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December 29, 2014

The Honorable Daniel E. Shearhouse
Clerk, Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

RECEIVED

JAN 02 2015

S.C. Supreme Court

RE: Tyrone Moore v. State of South Carolina, Case No.: 2013-CP-08-0164

Dear Mr. Shearhouse:

Enclosed for filing is the Notice of Appeal (original and clocked copy) in the above Post Conviction Relief (PCR) case. Also enclosed are the following:

- (1) Proof of service of the Notice of Appeal on the respondent;
- (2) The Order of Dismissal &
- (3) A Request for Representation on Appeal.

The Applicant-Appellant was represented by me as an indigent pursuant to my contract with the South Carolina Commission on Indigent Defense (SCCID) to handle PCR cases. By copy of this letter, I am forwarding a duplicate set of documents to the SCCID.

The Request for Representation on Appeal and the Affidavit in Support thereof are signed by me as attorney for Applicant-Appellant. If you need anything further, do not hesitate to contact me. Thank you for your time and attention to this matter.

Sincerely,

Rodney D. Davis
South Carolina Bar #: 12396
4000 Faber Place Drive, Suite 300
Charleston, SC 29405
(843) 323-4353
Davis@LowcountryLawOffice.com

CC: Ashleigh Wilson
Assistant Attorney General

Kimberly McCall
Appellate Division, SCCID

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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JAN 02 2015

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

S.C. Supreme Court

G. Thomas Cooper, Circuit Court Judge

Case No.: 2013-CP-08-0164

Tyrone Moore,

Appellant,

v.


State of South Carolina,

Respondent.

NOTICE OF APPEAL

Tyrone Moore appeals the denial of his Post Conviction Relief application in this case. The Application for relief was denied, following an evidentiary hearing before the Honorable G. Thomas Cooper on September 10, 2014.

12/30, 2014


Rodney D. Davis
400 Faber Place Drive, Suite 300
Charleston, SC 29405
(843) 323-4353
Davis@LowcountryLawOffice.com
Attorney for Appellant

Other Counsel of Record:
Ashleigh Wilson, Assistant Attorney General
Office of the Attorney General, State of South Carolina
P.O. Box 11549
Columbia, SC 29211-1549
Attorney for Respondent

2014 DEC 31 AM 10:55
MARK P. BROWN
CLERK OF COURT
BERKELEY COUNTY, SC

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

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JAN 02 2015

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

S.C. Supreme Court

G. Thomas Cooper, Circuit Court Judge

Case No.: 2013-CP-08-0164

Tyrone Moore,

Appellant,

v.

State of South Carolina,

Respondent.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on the State by mailing a copy of it to the address of record, Ashleigh Wilson, P.O. Box 11549, Columbia, South Carolina 29211-1549, on 12/30, 2014.

12/30, 2014



Rodney D. Davis
400 Faber Place Drive, Suite 300
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(843) 323-4353
Davis@LowcountryLawOffice.com
Attorney for Appellant

Other Counsel of Record:
Ashleigh Wilson, Assistant Attorney General
Office of the Attorney General, State of South Carolina
P.O. Box 11549
Columbia, SC 29211-1549
Attorney for Respondent

MARY P. BROWN
CLERK OF COURT
BERKELEY COUNTY, SC

2014 DEC 31 AM 10:55

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STATE OF SOUTH CAROLINA)
)
COUNTY OF BERKELEY)
)
Tyrone Moore, #156462,)
)
Applicant,)
)
v.)
)
State of South Carolina,)
)
Respondent.)
_____)

IN THE COURT OF COMMON PLEAS
2013-CP-08-0164

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CLERK OF COURT
BERKELEY COUNTY, SC

ORDER OF DISMISSAL

DW

Presiding Judge:	The Honorable G. Thomas Cooper
Applicant's Attorney:	Rodney Davis, Esquire
Respondent's Attorney:	Ashleigh R. Wilson, Esquire
Trial Counsel:	Eduardo Curry, Esquire
Date of Hearing:	September 8, 2014
Court Reporter:	Joyce Rueger

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed January 18, 2012. The Respondent made its Return on October 10, 2013. An evidentiary hearing on the matter was convened on September 8, 2014 at the Charleston County Courthouse. The Applicant was present at the hearing and represented by Rodney Davis, Esquire. Ashleigh R. Wilson, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

Also present and testifying was Eduardo Curry, Esquire. This Court had before it the trial transcript, the Charleston County Clerk of Court records, the Applicant's records from the South Carolina Department of Corrections, the Applicant's application, the Respondent's return, the Applicant's appellate records, and two exhibits submitted by the Applicant.¹

¹ Applicant's Exhibit 1 was a Motions List submitted by trial counsel on July 27, 2009. Applicant's Exhibit 2 was a Witness List submitted by trial counsel on July 27, 2009.

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PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Berkeley County Clerk of Court. The Applicant was indicted at the May 2008 term of the Berkeley County Grand Jury for two counts of lewd act on a minor (2008-GS-08-1020, -1021). He was represented by Eduardo Curry, Esquire.

The Applicant proceeded to trial and was found guilty by a jury. On July 29, 2009, the Honorable R. Markley Dennis sentenced the Applicant to confinement for fifteen (15) years on each count of lewd act on a minor. The sentences are to be served consecutively for a total confinement of thirty (30) years.

A timely Notice of Appeal was filed on the Applicant's behalf at the South Carolina Court of Appeals. Eduardo Curry, Esquire, also represented the Applicant on appeal. The South Carolina Court of Appeals affirmed the Applicant's convictions and sentences. State v. Moore, Up. Op. No. 2012-UP-344 (S.C. Ct. App. June 6, 2012).

ALLEGATIONS

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

1. Ineffective Assistance of Counsel.

At the hearing, Applicant proceeded solely on the following allegations:

1. Ineffective Assistance of Counsel.
 - a. Counsel failed to properly advise the Applicant regarding his right to testify at trial.
 - b. Counsel failed to preserve for appeal the issue regarding his cross-examination of a law enforcement officer.

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FINDINGS OF FACT AND CONCLUSIONS OF LAW

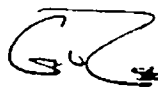
This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. Sec. 17-27-80 (2003).

Summary of the Testimony

Eduardo Curry, Esquire, was present and testified he has been practicing mainly criminal law since 1990. Counsel testified he was retained to represent the Applicant shortly after the Applicant's arrest. He testified he met with the Applicant frequently prior to trial. Counsel testified he filed Brady and Rule 5 motions on the Applicant's behalf and reviewed the material he received with the Applicant.

Counsel testified he discussed with the Applicant the elements of the charges he was facing and what the State was required to prove to convict the Applicant. Counsel also testified they discussed the Applicant's version of facts and possible defenses. Counsel testified he had ample time to prepare for trial. He testified his trial strategy was to challenge the credibility of the State's witnesses, to call into question the conduct of the police, and to cross-examine Dr. Elsey on suggestibility.

Counsel testified he cross-examined Officer Bullard on suggestibility based on the way he questioned various witnesses. Counsel testified he wanted to show from this line of questioning that the form of questioning used by police may have elicited responses that were not initially in the minds of the witnesses. He testified he also tried to cross-examine Officer Nix on the same topic, but Judge Dennis interrupted his cross-examination. Counsel testified he

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belabored the point with Officer Bullard and thought that he had preserved any appellate issues that came up during his testimony. Counsel testified he ultimately concluded that the suggestibility he tried to uncover did not exist and any further questioning of Officer Nix on the topic would likely have been unhelpful. He testified he did not think the Court's *sua sponte* interruption of his cross-examination was serious enough to object.

Counsel testified he spoke with the Applicant and his wife for a significant amount of time about taking the stand to testify at trial. Counsel testified he advised the Applicant of the pros and cons of both testifying and not testifying. He testified the Applicant was also advised of his right to testify by the Court at trial. He testified the Applicant was adamant from the beginning that he did not want to testify at trial.

Counsel testified they reviewed the Applicant's two prior convictions for lewd act and criminal sexual conduct with a minor. He testified he discussed with the Applicant prior to trial the fact that the State could use his prior record to impeach him if he took the stand. Counsel testified it is his general practice to tell his clients that if they chose to testify at trial, he would obtain a ruling from the Court on the admissibility of their prior record for impeachment purposes. He testified because the Applicant chose not to testify at trial, he did not need to obtain a ruling from the Court on the Applicant's prior record.

Counsel testified he spoke regularly with the Applicant about his case and the Applicant knew upfront that he could testify at trial. He testified he did not advise the Applicant on whether or not he should take the stand to testify. He testified that it was ultimately the Applicant's decision to make. Counsel testified the Applicant was afraid of his criminal past and made the decision not to testify at trial. He testified the Applicant was also concerned about how he would be perceived by the jury and how he would come off as a pastor. Counsel testified he put no

GR

pressure on the Applicant to waive his right to testify and the Applicant was adamant from the start that he did not want to testify.

Counsel testified he heard the Applicant's testimony at the evidentiary hearing and it was his first time hearing the version of events given by the Applicant at the hearing. He testified the Applicant never told him this theory that all the victims and their families were upset with the Applicant and had made up the allegations.

Counsel testified they also discussed calling witnesses to testify prior to trial and at the close of the State's case. Counsel testified he told the Applicant that if he wanted to call witnesses at trial, they would do so at trial. Counsel testified he discussed with the Applicant the perils of calling witnesses at trial and explained that ultimately it was the Applicant's decision whether or not they presented witnesses. Counsel testified he also discussed with the Applicant preserving last argument. Counsel testified the Applicant ultimately decided they would not call any witnesses at trial.

Counsel testified he was also retained by the Applicant's family to represent the Applicant on appeal. He testified he filed a Notice of Appeal on the Applicant's behalf. He testified he met with the Applicant to discuss possible issues they could raise on appeal. Counsel testified there were not a lot of meritorious issues the Applicant could flesh out on appeal. He testified he raised the issue of Officer Bullard's cross-examination on appeal because he was looking for anything he could raise with potential merit. Counsel testified he thought the issues he raised were a long shot.

The Applicant was present and testified he had family members who were willing to testify on his behalf at trial. He testified the decision was made at the start of his trial to call his family members as witnesses at trial. The Applicant testified he was adamant about calling

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witnesses at trial, but counsel told him and his wife that presenting witnesses was not necessary since they had a strong case. The Applicant testified he decided to go with his attorney's advice.

The Applicant testified he was aware of his right to testify prior to trial and that he was considering testifying when he initially spoke with trial counsel. The Applicant testified counsel told him it was not in his best interest to testify at trial because of his prior record. He testified he discussed the use of his prior convictions with counsel early on. He testified he told the Court that he did not want to testify at trial. He testified he told the Court that he was not forced or pressured to waive his right to testify. The Applicant testified he wanted to testify, but did not testify because of counsel's advice.

The Applicant testified if he had taken the stand he would have told the jury that the victims were at his home on the weekends because they were developing relationships with his four children. He testified he would have testified that lots of time he was not home when the victims were at his home. The Applicant also testified he would have told the jury that a group of his church members were upset with him about the way he disciplined at his church. He testified he told his attorney that the victims were making allegations because their parents were upset with him. The Applicant testified he would have told the jury at trial that the victims' statements were not true.

Ineffective Assistance of Counsel

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

For the 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

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prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. See Strickland v. Washington, 466 U.S. 668 (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, 117-118, 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).

As an initial matter, this Court finds the Applicant's testimony is not credible, while also finding trial counsel's testimony is credible. Regarding the Applicant's claims of ineffective assistance of counsel, this Court finds the Applicant has failed to meet his burden of proof. This Court finds that Applicant's attorney demonstrated the normal degree of skill, knowledge, professional judgment, and representation that are expected of an attorney who practices criminal law in South Carolina. State v. Pendergrass, 270 S.C. 1, 239 S.E.2d 750 (1977); Strickland, 466 U.S. at 668; Butler, 286 S.C. 441, 334 S.E.2d 813. This Court further finds counsel adequately conferred with the Applicant, conducted a proper investigation, and provided thorough representation. This Court finds that counsel's representation did not fall below an objective standard of reasonableness.

The Applicant alleges counsel was ineffective for failing to object and preserve for appellate review the trial court's limitation of counsel's cross-examination of Officer Nix at trial. This Court finds this allegation is wholly without merit. This Court finds the Applicant has failed to carry his burden of proving counsel was ineffective for failing to preserve this issue for appellate review. This Court finds counsel's performance was not deficient in this regard.

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This Court finds counsel's failure to object to the Court's limitation of his cross-examination of Officer Nix did not affect the outcome of the Applicant's trial. This Court finds persuasive counsel's credible testimony that the line of questioning he was trying to pursue with Officer Nix would likely have been unhelpful to the defense. This Court also finds persuasive counsel's testimony that he did not think the issue of the court's limitation of his cross-examination would be successful on appeal.

This Court also finds the Applicant has failed to show that if counsel had objected and preserved the issue for appellate review, the issue would have been meritorious on appeal. See State v. Aleksey, 343 S.C. 20, 33-34, 538 S.E.2d 248, 255 (2000) (stating the trial court retains broad discretion to limit the scope of cross-examination) and Delaware v. Van Arsdall, 475 U.S. 673, 679 (1986) ("Trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or marginally relevant.") This Court finds the Applicant has failed to show that he was prejudiced by counsel's failure to object or preserve this issue for appellate review. This Court finds counsel's performance was not deficient and did not affect the outcome of the Applicant's appellate proceeding.

The Applicant alleges counsel was ineffective for failing to properly advise him of his right to testify at trial. This Court finds this allegation is wholly without merit. Under the United States and South Carolina Constitutions, a criminal defendant has a right to remain silent and to not testify during his trial. U.S. Const. amend. V; S.C. Const. art. I, § 12. State v. Weaver, 361 S.C. 73, 88, 602 S.E.2d 786, 794 (Ct. App. 2004) aff'd as modified, 374 S.C. 313, 649 S.E.2d 479 (2007). A defendant's decision to testify or not must be made with knowledge of the

consequences of either choice. Brown v. State, 340 S.C. 590, 594, 533 S.E.2d 308, 310 (2000). It is the defendant who retains the ultimate authority to decide whether or not to testify. Jones v. Barnes, 463 U.S. 745, 751 (1983). South Carolina courts have declined to require an on-the-record waiver of a defendant's right against compelled testimony. Brown at 595, 533 S.E.2d at 310 (2000). "[T]rial counsel, not the court, has the primary responsibility for advising the defendant of his right to testify and for explaining the tactical implications of doing so or not." Sexton v. French, 163 F.3d 874, 882 (4th Cir.1998).

Under Strickland v. Washington, 466 U.S. 668, 694 (1984), in order to prove ineffective assistance of counsel based on a claim that counsel prevented a defendant from exercising his right to testify, the defendant must show both that his attorney violated his right to testify and that his testimony had a "reasonable probability" of changing the outcome of his trial. United States v. Squillacote, 183 F. App'x 393, 394 (4th Cir. 2006).

This Court finds the Applicant has failed to carry his burden of proving counsel violated his right to testify. This Court finds the Applicant was fully advised by both the Court and trial counsel of his right to testify at trial. Trial counsel provided credible testimony that he and the Applicant had significant conversations about whether or not the Applicant would testify at trial. The record reflects the trial court also informed the Applicant of his right to testify on the record after the completion of the State's case. The trial court advised the Applicant of the following: (1) the Court would instruct the jury that the State had the burden of proof and the Applicant did not have to present any evidence at trial (Tr.237:25-238:9) and (2) it was the Applicant's right to testify if he so chose and he would be subject to cross-examination (Tr. 10-15).

The Applicant told the Court that he had spoken with counsel about his right to testify (Tr. 237:7-13), that he had sufficient time to reflect on counsel's advice and their discussions on

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testifying at trial (Tr. 237:14-17, 238:24-239:2), and that he elected not to take the stand after discussing his decision with family and counsel (Tr. 237:18-24). The Applicant also told the Court that he was not under the influence of any alcohol or drugs, that he did not feel any undue pressure concerning his decision, and that he was not forced to make this decision. (Tr. 238:16-239:8). This Court finds most telling the Applicant's statement to the trial court that he was satisfied with the manner in which his attorney advised him on his right to testify. (App. 239:9-13).

This Court also finds the Applicant was fully advised that his prior record could be used by the State to impeach him if he chose to testify at trial. This Court finds trial counsel provided credible testimony that they reviewed the Applicant's prior record and that the Applicant knew it was a possibility the State would be able to impeach him with his prior convictions. This Court finds counsel's advice to the Applicant on the use of his prior convictions was proper.²

This Court finds the Applicant was fully aware of the consequences of taking the stand to testify at trial. This Court finds counsel adequately advised the Applicant of his right to testify and explained both the pros and cons of taking the stand. This Court finds the Applicant freely and voluntarily waived his right to testify at trial. This Court finds further the Applicant has also failed to carry his burden of proving that the testimony he presented at the evidentiary hearing had a reasonable probability of changing the outcome of his trial. This Court finds the Applicant has failed to carry his burden of proving that counsel was ineffective for failing to adequately advise him of his right to testify at trial.

² The Applicant's SCDC records reflect a prior conviction for criminal sexual conduct with a minor that could possibly have been used to impeach the Applicant if he had chosen to testify at trial. The records reflect the Applicant completed an 18 year sentence for this conviction and was released on August 22, 2000 which would have put the conviction within the 10 year time period outlined in Rule 609, SCRE.

GC #10

All Other Allegations

As to any and all allegations that were raised in the application in this matter and not specifically addressed in this Order, this Court finds Applicant failed to present any evidence regarding such allegations. Accordingly, this Court finds the Applicant waived such allegations. Therefore, they are hereby denied and dismissed.

CONCLUSION

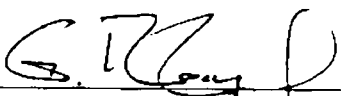
Based on all the forgoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations before or during his trial and sentencing proceedings. Counsel was not deficient and the Applicant was not prejudiced by counsel's representation. Therefore, this 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 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 11 day of December, 2014



The Honorable G. Thomas Cooper
Presiding Judge
9th Judicial Circuit

Columbia, South Carolina.



State of South Carolina
The Circuit Court of the Fifth Judicial Circuit

G. Thomas Cooper, Jr.
Judge

Post Office Box 192
1701 Main Street, Room 323
Columbia, SC 29202-0192
Phone: (803) 576-1783
Fax: (803) 576-1741
gcooperj@sccourts.org

December 11, 2014

The Honorable Mary P. Brown
Berkeley County Clerk of Court
PO Box 219
Moncks Corner, South Carolina 29461

Re: Tyrone Moore v. State of South Carolina, C/A No: 2013-CP-08-0164

Dear Ms. Brown:

Please find enclosed for filing an Order in the above-captioned case. I have included a copy, and if possible, please timestamp and return it to Judge Cooper's chambers for our records.

Very truly yours,

A handwritten signature in black ink, appearing to read "AOLive".

Alicia Olive
Law Clerk to the Honorable G. Thomas
Cooper, Jr., Judge for the Fifth Judicial
Circuit

GTCJr.:aao

Enclosure

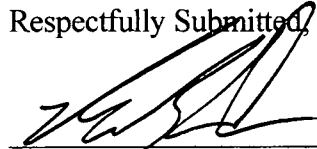
STATE OF SOUTH CAROLINA) IN THE SUPREME COURT OF SOUTH CAROLINA
)
 COUNTY OF BERKELEY)
) Case No.: 2013-CP-08-0164
)
 TYRONE MOORE,)
 Applicant.)
)
 -versus-) REQUEST FOR REPRESENTATION ON APPEAL
)
 STATE OF SOUTH CAROLINA,)
)
 Respondent.)

On behalf of the request of the above-named Applicant, to be represented by the South Carolina Commission of Indigent Defense, Appellate Division (SCCID), the undersigned attorney would show unto this Honorable Court that:

1. He is the attorney for the Applicant-Appellant in the above captioned case. The Applicant-Appellant was in custody during and taken into custody immediately following the Post Conviction Relief (PCR) hearing and was not available to personally sign this request;
2. The Applicant-Appellant was represented by the undersigned attorney as an indigent, pursuant to a contract with the SCCID;
3. The Applicant-Appellant has been informed that he may request assistance from the SCCID Appellate Division in perfecting his appeal;
4. A timely Notice of Intent to Appeal has been filed on the Applicant-Appellant's behalf;
5. The Applicant-Appellant has been informed that nothing requires SCCID Appellate Division to pursue this appeal unless that office's Chief Attorney is satisfied that there is arguable merit to this appeal and that he cannot afford to hire an attorney.

At this time, the Applicant-Appellant requests the aid of the SCCID Appellate Division in perfecting his appeal to the South Carolina Court of Appeals.

Respectfully Submitted,



Rodney D. Davis
 South Carolina Bar #: 12396

MARY F. BROWN
 CLERK OF COURT
 BERKELEY COUNTY, SC

FILED
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12/30, 2014
 Charleston, South Carolina.

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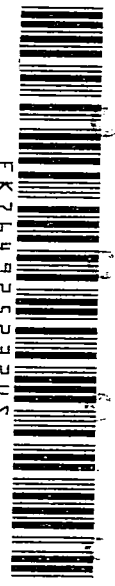


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11:15 AM	\$ 0.00	\$ 0.00	\$ 0.00
Weight	Sunday/Holiday Premium Fee	Total Postage & Fees	
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