

Hugh W. Welborn

Attorney at Law
Post Office Box 173
913 Carolina Circle
Anderson, South Carolina 29622

Office (864) 226-5787
Fax: (864) 224-3738

email to:
hughwelborn@bellsouth.net

November 16, 2015

RECEIVED

NOV 19 2015

S.C. SUPREME COURT

South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

In RE: Rahiem Kirkman, #334886 vs. State of South Carolina
Case #: 2012-CP-04-3291

Dear Sir/Madam:

Please find enclosed herewith the original and one (1) copy of the Appellant's Notice of Appeal in connection with the foregoing matter which I ask that you file for record, returning the clocked copy to my office. I also enclose a copy of the Order of Dismissal and the original Proof of Service on Walt Whitmire, Office of the Attorney General. Please use the enclosed self-addressed envelope to return the clocked copy to my office.

With kind regards,



Hugh W. Welborn

HWW/sba

cc: Office of the Appellate Defense
Office of the Attorney General
SC Court of Appeals

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM ANDERSON COUNTY
COURT OF COMMON PLEAS

HONORABLE J. CORDELL MADDOX, JR.

2012-CP-04-3291

RAHIEM KIRKMAN, #334886

APPELLANT,

vs

STATE OF SOUTH CAROLINA,

RESPONDENT.

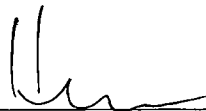
RECEIVED

NOV 19 2015

S.C. SUPREME COURT

NOTICE OF APPEAL

Rahiem Kirkman, #334886 appeals the denial of his Post Conviction Relief. The Post Conviction Relief Action was heard and denied by the Honorable J. Cordell Maddox, Jr., Circuit Court Judge on February 20, 2015, and Order of Dismissal issued on November 5, 2015, and filed on November 10, 2015. The Appellant received Order of Dismissal on November 16, 2015.



Hugh W. Welborn
Attorney for the Appellant
Post Office Box 173
Anderson, South Carolina 29622
(864) 226-5787
Attorney for Rahiem Kirkman, #334886

Other Counsel of Record:
Walt Whitmire
Office of Attorney General State of SC
Post Office Box 11549
Columbia, South Carolina 29211

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM ANDERSON COUNTY
COURT OF COMMON PLEAS

HONORABLE J. CORDELL MADDOX, JR.

2012-CP-04-3291

RAHIEM KIRKMAN, #334886

APPELLANT,

vs

STATE OF SOUTH CAROLINA, **S.C. SUPREME COURT**


RESPONDENT.

RECEIVED

NOV 19 2015

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 November 16, 2015, addressed to its attorney of record Walt Whitmire, Office of the Attorney General, Post Office Box 11549, Columbia, South Carolina 29211-1549



Hugh W. Welborn
Attorney for the Appellant
Post Office Box 173
Anderson, South Carolina 29622
(864) 226-5787
Attorney for Rahiem Kirkman, #334886

Anderson, South Carolina

November 16, 2015

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF ANDERSON) FOR THE TENTH JUDICIAL CIRCUIT

Rahiem Kirkman,
S.C.D.C. No. 334886,

Applicant,

v.

State of South Carolina,

Respondent.

A TRUE COPY

NOV 10 2015

Richard W. Bailey
CLERK OF COURT

C.A. No. 2012-CP-04-3291

ORDER OF DISMISSAL

COMMON PLEAS AND
GENERAL SESSIONS

NOV 10 PM 3:04

FILED-CLERK'S OFFICE
ANDERSON SC

This matter comes before the Court pursuant to an application for post-conviction relief (PCR) filed October 12, 2012. Respondent made its Return on or about August 1, 2013. An evidentiary hearing into the matter was convened on February 20, 2014, at the Anderson County Courthouse. Applicant was present and was represented by Hugh W. Welborn, Esquire. Respondent was represented by Walt Whitmire, Esquire, of the South Carolina Attorney General's Office.

Applicant testified on his own behalf at the evidentiary hearing. Applicant's trial counsel, Dorothy Manigault, Esquire, also testified. This Court had before it a copy of the trial transcript, the records of the Anderson County Clerk of Court regarding the subject guilty pleas, Applicant's records from the South Carolina Department of Corrections, Applicant's direct appeal records, and the pleadings. The Court finds as follows:

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Anderson County Clerk of Court. Applicant was indicted at the September 2006 term of the Anderson County Grand Jury for trafficking in cocaine, more than

40 grams (2006-GS-04-2922). He was represented by Dorothy Manigault, Esquire. On May 20, 2009, Applicant was tried and convicted in his absence. The Honorable J.C. Nicholson, Jr., sentenced him to confinement for a period of twenty-five (25) years.

A timely Notice of Appeal was filed on Applicant's behalf and perfected by J. Falkner Wilkes, Esquire. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Kirkman, Op. No. 2011-UP-500 (S.C. Ct. App. filed November 9, 2011).

Allegations

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

1. Ineffective assistance of counsel, specifically:
 - a. "Failure to object to jury instruction that 'the defendant is not present may not be considered against the defendant in any matter whatsoever.'"
 - b. "Failure to object to the Court's erroneous jury instructions, the defendant's trial in his absence."
 - c. "Failure to object to Jackson v. Denno hearing."
 - d. "Failure to include the South Carolina Constitution, Article 1, Section 10, along with the U.S. Const. amend. IV in the suppression of evidence motion."
 - e. Failure to move for a continuance since Counsel had never talked to Applicant.
 - f. "Failure to object to Solicitor's closing argument that violated the 'Golden Rule.'"
 - g. "Failure to object to Solicitor discussing prior bad acts in closing argument."
 - h. "Failure to object to Judge telling jury that if he makes an error of law, there is another time and place for that to be corrected."

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 reviewed the Clerk of Court records regarding the subject's convictions, the Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, the transcripts and documents from the prior proceedings, and legal arguments of counsel. Pursuant to S.C. Code Ann. §17-27-80 (2015), this Court makes the following findings of fact based upon all of the probative evidence presented.

Ineffective Assistance of Counsel

In a post-conviction relief action, the applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCP; Butler, 286 S.C. 441, 334 S.E.2d 813 (1985). 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, (1984); Butler, 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, 286 S.C. 441, 334 S.E.2d 813 (1985). The applicant must overcome this presumption 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. 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.

Failure to Request Continuance

Applicant has failed to present any evidence that counsel was deficient in failing to request a continuance. The Supreme Court has held that a failure to request a continuance prior to a trial *in absentia* may, under some circumstances, result in a finding of deficient performance. See Morris v. State, 371 S.C. 278, 282, 639 S.E.2d 53, 56 (2006). These circumstances, however, are not present in Applicant's case.

In Morris, the morning before being tried in his absence, the defendant signed a sentencing sheet in anticipation of entering a guilty plea to a lesser included offense. 371 S.C. at 280, 639 S.E.2d at 55. Upon learning his client had gone missing, the attorney failed to request a continuance and proceeded with the trial *in absentia*. While he did object to the defendant being tried in his absence, our state's Supreme Court concluded the failure to request the continuance so that the defendant could enter the agreed upon plea to the lesser included offense constituted deficient performance. Such circumstances were not present in this case. Crucially, Applicant did not inexplicably disappear immediately before he was set to enter into a beneficial plea deal: instead, Counsel had been unable to contact Applicant for roughly six months leading to the trial date despite numerous attempts *and numerous previous continuances*. This Court is convinced Counsel would have been reasonable in believing any further attempts to reach Applicant, even following a continuance, would have been futile. Accordingly, under the circumstances of this case, Counsel did not exhibit deficient performance in failing to request a continuance prior to his trial *in absentia*.

Applicant has also failed to show that he was prejudiced by the fact that Counsel did not request a continuance. In order to show prejudice arising out of the failure to request a continuance prior to a trial *in absentia*, an applicant for post-conviction relief must also show either that the presiding judge would have granted the request, or that denying it would have constituted reversible error. See State v. Ravenell, 387 S.C. 449, 457-58, 692 S.E.2d 554, 558-59 (2010) (*citing* Morris at 280-81, 639 S.E.2d at 55).

Applicant has not presented evidence that a request for continuance, if made, would have been granted. This Court notes Counsel made the request that Applicant not be tried in his absence – eliciting a denial by the trial court. Finding the Applicant had received notice of his right to be present and a warning that a trial would proceed in his absence upon his failure to attend, the presiding judge concluded Applicant freely, voluntarily, knowingly and intelligently waived his right to be present at trial. (Tr. p. 9-10).¹

Moreover, there is nothing to indicate a denial of any such continuance request would have constituted reversible error. It is well-settled in South Carolina that a trial court's denial of a motion for continuance "will not be disturbed absence a clear abuse of discretion." State v. McKennedy, 348 S.C. 270, 280, 559 S.E.2d 850, 855 (2002) (*quoting* State v. Tanner, 299 S.C. 459, 395 S.E.2d 832 (1989)). In fact, reversals of a continuance are as "rare as the proverbial hens' teeth." State v. Lytchfield, 230 S.C. 405, 409, 95 S.E.2d 857, 859 (1957). Here, there is no indication that the trial court would have abused its discretion by denying such a request. Accordingly, this Court finds Applicant has not met his burden to prove ineffective assistance of counsel in failing to request a continuance. This allegation is therefore denied and dismissed.

¹ While Counsel's request that the trial not proceed in Applicant's absence probably did not constitute a motion for continuance, see Morris at 56, 639 S.E.2d at 282, the trial court's denial certainly suggests additional delays would have been met with skepticism. In any event, it was Applicant's burden to show otherwise at the evidentiary hearing.

Trial in Absentia

To the extent Applicant alleges that he was tried *in absentia* as a result of his trial counsel's deficient performance, this Court finds such an allegation is without merit. It is well established that, although the Sixth Amendment of the United States Constitution guarantees the right of an accused to be present at every stage of his trial, this right may be waived, and a defendant may be tried in his absence. State v. Ravenell, 387 S.C. 449, 454, 692 S.E.2d 554, 557 (2010) (citing State v. Fairey, 374 S.C. 92, 99, 646 S.E.2d 445, 448 (Ct. App. 2007)). A trial judge must determine a criminal defendant voluntarily waived his right to be present at trial in order to try a defendant in his absence. State v. Jackson, 288 S.C. 94, 95, 341 S.E.2d 375, 375 (1986). The judge must make findings of fact on the record that the defendant (1) received notice of his right to be present and (2) was warned that he would be tried in his absence should he fail to attend. Id.

In the present case, the trial judge made both of the required findings and determined Applicant had "freely, voluntarily, knowingly and intelligently waived his right to be present at trial." (Tr. p. 9-10). Moreover, this Court finds credible and compelling Counsel's testimony that she tried to get in touch with Applicant prior to trial – including contacting Applicant's bail bondsman – without avail. Considering Applicant's phone number was disconnected and letters sent by Counsel were returned unopened, this Court is firmly convinced that Counsel met her obligation in this regard. Moreover, in light of the trial court's finding that Applicant was on notice of the trial date, he did not need his attorney to remind him simply to show up. As such, this allegation is denied and dismissed.

Failure to Object to Jury Instructions

This Court has also considered Applicant's allegation that counsel was ineffective in failing to object to jury instructions regarding his trial *in absentia* and found it to without merit. When a defendant is tried *in absentia*, the trial court should instruct the jury that the defendant's failure to appear may not be construed as an admission of guilt. McFadden v. State, 342 S.C. 637, 539 S.E.2d 391 (2000). In fact, failure to request such an instruction where the defendant is absence constitutes ineffective assistance of counsel. Id.

The record reflects that the trial court gave the required instruction, charging to the jury that "the fact that the defendant is not present may not be considered against the defendant in any manner whatsoever." (Tr. p. 281). Applicant's testimony at the PCR evidentiary hearing indicates he believes this charge highlighted his absence, and that "common sense" would have led the jury to assume he was guilty as a result. Such a claim is illogical. Jurors are presumed to follow the law as instructed to them. State v. Grovenstein, 335 S.C. 347, 353, 517 S.E.2d 216, 218 (1999). To hold otherwise would undermine the very bedrock of our justice system. Applicant has thus failed to meet his burden, and this allegation must be dismissed.

Failure to Object to Evidence of Prior Bad Act

Applicant's claim that counsel was ineffective for failure to object to the Solicitor's discussion of his prior bad acts during closing argument is similarly without merit. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. Rule 404(b), SCRE. Such evidence may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent. Id.

This Court first finds it prudent to point out that the purported “prior bad act” evidence Applicant believes should have been excluded was only brought to the State’s - and eventually the jury’s – attention *as a result of his own voluntary statement*. Applicant admitted to police, after waiving his right to remain silent, that over the course of several months he routinely took “five to ten kilos” at a time to sell in Atlanta – totaling roughly *one hundred and fifty (150) pounds*. (Tr. p. 237). With this in mind, this Court finds such evidence clearly tended to prove the existence of a common scheme or plan under Rule 404(b), SCRE. See State v. Raffaldt, 318 S.C. 110, 114, 456 S.E.2d 390, 392 (1995) (common scheme or plan existed where there was a close degree of similarity or connection between prior bad act and the crime); see also State v. Kirton, 381 S.C. 7, 28, 671 S.E.2d 107, 117 (Ct. App. 2008) (“Prior bad act evidence is admissible where the evidence is of such a close similarity to the charged offense that the previous act enhances the probative value of the evidence so as to outweigh the prejudicial effect.”). Accordingly, Counsel was not deficient in failing to object where the evidence was clearly admissible.

Applicant has also failed to meet his burden to show prejudice. Additionally, the evidence of Applicant’s guilt was utterly overwhelming in this case. See Applicant was caught red handed: he was pulled over for violating with a large amount of cocaine in his car, and subsequently gave a full confession. This is further reflected by the fact that it took the jury only fifteen minutes of deliberations to reach a guilty verdict. (Tr. p. 291). Therefore, this allegation is denied and dismissed.

Failure to Suppress Statement to Police and Physical Evidence

Applicant’s allegation concerning suppression of his statement to police and evidence presented at trial also falls short under the applicable standard. Applicant testified at the PCR

evidentiary hearing that he believes his trial counsel failed to apply the constitution to evidence of drugs seized from his car, as well as his admission of guilt – specifically, he said he was pressured into giving the statement, and it should not have come out at trial when he was not present. Applicant also alleged the police “put words in his mouth,” and that he was afraid they would arrest a female acquaintance² of his if he did not cooperate. He admitted, however, that he was read his Miranda rights and signed a waiver prior to giving the statement. Moreover, the Trial Court specifically found that Applicant made a knowing and intelligent waiver of his rights under the Fifth and Sixth Amendments. (Tr. p. 80).

Applicant has failed to prove counsel was deficient in any regard. Counsel made her objections for the record. Additionally, the issue of whether the evidence was seized as part of an unlawful search and seizure was adequately preserved for review, as indicated by the fact that the South Carolina Court of Appeals heard and considered the merits of that issue on Applicant’s direct appeal of his criminal conviction. This allegation is therefore denied and dismissed.

Failure to Object to Golden Rule Violation

Applicant next alleges Counsel was ineffective in failing to object to a purported “Golden Rule” violation by the Solicitor during closing arguments. Specifically, Applicant takes issue with the phrase “[y]ou know the difference between right and wrong,” directed toward the jury. (Tr. p. 270-271).

A “Golden Rule” argument which suggests to jurors to put themselves in the shoes of one of the parties is generally impermissible because it encourages the jurors to depart from neutrality and to decide the case on the basis of personal interest and bias rather than evidence. State v. Reese, 359 S.C. 260, 271, 597 S.E.2d 169, 175 (S.C. Ct. App. 2004).

² It appears Applicant was referring to Elizabeth Pope, his girlfriend at the time who was with him when he was apprehended.

This Court finds Applicant has failed to show a “Golden Rule” violation occurred. Looking at the contested statement in light of the entire record, it is clear that the Solicitor was not asking the jury to place themselves in Applicant’s shoes. Instead, the Solicitor was explaining how the type of nervousness Applicant exhibited when stopped was categorically distinct from the type of nervousness most people experience when stopped by police – to the extent that it became an independent indicator of suspicious activity.

This Court further finds that even if it were possible to construe the offending statement as a “Golden Rule” violation, Applicant has failed to show he was prejudiced by Counsel’s failure to object. A reviewing court must view the alleged impropriety of the solicitor’s argument in the context of the entire record, including whether the trial judge’s instruction adequately cured the improper argument *and whether there is overwhelming evidence of guilt*. Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998)(emphasis added). Improper comments do not automatically require reversal if they are not prejudicial to the defendant, and the Applicant has the burden of proving he did not receive a fair trial because of the alleged improper argument. Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 16, 166 (2002). The relevant question is whether the solicitor’s comments so infected the trial with unfairness as to make the resulting conviction a denial of due process. State v. Hornsby, 326 S.C. 121, 129, 484 S.E.2d 869, 873 (1997) (“A denial of due process occurs when a defendant in a criminal trial is denied the fundamental fairness essential to the concept of justice.”). Nothing in the record supports a finding that Applicant’s trial was not fundamentally unfair as a result of the Solicitor’s closing argument – nor has Applicant presented any evidence that would lead the court to such a conclusion. This is even clearer when considering – as discussed above – the overwhelming

evidence of Applicant's guilt. Therefore, this Court is left with no choice but to deny and dismiss this allegation.

CONCLUSION

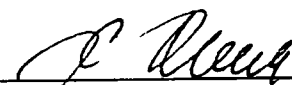
Based on the foregoing, this Court finds that the Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

This Court notes that Applicant must file and serve a notice of intent to appeal within thirty (30) days from receipt of this Order to secure the appropriate appellate review. See Rule 203, SCACR. Rule 71.1(g), SCRCF; 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 South Carolina Appellate Court Rule 243 for appropriate procedures after notice has been timely filed.

IT IS THEREFORE ORDERED

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

AND IT IS SO ORDERED this 5 day of November, 2015.



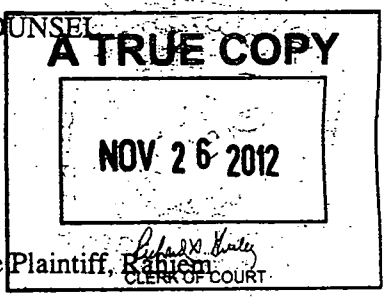
J. CORDELL MADDOX, JR.
Presiding Judge
Tenth Judicial Circuit

Anderson, South Carolina

FILED-CLERK'S OFFICE
ANDERSON SC
2015 NOV 10 PM 3:04
COMMON PLEAS AND
GENERAL SESSIONS

STATE OF SOUTH CAROLINA)
)
 COUNTY OF ANDERSON)
)
 Rahiem Kirkman,)
)
 PLAINTIFF,)
)
 vs.)
)
 State of South Carolina,)
)
 DEFENDANT.)

IN THE COURT OF COMMON PLEAS
 TENTH JUDICIAL CIRCUIT
 CASE NO.: 2012-CP-04-3291
 ORDER SUBSTITUTING COUNSEL



It appears that Lewey C. Hammett was appointed as the attorney for the Plaintiff, Kirkman, in the above-entitled matter.

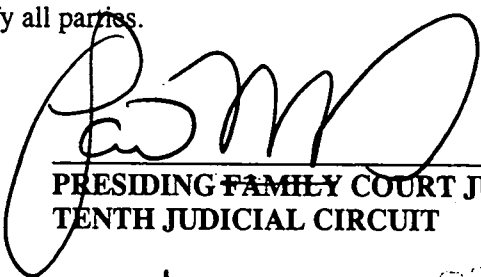
It appears that Hugh W. Welborn has consented to be substituted as the attorney for the Plaintiff, Rahiem Kirkman, for Lewey C. Hammett, in the above-entitled matter.

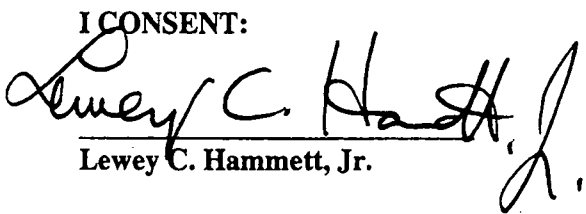
NOW THEREFORE IT IS ORDERED, AJUDGED AND DECREED:

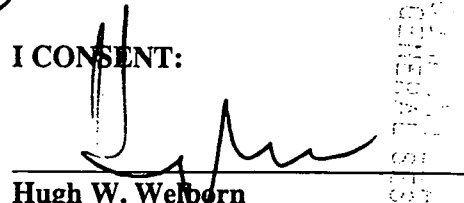
1. That Lewey C. Hammett be relieved as attorney for the Plaintiff, Rahiem Kirkman.
2. That Hugh W. Welborn is appointed as substitute attorney for the Plaintiff, Rahiem Kirkman.

Mr. Welborn is to immediately notify all parties.
IT IS SO ORDERED.

Anderson, South Carolina
 October 26, 2012
 HAA


 PRESIDING FAMILY COURT JUDGE
 TENTH JUDICIAL CIRCUIT

I CONSENT:

 Lewey C. Hammett, Jr.

I CONSENT:

 Hugh W. Welborn

GENERAL SESSIONS
 2012 NOV 26 AM 11:48
 CLERK OF COURT

Hugh W. Welborn

Attorney at Law
Post Office Box 173
913 Carolina Circle
Anderson, South Carolina 29622

Office Telephone:
(864) 226-5787

Fax:
(864) 224-3738

November 16, 2015

RECEIVED

NOV 19 2015

South Carolina Office of Appellate Defense
P. O. Box 11589
Columbia, South Carolina 29211-1589

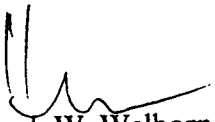
S.C. SUPREME COURT

In RE: Rahiem Kirkman, #334886 vs. State of South Carolina
Case #: 2012-CP-04-3291

Dear Sir or Madam:

In connection with the foregoing matter, please be advised that I was the Court Appointed Attorney and enclose herewith a copy of my appointment. I also enclose copies of all documents you requested for filing a copy of the Appellant's Notice of Appeal in this matter together with a copy of the Order and Proof of Service. I ask that your office assume representation of this indigent Applicant.

Very truly yours,


Hugh W. Welborn

HWW/sba
Enclosures

cc: South Carolina Supreme Court
Court of Appeals
Office of Attorney General

Hugh W. Welborn
Attorney At Law
P. O. Box 173
Anderson, SC 29622

South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

