

Hugh W. Welborn

Attorney at Law
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November 4, 2016

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

RECEIVED

NOV -8 2016

In RE: Dennis Temple #274802 vs. State of South Carolina
Case #: 2013-CP-37-729

S.C. SUPREME COURT

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
Enclosures

cc: Office of the Appellate Defense
Office of the Attorney General
Client

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT
APPEAL FROM OCONEE COUNTY
COURT OF COMMON PLEAS

HONORABLE EDGAR W. DICKSON

2013-CP-37-0729

DENNIS M. TEMPLE, #274802

APPELLANT,

VS

STATE OF SOUTH CAROLINA,

RESPONDENT.


RECEIVED

NOV -8 2016

S.C. SUPREME COURT

NOTICE OF APPEAL

Dennis M. Temple, #274802 appeals the denial of his Post Conviction Relief. The Post Conviction Relief Action was heard and denied by the Honorable Edgar W. Dickson, Circuit Court Judge on July 28, 2014, and Order of Dismissal issued on October 24, 2016 and filed on October 31, 2016. The Appellant received Order of Dismissal on November 4, 2016.



Hugh W. Welborn
Attorney for the Appellant
Post Office Box 173
Anderson, South Carolina 29622
(864) 226-5787
Attorney for Dennis M. Temple, #274802

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 OCONEE COUNTY
COURT OF COMMON PLEAS

HONORABLE EDGAR W. DICKSON

2013-CP-37-0729

DENNIS M. TEMPLE, #274802

APPELLANT,

VS

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RESPONDENT.

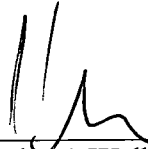
RECEIVED

NOV -8 2016

PROOF OF SERVICE

S.C. SUPREME COURT

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 4, 2016 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 Dennis M. Temple, #274802

Anderson, South Carolina

November 4, 2016

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November 4, 2016

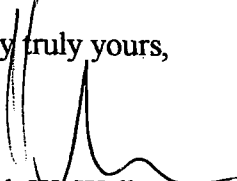
South Carolina Office of Appellate Defense
P. O. Box 11589
Columbia, South Carolina 29211-1589

In RE: Dennis Temple #274802 vs. State of South Carolina
Case #: 2013-CP-37-729

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
Office of Attorney General
Client

Hugh W. Welborn

Attorney at Law
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November 4, 2016

Walt Whitmire
Assistant to Attorney General
P. O. Box 11549
Columbia, South Carolina 29211-1549

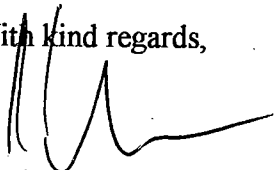
In RE: Dennis Temple #274802 vs. State of South Carolina
Case #: 2013-CP-37-729

Dear Walt:

Please find enclosed herewith a copy of the Appellant's Notice of Appeal, Proof of Service and Order of Dismissal in connection with the foregoing matter. I also enclose copies of correspondence to the Appellate Defense Office and the Supreme Court. I have also forwarded copies of all documents to my client.

If you have any questions, please do not hesitate to contact my office.

With kind regards,



Hugh W. Welborn

HWW/sba
Enclosures

cc: South Carolina Supreme Court
Office of Appellate Defense

STATE OF SOUTH CAROLINA)
COUNTY OF OCONEE)

IN THE COURT OF (Select one.)

COMMON PLEAS FAMILY COURT

TENTH JUDICIAL CIRCUIT

DENNIS TEMPLE,)

CASE NO.: 2013-CP-37-729

Plaintiff(s),)

APPOINTMENT OF COUNSEL OR GAL

-vs-)

(Select one.)

State of South Carolina,)

ORDER

Defendant(s).)

AMENDED ORDER

TYPE OF CASE/PROCEEDING: (Check one.)

- | | | |
|--|--|--|
| <input checked="" type="checkbox"/> Post-Conviction Relief (PCR)/habeas case | <input type="checkbox"/> Adoption | <input type="checkbox"/> Juvenile |
| <input type="checkbox"/> SVP case | <input type="checkbox"/> Custody and/or Visitation | <input type="checkbox"/> Abuse and Neglect |
| <input type="checkbox"/> Minor Name Change | <input type="checkbox"/> Other: | |

It appears that DENNIS TEMPLE, who is a litigant in this case, is entitled to court-appointed counsel or a guardian ad litem.

It further appears that: (Select only one.)

- counsel/guardian ad litem has not yet been appointed by the court: therefore, an appointment for counsel/guardian ad litem is necessary.
- counsel or a guardian ad litem was previously appointed by the court but has indicated either a possible conflict of interest, an entitlement to exemption, or other good cause warranting the appointment of new counsel or guardian ad litem based on: _____
- counsel was previously appointed by the court but has not indicated that the litigant has retained private counsel and is no longer entitled to appointed counsel.
- court appointed counsel has obtained _____ Esquire as substitute counsel pursuant to Rule 608(h)(2); provided, however, only the member who originally received the appointment and who sought substitute counsel shall receive credit.
- Other:
- counsel lead counsel (if capital PCR case) guardian ad litem

Therefore, it is ordered that _____, hereby is appointed as (Select one.)
for the above-named person. Any counsel or GAL previously appointed is/are hereby relieved.

(If Death Penalty PCR Case) It is further ordered that HUGH WELBORN, P. O. BOX 173, ANDERSON, S. C. 29622, Esquire, is hereby appointed as second counsel in this capital PCR case.

The clerk of court is directed to forward a copy of this order to all persons entitled to notice.

IT IS SO ORDERED THIS 31 DAY OF OCTOBER, 2013.

Circuit Judge

Clerk of Court

NOTICE: SC Supreme Court Order of September 29, 2006, requires appointed counsel entitled to payment from the Office of Indigent Defense (OID) to register the case online with OID within fifteen (15) days of this appointment at www.scid.sc.gov, and further directs that reimbursement vouchers be submitted directly to SCCID and not to the trial judge or clerk of court. See SCCID website for further details.

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF OCONEE)	TENTH JUDICIAL CIRCUIT
)	
Dennis M. Temple,)	C.A. No. 2013-CP-37-0729
S.C.D.C. No. 274802,)	
)	
Applicant,)	
)	
v.)	ORDER OF DISMISSAL
)	
)	
State of South Carolina,)	
)	
Respondent.)	
)	

OCEONEE COUNTY
 CLERK OF COURT
 1000 W. MAIN ST.
 OCEONEE, SC 29904

This matter comes before the Court by way of a post-conviction relief (PCR) application filed on October 15, 2013. Respondent filed its responsive pleadings on July 8, 2014. An evidentiary hearing into the matter was convened on July 28, 2014, at the Oconee County Courthouse. Applicant was present at the hearing and was represented by Hugh W. Welborn, Esquire. Respondent was represented by Walt Whitmire, Esquire, of the South Carolina Attorney General's Office.

PROCEDURAL BACKGROUND

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Oconee County. The Applicant was indicted at the September 2010 term of the Court of General Sessions for Oconee County for grand larceny, valued five-thousand dollars or more (2010-GS-37-886), kidnapping (2010-GS-37-888), and two counts of criminal sexual conduct (CSC), first-degree (2010-GS-37-887, -889). The Applicant was initially retained Robert Mills Ariel, Esq., to represent him at motion hearing regarding his bond. A hearing on the matter was convened on June 30, 2010 before the

Copies to
 Atty _____ (P) *Welborn*
 DSS _____ other *Temple*
 Mailed Boxed _____ handed _____

Honorable Alexander S. Macaulay. **R. pp.11-20.** Applicant insisted on self-representation for future matters. **R. p.18.** Out of an abundance of caution, Judge Macaulay appointed counsel. **R. p.18.**

Sarah Drawdy, Esq., and Keith Denny, Esq., were appointed represent him on his case. On July 29, 2010, a motion hearing was convened on Applicant's pro se motion to have his attorneys relieved from the case. **R. pp.21-31.** Applicant argued the motion was based on a breach of trust.¹ **R. p.24.** The Honorable J. Cordell Maddox, Jr., ultimately discharged Attorney Drawdy and Attorney Denny from the case and gave Applicant thirty (30) days to retain private counsel. **R. p.27.**

On September, 9, 2010, another motion hearing was reconvened before Judge Maddox to revisit lingering issues concerning Applicant's Sixth Amendment Right to counsel. **R. pp.20-50.** As a result of Applicant's wavering on the matter, Judge Maddox appointed Kurt Tavernier, Esq., as Applicant's fourth and final attorney on the case. **R. p. 48.** Judge Maddox issued several rulings concerning other pro se motions brought to the court by Applicant.

On September 22, 2010, a Schmerber² hearing was convened before Judge Macaulay. Applicant was present and was represented by Attorney Tavernier. **R. pp.52-77.** On October 21, 2010, another motion hearing was convened pursuant to Applicant's pro se motion to have Attorney Tavernier relieved before Judge Maddox. **R. p. 79-110.** Applicant apprised Judge Maddox that, "Mr. Tavernier has made threats against his people killing my people if I don't plead guilty." **R. p.82.** Judge Maddox warned Applicant on the perils of self-representation. **R. pp.82-83.** Applicant explained to Judge Maddox that "I have fifteen years experience in the law." **R. p.84.** Attorney Tavernier apprised Judge Maddox that the allegation was entirely false

¹ Applicant was unable to articulate the basis other than he was generally unhappy in the manner his attorneys were proceeding with his case.

² Schmerber v. California, 384 U.S. 757 (1966).

and based upon Applicant's ulterior disappointment in Attorney Tavernier's decision not to raise frivolous arguments and objections. **R. pp.85-86.** Judge Maddox ruled that he would not appoint a fifth attorney to Applicant's case. Judge Maddox commented, "you're welcome to hire a lawyer or you're welcome to represent yourself, or you could have Mr. Tavernier who I've appointed for you." **R. p.89.** On November 15, 2010, Judge Maddox issued an order titled "Amended Order Appointing Standby counsel" on November 8, 2010. **R. pp.111-18.**

On December 7, 2010 a final pre-trial motions hearing was convened before Judge Maddox to conclude all substantive preliminary matters. Applicant was present and proceeded pro se with Attorney Tavernier as "advisory counsel." **R. pp.119-210.** Judge Maddox continued to warn Applicant of the inherent risks of self-representation and apprised Applicant that he would be responsible for understanding to the Rules of Evidence, required court-room decorum, and error preservation. **R. p.131; p.134; p.145.** During the course of the hearing, Judge Maddox commented that "I've gone over exhaustively your right to counsel." **R. p.202.** Based on exhaustive inquiries regarding Applicant's Sixth Amendment rights, he made the final determination to proceed to trial pro se with the assistance of Attorney Tavernier as advisory counsel. **R. p.204.** Applicant apprised Judge Maddox that he had been representing himself from the beginning of his case that he was comfortable proceeding to trial pro se. **R. p.202.**

On December 13, 2010, the State called its case to trial. Applicant was present and proceeded pro se with Attorney Tavernier as advisory-counsel. **R. pp.211-657.** On December 15, 2010, after fifteen minutes of jury deliberations, Applicant was found guilty as indicted. **R. p.657.** Judge Maddox sentenced Applicant to a term of thirty (30) years imprisonment for CSC, first-degree (-887), a term of thirty (30) years imprisonment for CSC, first-degree (-889), a term of thirty (30) years imprisonment for kidnapping (-888), and a term of ten (10) years

imprisonment for grand larceny, greater than \$5,000. All sentences were to be served consecutively for an aggregate term of 100 (one-hundred) years imprisonment.

A timely Notice of Appeal was filed on the Applicant's behalf and an appeal was perfected by Wanda H. Carter, Esq., of the Office of Appellate Defense, pursuant to Anders v. California³ on September 29, 2012. Appellate counsel Carter raised the issue that the trial judge erred in denying Applicant's request for counsel in the middle of trial because the trial judge's prior waiver colloquy on the matter was insufficient pursuant to Faretta v. California⁴. **FBOA pp.1-10**. Applicant additionally filed a seventy-eight page pro se brief on October 29, 2012 to the South Carolina Court of appeals where he raised the two following issues:

1. "Did the judge err when he failed to suppress the evidence obtained from the arrest warrants that was issued upon a supporting affidavit that did not link Appellant to the criminal activity or storage unit #193, and failed to link the storage unit #193 to Appellant." **Pro Se FBOA pp.1-12**.
2. "Did the state commit perjury upon the court when it contended that this case was fast-tracked due to appellant's speedy trial motion." **Pro Se FBOA pp.13-16**.

The Court of Appeals dismissed the appeal. State v. Temple, No. 2013-UP-350 (filed September 11, 2013). The Remittitur was issued on September 27, 2013.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony and evidence 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 prior PCR proceedings, the subject convictions, 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 the legal arguments of counsel. Pursuant to S.C.

³ Anders v. California, 386 U.S. 738 (1967)

⁴ Faretta v. California, 422 U.S. 806 (1975).

Code Ann. §17-27-80 (2016), this Court makes the following findings of fact and conclusions of law based upon all of the probative evidence presented.

Ineffective Assistance of Appellate Counsel

Applicant alleged that his appellate counsel was ineffective for failing to submit the preliminary hearing transcript as part of the record on appeal; failing to argue that there was no probable cause to issue an arrest warrant; and failing to argue he did not freely and voluntarily waive the right to counsel. The State moved for summary dismissal on this allegation. This Court finds summary judgment is appropriate and grants the State's motion.

Under Rule 56, SCRCPP, a party is entitled to a judgment as a matter of law if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact. Law v. South Carolina Dept. of Corrections, 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006). In determining whether any triable issues of fact exist for summary judgment purposes, the evidence and all the inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party. Fleming v. Rose, 350 S.C. 488, 493-94, 567 S.E.2d 857, 860 (2002).

This Court first notes that in spite of Applicant's belief concerning the strength of the omitted arguments, his appeal was submitted pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967). Where appellate counsel submits an Anders brief, the role of the appellate court is to review the brief submitted by counsel, any *pro se* response submitted by the appellant, and the record on appeal to determine whether the appeal contains any issues of arguable merit. State v. Lyles, 381 S.C. 442, 444, 673 S.E.2d 811, 813 (2009) (*citing* State v. Williams, 305 S.C. 116, 406 S.E.2d 357 (1991)). If an issue is found which has arguable merit, the appellate court

will direct the parties to file merit briefs, and the case will proceed under the normal appellate process. Id. On the other hand, if no issues of arguable merit are found by the appellate court, the appeal is dismissed, and the appellant's counsel is relieved. Id. Applicant's appeal was dismissed after review pursuant to Anders, reflecting that "the appellate court was unable to ascertain a non-frivolous issue which would require counsel to file a merits brief." Id.

In this case, Applicant alleged his appellate counsel was ineffective for failing to argue that his arrest warrant was not supported by probable cause. This issue was raised in Applicant's *pro se* brief on direct appeal, and therefore considered and determined to be without merit by the appellate court pursuant to Anders. Applicant's allegation that appellate counsel was ineffective for failing to include the transcript from his preliminary hearing in the record is an extension of this argument. Applicant has failed to raise or argue any conceivable prejudice from the fact that this transcript was omitted, particularly in light of the lower court record.⁵

Applicant has also alleged that his appellate counsel was ineffective for failing to argue that he was forced to represent himself. There is no factual basis for this claim – the issue was raised by appellate counsel in its Anders brief. Had the issue been meritorious, then the appellate court would have ordered a brief on the merits. As discussed above, the record is replete with discussions concerning the dangers of self-representation. This Court is of the firm opinion that the Applicant waived his right to counsel with his eyes wide open and in compliance with Faretta. Because Applicant has failed to raise any meritorious arguments that his appellate counsel omitted, this allegation is summarily denied and dismissed.

⁵ The record clearly establishes that Applicant's arrest was supported by probable cause. Following a hearing on May 20, 2012, after hearing testimony that the victim identified the Applicant in a photo-lineup and that the assault took place in the Applicant's storage unit, the presiding judge determined that there was probable cause to believe he committed the assault. R. p. 5-7. In any event, the Applicant's subsequent indictment by the Grand Jury cures any deficiencies in the arrest warrant. R. p. 684-91; see Thompson v. State, 251 S.C. 593, 596, 164 S.E.2d 760, 761 (1968).

Res Judicata

Applicant has also raised the following allegations:

1. "Applicant, Dennis Maurice Temple was arrested and detained at the Oconee County Detention Center on arrest arrests that was issued upon a supporting affidavit or sworn written statement of the alleged victim that (1) was completely void of facts connecting Applicant to criminal activity, (2). There was no facts connecting applicant to the storage unit #193, (3). There was no facts connecting storage unit #193 to any criminal activity, (4). There was no facts under by the alleged victim stating the applicant was identified as the accused, (5). There was no mentioning of the applicant in the affidavit or sworn written statement of the alleged victim, (6) arrest warrants were issued upon facts never sworn too, (7). There was no probable cause to arrest." **APCR p.11; further more redundantly repeated in allegations (b), (f), (g), (h). & (m) on APCR p.12; pp.14-15; p.17.**
2. "Applicant was coerced to represent himself during trial." **APCR p.12**

This Court agrees with the state that these allegations are procedurally barred by *res judicata*. *Res judicata* prohibits subsequent actions by the same parties on the same issues. Bell v. Bennett, 307 S.C. 286, 414 S.E.2d 786 (Ct. App. 1992). A final judgment on the merits in a prior action bars subsequent consideration of those issues in a new action. Foran v. USAA Casualty Ins. Co., 311 S.C. 189, 427 S.E.2d 918 (Ct. App. 1993). *Res judicata* also bars any issues that could have been raised in the former action. Id. This application presents allegations that could have been and were in fact raised in those prior collateral proceedings. In Appellate counsel's Anders brief, she presented an issue concerning Applicant's self-representation to the Court of Appeals. The Court subsequently dismissed Applicant's appeal. Therefore, the issue has been raised and ruled upon. This Court will not revisit those rulings.

Subsequent to Appellate counsel perfecting Applicant's appeal pursuant to Anders on September 28, 2012 and motion to be relieved as Applicant's appellate attorney, he filed a pro se brief and presented an issue concerning the admissibility of evidence obtained from the search warrant to the Court of Appeals. The matter was properly raised by Applicant at that juncture

and was considered by the Court of Appeals. Similarly, *res judicata* bars further litigation on that matter. Therefore, summary dismissal is appropriate.

Direct Appeal Issues

The remainder of Applicant's allegations are direct appeal issues that are procedurally barred direct by S.C. Code Ann. § 17-27-20(b) (2003).

1. "indictments were not issued within 90 days." **APCR p.12.**
2. "The six man photo lineup of the applicant and five other black was assemble and shaded in a unduly and suggestive way, that gave way to irreparable misidentification and (2) the trial court judge failed to make specific findings of facts to mixed questions of law before its ruling in suppression hearing on the photo lineup. **APCR pp.13-14.**
3. "once the state presented its case against applicant during trial, the applicant was denied by judge to present witnesses for his defense." **Application for Post-Conviction Relief 'APCR' p.16.**
4. "The State failed to disclose photos of the alleged victim, her car, state witnesses names who testified during trial and a photo of the applicant which was used during trial to convict the applicant. In addition, the State further failed to disclose other materials in it's possession or control to the applicant which would have contradicted the state's claims or cleared the defendant of blame. **APCR pp.15-16.**
5. "one of the initial jurors started making comments about the case before the case was submitted to the jury for deliberation and was replaced by one of the two alternates, The record is void of these transactions and occurrences." **APCR p.16.**
6. "Trial Judge and solicitor leading the state witness on what to testify to or say on cross examination." **APCR p.17.**

Post-conviction relief is not a substitute for an appeal.⁶ Simmons v. State, 264 S.C. 417. 423, 215 S.E.2d 883, 885 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on appeal. Drayton v. Evatt, 312 S.C. 4, 8, 430 S.E.2d 517. 520 (1993). Summary dismissal is therefore appropriate.

⁶ Regardless, as discussed above, the record in Applicant's case has been thoroughly reviewed by the Court of Appeals and no meritorious issues were discovered.

Applicant's Motion for Summary Judgment

The Applicant also moved for summary judgment on the ground that the Attorney General's Office did not file its Return in a timely manner, and failed to respond to his summary judgment motion. This motion is denied. Applicant has failed to show or allege any prejudice from Respondent's delay. See Kneece v. State, 269 S.C. 177, 178, 236 S.E.2d 746, 747 (1977).

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.

[Signature follows]

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), SCRCP; 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~~ ^{is} be denied and dismissed with prejudice; and
2. Applicant ~~must~~ ^{is} be remanded to the custody of the South Carolina Department of Corrections.

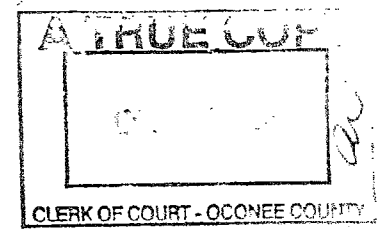
AND IT IS SO ORDERED this 24th day of October, 2016.

Edgar W. Dickson

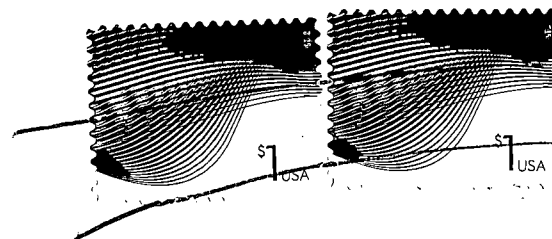
EDGAR W. DICKSON
Presiding Judge
Tenth Judicial Circuit

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CLERK OF COURT
OCONEE COUNTY
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Orangeburg, South Carolina



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



South Carolina Supreme Court
Post Office Box 11330
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