

Telephone
(803) 818-5700

Facsimile
(803) 818-5701



616 E. Liberty Street
P.O. Box 1030
York, SC 29745

December 11, 2018

The Supreme Court of South Carolina
Attention: The Honorable Daniel E. Shearouse
Post Office Box 11330
Columbia, SC 29211

RE: *David T. Gallman v. State of South Carolina*
Case No.: 2016-CP-44-489

Dear Mr. Shearouse:

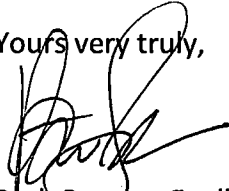
Please find enclosed the original and one copy of the Notice of Appeal, Motion to File *In Forma Pauperis*, a copy of the order that is the subject of the appeal, and Proof of Service in the above referenced matter. Please file these documents with your office and return the copies to me in the enclosed self-addressed stamped envelope.

By copy of this letter, I am also serving the Defendant's counsel.

If you have any questions concerning this matter, please do not hesitate to contact me at (803) 818-5700.

With kind regards, I am

Yours very truly,


Beth Ramsey Faulkner
Attorney

BRF/tsh

Enc.: As Noted.

cc: Julie A. Coleman, Esq.
SCCID
David T. Gallman

RECEIVED
DEC 14 2018
S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM UNION COUNTY
COURT OF COMMON PLEAS

ROGER E. HENDERSON, CIRCUIT COURT JUDGE

2016-CP-44-489

David T. Gallman
Appellant

vs.

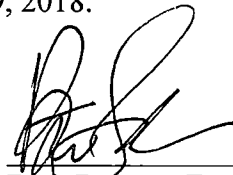
State of South Carolina
Respondent

RECEIVED
DEC 14 2018
S.C. SUPREME COURT

NOTICE OF APPEAL

David T. Gallman appeals the Order of Dismissal in this Post-Conviction Relief action issued by the Honorable Roger E. Henderson on November 8, 2018. Appellant received written notice of entry of this order on November 29, 2018.

December 11, 2018
York, South Carolina



Beth Ramsey Faulkner
Faulkner Law Firm, LLC
P.O. Box 1030
616 E. Liberty Street
York, South Carolina 29745
(803) 818-5700
Attorney for Appellant

Other Counsel of Record:

Julie A. Coleman, Esq.
PO Box 11549
Columbia, SC 29211
Attorney for Respondent

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM UNION COUNTY
COURT OF COMMON PLEAS

ROGER E. HENDERSON, CIRCUIT COURT JUDGE

2016-CP-44-489

David T. Gallman
Appellant

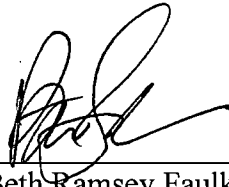
vs.

State of South Carolina
Respondent

MOTION TO FILE *IN FORMA PAUPERIS*

I, Beth Ramsey Faulkner, hereby motion the court to allow the filing of the Notice of Appeal in this matter, without requirement of the filing fee. Appellant appeals the Order of Dismissal in this Post-Conviction Relief action and Appellant was appointed Counsel on the Post- Conviction Relief action due to indigency by Appointment of Counsel dated January 11, 2017 (see attached).

December 11, 2018
York, South Carolina



Beth Ramsey Faulkner
Faulkner Law Firm, LLC
P.O. Box 1030
616 E. Liberty Street
York, South Carolina 29745
(803) 818-5700
Attorney for Appellant

STATE OF SOUTH CAROLINA)
COUNTY OF UNION)
David T Gallman,)
Plaintiff(s), FILED FOR RECORD)
-vs-)
South Carolina State of, 2017 JAN 11 AM 10 18)
Defendant(s).)

IN THE COURT OF COMMON PLEAS
16th JUDICIAL CIRCUIT
CASE NO.: 2016CP4400489
APPOINTMENT OF COUNSEL OR GAL
(Select one.)

ORDER
 AMENDED ORDER

CLERK OF COURT PROCEEDING: (Check one.)

- Post-Conviction Relief (PCR)/habeas case, UNION, SC Adoption Juvenile
 SVP case Custody and/or Visitation Abuse and Neglect
 Minor Name Change Other: Post Convict Rel 500

It appears David T Gallman, who is a litigant in this case, is entitled to court-appointed counsel or a guardian ad litem.

It further appears that: (Select only one.)

- counsel/guardian ad litem has not yet been appointed by the court; therefore, an appointment for counsel/guardian ad litem is necessary.
 counsel or a guardian ad litem was previously appointed by the court but has indicated either a possible conflict of interest, an entitlement to exemption, or other good cause warranting the appointment of new counsel or guardian ad litem based on:
 counsel was previously appointed by the court but has not indicated that the litigant has retained private counsel and is no longer entitled to appointed counsel.
 court appointed counsel has obtained , Esquire as substitute counsel pursuant to Rule 608(h)(2); provided, however, only the member who originally received the appointment and who sought substitute counsel shall receive credit.
 Other:

Therefore, it is ordered that N. Beth Ramsey Faulkner hereby is appointed as (Select one.)

Counsel lead counsel (if capital PCR case) guardian ad litem
for the above-named person. Any counsel or GAL previously appointed is/are hereby relieved.

(If Death Penalty PCR Case) It is further ordered that , Esquire, is hereby appointed as second counsel in this capital PCR case.

The clerk of court is directed to forward a copy of this order to all persons entitled to notice.

IT IS SO ORDERED
January 11, 2017

Melanie L. Lawson/dw
 Circuit Judge Clerk of Court

Plaintiff Attorney:

N. Beth Ramsey Faulkner	
PO Box 1030	
York, SC 29745-0300	

Defendant Attorney:

Justin James Hunter	
PO Box 11549	
Columbia, SC 29211-1549	

NOTICE: SC Supreme Court Order of September 29, 2006, requires appointed counsel entitled to payment from the Office of Indigent Defense (OID) to register the case online with OID within fifteen (15) days of this appointment at www.sccid.sc.gov, and further directs that reimbursement vouchers be submitted directly to SCCID and not to the trial judge or clerk of court. See SCCID website for further details.

Rec'd
11-28-18

STATE OF SOUTH CAROLINA)
COUNTY OF UNION)
David T. Gallman, #313769,)
Applicant,)
v.)
State of South Carolina,)
Respondent.)

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT

2016-CP-44-489

ORDER OF DISMISSAL

FILED FOR RECORD
2018 NOV 19 AM 11 19
CLERK OF COURT
UNION, SC

This matter comes before the Court by way of a post-conviction relief (PCR) application filed on December 19, 2016. Respondent submitted its Return on May 18, 2017. An evidentiary hearing was convened on April 17, 2018, at the York County Courthouse. Applicant was present at the hearing and was represented by Beth Faulkner, Esquire. Respondent was represented by Assistant Attorney General Justin Hunter of the South Carolina Attorney General's Office.

At the evidentiary hearing, Applicant testified on his own behalf. Respondent presented testimony from Eric Delaney, Esquire ("Trial Counsel"). This Court had before it the records of the Union County Clerk of Court regarding the subject convictions, the transcript from Applicant's trial, Applicant's appellate records, Applicant's records for the Department of Corrections, and the pleadings. The Court finds as follows:

I. PROCEDURAL HISTORY

The records before this Court indicate David T. Gallman ("Applicant") is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Union County Clerk of Court. Applicant was indicted at the March 2014 term of the Union County Grand Jury for possession of crack with intent to distribute (2014-GS-44-0077). Erik Delaney, Esquire, represented him. Deputy Solicitor John Anthony prosecuted the case. On July

8-9, 2014, Applicant proceeded to a trial before the Honorable John C. Hayes, III, after which the jury found Applicant guilty as indicted. Judge Hayes sentenced Applicant to imprisonment for thirty years.

Applicant filed a timely Notice of Appeal. Appellate Defender Benjamin Tripp perfected an appeal on Applicant's behalf by filing an Anders¹ brief. The South Carolina Court of Appeals dismissed the appeal after review pursuant to Anders. State v. David Terrell Gallman, Un. Op. No. 2016-UP-041 (S.C. Ct. App. Filed January 20, 2016). The remittitur was issued on February 5, 2016.

II. ALLEGATIONS

In his current application, Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel
 - a. "Was counsel ineffective for failing to object to the trial judge's jury instructions that not only shifted the burden of proof in violation of due process, but the jury could have easily interpreted the comment as an impermissible comments on the facts which is prohibited in South Carolina"
 - b. "Was trial counsel ineffective for failing to object to the solicitor's improper closing summation that violated the 'golden rule.'"
 - c. "Counsel failed to object to the trial court telling the jury to cross out one of the verdicts and leave the top one, which was the greater offense"

Applicant filed a *pro se* amendment to his application on June 21, 2017, adding an allegation of "Ex post Facto Violation due to the change of my 65% sentence to 85% percent [sic] thus a harsher sentence in violation of the Ex post factor Clause." The State did not oppose the filing of the amendment at the evidentiary hearing.

¹ Anders v. California, 386 U.S. 738 (1967).

III. SUMMARY OF RELEVANT TESTIMONY PRESENTED

Applicant's testimony

At the evidentiary hearing, Applicant testified he met with Trial Counsel three or four times before his trial on July 9, 2014. Applicant stated that during their meetings, Trial Counsel and he discussed his case. Applicant testified that Trial Counsel really tried to get him to plead guilty but Applicant did not want to plead guilty. Applicant testified he was facing charges of possession of crack-cocaine, two distribution charges from separate incidents, and assault and battery. Applicant stated he went to trial on the possession with intent to distribute charge, third offense, and was convicted. Applicant testified he was given a plea offer for zero to ten years but he rejected it. Applicant stated he did not know he could even face thirty years at trial because Trial Counsel never advised him of his exposure. He asserted that he would have taken the plea offer if he had known he could get thirty years at trial.

Applicant testified he thought he was going to trial on a different charge when he showed up for his trial. He stated Trial Counsel showed him discovery including pictures from the discovery file but Trial Counsel told him he wasn't worried about this case. Applicant testified that Trial Counsel should have objected when the trial court instructed the jury to correct their verdict sheet. Tr. 185, line 14. Applicant testified that they came to him at Perry and told him to sign his new eighty-five percent date—they changed his parole eligibility and maxout date a year and a half after he was incarcerated. Applicant stated that before this he was eligible for parole but that the drug law changed, changing his parole date. He stated he did not know this would happen when he was sentenced.

Applicant testified that the State introduced evidence of another alleged drug transaction as evidence of a prior bad act. He stated the trial judge charged the jury to consider the prior bad



act only for purposes of intent and Trial Counsel did not object to the evidence coming in at trial. Applicant stated Trial Counsel should have kept out this prior bad act evidence. He testified that Deputy Solicitor Anthony used a shoe metaphor in the closing argument to the jury, which violated the Golden Rule.

Trial Counsel's testimony

At the evidentiary hearing, Trial Counsel testified he was appointed to Applicant's case on August 6, 2013, through the Union County Public Defender's Office. He testified that he met with Applicant at least a dozen times before the trial, in his office, in the courtroom, and in the grand jury room. He stated he received the discovery from the State and reviewed it with Applicant. Trial Counsel testified this started as a "drop" case. He stated the police had a warrant, they saw Applicant drop a small amount of illegal drugs, and they found five or six grams of drugs. Trial Counsel stated Applicant was also charged with two counts of distribution. He testified that the State put them on notice that they would use at least one of those incidents to show intent at this trial. Trial Counsel testified that he objected to this evidence being admitted at a pre-trial hearing because there was a six month gap between the incidents but the judge overruled his objection. Trial Counsel testified the jury charge over this evidence was not objectionable because Crawford's testimony about this evidence was limited to Applicant's intent and the court gave a limiting instruction. Trial Counsel stated that he explained this evidence to Applicant. Trial Counsel testified that he told Applicant he thought the evidence would be allowed in and it would make it more difficult at trial.

Trial Counsel testified he tried to get the names of people who were at the crime scene as potential witnesses but he could only get one of them to testify at trial. He stated Applicant was cooperative during the course of his representation and Applicant understood the charges and



knew what he was going to trial on that day. Trial Counsel testified that the State offered Applicant a plea offer to plead guilty to PWID first offense with a cap of ten years. Trial Counsel stated he explained to Applicant that a first offense was different than what he was facing at trial, and he tried to convince Applicant to accept the plea offer. He stated that he did tell Applicant that he could get thirty years at trial.

Trial Counsel testified that when the jury came back with an incorrect verdict form, the trial judge told the jury to go back and make a collective decision to mark out whichever one was incorrect. He stated there was no reason to object to the verdict form after the judge's instruction because it was neutral and corrected the issue. Trial Counsel testified that he told Applicant before the trial that he would serve an eighty-five percent "no parole" sentence if convicted. Trial Counsel stated he did not find the Solicitor's closing argument to be objectionable, as it was not a violation of the Golden Rule. He explained that the Golden Rule prevents solicitors from asking the jury to put themselves in the victim's shoes, metaphorically, but there was no victim in Applicant's case. He stated the Solicitor's shoe store analogy was unrelated to the Golden Rule, so he did not object on those grounds.

Trial Counsel testified he did not find the trial court's jury instruction on constructive possession to be objectionable. He testified the charge correctly explained that constructive possession requires an element of knowledge and control and that the evidence in this case satisfied this element. Trial Counsel stated the officer testified at trial that he *saw* Applicant dropping the drugs and the drugs were found in close proximity.

IV. APPLICABLE LAW

In a post-conviction relief action, the 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).



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, (1984); Butler, 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, 286 S.C. 441, 334 S.E.2d 813 (1985). 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 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.

V. 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

Applicant alleges Trial Counsel was ineffective in his representation before and during his trial. This Court finds Applicant has failed to meet his burden of proving any of his allegations and that Trial Counsel was not ineffective in any of his actions or inactions. Each individual allegation is addressed as follows:

Failure to object to jury instructions

Applicant's allegation that Trial Counsel was ineffective for failing to object to the trial court's jury instructions is meritless. First, although Applicant alleges he failed to object to the introduction of evidence of a prior bad act, the record shows Trial Counsel did object to this evidence in a pre-trial hearing, but his motion was denied. Applicant has failed to prove anything further Trial Counsel could have done that would have resulted in the suppression of this evidence, and this allegation is denied.

Second, Applicant asserts Trial Counsel was ineffective for failing to object to the jury instruction on "constructive possession." At trial, the court gave the following instruction:

There are two kinds of possession to both the higher, possession with intent to distribute, or the lower is simple possession. There are two types of possession, - actual and constructive.

Constructive possession is when a person has dominion or control or the right to oversee the dominion or control of a substance or the premises where the substance is located.

Possession may- be inferred from the circumstances and may be imputed to anyone who has the power and intent to control the disposition of the subject - of the object at issue. In other words, possession of an object or the premises where the object is found gives rise to an inference that the person charged had both the power and the intent to control and disposition of the substance.

Actual knowledge of the presence of the substance is strong evidence of intent to control its disposition or use. However, the mere presence of a person in the area



where an illegal substance is found is not alone and is not enough by itself to give rise to the necessary inference. The State must prove that Mr. Gallman had both the power, that is the actual or constructive control, and the intent to control the disposition of the substance.

Actual control occurs when a controlled substance, and crack cocaine is by the laws of our State a. controlled substance, is found to be in the actual physical custody of the person charged.

Constructive possession occurs when the person charged with possession has dominion- and control over either the controlled substance itself or the premises upon which the controlled substance is found.

Constructive control, constructive possession means that, the defendant's knowledge and possession may be inferred that the controlled substance was found on the premises under his control. This is a permissive inference. You are free to accept or reject this inference depending upon your view of the evidence. Constructive control may be established by circumstantial as well as by direct evidence and constructive control may be shared by two or more individuals.

Tr. 175, line 9 – 177, line 1.

This Court finds the trial court's jury instructions on this topic were proper and correct under South Carolina law. Although the instruction did include an improper comment on the facts under State v. Cheeks, 408 S.C. 198, 758 S.E.2d 715 (2014)², the instruction did not prejudice Applicant. Here, as in Cheeks, there was no evidence that Applicant was "merely present," and there was evidence presented of actual possession by Applicant. As Trial Counsel testified, the officer testified at trial that he actually saw Applicant drop the drugs before he was arrested. Accordingly, Applicant has failed to prove both prongs of the Strickland test, and this allegation is denied and dismissed with prejudice.

Failure to object to Golden Rule violation

Applicant's allegation that Trial Counsel was ineffective for failing to object to a Golden Rule violation in the solicitor's closing argument is meritless. A solicitor violates the

² Holding that the instruction "actual knowledge of the presence of the crack cocaine is strong evidence of intent to control its disposition or use" was an improper comment on the facts and unduly emphasized the evidence.



“Golden Rule” when they appeal to the personal biases of the jury and arouse the jury’s passions or prejudices by asking them to imagine themselves as the victims in the case. “A Golden Rule argument *asking the jurors to place themselves in the victim’s shoes* tends to completely destroy all sense of impartiality of the jurors, and its effect is to arouse passion and prejudice.” Brown v. State, 383 S.C. 506, 515-16, 680 S.E.2d 909, 914 (2009) (citing State v. Reese, 370 S.C. 31, 38, 633 S.E.2d 898, 901 (2006)) (emphasis added).

Here, in Deputy Solicitor Anthony’s closing argument, he used an example of meeting someone who has twenty-four different pairs of shoes, all of the same kind, and using common sense to assume that they don’t have them all for personal use, but are selling them. Tr. 164, line 25-165, line 22. His example was, literally, about shoes. Applicant now claims this example was improper because it asked the jurors to put themselves in the victim’s shoes. However, as Trial Counsel credibly testified at the evidentiary hearing, there was nothing objectionable about this statement because this argument was not a Golden Rule violation and there are no victims in Applicant’s drug case. Accordingly, because the argument was not objectionable, Trial Counsel was not deficient for failing to object, and there is no resulting prejudice. Therefore, Applicant has failed to prove he was ineffective under Strickland, and this allegation is denied and dismissed with prejudice.

Failure to object to trial court jury instruction

Applicant’s allegation that Trial Counsel was ineffective for failing to object to the trial court telling the jury to cross out one of their verdicts on the verdict form is meritless. At trial, the jury returned from its deliberations and handed the judge the verdict form. The judge announced:

THE COURT: All right. You’ve got two places marked.
It’s the top one. Do you want to go back and mark out and initial it.



THE FOREMAN: I can.
THE COURT: I think the whole jury needs to go back out and correct it. Whichever one is inappropriate, just strike through it and initial it. Of course I will show it to everybody but the top two lines both have been checked.

Tr. 185, line 14-24. When the jury returned, they had crossed out the lesser offense and found Applicant guilty of possession of crack with intent to distribute. Tr. 186.

Applicant claims Trial Counsel should have objected to the court's instruction. Trial Counsel testified he saw no reason to object after the trial judge told the jury to go back together and choose whichever one was correct. This Court agrees that the curative instruction was neutral and properly instructed the jury to choose whichever verdict they agreed upon. Accordingly, this instruction was not objectionable, and Trial Counsel was not deficient for failing to object. Any objection would not have changed the outcome of the trial, and thus there is no prejudice. Therefore, this allegation is denied and dismissed with prejudice.

CONSTITUTIONAL VIOLATION

Applicant's allegation of an "ex post facto" violation based on the alleged changing of his sentence from parole eligible to not parole eligible is denied and dismissed. First, this allegation is improper for post-conviction relief, as it is an attack on collateral consequences of his sentence, which should be raised in administrative courts. Al-Shabazz v. State, 338 S.C. 354, 367, 527 S.E.2d 742, 749 (2000) (holding an ex post facto claim is not appropriate for PCR, as "PCR is a proper avenue of relief only when the applicant mounts a collateral attack challenging the validity of his conviction or sentence."); Jernigan v. State, 340 S.C. 256, 531 S.E.2d 507 (2000) (holding an ex post facto claim arising out of change from annual to biannual review for parole was not cognizable under the PCR statute, as the ex post facto claim was not a collateral attack on the validity of petitioner's conviction or sentence.).



Regardless, Trial Counsel credibly testified at the evidentiary hearing that he advised Applicant that he would serve an eighty-five percent "no parole" sentence if he were convicted of this offense. Applicant was aware of his parole eligibility, which was a factor he took into consideration when choosing to plead guilty or go to trial. Applicant has failed to prove any sort of constitutional violation regarding this claim that entitles him to a new trial. Accordingly, this allegation is denied and dismissed with prejudice.

[signature page to follow]

A handwritten signature in black ink, appearing to be the initials 'MJC' or similar, located at the bottom right of the page.

VI. 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), SCRPC, 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 the application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. Applicant must be remanded to the custody of Respondent.

AND IT IS SO ORDERED this 8th day of November, 2018.



ROGER E. HENDERSON
Presiding Judge
Sixteenth Judicial Circuit


_____, South Carolina

FILED FOR RECORD
2018 NOV 19 PM 11 19
CLERK OF COURT
UNION, SC

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM UNION COUNTY
COURT OF COMMON PLEAS

ROGER E. HENDERSON, CIRCUIT COURT JUDGE

2016-CP-44-489

David T. Gallman
Appellant

vs.

State of South Carolina
Respondent

RECEIVED
DEC 14 2018
S.C. SUPREME COURT

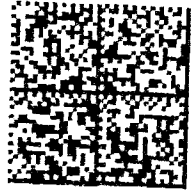
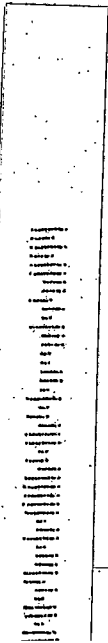
PROOF OF SERVICE

I certify that I have served the Notice of Appeal by depositing a copy of it in the United States Mail, postage prepaid on December 12, 2018 addressed to the attorney of record, Julie A. Coleman, Esq., PO Box 11549, Columbia, SC 29211.

December 12, 2018
York, South Carolina



Beth Ramsey Faulkner
Faulkner Law Firm, LLC
P.O. Box 1030
616 E. Liberty Street
York, South Carolina 29745
(803) 818-5700
Attorney for Appellant



FP [®] **US POSTAGE**
\$ 001.84

First-Class
12/12/2018
Zip 29115

033A 0071801905