

PCR

LEROY BENNETT, 153421  
LEE C.I. DARL. N. 1131  
990 WISACKY HWY.  
BISHOPVILLE, S.C. 29010

**RECEIVED**

APR 21 2014

APRIL 10, 2014

**S.C. SUPREME COURT**

HON: DANIEL E. SHEAROUSE  
CLERK  
S.C. SUPREME COURT  
P.O. BOX 11330  
COLUMBIA, S.C. 29211

RE: LEROY BENNETT, 153421 v. THE STATE S.C., #2012-CP-16-810, etc.  
ENCLOSURES: NOTICE OF APPEAL, PROOF OF SERVICE, etc.  
ORDER OF DISMISSAL, CONDITIONAL ORDER OF DISMISSAL, PCR, etc.

DEAR MR. SHEAROUSE:

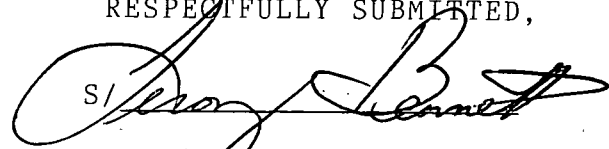
PLEASE SEE ENCLOSED FOR FILING MY NOTICE OF APPEAL AND PROOF OF SERVICE AS IS REQUIRED PURSUANT TO RULE 243, SCACR, I ALSO SENT AN EXTRA COPY FOR IT TO BE RETURNED TO ME WITH YOUR OFFICE SEALS STAMPED ON THEM SO I CAN HAVE THEM FOR ME FILES.

I AM THANKING YOU IN THE ADVANCE FOR YOUR TIME AND HELP GIVEN TO ME IN THIS CRUX MATTER AND I LOOK FORWARD IN HEARING FROM YOU IN THIS VERY NEAR FUTURE.

AGAIN THANK YOU!!!

RESPECTFULLY SUBMITTED,

APRIL 10, 2014



ENCLOSURES:

LEROY BENNETT, 153421  
990 WISACKY HWY.  
BISHOPVILLE, S.C. 29010  
pro se PETITIONER

THE STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

---

APPEAL FROM DARLINGTON COUNTY  
COURT OF COMMON PLEAS

THE HONORABLE J. MICHAEL BAXLEY, CIR. CT. JUDGE

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CASE NO. 2012-CP-16-810

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LEROY BENNETT, 153421,....., PETITIONER,

Vs.

THE STATE OF S.C.,....., RESPONDENT.

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NOTICE OF APPEAL

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~~LE~~ LEROY BENNETT, #153421  
LEE C.I./DARL. N 1131  
990 WISACKY HWY.  
BISHOPVILLE, S.C. 29010  
pro se PETITIONER

JOSHUA L. THOMAS, ESQ.  
ASST. ATTY. GEN.  
P.O. BOX 11549  
COLUMBIA, S.C. 29211-1549  
RESPONDENT

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APR 21 2014

**S.C. SUPREME COURT**

THE STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

APPEAL FROM DARLINGTON COUNTY  
COURT OF COMMON PLEAS

HON: J. MICHAEL BAXLEY, CIR CT. JUDGE

CASE NO. 2012-CP-16-810

LERoy BENNETT, 153421,....., PETTIONER,

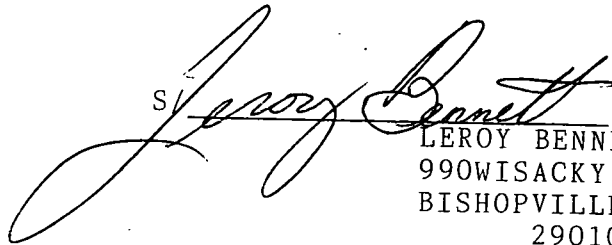
Vs.

THE STATE OF S.C.,....., RESPONDENT.

PROOF OF SERVICE

I, LEROY BENNETT, #153421, CERTIFY THAT I DID SERVED A TRUE COPY OF THE NOTICE OF APPEAL AND PROOF OF SERVICE TO THE COUNSEL OF RECORD FOR THE RESPONDENT BY WAY OF UNITED STATES MAIL, PRE-PAID POSTAGES ADDRESSED TO HIS OFFICE AS: ASST. ATTY. GENERAL, PO BOX 11549, COLUMBIA, S.C. 29211-1549, ON THIS 10th DAY OF APRIL 2014, BY PERSONALLY DELIVERING IT TO THE PRISON MAILROOM POSTAL DIRECTOR MS. WHITNEY ON THIS 10th DAY OF APRIL 2014. BY PROVING RESPONDENT WAS SERVED BY WAY OF MAIL AS THIS IS THE APPROPRIATE WAY TO COMMUNICATE WITH THE RESPONDENT OF CASE.

APRIL 10, 2014



LERoy BENNETT #153421  
990WISACKY HWY.  
BISHOPVILLE, S.C.  
29010

STATE OF SOUTH CAROLINA )

COUNTY OF DARLINGTON )

Leroy Bennett, 153421 )

Applicant, )

v. )

State of South Carolina, )

Respondent. )

IN THE COURT OF COMMON PLEAS

12-CP-16-810

**CONDITIONAL  
ORDER OF DISMISSAL**

RECEIVED  
CLERK OF COURT  
DARLINGTON COUNTY, S.C.  
NOV 10 11 51 AM

This matter comes before the Court by way of an Application for Post-Conviction Relief (PCR) filed September 21, 2012. Respondent made its Return on October 25, 2012, requesting summary dismissal of the matter. This Court also has before it the records of the Clerk of Court regarding the subject convictions.

**PROCEDURAL HISTORY**

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Darlington County. Applicant was indicted at the Darlington County Grand Jury for kidnapping (1988-GS-16-0904), armed robbery (1988-GS-16-0905), grand larceny of a vehicle (1988-GS-16-0906), and assault and battery with intent to kill (ABIK) (1988-GS-16-0907). He was represented by Robert L. Kilgo, Esquire.

After the State called the case to trial, Applicant was found guilty as indicted. On October 6, 1988, he was sentenced by the Honorable Edward B. Cottingham to consecutive sentences of life imprisonment for kidnapping, twenty-five (25) years for armed robbery, ten (10) years for grand larceny of a vehicle and twenty (20) years for ABIK.

TRUE CERTIFIED COPY,  
*Scott B. Suggs*  
CLERK OF COURT/RMC  
DARLINGTON COUNTY, S.C.

TRUE CERTIFIED COPY,  
*Scott B. Suggs*  
CLERK OF COURT/RMC  
DARLINGTON COUNTY, S.C.

A notice of appeal was filed at the South Carolina Supreme Court. Wanda H. Haile, Esquire of the South Carolina Office of Appellate Defense perfected the appeal in the form of an Anders<sup>1</sup> brief. The Supreme Court dismissed the appeal. State v. Bennett, Op. No. 90-MO-197 (S.C. Sup. Ct. filed July 20, 1990).

### **1991-CP-16-0375**

Applicant filed his first application for post-conviction relief (PCR) on May 21, 1991 (1991-CP-16-0375). An evidentiary hearing was convened on September 20, 1993 at the Darlington County Courthouse. Newton Howle, Jr., Esquire represented the Applicant. Applicant raised the following issues:

1. Prejudice by the court during trial.
2. Ineffective counseling.
3. Lack of evidence.

The Honorable Paul M. Burch denied and dismissed the application by written Order filed on November 15, 1993. Applicant filed a pro se notice of appeal, which was dismissed for failure to perfect the appeal.

### **Federal Habeas Corpus Petition**

Applicant filed a petition for writ of habeas corpus in the United States District Court for the District of South Carolina on July 31, 1995 (O:95-2362-23BD). The Respondent submitted a motion for summary judgment on October 12, 1995. The Honorable Bristow Marchant, United States Magistrate Judge, issued a report and recommendation to grant the motion for summary judgment dated April 19, 1996. On March 3, 1997, the Honorable Patrick Michael Duffy, United States District Judge, issued an order granting the motion for summary judgment and dismissing the petition with prejudice.

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<sup>1</sup> Anders v. California, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967).

1998-CP-16-0628

Applicant filed his second PCR application on October 13, 1998 (1998-CP-16-0628). An evidentiary hearing was convened on April 27, 2000 at the Darlington County Courthouse. John Wilson, Esquire represented the him. Applicant raised the following issues:

1. "Two strike law were effective against me and it was not define or known to sentencing phase by the court."
2. Ineffective assistance of counsel by trial and PCR counsel.
3. Court did not allow a fair trial and the presentation of all defense witnesses.
4. Court allowed improper prosecution evidence to be entered at trial.
5. Invalid search warrant was used to obtain evidence.
6. Excessive sentence by trial judge.

The Honorable John L. Breeden, Jr. denied and dismissed the application by written Order dated August 7, 2000. Applicant did not file an appeal.

2005-CP-16-0257

Applicant filed his third PCR application on March 28, 2005 (2005-CP-16-0257). He raised the following issues:

1. "Matters of subject matter of jurisdiction."
2. "Ineffective assistance of all appointed counsels."

The Honorable James E. Lockemy signed a Conditional Order of Dismissal on August 18, 2005, provisionally denying the action, while giving the Petitioner twenty (20) days from the date of service in which to show why the dismissal should not become final. While Applicant submitted a response to the Conditional Order, Judge Lockemy signed a final order dismissing the case on November 10, 2005.

Applicant filed an appeal at the South Carolina Supreme Court. William J. Tuck, Esquire

perfected the appeal in the nature of a Johnson<sup>2</sup> petition. By order dated August 22, 2006, the appeal was transferred to the South Carolina Court of Appeals. The Court of Appeals denied the petition by order dated August 30, 2007.

#### ALLEGATIONS

Applicant alleges that he is being held in custody unlawfully for the following reasons in answering question 15 of his Application:

1. "After discovered evidence..."

Applicant also attaches a memorandum of law in addition to his answer above, and states that he seeks "vacation of sentences and remand for new trial as entitled to it." as a result of this proceeding.

#### DISCUSSION

This Court finds that the Application should be dismissed with prejudice as it was filed beyond the statute of limitations, is successive, and is barred by laches.

##### Statute of Limitations

Applicant has failed to comply with the filing procedures of the Act. S.C. Code Ann § 17-27-10 to -160 (1976 & Supp. 1997). The Act reads as follows:

An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision upon an appeal, whichever is later.

S.C. Code Ann. § 17-27-45(a) (Supp. 1998).

The South Carolina Supreme Court has held that the statute of limitations shall apply to

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<sup>2</sup> Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988).

all applications filed after July 1, 1996. Peloquin v. State, 321 S.C. 468, 469 S.E.2d 606 (1996). Applicant's conviction was in 1988. This Application was filed in 2012, which was well beyond the time the statutory filing period expired.

A motion for summary judgment may properly be used to raise the defense of statute of limitations. McDonnell v. Consolidated School District of Aiken, 315 S.C. 487, 445 S.E.2d 638 (1994). In addition, S.C. Code Ann. § 17-27-70(c) (1985) authorizes the PCR Court to "grant a motion by either party for summary disposition of [an] application when it appears from the pleadings . . . that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Therefore, the Court finds that it should summarily dismiss the Application for PCR for failure to file within the time mandated by statute.

#### Laches

This Court finds the Application should be summarily dismissed as it is barred by laches. Applicant has filed this application over four years after his conviction. Absent some explanation or justification for delay in seeking PCR, laches will prevent an applicant from seeking collateral review of a conviction, especially where the delay affects the availability of evidence to refute an applicant's claims. McElrath v. State, 276 S.C. 282, 277 S.E.2d 890 (1981).

Therefore, this Court finds the Application should be summarily dismissed based on laches.

#### Successive

This Court finds the Application must be summarily dismissed because it is successive to the Applicant's prior PCR Applications. The Uniform Post Conviction Procedure Act (the Act)

provides that:

All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence, or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which, for sufficient reason, was not asserted or was inadequately raised in the original, supplemental or amended application.

S.C. code Ann. § 17-27-90 (1985). Successive applications are disfavored and the burden is on the Applicant to establish that any new ground raised in a subsequent application could not have been raised in the previous application. Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991).

The current allegations were or could have been raised in the proceedings based on Applicant's prior applications for post-conviction relief and thus the current application is successive and barred under S.C. Code § 17-27-90. The Applicant has failed to establish sufficient reason why he could not have raised his current allegations in his previous application for post-conviction relief; accordingly, this Court finds the Application should be summarily dismissed as successive.


#### CONCLUSION

Based upon its review of the pleadings in this matter, this Court expresses its intent to summarily dismiss this matter unless the Applicant advises this Court with specific reasons, factual or legal, why it should not dismiss the matter in its entirety. The Applicant is granted twenty (20) days from the date of service of this Order upon him to show why this Order should not become final by filing any reasons he may have with the Clerk of Court, and serving such reasons with the SC Office of the Attorney General: Attn. Assistant Attorney General Tyson A.

Johnson, Sr., Post Office Box 11549, Columbia, SC 29211.

AND IT IS SO ORDERED this

27th day of December, 2012.



Honorable Paul M. Burch  
Chief Administrative Judge  
4<sup>th</sup> Circuit

Pageland  
Grade 4th, South Carolina.

2012 DEC 10 PM 1:54  
SCOTT B. SUGGS  
CLERK OF COURT/RMC  
DARLINGTON COUNTY, S.C.

TRUE CERTIFIED COPY,

*Scott B. Suggs*  
Page 7 of 7  
CLERK OF COURT/RMC  
DARLINGTON COUNTY, S.C.

TRUE CERTIFIED COPY,

*Scott B. Suggs*  
CLERK OF COURT/RMC  
DARLINGTON COUNTY, S.C.

**SOUTH CAROLINA DEPARTMENT OF CORRECTIONS**

Post Office Box 21787 - Columbia, South Carolina 29221

Pursuant to Rule 4(d)(2) of the South Carolina Rules of Civil Procedure, the Director of the South Carolina Department of Corrections has designated C.M. Toliver (Server) as his duly authorized agent for the purpose of making service of the process on the below named individual.

STATE OF SOUTH CAROLINA )

COUNTY OF Lee )

**AFFIDAVIT OF PERSONAL SERVICE**

On this 20<sup>th</sup> day of March 2014, I served the **Final Order of Dismissal**, on **Inmate Leroy Bennett, SCDC Inmate #153421**, by delivering personally and leaving a copy of the same at **Lee Correctional Institution, Bishopville, SC**. Deponent is not a party to this action.

s/ C.M. Toliver

SCDC Server

**SWORN TO AND SUBSCRIBED BEFORE ME**

this 20<sup>th</sup> day of March, 2014

[Signature] (L.S.)

Notary Public for South Carolina

My Commission Expires: 09/10/2013 ~~2014~~

**ADMISSION OF SERVICE**

Service of a copy of the within **Final Order of Dismissal** is admitted at the South Carolina Department of Corrections ( Lee Correctional Institution), Bishopville, SC, Lee County, SC this 20<sup>th</sup> day of March, 2014.

s/ Leroy Bennett  
Inmate  
SCDC Inmate #: 153421

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS  
OFFICE OF GENERAL COUNSEL  
MEMORANDUM

Dec 11 3:13  
WARDEN

FEB 07 2014

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FEB 10 2014

LEE CI CLASSIFICATION

TO: WARDEN'S OFFICE  
Lee Correctional Institution

FROM: Tina Kellett  
Office of General Counsel

RE: REQUEST FOR SERVICE OF LEGAL PLEADINGS  
Inmate Gray Bennett SCDC Inmate # 153421

DATE: 2-6, 2014

Pursuant to the above referenced subject, please follow the below procedures for *Service of Legal Pleadings on Inmate*.

1. **Serve Papers (Pleadings/Summons/Complaint etc.) on Inmate.**
2. **Complete the AFFIDAVIT OF SERVICE (sign/date/notarize) acknowledging that the Legal Pleading(s) were served on the Inmate.**
3. **Please note that if the Inmate chooses 'not' to physically accept the Legal documents from you (Server), the Inmate is considered 'Served' once he/she has been properly identified. Therefore, please proceed with service process by placing the Legal document(s) under the Inmate's cell door.**
4. **Please indicate on the ORIGINAL AFFIDAVIT OF SERVICE the following: 'Inmate refused to accept service'.**
5. **Make a COPY of the AFFIDAVIT OF SERVICE for the Inmate for his/her record.**
6. **Return the completed 'ORIGINAL' AFFIDAVIT OF SERVICE ONLY back to the Office of General Counsel (H.Q.)**

If you have any questions, please call me at 896-8508.

tk:  
Attachment(s)



RECEIVED

FEB - 5 2014

GENERAL COUNSEL

lee

ALAN WILSON  
ATTORNEY GENERAL

February 4, 2014

David M. Tatarsky, General Counsel  
South Carolina Department of Corrections  
4444 Broad River Road  
Columbia SC 29221-1787

**Re: Leroy Bennett v. State of South Carolina**  
**2012-CP-16-0810**

Dear Mr. Tatarsky:

Enclosed please find the **Final Order** dismissing the above-captioned inmate's post-conviction relief application. Please serve the inmate, **Leroy Bennett, 153421**, with the order and provide me with an affidavit of service (enclosed).

If you have any questions, please feel free to call: (803) 734-0021.

Sincerely,

Joshua L. Thomas  
Assistant Attorney General

JLT/jacc  
Enclosure

STATE OF SOUTH CAROLINA  
COUNTY OF DARLINGTON

) IN THE COURT OF COMMON PLEAS  
) FOR THE FOURTH JUDICIAL CIRCUIT

Leroy Bennett, # 153421,

) Case No. 2012-CP-16-810

) Applicant,

) **FINAL ORDER OF DISMISSAL**

) v.

) State of South Carolina,

) Respondent.

This matter comes before the Court pursuant to an application for post-conviction relief (PCR) filed September 21, 2012. Respondent made its Return and Motion to Dismiss on or about November 21, 2012, requesting the application be summarily dismissed as untimely, successive, and barred by the doctrine of laches. Pursuant to this request, the Court reviewed the pleadings in this matter and all of the records attached thereto. The Honorable Paul M. Burch issued a Conditional Order of Dismissal, filed on December 10, 2012, provisionally denying and dismissing this action, while giving Applicant twenty (20) days from the date of service of said order to show why the dismissal should not become final. Attached to this Final Order and incorporated herein by reference is the affidavit of personal service, dated July 8, 2013, of the above-mentioned conditional order on Applicant.

Applicant filed a document titled "Applicant's Factual and Legal Specific Reasons not to Dismiss PCR, etc., & Applicant's Factual Oppositions to the Respondent's Return, Incomp." In this document, Applicant makes two basic assertions:

1. Applicant filed an amendment alleging substantive claims, which Martinez v. Ryan, \_\_\_ U.S. \_\_\_, 132 S.Ct. 1309 (2012), permits him raise in a successive application.

TRUE CERTIFIED COPY,  
Page 1 of 3

*Paul M. Burch*  
CLERK OF COURT/RMC  
DARLINGTON COUNTY, SC

SCOTT B. BURCH  
CLERK OF COURT/RMC  
DARLINGTON COUNTY, SC

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2. The application challenges a Rule 29, SCRCrimP, motion hearing in General Sessions court, which is timely because the appeal was remitted on August 16, 2012.

Applicant also filed a document titled "Motion to Vacate the Conditional Order to Dismiss PCR and Appoint Attorney and Schedule Date for an Evidentiary Hearing, etc." In this document, Applicant again contends he is entitled to a post-conviction relief hearing to challenge the outcome of his 2011 Rule 29, SCRCrimP, motion.

Regarding Applicant's allegation that Martinez allows a successive filing regarding the substantive issues included in his amendment, the Court finds this claim is without merit. Martinez addresses a narrow exception to the procedural default rules imposed on federal habeas corpus petitions. See Martinez, 132 S. Ct. at 1315 ("The precise question here is whether ineffective assistance in an initial-review collateral proceeding on a claim of ineffective assistance at trial may provide cause for a procedural default in a federal habeas proceeding."). Thus, the holding in Martinez is limited to federal habeas corpus review and is not applicable to state PCR actions. See Kelly v. State, Order No. 2013-06-20-01 (S.C. Sup. Ct. order dated June 20, 2013) ("Like other states, we hereby recognize that the holding in Martinez is limited to federal habeas corpus review and is not applicable to state post-conviction relief actions."). Therefore, Martinez is not grounds to file a successive and untimely application.

The Court also finds Applicant's contention he is permitted to challenge his Rule 29 hearing results in this post-conviction relief action to be without merit. The Sixth Amendment only guarantees effective assistance of counsel at critical stages of a prosecution. State v. Clinkscales, 318 S.C. 513, 515, 458 S.E.2d 548, 549 (1995). However, a post-trial motion is not a critical stage of criminal proceedings. Id. Because the Constitution does not guarantee Applicant effective assistance of counsel for his Rule 29 hearing, he has not demonstrated "[t]hat

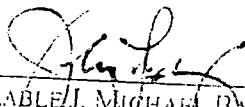
the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State" which would allow him to mount a collateral attack in a post-conviction relief hearing. S.C. Code Ann. § 17-27-20(a)(1).

The Court has reviewed the original pleadings and Applicant's submissions. The Court finds Applicant has not shown a sufficient reason why the application is not untimely and successive and why the Conditional Order of Dismissal should not become final.

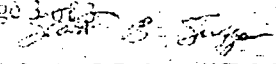
**IT IS THEREFORE ORDERED** that, for the reasons set forth in the Court's Conditional Order of Dismissal, the Application for Post-Conviction Relief is hereby denied and dismissed with prejudice. Accordingly, Applicant's motions to appoint an attorney and schedule a hearing are denied.

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, and 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 Rule 243, SCACR, for appropriate procedures after notice has been timely filed.

AND IT IS SO ORDERED this 23<sup>rd</sup> day of December, 2013.

  
THE HONORABLE J. MICHAEL BAXLEY  
Chief Judge for Administrative Purposes  
Fourth Judicial Circuit

Darlington, South Carolina

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Page 3 of 3  
  
CLERK OF COURT/RMC  
DARLINGTON COUNTY, SC

SPOTT B. JAMES  
CLERK OF COURT/RMC  
DARLINGTON COUNTY, SC

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APR 16 2014

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HON: DANIEL E. SHEAROUSE  
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COLUMBIA, S.C. 29211

LEGAL MAIL

29010  
LEROY BENNETT, 153421  
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