

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

APPEAL FROM GREENWOOD COUNTY
Court of Common Pleas

Frank R. Addy, Jr., Circuit Court Judge

Case No. 2013-CP-24-0336

State of South Carolina.....Respondent

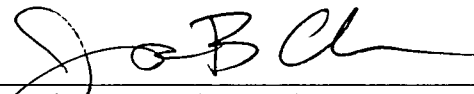
vs.

Gerald R. Gaines #222430.....Appellant

NOTICE OF APPEAL

Gerald R. Gaines appeals both the Order of Dismissal signed by the Honorable Frank R. Addy, Jr. on November 26, 2014 and filed December 22, 2014, and the Order denying Appellant's 59(e) motion, which was signed by Judge Addy and filed on January 20, 2015. Counsel for Appellant received a signed, filed copy of the Order denying Appellant's 59(e) motion on January 21, 2015.

February 2, 2015



Jennings B. Anderson, S.C. Bar No. 74900
NICHOLSON MEREDITH & ANDERSON, LLC
P.O. Box 457
Greenwood, SC 29648
864-229-7241
Attorneys for Appellant

Other Counsel of Record:
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Columbia, SC 29211-1549

**THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT
APPEAL FROM GREENWOOD COUNTY**

State of South Carolina,)	
)	
Respondent,)	
)	
vs.)	CERTIFICATE OF SERVICE
)	C. A. No. 2013-CP-24-0336
)	
Gerald R. Gaines #222430,)	
)	
Appellant.)	

The undersigned does hereby certify that he is employed by the Law Firm of Nicholson Meredith & Anderson, LLC, the attorneys for the Appellant in the above entitled action; that he has served the **NOTICE OF APPEAL** in the above case upon the following by depositing a copy of same in the United States mail, with sufficient postage affixed, on the 2nd day of February, 2015:

J. Rutledge Johnson, Esquire
Assistant Attorney General
P. O. Box 11549
Columbia, SC 29211

Daniel E. Shearouse
Clerk, SC Supreme Court
1231 Gervais Street
Columbia, SC 29201


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Gerald R. Gaines #222430
Perry Correctional Inst.
Q1B-112T
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and by hand-delivering a copy of same on the 2nd day of February, 2015 to:

Angie Woodhurst
Clerk of Court, Greenwood County
528 Monument Street, Room 114
Greenwood, SC 29646

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February 2, 2015

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

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2013 CP-24-0336

GERALD R. GAINES

STATE OF SOUTH CAROLINA

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: COURT

Attorney for : Plaintiff Defendant
 or
 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.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRCP; Rule 41(a), SCRCP (Vol. Nonsuit); Rule 43(k), SCRCP (Settled); Other
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRCP; 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.

FILED COMMON PLEAS
 8th JUDICIAL CIRCUIT
 GREENWOOD, SC
 2015 JAN 20 PM 4:26:58

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court: Applicant's post conviction relief hearing was heard on October 13, 2014. Judgment was entered denying applicant's PCR on December 22, 2014. Applicant now moves pursuant to Rule 59(e) to alter/amend the judgment. Applicant's motion is hereby denied.

ORDER INFORMATION

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.

[Signature]
Circuit Court Judge

2159

1/20/2015

Judge Code

Date

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of _____, 20____ to attorneys of record or to parties (when appearing pro se) as follows:

Jennings Anderson, Jr.

Rutledge Johnson

ATTORNEY(S) FOR THE PLAINTIFF(S)

[Signature]

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

88

STATE OF SOUTH CAROLINA)
COUNTY OF GREENWOOD)
)
Gerald Gaines, #222430,)
)
Applicant,)
)
v.)
)
State of South Carolina,)
)
Respondent.)

IN THE COURT OF COMMON PLEAS
EIGHTH JUDICIAL CIRCUIT

2013-CP-24-0336

ORDER OF DISMISSAL

FILED COMMON PLEAS
8th JUDICIAL CIRCUIT
GREENWOOD, SC.
2014 DEC 22 PM 4:06

This matter comes before the Court by way of an Application for Post-Conviction Relief filed April 9, 2013. The Respondent made its Return on June 19, 2014. An evidentiary hearing into the matter was convened on October 13, 2014, at the Greenwood County Courthouse. Jennings Anderson, Esquire represented Applicant. J. Rutledge Johnson, Esquire, of the South Carolina Attorney General's Office, represented the Respondent.

At the hearing, Applicant testified on his own behalf. Chris Pracht, Esquire and Sarah Drawdy, Esquire also testified. This Court also had before it a copy of the records of the Greenwood County Clerk of Court, records from the South Carolina Department of Corrections, and the guilty plea transcript.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Greenwood County Clerk of Court. The Applicant was indicted at the March 2012 term of the Greenwood County Grand Jury for failure to stop for law enforcement vehicle resulting in death (2012-GS-24-0541) and two (2) counts of felony driving under the

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S.C. SUPREME COURT

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U.S. SUPREME COURT

ATTORNEY GENERAL'S OFFICE
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 ADMINISTRATIVE INSTRUCTIONS
 FILE _____ OPEN _____ END _____
 HAVE _____ COPIES MADE _____
 ROUTE TO _____
 ORDER: _____ TRANSCRIPT _____
 PEN RECORDS _____ CLEAR RECORDS _____
 OTHER: *Ch. Sec.*
 close 30 days
 send copy to court

12/29/11
Bob

influence (2011-GS-24-2067; -2068). The Applicant was also charged with Manufacturing Methamphetamine in Abbeville County. The Applicant was represented by Christopher Pracht, Esquire, and Sarah Drawdy, Esquire. On May 14, 2012, the Applicant pled guilty before the Honorable J. Cordell Maddox, Jr. and was sentenced to confinement for twenty (20) years for failure to stop for law enforcement resulting in death, twenty (20) years, concurrent, for felony DUI resulting in death, and fifteen (15) years, concurrent, for felony DUI resulting in great bodily injury. The Applicant also waived venue and grand jury presentment for a Manufacturing Methamphetamine charge, pled guilty, and was sentenced to time served. The Applicant did not appeal his conviction and sentence.

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

1. "Ineffective Assistance of Counsel"
 - a. "Ill Advised (sic) of Guilty Plea"

In an amended Application filed by Counsel on August 21, 2014, Applicant alleged ineffective assistance of counsel for "failure to fully apprise Petitioner of all consequences of his guilty plea, therefore allowing Petitioner to enter an involuntary plea; counsel's failure to object to Petitioner being subjected to double jeopardy in violation of the South Carolina and United States Constitutions; and counsel's failure to interview the driver of the other vehicle involved in the accident."

At the PCR hearing, the Applicant proceeded on these latter claims.

SUMMARY OF TESTIMONY

Applicant testified he was initially appointed Shane Goranson from the Greenwood Public Defender's Office as counsel. Applicant stated he met with Mr. Goranson once and a plea offer was

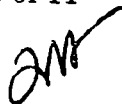


extended. Applicant testified it was his understanding that he had until the end of the working day to accept or reject the offer. Applicant then subsequently hired Chris Pracht and Sarah Drawdy as counsel. When Applicant met with his attorneys, he discussed his case with them and was extended an offer of thirteen (13) years. Applicant testified he signed a rejection letter because he thought he would receive a better offer. When Applicant spoke with Counsel Drawdy concerning the offer, Counsel Drawdy stated she was not sure if another offer would become available. Applicant then testified he signed the rejection letter, but after more thought, he wanted to accept the offer. He then spoke with both counsel, and Counsel Pracht told him it was too late to accept the offer. Applicant then stated he thought he had until the end of the working day to accept the offer based on the public defender's letter. Applicant testified he thought he was going to receive a sentence of thirteen (13) years and not twenty (20) years; otherwise, he would not have pled guilty.

Applicant testified that the August, 2011 incident was the incident in which he had a wreck and fled the scene. Applicant stated he jumped into a creek where law enforcement arrested him. He testified the arrest records indicate he was arrested at 4:57 pm and the time of his blood test was 6:50 or 7:05 pm. Applicant then claimed the actual time of arrest was 3:37 pm. Applicant testified he did not find out this information until after he pled guilty.

Applicant again testified he rejected the thirteen (13) year offer and then met with his attorneys after they were able to prevail on their motion to vacate the Life without Parole Notice which had been filed by the State. He was adamant that he was still receiving thirteen (13) years. Applicant also stated there was no discussion about fines and that Counsel Drawdy told him he was parole eligible when, in fact, he is not.

Additionally, Applicant testified both counsels were ineffective for not objecting to a Double



Jeopardy claim because he was charged with both DUI resulting in Death and Failure to Stop for a Blue Light resulting in Death. Applicant claims he did not discuss this issue with his attorneys. Applicant further testified he does not remember having discussions with his attorneys concerning the driver of the other vehicle involved in the incident. Applicant wanted Counsel to interview the driver of the other car and see the driver's BA results. Applicant lastly testified he did not understand the consequences of his plea and that he wanted a new trial.

On cross-examination, Applicant admitted his current counsel did not tell him anything about being able to accept the plea offer by the end of the working day. Applicant also admitted that he stated at the plea that he knew there were no negotiations or recommendations to get him to plead guilty and that this plea was "straight-up." He testified he was satisfied with his attorneys at the plea and agreed with the facts as presented by the solicitor. Applicant further admitted he was facing close to sixty-five (65) years' imprisonment.

Counsel Pracht testified he represented Applicant on a previous charge and was contacted by a third party on this case. After being retained, he associated Counsel Drawdy. Counsel testified he filed for discovery and received an extensive file, which he discussed thoroughly with Applicant. Counsel testified the blood report was within the two hour window and that he did not have a reason to challenge the report. Counsel testified he met with Applicant four (4) to five (5) times in person and spoke with him on numerous other occasions. Applicant understood all of their conversations.

Counsel then testified he remembered the plea offer as thirteen (13) years and believed it was more than reasonable. Counsel stated he advised Applicant to accept the offer but Applicant rejected it. Counsel also testified that once Applicant rejected the offer it was no longer available to accept. Counsel stated it was Applicant's choice to reject the offer and that there were no threats involved.



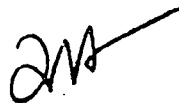
Additionally, Counsel testified he did not challenge the charges on a Double Jeopardy basis because the elements of the offenses were quite different from one another. Counsel then testified Applicant never mentioned the notion that Applicant thought he had until the end of the working day to accept the offer. Counsel lastly testified it was very clear that the plea was "straight-up."

On cross-examination, Counsel testified it was clear that Applicant's arrest occurred after 4 pm but that it was hard to determine the exact time of his arrest because Applicant fled the scene. Counsel also testified Applicant signed a plea rejection and waiver of rights form. Counsel then stated that after they prevailed on the Notice for Life without Parole issue, both he and Counsel Drawdy met with Applicant for 20-30 minutes to decide whether to pursue a trial or accept a guilty plea. Counsel stated at no time did Applicant ask for more time to discuss the case or to halt the proceedings.

Counsel then testified the letter Applicant received from the public defender's office was a form letter and he explained it to Applicant. Counsel stated while Applicant might have been confused by the letter, Counsel made it very clear that the offer for thirteen (13) years was off of the table after Applicant rejected it. Counsel then admitted he did not remember having a specific conversation with Applicant about the 2-3 hours blood draw window and that he did not interview Jimmy Turner, the driver of the other car involved in the incident.

Upon questioning by this Court, Counsel testified he does not remember Applicant ever telling him that he ingested the methamphetamines while he was fleeing law enforcement and not before driving the vehicle. Counsel also testified he advised Applicant that this charge would carry 85% parole eligibility.

Counsel Drawdy testified she was not initially associated by Counsel Pracht for the drug



charges but that Applicant picked up these charges in the course of her representation of Applicant. Counsel, like Counsel Pracht, testified Applicant never explained to her that he ingested the methamphetamines while trying to elude capture. Counsel testified Applicant told her that he had been up for twenty-three (23) days straight and had gone without methamphetamine for two (2) days. Counsel then testified she did not advise Applicant that he had until the end of the working day to accept the offer; rather, she begged Applicant to accept the offer. However, Applicant stated that God told him not to take the plea offer. Counsel then introduced the plea rejection sheet along with the waiver of rights form she had Applicant sign. Counsel testified it was Applicant choice to reject the offer. Counsel then stated she advised Applicant that SCDC would determine his parole eligibility.

Counsel then testified that, as to the blood draw report, all of the documents she reviewed showed a timely test. Counsel also stated there was overwhelming evidence of Applicant guilt as methamphetamine was found in the car, a methamphetamine lab was found, the car was stolen, and Applicant had fled the scene. Counsel lastly testified that pursuing a trial would have been difficult for Applicant because he would have had to take the stand and testify, so he would be exposed to cross-examination and the potential for his prior convictions being revealed to the jury.

On cross-examination, Counsel testified that she would have advised Applicant that it was up to SCDC to determine Applicant's release date. Counsel then stated that she did not have a waiver of rights form for the May plea because that was the day Applicant's trial was scheduled to begin and they did not have the luxury of time. However, she did explain to Applicant the waiver of his rights. Counsel testified Applicant was fully aware of the consequences of pleading guilty and that, in her opinion, the plea was in his best interest. Counsel stated she extensively reviewed the discovery with

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Applicant and that Applicant completely understood the ramifications of his decision to plead guilty.

On re-direct examination, Counsel testified Applicant thought the attorneys were bluffing about the thirteen (13) year offer.

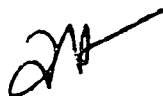
FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to 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) (citing Rule 71.1(e), SCRCP). Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

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

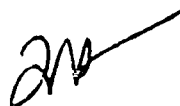


First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625, *citing Strickland*. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, the Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985).

Apprising Applicant of Consequences of Guilty Plea

This Court finds both Counsel Pracht and Counsel Drawdy were competent and diligent in their representation of the Applicant in this case. Counsel sufficiently advised the Applicant of the charges against him, the potential penalties if convicted at trial, and the evidence the State would produce at trial. Counsel satisfactorily investigated this case based upon the information supplied by the Applicant and the evidence available. Counsel also engaged in plea negotiations which were beneficial to the Applicant. This Court also finds the Applicant was well informed by Counsel in this case. The Applicant expressed to the plea court that he was satisfied with Counsel's representation. The Applicant pled guilty without any threat or coercion and was not under the influence of any intoxicant at the plea. The Applicant voluntarily waived his Constitutional rights afforded to him. This Court finds the Applicant pled knowingly, voluntarily, and on his own free will.

This Court further finds the Applicant's testimony regarding Counsel's performance is not

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credible while also finding Counsel's testimony is credible. This Court finds Applicant had a tough decision to make, but the decision to plead guilty was made by Applicant without any threats or coercion from Counsel or anybody else; accordingly, Applicant's plea was freely and voluntarily made with complete awareness of the consequences of his plea. This Court finds the Applicant has failed to meet his burden of proving counsel's performance was deficient or that he was prejudiced thereby. Accordingly, this allegation is denied.

Double Jeopardy

Applicant also alleges Counsel was ineffective for failure to challenge the charges as being in violation of the Double Jeopardy Clause. This allegation is without merit. Applicant was charged with DUI with death resulting and Failure to Stop for a Blue Light with death resulting. While each of these charges has the element of death resulting, Driving under the Influence and Failing to Stop for a Blue Light are wholly separate from one another and patently different charges. On its face, this allegation fails. Therefore, this allegation is denied.

Failure to Interview Driver of Other Car

Applicant finally alleges both Counsel Pracht and Counsel Drawdy were ineffective for failing to interview Jimmy Turner, the driver of the other car involved in the accident.

Prejudice from trial counsel's failure to interview or call witnesses cannot be shown where the witnesses do not testify at post-conviction relief. Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Bassette v. Thompson, 915 F.2d 932 (4th Cir. 1990), cert. denied, 499 U.S. 982 (1991). The Applicant's mere speculation as to what a witnesses' testimony would have been cannot, by itself, satisfy his burden of showing prejudice. Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993); Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995). An Applicant must produce the testimony of



a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial. Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998).

Applicant presented no evidence or testimony from Mr. Turner in accordance with the rules of evidence to support his claim. Even if such testimony had been offered, based upon a review of the record as a whole, the court has difficulty imagining a scenario whereby Mr. Turner's testimony would have been so favorable to Applicant that he would have elected to proceed to trial. Therefore, this allegation is denied.

Accordingly, this Court finds Applicant has failed to prove the first prong of the Strickland test – that Counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that Counsel committed either errors or omissions in his representation of Applicant.

This Court also finds Applicant has failed to prove the second prong of Strickland – that he was prejudiced by Counsel's performance. This Court concludes Applicant has not met his burden of proving counsel failed to render reasonably effective assistance. Therefore, these allegations are denied.

CONCLUSION

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

This Court notifies Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate

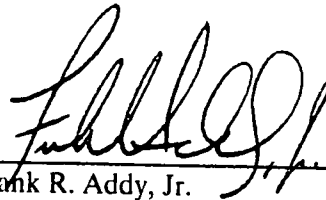


appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCR, provides that if the applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

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

IT IS SO ORDERED.



Frank R. Addy, Jr.
Presiding Circuit Court Judge
Eighth Judicial Circuit

November 26, 2014
Greenwood, South Carolina

NICHOLSON MEREDITH & ANDERSON, LLC
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Jennings B. Anderson
W.H. Nicholson, IV

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February 2, 2015

Daniel E. Shearouse
Clerk of Court
South Carolina Supreme Court
1231 Gervais Street
Columbia, SC 29201

Re: State of South Carolina vs. Gerald R. Gaines #222430
Case No. 2013-CP-24-0336

Dear Mr. Shearouse:

Enclosed please find the original and one copy of a Notice of Appeal and Certificate of Service in the above case. Please file the original and return a clocked-in copy to me in the envelope provided. Also enclosed please find copies of 1) the Order of Dismissal of Mr. Gaines' post-conviction relief application, and 2) the Order denying Mr. Gaines' subsequent 59(e) motion. Thank you for your help with this matter. Please do not hesitate to contact me with any questions.

Yours very truly,

NICHOLSON MEREDITH & ANDERSON, LLC



Jennings B. Anderson

JBA/
Enclosures

cc: J. Rutledge Johnson, Esquire
Assistant Attorney General
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Columbia, SC 29211-1549

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S.C. SUPREME COURT

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