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February 5, 2018

Clerk of Court
Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

RECEIVED

FEB 09 2018

S.C. SUPREME COURT

Re: Wilson v State, 2013-CP-26-00469

Dear Clerk Shearouse:

Please find the enclosed Notice of Appeal, Proof of Service, and Order of Dismissal in the above Horry County PCR action. Please return a clocked copy of the Notice of Appeal and Proof of Service in the enclosed SASE.

Should you have any additional questions please do not hesitate to contact my office.

With best regards, I am,



James K Falk

Thank you for your assistance.

Cc: Valerie Giovanoli, Esq. Michael Wilson 343053.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

FEB 09 2013

S.C. SUPREME COURT

APPEAL FROM HORRY COUNTY

Court of Common Pleas

Honorable Michael G. Nettles, Circuit Judge

Case No.: 2013-CP-26-00469

Michael Wilson 343053.....PETITIONER

V.

State of South Carolina.....RESPONDENT

NOTICE OF APPEAL

The Petitioner Michael Wilson appeals the Honorable Michael G Nettles May 1, 2017 Order of Dismissal and his January 16, 2018 ORDER DENYING MOTION TO ALTER OR AMEND SENTENCE. Undersigned counsel received notice of entry of Judge Nettles' subsequent order on January 23, 2018. A copy of the orders on appeal are attached hereto.



James K Falk
Falk Law Firm
PO Box 1058
Charleston, SC 29402

February 6, 2018

Valerie Giovanoli, Esq.
Office of S.C. Attorney General
PO Box 11549
Columbia, SC 29211-1549

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

FEB 09 2018

S.C. SUPREME COURT

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Honorable Michael G. Nettles, Circuit Judge

Case No.: 2013-CP-26-0469

Michael Wilson 343053.....PETITIONER

V.

State of South Carolina.....RESPONDENT

PROOF OF SERVICE

I, James Falk, certify that I have today served the within notice of appeal upon the Respondent by depositing a copy of it in the U.S. Mail, postage prepaid, addressed to its attorney of record, Valerie Giovanoli, Esq. Office of the S.C. Attorney General, PO Box 11549, Columbia, SC 29211-1549. I further certify that all parties required by Rule to be served have been served this February 6, 2018.



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February 5, 2018

Horry County Clerk of Court
PO BOX 677
Conway, SC 29526

Dear Madam Clerk

Re: Wilson v State, 2013-CP-26-00469

Dear Madam Clerk

Please find the enclosed copy of a Notice of Appeal I filed in the above Post-Conviction Relief action.

Regards



James Falk

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)
)
Michael B. Wilson, #343053,)
)
Applicant,)
)
v.)
)
State of South Carolina,)
)
Respondent.)
_____)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTEENTH JUDICIAL CIRCUIT

Case No. 2013-CP-26-0469

**ORDER OF DISMISSAL
WITH PREJUDICE**

FILED
HORRY COUNTY
17 MAY -4 AM 11:27
RENEE M. EMMIS
CLERK OF COURT
HORRY COUNTY, SC

This matter comes before the Court by way of an Application for Post-Conviction Relief filed January 23, 2013. Respondent made a timely Return on or about May 14, 2013. On August 4, 2014, Respondent filed a Motion to Dismiss, requesting summary dismissal based on the fugitive disentitlement doctrine and the doctrine of *laches*. The Court convened a hearing into Respondent's motion on August 27, 2014. The Honorable Kristi Lea Harrington denied Respondent's Motion to Dismiss. Subsequently, an evidentiary hearing was convened into the matter on February 7, 2017 at the Horry County Courthouse. Applicant was present and represented by James K. Falk, Esquire. Valerie Garcia Giovanoli, Esquire, of the South Carolina Office of the Attorney General represented Respondent.

At the hearing, Applicant testified on his own behalf. Applicant's trial counsel, Russell B. Long, Esquire, (Counsel) also testified. This Court had before it a copy of the Horry County Clerk of Court records regarding the subject convictions, Applicant's SCDC records, Applicant's sentencing transcript, Applicant's appellate records, and the records of this PCR action.

PROCEDURAL HISTORY

In December 1998, the Horry County Grand Jury indicted Applicant for criminal sexual conduct and kidnapping (1998-GS-26-2612). Applicant was represented by Russell B. Long, Esquire. On December 3, 2001, the matters were called for trial before the Honorable Edward B. Cottingham and a jury. Applicant initially appeared for trial, but absconded during trial. The jury found Applicant guilty as indicted. Judge Cottingham issued a sealed sentence at that time and issued a bench warrant for Applicant's arrest. After his arrest in Florida, Applicant was returned to this jurisdiction. On October 4, 2010, Applicant appeared before the Honorable Steven H. John, who unsealed and pronounced Judge Cottingham's sentences of thirty (30) years for each offense. Judge John denied Applicant's motion to vacate sentence, motion for a new trial, and motion to reduce sentence.

Applicant filed and served notice of appeal on October 14, 2010. The South Carolina Court of Appeals denied Applicant's motion to remand for reconstruction hearing and dismissed Applicant's appeal on November 16, 2011, based on the fugitive disentitlement doctrine. The remittitur was returned to the circuit court on March 28, 2012.

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

1. Ineffective assistance of counsel
2. Denial of due process

At the evidentiary hearing, Applicant proceeded specifically on the following allegations:

1. Trial counsel failed to preserve trial transcript.
2. Trial counsel failed to warn Applicant that failing to appear for trial would result in a trial in Applicant's absence.
3. Applicant was tried for charges for which he was not indicted and trial counsel failed to move for dismissal.

4. Trial counsel had a conflict of interest at the time he represented Applicant.
5. Trial counsel failed to investigate.

SUMMARY OF TESTIMONY

I. Applicant testified to the following:

Applicant addressed this Court prior to taking the stand complaining that the investigator he hired with the investigative funds issued by this Court in February of 2016, would not do any work and would not respond to inquiries by Applicant. Applicant requested that a new investigator be assigned and more investigative funds be ordered.

Applicant appeared at least three times for his trial, but his case was not called. He showed up to the courthouse early on the date his case was called to trial, however he said the judge had not taken the bench by 8 or 9 o'clock A.M. so he left. His girlfriend at the time was there with him and left with him. No one told the Applicant that he had to be present for his trial. Applicant claims his indictment was flawed because he was indicted under an old statute. Counsel failed to move to dismiss the indictment and force the State to re-indict him under the new statute. Applicant's indictment shows a hand-written amendment of the statute on his indictment. Applicant discussed the indictment flaw before leaving. Applicant claims he did not know his case was called to trial.¹ Applicant attempted to blame his attorney, stating that Counsel had his telephone number and new what hotel he was staying. Applicant claimed the trial court did not advise him he had to be present at his trial or that they would try him in his absence.

Applicant originally hired Counsel's father to represent him. Upon his passing, Counsel took over Applicant's case. After many months of calls, meetings, and letters, Counsel informed

¹ This Court notes the transcript from Applicant's sentencing shows that Applicant admitted that he "was advised that morning that [his] bond [was] to be revoked, [and they were] to proceed with the trial" and that he "panicked and... left" Sent. Tr. 7, ll. 17-20.

Applicant that he had a conflict of interest in his case. Counsel had represented employees and owners of the FanTails club at which the victim worked. The State's witnesses in the case included a club owner and employee. Applicant claimed that Counsel told him he would have to waive the conflict or the judge would revoke his bond and put him back in jail. The letter he received and signed informing him of the conflict of interest came as a complete shock to Applicant. Applicant figured he could hire another attorney, but admitted he made no real effort to do so.

Applicant testified that he had an insurance check for around forty thousand dollars that the bank would not cash for him. Counsel offered to hold it in an escrow account and give him the money for a fee of six thousand dollars. Applicant was complicit in paying the fee in exchange for cashing his check because he expected Counsel to represent him to the utmost standard. Applicant admitted he used some of the money to flee the jurisdiction and that he was able to change his identity before absconding to Florida. Applicant instructed Counsel that if he lost at trial, to make sure to file an appeal and specifically "preserve record for appeal." Essentially, Applicant stated he wanted Counsel to "do his job." Counsel filed a notice of appeal after the trial, but did not order a transcript. After Applicant was extradited from Florida and brought back to Horry County for sentencing about nine years after his conviction, he attempted to file an appeal and found out the transcript was no longer available.

Applicant claimed to have had a list of witnesses that Counsel could have called in his defense at trial. Among those were some college kids that lived in the apartment above him who had seen the victim and Applicant together and could testify to the victim's demeanor the night of the incident. Applicant testified that the victim had even left his apartment to go party with the college guys, proving that she wasn't unconscious from intoxication. Another witness Applicant alleged could have testified in his defense was the nurse who performed a rape kit test on the victim.

Applicant claimed that he tracked down the nurse and she told him the victim was overly concerned about her husband. The nurse was willing to testify for Applicant, but Applicant claims Counsel failed to investigate her or call her as a witness. Applicant claimed he told Counsel about another gentleman who lived next door who also saw the victim and Applicant and could attest to the victim's demeanor that night.

Applicant testified that the victim had prior problems with her husband and that she was concerned for her safety. Applicant described the victim's husband the day following the rape of his wife as "causing a commotion" while the cops were responding to the report made by the victim. Applicant complains that Counsel did not question the victim's husband. Applicant also claimed to have met the victim at the strip club prior to the incident and hit it off with her. Applicant also recalled an altercation the victim had gotten into with another patron because she wanted more money and the patron would not pay her more. The manager fired the victim, but Applicant saw her back at the club a week later and was pleasantly surprised to see her back.

II. Counsel testified to the following:

Counsel testified that the trial was very long ago, approximately 16 years ago. Counsel's father was originally retained to represent Applicant, but after his father passed away, Counsel took over Applicant's case. Counsel has been practicing law for 25 years now, and 10 years at the time of Applicant's trial. Counsel testified that he became concerned with a potential conflict of interest because he created the FanTails Limited Liability Corporation. Counsel sought advice from a more senior attorney regarding the potential conflict of interest. When he learned that a member of the LLC was going to testify against Applicant, out of an abundance of caution, he informed Applicant,

the solicitor, the judge, and the LLC of the potential conflict. Applicant waived the conflict without hesitation and signed a waiver.²

Applicant informed Counsel that the incident between he and the victim was consensual, but the State was alleging that the victim was unconscious, raped repeatedly and photographed. The only evidence supporting Applicant's consensual defense was Applicant's testimony and the results of the rape kit that showed no bruising or cuts. Also, other than the victim being a nude dancer, Counsel had no other information to impugn the victim. Applicant never gave Counsel a list of potential witnesses to interview. The victim's testimony was that she woke up naked, confused, and wandered the streets seeking help and the emergency room records corroborated her testimony. Applicant did not mention the nurse who treated the victim as a potentially helpful witness to Applicant's case. Despite Applicant's allegation that Counsel failed to interview and call the nurse to testify, the nurse, in fact, testified at trial on behalf of the state. The bouncer at the club also testified at trial, that Applicant came up to him, carrying the victim, who was apparently passed out or sleeping, and told him that the victim was a friend, had too much drink, and he would take her home.

The day of trial, Applicant was present that morning. They drew a jury, with Applicant present. Then, during a brief recess, Counsel went to the judge's chambers to discuss something and when he returned, Applicant was nowhere to be found. Counsel tried calling him and looking for him and the judge sent bailiffs out to look for him. Ultimately, Counsel was forced to try the case without Applicant present. Counsel did not recall any problems with the indictment, but found it likely that the solicitor amended the indictment. Had there been a fatal flaw with the indictment,

² This signed waiver was admitted into evidence at the PCR hearing, as State's Exhibit 2.

Counsel would have objected to it. Furthermore, an amended indictment would not have changed the case or the ability to prosecute Applicant.

After the trial, Counsel received a telephone call from Applicant asking what happened at the trial. Counsel told him he was found guilty and advised him to turn himself in. That was the last time Counsel ever heard from Applicant, until he was arrested about nine years later. Applicant never requested that Counsel file an appeal for him nor did he retain Counsel to represent him on appeal. Counsel does not normally handle appeals in his practice. However, in an abundance of caution, Counsel filed a notice of appeal on Applicant's behalf. Counsel did not order Applicant's transcript because that is the duty of appellate counsel. Counsel was relieved after filing the notice of appeal.

Counsel gave a brief summation of the evidence presented during Applicant's trial, which included: multiple photos of a nude and unconscious victim, which included photos of Applicant raping the victim in multiple manners³, the plastic shot cup from which the victim drank was found in the club that had been sent to South Carolina Law Enforcement Division (SLED) for testing and confirmed to contain GHB⁴, Applicant's post-Miranda statement that admitted the victim was extremely intoxicated, testimony from Applicant's then-live-in-girlfriend who found the camera with the nude photos on it, testimony from the victim as to her recollection of events, testimony from the nurse who attended to the victim in the emergency room, testimony from the doorman of the club, and testimony from another dancer at the club who witnessed the victim unconscious. Counsel characterized the case as "undefendable" (sic) and the two day trial was a presentation of "overwhelming" evidence of guilt. Every witness presented at trial corroborated that the victim was

³ Some of the photos used at trial were admitted into evidence during the PCR hearing, as the State's Exhibit 1.

⁴ Gamma-Hydroxybutyric Acid, also known as a "date rape" drug.

unconscious the night of the rape, which was further corroborated by the photos of the victim. Applicant told Counsel that she was “acting” unconscious for the photos, however, Applicant failed to stay for his trial and thus did not testify to such. Regardless, Counsel did his best by making the jury aware that the victim was not the most innocent of victims.

Lastly, Counsel noted that when he represented Applicant nine years later at his sentencing hearing, Applicant was very proud of himself for eluding the authorities for over nine years.

III. Upon rebuttal, Applicant testified to the following:

Applicant never saw the SLED report testing the cup. After his return to this jurisdiction, Applicant learned that the cup was destroyed during testing and could not be re-tested. Applicant reiterated that he arrived to court the day of his trial early and left at about 9:00am. Counsel was there, in or about the courtroom. Applicant’s girlfriend left with him at the same time.

FINDINGS OF FACT AND CONCLUSION OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has had the opportunity to observe the witnesses presented at the hearing, and has weighed their testimony and credibility accordingly. Below are the findings of fact and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (2017).

As a matter of general impression, this Court finds the testimony of Counsel to be credible. This Court further finds that the testimony by Applicant is not credible.

Ineffective Assistance of Counsel

Applicant alleges he received ineffective assistance of counsel. In a PCR action, “[t]he burden of proof is on the Applicant to prove his allegations by a preponderance of the evidence.” Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRPC).

Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, Id. The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625, *citing* Strickland. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

Failure to preserve trial transcript

This Court finds Applicant has failed to meet his burden to prove Counsel was ineffective for failing to preserve the trial transcript. This Court finds Applicant's testimony that he told Counsel to file an appeal and specifically to preserve the record for appeal is not credible and is further contradicted by the record in this case. This Court also finds Counsel's testimony that he was never retained to handle Applicant's appeal and there was never any discussion of an appeal between Counsel and Applicant to be credible. There is no duty upon trial counsel to order and preserve a trial transcript from a trial during which the defendant willfully absconds and is tried in absentia. Although there is also no duty upon trial counsel to file a notice of appeal when a defendant does not

so request, Counsel filed a notice of appeal anyway, in an abundance of caution. Not only did Counsel fulfill his duties as Applicant's trial attorney, he went above and beyond those duties by filing Applicant's notice of appeal in the event Applicant returned and wanted to pursue an appeal.⁵ Consistent with the Court of Appeals opinion in Applicant's direct appeal, this Court finds Applicant's willful decision to remain a fugitive from justice for approximately nine years led to the destruction of his trial transcript, not any error or omission by his trial counsel. See State v. Serrette, 375 S.C. 650, 654 S.E.2d 554 (2007). Therefore, this Court finds this allegation is without merit and is denied and dismissed with prejudice.

Failure to warn Applicant could be tried in absentia

This Court finds Applicant has failed to meet his burden of proving Counsel was ineffective for failing to warn Applicant that if he failed to appear for trial, he could be tried in absentia. Applicant's testimony that he was not aware his trial was going forward that day is not credible. Counsel testified that Applicant was notified, appeared the morning of trial, was present during jury selection, and snuck off during a brief recess. This testimony is credible and supported by the prior admission made by Applicant during his sentencing that he panicked and left. This Court finds that Applicant was fully aware that his trial was proceeding that day and willfully fled not only his trial, but the state of South Carolina. Applicant also willfully took on a new identity and eluded authorities for over nine years.

Regardless of whether Counsel advised Applicant he could be tried in his absence or not, there is no duty to advise a defendant of such. Imposing a duty on criminal trial attorneys to inform their clients of the ability to be tried in absentia would in turn impose a duty upon Counsel to foresee

⁵ It is worth noting that Applicant did not return on his own volition seeking to pursue an appeal of his conviction. Rather, Applicant was arrested approximately nine years later in Florida under a new identity and extradited back to Horry County to face sentencing for his outstanding conviction.

a client will abscond. Counsel fulfilled his duty by informing Applicant of his trial date and advising him he must be there. Counsel could not have, and should not be expected to, foresee Applicant's abscondence. Therefore this allegation is without merit and is denied and dismissed with prejudice.

Failure to move for dismissal

This Court finds Applicant has failed to meet his burden to prove Counsel was ineffective for failing to move for dismissal based on Applicant being improperly indicted. Applicant failed to provide sufficient evidence that he was not properly indicted or that his indictment contained any flaws. The indictment is part of the record of this PCR action and shows no flaws or errors. Furthermore, Counsel testified that he had no specific recollection of any problems with the indictment, but that if there had been a problem, Counsel would have objected and brought it to the Court's attention. The Solicitor could have easily amended any alleged error within the indictment with no effect on the ability to prosecute Applicant for the rape and kidnap of his victim. Having found the allegation is without merit, this Court denies and dismisses the claim with prejudice.

Conflict of interest

This Court finds that Applicant has failed to meet his burden to prove that Counsel was ineffective due to a conflict of interest. This Court finds Counsel's testimony that he consulted with a senior attorney for advice and, in the abundance of caution, informed all relevant parties and obtained a written waiver from Applicant is credible. This Court further finds Applicant's testimony that Counsel threatened him to get him to sign the conflict waiver to be not credible. Counsel was astute in obtaining a written and signed waiver. When presented with this issue, Applicant had the opportunity to refuse to waive the conflict and hire new counsel, but he admittedly made no such effort. This Court finds Applicant made an intelligent waiver of any alleged conflict of interest. This allegation is denied and dismissed with prejudice.

Failure to investigate

This Court finds Applicant has failed to meet his burden to prove Counsel was ineffective due to failing to investigate Applicant's case. It was abundantly evident from the PCR hearing that Counsel was more familiar with the actual facts of Applicant's sixteen year old case than Applicant was. Counsel was able to recount in some detail the overwhelming evidence against Applicant. Because of Applicant's willful fleeing during his trial, Counsel was also more familiar with the facts presented at trial. This allegation is denied and dismissed with prejudice.

It is worth noting that the photographs of the victim nude and being sexually assaulted are the most telling – they clearly show the victim's comatose, lifeless, near-dead state. She appears completely unconscious with her eyes only slightly open and her mouth open. The photos, coupled with Applicant's post-Miranda statement, the doorman and other dancer's testimony of the victim's state of intoxication to the point of unconsciousness, makes this case, as Counsel stated, indefensible. Applicant's testimony is in complete contradiction of all other evidence.

Applicant's claim that the investigator in this case failed to do his job is not credible. The investigator could have found witnesses Applicant claims existed if there actually were any. This Court finds the investigator's absence indicates he could not find anything or anyone helpful to Applicant's case. Even if investigation produced witnesses with favorable testimony to Applicant, it would be in direct conflict with all other evidence in this case, including Applicant's own post-Miranda statement. Investigative funding was ordered one year ago from the date of Applicant's PCR evidentiary hearing and Applicant has failed to produce any evidence or information from that investigation to aid in his allegations. This Court denies Applicant's request for more investigative funds to hire a new investigator.

CONCLUSION

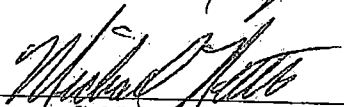
Based on all the foregoing, this Court finds and concludes that Applicant has not established any violations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice. This Court also finds that Applicant failed to present evidence as to the other allegations, and thus, this Court deems the other allegations abandoned.

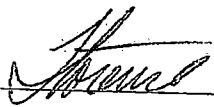
This Court notifies Applicant that he must file and serve a notice of appeal within thirty (30) days from receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. An applicant has a right to an appellate counsel's assistance when they are seeking review of the denial of PCR. Austin v. State, 305 S.C. 453 (1991). If an applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. See Rule 71.1 (g), SCRCP. You must look at Rule 243 of the South Carolina Appellate Court Rules for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

1. The application for Post-Conviction Relief is denied and dismissed with prejudice;
2. Applicant shall remain in the custody of the South Carolina Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 1 day of May, 2017.


MICHAEL G. NETTLES
Presiding Judge
Fifteenth Judicial Circuit

, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

Michael Brenton Wilson, #343053,

Applicant,

v.

State of South Carolina,
Respondent.

IN THE COURT OF COMMON PLEAS
FOR THE FIFTEENTH JUDICIAL CIRCUIT

2013-CP-26-469

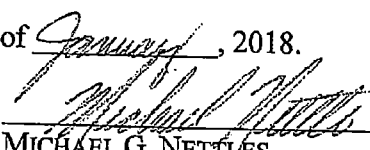
**ORDER DENYING MOTION TO ALTER
OR AMEND JUDGMENT**

This matter comes before the Court by way of Applicant's Motion to Alter or Amend Judgement pursuant to Rule 59(e), SCRCP, filed May 15, 2017. Based upon careful reconsideration of all of the evidence in this case and upon full consideration of Applicant's motion and supporting memorandum, this Court is not persuaded to alter or amend the judgment.

IT IS THEREFORE ORDERED:

1. That Applicant's motion is denied and dismissed.
2. Applicant shall remain in the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 16 day of January, 2018.


MICHAEL G. NETTLES
Presiding Judge
Fifteenth Judicial Circuit


_____, South Carolina

FILED
COUNTY
2018 JAN 18 PM 12:45
JUDGE G. ELLIS
CLERK OF COURT
HORRY COUNTY, SC



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29211

U.S. POSTAGE
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LK LAW FIRM

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Clerk of Court
Supreme Court of South Carolina
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Columbia, SC 29211