

THE STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT  
APPEAL FROM ANDERSON COUNTY  
COURT OF COMMON PLEAS  
HONORABLE R. LAWTON McINTOSH

2012-CP-04-3434

KEVIN WARE, #269271

APPELLANT,

vs

STATE OF SOUTH CAROLINA,


RESPONDENT.

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**NOTICE OF APPEAL**

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Kevin Ware, #269271, appeals the denial of his Post Conviction Relief. The Post Conviction Relief Action was heard and denied by the Honorable R. Lawton McIntosh, Circuit Court Judge on September 18, 2013, and Order signed on February 25, 2014, and filed on February 26, 2014. The Appellant received notice of the judgment on March 3, 2014.



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Hugh W. Welborn  
Attorney for the Appellant  
Post Office Box 173  
Anderson, South Carolina 29622  
(864) 226-5787  
Attorney for Kevin Ware, #269271

Other Counsel of Record:  
Walt Whitmire, Esquire  
Office of Attorney General, State of SC  
Post Office Box 11549  
Columbia, South Carolina 29211

THE STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT  
APPEAL FROM ANDERSON COUNTY  
COURT OF COMMON PLEAS  
HONORABLE R. LAWTON McINTOSH

2012-CP-04-3434

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vs

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STATE OF SOUTH CAROLINA,

RESPONDENT.

MAR 07 2014

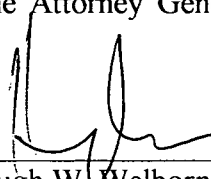
S.C. SUPREME COURT

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**PROOF OF SERVICE**

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I certify that I have served the Notice of Appeal on the State of South Carolina by depositing a copy of it in the United States Mail postage prepaid on March 4, 2014, addressed to its attorney of record Walt Whitmire, Office of the Attorney General, Post Office Box 11549, Columbia, South Carolina 29211-1549



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Hugh W. Welborn  
Attorney for the Appellant  
Post Office Box 173  
Anderson, South Carolina 29622  
(864) 226-5787  
Attorney for Kevin Ware

Anderson, South Carolina

March 4, 2014

STATE OF SOUTH CAROLINA )  
COUNTY OF ANDERSON )

IN THE COURT OF (Select one.)

COMMON PLEAS  FAMILY COURT  
10TH JUDICIAL CIRCUIT

Kevin Ware,  
Plaintiff(s),  
-vs-

CASE NO.: 2012-CP-04-3434  
APPOINTMENT OF COUNSEL OR GAL  
(Select one.)

State Of South Carolina,  
Defendant(s).

ORDER  
 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 \_\_\_\_\_, 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:

**A TRUE COPY**  
**JAN - 7 2013**  
*Richard X. Wiley*  
CLERK OF COURT

Therefore, it is ordered that Hugh Welborn, 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.

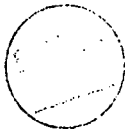
(If Death Penalty PCR Case) It is further ordered that \_\_\_\_\_, Esquire, is hereby appointed as second counsel in this capital PCR case.

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

IT IS SO ORDERED THIS 4th DAY OF January, 2013.

*Richard X. Wiley*  
 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, 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.



STATE OF SOUTH CAROLINA )  
 COUNTY OF ANDERSON )  
 Kevin Ware, )  
 S.C.D.C. No. #269271 )

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 COMMON PLEAS AND  
 GENERAL SESSIONS )

IN THE COURT OF COMMON PLEAS  
 FOR THE TENTH JUDICIAL CIRCUIT  
 Case No. 2012-CP-04-3434

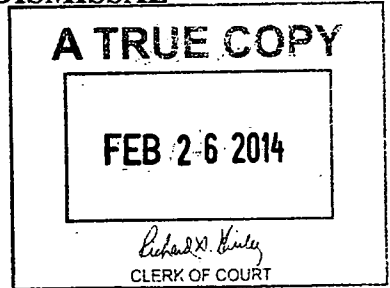
Applicant,

v.

State of South Carolina,

Respondent.

**ORDER OF DISMISSAL**



This matter comes before the Court pursuant to an application for post-conviction relief (PCR) filed October 30, 2012. Respondent made its Return. An evidentiary hearing into the matter was convened on September 18, 2013 at the Anderson County Courthouse. Applicant was present and was represented by Hugh W. Welborn, Esq. Respondent was represented by Walt Whitmire, Esq., of the Office of the Attorney General. Applicant and trial counsel testified at the hearing.

**PROCEDURAL HISTORY**

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Anderson County. Applicant was indicted at the March 2007 term of the Court of General Sessions for Anderson County for possession of crack cocaine with intent to distribute within proximity of a park (2007-GS-04-972) and possession of crack cocaine with intent to distribute (2007-GS-04-971). He was represented by Bruce Byrholdt, Esquire. On January 9, 2009, Applicant pled guilty as indicted. He was sentenced by the Honorable J.C. Nicholson, Jr., to confinement for a period of ten (10) years of incarceration for possession of crack cocaine with intent to distribute within proximity of a park

(2007-GS-04-972) and ten (10) years of incarceration for possession of crack cocaine with intent to distribute (2007-GS-04-971), with all sentences running concurrently.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected. The Applicant was represented by LaNelle Durant, Esquire on direct appeal. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Ware, Kevin M., Op. No. 2011-UP-273 (S.C. Ct. App. filed June 8, 2011). Applicant also filed a petition for writ of certiorari with the South Carolina Supreme Court. The Supreme Court denied certiorari on September 20, 2012. Applicant proceeded on the following allegations at his PCR hearing:

1. Ineffective Assistance of Counsel
  - a) failure to advise Applicant on his right to testify;
  - b) failure to investigate a defense of merely possession for personal use;
  - c) failure to properly cross-examine State witnesses;
  - d) failure to request a jury charge on possession of narcotics;
  - e) failure to object to trial judge's charge during deliberations.

#### **SUMMARY OF TESTIMONY**

Applicant testified counsel was ineffective for failing to investigate allegedly contaminated evidence. He elaborated that as a result of the inclusion of two different narcotics samples in a single evidence kit, counsel should have requested a charge on the lesser-included offense of possession. Applicant stated that counsel was deficient for not investigating material facts or principles of law. His version of the facts that led to his arrest and conviction was that he solely possessed the narcotics for personal use. He claimed counsel never advised him that was a viable defense. Applicant did testify that counsel reviewed the State's evidence and possible suppression defenses.

Applicant alleged counsel was ineffective for failing to conduct a proper cross-examination of Virginia Richardson. He contended counsel should not have held back in

impeaching Richardson with all of her prior convictions. Applicant surmised that this would have been relevant to the jury. Applicant alleged counsel was ineffective for failing to object to Captain Marsee's perjured testimony. He alluded to the trial judge suppressing a distribution charge that was not properly transcribed into the record.

Applicant alleged counsel was ineffective for failing to present witnesses on his behalf at trial. He testified counsel discussed the benefits and detriments of testifying on his own behalf with him. It is contention that counsel warned him that his prior convictions would come out of cross-examination. Applicant claimed that counsel's advice on the matter primarily influenced his decision not to testify. He now wishes he did testify and explain to the jury that the narcotics were for personal use.

Last, Applicant testified counsel was ineffective for not objecting to the trial judge's instruction to the jury when the deliberations stalled. He stated that five hours into deliberations, he felt like the trial judge's comments pressured the jury to return a guilty verdict.

At the PCR hearing, counsel testified to his course of conduct during the representation. Counsel believed he did a good job in the case. Counsel discussed Applicant's version of the facts with him. Counsel explained to Applicant version that he was "just a user" would be contradicted at trial by his past record. Counsel explained to him that it would not only hurt his credibility, but that it would further taint his image to the jury. Counsel was adamant that Applicant made the ultimate decision to not testify. He recalled the trial judge's colloquy on the matter. Counsel noted the one weakness in the State's case lied in evidence collection. Counsel formulated a motion to suppress on chain of custody and properly preserved his argument when trial denied his motion. Further, counsel formulated a trial strategy to diminish the weight of the evidence by exacerbating the minor mishandling from the evidence custodians. Furthermore, the

trial judge granted his motion to dismiss the conspiracy charge. Counsel found Richardson's testimony insignificant to the State's case in light of the numerous officers that witnessed Applicant throw the bag of narcotics at one of their comrades. His cross-examination was tempered with the fact that Richardson maintained no credibility. He was primarily concerned with opening the door to harmful testimony to his case. Counsel noted that he did request a lesser-included charge of possession but recognized the trial judge's ruling was correct. He stated that the possession charge was not applicable to the facts of the case. Last, counsel testified to the extended jury deliberations. He testified that the trial judge correctly charged Allen<sup>1</sup> at the appropriate juncture.

#### APPLICABLE LAW

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application 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, 104 S.Ct. 2052, 2064, (1984); Butler, 286 S.C. at 441, 334 S.E.2d at 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 668, 104 S.Ct. at 2064. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

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<sup>1</sup> Allen v. United States, 164 U.S. 492, 494, 17 S. Ct. 154, 41 L. Ed. 528 (1896)

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland, *supra*. 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." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

As a matter of general impression, this Court finds counsel's representation here exemplary. He faced great odds at trial in light of the State's overwhelming evidence of Applicant's guilt, yet was able to turn a small defect that only went to the weight of the evidence into a near acquittal. This Court finds counsel's testimony credible and Applicant's testimony not credible. Counsel made appropriate and timely objections expected from a seasoned criminal defense lawyer.

#### A.

This Court finds Applicant failed to meet his burden to prove counsel was ineffective in the advising him on his right to testify. "An on-the-record waiver of a constitutional or statutory right is but one method of determining whether the defendant knowingly and intelligently waived that right." Brown v. State, 317 S.C. 270, 272, 453 S.E.2d 251, 252 (1994). "The same principles apply to the lack of a knowing and intelligent waiver of the defendant's right to testify at trial." Brown v. State, 317 S.C. 270, 272, 453 S.E.2d 251, 252 (1994). "The Fifth Amendment provides that [n]o person ... shall be compelled in any criminal case to be a witness against himself. U.S. Const. Amend. V. The decision to testify or not is a perilous one. If a defendant

does not testify, he foregoes the opportunity to tell the jury his version of events. On the other hand, if a defendant chooses to testify, he subjects himself to cross-examination, including possible impeachment with prior convictions. Rule 609, SCRE. If a defendant chooses not to take the stand in his own defense, the trial judge must, if requested, instruct the jury that the defendant's failure to testify cannot be held against him or considered by the jury in any manner during its deliberations. Brown v. State, 340 S.C. 590, 594, 533 S.E.2d 308, 310 (2000) (internal quotations omitted). Here, this Court finds counsel adequately advised Applicant on his fundamental constitutional rights at issue. In addition, the trial judge entered a thorough colloquy on the matter where Applicant. Applicant knowingly, intelligently, and voluntarily made the ultimate decision not to testify.

This Court finds Applicant's contention that he was allegedly prejudice from counsel's advice here because had he testified, he would have been acquitted for PWID to be without merit. Applicant's testimony that he possessed the narcotics at the time of arrest solely for personal use was unpersuasive. The record shows he possessed a sufficient amount of narcotics necessitated to trigger the legal inference for PWID. Furthermore, he did not possess the narcotics paraphilia that is commonly associated with crack-cocaine consumption. Neither did a single witness testify that he was a mere user. In contrast, this Court agrees with counsel that the introduction of Applicant's prior convictions paints a much different picture. In addition this Court finds the allegation that counsel was ineffective for failing to investigate to support his claim that he was just a user where it is only supported by mere speculation. Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to result. See Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998). Therefore, these allegations are denied and dismissed.

**B.**

This Court finds Applicant failed to meet his burden to prove counsel was ineffective for not impeaching Virginia Richardson on all of her admissible prior convictions during his cross-examination. “A criminal defense attorney has the duty to conduct a reasonable investigation to discover all reasonably available mitigation evidence and all reasonably available evidence tending to rebut any aggravating evidence introduced by the State.” McKnight v. State, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008). “The Confrontation Clause “guarantees only an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.” State v. Nance, 393 S.C. 289, 294, 712 S.E.2d 446, 449 (2011) (citing United States v. Owens, 484 U.S. 554, 559, 108 S.Ct. 838, 98 L.Ed.2d 951 (1988)) (emphasis supplied). Here counsel articulated valid trial strategy to limit his cross-examination where the witnesses credulity was already in doubt. Virginia Richardson had testified on direct that she was arrested and subsequently convicted for “running a crack house.” This Court finds counsel’s explanation that an extended focus on cumulative prior convictions yielded diminished returns to Applicant’s case at best. See Huggler v. State, 360 S.C. 627, 635, 602 S.E.2d 753, 757 (2004). “[The Court found it] prudent for counsel to limit cross-examination to the issues he thought were most important, without picking apart the witnesses’ testimonies based on meaningless inconsistencies.”). Instead the record shows counsel cross-examined Applicant on her inconsistent testimony concerning her drug use along and established a defense theory regarding her motive to testify against Applicant. Not only did counsel cross-examine Richardson on her beneficial plea deal, he also questioned a police officer on the matter. This Court finds counsel’s strategy was deliberate and well executed. Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992) (“Where, as here, counsel articulates a valid reason for

employing certain strategy, such conduct will not be deemed ineffective assistance of counsel.”). Any possible harm to Applicant here was speculative at best. See Drayton v. Evatt, 312 S.C. 4, 12, 430 S.E.2d 517, 522 (1993) (“[Counsel’s trial strategy on cross-examination] proves only that trial counsel was ineffective in the sense that all criminal defense lawyers whose clients are found guilty are ineffective. That any more argument or different contentions might possibly have altered this result would be sheer speculation.”). Last this Court finds Applicant’s allegation that counsel did not object to Captain Marsee’s alleged perjured testimony to be without merit and utterly unfounded. Therefore, these allegations are denied and dismissed.

C.

This Court finds Applicant’s allegation that counsel was ineffective for not objecting to the trial judge’s Allen charge to be without merit. This Court agrees with counsel that the charge was proper. “The typical judicial mechanism for encouraging an indecisive jury is the *Allen* charge, in which jurors are instructed on, among other things, their duties to approach the evidence with an open mind and consider the opinions of their fellow jurors.” State v. Robinson, 360 S.C. 187, 193, 600 S.E.2d 100, 103 (Ct.App.2004). “In South Carolina state courts, an Allen charge cannot be directed to the minority voters on the jury panel. Instead, an Allen charge should be even-handed, directing both the majority and the minority to consider the other’s views. A trial judge has a duty to urge, but not coerce, a jury to reach a verdict. It is not coercion to charge every juror has a right to his own opinion and need not give up the opinion merely to reach a verdict. State v. Williams, 386 S.C. 503, 512, 690 S.E.2d 62, 66 (2010) (Green v. State, 351 S.C. 184, 194, 569 S.E.2d 318, 323 (2002)). Here, the trial judge’s charge was not directed towards a minority juror or even remotely coercive. See Tucker v. Catoe, 346 S.C. 483, 485, 552

S.E.2d 712, 713 (2001). Simply, a defense is under no duty to make an objection for the sake of making an objection. Therefore this allegation is denied and dismissed.

**D.**

Last this Court summarily dismisses Applicant's allegation that counsel was ineffective for not requesting a jury instruction to on the lesser-included offense of narcotics possession. Counsel requested the charge. See Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1975), errors which can be reviewed on direct appeal may not be asserted for the first time, or reasserted, in post-conviction proceedings. Therefore, this allegation is denied and dismissed.

**E.**

Except as discussed above, this Court finds that the Applicant affirmatively abandoned the remaining allegations set forth in his application at the hearing. A waiver is a voluntary and intentional abandonment or relinquishment of a known right. Janasik v. Fairway Oaks Villas Horizontal Property Regime, 307 S.C. 339, 415 S.E.2d 384 (1992). A waiver may be express or implied. "An implied waiver results from acts and conduct of the party against whom the doctrine is invoked from which an intentional relinquishment of a right is reasonably inferable." Lyles v. BMI, Inc., 292 S.C. 153, 158-59, 355 S.E.2d 282 (Ct. App. 1987). The Applicant's failure to address these issues at the hearing indicates a voluntary and intentional relinquishment of his right to do so. Therefore, any and all remaining allegations are denied and dismissed.

**CONCLUSION**

Based on all the forgoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

This Court notes that Applicant must file and serve a notice of intent to appeal within thirty (30) days from receipt of this Order to secure the appropriate appellate review. See Rule 203, SCACR. Rule 71.1(g), SCRCP; Bray v. State, 336 S.C. 137, 620 S.E.2d 743 (2005), for the obligation of Applicant's counsel to file and serve notice of appeal. The Applicant's attention is also directed to South Carolina Appellate Court Rule 243 for appropriate procedures after notice has been timely filed.

**IT IS THEREFORE ORDERED:**

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. Applicant must be remanded to the custody of Respondent

AND IT IS SO ORDERED this 28 day of Feb, 2014.

  
R. LAWTON MCINTOSH  
Presiding Judge  
Tenth Judicial Circuit

Anderson, South Carolina

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GENERAL SESSIONS

*Hugh W. Welborn*

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email to:  
hughwelborn@bellsouth.net

March 4, 2014

South Carolina Office of Appellate Defense  
P. O. Box 11589  
Columbia, South Carolina 29211-1509

Dear Sir or Madam:

In Re: Kevin Ware #269271 vs State of South Carolina

In connection with the foregoing matter, please be advised that I was the Court Appointed Attorney and enclose herewith a copy of my appointment. I also enclose copies of all documents you requested for filing a copy of the Appellant's Notice of Appeal in this matter together with a copy of the Order of Dismissal and Proof of Service. I ask that your office assume representation of this indigent Applicant.

With kind regards,

  
Hugh W. Welborn

HWW/bmg

Enclosures

cc: Supreme Court

cc: Attorney General Office

cc: Client

*Hugh W. Welborn*

Attorney at Law  
Post Office Box 173  
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Office (864) 226-5787  
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hughwelborn@bellsouth.net

March 4, 2014

Walt Whitmire, Esquire  
Office of Attorney General  
State of South Carolina  
Post Office Box 11549  
Columbia, South Carolina 29211

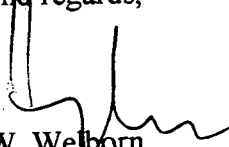
Dear Walt:

In Re: Kevin Ware, #269271, vs State of South Carolina

Please find enclosed herewith a copy of the Appellant's Notice of Appeal and Proof of Service in connection with the foregoing matter. I also enclose copies of correspondence to the Appellate Defense Office and the Supreme Court. I have also forwarded copies of all documents to Mr. Ware.

If you have any questions, please do not hesitate to contact my office.

With kind regards,

  
Hugh W. Welborn

HWW/bmg  
Enclosures  
cc: Office of the Appellate Defense  
cc: South Carolina Supreme Court  
cc: Client

*Hugh W. Welborn*

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March 4, 2014

Kevin Ware #269271  
MacDougall Correctional Institution #B-2  
1516 Old Gilliard Road  
Ridgeville, SC 29472

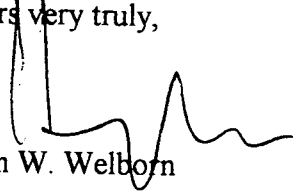
Dear Mr. Ware:

In RE: Kevin Ware #269271 vs State of South Carolina (PCR)  
Case No. 2012-CP-04-3434

In connection with the foregoing matter, please find enclosed herewith a copy of the Order of Dismissal from the Court. I have already filed the necessary paperwork regarding your Appeal. I have notified the State Supreme Court that you intended to appeal Judge McIntosh's ruling. I have also referred this matter to the South Carolina Appellate Defense as I have not been appointed to handle your Appeal. The South Carolina Appellate Defense Office will now assign an attorney to represent you in the Appeal.

Copies of these documents and my correspondence are enclosed for your records.

Yours very truly,

  
Hugh W. Welborn

HWW/bmg  
Enclosures

*Hugh W. Welborn*

Attorney at Law  
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Anderson, South Carolina 29622

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March 4, 2014

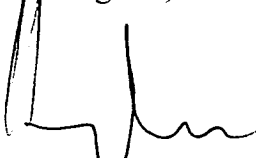
South Carolina Supreme Court  
Post Office Box 11330  
Columbia, South Carolina 29211

Dear Sir/Madam:

In Re: Kevin Ware, #269271 vs State of South Carolina

Please find enclosed herewith the original and one (1) copy of the Appellant's Notice of Appeal in connection with the foregoing matter which I ask that you file for record, returning the clocked copy to my office. I also enclose a copy of the Order of Dismissal and the original Proof of Service on Walt Whitmire, Esquire, Office of the Attorney General. Please use the enclosed self-addressed envelope to return the clocked copy to my office.

With kind regards,



Hugh W. Welborn

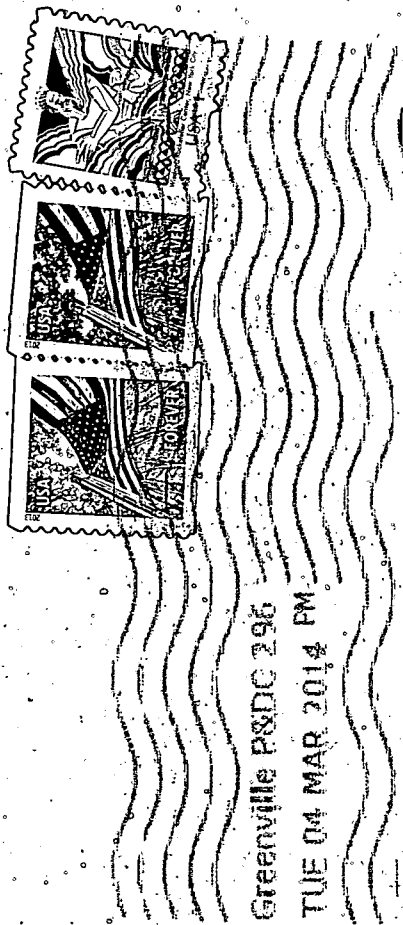
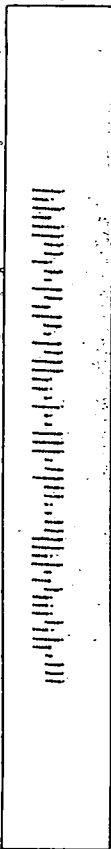
HWW/bmg

cc: Office of the Appellate Defense  
cc: Office of the Attorney General  
cc: Client

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**S.C. SUPREME COURT**



Hugh W. Welborn  
Attorney at Law  
P. O. Box 173  
Anderson, SC 29622

South Carolina Supreme Court  
Post Office Box 11330  
Columbia, South Carolina 29211

100% PCC