

 **RESNICK & LOUIS, P.C.**
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REPLY TO THE CHARLESTON OFFICE
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July 20, 2018

RECEIVED

JUL 24 2018

S.C. SUPREME COURT

VIA U.S. MAIL

The Honorable Daniel E. Shearhouse
Clerk of South Carolina Supreme Court
Supreme Court Building
Post Office Box 11330
Columbia, SC 29211

Re: John Cleveland, #291078 v. State of South Carolina
Civil Action No.: 2017-CP-10-6621

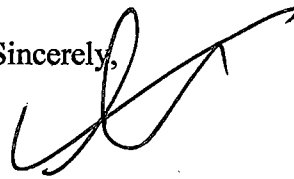
Dear Mr. Shearhouse:

Enclosed for filing, please find an original and two copies of Appellant's Notice of Appeal of the denial of his application for Post-Conviction Relief, and a Proof of Service regarding same. If you find everything in order, please file the original and return the clocked-in copies in the enclosed self-addressed envelope.

Please note, I was appointed to this and case and have copied the Office of Appellate Defense on this who will handle the appeal. Please call if you have any questions.

With kindest regards, I am

Sincerely,



Christopher L. Murphy, Esq.
For the Firm

CLM/jh

Enclosures

cc (w/ encls.): Mr. John Cleveland
Rasheeda Cleveland, Asst. AG
Office of Appellate Defense
The Honorable Roger M. Young, Sr.
The Honorable Julie J. Armstrong, Clerk, 9th Jud. Cir.

THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED

JUL 24 2018

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

S.C. SUPREME COURT

Roger M. Young, Sr., Circuit Court Judge


Case No.: 2017-CP-10-6621

John Cleveland, Jr., #291078 Appellant
v.
State of South Carolina Respondent

NOTICE OF APPEAL

Appellant appeals the Court's denial of his application for post-conviction relief.
Attached is the order from the court dated July 2, 2018 and received July 17, 2018.

July 20, 2018



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THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

JUL 24 2018

Roger M. Young, Sr., Circuit Court Judge

S.C. SUPREME COURT

Case No.: 2017-CP-10-6621

John Cleveland, Jr., #291078 Appellant
v.
State of South Carolina Respondent

PROOF OF SERVICE

I certify that I have served APPELLANT'S NOTICE OF APPEAL by delivering a copy via U.S. Mail First-Class postage prepaid on the 19th day of April, 2018, on the following:

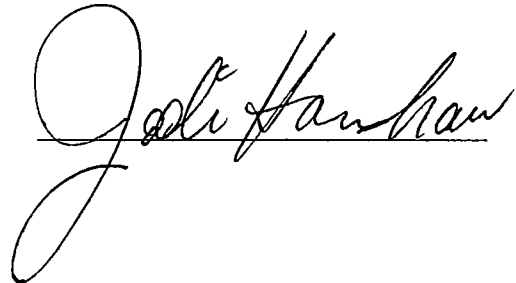
Rasheeda Cleveland, Esquire
Assistant Attorney General
SC Office of the Attorney General
PO Box 11549
Columbia, SC 29201

The Honorable Roger M. Young, Sr.
100 Broad Street, Suite 368
Charleston, SC 29401

The Honorable Julie J. Armstrong
Clerk of Court, Ninth Judicial Circuit
100 Broad Street, Suite 106
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Office of Appellate Defense
PO Box 11433
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Mr. John Cleveland, SCDC #291078
Ridgeland Correctional Institution
PO Box 2039
Ridgeland, SC 29936



IC
AG
AT

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)
)
John Cleveland, Jr., #291078,)
)
Applicant,)
)
v.)
)
State of South Carolina,)
)
Respondent.)
_____)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

Case No. 2017-CP-10-6621

FILED
2018 JUL -3 PM 12:24
JULIE J. BISHOP
CLERK OF COURT

ORDER OF DISMISSAL

PROCEDURAL HISTORY

This matter comes before the Court by way of an application for post-conviction relief filed December 27, 2017, by John Cleveland, Jr. (Applicant). The State (Respondent) made its Return and Partial Motion to Dismiss on April 11, 2018, requesting an evidentiary hearing be held on Applicant's allegations of ineffective assistance of counsel and requesting summary judgment on Applicant's allegation regarding subject-matter jurisdiction. An evidentiary hearing into the matter was convened on May 24, 2018, at the Charleston County Courthouse before the Honorable Roger M. Young, Sr. Applicant was present at the hearing and was represented by Christopher L. Murphy, Esquire. Assistant Attorney General Kelly Oppenheimer of the South Carolina Attorney General's Office represented Respondent.

The records before this Court indicate Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Charleston County Clerk of Court. During its January 2015 term, the Charleston County Grand Jury indicted Applicant for failure to register as a sex offender, third offense (2015-GS-10-00019). Robert L. Gailliard, Esquire, represented him on this charge. Assistant Solicitors Edward R. Corvey, III, and G. Scott Maynor, both of the Ninth Circuit Solicitor's Office, prosecuted the case. On

October 13, 2015, Applicant proceeded to a jury trial before the Honorable W. Jeffrey Young. The following day, Applicant failed to appear for his trial, and he was tried in his absence. On October 15, 2015, the jury convicted Applicant as indicted. Judge Young sentenced Applicant to a term of imprisonment of five years and sealed the sentence. Thereafter, on July 18, 2016, Applicant appeared before the Honorable Deadra L. Jefferson with new counsel, Shirene C. Hansotia, Esquire, for sentencing. Judge Jefferson imposed the sentence of Judge Young. Subsequently, Applicant filed a motion to reconsider, and a hearing into the matter was convened before Judge Young on September 16, 2016. Following argument, Judge Young denied the motion to reconsider.

Applicant filed a timely Notice of Appeal, and Deputy Chief Appellate Defender Wanda H. Carter, of the South Carolina Commission of Indigent Defense, Office of Appellate Defense, perfected an appeal on Applicant's behalf. Following the submission of an *Anders*¹ brief, the South Carolina Court of Appeals dismissed Applicant's appeal by unpublished opinion on October 11, 2017. *State v. Cleveland*, Op. No. 20147-UP-369 (S.C. Ct. App. filed Oct. 11, 2017). The remittitur was issued on October 30, 2017.

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

1. "Ineffective assistance of trial, post-trial, and appeal counsel;"
 - a. "Counsel's [sic] failed to raise statutory exemption under 23-3-430."
2. "Statutory and constitutional violations;" and
 - a. "Deprivation of statutory right to exemption from registration law."
3. "Statutory exemption/subject matter jurisdiction."
 - a. "Trial nor sentence Court had jurisdiction of matter exempted."

At the evidentiary hearing, Applicant proceeded forward on the allegations of ineffective assistance of trial and sentencing counsel raised in his application, as well as the allegation raised

¹ *Anders v. California*, 388 U.S. 924 (1967).



concerning subject-matter jurisdiction. Applicant waived all allegations regarding ineffective assistance of appellate counsel.

STATEMENTS OF FACTS ADDUCED AT TRIAL

In 1987, Applicant pled to second-degree criminal sexual conduct with a minor, for which he was sentenced under the Youthful Offender Act to a term of imprisonment not to exceed six years. Trial Tr. 51. As a result of this conviction, Applicant was required to register as a sex offender quarterly for life. Trial Tr. 61, 64-65. Applicant's original registration date was January 22, 2001, where he filled out a form indicating he understood he was required to register annually for life and to update his address within ten days of moving. Trial Tr. 59, 61. Initially, however, Applicant was not required to register quarterly, but due to changes in the South Carolina Law Enforcement Division (SLED) regulations in 2012, he was later required to register each March, June, September, and December. Trial Tr. 65, 73, 77, 79.

In June 2008, as well as June 2013, Applicant appeared for his annual registration. Trial Tr. 63. He also appeared on September 18, 2013 in order to register. Trial Tr. 71. Applicant was required to register again in December 2013, but he did not appear. Trial Tr. 71, 94. On December 3, 2013, law enforcement attempted to verify Applicant's address, but he had not lived at the address they had listed for him for at least one year prior. Trial Tr. 71, 80. Thereafter, on December 27, 2013, law enforcement left Applicant a voicemail, indicating he needed to appear in order to register by January 8, 2014. Trial Tr. 72, 93. By January 23, 2014, Applicant still had not appeared. Tr. 72. Therefore, on January 27, 2014, a warrant was issued for Applicant. Trial Tr. 72.

A handwritten signature or set of initials, possibly 'B3', written in blue ink in the bottom right corner of the page.

TESTIMONY PRESENTED AT THE EVIDENTIARY HEARING

At the evidentiary hearing, Applicant testified on his own behalf. Respondent presented the testimony of Robert L. Gailliard, Esquire, (hereinafter "Trial Counsel") and Shirene C. Hansotia, Esquire (hereinafter "Sentencing Counsel"). This Court also had before it a copy of Applicant's trial transcript, Applicant's appellate records, the records of the Charleston County Clerk of Court, and Applicant's records from the South Carolina Department of Corrections.

During the evidentiary hearing, Applicant testified he retained Trial Counsel to represent him. He also testified he was tried in his absence and convicted of failure to register as a sex offender. He elaborated he knew he was going to be tried in his absence and made the decision not to appear for trial, even though the trial court advised him it was imperative to appear for his trial.

He testified prior to his conviction he had "forcefully" appeared to register as a sex offender. He elaborated he was incarcerated in 2001 on a drug charge, and SCDC required him to register based on their classification system and his prior conviction. Applicant also testified he did not sign any papers, through which he would have registered. He further testified the 1994 Sex Offender Registry Act was passed after his 1987 conviction.

Applicant testified he and Trial Counsel discussed the possibility of raising an *ex post facto* defense, but that was the only defense they discussed. He also testified Trial Counsel made a motion to dismiss under the sweetheart exception of the statute² but did not argue the retroactivity of the statute nor made an argument under equal protection. On the other hand, Applicant also testified Trial Counsel did make an argument under equal protection, which the trial court denied. He further testified the State argued the sweetheart exception could not be raised because of the victim's age. He testified he believed the victim was between the ages of

² See S.C. Code Ann. § 23-3-430(C)(5).



fifteen and sixteen. He elaborated when Trial Counsel heard the State's argument, he no longer wanted to represent Applicant. He further elaborated Applicant's motion to dismiss was denied; and, therefore, Trial Counsel proceeded to a jury trial. Applicant also testified it was improper for Trial Counsel to take his case to trial, and Trial Counsel was not adequately prepared to do so. He elaborated Trial Counsel was not fully prepared with regards to the sex offender registry statute, the law, or his closing argument. He further elaborated Trial Counsel did not raise issues at trial, which would have resulted in Applicant's acquittal.

Applicant also testified Trial Counsel did not appear for his sentencing, but rather got someone from the Public Defender's Office to represent Applicant. He elaborated at that time, Trial Counsel wanted nothing to do with Applicant's case. Applicant also testified he appeared at sentencing with Sentencing Counsel, who advised there was nothing left to be done except for sentencing. However, Applicant testified Sentencing Counsel made a motion to reconsider the sentence.

Similarly, Applicant testified appellate counsel filed an *Anders* brief, thereby signaling she wanted nothing to do with his case. He elaborated none of his attorneys took the law into consideration during the course of their representation of him.

Following Applicant's testimony, Trial Counsel testified. Trial Counsel testified he was admitted to practice law in 1977, and has been practicing for forty years. He also testified he is self-employed, and approximately ten to twenty percent of his practice is criminal law. Trial Counsel testified he was retained to represent Applicant, and he had sufficient time to prepare for trial. He testified he did not have his case file, but he was familiar with the file.

He further testified he met with Applicant personally and discussed possible issues with him, including the fact Applicant had been reporting, up to a point, after his conviction and the



sweetheart exception. He elaborated Applicant informed him the minor victim from the 1987 conviction was over sixteen years old, and the sex was consensual; so he moved to dismiss under the sweetheart exception. He further elaborated that motion was denied, as the child was, indeed, under sixteen years old and did not consent. Trial Counsel also testified the information Applicant had provided him was incorrect. Trial Counsel testified he did not move to dismiss on the basis it was in violation of the *ex post facto* clause based on his research of the case law. He elaborated he had no other defenses other than the sweetheart exception and the age of the victim, which he explained to Applicant. Trial Counsel also testified he had extensive conversations with the solicitor regarding a potential plea offer, the sweetheart exception, and retroactivity, but they were unwilling to make any offers.

Trial Counsel also testified Applicant did not appear for the second day of the trial, and Applicant did not tell him he was not going to appear. He elaborated when he attempted to call Applicant, he did not answer. He further elaborated he was surprised by Applicant's decision not to appear.

Following Trial Counsel's testimony, Sentencing Counsel testified. Sentencing Counsel testified she was working at the Public Defender's Office when she was assigned Applicant's case. She further testified she was only assigned the case for sentencing purposes, as Trial Counsel was unavailable. She elaborated she called Trial Counsel when she was assigned the case, and they had a brief discussion regarding the case.

She also testified she met with Applicant prior to sentencing and explained to him his absence at trial would be a difficult hurdle to overcome. She further testified she was aware of Applicant's mental health and addiction issues and attempted to argue those to the court in an effort to justify his absence at trial. She elaborated she also attempted to argue the statutory



exemption before the court but was unable to do so. She testified, however, she was very limited in the arguments she could make.

Sentencing Counsel testified she made a motion to reconsider before the trial court as well. In that motion, she attempted to argue Applicant's addiction and mental health issues and also attempted to allow Applicant to explain his YOA sentence for this 1987 conviction. She further testified, however, this argument was not meritorious.

FINDINGS OF FACT AND CONCLUSIONS 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 further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

Ineffective Assistance of Counsel

In a post-conviction relief action, an applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRPC; *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, the applicant must prove "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 (1984); *Butler*, 286 S.C. 441, 334 S.E.2d 813.

The proper measure of performance is whether an 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*, 286 S.C. 441, 334 S.E.2d 813. The applicant must overcome this presumption to receive relief. *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove 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.

After careful review based on the standard discussed above, this Court finds Applicant has failed to carry his burden in this action. Below are this Court's findings in regards to each of Applicant's allegations of ineffective assistance of counsel.

Counsels' alleged failure to raise statutory exemption

Applicant alleges both Trial Counsel and Sentencing Counsel failed to raise and argue the sweetheart exception under the sex offender registry statute. Applicant further contends Trial Counsel should have argued he was exempt from registering based on the *ex post facto* clause and under equal protection.

With respect to the sweetheart exception, this Court finds Applicant has failed to establish either Trial Counsel or Sentencing Counsel was deficient. Both Trial Counsel and Sentencing Counsel did, indeed, attempt to argue Applicant was exempt from registering under the sweetheart exception. In fact, Trial Counsel moved to dismiss the case based on this exemption, arguing because the victim was sixteen years old, the sweetheart exception applied. Trial Tr. 24-25. Furthermore, Sentencing Counsel attempted to make the same argument before



the trial court during her motion to reconsider, but the trial court would not allow her to make that argument, specifically stating “that’s not before me.” Motion to Reconsider Tr. 6. Because both Trial Counsel and Sentencing Counsel attempted to argue Applicant was exempt under the exemption, this Court finds Applicant has failed to establish either was deficient.

Similarly, this Court finds Applicant has failed to establish any resulting prejudice therefrom. Section 23-3-430 of the South Carolina Code provides any person who has been convicted of or pled guilty to second-degree criminal sexual conduct with a minor shall register as a sex offender. S.C. Code Ann. § 23-3-430(C)(5). However:

If evidence is presented at the criminal proceeding and the court makes a specific finding on the record that the conviction obtained for this offense resulted from consensual sexual conduct, as contained in Section 16-3-655(B)(2) provided the offender is eighteen years of age or less, or consensual sexual conduct between persons under sixteen years of age, the convicted person is not an offender and is not required to register.

Id. Section 16-3-655(B)(2) further provides:

A person is guilty of criminal sexual conduct with a minor in the second degree if the actor engages in sexual battery with a victim who is *at least* fourteen years of age but who is less than sixteen years of age and the actor is in a position of familial, custodial, or official authority to coerce the victim to submit or is older than the victim.

S.C. Code Ann. § 16-3-655(B)(2) (emphasis added). Here, evidence was presented during Applicant’s motion to dismiss the victim was twelve years old at the time of the abuse by Applicant. *See* Trial Tr. 25-26. Accordingly, the sweetheart exception did not apply to Applicant, and he has failed to establish he suffered any prejudice from this alleged deficiency. This allegation must be denied and dismissed with prejudice.

With regards to Applicant’s allegation Trial Counsel should have argued the applicability of the statute based on the *ex post facto* clause, this Court finds Applicant has failed to establish



any deficiency on the part of Trial Counsel. Trial counsel must be given leeway to make reasonable strategic decisions. Indeed, “no particular set of detailed rules for counsel’s conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant.” *Strickland*, 466 U.S. at 689. Furthermore, “representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another.” *Id.* at 693. Where counsel articulates a valid strategic reason for his action or inaction, counsel’s performance should not be found ineffective. *Roseboro v. State*, 317 S.C. 292, 454 S.E.2d 312 (1996); *Underwood v. State*, 309 S.C. 560, 425 S.E.2d 20 (1992); *Stokes v. State*, 308 S.C. 546, 419 S.E.2d 778 (1992). Here, Trial Counsel testified he did not challenge the statute under the *ex post facto* clause based on his research and relevant case law he found. Therefore, this Court finds Trial Counsel employed a valid strategy, and Applicant has failed to establish any deficiency on the part of Trial Counsel.

This Court further finds Applicant has failed to establish any resulting prejudice from this alleged deficiency. The South Carolina Supreme Court has held the Sex Offender Registry Act does not violate the *ex post facto* clause. *See State v. Walls*, 348 S.C. 26, 558 S.E.2d 524 (2002) (finding although the Act applies retroactively, the General Assembly did not intend to punish sex offenders in passing the Act, but rather intended to protect the public from those offenders who may re-offend; and therefore, the intention was to create a non-punitive act). Based on the foregoing, this allegation must be denied and dismissed with prejudice.

Finally, regarding Applicant’s allegation Trial Counsel was ineffective for failing to argue the statute was invalid under equal protection, this Court finds Applicant has failed to establish any deficiency on the part of Trial Counsel. Trial Counsel argued Applicant’s case



should be dismissed under equal protection. *See* Trial Tr. 30-31. Specifically, Trial Counsel argued: “The State only, only requires persons who are convicted and sentenced before they go back and look into their past. For someone who was with [Applicant] committed the same offense and according to the solicitor would be required to register they never notify, and they don’t.” Trial Tr. 30. He further argued:

[T]he only people who we are going to require to register are those who managed to get into some criminal trouble and we have them in the Department of Corrections and now we can say, okay, now we know that you committed -- they could-- that’s selecting out a class of person and saying, okay, we are going to apply the law to you and no one else.

Trial Tr. 31. Because Trial Counsel did, indeed, make this argument, this Court finds Applicant has failed to establish Trial Counsel was deficient. Accordingly, this allegation must be denied and dismissed with prejudice.

Subject Matter Jurisdiction

An applicant may challenge the subject matter jurisdiction of the trial court and such a claim is one that may be raised at any time. *See Brown v. State*, 343 S.C. 342, 540 S.E.2d 846 (2001), *overruled in part by Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005). However, “[c]ircuit courts obviously have subject matter jurisdiction to try criminal matters.” *Gentry*, 363 S.C. at 101, 610 S.E.2d at 499. *See also* S.C. Const. Art. V, § 7. Thus, Applicant must present evidence that his case is of some class over which the circuit court does not have the authority to preside. Applicant was indicted by the Charleston County Grand Jury for failure to register as a sex offender, third offense, and the indictments allege the criminal offenses occurred in Charleston County. Moreover, Applicant was prosecuted for these charges in Charleston County Court of General Sessions. Accordingly, this Court finds Applicant has failed to present any facts or evidence which would establish the convictions he challenges in this application are of a class



over which the circuit court does not have the authority to preside. This allegation must be denied and dismissed with prejudice.

CONCLUSION

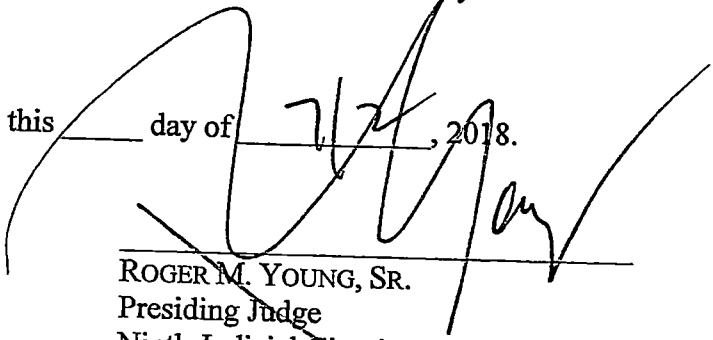
Based on all the foregoing, this Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

This Court notes that Applicant must file and serve a notice of appeal within thirty days from the receipt by counsel 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 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on the Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

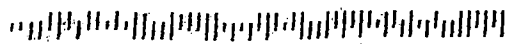
1. That this application for post-conviction relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to and remain in the custody of the State

AND IT IS SO ORDERED this _____ day of _____, 2018.



ROGER M. YOUNG, SR.
Presiding Judge
Ninth Judicial Circuit


_____, South Carolina



 **RESNICK & LOUIS, P.C.**

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