

Brandt Rucker
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June 30, 2016

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

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S.C. SUPREME COURT

RE: Stapleton, McDaniels, Moore Notices of Appeal

Dear Mr. Shearouse:

Please find enclosed the Notices of Appeal for Brian Stapleton, Kevin McDaniels, and Charles Moore, as well as the proofs of service and copies of the orders to be appealed.

Please do not hesitate to contact me if you have questions or concerns.

Sincerely,



Brandt Rucker, Esq.

ENCLOSURE

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM SPARTANBURG COUNTY
Circuit Court

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The Honorable R. Ferrell Cothran, Circuit Court Judge

S.C. SUPREME COURT

Case No. 2014-CP-42-0506

Kevin Wayne McDaniels,

Appellant,

v.

State of South Carolina

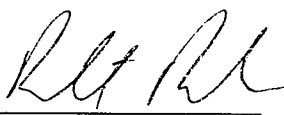
Respondent.

Notice of Appeal

Kevin Wayne McDaniels appeals the order of the Honorable R. Ferrell Cothran dated May 4, 2016. Appellant received written notice of entry of this order on June 21, 2016.

June 21, 2016

Sincerely,

s/ 

Brandt Rucker
522 North Church Street
Greenville, South Carolina 29601
(864) 271-9925
Attorney for Appellant

Other Counsel of Record:

Alicia Olive, Esq.
S.C. Attorney General's Office
PO Box 11549
Columbia, SC 29211

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Circuit Court

The Honorable R. Ferrell Cothran, Circuit Court Judge

Case No. 2014-CP-42-0506

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S.C. SUPREME COURT *U.*

Kevin Wayne McDaniels

Appellant,

v.

State of South Carolina

Respondent.

Proof of Service

I certify that I have served the Notice of Appeal on the State of South Carolina by depositing it in the United States Mail, postage prepaid, on June 21, 2016, addressed to its attorney of record, on Alicia Olive, P.O. Box 11549, Columbia, S.C. 29211 .

June 21, 2016

Sincerely,

s/ 

Brandt Rucker
522 North Church Street
Greenville, South Carolina 29601
(864) 271-9925
Attorney for Appellant

Other Counsel of Record:

Alicia Olive, Esq.
S.C. Attorney General's Office
PO Box 11549
Columbia, SC 29211

STATE OF SOUTH CAROLINA)
)
 COUNTY OF SPARTANBURG)
 Kevin Wayne McDaniels, #254398)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)
 _____)

IN THE COURT OF COMMON PLEAS
 FOR THE SEVENTH JUDICIAL CIRCUIT

Case No.: 2014-CP-42-0506

ORDER OF DISMISSAL

This matter comes before the Court by way of an application for post-conviction relief ("PCR") filed February 10, 2014. Applicant filed an initial PCR application¹ on June 16, 2009, with an amendment filed April 22, 2010. Respondent filed an Amended Return and Motion to Dismiss Without Prejudice on October 2010. Because Applicant was housed outside of the state in a federal facility, the Court dismissed the application without prejudice with leave to file when Applicant returned to state custody.

Respondent filed its Return to the current application on September 11, 2014, requesting that an evidentiary hearing be held. An evidentiary hearing into the matter was convened at the Spartanburg County Courthouse before the undersigned on January 11, 2016. Applicant was present at the hearing via telephone and was represented by J. Brandt Rucker, Esquire. Alicia A. Olive, Esquire, represented Respondent.

At the evidentiary hearing, Applicant testified via telephone on his own behalf. Nancy Griffin, Applicant's mother, also testified. The State presented testimony from Robert B. Hall, Esquire. This Court also had before it the records of the Spartanburg County Clerk of Court

¹ Case No. 2009-CP-42-3350

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regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the plea transcript, and the pleadings.

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections ("SCDC") pursuant to orders of commitment of the Spartanburg County Clerk of Court.² Applicant was indicted at the March 2008 term of the Spartanburg County Grand Jury for first degree burglary (2008-GS-42-1743), second degree burglary (2008-GS-42-1744), and two counts of grand larceny between \$1,000 and \$5,000 (2008-GS-42-1745, 1746). He was represented by Robert Hall, Esquire ("Counsel"). On August 26, 2008, the Applicant pleaded guilty to the charges as indicted pursuant to North Carolina v. Alford, 400 U.S. 25 (1970), before the Honorable R. Markley Dennis, Jr. Pursuant to a negotiated sentence, Judge Dennis sentenced Applicant to confinement for concurrent terms of fifteen years on each burglary charge and five years on each grand larceny charge. Applicant did not appeal his plea or sentence.

Allegations

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

1. "Miscarriage of justice for not granting a continuance"
2. Ineffective assistance of counsel for failure to pursue a one hour continuance
3. Actual innocence, in that: "I was not in the state when the crime was committed."
4. "Police coercion—involuntary confession" "police coerced me into confession of crimes I did not commit."

² Although Applicant is classified as an SCDC inmate, he is currently housed in the Federal Bureau of Prisons as a result of separate federal convictions.

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II. SUMMARY OF TESTIMONY PRESENTED

Applicant testified that his case was on the docket for a jury trial on the date that he pleaded guilty, August 26, 2008. Applicant testified that Counsel met with him only once before his scheduled trial. Applicant testified he could not have been guilty of the charges because he was in Newport, Florida at the time the crimes were alleged to have been committed. Applicant testified that he had sixteen affidavits from individuals who would attest that he was out of the state at the time, as well as photographs of him in Florida. He testified that he had alibi witnesses that were planning to testify at his trial and that he and Counsel discussed these witnesses. Applicant testified that his father was one of his alibi witnesses. Applicant testified his father was not present to testify at the PCR hearing but that he had expected him to testify. Applicant testified that he was being pressured with a life sentence and that Counsel abandoned him. Applicant testified his father and stepmother were on their way to the courthouse the morning that the trial was scheduled to begin and that he asked Counsel to request a one hour continuance but Counsel refused to do so. Applicant alleged that these individuals were going to testify that he was in Florida at the time the crimes were committed.

Nancy Griffin, Applicant's mother, testified that she was prepared to testify on the day of trial. Griffin testified that she, Applicant, and Counsel spoke in the conference room in the rear of the courtroom on the day Applicant's trial was scheduled to begin. She testified that the prosecuting attorney was present during their conference.

Counsel testified he did not move for a continuance because a continuance was not necessary. Counsel testified that another attorney, Joshua Schultz, Esquire, was initially appointed to represent Applicant. Counsel testified that his first contact with Applicant was on June 4, 2008, which was within days after Counsel became employed as a public defender. Counsel testified that James

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Cheek, Esquire, also of the Public Defender's Office, had been working with Applicant on obtaining a potential plea offer. Counsel testified that Cheek met with Applicant on at least two days, for at least two hours each time. He testified that Applicant's charges were discussed with him. Counsel testified that discovery was provided in full and he reviewed discovery with Applicant. At Applicant's plea, Counsel stated in mitigation that Applicant's confession "was an ill-conceived plan to stop what was going on at a crack dealer's house involving prostituting young girls in Richland County[.]" and that Applicant gave them information about the burglary thinking that the officers "would immediately go raid the house, which they did." Counsel also testified to this at the PCR hearing.

Counsel testified that all along he was planning to try the case and that he was prepared to go to trial until the day of the plea when Applicant decided he wanted to plead guilty. Counsel testified that Applicant provided him with a witness list and that he communicated with Applicant's father and sent letters to the individuals on the list, and spoke with all potential alibi witnesses. He testified that he received several affidavits but that they were "no good." Counsel testified that Applicant's father, stepmother, and mother were planning to testify. Counsel testified that there would have been problems with Applicant's father's testimony, and that his best witness was going to be Applicant's ex-wife. Counsel testified that Applicant had been served with a notice of life sentence. Counsel testified that on the day of trial, the plea offer was made. Counsel testified Applicant requested to speak with his mother. Counsel testified that there was no prosecutor involved in his discussion of the case with Applicant and his mother.

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Counsel testified that he presumed that Applicant's father was nervous about testifying and had been approached by the FBI. Counsel testified that he recalled that Applicant's father showed up

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right after the plea, but that there was no need for a continuance because even if the case had gone to trial, the fact that the witnesses were running an hour late was not an issue.

III. 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, and closely pass upon their credibility. This Court has weighed 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).

As a matter of general impression, this Court finds Counsel's testimony to be more credible than Applicant's testimony.

A. Ineffective Assistance of Counsel

Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where an application alleges ineffective assistance of counsel, 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. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). The applicant "must first demonstrate that counsel was deficient and then must also show the deficiency resulted in prejudice." Walker v. State, 407 S.C. 400, 404-05, 756 S.E.2d 144, 146 (2014). "The two-part test adopted in Strickland also applies to challenges to guilty

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pleas based on ineffective assistance of counsel.” Holden v. State, 393 S.C. 565, 572, 713 S.E.2d 611, 615 (2011).

First, the applicant must show that counsel’s performance “fell below an objective standard of reasonableness under prevailing professional norms.” Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. “Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” Id. (citing Strickland, 466 U.S. at 690). The Applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, counsel's deficient performance must have prejudiced the Applicant such that “there is a reasonable probability that, but for counsel’s unprofessional errors, he would not have [pleaded] guilty, but would have insisted on going to trial.” Thompson v. State, 340 S.C. 112, 116, 531 S.E.2d 294, 297 (2000).

This Court finds Applicant has failed to establish his burden of proving either prong of Strickland. This Court finds that Applicant's attorney demonstrated the normal degree of skill, knowledge, professional judgment, and representation that is expected of an attorney who practices criminal law in South Carolina. State v. Pendergrass, 270 S.C. 1, 239 S.E.2d 750 (1977). This Court finds that Counsel adequately conferred with Applicant in preparation for his plea. During these conferences with Applicant, Counsel discussed the pending charges, the elements of the charges and what the State was required to prove, the potential penalties, Applicant’s constitutional rights, Applicant’s version of the facts, and possible defenses or lack thereof. This Court further finds that Counsel conducted a proper investigation and provided thorough representation. This Court finds the

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record also reflects that the plea judge reviewed questions with Applicant and Applicant understood the nature of the charges against him and knew what evidence the State had against him. Applicant told the plea court that he spoke with his mother when she was there with his father, and that he had accepted the negotiated sentence and changed his plea from not guilty to an Alford plea. Applicant told the plea court that no one had threatened him or promised him anything to plead guilty, and the record reflects that Applicant fully understood the terms of the plea. Counsel discussed all potential witnesses, including alibi witnesses, with Applicant, investigated those witnesses, and contacted those witnesses that would have been helpful for the defense. Counsel testified he was prepared to try the case if Applicant had decided he wished to proceed. This Court finds that Applicant was facing serious charges and a sentence of life without parole if he was convicted of first degree burglary. Counsel successfully negotiated a favorable plea offer for Applicant. Therefore, this Court finds Applicant failed to satisfy his burden of proving that Counsel rendered deficient performance with respect to this allegation.

Applicant alleged that Counsel was ineffective because he failed to request a one hour continuance on the basis that Applicant's witnesses were running late. In order to show that counsel was ineffective for failing to move for a continuance, Applicant must show what benefits would accrue from additional preparation. See Skeen, 325 S.C. 210, 481 S.E.2d 129 (finding applicant failed to show counsel was ineffective for failing to request a continuance where he offered no evidence as to what benefits additional preparation would have yielded). Counsel testified there was no need to request a continuance. Applicant decided to plead guilty on the morning of his scheduled trial date. The trial proceedings had not yet begun. The witnesses were only delayed by an hour and would not have been prevented from testifying had the case gone to trial regardless of whether a

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continuance was requested. Applicant produced only one additional witness, his mother, at the PCR hearing. Neither has provided testimony to persuade this Court that a motion to continue was necessary. As a result, Applicant has failed to show that Counsel was deficient for not requesting a one hour continuance.

Applicant has failed to show that but for any alleged deficiency of Counsel, he would not have pleaded guilty but would have insisted on going to trial. Applicant was facing a sentence of life without parole if a jury had convicted him of first degree burglary. By entering a plea, he obtained the benefit of a negotiated, concurrent, fifteen year sentence on both burglary charges. Furthermore, Applicant confessed to committing the burglaries. Accordingly, this Court finds Applicant has failed to show there was any deficiency in Counsel's performance or that any alleged deficiency prejudiced him. Therefore, this Court denies and dismisses Applicants allegations of ineffective assistance.

B. Involuntary Guilty Plea

Applicant alleged that he was coerced to confess and was threatened with life without parole and therefore he was coerced to plead guilty. This Court interprets this as a claim that his plea was involuntary. This Court finds that Applicant has failed to show that his plea was involuntary.

In post-conviction relief cases, an applicant asserting a constitutional violation must frame the issue as one of ineffective assistance of counsel. Al-Shabazz v. State, 338 S.C. 354, 363-64, 527 S.E.2d 742, 747 (2000) (citing Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517 (1993); Hyman v. State, 278 S.C. 501, 299 S.E.2d 330 (1983); Richardson v. State, 310 S.C. 360, 426 S.E.2d 795 (1993)). An applicant who pleads guilty on the advice of counsel may collaterally attack the plea only by showing (1) counsel was ineffective and (2) there is a reasonable probability that but for counsel's errors, the defendant would not have pled guilty and would have insisted on going to trial. Roscoe v.

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State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001) (citing Hill v. Lockhart, 474 U.S. 52; Jackson v. State, 342 S.C. 95, 535 S.E.2d 926 (2000); Thompson v. State, 340 S.C. 112, 531 S.E.2d 294 (2000); Rayford v. State, 314 S.C. 46, 443 S.E.2d 805 (1994)).

An applicant alleging his guilty plea was induced by ineffective assistance of counsel must prove counsel's advice was not "within the competence demanded of attorneys in criminal cases." Hill v. Lockhart, 474 U.S. at 56. Furthermore, "[a] guilty plea is a solemn, judicial admission of the truth of the charges" against the applicant. Dalton v. State, 376 S.C. 130, 137, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing Blackledge v. Allison, 431 U.S. 63 (1977)). Statements "made during a guilty plea should be considered conclusive unless [an applicant] presents valid reasons why he should be allowed to depart from the truth of his statements." Id. at 137-38, 654 S.E.2d at 874 (citing Crawford v. United States, 519 F.2d 347 (4th Cir. 1975); Edmonds v. Lewis, 546 F.2d 566 (4th Cir. 1976)). When determining issues relating to guilty pleas, the court will consider the entire record, including the transcript of the guilty plea, and the evidence presented at the post-conviction relief hearing. Anderson v. State, 342 S.C. 54, 57, 535 S.E.2d 649, 657 (2000) (citing Harres v. Leeke, 282 S.C. 131, 318 S.E.2d 360 (1984)).

This Court finds that the record fully supports the knowing and voluntary nature of Applicant's guilty plea. At Applicant's plea, Applicant told the plea judge that no one had threatened him in any way to get him to plead. Applicant told the plea judge that Counsel discussed with him what an Alford plea meant and agreed with the judge's explanation of what it meant. Applicant told the judge that he had requested that Counsel negotiate the best sentence for him. Applicant also told the judge that on the day of the plea, he had spoken to his mother and Counsel and that he had changed his plea from not guilty to an Alford plea, and he specifically asked the judge to accept

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plea and sentence him and give him concurrent sentencing. Applicant has presented no evidence or valid reasons why he should be allowed to depart from his statements made at the guilty plea hearing.

Applicant was served with notice of life sentence on August 13, 2008. Regardless, the offense of burglary first carries up to life imprisonment upon conviction. S.C. Code Ann. § 16-11-311(B). Counsel advised Applicant concerning the potential penalty he faced if he was convicted of that charge. The record plainly reflects that Applicant knew that he would receive a negotiated sentence of fifteen years when he pleaded guilty pursuant to Alford. Had Applicant gone to trial, he was facing a sentence of life without parole if convicted, and as a result of pleading, he obtained the benefit of a significantly reduced sentence of concurrent terms of fifteen years.

Similarly, Applicant failed to present any evidence to show that he was coerced to give a confession. Rather, based on the testimony at the PCR hearing and Counsel's comments to the plea judge during mitigation, Richland County deputies had detained Applicant in connection with charges in that county, and at that time he gave a statement to law enforcement with the intent that his confession would induce officers to raid a house where Applicant believed prostitution was occurring. Applicant also confessed to burglarizing another home.

Applicant has failed to show that Counsel's performance was deficient in any regard, or that any alleged deficiency prejudiced him. The record reflects that Applicant's plea was entered freely, voluntarily, knowingly, and intelligently. Therefore, this Court finds Applicant has failed to show that his plea was involuntary, and this claim is denied and dismissed with prejudice.

C. Actual Innocence

This Court finds Applicant's claim of actual innocence should be summarily dismissed for



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failure to state a claim cognizable under the Post-Conviction Procedure Act, S.C. Code Ann. § 17-27-10 to -160 (2003). An Applicant may commence a post-conviction relief action on the following grounds:

1. That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;
2. That the court was without jurisdiction to impose sentence;
3. That the sentence exceeds the maximum authorized by law;
4. That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
5. That his sentence has expired, his probation, parole or conditional release [was] unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or
6. That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy.... S.C. Code Ann. § 17-27-20 (1976).

The allegation presented by Applicant raises direct appeal issues that are procedurally barred by S.C. Code Ann. § 17-27-20(b) (1985). PCR is not a substitute for a direct appeal. Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on direct appeal. Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973).

Additionally, the PCR court cannot consider the sufficiency of the evidence against a convicted defendant. S.C. Code Ann. § 17-27-20(a)(6) (1985). The Uniform Post-Conviction Procedure Act is not a substitute for remedies that were available before ~~and~~ during the original trial or by review on motion for a new trial or on appeal. Irick v. State, 264 S.C. 632, 216 S.E.2d 545,

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(1975); Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1975). Therefore, this Court finds this allegation must be denied and dismissed.

D. 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, this Court finds the Applicant failed to present any testimony, argument, or evidence at the hearing regarding such allegations. Accordingly, this Court finds the Applicant has abandoned any such allegations.

IV. CONCLUSION

Based on the foregoing, this Court finds and concludes that the 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 notes that Applicant must file and serve a notice of appeal within thirty 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 post-conviction relief. Rule 71.1(g), SCRPC, provides that if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on the Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

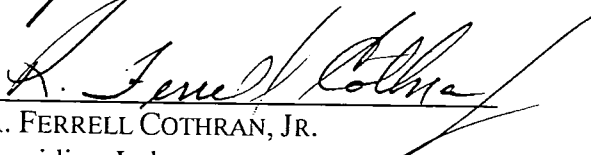
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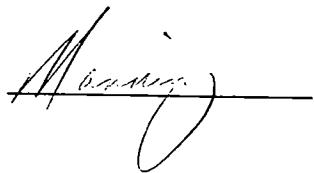
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IT IS THEREFORE ORDERED:

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

AND IT IS SO ORDERED this 29 day of April, 2016.


R. FERRELL COTHRAN, JR.
Presiding Judge
Seventh Judicial Circuit

, South Carolina

SPARTANBURG COUNTY
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M. HOPE BLACKLEY

Brandt Rucker
Attorney at Law, L.L.C.
522 North Church Street
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The Honorable Daniel E. Shearouse
Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211