

LETTER TO THE APPELLATE COURT CLERK FILING
THE NOTICE OF APPEAL

October 30, 2014

The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
Post office Box 11330
Columbia, South Carolina 29211

RECEIVED

NOV 03 2014

S.C. SUPREME COURT

RE: State of South Carolina, Respondent, v. Michel A. Dukes^{SR}, #
311176, Appellant, Case No. 2013-CP-26-2686

Dear Mr. Shearouse:

Enclosed for filing is a notice of appeal in the above case. Also
enclosed are the following:

- (1). Proof of service of the notice of appeal on the respondent[s].
- (2). A copy of the order which is to be challenged on appeal.
- (3). This appeal is being filed with the Supreme Court because ... (see
Rule 203(d)(1)(B)(V) for when an appeal can be filed with the
Supreme Court.

Sincerely,

~~/s/ Michel A. Dukes^{SR}, #311176~~

Michel A. Dukes^{SR}, #311176

ECI-FI-211-B

610 Hwy 9 west

Bennettsville, SC 29512-2130

CC: Office of the Attorney General
Attn: Joshua L. Thomas, Esquire
Post office Box 11549
Columbia, South Carolina 29211
(803) 734-3970

Attorney for Respondent

LETTER TO CLERK OF LOWER COURT FILING NOTICE
OF APPEAL

October 30, 2014

The Honorable Melanie Huggins-Ward
Clerk of Court for Horry County
Post Office Box 677
Conway, South Carolina 29528-0677

RE: State of South Carolina, Respondent, v.
Michêl A. Dukes^{SR.}, #311176, Appellant, Case No. 2013-CP-26-
2686

Dear MRS. Huggins-Ward:

Enclosed for filing is a notice of appeal in the above case.

RECEIVED

NOV 03 2014

S.C. SUPREME COURT

Sincerely,

~~LSI Michêl A. Dukes, #311176~~
Michêl A. Dukes^{SR.}, #311176
ECI-FI-211-B
610 Hwy 9 west
Bennettsville, SC 29512-2130

CC: Office of the Attorney General
Attn: Joshua L. Thomas, Esquire
Post office Box 11549
Columbia, South Carolina 29211
(803) 734-3970
Attorney for Respondent

NOTICE OF APPEAL IN A CIVIL CASE

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM Horry County
Court of Common Pleas

BENJAMIN H. CULBERTSON,
Chief Judge for Administrative purposes
Fifteenth Judicial Circuit

Case No. 2013-CP-26-2686

State of South Carolina, Respondent,
v.
Michêl A. Dukes, Sr., #311176, Appellant

NOTICE OF APPEAL

Michêl A. Dukes, Sr., #311176 appeals the order of the Honorable Benjamin H. Culbertson dated August 29th, 2013. Appellant received written notice of entry of this order on October 4th, 2013.

Date: 10-30-14

LS Michêl A. Dukes, Sr., #311176
Michêl A. Dukes, Sr., #311176
ECI-FI-211-B
610 Hwy 9 west
Bennettsville, SC
29512-2130

Other Counsel of Record:
Office of the Attorney General
ATTN: Joshua L. Thomas, Esquire
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3970

PROOF OF SERVICE OF A NOTICE OF APPEAL

THE STATE OF SOUTH CAROLINA

In The Supreme Court

APPEAL FROM Horry County

Court of Common Pleas

BENJAMIN H. CULBERTSON, Chief Judge for
Administrative Purposes Fifteenth Judicial Circuit

Case No. 2013-CP-26-2686

State of South Carolina, Respondent,
v.

Michél A. Dukes Sr. #311176, Appellant

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 October 30, 2014, addressed to his attorney of record, Joshua L. Thomas, Esquire, Post office Box 11549, Columbia, South Carolina 29211, The Honorable Melanie Huggins-Ward, Clerk's office, P.O. Box 677 Conway, SC 29528-0677, The Honorable Daniel E. Shearouse, Clerk's office of South Carolina Supreme Court, P.O. Box 11330 Columbia, SC 29211.

Date: 10-30-14

15/ Michél A. Dukes Sr. #311176
Michél A. Dukes Sr. #311176
ECI-FI-211-B
610 Hwy 9 west
Bennettsville, SC
29512

STATE OF South Carolina
County of Horry

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT

State of South Carolina, Respondent
v.

EXPLANATION REQUIRED BY RULE
243(C)

Michêl A. Dukes, Sr. #311176, Appellant

RE: 2013-CP-26-2686

To satisfy the successive Application see Butler v. State, 397 S.E.2d 87 (S.C. 1990) (Gross miscarriage of Justice without review) and for the failure to timely file see the following:

The arguable basis for asserting that the determination by the lower courts was improper fall under: S.C. Code Ann. § 17-27-45

(2003) which states; specifically, IF the applicant contends that there is evidence of material facts not previously presented and heard that requires vacation of the conviction or sentence, the application must be filed under this chapter within one year after the date of actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence.

This exception to the general one-year statute of limitations is commonly known as "the discovery rule".

For an example see Coats v. State, 575 S.E.2d 557 (S.C. 2003) (entitled to an evidentiary hearing to determine if his trial counsel was in fact ineffective.

For the reasons stated, appellant ask the court to grant him the opportunity to present the evidence of material facts not previously presented and heard that requires vacation of the conviction and sentence.

For the appellant ever prays,

Date: 10-30-14

yours truly,
Michêl A. Dukes, Sr. #311176
Michêl A. Dukes, Sr. #311176
ECI-FI-211-B
610 Hwy 9 west
Bennettsville, SC 29512-2130

Other Counsel of Record:
Attn: Joshua L. Thomas, Esquire
Post office Box 11549
Columbia, South Carolina 29211
(803) 734-3970



RECEIVED

SEP 24 2013

GENERAL COUNSEL

lee

ALAN WILSON
ATTORNEY GENERAL

September 23, 2013

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

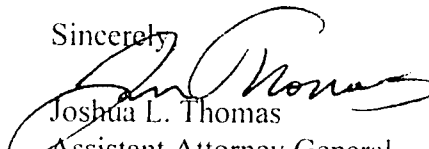
Re: Michael A. Dukes, Sr., #311176 v. State of South Carolina
2013-CP-26-2686

Dear Mr. Tatarsky:

Enclosed please find the **Conditional Order of Dismissal** dismissing the above-captioned inmate post-conviction relief application. Please serve the inmate, Michael A. Dukes, #311176 with the order and provide me with the affidavit of service (enclosed).

If you have any questions, please feel free to call: (803) 734-3737.

Sincerely,


Joshua L. Thomas
Assistant Attorney General

JLT/nb
Enclosures

Applicant filed a timely notice of appeal. Aileen P. Clare, Esquire, of the South Carolina Office of Appellate Defense perfected the appeal with the filing of an Anders² brief on October 18, 2006. The South Carolina Court of Appeals dismissed Applicant's appeal on October 8, 2007. See Sate v. Dukes, Op. No. 2007-UP-423 (S.C. Ct. App. filed October 8, 2007). The remittitur was returned to the circuit court on December 21, 2007.

Applicant filed his first PCR action on January 18, 2008. Respondent made its return on March 31, 2008. In his first application, Applicant alleged the following grounds for relief:

1. "Directed Verdict"
 - a. "The judge should have directed a verdict due to the state not putting forth any evidence to show actual or constructive possession"
2. "Ineffective assistance of counsel"
 - a. "Not doing any investigation into whether or not applicants 4th amendment was violated by the officer searching his vehicle..."
 - b. "Proceeding with the picking of the jury in the absence of Applicant..."
 - c. "Court lacked subject matter jurisdiction to sentence applicant as second or subsequent offender for trafficking [because] applicant has never been convicted of trafficking first."
3. "Did judge err in his ruling of Brady violation?"

The Honorable Michael G. Nettles convened a hearing on the application on November 17, 2008. At the hearing, Applicant voluntarily withdrew all claims except the ineffective assistance of counsel claims. Judge Nettles issued an order, signed December 9, 2008, and filed December 12, 2008, denying and dismissing the first PCR application. Applicant filed a timely notice of appeal. M. Celia Robinson, Esquire, of the Office of Appellate Defense perfected the appeal with the filing of a petition for writ of certiorari on December 11, 2009. The South Carolina Supreme Court denied the petition on January 7, 2011. The remittitur was returned to the circuit court on January 25, 2011.

² 386 U.S. 738 (1967)

Applicant filed a federal petition for *habeas corpus* on February 24, 2011 (Case number 0:11-cv-00819-JFA). The United States District Court for the District of South Carolina granted summary judgment against Applicant on January 4, 2012. The District Court denied Applicant's certificate of appealability on February 7, 2012. On March 8, 2012, Applicant filed a motion to file a subsequent federal *habeas corpus* action with the United States Court of Appeals for the Fourth Circuit. The Fourth Circuit denied the motion on March 28, 2012.

Applicant filed a second federal *habeas corpus* on December 19, 2012 (Case number 0:12-3445-JFA-PJG). The District Court dismissed the action on June 4, 2013. Applicant also filed a third federal habeas on February 28, 2013 (Case number 0:13-157-JFA-PJG). This action was dismissed on June 4, 2013 as well.

Applicant filed a second PCR application on April 13, 2012. In the second application, Applicant again alleged violation of his 4th amendment rights, trial judge error in selecting a jury outside Applicant's presence, and ineffective assistance of counsel for allowing jury selection outside of Applicant's presence. The court entered a Conditional Order of Dismissal on June 13, 2012. The Honorable Thomas A. Russo convened a hearing on Applicant's response to the conditional order on August 27, 2012, in Horry County. Applicant was present and represented by counsel at this hearing. Judge Russo issued an order on September 11, 2013, dismissing the second PCR as untimely and successive. Applicant's motion for reconsideration was denied on October 17, 2012.

Applicant also appealed Judge Russo's order with the filing of a notice of appeal on January 24, 2013. The South Carolina Supreme Court dismissed the appeal on March 8, 2013. The remitter was returned to the circuit court on March 26, 2013.

II. CURRENT APPLICATION

In his current application for post-conviction relief, Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. "Ineffective assistance of trial counsel for not requesting a suppression hearing due to an illegal arrest" Sikes v. State, 448 S.E.2d 560 (S.C. 1994); KIMMELMAN v. MORRISON, 477 U.S. 365, 385 (1986)
2. "Ineffective assistance of trial counsel by not protecting defendants' 4th and 14th amendment constitutional rights under due process due to an illegal arrest" (SAME) also see § 17-13
3. "Ineffective assistance of counsel by not raising a brady violation" State v. Chisolm, 584 S.E.2d 401
4. "Lack of subject matter jurisdiction" State v. Keenan, 296 S.E.2d 676, State v. Funderburk, 259 S.C. 256, 191 S.E.2d 520 (1972), S.C. Code 1976 § 22-5-320; and S.C. Code § 17-23-160

Applicant filed an "Amendment and Supplementation" on June 11, 2013. In the amendment,

Applicant states he "was denied the right to effective assistance of counsel guaranteed by the sixth and fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution during the course of applicant's criminal trial[.]" In support of this allegation, Applicant posits that trial counsel failed to object to evidence and statements gathered during an illegal arrest. Respondent made a return and motion to dismiss the application on August 15, 2013. Respondent asked this Court to dismiss the application as successive, untimely, and barred by the doctrine of laches.

Applicant filed a "Motion for Default" on July 12, 2013. Respondent made a return to the motion on August 15, 2013, asking the court to deny the motion pursuant to Rule 55(e), SCRPC, and Kneece v. State, 269 S.C. 177, 236 S.E.2d 746 (1977).

III. FINDINGS OF FACT AND CONCLUSION OF LAW

S.C. Code Ann. § 17-27-70(c) authorizes the 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." The

Court has reviewed the pleadings and all relevant supporting documents. Pursuant to S.C. Code Ann. § 17-27-70(b), the Court makes the following findings of fact and conclusions of law in ruling on Applicant's motion for default and Respondent's motion to dismiss:

A. Applicant's Motion for Default

The Court finds that Applicant's motion for default should be denied. In his motion, Applicant alleges that Respondent's delay in filing a return has prejudiced the prosecution of his claim. However, a state agency cannot be held in default except in rare circumstances. See Rule 55 (e), SCRCP. In this post-conviction relief action, Applicant must show that he has been prejudiced by Respondent's delay in filing a return. Kneece, 269 S.C. at 178, 236 S.E.2d at 747. However, Applicant cannot show prejudice if the application is without merit. Herring v. State, 262 S.C. 597, 598, 206 S.E.2d 885, 886 (1974).

Applicant has not shown any evidence he has been prejudiced by Respondent's delay in filing a return. Respondent's return was only filed 114 days after the application was filed on April 23, 2013. See Guinyard, 260 S.C. at 225, 195 S.E.2d at 394 (not prejudice from 190 day delay); Herring, 262 S.C. at 598, 206 S.E.2d at 886 (no prejudice from eleven month delay). Even if Applicant had filed a meritorious claim, he would not have received a hearing on his claim at the time he filed his motion for default as the next scheduled term for hearings in Horry County was the week of August 26, 2013.

Furthermore, Applicant has not shown that his claims are meritorious. His current application re-alleges the same complaints he raised in his first and second application for PCR. Applicant litigated the issue in his current application in his direct appeal in the prior PCR and federal *habeas* actions. Because Applicant has only presented claims that have already been

dismissed in prior actions, the Court finds that he had not established prejudice from Respondent's failure to file a timely return. Therefore, the motion for default is denied.

B. Respondent's Motion to Dismiss

1. Successive Application

The Court finds that this application should be dismissed because it is successive to Applicant's previous applications for post-conviction relief and petitions for federal *habeas corpus*. Successive applications for post-conviction relief are disfavored. Land v. State, 274 S.C. 243, 246, 262 S.E.2d 735, 737 (1980). S.C. Code Ann. § 17-27-90 requires 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.

Under this statute, successive post-conviction relief applications are forbidden unless Applicant can point to a "sufficient reason" why new grounds for relief were not raised or were not properly raised in previous applications. Aice v. State, 305 S.C. 448, 450, 409 S.E.2d 392, 394 (1991). Any new grounds raised in a subsequent application are limited to those that "could not have been raised . . . in the previous application." Id. If Applicant could have raised these allegations in a previous application, then he may not raise those grounds in successive applications. Id. Applicant bears the burden of showing that the allegations could not have been raised previously. Id.

Applicant could have raised the "new" grounds for relief in his prior post-conviction relief application. In fact, the grounds alleged in the current applications are almost identical to the

grounds raised Applicant's two prior PCRs and his three federal *habeas corpus* actions. Applicant has failed to present any reasons why the current allegations are different from the allegations in his previous applications. Therefore, the Court finds that summary dismissal is appropriate.

2. Failure to Timely File

The Court further finds that this application should be dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act. S.C. Code Ann. §17-27-45(a) provides that:

"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."

This statute of limitations applies to all applications filed after July 1, 1996. Peloquin v. State, 321

S.C. 468, 469 S.E.2d 606 (1996). Applicant was convicted of the offense he challenges in this application on August 9, 2005. ^{He appealed his conviction. The appeal was dismissed and remittitur filed 12/21/2007.} Applicant was therefore required to file his application before ^(7HC)

^(7HC) 12/21/2007.

^(7HC) ~~August 9, 2006~~. This application was filed on April 23, 2013, which was well beyond the time when the statutory filing period had expired. Therefore, the Court finds that summary dismissal is appropriate.

3. Laches

The Court further finds that this application should be dismissed based on the doctrine of laches. Absent some explanation or justification for the delay in seeking post-conviction relief, laches will prevent Applicant from seeking collateral review of his conviction, especially where the delay affects the availability of evidence to refute Applicant's claims. See McElrath v. State, 276 S.C. 282, 277 S.E.2d 890 (1981); Whitehead v. State, 352 S.C. 215, 574 S.E.2d 200 (2002). To

ensure finality of litigation, our courts require reasonable diligence in pursuing collateral relief. McElrath, 276 S.C. at 283, 277 S.E.2d at 890. This requirement "guards the state's legitimate expectation that it will not be called upon without due cause, to defend the integrity of convictions that occurred many years ago, where records and witnesses are no longer available." Id. (citing Honeycutt v. Ward, 612 F.2d 36 (2nd Cir. 1979)). Recognizing the importance of finality in litigation, Rule 9(a) of the Federal Habeas Corpus Act recognizes the doctrine of laches. The Rule states in pertinent part:

A petition may be dismissed if it appears that the state of which the Respondent is an officer has been prejudiced in its ability to respond to the Petition by delay in its filing unless the Petitioner shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred.

The South Carolina General Assembly has likewise recognized this problem and instituted a one year statute of limitations. See S.C. Code Ann. § 17-27-45(a).

Applicant filed this current application over seven (7) years after he was convicted. This delay has prejudiced Respondent (and Applicant) in that records and exhibits from the trial may no longer be available. Therefore, the Court finds that summary dismissal is appropriate.

IV. CONCLUSION

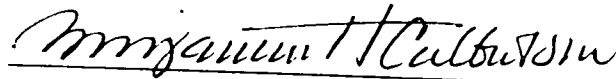
The Court finds that the record before the Court creates no genuine issue of material fact and Respondent is therefore entitled to judgment as a matter of law.

Pursuant to S.C. Code Ann. § 17-27-70(b), the Court intends to dismiss this application with prejudice unless Applicant provides specific reasons, factual or legal, why the application should not be dismissed in its entirety. 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. Applicant shall file any reasons he may have with the Horry County Clerk of Court and shall serve opposing counsel at the following address:

Office of the Attorney General
Attn: Joshua L. Thomas, Esquire
Post Office Box 11549
Columbia, South Carolina 29211

IT IS SO ORDERED.



THE HONORABLE BENJAMIN H. CULBERTSON
Chief Judge for Administrative Purposes
Fifteenth Judicial Circuit

Aug. 29, 2013
~~Georgetown~~, South Carolina
Conway,

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS

Post Office Box 21787 - Columbia, South Carolina 29221

Pursuant to Rule 4(d)(2), SCRCP, 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 signed Conditional Order of Dismissal on the below named individual.

STATE OF SOUTH CAROLINA)
AFFIDAVIT OF PERSONAL SERVICE
COUNTY OF)

On this 4th day of October, 2013, I served the signed **Conditional Order of Dismissal** on *Inmate Michael A. Dukes No. 311176*, by delivering personally and leaving a copy of the same at **Lee Correctional Institution**, Bishopville, South Carolina. Deponent is not a party to this action.

s/ C.M. Toliver
SCDC Server

SWORN TO AND SUBSCRIBED BEFORE ME

this 4th day of October, 2013
[Signature] (L.S.)
Notary Public for South Carolina

My Commission Expires 09/10/2023

ADMISSION OF SERVICE

Service of a copy of the signed Conditional Order of Dismissal is admitted at the S.C. Department of Corrections, **Lee Correctional Institution**, Bishopville, SC, Lee County, South Carolina, this 4th day of October, 2013.

s/ Michael A. Dukes
Inmate Signature
SCDC No. 311176

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

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

Michael A. Dukes, Sr., #311176,

) Case No. 2013-CP-26-2686
)

) Applicant,
)

) **FINAL ORDER OF DISMISSAL**
)

v.)

) State of South Carolina,
)

) Respondent.
)
)

APPELLATE COURT
14 JAN -7 PM 1:31
DELAWARE COUNTY CLERK OF COURT

This matter comes before the Court pursuant to an Application for Post-Conviction Relief (PCR) filed April 13, 2013. Respondent made its Return and Motion to Dismiss on or about August 15, 2013, requesting the application be summarily dismissed as successive, untimely, and barred by the doctrine of laches. Pursuant to this motion, the Court reviewed the pleadings in this matter and all of the records attached thereto. The Court issued a Conditional Order of Dismissal, filed on September 13, 2013, 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 October 4, 2013, of the above-mentioned conditional order on Applicant.

Applicant filed a *pro se* "Response to Conditional Order of Dismissal" on August 28, 2013. In this filing, Applicant alleges he never received a full adjudication on his allegation trial counsel was ineffective for failing to challenge the constitutionality of a search. He claims PCR appellate counsel from his first PCR (2008-CP-26-489) did not raise the issue in her petition for writ of certiorari to the supreme court. However, allegations of ineffective PCR counsel,

including PCR appellate counsel, "are not *per se* a 'sufficient reason' allowing for a successive PCR application[.]" Aice v. State, 305 S.C. 448, 451, 409 S.E.2d 392, 394 (1991). Furthermore, the Court notes Applicant filed a second PCR action (2012-CP-26-3026) subsequent to the first PCR appeal. Thus, his allegation regarding PCR appellate counsel either was raised or could have been raised in that action.

The Court has reviewed the original pleadings and finds Applicant has not shown a sufficient reason why the application is not successive, untimely, or barred by the doctrine of laches, and why the conditional order 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**.

This Court notes 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), SCRCR, 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.

IT IS SO ORDERED this 19th day of December, 2013.

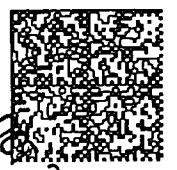


THE HONORABLE BENJAMIN H. CULBERTSON
Chief Judge for Administrative Purposes
Fifteenth Judicial Circuit

Georgetown, South Carolina

MICHAEL A. DUKES, SR. #311106
ETI-f1-B-211
610 Hwy 9 West
Bennettsville, SC
29512

OCT 31 2014



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The Supreme Court of South Carolina
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Columbia, SC
29211

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THE DEPARTMENT OF CORRECTIONS HAS NEITHER
CENSORED NOR INSPECTED THIS ITEM. THEREFORE,
THE DEPARTMENT DOES NOT ASSUME RESPONSIBILITY
FOR ITS CONTENTS.
EVANS CORRECTIONAL INSTITUTION
S.C. DEPARTMENT OF CORRECTIONS