term of imprisonment for thirty years to life required by this section.

S.C. CODE ANN. § 16-3-20(A) (2003).

<sup>2</sup> The penalty statute for the offense of Burglary-First Degree provides that "Burglary in the first degree is a felony punishable by life imprisonment. For purposes of this section, "life" means until death. The court, in its discretion, may sentence the defendant to a term of not less than fifteen years." S.C. Code Ann. § 16-11-311(B) (2003).

<sup>3</sup> The offense of Armed Robbery is a felony by which a convicted defendant "must be imprisoned for a mandatory minimum term of not less than ten years or more than thirty years, no part of which may be suspended or probation granted. A person convicted under this subsection is not eligible for parole until the person has served at least seven years of the sentence." S.C. CODE ANN. § 16-11-330(A) (2003).

At the hearing, the Applicant argued his plea attorney should have filed his post-conviction relief application. Subsequently, the State moved to dismiss all allegations other than ineffective assistance of counsel for failure to file an appeal as untimely because the Applicant's application was filed outside of the one year statute of limitations. See S.C CODE ANN. § 17-27-45(A) (2003) (providing a one year filing limitation for post-conviction relief applications to be filed within one year of conviction or final disposition); Peloquin v. State, 321 S.C. 468, 470, 469 S.E.2d 606, 607 (1996) (one year statute of limitations applies to all applications filed after July 1, 1996). Accordingly, this Court grants the State's motion to dismiss and dismisses all allegations other than the issue of counsel's ineffective assistance for failing to file a direct appeal for the Applicant. This Court finds the Applicant presented no persuasive argument to explain the failure to file his application within the statute of limitations. At the hearing, the only issue under consideration by this Court was whether counsel was ineffective for failing to file a direct appeal for the Applicant after his guilty plea. This Court had before it the guilty plea transcript, the records of the Jasper County Clerk of Court, the Applicant's records from the South Carolina Department of Corrections, the PCR application, and Respondent's Return thereto.

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing and to closely pass upon his or her credibility. This Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. CODE ANN. § 17-27-80

(2003).

The Applicant testified that he met with counsel once or twice prior to his guilty plea. He testified he asked his attorney to appeal his plea after he was sentenced in the back of the courthouse. He further testified that counsel represented he would and failed to file the direct appeal that he requested. On cross examination, the Applicant admitted that he signed Judge Kinard's standard form advising him of his constitutional rights including his right to appeal.

Plea counsel, Stephen T. Plexico, Esquire, testified he has been engaged in the practice of criminal law for twenty-three (23) to twenty-five (25) years. He testified that at the time of Applicant's plea he was employed as a Public Defender. Plea counsel testified he advised the Applicant of his right to appeal and all other constitutional rights. Counsel testified he did not recall speaking with the Applicant after his guilty plea. Counsel testified the Applicant never indicated he wanted an appeal. He testified he received correspondence from the Applicant requesting a copy of his file after the plea, but he never received any letters requesting a direct appeal after the plea. He testified he did not recall any issues with the guilty plea that would have been meritorious on appeal. Counsel further testified that had there been any issues with the guilty plea, he would have filed a post-plea motion to correct the issue. He testified that, had the Applicant requested an appeal, he would have filed a Notice of Appeal on his behalf. Additionally, counsel testified that Judge Kinard's routine practice is to incorporate a defendant's signed advisement of rights form into the record of any guilty plea.

#### **Ineffective Assistance of Counsel**

The Applicant alleges that he received ineffective assistance of counsel. In a post-conviction relief action, the applicant has the burden of proving the allegations in the application by a preponderance of the evidence. Rule 71.1(e), SCRPC; Butler v. State, 286 S.C. 441, 442,

334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 622, 300 S.E.2d 482, 483 (1983)). Where the Applicant alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that “counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result.” Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2064 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814 (citing Strickland, 466 U.S. at 686, 104 S. Ct. at 2064).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. See Strickland at 690, 104 S. Ct. at 2066. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. See id. The applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

Courts use a two-pronged test to evaluate allegations of ineffective assistance of counsel. First, the applicant must prove that counsel’s performance was deficient. See id. at 117–18, 386 S.E.2d at 625. Under this prong, attorney performance is measured by its “reasonableness under prevailing professional norms.” Id. at 117, 386 S.E.2d at 625 (citing Strickland, 466 U.S. at 668, 104 S. Ct. at 2052). Second, counsel’s deficient performance must have prejudiced the applicant such that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Id. at 117–18, 386 S.E.2d at 625 (citing Strickland, 466 U.S. at 694, 104 S. Ct. at 2068). “A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial.” Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland, 466 U.S. at 694, 104 S. Ct. at 2068). When there has been a guilty plea, the applicant must prove that counsel’s representation

was below the standard of reasonableness and that, but for counsel's unprofessional errors, there is a reasonable probability that he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 52, 106 S. Ct. 366, 366 (1985); Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001) (citing Lockhart, 474 U.S. at 52, 106 S. Ct. at 366; Jackson v. State, 342 S.C. 95, 535 S.E.2d 926 (2000); Thompson v. State, 340 S.C. 112, 531 S.E.2d 294 (2000); Rayford v. State, 314 S.C. 46, 443 S.E.2d 805 (1994)).

To be knowing and voluntary, a plea must be entered with a full understanding of the charges and the consequences of the plea. Boykin v. Alabama, 395 U.S. 238, 243-44, 89 S. Ct. 1709, 1712 (1969); Dover v. State, 304 S.C. 433, 434, 405 S.E.2d 391, 392 (1991) (citing State v. Hazel, 275 S.C. 392, 394, 271 S.E.2d 602, 602 (1980)). When determining issues relating to guilty pleas, the court will consider the entire record, including the transcript of the guilty plea, and the evidence presented at the post-conviction relief hearing. Rolen v. State, 384 S.C. 409, 413, 683 S.E.2d 471, 474 (2009) (citing Anderson v. State, 342 S.C. 54, 57, 535 S.E.2d 649, 650 (2000)). See Harres v. Leeke, 282 S.C. 131, 318 S.E.2d 360 (1984)). When a defendant pleads guilty on the advice of counsel, the plea may be attacked through only a claim of ineffective assistance of counsel. Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2002) (citing Al-Shabazz v. State, 338 S.C. 354, 363-64, 527 S.E.2d 742, 747 (1999)).

Regarding the Applicant's claims of ineffective assistance of counsel, this Court finds the Applicant has failed to meet his burden of proof. This Court finds counsel's testimony credible and the Applicant's testimony not credible. This Court finds that the Applicant's attorney demonstrated the normal degree of skill, knowledge, professional judgment, and representation that is expected of an attorney who practices criminal law in South Carolina. State v. Pendergrass, 270 S.C. 1, 5, 239 S.E.2d 750, 752 (1977); Strickland, 466 U.S. at 687-88, 104 S.

Ct. 2052, 2064-65; Butler, 286 S.C. at 442, 334 S.E.2d at 814 (citing Strickland, 466 U.S. at 687-88, 104 S. Ct. at 2064-65, Turner v. Bass, 753 F.2d 342, 348 (4th Cir. 1985), *rev'd on other grounds*, Turner v. Murray, 106 S. Ct. 1683 (1986); Marzullo v. Maryland, 561 F.2d 540, 543 (4th Cir. 1977)). This Court further finds counsel adequately conferred with the Applicant, conducted a proper investigation, and was thoroughly competent in his representation. This Court finds that counsel's representation did not fall below an objective standard of reasonableness.

This Court finds counsel adequately advised the Applicant of his right to appeal. "[C]ounsel has a constitutionally-imposed duty to consult with defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal, or . . . (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing." Roe v. Flores-Ortega, 528 U.S. 470, 480, 120 S. Ct. 1029, 1037 (2000). This Court finds credible counsel's testimony that he advised the Applicant of his right to appeal and that the Applicant never indicated he wanted an appeal. This Court also finds credible counsel's testimony that there were no meritorious issues for appeal of the Applicant's guilty plea, and, upon review of the record, any appeal would have been dismissed pursuant to Anders v. California, 386 S.C. 738, 744-45, 87 S. Ct. 1396, 1400 (1967). This Court finds counsel properly advised the Applicant of his right to appeal and that the Applicant failed to indicate to counsel his desire for an appeal.

Although the Applicant argues he did not voluntarily and intelligently abandon his right to direct appeal of his criminal conviction, this Court finds that the Applicant failed to meet his burden of proof by a preponderance of the evidence that counsel did not file an appeal based on the Applicant's request. This Court finds Jones v. State, 382 S.C. 589, 677 S.E.2d 20 (2009),

dispositive. In Jones, the PCR judge granted the applicant a belated direct appeal pursuant to White v. State, 263 S.C. 110, 118–19, 208 S.E.2d 35, 40 (1974). See Jones, 382 S.C. at 594, 677 S.E.2d at 22. However, the South Carolina Supreme Court found that because the applicant failed to establish any meritorious issue ripe for appellate review and failed to ask counsel to file a direct appeal on his behalf, the applicant failed to meet his burden of proof entitling him to a belated appeal. See id. at 597, 677 S.E.2d at 24 (quoting Roe, 528 U.S. at 480, 120 S. Ct. at 1036); see also Turner v. State, 380 S.C. 223, 224–25, 670 S.E.2d 373, 374 (2008) (without evidence of “extraordinary circumstances” obligating counsel to advise the applicant of his right to appeal, the South Carolina Supreme Court found “the PCR judge erred in finding petitioner was entitled to a belated appellate review of his guilty plea”). Therefore, this Court finds that this allegation is without merit and the Applicant has failed to carry his burden of proving counsel was ineffective for failing to file a notice of appeal. Accordingly, this Court declines to grant the Applicant a belated direct appeal.

Ultimately, this Court finds the Applicant has failed to prove the first prong of the Strickland test specifically that counsel failed to render reasonably effective assistance under prevailing professional norms. See Cherry, 300 S. C. at 117, 386 S.E.2d at 625 (citing Strickland, 466 U.S. at 688, 104 S. Ct. at 2065). The Applicant failed to present specific and compelling evidence that counsel committed either errors or omissions in his representation of the Applicant. The Applicant failed to show that counsel’s performance was deficient. Therefore, this Court need not address whether the Applicant was prejudiced by counsel’s representation. See id. The Applicant’s complaints concerning counsel’s performance are without merit and are denied and dismissed.

### All Other Allegations

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this Order, this Court finds the Applicant failed to present any evidence regarding such allegations. Accordingly, this Court finds the Applicant waived such allegations and failed to meet his burden of proof. Therefore, all other allegations are hereby denied and dismissed.

### CONCLUSION

Based on the foregoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations occurring before or during his guilty plea and sentencing proceedings. Counsel was not deficient in any manner, nor was the Applicant prejudiced by counsel's representation. Therefore, this application for PCR must be denied and dismissed with prejudice.

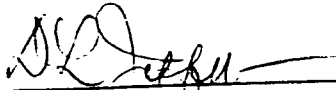
This Court advises the Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of written notice of entry of this Order to secure appropriate appellate review. His attention is also directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely served and filed.

### **IT IS THEREFORE ORDERED:**

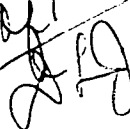
1. That the application for post-conviction relief be denied and dismissed with prejudice; and
2. That the Applicant be remanded to the custody of the Respondent.

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-  
JAG

AND IT IS SO ORDERED this 28<sup>th</sup> day of Oct., 2013.

  
The Honorable Deadra L. Jefferson  
Presiding Judge

Ches., South Carolina.  
at chambers

10  
10/28/10  


STATE OF SOUTH CAROLINA )  
COUNTY OF JASPER )

IN THE COURT OF (Select one.)

COMMON PLEAS  FAMILY COURT  
14TH JUDICIAL CIRCUIT

2013 APR -9 PM 3:27

BREON ALEXANDRE,

CASE NO.: 2012-CP-27-0218

Plaintiff(s),

CLERK OF COURT  
JASPER COUNTY SC

APPOINTMENT OF COUNSEL OR GAL

-vs-

(Select one.)

STATE OF SOUTH CAROLINA,

ORDER

Defendant(s).

AMENDED ORDER

TYPE OF CASE/PROCEEDING: (Check one.)

- |  |  |  |
|--|--|--|
| <input checked="" type="checkbox"/> Post-Conviction Relief (PCR)/habeas case | <input type="checkbox"/> Adoption                  | <input type="checkbox"/> Juvenile          |
| <input type="checkbox"/> SVP case  | <input type="checkbox"/> Custody and/or Visitation | <input type="checkbox"/> Abuse and Neglect |
| <input type="checkbox"/> Minor Name Change                                   | <input type="checkbox"/> Other:                    |  |

It appears that BREON ALEXANDRE, who is a litigant in this case, is entitled to court-appointed counsel or a guardian ad litem.

It further appears that: (Select only one.)

- counsel/guardian ad litem has not yet been appointed by the court; therefore, an appointment for counsel/guardian ad litem is necessary.
- counsel or a guardian ad litem was previously appointed by the court but has indicated either a possible conflict of interest, an entitlement to exemption, or other good cause warranting the appointment of new counsel or guardian ad litem based on: \_\_\_\_\_
- counsel was previously appointed by the court but has not indicated that the litigant has retained private counsel and is no longer entitled to appointed counsel.
- court appointed counsel has obtained \_\_\_\_\_, Esquire as substitute counsel pursuant to Rule 608(h)(2); provided, however, only the member who originally received the appointment and who sought substitute counsel shall receive credit.
- Other:

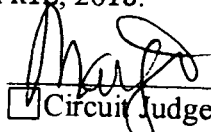
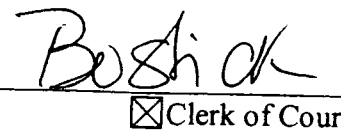
Therefore, it is ordered that GERALD A KELLY, hereby is appointed as (Select one.)

counsel  lead counsel (if capital PCR case)  guardian ad litem  
for the above-named person. Any counsel or GAL previously appointed is/are hereby relieved.

(If Death Penalty PCR Case) It is further ordered that \_\_\_\_\_, Esquire, is hereby appointed as second counsel in this capital PCR case.

The clerk of court is directed to forward a copy of this order to all persons entitled to notice.

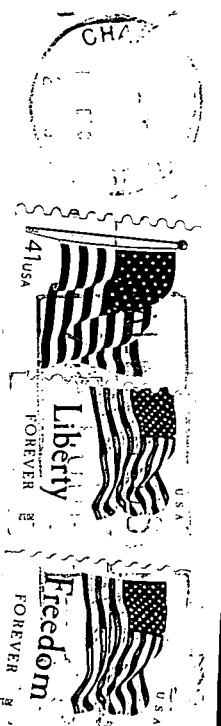
IT IS SO ORDERED THIS 9TH DAY OF APRIL, 2013.

   
 Circuit Judge  Clerk of Court

NOTICE: SC Supreme Court Order of September 29, 2006, requires appointed counsel entitled to payment from the Office of Indigent Defense (OID) to register the case online with OID within fifteen (15) days of this appointment at [www.sccid.sc.gov](http://www.sccid.sc.gov), and further directs that reimbursement vouchers be submitted directly to SCCID and not to the trial judge or clerk of court. See SCCID website for further details.

Kelley, Attorney at Law  
4760 Yamacraw  
Vannille, SC  
29944

Hon. Daniel E. Shearman  
Clerk of South Carolina Supreme Ct  
P.O. Box 11330  
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