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THE BOOZER LAW FIRM, LLC

S.C. SUPREME COURT

Lance S. Boozer, Esq.*
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March 2, 2017

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

The Honorable Scott B. Suggs
Clerk of Court
1 Public Square
Darlington, SC 29532

RE: Jimmy Gallishaw, #341905, v. State of South Carolina
2013-CP-16-576

Dear Mr. Shearouse and Mr. Suggs:

Enclosed for filing is a Notice of Appeal in the above-referenced case. Also enclosed are the following:

- (1) Proof of Service of the Notice of Appeal;
- (2) A copy of the Order which is to be challenged on appeal; and
- (3) Prior Order of Appointment of Counsel.

As I was appointed to represent Mr. Gallishaw in his PCR proceeding, I anticipate that the Office of Appellate Defense will represent Mr. Gallishaw in this appeal.

Yours very truly,



Lance S. Boozer

Enclosures

cc: Jessica Kinard, AAG
Loriene French, OAD
Jimmy Gallishaw, #341905

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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MAR -6 2017

APPEAL FROM DARLINGTON COUNTY
Court of Common Pleas

S.C. SUPREME COURT

The Honorable G. Thomas Cooper, Circuit Court Judge

Case No. 2013-CP-16-576

Jimmy Gallishaw, #341905,Petitioner,

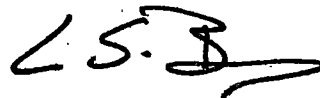
v.

State of South Carolina,.....Respondent.

NOTICE OF APPEAL

The Petitioner appeals the Honorable G. Thomas Cooper's Order dated February 17, 2017, denying post-conviction relief to the Petitioner. The Order was received by undersigned counsel on March 1, 2017. A copy of the Order on appeal is attached to this notice.

Respectfully submitted,



Lance S. Boozer
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Tele: 803-608-5543

March 2, 2017

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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MAR -6 2017

APPEAL FROM DARLINGTON COUNTY
Court of Common Pleas

S.C. SUPREME COURT

The Honorable G. Thomas Cooper, Circuit Court Judge

Case No. 2013-CP-16-576

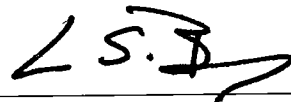
Jimmy Gallishaw, #341905,Petitioner,

v.

State of South Carolina,.....Respondent.

PROOF OF SERVICE

I, Lance S. Boozer, appointed attorney for Petitioner, certify that I have today served within Notice of Appeal upon the Respondent by depositing a copy of it in the United States Mail, postage prepaid, addressed to Assistant Attorney General Jessica Kinard, P.O. Box 11549, Columbia, SC 29211. I further certify that all parties required by Rule to be served have been served this 2nd day of March, 2017.



Lance S. Boozer
The Boozer Law Firm, LLC
1400 Laurel Street, Suite 4A
Columbia, SC 29201
Tele: 803-608-5543

Handwritten initials

STATE OF SOUTH CAROLINA)
COUNTY OF DARLINGTON)
)
Jimmy Gallishaw, #341905,)
)
Applicant,)
)
v.)
)
State of South Carolina,)
)
Respondent.)

IN THE COURT OF COMMON PLEAS
FOR THE FOURTH JUDICIAL CIRCUIT

Case No. 2013-CP-16-0576

ORDER OF DISMISSAL

This matter came before the Court by way of an Application for Post-Conviction Relief filed July 3, 2013. Respondent filed a return and motion for more definite statement on or about June 11, 2015. Applicant filed an amended application on June 17, 2016, to which Respondent did not file a return. The Court convened an evidentiary hearing into the matter on July 20, 2016, at the Chesterfield County Courthouse. Applicant was present and represented by Lance S. Boozer, Esquire. Jessica E. Kinard, Esquire of the South Carolina Attorney General's Office, represented Respondent.

Applicant and Applicant's trial counsel, Tonya Copeland-Little and Matthew Swilley, Esquires, testified at the hearing. The Court had before it a copy of the trial transcript, the records of the Darlington County Clerk of Court regarding the subject conviction, Applicant's records from the South Carolina Department of Corrections, and the pleadings. The Court finds as follows:

I. Procedural History

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Darlington County Clerk of Court. In October 2009, the Darlington County Grand Jury indicted Applicant for three counts of first degree criminal sexual

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SOUTH CAROLINA
DARLINGTON COUNTY, S.C.

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conduct with a minor (2009-GS-16-1235, -1238, -1239), two counts of lewd act on a minor (2009-GS-16-1236, -1240), and two counts of incest (2009-GS-16-1237, -1241). Tonya Copeland Little, Esquire, and Matthew S. Swilley, Esquire, represented Applicant. On July 19, 2010, Applicant proceeded to trial before the Honorable Howard P. King and a jury. On July 23, 2010, the jury found Applicant guilty as indicted. Judge King sentenced Applicant to consecutive terms of imprisonment for twenty-five years on two of the first degree criminal sexual conduct with a minor convictions. Judge King sentenced Applicant to concurrent term of twenty-five years on the remaining first degree criminal sexual conduct with a minor conviction, fifteen years on each lewd act conviction, and ten years on each incest conviction.

Applicant filed a timely notice of appeal. Tristan M. Shaffer, Esquire, and Wanda H. Carter, Esquire, of the Office of Appellate Defense perfected the appeal. The South Carolina Court of Appeals affirmed Applicant's conviction on September 19, 2012. State v. Gallishaw, Op. No. 2012-UP-532 (S.C. Ct. App. filed September 19, 2012). The remittitur was returned to the circuit court on October 5, 2012

II. Allegations

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

1. "Applicant was denied the effective assistance of trial counsel as guaranteed by the Sixth and Fourteenth Amendments to the U.S. Constitution and the provisions of the South Carolina Constitution when trial counsel failed to perform her duty as a competent counsel before and at trial."
 - a. "The ground for relief states the relevant facts"
2. "Applicant was denied effective assistance of Appealant Counsel, in return denied him his first bite at the apple"
 - a. "Applicant's counsel failed to present all issues available to him on appeal that the record reflects. Applicant's Sixth and Fourteenth Amendments were

violated State and Federal Constitutional rights among others.”

Applicant’s amended application included the ground of “Trial counsel failed to adequately cross-examine and attack credibility of witnesses.”

III. Findings of Fact and Conclusions of Law

The Court has reviewed the record in its entirety and has heard the testimony and arguments presented at the evidentiary hearing. The Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court finds Counsel’s testimony credible and Applicant’s testimony not credible. The Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

Summary of testimony

Jimmy Gallishaw, Jr. - Applicant

Applicant began his testimony by describing his interactions with Ms. Little and stating that he met with her three times in seventeen months, and that Mr. Swilley was brought onto the case when Applicant wanted to speak with a male attorney about some private matters. He felt offended by comments that Ms. Little had made and inferred that she believed he was guilty, which led him to ask for her to be relieved the first day of the trial. This request was not granted, and the trial proceeded with both Ms. Little and Mr. Swilley as Applicant’s trial counsel.

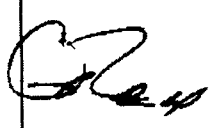
Applicant testified that he remembered reviewing the discovery and State’s evidence with his attorneys, but was not sure that they discussed a trial strategy. However, Applicant testified that he never asked his attorneys to find witnesses to testify on his behalf, but rather wanted them to contradict what was being presented by the State with inconsistencies that he had found.

GR 3

Applicant went on to delineate some of these inconsistencies: differences between the testimonies of Officer August and Agent Charles; differences in his wife's testimony regarding what was said to law enforcement versus on the stand toward her; Ms. Little's failure to ask if his wife had been threatened with removal of the children; differences in his daughter's and the expert's testimony; and differences in the reporting of what he was wearing during the incident. Applicant also testified that he believed hearsay testimony was presented and not objected to by counsel, particularly in the statements of children and a CARE house report that he believed contained information from a prior visit of his daughter's. He was further concerned about the fact that his wife left in tears during their daughter's testimony, though he did recall that the judge gave a curative instruction to the jury to disregard the behavior.

Regarding his allegations about appellate counsel, Applicant testified that he provided appellate counsel with background and citations to the trial transcript that he thought may be helpful. He further testified that appellate counsel usually responded, but he wished that they had more interaction so he could have "guided" appellate counsel to show him that little had been preserved. He further testified that he thought Ms. Little was effective in her handling of the issue of the videotape during Officer August's testimony.

During cross-examination, Applicant recalled that Ms. Little moved for a continuance at the beginning of a trial due to the recent receipt of evidence. He also testified that he never provided his attorneys with any witness names or other information that would have been potentially beneficial to his case. Applicant testified that he understood the charges he was facing and all of the elements of those charges, as well as the contents of the discovery that he reviewed.



Tonya Copeland Little, Esquire – lead trial counsel

Ms. Little testified that she met with the Applicant approximately nine (9) times at the jail before trial, and that several of those times occurred within the same day as trial grew closer. She also went to the home and visited several potential witnesses. Ms. Little stated that some of her visits with the Applicant were with Mr. Swilley, and that Mr. Swilley met with the Applicant at least once without her present. She corroborated the Applicant's testimony that Mr. Swilley was brought on to assist with the case because the Applicant wanted to speak to a man about private, sexual matters, especially as these issues constituted a large part of the defense strategy. When asked if she believed the Applicant was guilty or told him she believed as much, Ms. Little stated that she never had a conversation with the Applicant about guilt or innocence.

Regarding discovery, Ms. Little testified that the proper motions were filed regarding discovery, and that she received everything in a timely matter except for letters that Applicant had written, which were not presented to her until very close to the time of trial. She further testified that she gave a hard copy of all discovery materials to the Applicant and the investigator on the case, and she watched the forensic interviews of the child victim with the Applicant. As part of the preparation process, she ensured that the Applicant understood the charges he was facing and elements of those charges.

Ms. Little testified that the Applicant received a plea offer of fifteen (15) years approximately two (2) months before the time of trial. She originally received an offer of 10-30 (ten-thirty) years, and went with the investigator to discuss this offer with the Applicant at length, but he outright rejected the offer and refused to plead to anything. Even when Ms. Little negotiated to an offer of fifteen (15) years, Applicant refused to plead and the offer was withdrawn. Ms. Little testified that the Applicant's mother called and begged her to get the offer

Giles

back on the table, yet Applicant still refused to consider an offer, despite the encouragement of his attorneys and family.

When questioned about specific facts arising during trial, Ms. Little was able to accurately and adequately explain her trial tactics. Because most of the issues that the Applicant brought up during his testimony were regarding inconsistencies between different accounts of the case, Ms. Little was able to point to each statement and explain that these differences existed but were not material. Regarding some of these, such as differences between versions of testimony, Ms. Little testified that not only were these differences immaterial, she was strategically attempting to avoid repeated mentions of certain factors in order to avoid drawing unnecessary attention. This is a similar tactic to Ms. Little's motion for a mistrial when the Applicant's wife left in tears during their daughter's testimony – she believed that the attention drawn was prejudicial and drew undue attention to the child's testimony. On cross-examination, Ms. Little was asked about Applicant's testimony during trial about whether charges were filed against Applicant's wife or if threats were made regarding removing the children from her home, and why she did not bring these forward. Ms. Little testified that she only remembered testimony about this during the pre-trial Jackson v. Denno¹ hearing, and did not believe that it would have made a difference in the case in chief if the jury heard this information, as the other evidence against the Applicant was overwhelming.

Ms. Little testified that the Applicant testified on his own behalf during trial, and he had always been intent on doing so. She further testified that it was her understanding that Mr. Swilley spoke with the Applicant about testifying, including that the State could use his prior criminal record against him if he chose to testify. Lastly, Ms. Little testified that she filed a

¹ Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774 (1964).

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notice of appeal in this matter, but did not recall talking to the Applicant or appellate counsel about it.

Matthew Swilley, Esquire – second chair trial counsel

Mr. Swilley testified that he sat second chair on the trial of this matter and was involved for a number of weeks before the trial. His primary objective was to speak with the Applicant about his sexual functions and issues, though he was not sure how important it was to the case. Mr. Swilley testified that he reviewed the charges and elements of the charges that the Applicant faced, as well as what it meant for him to testify on his own behalf. He advised the Applicant to take the plea offer that was negotiated for him, but the Applicant was adamant that he wanted a trial and tell his side of the story. Mr. Swilley testified that the Applicant understood the defensive position and strategy that he and Ms. Little had prepared, but also that the Applicant faced an uphill battle. He testified that the strategy was typical of a sexual abuse case, in that the best argument is that the accused simply did not commit the crime. On cross-examination, Mr. Swilley testified that he could not recall if the threats of charges against the Applicant's wife or removal their children was discussed, though he admitted that it could have been important because it would have affected her credibility with the jury.

Ineffective Assistance of Counsel

In this post-conviction relief action, Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). Where the application alleges ineffective assistance of trial counsel as a ground for relief, Applicant must prove trial 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.” Id. (citing Strickland v. Washington, 466 U.S. 668, 686 (1984)).

The proper measure of performance is whether trial counsel provided representation within the range of competence required in criminal cases. Id. (citing Strickland, 466 U.S. at 687; Turner v. Bass, 753 F.2d 342 (4th Cir. 1985); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977)). The Court strongly presumes trial counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. (citing Strickland, 466 U.S. at 690). Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The Court applies a two-pronged test in evaluating allegations of ineffective assistance of trial counsel. Id. at 117, 386 S.E.2d at 625. First, Applicant must prove trial counsel’s performance was deficient. Id. Under this prong, the Court measures trial counsel’s performance by its “reasonableness under prevailing professional norms.” Id. (citing Strickland, 466 U.S. at 688). Second, trial counsel’s 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.

This Court finds Applicant has failed to show that either attorney’s performance fell below an objective standard of reasonableness. All testimony indicated that the attorneys were extremely familiar with the facts of Applicant’s case. This Court finds trial counsel met with Applicant an adequate number of times and were familiar with the discovery materials. Trial counsel indicated that they explained Applicant’s constitutional rights, and they explained the differences between going to trial and entering a guilty plea, especially in light of the favorable plea offer that was discussed. Counsel indicated they never had trouble communicating with

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Applicant, and they never had any concern that Applicant did not fully understand their conversations.

Counsel refuted all allegations that Applicant made in his application as well as during his testimony including, but not limited to, inconsistencies in testimony; issues regarding charges against Applicant's wife and threats of removing children from the home; Applicant's motion to relieve Ms. Little; defense strategies; availability of witnesses; and the problems arising out of Mrs. Gallishaw's leaving the courtroom in tears. This Court finds that, through the presentation of evidence at the post-conviction relief hearing, Applicant has failed to demonstrate both deficiency by trial counsel, as well as any prejudice caused by trial counsel's actions. Therefore, this allegation is denied and dismissed with prejudice.

Ineffective Assistance of Appellate Counsel

Applicant alleges he was denied effective assistance of appellate counsel in that appellate counsel failed to raise all meritorious issues that could have been raised on appeal. A criminal defendant is constitutionally entitled to the effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830 (1985). Applicant must show (1) that appellate counsel's performance was deficient; and (2) that he was prejudiced by the deficient performance. Southerland v. State, 337 S.C. 610, 524 S.E.2d 833 (1999). To prove prejudice, the applicant must show that, but for counsel's errors, there is a reasonable probability he would have prevailed on appeal. Anderson v. State, 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003) (citing Strickland v. Washington, 466 U.S. 668 (1984); Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997)). Further, 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).

To be effective, appellate counsel must give assistance of such quality as to make appellate proceedings fair. *Id.* (citing *Evitts*, 469 U.S. 387, 105 S.Ct. 830 (1999)). Counsel is not required to raise every non-frivolous claim, but instead may select among them to maximize the likelihood of a favorable outcome. *Smith v. Robbins*, 528 U.S. 259 (2009). "For judges to second-guess reasonable professional judgments and impose on . . . counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy." *Tisdale v. State*, 357 S.C. 474, 476, 594 S.E.2d 166, 167 (2004) (quoting *Jones v. Barnes*, 463 U.S. 745, 754, 103 S.Ct. 3308 (1983)). See also *Griffin v. Aiken*, 775 F.2d 1226 (4th Cir. 1985) (finding the failure to appeal all trial errors is not ineffective assistance where strategic decision to exclude issues on appeal is based on reasonable professional judgment).

When a claim of ineffective assistance of appellate counsel is based on failure to raise viable issues, the court must examine the record to determine "whether appellate counsel failed to present significant and obvious issues on appeal." *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986). Generally, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. *Id.* If the issue is not preserved for appeal, appellate counsel cannot be ineffective for not raising that issue on appeal. See *State v. Morris*, 307 S.C. 480, 485, 415 S.E.2d 819, 823 (Ct. App. 1991) (holding where an objection and the ground therefore is not stated in the record, there is no basis for appellate review).

Here, the issue Appellate Counsel raised on appeal was whether the trial court erred in qualifying an expert in the field of child abuse assessment because the State failed to offer any evidence concerning the reliability of the field. Applicant asserts that appellate counsel should

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have also raised the fact that the trial court failed to relieve Ms. Little and that there were issues regarding the testimony of Officer August and the capability of law enforcement to videotape an interview. However, many of these arguments were either waived by Applicant at trial or were otherwise not properly preserved for appeal. Specifically, the trial judge gave proper rulings and curative instructions on the issues.

Accordingly, because this Court must presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment, Strickland, 466 U.S. 668, this Court finds that appellate counsel chose to assert the claim he found to be most meritorious. Furthermore, though he argues that appellate counsel could have made other arguments, Applicant has presented no showing of how they would have affected the outcome of his appeal. Therefore, this Court finds that appellate counsel raised the issue that had the greatest chance of being successful on appeal.

This Court finds, in viewing the record in the light most favorable to Applicant, there is no genuine issue of material fact with regard to Applicant's allegation that appellate counsel failed to raise issues on appeal, and it is therefore denied and dismissed.

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.



IV. 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. 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 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, his post-conviction relief attorney must serve and file a notice of appeal on Applicant's behalf. Applicant and his attorney are directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

1. This Application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. Applicant must be remanded to the custody of the Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 17 day of February, 2016.


G. THOMAS COOPER, JR.
Presiding Judge
Fourth Judicial Circuit

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SCOTT B. STROSS
CLERK OF COURT/TRO. D.
BARLINGTON COUNTY, S.C.

FILED


_____, South Carolina

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STATE OF SOUTH CAROLINA)
COUNTY OF DARLINGTON)
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Jimmy Gallishaw, #341905,)
Applicant,)
v.)
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State of South Carolina,)
Respondent.)
)
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_____)

IN THE COURT OF COMMON PLEAS
FOURTH JUDICIAL CIRCUIT

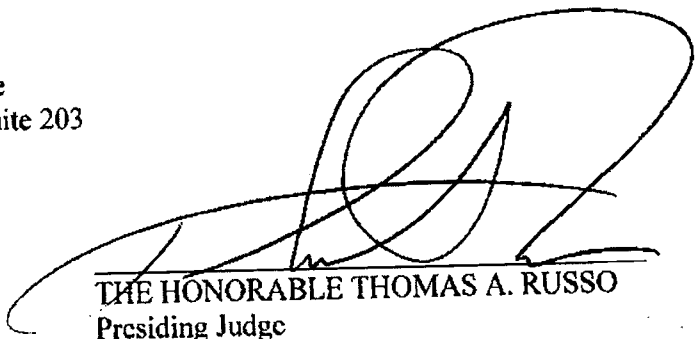
Case No. 2013-CP-16-576

CONSENT ORDER FOR
SUBSTITUTING COUNSEL FOR
THE APPLICANT

This matter comes to me by way of this consent order. Counsel of record for Applicant, Tristan Shaffer, has indicated that he has at the time of his appointment he was no longer listed at a Rule 608 contract attorney. Tristan Shaffer is hereby relieved as counsel for the Applicant, in the above-referenced action. Pursuant to the new Rule 608 contract, Lance Boozer is hereby substituted as counsel of record for the said Applicant. As of the date of the service of this Order, all further notices, papers or pleadings must be served on:


Lance Boozer, Esquire
807 Gervais Street, Suite 203
Columbia, SC 29201

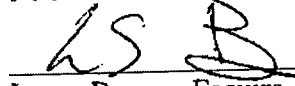
IT IS SO ORDERED.



THE HONORABLE THOMAS A. RUSSO
Presiding Judge
Fourth Judicial Circuit

Date: 7/28/2015

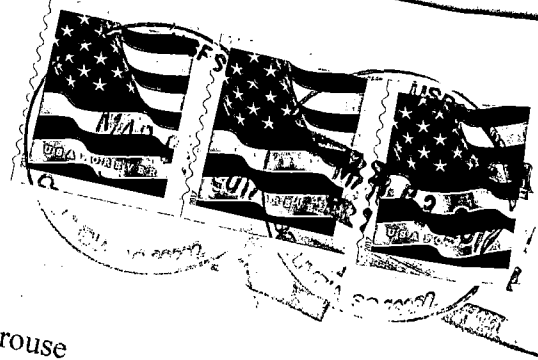
I SO MOVE:

Tristan M. Shaffer, Esquire

I SO CONSENT:

Lance Boozer, Esquire

2015 JUL 29 PM 1:04
SCOTT B. SUGGS
CLERK OF COURT
DARLINGTON COUNTY, S.C.

FILED

THE BOOZER LAW FIRM, LLC
1400 Laurel Street, Suite 4A
Columbia, SC 29201



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