

ROSS AND ENDERLIN, PA
ATTORNEYS AT LAW

April 3, 2014

Mr. Daniel E. Shearouse
Clerk, The S.C. Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: James M. Babb v. State

Dear Mr. Shearouse:

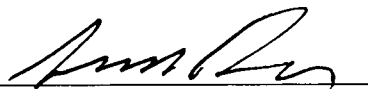
Enclosed you will find the original Notice of Appeal in the above matter along with Proof of Service upon the Respondent and the Order of Dismissal. The Notice has also been filed with the Greenville County Clerk of Court.

RECEIVED

APR 07 2014

S.C. SUPREME COURT

Sincerely,



Susannah Ross
Attorney at Law

enclosure

cc: Paul Wickensimer, Clerk
Office of the Attorney General
Office of Appellate Defense

330 E. COFFEE ST. • GREENVILLE/SC • 29601
PHONE: (864) 242-0029
E-MAIL: SUSANNAH@ROSSENDERLIN.COM

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMER
THE STATE OF SOUTH CAROLINA
In The Supreme Court

2014 APR 3 PM 12 05

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

G. Edward Welmaker, Circuit Court Judge

2012-CP-23-03342

James M. Babb, Appellant,

v.

The State, Respondent.

RECEIVED

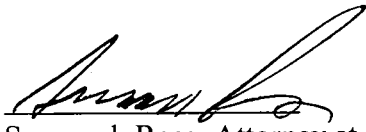
APR 07 2014

NOTICE OF APPEAL

S.C. SUPREME COURT

James M. Babb appeals the Honorable G. Edward Welmaker's Order of Dismissal filed on February 17, 2014, and his Order denying Plaintiff's Motion to Alter or Amend filed March 25, 2014.

This 3 day of April, 2014.


Susannah Ross, Attorney at Law
330 East Coffee St.
Greenville, South Carolina 29601
(864) 242-0029
Attorney for Appellant

Other Counsel of Record:
Karen Ratigan, Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211
(803) 734-3970
Attorney for Respondent

PROOF OF SERVICE OF NOTICE OF APPEAL

THE STATE OF SOUTH CAROLINA

In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

G. Edward Welmaker, Circuit Court Judge

2012-CP-23-03342

James M. Babb, Appellant,

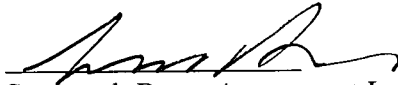
v.

The State, Respondent.

PROOF OF SERVICE

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 April 3, 2014, addressed to Attorney General of South Carolina, Attn: Karen Ratigan, P.O. Box 11549 Columbia, SC 29211.

This 3 day of April, 2014.


Susannah Ross, Attorney at Law
330 East Coffee St.
Greenville, South Carolina 29601
(864) 242-0029
Attorney for Appellant

STATE OF SOUTH CAROLINA)
)
 COUNTY OF GREENVILLE)
)
 James Melvin Babb,)
 S.C.D.C. No. 339152,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 C.A. No. 2012-CP-23-3342

ORDER OF DISMISSAL

FILED-CLERK OF COURT
 GREENVILLE CO. S.C.
 PAUL B. WICKENSIMMER
 2014 FEB 17 AM 11 30

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed May 17, 2012. The Respondent made its return on August 31, 2012. An evidentiary hearing into the matter was convened on December 19, 2013 at the Greenville County Courthouse. The Applicant was present at the hearing and represented by Susannah C. Ross, Esquire. Karen C. Ratigan, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

The Applicant testified on his own behalf at the PCR hearing. Also testifying were Michael Few, Roger Ensley, and the Applicant's trial counsel, Richard H. Warder, Esquire. The Court had before it the trial transcript, the Greenville County Clerk of Court records, the Applicant's South Carolina Department of Corrections records, the PCR application, the return, the appellate records, and the Applicant's Exhibits 1-2.

PROCEDURAL HISTORY

The Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Greenville County Clerk of Court. The Applicant was indicted at the September 2007 term of the Greenville County Grand Jury for trafficking

1


methamphetamine (2007-GS-23-7963) and at the November 2007 term for possession with intent to distribute (PWID) a controlled substance (2007-GS-23-7964). He was represented by Richard H. Warder, Esquire.

After the State brought the case to trial, the Applicant was found guilty. On February 2, 2010, the Honorable Edward W. Miller levied concurrent sentences of fifteen years for trafficking methamphetamine, second offense and five years for PWID a controlled substance, second offense.

A notice of appeal was filed at the South Carolina Court of Appeals. Wanda H. Carter, Esquire of the South Carolina Office of Appellate Defense perfected the appeal. The Court of Appeals affirmed the Applicant's convictions and sentences. State v. Babb, Op. No. 2012-UP-209 (S.C. Ct. App. filed March 28, 2012).

ALLEGATIONS

In his application, the Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of trial counsel:
 - a. Allowed deliberate deception of co-defendant's testimony.
 - b. Failed to put the State's case through adversarial testing.
 - c. Failed to challenge chain of custody.
 - d. Failed to challenge co-defendant's pre-arranged plea agreement.
 - e. Failed to request to suppress co-defendant's statement.
 - f. Failed to object to trial judge's prejudicial comments.
 - g. Compelled the Applicant to take the stand.
 - h. Failed to object to pitting of witnesses by solicitor.
 - i. Failed to interview State's main witness.
 - j. Failed to object to prior bad acts.
 - k. Failed to object to prosecutorial misconduct.
 - l. Allowed prosecutorial conduct to take place.
 - m. Failed to request a mistrial.
 - n. Failed to request a severance.
 - o. Failed to properly argue probable cause and traffic stop.
2. Ineffective assistance of appellate counsel.

3. “Wrongful consolidation of Defendants.”

At the evidentiary hearing, the Applicant proceeded solely upon the following issues and allegations:

1. Ineffective assistance of trial counsel:
 - a. Failed to argue a violation of Rule 3(c), SCRCrimP.
 - b. Failed to investigate and communicate with the Applicant.
 - c. Failed to argue S.C. Code Ann. § 56-5-6540(D).
 - d. Failed to call witnesses.

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 their 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).

Ineffective Assistance of Counsel

The Applicant alleges he received ineffective assistance of counsel. In a PCR action, “[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.” Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002).

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel’s ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). In order to prove prejudice, an applicant must show “there is a reasonable probability that, but for counsel’s unprofessional errors, the



result of the proceeding would have been different.” Cherry v. State, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989). “A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial.” Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052).

The Applicant stated he retained trial counsel and they met three times before trial. The Applicant stated they did not review the case or possible defenses. The Applicant stated he told trial counsel’s assistant that the check at issue was not for drugs but that the person he gave that check to could be called as a witness. The Applicant stated his co-defendant (Troy Fallin) would have drugs and share them with him. The Applicant stated Fallin sent a letter to trial counsel after the trial, in which he said he was promised a seven-year sentence and was coached as to how to testify. The Applicant stated that, while trial counsel did not keep him informed about the case, he was content to let trial counsel “run the show.”

Michael Few stated he knows both Fallin and the Applicant. Few stated he would have testified at trial that Fallin was a drug dealer and that he did not know of the Applicant as a dealer. On cross-examination, Few admitted he knew of the Applicant’s court date but did not contact trial counsel.

Roger Ensley stated he has known the Applicant since the late 1980s. Ensley stated he wrote a check to the Applicant (the check used at trial). Ensley stated he learned this check was at issue approximately one year after the Applicant’s conviction. Ensley admitted he knew the Applicant was a drug user.

Trial counsel confirmed he was retained in this case. Trial counsel testified he filed discovery motions, received those materials, and reviewed them with the Applicant. Trial counsel testified he spoke with the Applicant “several” times. Trial counsel testified they



reviewed the Applicant's version of events, the tip to the police officers, and the doctrines of mere presence and accomplice liability. Trial counsel testified the defense strategy was to argue the Applicant was not involved in the drug transaction and that the officers saw Fallin put the bag of drugs in the trunk. Trial counsel testified he did not recall the check issue but that if this item were in the discovery materials, he would have reviewed it with the Applicant. Trial counsel testified the Applicant never asked him to contact Ensley. Trial counsel testified he did not recall if he did anything with Fallin's letter. Trial counsel testified he did not argue § 56-5-6540(D) at the suppression hearing.

This Court finds the Applicant's testimony is not credible, while also finding trial counsel's testimony is credible. This Court further finds trial counsel adequately conferred with the Applicant, conducted a proper investigation, and was thoroughly competent in his representation.

This Court finds the Applicant failed to meet his burden of proving trial counsel did not adequately communicate with him or investigate his case. Trial counsel testified they had several meetings about the case and reviewed the discovery materials and the Applicant's version of the case. This Court finds trial counsel's testimony is credible. This Court also notes the Applicant failed to voice any dissatisfaction with trial counsel's representation to the trial judge.

This Court finds the Applicant failed to meet his burden of proving trial counsel should have filed a motion pursuant to Rule 3(c), SCRCrimP.¹ This Court notes the lack of an

¹ This Court notes the Applicant moved for summary judgment in this case, arguing the State's return was filed late. As the State's return was dated August 31, 2012, it was filed two weeks late. Rule 12(a), SCRCrimP. The motion is denied, as this Court finds the Applicant failed to articulate or demonstrate any prejudice as a result of this delay.

indictment within 90 days does not automatically nullify a warrant. See State v. Culbreath, 282 S.C. 38, 40, 316 S.E.2d 681, 681 (1984) (“[T]he failure of the solicitor to act upon a warrant within ninety (90) days . . . does not within itself invalidate a warrant or prevent subsequent prosecution.”). Further, this Court finds the Applicant failed to provide evidence of any prejudice that resulted from the delay. See, e.g., State v. Pittman, 373 S.C. 527, 647 S.E.2d 144 (2007) (noting one must prove prejudice in order to prevail on an allegation that one’s speedy trial rights were violated).

This Court finds the Applicant failed to meet his burden of proving trial counsel should have argued S.C. Code Ann. § 56-5-6540(D) when arguing the motion to suppress. This Court notes trial counsel argued the substance of this statute, without actually mentioning the statute number. (Trial transcript, p.75). This Court further notes the Court of Appeals cited § 56-5-6540(D) in addressing the search and affirming the Applicant’s conviction. See State v. Babb, Op. No. 2012-UP-209 (S.C. Ct. App. filed March 28, 2012).

This Court finds the Applicant failed to meet his burden of proving trial counsel should have subpoenaed witnesses Few and Ensley to testify at trial. Few stated he would have testified at trial that Fallin was the source and dealer of the drugs. Ensley stated he would have testified that he wrote the Applicant a check, which was admitted at trial, for gratuitous reasons. While the assistant solicitor briefly mentioned the check in closing argument as a possible drug payment, the thrust of the importance of this evidence was to show the Applicant’s knowledge of the drugs. (Trial transcript, pp.138-39; pp.257-58). While the law requires that defense attorneys conduct a reasonable investigation, the law does not require attorneys interview “every potential witness” when they can articulate reasonable grounds not to do so. See Edwards v. State, 392 S.C. 449, 457, 710 S.E.2d 60, 64-65 (2011). In this case, trial counsel had no

knowledge of any favorable witnesses because none contacted him and offered to testify – and the Applicant did not instruct him to contact any witnesses. In sum, trial counsel committed no unprofessional error in not calling Few and Ensley at trial. Regardless, the Applicant failed to demonstrate the testimony of either witness would have changed the ultimate outcome of his trial. Johnson v. State, 325 S.C. at 186, 480 S.E.2d at 735.

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test – that trial counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that trial counsel committed either errors or omissions in his representation of the Applicant. This Court also finds the Applicant has failed to prove the second prong of Strickland – that he was prejudiced by trial counsel’s performance. The State produced overwhelming evidence of guilt: a tip alerted police to the drug activity, the factual basis for the tip was confirmed by police, police found drugs in the trunk of the car in which the Applicant and Fallin were riding, and Fallin implicated the Applicant in the drug transaction. See Geter v. State, 305 S.C. 365, 367, 409 S.E.2d 344, 346 (1991) (concluding reasonable probability of a different result does not exist when there is overwhelming evidence of guilt). This Court concludes the Applicant has not met his burden of proving counsel failed to render reasonably effective assistance. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

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 testimony, argument, or evidence at the hearing regarding such allegations. Accordingly, this Court finds the Applicant has abandoned any such allegations.

7 

CONCLUSION

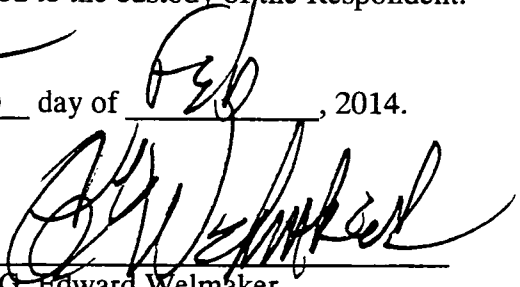
Based on all the foregoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations before or during his trial and sentencing proceedings. Counsel was not deficient and the Applicant was not prejudiced by counsel's representation. Therefore, this PCR application 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 this Order if he wants 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 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.

AND IT IS SO ORDERED this 5 day of Feb, 2014.



G. Edward Welmaker
Presiding Judge
Thirteenth Judicial Circuit

Dickens, South Carolina.

STATE OF SOUTH CAROLINA)
)
 COUNTY OF GREENVILLE)
)
 JAMES MELVIN BABB,)
)
 APPLICANT,)
)
 VS.)
)
 STATE OF SOUTH CAROLINA,)
)
)
 RESPONDENT.)

IN THE COURT OF COMMON PLEAS
 CASE NO. 2012-CP-23-3342

MOTION TO ALTER OR AMEND
 THE JUDGMENT

FILED-CLERK OF COURT
 GREENVILLE CO. S.C.
 PAUL B. WICKENS/ME
 2014 FEB 24 PM 3 4

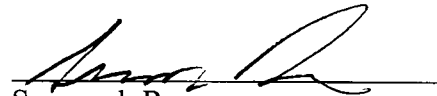
Pursuant to Rule 59(e), SCRPC, Applicant hereby moves to alter or amend the judgment of this Court filed on February 17, 2014.

Page three of the Order of Dismissal states that the Applicant proceeded solely on the issue of ineffective assistance of trial counsel. This is not the case. The Applicant also argued ineffective assistance of appellate counsel in failing to argue § 56-5-6540 (D) in her brief. The argued issue on appeal in Babb’s final brief is that an anonymous tip did not justify the investigatory stop and search that led to the discovery if illegal drugs. (Final Brief p. 3) Though the officer who made the stop stated the purpose of the stop was to address a seatbelt violation, the brief does not argue South Carolina Code Annotated § 56-5-6540 (D) of Article 48 on safety belts which states: “A vehicle, driver or occupant in a vehicle must not be searched, nor may consent to search be requested by a law enforcement officer, solely because of a violation of this article.” The damage of this omission was increased because this was not an Anders brief, thus the Court of Appeals was under no duty to conduct a full review of the trial record for error. Had

appellate counsel not omitted this issue or filed an Anders brief triggering a full review of the trial record, the outcome of the Applicant's case would likely have been different.

For the foregoing reasons, the Applicant requests this Court to alter or amend its Order of Dismissal.

Respectfully submitted,



Susannah Ross
Attorney for the Applicant
333 E. Coffee Street,
Greenville, SC 29601
(864) 242-0029

Greenville, South Carolina
This 2nd day of Feb., 2014.

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)
)
James Melvin Babb,)
S.C.D.C. No. 339152,)
)
Applicant,)
)
v.)
)
State of South Carolina,)
)
Respondent.)
_____)

IN THE COURT OF COMMON PLEAS
C.A. No. 2012-CP-23-3342

**RETURN TO MOTION TO ALTER OR
AMEND THE ORDER OF DISMISSAL**

Respondent, by and through undersigned counsel, making Return to Applicant's Motion to Alter or Amend, would respectfully show unto this Court:

1. The matter is before the Court by way of a post-conviction relief action filed May 17, 2012.
2. An evidentiary hearing was convened on December 19, 2013 at the Greenville County Courthouse.
3. Applicant was present at the hearing and represented by Susannah C. Ross, Esquire. Applicant testified in his own behalf. Also testifying were Michael Few, Roger Ensley, and Applicant's trial counsel, Richard H. Warder, Esquire.
4. After a full review of the evidence presented at the evidentiary hearing, the post-conviction relief court issued an order dated February 5, 2014 and filed February 17, 2014 denying the application for post-conviction relief.
5. Applicant – through counsel – filed a Motion to Alter or Amend Judgment on February 24, 2014 (which was received by Respondent on March 3, 2014). Applicant moves this

Court to alter or amend the final order of dismissal to include the issue of ineffective assistance of appellate counsel.

6. Respondent has reviewed the four pages of notes taken during the evidentiary hearing. Respondent's notes indicate Applicant's counsel cross-examined trial counsel about the facts and underlying law surrounding the S.C. Code Ann. § 56-5-6540(d) issue. Respondent's notes indicate the only mention of ineffective assistance of appellate counsel was Applicant's counsel's closing remarks. Respondent's notes indicate Applicant's counsel stated appellate counsel failed to argue the statute in the brief (but that appellate counsel could not argue such because it had not been properly preserved).

7. Respondent submits the final order should be amended to reflect the issue of ineffective assistance of appellate counsel and the limited argument made at the evidentiary hearing. Respondent submits the remainder of the issues raised at the PCR hearing were addressed in the final order of dismissal.

Respectfully submitted,

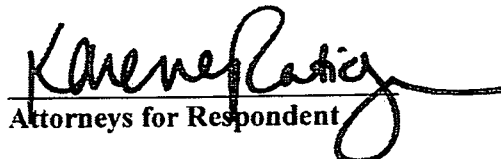
ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

KAREN C. RATIGAN
Senior Assistant Deputy Attorney General

P.O. Box 11549
Columbia, S.C. 29211

By:


Attorneys for Respondent

March 6, 2014

FORM 4

STATE OF SOUTH CAROLINA
 COUNTY OF GREENVILLE
 IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
 CASE NUMBER 2012CP233342

James Melvin Babb

State of South Carolina

FILED-CLERK OF COURT
 GREENVILLE CO. S.C.
 PAUL D. HENSINGER
 2014 MAR 2
 10 10 33

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for: Plaintiff Defendant
 Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):**
 - Rule 12(b), SCRPC;
 - Rule 41(a), SCRPC (Vol. Nonsuit);
 - Rule 43(k), SCRPC (Settled);
 - Other: _____
- ACTION STRICKEN (CHECK REASON):**
 - Rule 40(j) SCRPC;
 - Bankruptcy;
 - Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
 - Other: _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 - Affirmed;
 - Reversed;
 - Remanded;
 - Other:

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order; (formal order to follow) Statement of Judgment by the Court:

ORDER INFORMATION

This matter comes before the court on Plaintiff's Motion to Alter or Amend the Order of Dismissal pursuant to SCRPC 59(e). After having fully reviewed Petitioner's motion, Respondent's return, and the file in this case, this court agrees with Respondent that no testimony was presented at the PCR hearing bearing on this issue. Even if testimony had been presented, this court believes the Order of Dismissal encompasses this issue. See also State v. Babb, Op. No. 2012-UP-209 (S.C. Ct. App. filed March 28, 2012).

This order ends does not end the case.

Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge

may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

[Handwritten signature]

3/11/2014

Circuit Court Judge

Judge Code

Date

For Clerk of Court Office Use Only

3-25-14

3-25-14

This judgment was entered on, and a copy mailed first class or placed in the appropriate attorney's box on, to attorneys of record or to parties (when appearing pro se) as follows:

Susannah Ross, 333 E. Coffee Street, Greenville, SC 29601

Karen Ratigan, PO BOX 11549, Columbia, SC 29211

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Paul B. Wickensimer

Court Reporter

Paul B. Wickensimer - Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

