

RECEIVED

SEP 28 2018

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In the Supreme Court

On Writ of Certiorari to Charleston County
Maite D. Murphy, Post-Conviction Relief Judge
Deadra L. Jefferson, Trial Court Judge

Appellate Case No. 2018-000867

DALE GOULD,

Respondent,

v.

THE STATE OF SOUTH CAROLINA,

Petitioner.

PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General
S.C. Bar No. 100108

Post Office Box 11549
Columbia, SC 29211
(803) 734-3737

ATTORNEYS FOR PETITIONER

TABLE OF CONTENTS

STATEMENT OF ISSUE ON CERTIORARI.....2

STATEMENT OF THE CASE.....3

STANDARD OF REVIEW7

ARGUMENT8

 The post-conviction relief court erred as a matter of law in finding trial
 counsel was constitutionally ineffective for failing to object to the trial
 court’s jury instruction that actual knowledge of the presence of an item is
 evidence of intent to control its disposition or use because the court failed
 to undertake the necessary prejudice analysis to determine if the result of
 Gould’s trial would have been different had trial counsel objected and
 because Gould failed to establish any resulting prejudice from counsel’s
 failure to object to this erroneous charge where the evidence established
 Petitioner was not merely present but was in actual possession of the
 cocaine in question.....8

CONCLUSION.....16

STATEMENT OF ISSUE ON CERTIORARI

Did the post-conviction relief court err in finding trial counsel was constitutionally ineffective for failing to object to the trial court's jury instruction that actual knowledge of the presence of an item is evidence of intent to control its disposition or use because the court failed to undertake the necessary prejudice analysis to determine if the result of Gould's trial would have been different had trial counsel objected and because Gould failed to establish any resulting prejudice from counsel's failure to object to this erroneous charge where the evidence established Petitioner was not merely present but was in actual possession of the cocaine in question?

STATEMENT OF THE CASE

Procedural History

During its January 2014 term of court, the Charleston County Grand Jury indicted Respondent Dale Gould (Gould) for Distribution of Cocaine (2014-CP-10-0320). He was represented by Melisa Gay, Esquire. Assistant Solicitors J. Whit Sowards and Stephanie Linder of the Ninth Circuit Solicitor's Office prosecuted the case.

On November 19, 2014, Gould proceeded to a jury trial in the Charleston County Court of General Sessions before the Honorable Deadra L. Jefferson, circuit court judge. The jury convicted Gould as indicted. Judge Jefferson sentenced Gould to the mandatory minimum sentence of ten years imprisonment, as this was Gould's third drug offense.

A notice of appeal was filed and an appeal perfected on Gould's behalf by Appellate Defender Laura R. Baer of the South Carolina Commission on Indigent Defense-Division of Appellate Defense. On appeal, counsel filed a brief of appellant pursuant to Anders v. California, 386 U.S. 738 (1967), arguing the trial court erred in denying Gould's motion for a directed verdict but indicating the appeal was without merit and asking to be relieved as counsel. Thereafter, Gould moved to withdraw his appeal. By written order filed on October 1, 2015, the South Carolina Court of Appeals dismissed Gould's appeal. The remittitur was returned to the circuit court on October 22, 2015.

Thereafter, on April 1, 2016, Gould filed an application for post-conviction relief alleging various grounds of ineffective assistance of counsel. The State served its return on June 23, 2016, requesting an evidentiary hearing be held on the application. On November 27, 2017, Gould, through counsel Rodney D. Davis, filed an amended application alleging the following grounds for relief:

1. Ineffective assistance of counsel by failing to investigate the case prior to the guilty trial.
2. Applicant's attorney provided ineffective assistance of counsel by failing to meet with the Applicant a sufficient amount to adequately advise the Applicant and prepare for a resolution.
3. Applicant's attorney provided ineffective assistance of counsel by failing to properly cross-examine witnesses at trial.
4. Applicant's attorney provided ineffective assistance of counsel by failing to properly advise the Applicant concerning the consequences of conviction versus a plea offer from the State.
5. Applicant's attorney provided ineffective assistance of counsel by failing to object to the jury charge mentioning "strong evidence."

An evidentiary hearing into the matter was convened January 30, 2018, at the Charleston County Courthouse before the Honorable Maite D. Murphy, circuit court judge. Gould was present at the hearing and represented by counsel Davis. Respondent was represented by Assistant Attorney General Rasheeda N. Cleveland of the South Carolina Attorney General's Office. Gould testified on his own behalf. The State presented testimony from trial counsel Gay. At the conclusion of the hearing, the post-conviction relief court took the matter under advisement.

Thereafter, by order signed on March 29, 2018, and filed on April 9, 2018, the court granted post-conviction relief and remanded the matter back to the court of general sessions for a new trial, finding trial counsel was ineffective for failing to object to the trial court's "strong evidence" jury instruction. This appeal follows.

Factual History

In October of 2013, the narcotics investigation division of the Charleston Police Department (CPD) was conducting an investigation into cocaine sales at the Joe Pasta restaurant on King Street in downtown Charleston. (App. 60-62, 64, 88-95). The investigation was led by

Investigator Patrick Gill and included Detective Melanie Frederick with CPD, who was working as an undercover officer, and College of Charleston student Taylor Boyd, who was working with CPD as a confidential informant. (App. 60-62, 64, 78-80, 88-90). Boyd had recently been issued a citation as a minor in possession of alcohol and had informed CPD she knew someone selling cocaine out of Joe Pasta—restaurant manager Dale Gould. (App. 79-80, 103-04). The goal of the operation was to introduce Detective Frederick to Gould with the intent she could make long-term purchases of narcotics from Gould. (App. 79, 95-96, 98).

On October 10, 2013, Detective Frederick and Boyd, participated in an undercover operation to purchase narcotics from Gould at Joe Pasta. (App. 60-62, 64, 80). Boyd was brought to the CPD station and was thoroughly searched for money and contraband. (App. 61, 80). After insuring Boyd was clean, CPD officers equipped her with an audio recording device and briefed as to the undercover operation. (App. 61, 80-81). Officers also equipped Detective Frederick with audio and video recording devices. (App. 62, 72). Detective Frederick, Investigator Gill, Boyd, and other CPD officers then went to the general vicinity of Joe Pasta, where Boyd had agreed to meet Gould. (App. 64, 82).

Detective Frederick and Boyd were dropped off down the street from Joe Pasta and proceeded inside the restaurant alone, still equipped with their respective recording devices. (App. 65, 82). Detective Frederick and Boyd ordered food and waited for Gould to arrive. (App. 65, 82). Boyd and Gould had been texting and Gould arrived shortly thereafter. (App. 65, 82). The three (Detective Frederick, Boyd, and Gould) then went outside the restaurant and Boyd introduced Detective Frederick, who was undercover, as her friend. (App. 82). Boyd and Detective Frederick indicated they were going to a friend's birthday party and wanted cocaine to bring. (App.83, 179). The three then went back inside the restaurant and eventually Gould told

Detective Frederick and Boyd to come inside the restaurant's office. (App. 73, 82-83). Gould asked Detective Frederick to shut the office door and she complied. (App. 73, 83). Once the office door was shut, Gould pointed to a package on the floor that Detective Frederick identified as cocaine based on her training and experience. (App. 75). While neither woman saw Gould put the cocaine on the floor, Boyd indicated it was "obvious" the cocaine had been placed on the floor. (App. 83-84). Gould picked up the cocaine and sampled it several times and tried to get both Detective Frederick and Boyd to sample the cocaine without success. (App. 84). While in the office, Detective Frederick held the package of cocaine briefly. (App. 87). Gould appeared anxious that the women were members of law enforcement and made comments that he did not want to go to prison for distributing cocaine. (App. 84). Eventually, Gould told the women to return to the restaurant and they complied. (App. 74, 84). Gould left the office a short time later and approached Detective Frederick and Boyd, where he again motioned towards a bag on the floor that Detective Frederick recognized as cocaine based on her training and experience. (App. 74, 84-85). Detective Frederick picked up the cocaine. (App. 84-85). Detective Frederick and Boyd finished their meal, paid the bill, and left Joe Pasta with the cocaine. (App. 85-87).

Immediately after leaving Joe Pasta, Detective Fredrick and Boyd met with Investigator Gill and turned over the cocaine. (App. 75, 85). Investigator Gill had been able to monitor the entire encounter with Gould without interruption based on the recording equipment on Detective Frederick and Boyd. (App. 97). CPD chemist Renee Hilton later confirmed the substance was 0.23 grams of cocaine. (App. 136-38). Gould was subsequently arrested for distribution of cocaine—his third drug offense.

STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839 (2018). On appellate review, courts defer to a post-conviction relief court's findings of fact and will uphold them if there is any evidence in the record to support them. Id. at 180-81, 810 S.E.2d at 839-40 (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Smalls, 422 S.C. at 180-81, 810 S.E.2d at 839-40. Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

The post-conviction relief court erred as a matter of law in finding trial counsel was constitutionally ineffective for failing to object to the trial court's jury instruction that actual knowledge of the presence of an item is evidence of intent to control its disposition or use because the court failed to undertake the necessary prejudice analysis to determine if the result of Gould's trial would have been different had trial counsel objected and because Gould failed to establish any resulting prejudice from counsel's failure to object to this erroneous charge where the evidence established Petitioner was not merely present but was in actual possession of the cocaine in question.

In granting relief, the post-conviction relief court found trial counsel was constitutionally ineffective for failing to object to the trial court's instruction advising the jury that actual knowledge of the presence of an item is evidence of intent to control its disposition or use following this Court's decision in State v. Cheeks, 401 S.C. 322, 727 S.E.2d 480 (2013). Certiorari is proper to review this finding, where the post-conviction relief court wholly failed to undertake the necessary prejudice analysis as required to determine if the result of the proceeding would have been different but for trial counsel's failure to object. Based on a review of the record in its entirety as required, the post-conviction relief court erred in determining counsel was constitutionally ineffective and granting Gould a new trial because there is no evidence that Gould was merely present but instead was in actual possession of the cocaine and distributed it to Detective Frederick, and therefore, the result of the proceeding would not have been different but for trial counsel's failure to object to this erroneous jury charge. This Court should grant certiorari and ultimately reverse the post-conviction relief court's grant of relief.

In the present case, Gould had the burden of establishing not only that trial counsel failed to object to the jury charge in question but also that but for this erroneous jury charge, he would not have been convicted of distributing cocaine. In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985);

Rule 71.1(e), SCRPC. When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she 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. “There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case.” Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Post-conviction relief courts are required to employ a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the court must find that the applicant has established his or her 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, the court must find that counsel’s deficient performance 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.

While post-conviction relief court’s must analysis both deficiency and prejudice, there are no mechanical rules requiring the court to analyze deficiency of counsel first then undertake a prejudice analysis. Rather, the ultimate focus of the post-conviction relief court’s inquiry must be on the fundamental fairness of the proceeding that is being challenged. The post-conviction relief court need not first determine whether counsel’s performance was deficient before

examining the whether there is any prejudice suffered by the applicant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed by the post-conviction relief court. Strickland, 466 U.S. 668.

When an applicant has alleged trial counsel was ineffective for failing to object to an allegedly impermissible jury charge, the post-conviction relief court must not only find that the jury charge was erroneous but also find the error of failing to object to this jury charge resulted in an applicant's conviction. See Lowry v. State, 376 S.C. 499, 507–08, 657 S.E.2d 760, 764–65 (2008) (internal citations omitted) (noting “an unconstitutional jury instruction will not require reversal of the conviction if the [c]ourt determines beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained”). It is crucial that the post-conviction relief court not only find a jury charge was erroneous and counsel failed to object, but also find that the applicant would not have been convicted but for these errors.

The purpose of a trial court's jury instructions is “to enlighten the jury and to aid it in arriving at a correct verdict.” State v. Leonard, 292 S.C. 133, 137, 355 S.E.2d 270, 273 (1987). When instructing a jury on the law, a trial judge is required to charge only the current and correct law of South Carolina, and the law to be charged is determined by the evidence presented at trial. State v. Holland, 385 S.C. 159, 165, 682 S.E.2d 898, 901 (Ct. App. 2009); see State v. Taylor, 356 S.C. 227, 231, 589 S.E.2d 1, 2 (2003) (“In general, the trial judge is required to charge only the **current and correct law** of South Carolina, . . . and the law to be charged to the jury is determined by the evidence at trial.” (citations omitted) (emphasis added)).

In State v. Cheeks, 401 S.C. 322, 737 S.E.2d 480 (2013), which was decided over a year prior to Petitioner's trial, this Court overruled prior precedent and instructed the bench to no

longer use the “actual knowledge/strong evidence” charge. In Cheeks, appellant Derrick Lamar Cheeks, who was tried with his uncle, co-defendant Ricky Cheeks, was convicted of trafficking in crack cocaine in excess of 400 grams and possession of crack with intent to distribute within proximity to a school and received concurrent sentences of twenty-five years for trafficking and ten years for proximity. Id. at 324, 737 S.E.2d at 482. During trial, Cheeks raised a defense of mere presence and the trial court repeatedly instructed the jury that “mere presence at the scene of a crime is insufficient evidence, in and of itself, to support a guilty verdict.” Id. at 327, 737 S.E.2d at 483. When instructing the jury on trafficking by possession, the trial court stated,

Now, possession, to prove possession the State must prove, beyond a reasonable doubt, that the defendant in the, in the case both had the power and the intent to control the disposition or use of the crack cocaine. Therefore, possession, under the law, can either be actual or constructive.

Now, actual possession means that the crack cocaine was in the actual physical custody of the defendant. Constructive possession means that the defendant had dominion or control or the right to exercise dominion or control over either the crack cocaine or the property on which the crack cocaine was found.

Now, mere presence at a scene where drugs are found is not enough to prove possession. **Actual knowledge of the presence of the crack cocaine is strong evidence of a defendant's intent to control its disposition or use.** The defendant's knowledge and possession can be inferred when a substance is found on property under the defendant's control. However, this inference is simply an evidentiary fact to be taken into consideration by you along with other evidence in this case and to be given the amount of weight you think it should have. Two or more persons may have joint possession of a drug.

Id. (emphasis in Cheeks). Cheeks’s counsel objected to this jury instruction, “arguing that it was a comment on the facts and the weight of those facts, and that it nullifies or at least conflicts with the mere presence charge.” Id. The trial court, noting Solomon v. State, 313 S.C. 526, 443 S.E.2d 540 (1994), overruled Cheeks’s objection. Id.

On appeal, Cheeks argued the trial court erred in charging the jury that “[a]ctual knowledge of the presence of crack cocaine is strong evidence of a defendant’s intent to control its disposition or use.” Id. at 325, 737 S.E.2d at 482. This Court agreed with Cheeks that this jury instruction was impermissible because it “this charge both improperly weighs the evidence, and that it largely negates the mere presence charge.” Id. at 328, 737 S.E.2d at 484. This Court noted, “[t]his charge converts all persons merely present who have actual knowledge of the drugs on the premises into possessors of that drug.” Id. at 329, 737 S.E.2d at 484. This Court concluded, “[w]e now overrule Solomon and instruct the bench to no longer use the “strong evidence” charge, which is derived from a statement on the sufficiency of the evidence in Kimbrell. Id. However, this Court found Cheeks could not establish any reversible error, “as there was no evidence that he was ‘merely present’ at Markley’s house when the search warrant was executed. Rather the evidence was that he was actively cooking crack cocaine when the warrant was served, and that he possessed the 650 grams of crack found on the kitchen counter. Further, in light of the overwhelming evidence of appellant’s guilt, he cannot demonstrate prejudice warranting reversal from the adjective ‘strong’ used in the charge.” Id.

Following this Court’s decision in Cheeks, this Court issued a subsequent published opinion on the same issue in co-defendant Ricky Cheeks’s case, again reminding the bench of its decision roughly a year earlier holding the “actual possession/strong evidence” charge “unduly emphasized the evidence, and deprived the jury of its prerogative to draw inferences and to weigh evidence” and that “he charge converted all persons merely present who have actual knowledge of the drugs on the premises into possessors of that drug and largely negated the mere presence charge, and erroneously conveyed that a mere permissible evidentiary inference was, instead, a proposition of law.” State v. Cheeks, 408 S.C. 198, 200, 758 S.E.2d 715, 716 (2014).

As with his co-defendant, this Court again found Cheeks could not establish any prejudice because ‘[t]here was no evidence that petitioner was ‘merely present;’ rather, petitioner provided financial assistance to the drug operation, aided and abetted the operation, and was in actual possession of the drugs. *Id.* at 200, 758 S.E.2d at 716.

In the present case, the trial court improperly instructed the jury that “[a]ctual knowledge of the presence of the cocaine is strong evidence of the Defendant’s intent to control its disposition and use” in violation of Cheeks. (App. 214, 252). Trial counsel failed to object to this jury instruction when it was originally given (App. 214, 219) and again when the trial court re-instructed the jury after the jury requested to be re-charged (App. 252, 255). During the evidentiary hearing, trial counsel admitted she failed to object to this erroneous charge and did not provide any strategic reason for her failure to object. (App. 388). The State does not challenge the post-conviction relief court’s finding that trial counsel should have objected to this charge and failed to do so, thereby rendering her performance deficient.

However, despite trial counsel’s clear failure to object to an improper charge, the post-conviction relief court erred as a matter of law when it wholly failed to undertake a prejudice analysis. Instead of undertaking this necessary prejudice analysis, the court merely stated in conclusory fashion that “Applicant was therefore prejudiced by Trial Counsel’s failure to object to the trial judge’s use of the term “strong evidence” in his instruction to the jury.” (App. 405). By failing to make any prejudice findings, the post-conviction relief court failed to make the necessary findings to support its grant of relief.

Moreover, Gould cannot establish any resulting prejudice from trial counsel’s failure to object to the erroneous jury instruction because there is no evidence he was merely present. In contrast, the evidence presented at trial firmly established Gould was in possession of cocaine

and distributed that cocaine to an undercover law enforcement officer who was recording the encounter. Therefore, the post-conviction relief court erred in granting relief.

In both Cheeks opinions, this Court ruled neither petitioner could establish any resulting prejudice from the trial court's erroneous instruction because there was no evidence either were "merely present" in the house where the drugs were located. See Cheeks, 408 S.C. at 200, 758 S.E.2d at 716 ("However, we also find petitioner was not prejudiced by the charge. There was no evidence that petitioner was 'merely present;' rather, petitioner provided financial assistance to the drug operation, aided and abetted the operation, and was in actual possession of the drugs."); Cheeks, 401 S.C. at 329, 737 S.E.2d at 484 ("Appellant cannot show prejudice from the charge in this case, however, as there was no evidence that he was 'merely present' at Markley's house when the search warrant was executed. Rather the evidence was that he was actively cooking crack cocaine when the warrant was served, and that he possessed the 650 grams of crack found on the kitchen counter. Further, in light of the overwhelming evidence of appellant's guilt, he cannot demonstrate prejudice warranting reversal from the adjective 'strong' used in the charge.").

In Gould's case, there is similarly a dearth of evidence that Gould was "merely present" when cocaine was distributed to Detective Frederick and Boyd. Evidence presented at trial firmly established Gould met with Detective Frederick and Boyd for the express purpose of providing the women with cocaine, possessed and used cocaine in front of Detective Frederick and Boyd, and offered both women cocaine, all of which was recorded by multiple recording devices. Similarly, Gould expressed fear he would be sent to prison for providing the women with cocaine and went through great lengths to conceal his distribution, including moving the women to three different locations in and around Joe Pasta before leaving the cocaine on the ground near

the women and advising them of its presence in an effort to have them take it. Petitioner cannot establish any prejudice from the trial court's jury instruction because there is no evidence he was "merely present" during the distribution of cocaine to Detective Frederick and Boyd.

Because Petitioner cannot establish any requisite prejudice, the post-conviction relief court erred as a matter of law in finding trial counsel constitutionally ineffective. Based on the foregoing, the post-conviction relief court erred in granting Gould relief and remanding his case to the court of general sessions for a new trial. Therefore, the State asks this Court to grant certiorari and ultimately reverse the lower court's grant of post-conviction relief.

CONCLUSION

For all the foregoing reasons, the State requests that this Court grant this petition for writ of certiorari and reverse the post-conviction relief court's grant of a new trial.

Respectfully submitted,

ALAN WILSON
Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General
S.C. Bar No. 100108

BY: 
MEGAN HARRIGAN JAMESON

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR PETITIONER

September 28, 2018

STATE OF SOUTH CAROLINA
In the Supreme Court

On Writ of Certiorari to Charleston County
Maite D. Murphy, Post-Conviction Relief Judge
Deadra L. Jefferson, Trial Court Judge

Appellate Case No. 2018-000867

DALE GOULD,

Respondent,

v.

THE STATE OF SOUTH CAROLINA,

Petitioner.

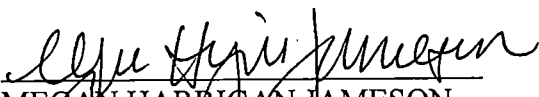
PROOF OF SERVICE

I, Megan Harrigan Jameson, certify that I have served the within Petition for Writ of Certiorari and Appendix on Respondent by depositing two copies of the same interagency mail to be delivered to the address below on today's date:

Appellate Defender Laura R. Baer
S.C. Comm. on Indigent Defense – Division of Appellate Defense
P.O. Box 11589
Columbia, South Carolina 29211-1589

I further certify that all parties required by Rule to be served have been served.

This 28th day of Sept., 2018.


MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General
S.C. Bar No. 100108

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737



ALAN WILSON
ATTORNEY GENERAL

RECEIVED
SEP 28 2018
S.C. SUPREME COURT

September 28, 2018

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: Dale Gould v. State – Appellate Case No. 2018-000867

Dear Mr. Shearouse:

Enclosed please find the original and six copies of the Petition for a Writ of Certiorari and Appendix, along with proof of service, for filing in the above-referenced appeal.

Sincerely,

Megan Harrigan Jameson
Senior Assistant Deputy Attorney General
S.C. Bar No. 100108

MHJ/jaj
Enclosures

cc: Appellate Defender Laura R. Baer
Victim Advocacy Division