



The Brough Law Firm



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November 9, 2015

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

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NOV 12 2015

RE: Derrick Cheeks v. State of South Carolina
2013-CP-42-2654

S.C. SUPREME COURT

Dear Mr. Shearouse:

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

- (1) Original Proof of Service upon opposing counsel.
- (2) Order of Dismissal.

If I can be of any further assistance please feel free to call me.

Sincerely,

Christopher D. Brough

Enclosure

cc: South Carolina Office of the Attorney General

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

The Honorable James R. Barber, III, Circuit Court Judge

Case No.: 2013-CP-42-2654

The State,

Respondent,

v.

Derrick Cheeks,

Appellant.

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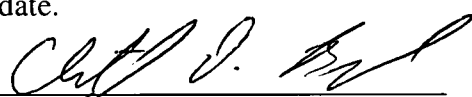
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S.C. SUPREME COURT

NOTICE OF INTENT TO APPEAL

Derrick Cheeks appeals the denial of his application for Post-Conviction Relief in this case. The Order of Dismissal was imposed by the Honorable James R. Barber, III on November 2, 2015. Appellant received notice of the same on that date.

November 10, 2015


CHRISTOPHER D. BROUGH
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ATTORNEY FOR APPELLANT

Other Counsel of Record:
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

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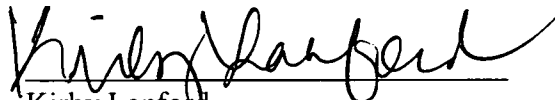
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S.C. SUPREME COURT

PROOF OF SERVICE

The undersigned hereby certifies that he is a person of such age and discretion as to be competent to serve papers and that a copy of the **Notice of Intent to Appeal**, was served upon the following person(s) on the State, by depositing copies of the same in the United States Mail, with sufficient postage affixed thereto, on November 10, 2015, addressed as follows:

The Honorable Alan Wilson
SC Attorney General
Rembert Dennis Building
1000 Assembly Street, Room 519
Columbia, S.C. 29201


Kirby Lanford

SWORN BEFORE ME THIS

10 DAY OF November, 2015.

Catherine Q. Felmet

Catherine Q. Felmet

NOTARY PUBLIC FOR SOUTH CAROLINA

MY COMMISSION EXPIRES: Aug 3, 2019

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

IN THE COURT OF COMMON PLEAS
OF THE SEVENTH JUDICIAL CIRCUIT

Derrick Lamar Cheeks,
S.C.D.C. No. 343108,

2013-CP-42-2654

Applicant,

ORDER OF DISMISSAL

v.

State of South Carolina,

Respondent.

This matter comes before the Court by way of an Application for Post-Conviction Relief (PCR) filed June 21, 2013. Respondent made its Return on or about July 11, 2014. An evidentiary hearing into the matter was convened on September 3, 2015, at the Spartanburg County Courthouse. Applicant was present at the hearing and represented by Christopher Brough, Esquire. Justin Hunter, Esquire, of the South Carolina Attorney General's Office represented Respondent. At the hearing, Applicant testified on his own behalf. Applicant's trial counsel, J. Faulkner Wilkes, Esquire, also testified. This Court had before it a copy of Applicant's records from the Spartanburg County Clerk of Court, Applicant's records from the South Carolina Department of Corrections, the trial transcript, and Applicant's appellate records.

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. He was indicted at the November 2009 term and the indictment was amended at the October 2010 term of the Spartanburg County Grand Jury for trafficking in crack, over 400 grams (2009-GS-42-6453) and possession with intent to distribute within 1/2 mile of a school zone (2009-GS-42-6452). Applicant was represented by J.

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SPARTANBURG COUNTY



Falkner Wilkes, Esquire. On October 6, 2010, Applicant proceeded to trial and was found guilty by a jury of the charges as indicted. The Honorable Roger L. Couch sentenced Applicant to concurrent sentences of imprisonment for twenty-five years with a \$200,000 fine for trafficking in crack and ten years with a \$100,000 fine for possession with intent to distribute within ½ of a school zone.

A timely Notice of Appeal was filed on Applicant's behalf by J. Falkner Wilkes, Esquire. The South Carolina Supreme Court affirmed the Applicant's conviction. State v. Cheeks, Op. No. 27211 (Sup. Ct. filed January 16, 2013). The Remittitur was issued on February 1, 2014.

Allegations

Applicant presented the following allegations for post-conviction relief:

1. Ineffective assistance of counsel, in that trial counsel was ineffective for
 - a. consenting to allow Applicant's case to be tried with the case of Ricky Dwight Cheeks thereby prejudicing the Applicant's defense;
 - b. failing to move to sever his case from the case of Ricky Dwight Cheeks;
 - c. failing to make a motion for a pre-trial Franks hearing in order to suppress evidence of drugs based on a search warrant dated June 4, 2009, that was defective;
 - d. failing to make a motion in limine to exclude character and prior bad act evidence before the trial, resulting in testimony being admitted of the Applicant's prior drug dealings;
 - e. failing to object to testimony from Eric Elder and Tracy Markley that discussed the prior drug relationship that they had with the Applicant;
 - f. and for failing to move for a mistrial based upon prosecutorial misconduct, such misconduct being the admission of prior drug dealings by an experienced prosecutor.

II. SUMMARY AND EVIDENCE PRESENTED AT PCR HEARING

Applicant's Testimony

Applicant testified that he did not want to be tried with his codefendant, Ricky Cheeks, who was indicted for trafficking in crack cocaine over 100 grams, possession with intent to distribute

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crack cocaine within ½ mile of a school, and trafficking in cocaine base over 400 grams. Applicant introduced to the Court a consent order where his trial counsel, J. Faulkner Wilkes, Esquire, ("Counsel") consented to allow his case to be tried with Ricky Cheeks. Applicant testified that he was prejudiced by having his case tried with Ricky's because he was only charged with trafficking for the drugs found at the house and not for the drugs found in Ricky's car. Applicant testified that Counsel should have moved to sever his trial from Ricky's trial. Applicant also testified that he had an issue with the search warrant because the description of the premises to be searched was left blank on the face of the warrant.

Applicant further testified that Counsel did not discuss the possibility of prior bad act evidence being introduced and he believed that inappropriate testimony came in during the assistant solicitor's direct examination of Eric Elder, the driver of the vehicle that was stopped by police resulting in Ricky Cheeks' arrest for trafficking. Applicant first took issue with a portion of the testimony where the solicitor asked Elder:

Q. Have you ever been present during the manufacturing or cooking of crack cocaine?

A. Yes, sir.

(Tr. 256, 15-17).

Applicant next took issue with the following exchange from the solicitor and Elder:

Q. Okay, why were you driving Mr. Derrick Cheeks and Mr. Ricky Cheeks?

A. Cause a lot of times I'd get free dope, free crack.

(Tr. 257, ll. 10-12).

Applicant also took issue with the following exchange from the solicitor and Elder:

Q. Who did you leave the residence with?

A. With Ricky Cheeks.

Q. And what were y'all going to do?

A. Derrick had told him that he needed to go somewhere to, to get rid of something.

Q. Okay. And you were — I couldn't hear you. What did you say?

A. Ricky — Derrick told his Uncle Ricky that, that he needed to get rid of

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M. HOPE BRADLEY
STATE BAR OF MISSISSIPPI
SHERIFF'S OFFICE

something, somebody was calling. So, he needed to get rid of something.
(Tr. 258, ll. 8-17).

Applicant also testified that he believed improper prior bad act evidence came out during the solicitor's direct examination of Tracy Markley, where the following exchange took place:

Q. And how did you meet Derrick Cheeks?

A. It was a long process, we knew each other at work, we weren't friends. We didn't hang out. It was a, probably a six month period before me and him actually started hanging out, and that was because of my friend, James Cranfield. He was, he was going to Derrick to buy crack, and, like I said, he got me started smoking, and we would go to his, you know, where he lived at the time to buy some. But that, you know, I didn't, I didn't even go inside and buy it or anything cause at that time I still didn't know—

(Tr. 300 l. 23 – 301 l. 7).

Applicant testified that he believed Counsel was ineffective for not objecting to the above testimony because it was improper prior bad act evidence that made him look like a drug dealer.

Applicant further testified that Counsel was ineffective for failing to effectively suppress the search warrant, which he believed contained unreliable information regarding the confidential informant as well as prior bad act evidence. Applicant testified that the confidential informant's purchases described as taking place March 3, 2009, and March 16, 2009, are improper and unreliable because Applicant was not actually charged with a crime as a result of those buys. Applicant further testified that the information in the search warrant was not reliable because the unnamed female who tipped the police to the motel on the date of his arrest was unidentified and because Applicant was seen at the motel empty handed. Applicant testified that the only information the police had leading to his arrest was the baking soda buy at Wal-Mart. Applicant testified that this information was insufficient to result in the search of Markley's house which led to Applicant's arrest.

Applicant testified that his defense at trial was that he was merely present at Markley's house when the police arrived and not engaging in any illegal activity. He testified that the only testimony

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that placed him near the kitchen where the drugs were being manufactured was that of Markley.

On cross-examination, Applicant testified that he was in fact only charged with the drugs found at the house, and not the drugs found on Ricky Cheeks at the car stop. Applicant testified that everything in the search warrant affidavit was untrue, but later admitted that the confidential informant's purchase of crack cocaine from him at Fatz Cafe did occur.

Applicant testified that the State engaged in misconduct through selective prosecution, because his codefendants received plea deals.

Further, on cross-examination, the State introduced language from Applicant's direct appeal opinion, where the South Carolina Supreme Court found overwhelming evidence of Applicant's guilt.

Counsel's Testimony

Counsel testified that he has been in the practice of law for 26 years as a prosecutor and defense attorney. Counsel testified that he met with Applicant many times prior to his trial. Counsel testified that Applicant was not as detailed in their pre-trial discussions as he was on the stand during this hearing. Counsel testified that he filed all of the correct discovery motions and went over the discovery, charges, potential sentences, and trial rights with Applicant.

Counsel testified that he looked at the search warrant with Applicant and took issue with the lack of description of premises to be searched. He testified that this was a question of the warrant's sufficiency. Counsel testified that he did not make a motion to have a Franks hearing because he was not aware of the inclusion of any falsity or the exclusion of any exculpatory information in the search warrant.

Counsel testified that Applicant was not able to provide him with alibis or his version of the facts other than his claim that he was merely present at the scene where the drugs were found.

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SOUTH CAROLINA
COUNTY

Counsel testified that he did join in the motion to sever the indictments, moved to suppress the search warrant, and preserved his objections throughout the trial.

Regarding the alleged prior bad act testimony from Markley and Elder, Counsel testified that the statements were very short and at the time did not strike him as something he should object to, especially since the jury's attention would then be drawn to the statements which were made in the context of an explanation. Counsel testified that maybe he should have objected but explained that the outcome of the trial would not have been different had he done so. Counsel further testified that there was overwhelming evidence of Applicant's guilt because he was the only one in proximity to the kitchen where the cooking of crack was taking place.

III. APPLICABLE LAW

In a post-conviction relief action, the applicant bears the burden of proving the allegations in the application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, 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, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. at 117, 386 S.E.2d at 625. First, Applicant must prove counsel's performance was deficient. Id.

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M. HOPE LADLEY
CLERK OF COURT
SOUTH CAROLINA

Under this prong, courts measure an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, any deficient performance must have prejudiced Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court has reviewed the Clerk of Court records regarding the subject convictions, the trial transcript, Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, and the legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80 (2003), this Court makes the following findings of fact based upon all of the probative evidence presented.

As a matter of general impression, this Court finds Applicant's testimony and assertions to be not credible. In contrast, this Court finds the testimony of Counsel to be credible and persuasive on all matters. These credibility findings have been applied to the Court's findings and conclusions set forth below.

Additionally, as the South Carolina Supreme Court found in Applicant's direct appeal, this Court finds there is overwhelming evidence of Applicant's guilt, and therefore Applicant cannot prove prejudice. See State v. Cheeks, 401 S.C. 322, 329, 737 S.E.2d 480, 484 (2013).

Failure to Move for a Severance

This Court finds that Applicant failed to meet his burden of proving that his trial counsel was ineffective for consenting to having Applicant's case tried with Ricky Cheeks and for not moving to

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CLERK OF COURT
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sever their two trials.

"Criminal defendants who are jointly tried [...] are not entitled to separate trials as a matter of right." State v. Dennis 337 S.C. 275, 281, 523 SE2d 173, 176 (1999) (citing State v. Kelsey, 331 S.C. 50, 502 S.E.2d 63 (1998); State v. Holland, 261 S.C. 488, 201 S.E.2d 118 (1973); State v. Crowe, 258 S.C. 258, 188 S.E.2d 379 (1972)). "Charges can be joined in the same indictment and tried together where they (1) arise out of a single chain of circumstances; (2) are proved by the same evidence, (3) are of the same general nature; and (4) no real right of the defendant has been prejudiced." State v. Beekman 405 S.C. 225, 229, 746 S.E.2d 483, 486 (2013). A court should only grant a severance "when there is a serious risk that a joint trial would compromise a specific trial right of a co-defendant or prevent a jury from making a reliable judgment about a co-defendant's guilt." Id. at 282, 523 S.E.2d at 176.

This Court finds that Ricky Cheeks' counsel, Mr. Roger Poole, first made a motion to sever the two defendants' trials, to which Counsel joined and also moved to sever Ricky Cheeks' distribution charge. The record reflects that the State contended that one consolidated trial was necessary because the charges arose out of the same chain of circumstances, and the trial court denied the defendants' motion. This Court finds that Counsel was not ineffective for failing to move to sever because he moved to sever Ricky Cheeks' distribution charge and Applicant provided no evidence to show that his trial rights were compromised or that he and Ricky presented antagonistic defenses. Likewise, this Court finds that the charges resulted from the same chain of circumstances because Ricky Cheeks was pulled over almost immediately after leaving the house where Applicant was found.

Applicant has failed to prove prejudice because he cannot show that the outcome of the trial would have been different had Counsel moved to sever Ricky Cheeks' case. Ricky Cheeks' counsel,

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COURT OF COMMON PLEAS

Roger Poole, made a motion to sever the two defendants' trials, which was joined in by Counsel. It is undisputed that Applicant was charged with manufacturing over 400 grams of crack cocaine – the drugs found in Markley's house where Applicant was standing when police arrived – and not charged with trafficking or manufacturing the drugs that were found on Ricky Cheeks at the car stop. Moreover, Applicant has failed to show that a motion to sever his case from Ricky Cheeks' would have been successful. In all likelihood, such a motion would have been denied just as Counsel's motion to sever Ricky Cheeks' distribution charges was also denied. Accordingly, this allegation is denied and dismissed.

Failure to Request a Franks Hearing

This Court finds that Applicant has failed to meet his burden of proving that Counsel was ineffective for failing to request a Franks hearing to suppress the search warrant. Counsel testified that he did not request a Franks hearing because he had no grounds to do so. This Court finds that Applicant presented no evidence regarding whether false information supporting the affidavit had been recklessly or intentionally included in the affidavit, or whether exculpatory information was recklessly omitted from the affidavit under Franks v. Delaware, 438 U.S. 154 (1978). Franks holds:

where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.

Franks, 438 U.S. at 155-56. Applicant failed to articulate that Counsel was ineffective for failing to successfully suppress the search warrant under Franks. Applicant failed to produce any evidence that

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any deliberate or reckless falsehoods appear in the arrest warrant. Accordingly, a Franks hearing was unnecessary. See State v. Missouri, 337 S.C. 548, 553, 524 S.E.2d 394, 396 (1999) (a defendant's attack on a search warrant affidavit must be more than conclusory; there must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof).

Failure to Exclude Character or Prior Bad Act Evidence

This Court finds that Applicant has failed to meet his burden of proving that Counsel was ineffective for failing to make a motion to exclude character and prior bad act evidence before the trial. Applicant's first complaint regarded statements elicited from Elder. When asked if he had ever been present during the manufacturing or cooking of crack cocaine, Elder answered that he had. This Court finds that Counsel was not ineffective for failing to object to this statement because it is not an example of a prior bad act by Applicant because it does not refer to Applicant. Next, when asked why he drove the Cheeks' car, Elder answered that he had hoped to get free crack. This Court finds that Counsel was not ineffective for failing to object to this statement because it is part of the res gestae of the case and not a prior bad act. When the statement is read in context, the solicitor was asking Elder about what was occurring during the day in question and why he was driving the car that was later pulled over by police. Later in the trial, Elder was asked why he left the residence with Ricky Cheeks and he responded that it was because Applicant told him to go somewhere to get rid of something. This Court finds that Counsel was not ineffective for failing to object to this statement because it describes the res gestae of the case and explains why Elder left the house before was pulled over by police. Lastly, Applicant took issue with Markley's statement that he met Applicant through a friend who was buying crack from Applicant.

Counsel testified at the hearing that he did not object to these because he did not believe them

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to be objectionable and an objection would have unnecessarily drawn the jury's attention to the statements. Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1996); Underwood v. State, 309 S.C. 560, 562, 425 S.E.2d 20, 22 (1992); Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 778-79 (1992). Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel. Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992). Here, Counsel articulated a valid strategy in that he did not want to draw even more attention to the subject statements. Accordingly, this Court finds Applicant has not demonstrated that Counsel's performance in this respect was unreasonable or that such performance prejudiced him.

Additionally, this Court finds that Applicant's related allegation that Counsel was ineffective for failing to move for a mistrial based upon prosecutorial misconduct must be dismissed. This Court finds that Applicant has failed to present any actual evidence of prosecutorial misconduct by the State.

All Other Allegations

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this order, the Court finds Applicant failed to present any evidence regarding such allegations. Accordingly, the Court finds Applicant has abandoned any such allegations.

V. CONCLUSION

Based on the foregoing, the Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Applicant failed to demonstrate Counsel's performance was unreasonable under prevailing

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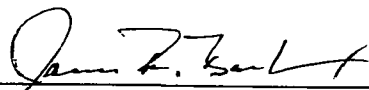
professional norms. Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625; Stalk v. State, 383 S.C. 559, 563, 681 S.E.2d 592, 594 (2009). Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

The Court notes Applicant must file and serve a notice of appeal within thirty (30) days from PCR counsel's receipt 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, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

1. The Application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. Applicant shall remain in the custody of the South Carolina Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 2nd day of NOVEMBER, 2015.


JAMES R. BARBER, III
Presiding Judge
Seventh Judicial Circuit

M. HOPE BLACKLEY

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SPAINBARDEN COUNTY

COLUMBIA, South Carolina

The Brough Law Firm
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The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
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