

**IN THE STATE OF SOUTH CAROLINA
In the Supreme Court**

RECEIVED

**APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas
Post-Conviction Relief**

MAY 30 2017

S.C. SUPREME COURT

Honorable Larry B. Hyman, Jr., Circuit Court Judge

**Case No.: 2013-CP-42-3190
Appellate Case No.: 2016-001990**

BILLY SHANE MILLER,.....Respondent,

vs.

THE STATE OF SOUTH CAROLINA,.....Petitioner.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the record contain any evidence of probative value to support the post-conviction relief court's finding that counsel was ineffective for failing to investigate four witnesses where counsel's decision not to investigate or call any of those witnesses was reasonable; the witnesses' testimony was not probative of whether the victim was incapacitated or whether Respondent reasonably believed her to be at least sixteen years old, and the court erred in failing to make findings as to each witness individually?

POST CONVICTION RELIEF PROCEDURAL HISTORY

This matter came before the lower court by way of an Application for Post-Conviction Relief filed in Spartanburg County on August 12, 2013. The day that the Application for Post-Conviction Relief was filed, Respondent (hereinafter Miller), through counsel, filed alleging ineffective assistance of counsel in the following particulars:

- 1.) Failure to ask for not guilty verdict and in fact asked for guilty verdict and failed to call important witnesses to testify; and
- 2.) Failure to investigate and interview witnesses.

Petitioner, hereinafter (the State) made its return on or about July 10, 2014.

An evidentiary hearing into the matter was held on November 9, 2015 at the Spartanburg County Courthouse before the Honorable Larry B. Hyman, Jr. Miller was present at the hearing and was represented by Timothy Ray, Esquire. The State was represented by Alicia Olive, Assistant Attorney General.

During the hearing, Miller testified on his own behalf. Miller's counsel also called Shadon Miller, Sharon Miller, Jonathan Isom, Bryan Black, David Freeman and Michael Kimbrell to the stand. Miller's counsel introduced two exhibits. The State called Andrea Price, Esquire, to the stand. The lower court also had before it a copy of the Application, The State's Return, Miller's Amendment, the records of the Spartanburg County Clerk of Court concerning the subject conviction, the trial transcript, and Miller's records from the South Carolina Department of Corrections.

At the close of the hearing, the Honorable Larry B. Hyman, Jr., agreed with Miller and on January 8, 2016, signed an Order granting Miller's request for a new trial as to his convictions of Criminal Sexual Conduct with a Minor 2nd Degree and Criminal Sexual Conduct 3rd Degree; and

denying The State's request for relief as it pertained to his conviction of Contributing to the Delinquency of a Minor, which was filed on January 12, 2016. Thereafter, the State filed a Motion to Reconsider. This motion was heard on July 7, 2016, and again, after reviewing the record of the trial, hearing the testimony presented in the Post-Conviction Relief hearing, and considering the statements made by counsel for the parties, the Honorable Larry B. Hyman, Jr., issued a written Order, filed August 24, 2016, upholding Miller's requested relief and granting a new trial as to his convictions of Criminal Sexual Conduct with a Minor 2nd Degree and Criminal Sexual Conduct 3rd Degree, denying Miller's requested relief as to his conviction of Contributing to the Delinquency of a Minor, and denying the State's Motion to Reconsider.

On September 23, 2016, the State filed a Notice of Intent to Appeal.

GENERAL SESSIONS PROCEDURAL HISTORY

Miller is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Spartanburg County Clerk of Court. During the May 2008 term of the Spartanburg County Grand Jury, Miller was indicted for Criminal Sexual Conduct with a Minor 2nd Degree (Indictment No.: 2008GS4202594), Criminal Sexual Conduct 3rd Degree (Indictment No.: 2008GS4202593) and Contributing to the Delinquency of a Minor (Indictment No.: 2008GS4202592). On April 12, 2011, a jury trial was conducted in Spartanburg County in front of the Honorable J. Derham Cole. Miller was represented by Andrea Price, Esquire. The jury returned a verdict of guilty on Criminal Sexual Conduct with a Minor 2nd Degree, Criminal Sexual Conduct 3rd Degree, and Contributing to the Delinquency of a Minor. On April 13, 2011, the Honorable J. Derham Cole sentenced Miller to confinement for a term of twenty (20) years, suspended upon the service of twelve (12) years and three (3) years probation and sex offender registry, ten (10) years concurrent, and three (3) years concurrent, respectively.

ARGUMENTS WHY CERTIORARI SHOULD BE DENIED

On certiorari in PCR cases, the Court applies an “any evidence” standard of review. *473 *Terry v. State*, 394 S.C. 62, 66, 714 S.E.2d 326, 328 (2011) (citing *Cherry v. State*, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989)). “This Court will uphold the findings of the PCR judge when there is any evidence of probative value to support them,” and it “will reverse the PCR judge's decision when it is controlled by an error of law.” *Suber v. State*, 371 S.C. 554, 558–59, 640 S.E.2d 884, 886 (2007). This Court has given great deference to the PCR judge's findings of fact and conclusions of law. *Dempsey v. State*, 363 S.C. 365, 610 S.E.2d 812 (2005).

By way of Order Granting Application for Post-Conviction Relief as to the convictions for Criminal Sexual Conduct with a Minor 2nd Degree and Criminal Sexual Conduct 3rd Degree, the Honorable Larry B. Hyman, Jr., granted Miller relief on the issue of ineffective assistance of trial counsel. In the detailed and well-reasoned Order the lower court addressed counsel's failure to prepare and investigate and held as follows:

As defense counsel, a strategic decision must be reasonable, and at a minimum, witnesses best be interviewed to determine if their testimony could be helpful. As the South Carolina Supreme Court has stated in *Ard v. Catoe* 372 S.C. 318 (2007) defense counsel must conduct a reasonable investigation, and at a minimum, defense counsel must interview potential witnesses and conduct an independent investigation into the facts and circumstances of the case. This Court finds that Defense counsel's strategic decision not to attempt to interview any of the potential witnesses on the list that was given to her, especially considering the testimony of four of those witnesses presented to this Court, was unreasonable and Defense counsel was ineffective in assisting Petitioner [Miller] in the trial of his case.

Order (Aug. 24, 2016) p. 2.

Turning to the witnesses called at the evidentiary hearing, the lower court held:

Next, this Court must look at the facts of the case and the testimony that some of the witnesses would have presented at trial if defense counsel had interviewed them and subpoenaed them to testify. Impeaching the Defendant's accuser became paramount in this case because her testimony was the only evidence that alleged that the Defendant knew her age, and that she was incapacitated and helpless to resist when the Defendant engaged in intercourse with her. The testimony of Petitioner's [Miller] witnesses would have directly

contradicted the alleged victim's testimony. This Court finds it very likely that the Defendant's trial would have had a different outcome by the strength of this testimony alone. However, that testimony would be given greater deference when combined with the social media evidence that was presented at trial and would have increased the likelihood that the trial would have resulted in a favorable verdict for the Defendant.

Order (Aug. 24, 2016) pp. 2-3.

In considering the prejudicial effect to Miller and the failure to present witness testimony at the trial, the lower court further held that:

Additionally, the witness testimony, also gave insight into the alleged victim's awareness of what was going on around her. The testimony tended to show that the alleged victim knew what was happening to her and around her until she later took a Valium when she arrived to a different friend's home. One particular witness even testified how the alleged victim answered the door when he knocked, and stated that she was topless and had a conversation with him.

Order (Aug. 24, 2016) p. 3.

Regarding how the witness testimony would have assisted Miller and defense counsel's trial strategy, the lower court held:

The seriousness of Petitioner's [Miller] charges and the evidence against him required that defense counsel interview witnesses. Without the knowledge of what a witness will say, defense counsel has no ability to determine if such witness will fit into her trial strategy. In this case, it appears that defense counsel chose to attack the alleged victim's credibility, and the fact that she held herself out to be older. The testimony of the witnesses would have been used for that exact defense. The testimony would have also been used to show that the alleged victim was conscious and aware of what was occurring when the Defendant engaged in sexual intercourse with her.

Order (Aug. 24, 2016) p. 3.

In discussing the persuasiveness of the witness testimony, the lower court held:

The Defendant was charged with very serious crimes, and when given a list of possible witnesses who may be able to present testimony that would help the Defendant, it is the responsibility of defense counsel to attempt to interview those witnesses. Here, if Defense Counsel had attempted to interview the witnesses, at least the witnesses that have now testified, she would have realized that their testimony was vital to the defense of the case. Furthermore, it is the opinion of this Court that if the testimony that has now been presented to this Court is very persuasive in favor of the Defendant, and if such would have been presented to the jury at the trial of the case, then the outcome would have most likely been in favor of the Defendant.

Order (Aug. 24, 2016) p. 3.

In this trial, Miller was charged with committing CSC 2d degree. However, under the version of the statute in effect at the time of the alleged commission of the crimes, a statutory defense existed, to-wit: The trial judge instructed the jury that "mistake of age" was a defense to CSC with a minor, second degree. (App. p. 124).

The trial judge instructed the jury that it could not find Miller guilty if it found he were reasonably mistaken as to [Victim's] age and believed her to be sixteen years of age or older" and that "it must be shown that the circumstances were such that the defendant believed that victim was at least sixteen years of age and that such a belief was reasonable." (App. p. 165, line 17-p. 166, line 2). The trial judge further instructed that it must be proven beyond a reasonable doubt that Miller "knew or reasonably should have known that the victim was less than sixteen years of age." (App. p. 167, lines 5-7).

Trial counsel testified that the only defense Miller had was a mistake of age and that her strategy was based on the mistake of age defense. (App. p. 272-73). She testified there was never a dispute about the drug use. (App. p. 276). Counsel testified Victim had a Myspace page with pictures on it that made her look very mature, and that Victim indicated on the page that she was eighteen. (App. p. 277). She stated she met with Miller several times while he was in jail. (App. p. 271). She testified he gave consistent statements about his version of what happened throughout her representation. (App. p. 271).

Trial counsel apparently ignored an obvious potential defense to the charge of CSC third degree. The original Trial Judge charged the jury concerning Criminal Sexual Conduct in the third degree provided that a person is guilty of criminal sexual conduct in the third degree if the actor engaged in a sexual battery and one or more of the following circumstances were proven: first,

that the actor used force or coercion to accomplish any sexual battery but there were no aggravating circumstances ; secondly, that the actor knew or had reason to know that the victim was mentally defective or mentally incapacitated or physically helpless. (App. p. 149).

Miller had this second potential defense to the next most serious charge because in order to convict him of CSC third degree, the state would have to have proven beyond a reasonable doubt that the alleged victim was physically helpless at the time of a sexual battery. Under the facts of this case, the physical helplessness would have had to have been by use of drugs and/ or alcohol.

Trial counsel testified that she received a list of potential defense witnesses on Friday before the trial was scheduled to begin on Monday. (App. p. 273). All four of the witnesses who testified at the PCR hearing were set forth on that list. (App. p. 286).

While Trial counsel may have only received the formal list on the eve of trial, she did testify that she had been representing Miller for some time and had met with him “several” times. (App. p. 271) and that she met also with Miller’s mother and sister on “numerous” occasions. (App. p. 272). It would certainly seem logical that the subject of potential defense witnesses would have been raised, or at least should have been. It is also noteworthy that Miller’s sister gave sworn testimony that she supplied information about the witnesses well before the trial. (App. p. 249-252).

Even more significantly, Trial counsel testified that a second list of witnesses that she acknowledged was in the file when she was assigned the file. It was dated September 25, 2008. (App. p. 274). The trial took place April 12-13, 2011. (App. p.1).

In any event, Trial counsel’s only explanation for not calling the witnesses was because “at that late juncture,” she had “no idea what those people were going to say.” (App. p. 273). This

despite the fact that the “second list” contained hand-written entries concerning potential knowledge of the witnesses. (App. p. 287).

The “second list” contained this and other information:

Jonathan Isom: “He is 25 yr. OLD: HE WAS DATING VICTIM AND THEY THOUGHT SHE WAS PREGNANT. AT THAT TIME.” A further discussion of Isom’s possible testimony continues, “HE [Jonathan] LATER TOOK HER TO THE HOSPITAL BECAUSE SHE [ALLEGED VICTIM] WAS SUPPOSED TO BE MESSED UP. BUT SHE WASN’T TO [SIC] MESSED UP TO TELL JONATHAN [WITNESS] ABOUT THE WHOLE INCIDENT. JONATHAN SAID HE HAD SEEN VICTIM WITH ZANEX [SIC], ADDERALL, AND METHADON[E] AND VALIUM. JONATHAN SAYS TAKES ANYTHING SHE CAN GET HER HANDS ON.”

Bryan Black: “HE WAS AT SHANES ON OR AROUND 3-25-08 WHEN VICTIM DROVE HER UNCLE JOHNNYS WHITE EXPLORER TO SHANES HOUSE: JONATHAN WAS WITH HER THEN. VICTIM AND JONATHAN LEFT IN THE EARLY MORNING HOURS THE NEXT MORNING. SHE LATER WRECKED AFTER SHE LET JONATHAN OUT AT HIS HOUSE. SHE TOLD JONATHAN HER DAD HAD GOTTEN THE DAMAGE FIXED ON THE CAR. SHE SAID SHE RAN INTO A DITCH AT THE LITTLE CRICKET GOING INTO LANDRUM.”

Mikey Kimbrell: “lied about being 18 yrs. Old. So did Stephanie” (App. p. 287).

There is also a further hand-written reference to what else Jonathan Isom might testify about, but this is not legible on the exhibit. (App. p. 287).

These notes prepared by a layperson appear in the overall context of a discussion about the two actual legal defenses that potentially existed, at least in general terms. In order to prove that trial counsel was ineffective, the PCR applicant must show that: (1) trial counsel's performance was deficient; and (2) there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. *Strickland v. Washington*, 467 U.S. 1267, 104 S.Ct. 2052. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Furthermore, when a defendant's conviction is challenged, “the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt.” *Strickland*, 466 U.S. at 695, 104 S.Ct. 2052.

Trial counsel's performance under the first prong of the *Strickland* test is judged under the standard of "reasonableness under prevailing professional norms." *Id.* at 688, 104 S.Ct. 2052. This Court has stated previously that criminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case. *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007); *see also McKnight v. State*, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008) ("A criminal defense attorney has the duty to conduct a reasonable investigation to discover all reasonably available mitigation evidence and all reasonably available evidence tending to rebut any aggravating evidence introduced by the State.").

In its Petition for Writ of *Certiorari*, the State relies heavily on the case of *Edwards v. State*, 392 S.C. 449, 710 S.E. 2d 60 (2011), asserting that the PCR Trial court "failed to take into account the legal principle set forth in *Edwards v. State*:

While our case law does provide that defense counsel must, at a minimum, interview potential witnesses, a strict adherence to that rule loses sight of the controlling standard for counsel's duty to investigate: reasonableness. Indeed, it would be an absurdity to require criminal defense lawyers to interview *every* potential witness when they can articulate reasonable grounds not to. When counsel makes such a reasonable decision, he will have fulfilled the duty he owes to his client. Petitioner would have this Court raise the duty to conduct a reasonable investigation to include creating "a simulated trial situation" for every witness, subjecting them all to mock cross-examination. Our case law has never required so much of defense counsel, and we decline to so extend it. So long as a defendant's attorney conducts a reasonable investigation, including interviewing potential witnesses when it is reasonable to do so, his performance will not be deficient.

(The State's brief p.11.)

While certainly making a correct statement of law, the State fails to account for the factual differences between *Edwards* and the case at bar. In *Edwards*, there was but a single witness at issue that trial counsel had failed to interview and call as a witness. *Edwards*' trial counsel, admitted he neither interviewed nor called a man named Marshall, who was *Edwards*' co-

defendant. However, he was present at Marshall's guilty plea, giving him an opportunity to observe Marshall in court, and retained a copy of Marshall's plea transcript. *Edwards*, 392 S.C. at 453.

According to the *Edwards*' opinion, during his plea, Marshall was consistent in his denial of Edward's involvement in the murder, but his version of the rest of the events changed no less than three times during his statement to Law Enforcement because he was unable to give a consistent recitation of the facts. It was only when he finally was able to do so—after being instructed to ignore any prior statements he made in court or to the police—that the court accepted his plea. *Edwards*, 392 S.C. at 454-455.

At the PCR hearing, Edward's PCR attorney maintained that this final version of the facts, highlighting the accidental nature of the crimes and Edwards' lack of involvement, was wholly consistent with the version given to law enforcement by Edwards and introduced at Edwards' trial through the testimony of a SLED agent. *Edwards*, 392 S.C. at 454-455.

However, Edwards' Trial counsel, testified at the PCR hearing that his decision not to call Marshall was a strategic one he made for two reasons. First, he testified that he actually disagreed with Marshall's version of the facts presented at the plea hearing, stating, “[I]t wasn't an accident if he's pleading guilty to murder.” Second, he expressed serious concerns about Marshall's ability to withstand cross-examination by the Solicitor were he to testify. *Edwards*, 392 S.C. at 455.

The PCR judge determined that Edwards' decision to not call Marshall was “a planned and calculated” one and “[o]nly in hindsight[] can the failure to call Mr. Marshall seem as an error.” He also determined that Petitioner failed to establish any resulting prejudice from his attorney's actions. Accordingly, he denied and dismissed with prejudice Edwards' application. *Edwards*, 392 S.C. at 455. The Supreme Court granted *certiorari*.

The *Edwards*' court held that with the Court's earlier admonitions against second-guessing counsel's trial strategy, Marshall's performance and the cumulative nature of his testimony provide probative evidence under our prevailing law to support the PCR court's determination that Petitioner's attorney articulated a valid trial strategy when he chose not to call Marshall as a witness. The Court went to say that because Edwards' trial attorney had valid reasons for not calling Marshall to testify, it would be "futile and unreasonable to also require defense counsel to interview him to satisfy the Sixth Amendment because doing so would serve no purpose in connection with Petitioner's defense." *Edwards*, 392 S.C. at 458. The Court said it ample probative evidence to sustain the PCR court's ruling that he did not render deficient performance. *Edwards*, 392 S.C. at 458.

In this case, Miller's trial counsel offered no coherent strategic reasons for neither interviewing nor calling any of the four witnesses who testified at the PCR hearing. She testified only that she was concerned about calling Witness Kimbrell because as a co-defendant who had pled guilty (*albeit* under very different circumstances), the jury might be told by the prosecutor "why shouldn't we [therefore] believe that these facts are the facts that happened." (App. p. 275). Had Trial counsel bothered to interview Witness Kimbrell, she would have learned that he pled guilty reluctantly to a reduced charge that would not carry sex offender registration and explained his actions on cross-examination by responding that he pled guilty because if Miller's counsel had sat in the "Spartanburg County jail for 18 months, not hearing anything from anybody, hours a day you would be willing to plead to[o]."

Kimbrell would also have offered exculpatory evidence at trial. His testimony at the PCR hearing was that he told the prosecutor that he would not testify for the state and that he told them: "Yes, I told them that she had told us that she was 19, 18 or 19. It was 19 at the time because it

was on her MySpace account. And, you know, she is lying the whole time and I have done plead guilty to it.” (App. p. 268). He testified she told him that she used to dance at a strip club near Landrum. (App. p. 265).

Jonathan Isom testified at the PCR hearing that he and the alleged victim had been dating at the time of the incident. (App. p. 256). He said he believed she was 18 years of age and the alleged victim had told him that herself. (App. p. 256). He also related to the court that the alleged victim told “everybody” she was 18 and that she looked and acted 18. (App. p. 256). He testified also that the alleged victim’s had told him that she was lying about what happened because her father “caught her” and was “making her do this.”

Bryan Black testified as well at the PCR hearing. He testified that the girl did not look 14 years old. (App. p. 256). He was asked if there was anything in the girl’s demeanor that would have indicated she was a minor. He replied, “No, sir. I mean, I just thought, if I am pulling up at somebody’s house, even me being grown and it is 12:00 o’clock at night and I don’t know nobody there. I am not going to just bebop out of the car and go up into the house like I know somebody. I am going to probably sit in the car and just kind of wait and see what happens. But they did pull up in the driveway and she did get out of the driver’s side and marched right in the house like she was where she wanted to be.” (App. p. 261).

David Freeman also testified at the PCR hearing. He testified that he went to the residence looking for someone and was greeted at the door by the alleged victim – topless. I looked down, and she was like, you like them, don’t you. I said, they are nice. (App. p. 262). Hardly, the expected conduct of a 14-year-old. He also confirmed that the girl’s appearance was of an 18 or 19-year-old. (App. p. 262). Freeman also offered what would have been potentially useful testimony about

the girl's condition. When asked if the girl looked sedated, he replied, "Not sedated by any means. She was, I figured she was high or something." (App. p. 262).

Trial counsel did nothing to investigate any of these witnesses. Trial counsel's failure to adequately investigate these defense witnesses under the circumstances presented in this case was unreasonable under prevailing professional norms, and therefore deficient performance under the Sixth Amendment.

The State thus argues that trial counsel's failure to investigate these witnesses was justified as a valid strategic decision. This argument mischaracterizes the role of strategy in the analysis of trial counsel's performance. If counsel had properly investigated the defenses, and then made an informed strategic decision not to call one or more of the witnesses, the State's argument might be persuasive. However, because trial counsel did not even interview witnesses she had been told might support valid defenses, she could not have made an informed strategic choice.


In *Strickland*, the US Supreme Court stated that strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.... [C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. *Strickland*, 466 US at 690-91. Here, trial counsel articulated no reasonable basis for her decision not to investigate the witnesses. Therefore, reasonable professional judgment does not support the limitation on the investigation. Moreover, such a decision could not have been reasonable professional judgment. Because the testimony could have constituted complete defenses, there is no conception of sound judgment that would permit trial counsel to choose not to investigate the testimony of a witness whom counsel has reason to believe

could a complete defense. Therefore, that there is ample evidence to support the PCR court's ruling that Miller met the first prong of the Strickland test.

All four of the witnesses presented at the PCR hearing presented testimony that could have proved a complete defense to either CSC 2d, CSC 3d or both. Therefore, the PCR Court's conclusion that the second prong of the *Strickland* test was met is also fully supported by the testimony.

Based on the foregoing, Miller submits that the PCR court's order should be affirmed and the Petition for Writ of *Certiorari* denied.

Respectfully submitted,



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May 26, 2017

Spartanburg, South Carolina

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S.C. SUPREME COURT

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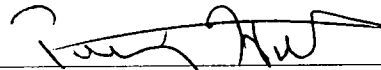
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CERTIFICATE OF SERVICE BY MAIL

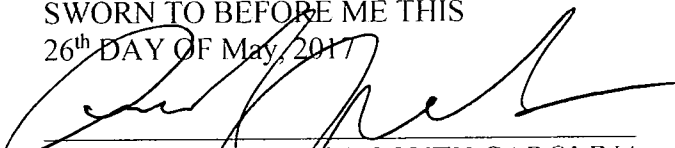
The undersigned hereby certifies that she is employed in the office of Andrew J. Johnston, Attorney at Law, and is a person of such age and discretion as to be competent to serve papers, and that the within Return to Petition for Writ of Certiorari was served upon the following person(s) on May 26, 2017, by depositing copies of same in the United States Mail, with sufficient postage affixed hereto, addressed as follows:

Alicia A. Olive, Esquire
SC Attorney General's Office
Post Office Box 11549
Columbia, SC 29211



Tammy Hutchinson

SWORN TO BEFORE ME THIS
26th DAY OF May, 2017



NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES: 3/18/27