

**APPEAL IN A CIVIL CASE**

**THE STATE OF SOUTH CAROLINA**

**In The Court of Appeals**

**Case#: 2016-002024**

**APPEAL FROM CHARELSTON COUNTY**

**Court of Common Pleas**

**Kristi Harrington, Circuit Court Judge  
Dennis Markley, Circuit Court Judge**

**Case No. 2015CP1002824**

**RECEIVED**

NOV 01 2017

SC Court of Appeals

**David Scot Lynd**

**VS**

**Isle of Palms**

**Dawn Caldwell,  
Individually and in her capacity as an Officer of the Isle of Palms Police  
Department**

**South Carolina Law Enforcement Division**

**Appellants Response to I.O.P.'S Motion To Dismiss.**

First IOP thru its counsel Domin argues a time barred appeal, but then goes on to state that under some grounds it is not time barred, as well as misstates the facts and filings. IOP is

seeking a favor on a filing it admits is timely filed. IOP is asking the court to seek some extreme interpretation to benefit IOP when it is evident in all the filings, and IOPP's own motion that the appeal is timely. IOP is seeking to avoid an Issue it can't defeat on a made up technicality but fails to mention that the motion to dismiss it filed is the one untimely.

IOP goes on to state that under rule 54 that the appeal filed after the final ruling is the correct time to file the appeal. This is also echoed by the COA clerk's office when asked, and the trial court's court administrators office of Rosalyn W. Frierson, that is to avoid numerous and lengthy appeals, that the appeal is taking after the final ruling dismissing the case.

IOP goes on to even caption the motion 'Judge Kristy Harrington' in its motions caption, as the trial judge which is correct and is who issued the final order and ruling, in its motions caption, when it is trying to claim a prior motion ruling by a different Judge is the basis. The ruling it is trying to use to start the appeal clock was not the final ruling. And as stated rule 54 (b) clearly states it was not a final ruling.

***RULE 54, (b) Judgment Upon Multiple Claims or Involving Multiple Parties.***

*In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties*

**Hagood v. Sommerville, 607 SE 2d 707 - SC: Supreme Court 2005**

*An appeal ordinarily may be pursued only after a party has obtained a final judgment. Mid-State Distributors, Inc. v. 195\*195 Century Importers, Inc., 310 S.C. 330, 335, 426 S.E.2d 777, 781 (1993); S.C.Code Ann. § 14-3-330(1) (1976); Rule 72, SCRPC; Rule 201(a), SCACR.*

*An order which does not finally end a case or prevent a final judgment from which a party may seek appellate review usually is considered an interlocutory order from which no immediate appeal is allowed. Tatnall v. Gardner, 350 S.C. 135, 138, 564 S.E.2d 377, 379 (Ct.App.2002).*

*Piecemeal appeals should be avoided and most errors can be corrected by the remedy of a new trial.*

This is IOP, same as the trial level, crying and attempting to create a time issues, because **it cannot face or beat the facts of the case**, those being that IOP destroyed Lynd's property without notice, and in doing so committed conversion under the statute. Unable to deny or defeat that it has embarked on a campaign of *technical issues creation* to avoid facing the issue. That is the exact cause of riots in the streets these days, police depts. at fault, and lying to cover it up.

IOP tries to imply this was a final judgement in the case and Lynd is bootstrapping an appeal to a separate case. That is not the facts, this was a motion filed along with other motions filed that was ruled on and the rule 59 and 60 motion filed on the final ruling.

IOP fails to name the motions to rehear that were filed and ruled on by another judge, knowing full well that defeats its argument.

The courts and defendants stretching out of Summary judgement motions and hearings over a year, cannot in any way effect Lynd's right to appeal a final dismissal of a case. As a note, the motion to reconsider was filed after awaiting a signed order that was never entered. AS of this date the final order has never been entered, only a form 4 entry with an attached order to come later, of which never materialized. That caused Lynd's attorney at the time problems that it could only file a motion to rehear or reconsider on what was heard in court, not on facts or opinions found in a written order to reference. The rule 59/60 motion was correct.

Remember the 2<sup>nd</sup> and 3<sup>rd</sup> summary judgements were based on the ruling of the first, and the issuance of that ruling, and followed that ruling to the letter, **so an appeal of one on the facts would apply to all three, since they are all granted and based on the same date and occurrence, and the transcripts show and discuss that.**

The South Carolina Supreme Court has held that the motion Lynd filed does apply to start/toll the appeal time limit and the motion in 2015 was not required to be a separate appeal. The Court also outlines the times and cause of order entry's to file the rule 59/60 motions as well as the application of all the previous motions in a particular case. This is the standard precedent the court has set to correlate all the prior precedents.

**Elam v. South Carolina Dept. of Transp., 602 SE 2d 772 - SC: Supreme Court 2004**

We take this opportunity to clarify the limits and rationale of *Quality Trailer, supra*, and two Court of Appeals' opinions, *Coward Hund Const. Co. v. Ball Corp.*, 336 S.C. 1, 518 S.E.2d 56 (Ct.App.1999), and *Collins Music Co. v. IGT*, 353 S.C. 559, 579 S.E.2d 524 (Ct.App.2002). We conclude the Court of Appeals in the present case and in *Matthews v. Richland County School Dist. One*, 357 S.C. 594, 594 S.E.2d 177 (Ct.App.2004) has extended the holdings and rationale of those three cases in a manner which unnecessarily complicates post-trial and appellate practice.

After studied review, we reject the rationale and result reached by the Court of Appeals in the present case and in *Matthews*. We conclude a party usually is free to file an initial Rule 59(e) motion, regardless of whether the previous JNOV/new trial motions were made orally or in writing, without unnecessary concern the repetition of an issue or argument made in a previous motion will result in a subsequent appeal being dismissed as untimely. In essence, we view the use of oral or written JNOV/new trial motions, followed by an initial Rule 59(e) motion, as **part and parcel of a party's "single bite at the apple" in presenting his case to the trial court.**

We believe this view of the propriety of post-trial motions to be the correct approach for several reasons. First, it is proper to view a Rule 59(e) motion not only as a vehicle to request the trial court "alter or amend the judgment," but also as a vehicle to seek "reconsideration" of issues and arguments. A motion under Rule 59(e) long has been viewed as "motion for reconsideration" despite the absence of those words from the rule. Consequently, a party usually is allowed to ask the court to reconsider its decision even if it means rehashing all or part of an argument previously presented. *See, e.g., Arnold v. State*, 309 S.C. 157, 420 S.E.2d 834 (1992) ("purpose of Rule 59(e), SCRPC, to alter or amend the judgment is to 22\*22 request the judge to reconsider matters properly encompassed in a decision on the merits"); *Curcio v. Caterpillar, Inc.*, 355 S.C. 316, 585 S.E.2d 272 (2003) (an example of the many cases in which trial and appellate courts describe a Rule 59(e) motion as a "motion to reconsider" or "motion for reconsideration"); James Flanagan, *South Carolina Civil Procedure* 474-475 (2d ed. 1996). There is nothing inherently unfair in allowing a party one final chance not only to call the court's attention to a possible misapprehension of an earlier argument, but also to revisit a previously raised argument. **It is inherently unfair to disallow such an opportunity.**

Rule 59(e) in the South Carolina and federal rules of civil procedure is practically identical.<sup>[3]</sup> Neither contains any provision for a motion for "reconsideration." However, federal courts consider it appropriate for a party to make a "motion for reconsideration" under Rule 59(e) even though the rule mentions only a "motion to alter or amend a judgment." **This view holds true even when a party mislabels a post-trial motion.** *See Blair v. Equifax Check Services, Inc.*, 181 F.3d 832, 837 (7th Cir.1999) (Rule 4(a)(4), FRAP, restates long-accepted practice of considering motions for reconsideration, a practice independent of any appellate rule); 12 *Moore's Federal Practice* § 59.30[2][a] and [7]; 11

Wright, Miller & Kane § 2810.1; 20 *Moore's Federal Practice* §§ 304.13[2] and 304.13[4][b] (3d ed. 2003). "\

In fact, the United States Supreme Court explicitly has described a motion under federal Rule 59(e) as one which "involves *reconsideration* of matters properly encompassed in a decision on the merits." *Osterneck v. Ernst & Whinney*, 489 U.S. 169, 174, 109 S.Ct. 987, 990, 103 L.Ed.2d 146, 154 (1989) 23\*23 (a request relating to discretionary prejudgment interest is a part of the plaintiff's compensation and thus a part of the decision on the merits, which means a Rule 59(e) motion raising prejudgment interest tolled the time for appeal; Court cited precedent in which Rule 59(e) motions relating to attorney's fees and case costs are deemed collateral issues, thus such motions did not toll the time for appeal) (emphasis added). The Court explained its decision furthered the goals of avoiding piecemeal appeals and fostering informed appellate review. *Osterneck*, 489 U.S. at 177-178, 109 S.Ct. at 992, 103 L.Ed.2d at 156

The commentators explain that the approach taken in today's rules allowing a motion for reconsideration which addresses the merits of the case at hand originated in the common law. "It is absolutely necessary *to justice*, that there should, upon many occasions, be opportunities of *reconsidering* the cause by a new trial." 11 Wright, Miller & Kane § 2801 (quoting a 1757 opinion written by an English judge) (emphasis in original); 12 *Moore's Federal Practice* 59 App. 102 (even before 1946 amendment adding subdivision (e) to Rule 59, courts routinely found that motions seeking such relief as rehearing or reconsideration were proper under Rule 59, although the motions were not literally or technically motions for a new trial).

Third, our rules contemplate two basic situations in which a party should consider filing a Rule 59(e) motion. A party *may* wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. A party *must* file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review.

Fourth, South Carolina appellate courts do not recognize the "plain error rule," under which a court in certain circumstances is allowed to consider and rectify an error not raised below by the party. *Dykema v. Carolina Emergency Physicians, P.C.*, 348 S.C. 549, 554, 560 S.E.2d 894, 896 (2002); *Kennedy v. South Carolina Retirement System*, 349 S.C. 531, 25\*25 564 S.E.2d 322 (2001). **Our mandatory preservation requirements make it doubly important that litigants generally be freely allowed to file a first, written Rule 59(e) motion without concern a later appeal will be deemed untimely.**

**Fifth, civil procedure and appellate rules should not be written or interpreted to create a trap for the unwary lawyer or party, but a**

**careful consideration of this issue has led us to conclude that is precisely the effect of an unwarranted expansion of *Quality Trailer*. Cf. *Gamble v. State*, 298 S.C. 176, 379 S.E.2d 118 (1989)**

If a party is unsure whether he properly raised all issues and obtained a ruling, he must file a Rule 59(e) motion or an appellate court may later determine the issue or argument is not preserved for review. But in filing the motion, he may unwittingly forfeit the right to an appeal if an appellate court later determines the Rule 59(e) motion was unnecessary because he already had raised the issue and obtained a ruling. We strive to avoid an interpretation of procedural rules which routinely would place a party between the proverbial rock and a hard place.<sup>[5]</sup>

We reaffirm the principles set forth in *Coward Hund*, 336 S.C. 1, 518 S.E.2d 56; *Quality Trailer*, 349 S.C. 216, 562 S.E.2d 615; and *Collins Music*, 353 S.C. 559, 579 S.E.2d 524. We reverse the Court of Appeals' order in the present case and overrule the Court of Appeals' opinion in *Matthews*, 357 S.C. 594, 594 S.E.2d 177. We conclude SCDOT timely served its notice of appeal after receipt of written notice of entry of the order denying its Rule 59(e) motion.

Let's remember this appeal went from attorney of record, Greenberg, to pro-se Lynd without the attorney supplying the file or record to Lynd. Therefore Lynd due to the actions of a South Carolina court officer was impeded from the start. Lynd contacted and filed all documents the clerks requested, but according to the clerks could not be accepted till the attorney of record was removed, this was later done by an order from the COA. IT is clear on the record that Lynd made a good faith effort to perfect the appeal.

Is equity in the courts what is sought or grounds to absolve Government agencies of its error by the manufacture of SOL dates in contradiction to equity and good faith appeals. This is one of the oldest questions in legal thought, one that can be traced back at least to Aristotle -- and the U.S. Supreme Court weighed in, 5-4, on the side of equity, with Justice Anthony Kennedy providing the deciding vote.

The technical issue before the justices in federal courts case, *U.S. v. Kwai Fun Wong*, had to do with what happens when a plaintiff who alleges that he's been injured by the government files suit after the statute of limitations has run its course. The law says, rather

biblically, that a suit "shall be forever barred" if the plaintiff misses one of the required deadlines.

The "equitable" part means that the court is exercising the form of justice known as "equity." That's the English translation of what Aristotle had in mind when he proposed that the strict letter of the law **should be overridden when following it would produce an unjust result.**

The Supreme Court had to decide whether the words "shall be forever barred" do or don't permit equitable tolling. The majority decision, analyzed the issue by asking whether Congress had made a "clear statement" that equitable tolling shouldn't apply to a suit brought under the FTCA.

According to the Court, if Congress clearly stated that a court lacked the jurisdiction to proceed on a time-barred claim, then equitable tolling shouldn't be allowed. But it concluded that Congress had made no such clear statement. It followed that equitable tolling is allowed, and that the law can be bent when there is good reason to do so.

The key to the Court's opinion was to establish it as the default position that a statute of limitations may be tolled in a suit against the government. In other words, the Court was implying that the **primary job of the courts is to do substantial justice, which means using equity.**

Under every South Carolina ruling, the recent Supreme Court ruling, and the South Carolina Supreme Court rulings covering both rule 59 & 60 motions, ineffective assistance of counsel, tolling, and Good faith attempts; it is clear Lynd's appeal is timely filed and perfected.

IOP goes on to state, that all this time Lynd was represented by counsel, and notice was made to counsel, and Lynd's receipt of that has no bearing. **On the contrary even though the appeal is timely on all parties, any error that caused an untimely appeal would be the fault of counsel of record.** Not an error on Lynd, and Lynd's good faith appeal would survive an equity ruling. And clearly and unequivocally would fall under the ineffective assistance of counsel standard. That ineffective assistance of counsel is one of the grounds being heard on this

appeal. So the court would have to rule on that matter to determine if the appeal was untimely due to Lynd or due to Lynd's counsel.

Lynd's contract with counsel clearly shows the appeal was contracted for, as well as emails discussing the filing of the notice of appeal, and counsel advice that it was not time. Lynd then upon his own contacted all, the court administrator, the COA, and the trial clerk, all of which corroborated Lynd's counsel statement that after all matters were ruled on was the start of the time limit to file a notice of appeal.

Lynd's counsel then refused to file the notice and Lynd to preserve the appeal, filed the notice of appeal himself, as outlined before, the COA clerks would not accept it while Greenberg was still shown as attorney of record, **but do show the filing accepted and as timely by Lynd.** The Court of Appeal clerk has dozens of notices to Lynd counsel discussing Lynd's timely filing and Counsel Responsibility to do it himself.

Lynd made numerous attempts to start the appeal, **and made a clear and concise Good faith effort under the rules** and has perfected a timely appeal on all parties and all matters in the cause of action.

**US v. Peak, 992 F. 2d 39 - Court of Appeals, 4th Circuit 1993**

In its answer, the government conceded that "*failure to file a notice of appeal when so instructed by the client constitutes ineffective assistance of counsel for purposes of § 2255.*" (emphasis added). In a supplemental memorandum, the government reported that it had been unable to locate attorney Brown to see whether he could contradict Peak's representation that he had requested the filing of a notice of appeal. Accordingly, said the government, "the court should grant whatever relief it deems necessary in this case under the circumstances."

However effective or ineffective Peak's counsel was before the judgment of conviction, **his failure to file the requested appeal deprived Peak of the assistance of counsel on direct appeal altogether.**

We touched on this issue in *Becton v. Barnett*, 920 F.2d 1190 (4th Cir.1990). In remanding a dismissed ineffectiveness claim based, in part, **on a failure to file a notice of appeal**, we said (920 F.2d at 1195):

**The effect of counsel's failure to appeal was that Becton lost his ability to protect his "vital interests at stake."** See *Evitts [v. Lucey]*, 469 U.S. [387] at 396, 105 S.Ct. [830] at 836 [1985]. He was unable to attempt to demonstrate that his conviction was unlawful

through the appellate process. *See id.* For whatever reason, Becton's appeal was not filed. As a result, Becton might well have been prejudiced by his counsel's ineffective assistance. Therefore, Becton has presented a colorable claim of ineffectiveness based on counsel's failure to appeal.

In *Becton*, there was a potential factual dispute as to whether the petitioner had actually requested his attorney to file the notice of appeal. Hence, we simply remanded for an evidentiary hearing. If *Becton* left any doubt as to the showing required of petitioners raising this type of claim, we dispel it today: we join those circuits that hold that a criminal defense attorney's failure to file a notice of appeal when requested by his client deprives the defendant of his Sixth Amendment right to the assistance of counsel, notwithstanding that the lost appeal may not have had a reasonable probability of success.

The judgment is reversed, and the case is remanded with instructions to vacate Peak's judgment of conviction and enter a new judgment from which an appeal can be taken. *See Estes*, 883 F.2d at 649.

**Becton v. Barnett, 920 F. 2d 1190 - Court of Appeals, 4th Circuit 1990**

Although Becton did not give notice of appeal at the trial, he alleged in this petition that he contacted counsel three days 1192\*1192 after the trial to ask counsel to appeal. He alleged further that counsel assured him that there was still time to appeal as the ten day period for appeal had not yet run. However, no appeal was ever filed.

Therefore, the ultimate conclusion of a state or federal court that counsel was effective is not binding upon a court reviewing the issue. *Hyman v. Aiken*, 824 F.2d 1405, 1412 (4th Cir.1987); *Lee v. Hopper*, 499 F.2d 456 (5th Cir.), cert. denied, 419 U.S. 1053, 95 S.Ct. 633, 42 L.Ed.2d 650 (1974). As a reviewing court, it is proper for us to address the ineffectiveness claims anew, regardless of the findings of the district court.

Becton alleged that counsel was ineffective for a second reason: failure to appeal. In North Carolina, persons convicted of a criminal charge on a plea of not guilty are entitled to appeal the adverse judgment as a matter of right. N.C.Gen.Stat. § 15A-1444(a) (1988). In order for the appeal as of right to be adjudicated in accord with due process of law, the appellant must have the effective assistance of counsel. *Evitts v. Lucey*, 469 U.S. 387, 396, 105 S.Ct. 830, 836, 83 L.Ed.2d 821 (1985).

*Turner v. North Carolina* is another case involving ineffectiveness regarding appeal. 412 F.2d 486 (4th Cir.1969). There, counsel gave oral notice to the court of his desire to appeal at defendant's request. However, counsel never took any further action in connection with the appeal. This court stated that after conviction,

***when time is an important factor in obtaining appellate review, no one is in better position to insure the indigent defendant of the appeal which he has requested than counsel who has represented him at trial.***

After desire to take an appeal is shown by an indigent defendant the very least which counsel must do is inform the defendant of his right to appeal without cost; of the need for a transcript of the 1195\*1195 trial proceedings; and of the availability of this transcript without cost. If at this time appointed trial counsel decides that he cannot or will not continue to represent the defendant he must so inform the defendant, in addition to informing him of his right to appointment of other counsel, and of the procedure through which the trial transcript and appeal may be obtained if assistance of counsel is not desired.

*Id.* at 489. This court held that petitioner was denied his right to assistance of counsel due to the inaction and neglect of his attorney. *Id.*

Counsel candidly admitted that he cannot remember whether or not he advised Becton of his right to appeal.

The district court stated that it could not say that the failure to appeal resulted in a different outcome. However, this court should properly address the issue of ineffectiveness of counsel anew because it is a mixed question of law and fact. Strickland, 466 U.S. at 698, 104 S.Ct. at 2070. Becton asserted that he asked his attorney to appeal. No affirmative evidence refutes that assertion other than counsel's general statement of his habit. Proper records of counsel might have cleared up this issue; however, none were presented.

#### **US v. Poindexter, 492 F. 3d 263 - Court of Appeals, 4th Circuit 2007**

In preparation for the appellate phase of the case, an attorney in an appeal waiver case still owes important duties to the defendant. First and foremost, the attorney, as recognized in *Flores-Ortega*, **has the duty to respect the appellate wishes of his client by filing a timely notice of appeal if he is unequivocally instructed to do so.** 528 U.S. at 476, 120 S.Ct. 1029. Second, as further recognized in *Flores-Ortega*, even if his client does not express (or clearly express) a desire to appeal, the attorney may be required to file a timely notice of appeal after appropriate consultation with the his client. *Id.* at 478.<sup>[5]</sup>

If a notice of appeal is ultimately filed, an attorney has yet other duties owing to his client. These duties include examining the trial record and identifying and weighing potential issues for appeal. If the appropriate review reveals a meritorious issue for appeal, the attorney is ethically required to prepare a brief on the merits and argue the appeal. If the appropriate review reveals only frivolous issues, the attorney can file a brief in accordance with *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967).<sup>[6]</sup>

**Our decision today is consistent with the four United States Courts of Appeal that have concluded that an attorney renders constitutionally ineffective assistance of counsel if he fails to follow his client's unequivocal instruction to file a notice of appeal.** See *Sandoval-Lopez*, 409 F.3d at 1195-99 "But even though no one would think a doctor incompetent for refusing to perform unwise and dangerous surgery, the law is

that "a lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable."<sup>[18]</sup> Indeed, in Pequero v. United States,<sup>[19]</sup> the Supreme Court summarized its previous holding in Rodriguez v. United States<sup>[20]</sup> as "when counsel fails to file a requested appeal, a defendant is entitled to resentencing and to an appeal without showing that his appeal would likely have had merit."<sup>4</sup>

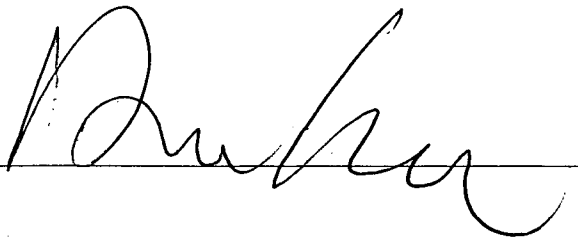
**In sum, we hold that an attorney is required to file a notice of appeal when unequivocally instructed to do so by his client,**

**Hill v. Braxton, 277 F. 3d 701 - Court of Appeals, 4th Circuit 2002**

The court's "exercise of ... discretion should not be automatic, but must in every case be informed by those factors relevant to balancing the federal interests in comity and judicial economy against the petitioner's substantial interest in justice." Yeatts, 166 F.3d at 262

second, notice and an opportunity to respond are particularly appropriate when the prisoner is *pro se*, like Hill, and the long-standing practice is to construe *pro se* pleadings liberally. See Haines v. Kerner, 404 U.S. 519, 520, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972) (per curiam). A seasoned habeas practitioner might try to preempt an anticipated statute of limitations defense by including facts to show that the petition is timely. A *pro se* prisoner, however, is generally less able to anticipate affirmative defenses. This problem was made worse in Hill's case because, as a *pro se* § 2254 petitioner, Hill was required to use a standard government form that did not direct him to address the timeliness issue or ask him to include facts that might be outside of the record but relevant to timeliness under § 2244(d). See Acosta, 221 F.3d at 125

There are large quantities of case law, both State of South Carolina and federal that shows Lynd filed the appeal timely and correctly. IOP's attempt to hold Lynd in some false light to seek pity from the court on issues it cannot overcome is a shame. This is once again IOP begging for help from the courts to avoid it having to face its failures. The appeal should move forward to the interest of justice and equity.



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**THE STATE OF SOUTH CAROLINA**

**In The Court of Appeals**

**Case#: 2016-002024**

**APPEAL FROM CHARELSTON COUNTY**

**Court of Common Pleas**

**Kristi Harrington, Circuit Court Judge  
Dennis Markley, Circuit Court Judge**

**Case No. 2015CP1002824**

**RECEIVED**

**David Scot Lynd**

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**VS**

SC Court of Appeals

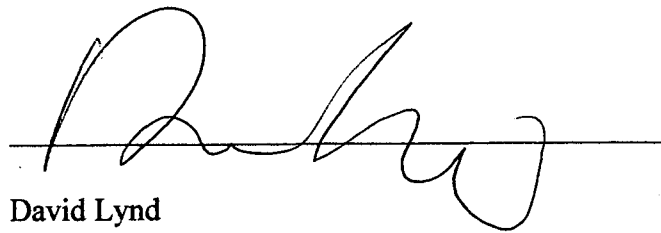
**Isle of Palms**

**Dawn Caldwell,  
Individually and in her capacity as an Officer of the Isle of Palms Police  
Department**

**South Carolina Law Enforcement Division**

**PROOF OF SERVICE**

I hereby certify that the above named parties were served this reply by U.S.P.S. mail on 10-30-2017 to the address on file with the court shown below.



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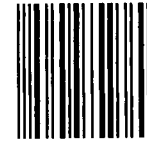
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SC Court of Appeals

TO

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Clerk of the Court*

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Columbia SC 29201

Label 228, January 2008

