AIKEN & HIGHTOWER, PA
Attorneys at Law
2231 Devine Street, Suite 201
Columbia, SC 29205
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Arthur K. Aiken ***A. Bea Hightower***

July 25, 2019

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

RECEIVED
JUL 29 2019
S.C. SUPREME COURT

Re: Worth Edward Cook # 293532 v. State of South Carolina
Civil Action No.: 2018-CP-32-01554

Dear Mr. Shearouse:

I am appointed counsel for the Applicant, Worth E. Cook, in the above captioned post-conviction relief case. I have enclosed an original and one (1) copy of a Notice of Appeal for this case. Please file the original and return the file stamped copy in the enclosed SASE.

By copy of this letter with the filing enclosed, I have filed the filing with the Clerk of the Lexington County Court of Common Pleas. I have also served the filing on the Office of the Attorney General for South Carolina. Please call with any questions.

Thank you for your help

Sincerely,

Arthur K. Aiken
art@aikenandhightower.com

cc: Clerk, Lexington County Court of Common Pleas (w/enclosures)
Office of the Attorney General for South Carolina (w/enclosures)
Worth E. Cook (w/enclosures)

RECEIVED
JUL 29 2019
S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Walton J. McLeod, IV, Circuit Court Judge

Case No. 2018-CP-32-01554

Worth Edward Cook #293532..Applicant/Appellant

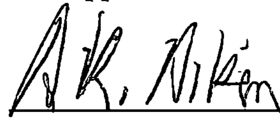
v.

State of South Carolina..Respondent/Respondent

NOTICE OF APPEAL

This is a post-conviction relief case. Appellant appeals from the Order of Dismissal filed on June 27, 2019 in this case. Appellant received written notice of the Order of Dismissal by mail on June 28, 2019. A copy of the Order of Dismissal appealed from is attached.

July 25, 2019



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ATTORNEYS FOR APPELLANT

OTHER COUNSEL OF RECORD:
South Carolina Attorney General's Office
Assistant Attorney General Johnny E. James, Jr.
PO Box 11549
Columbia, SC 29211
ATTORNEYS FOR RESPONDENT

RECEIVED
JUL 29 2019
S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Walton J. McLeod, IV, Circuit Court Judge

Case No. 2018-CP-32-01554

Worth Edward Cook #293532...Applicant/Appellant

v.

State of South Carolina...;.....Respondent/Respondent

PROOF OF SERVICE AND FILING

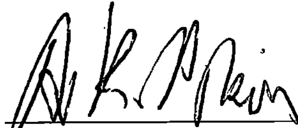
I certify that, on July 25, 2019, I served and filed the Notice of Appeal in this case by mailing copies of the Notice to:

South Carolina Attorney General's Office
Assistant Attorney General Johnny E. James, Jr.
PO Box 11549
Columbia, SC 29211

and

The Honorable Lisa M. Comer
Lexington County Clerk of Court
205 E. Main Street
Lexington, SC 29072

SIGNATURE ON THE FOLLOWING PAGE



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Columbia, SC
July 25, 2019

COPY

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE ELEVENTH JUDICIAL CIRCUIT
COUNTY OF LEXINGTON	)	
	)	
Worth Edward Cook,	)	Case No.: 2018-CP-32-01554
S.C.D.C. No. 293532,	)	
	)	
Applicant,	)	
	)	**ORDER OF DISMISSAL**
v.	)	
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

2019 JUN 27 PM 4:43
LISA M. COMER
CLERK OF COURT
FILED

This matter comes before the court by way of an application for post-conviction relief filed by Worth Edward Cook ("Applicant") on May 4, 2018. Respondent made its return on or about August 16, 2018. The court convened an evidentiary hearing into the matter on Friday, April 5, 2019, at the Marc H. Westbrook Judicial Center in Lexington, South Carolina. Worth Edward Cook ("Applicant") was present at the hearing and represented by Arthur K. Aiken, Esq. Johnny Ellis James Jr., of the South Carolina Attorney General's Office, represented the State of South Carolina ("Respondent").

Applicant was present but did not testify at the evidentiary hearing. Applicant's trial counsel, Elizabeth Fullwood, Esq. ("Counsel") testified. The court had before it Applicant's records from the South Carolina Department of Corrections, the records of the Lexington County Clerk of Court regarding the subject convictions, Applicant's direct appeal records (including the entire trial transcript as included in the Record on Appeal), the pleadings, and a transcript excerpt relating to case law submitted by Respondent.[1] The court finds as follows:

[1] Tr. 2702-03 of State v. Cottrell, 2003-GS-26-00020, as it related to State v. Cottrell, 421 S.C. 622, 643-44, 809 S.E.2d 423, 434-35 (2017).

I. PROCEDURAL HISTORY

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Lexington County Clerk of Court. Applicant was indicted at the January 2014 term of the Lexington County Grand Jury for murder (2014-GS-32-00228). Elizabeth C. Fullwood and Sally J. Henry, Esqs. represented Applicant. D. Shawn Graham and Micah Caskey, Esqs., of the Eleventh Circuit Solicitor's Office, prosecuted the case. On February 29, 2016, Applicant proceeded to trial before Judge R. Knox McMahon and a jury. The jury found Applicant guilty as indicted on March 4, 2016. Judge McMahon sentenced Applicant to imprisonment for a term of 35 years.

Applicant filed a timely notice of appeal and a direct appeal was perfected by Susan B. Hackett, Esqs. filing a brief pursuant to Anders v. California, 386 U.S. 738 (1967), which offered the following issue:

> Did the trial judge err in admitting statements made by Appellant to law enforcement where (1) the police failed to scrupulously honor his invocation of his right to counsel and (2) the police coerced him to waive his rights to counsel and silence by threatening to arrest the mother of his child and place his child in the custody of social services?

The South Carolina Court of Appeals dismissed Applicant's appeal by unpublished opinion. State v. Cook, Op. No. 2018-UP-139 (S.C. Ct. App. filed April 4, 2018). The Remittitur was issued on April 24, 2018.

Present Application

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

1. "Ineffective defense attorney/counsel;"

   a. "The defense intentionally withheld arguments, and show all discovery evidence at time of trial. They also violated the Bruton violation. They allowed evidence to be admitted into the trial for the judge and jurors

to hear that helped convicted the defendant. They failed to investigate the full facts and circumstances of the case. They only objected to irrelevant testimonies. Defense counsel as had conflict of interest, because they could have been called as a witness for the defendant. The defense counsel knowledge of the defendant dropping out of school 17 years old and got his GED in prison also know that the defendant has a low IQ that has declined since he has gotten older. He also placed in the 1st to 4th percentile among his peers. They also know he couldn't spell or understand the English [language] and couldn't read."

2. "Unfair trial – due process violations clause;"
   a. "The defendant had a [sic] unfair trial. Falsified evidence, bungled investigations, and inadequate defense. The defendants fifth and fourteenth amendment has been violated also the sixth amendment."
3. "Prosecutorial misconduct."
   a. "False confessions, falsified evidence, prosecutorial corruption, failure to disclose exculpatory evidence, testifying – allowing witnesses to perjury under oath swearing of a false oath to tell the truth spoken and written."

Applicant, by and through PCR counsel, Arthur Aiken, thereafter amended his application to allege the following additional grounds for relief:

1. "The performance of Cook's trial counsel was deficient because they did not object to the trial court's failure to include the permissive inference jury instruction in its jury instructions on inferred malice. Cook was prejudiced by this deficient performance."
   a. "The trial court gave inferred malice instructions to Cook's jury. (Tr. 954-55). In State v. Elmore, 279 S.C. 417, 308 S.E.2d 781 (1983), overruled on other grounds, State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991), our Supreme Court required that inferred malice instructions include a permissive inference instruction that '[I]f facts, are proved beyond a reasonable doubt, sufficient to raise an inference of malice to your satisfaction, this inference would simply an evidentiary fact to be taken into consideration by you, the jury, along with other evidence in the case, and you may give it such weight as you determine it should receive.' Elmore, 279 S.C. at 421, 308 S.E.2d at 784. The Elmore Court also cautioned the bench 'that hereafter only slight deviations from this charge will be tolerated.' Elmore, 279 S.C. at 421, 308 S.E.2d at 784."
   b. "The Elmore permissive inference instruction was not given by the trial court during Cook's trial, and this failure to give the permissive inference charge was reversible error. (Tr. 954-55). Cook's counsel did not object to

> the trial court's failure to give the permissive inference instruction. (Tr. 967-72). Cook's counsel's failure to object to the trial court's failure to give the Elmore permissive inference instructions rendered Cook's counsel's performance deficient. This deficiency in the performance of Cook's counsel prejudiced Cook in that the failure to include the permissive inference language in the inferred malice instructions most probably contributed to the verdict based on all the evidence submitted to the jury. See, Gibson v. State, 416 S.C. 260, 786 S.E.2d 121 (2016) (denial of PCR application reversed on findings that failure to object to Elmore error deficient performance and that erroneous instruction contributed to the verdict)."

Applicant requests relief as follows in his amended application:

- "Order vacating conviction and sentence."

At the evidentiary hearing, Applicant proceeded forward only on the amended allegation.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this court has reviewed the records submitted to it by the parties and the legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80, this court makes the following findings based upon all of the probative evidence presented.

A. Ineffective Assistance of Counsel

Applicant's allegations of ineffective assistance of counsel are without merit. In a PCR action, Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland. First, Applicant must prove that counsel's performance was deficient. Strickland, 466 U.S. at 686; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). "When counsel focuses on some issues to the exclusion of others, there is a strong presumption that he [or she] did so for tactical reasons rather than through sheer neglect." Yarborough v. Gentry, 540 U.S. 1, 5 (2003) (citing Strickland, 466 U.S. at 690). The court, in determining deficiency, must affirmatively entertain the range of possible reasons counsel may have had for proceeding as they did. Cullen v. Pinholster, 563 U.S. 170, 196 (2011); Harrington v. Richter, 562 U.S. 86, 109-10 (2011). "[E]ven if an omission is inadvertent, relief is not automatic. The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." Yarborough at 6; see also Murphy v. Davis, 901 F.3d 578, 592 (5th Cir. 2018) ("[C]ounsel's performance need not be optimal to be reasonable."). Applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625.

Second, counsel's deficient performance must have prejudiced 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. "The prejudice analysis requires the court deciding the ineffectiveness claim to consider the totality of the

evidence before the judge or jury." United States v. Basham, 789 F.3d 358, 371-72 (4th Cir. 2015) (quoting Elmore v. Ozmint, 661 F.3d 783, 858 (4th Cir. 2011)).

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. Strickland, 466 U.S. at 696. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant 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. Id. at 696-97.

1. Failure to Request General Permissive Inference of Malice Instruction

Applicant's claim that Counsel was ineffective for failing to request or otherwise object to the omission of the general permissive inference of malice instruction. In State v. Elmore, 279 S.C. 417, 803 S.E.2d 781 (1983), overruled on other grounds by State v. Torrence, 305 S.C. 45, 69 n. 5, 406 S.E.2d 315, 328 n. 5 (1991), the South Carolina Supreme Court held that the trial court's instruction on malice as it related to the use of a deadly weapon constituted a mandatory presumption, and set forth a jury charge consistent with the Due Process Clause for trial courts to utilize in the future:

> The law says if one intentionally kills another with a deadly weapon, the implication of malice may arise. If facts are proved beyond a reasonable doubt, sufficient to raise an inference of malice to your satisfaction, this inference would simply [be] an evidentiary fact to be taken into consideration by you, the jury, along with other evidence in the case, and you may give it such weight as you determine it should receive.

Elmore, 279 S.C. at 421, 308 S.E.2d at 784. The Elmore Court firmly advised the bench "that hereafter only slight deviations from this charge will be tolerated." Id.

The South Carolina Supreme Court returned to the inference of malice from the use of a deadly weapon more than 25 years later in State v. Belcher and held that the first sentence of the

above charge could not be instructed to juries where the record contained evidence to reduce, excuse, mitigate, or justify a homicide or assault and battery with intent to kill. 385 S.C. 597, 685 S.E.2d 802 (2009). The South Carolina Supreme Court distinguished the remainder of the charge as the "general permissive inference instruction," and noted that it remained valid. Id., 385 S.C. at 612, n. 9, 685 S.E.2d at 810, n. 9.

A few years later, in Gibson v. State, the South Carolina Supreme Court reversed a denial of post-conviction relief where the trial court charged the inference of malice from the use of a deadly weapon but failed to include the remainder of the Elmore charge. 416 S.C. 260, 785 S.E.2d 121 (2016). Gibson was decided in simple fashion, without briefing or oral arguments, based on the very reasonable observation that total omission of the general permissive inference language was no "slight deviation" from the Elmore charge, in clear disregard for Elmore's admonition.

At the trial at issue, Applicant secured jury instructions for self-defense and voluntary manslaughter after evidence was presented that the victim, consumed by a meth-fueled rage, attacked Applicant with a knife and kicked his pregnant wife in the stomach. (R. 895-97; R. 955-64). The inference of malice from the use of a deadly weapon was not charged. As to inferred malice, the trial court only instructed the jury that "[m]alice may be inferred from conduct showing a total disregard for human life based on the totality of the circumstances shown to have existed." (R. 954-55).

At the evidentiary hearing, Counsel testified that the trial court did not charge the jury on the inference of malice from the use of a deadly weapon. Counsel acknowledged that Elmore requires the permissive inference instruction in certain circumstances, and that Belcher held it was error to charge the inference of malice from the use of a deadly weapon in most circumstances.

Respondent argued that it was not necessary for the trial court to give Elmore's general permissive inference instruction. Respondent asserted that the general permissive inference of

malice portion of Elmore was only necessary and required as part of a complete instruction on the inference of malice from the use of a deadly weapon, and there was no requirement to charge the language in a stand-alone fashion. Respondent provided the Court a copy of State v. Cottrell, 421 S.C. 622, 809 S.E.2d 423 (2017), as well as a two page excerpt (Cottrell Tr. 2702-03) from the transcript of that trial reflecting the malice charge in that case, which was not quoted in the South Carolina Supreme Court opinion. Citing to the charge in Cottrell, Respondent noted the South Carolina Supreme Court had approved of the total exclusion of the Elmore instruction in that case, and rejected Cottrell's argument that the trial court had an obligation after Belcher to affirmatively instruct juries *not* to infer malice from the use of a deadly weapon. Cottrell, 421 S.C. at 643-44, 809 S.E.2d at 434-35. Finally, Respondent noted that Applicant's trial was prior to Gibson, the case relied upon by Applicant as part of his argument for relief, and that Gibson did not stand for the proposition that the general permissive inference instruction must be given in every case involving malice aforethought.

The court agrees with Respondent. There is no obligation under our current jurisprudence, let alone that in effect at the time of trial, to charge the general permissive inference of malice instruction where, consistent with Belcher, there is no charge on the implication of malice from the use of a deadly weapon. The language of the Elmore charge is specifically tailored to deal with the perceived and real dangers in instructing the jury that inference may be inferred *from the use of a deadly weapon*, and represents a solution to the then-recurring problem of jury instructions which provided for burden-shifting presumptions in violation of the United States Constitution. The second part of the Elmore charge serves as a cautionary restraint on the first part, and is of little instructional value standing alone. Standing alone, the instruction demanded would be confusing. Respondent's provision of the Cottrell charge is well taken, as the relevant portion is not meaningfully distinguishable from the charge at issue, and met with the satisfaction of the

South Carolina Supreme Court. Furthermore, even if the South Carolina Supreme Court subsequently holds that the general permissive inference instruction was required in every case involving malice aforethought, the absence of any clear precedent to that effect at this time and at the time of trial provides that Counsel could not have possibly known to demand the language, or object to its exclusion. For all of these reasons, Applicant cannot show any deficiency on the part of Counsel by way of this allegation.

As to prejudice, even if the charge were required, the court cannot conceive of how Applicant was prejudiced by the absence of the general permissive inference instruction. In the absence of the implication of malice from the use of a deadly weapon, the instruction demanded says little more than what is already instructed to the jury: that they may use evidence and give it such weight as they determine it should receive. See, e.g. (R. 946-47). The court finds there is no reasonable probability the outcome of trial would have been different if only Counsel had requested, and the trial court had charged the jury with a naked general permissive inference instruction. Thus, Applicant has failed to meet his burden of showing Strickland prejudice.

Applicant fails to meet his burden as to either prong of Strickland, and his request for relief is **DENIED**.

III. 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 (30) 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, 409 S.E.2d 395 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the

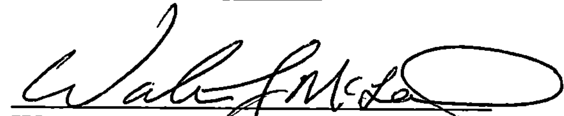
denial of PCR. Rule 71.1(g), SCRCP provides that if the Applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Applicant's attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS, THEREFORE, ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and

2. The Applicant must be remanded to the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 27 **day of** JUNE **, 2019.**



WALTON J. MCLEOD, IV
Presiding Judge
Eleventh Judicial Circuit

Lexington, South Carolina

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2018CP3201554

Worth Edward Cook III 293532		South Carolina State of	
PLAINTIFF(S)		DEFENDANT(S)	

Submitted by:	Attorney for: ☐ Plaintiff ☐ Defendant ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED (*CHECK REASON*):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: ____________________

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: ____________________

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: ____________________

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.
Additional Information for the Clerk: ____________________

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.
Note: Title abstractors and researchers should refer to the official court order for judgment details.
E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

6/27/2019

Circuit Court Judge **Judge Code** **Date**

For Clerk of Court Office Use Only

This judgment was entered on **June 27th 2019**, and a copy mailed first class or placed in the appropriate attorney's box on **June 27th 2019**, to attorneys of record or to parties (when appearing pro se) as follows:

Arthur Kerr Aiken 2231 Devine St. Ste. 201 Columbia, SC 29205

Taylor Zane Smith PO Box 11549 Columbia, SC 29211

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter

Lisa Comer /jp

Lisa M. Comer - Clerk of Court

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

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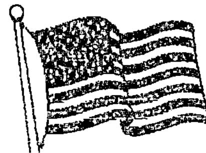

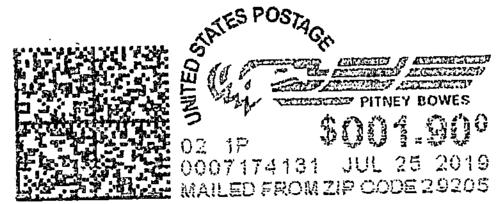

The Honorable Daniel E. Shearouse, Clerk
South Carolina Supreme Court
PO Box 11330
Columbia, SC 29211