

McMAHAN & TAYLOR
ATTORNEYS^{LLC}

August 2, 2019

RECEIVED

AUG 07 2019

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

S.C. SUPREME COURT

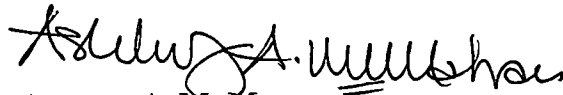
RE: Ivis Ahimara Reyes Yedra, v. State of South Carolina
2017-CP-32-04132

Dear Mr. Shearouse:

Please find enclosed a Notice of Appeal along with the accompanying Order for the above-referenced matter.

I am also including a copy of the email requesting the transcript for this matter.

Best regards,



ASHLEY A. McMAHAN
ATTORNEY AT LAW

AAM

cc: Ivis Ahimara Reyes Yedra
Megan H. Jameson, Asst. Deputy Attorney General
Lexington County Clerk of Court

STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

AUG 07 2019

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

S.C. SUPREME COURT

The Honorable Walton J. McLeod, IV, Circuit Court Judge

Case No. 2017-CP-32-4132

Ivis Ahimara Reyes Yedra, Petitioner,

v.

State of South Carolina, Respondent.

NOTICE OF APPEAL

Applicant, Ivis Ahimara Reyes Yedra, appeals the order of the Honorable Walton J. McLeod, IV, filed June 11, 2019, and the order denying her SCRCF 59 motion filed on July 26, 2019.

Aug. 2nd, 2019


ASHLEY A. MCMAHAN, ESQUIRE

MCMAHAN & TAYLOR, ATTORNEYS, LLC

PO Box 5501
West Columbia, SC 29171

803-219-1110

ashley@macvance.com

SC Bar No. 71676

ATTORNEY FOR APPLICANT

Opposing Counsel:

Megan H. Jameson, Asst. Deputy Attorney General

S.C. Attorney General's Office

PO Box 11549

Columbia, SC 29211-1549

STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

S.C. SUPREME COURT

The Honorable Walton J. McLeod, IV, Circuit Court Judge

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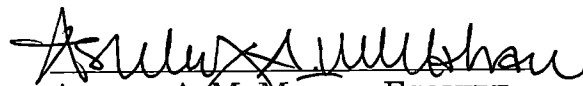
PROOF OF SERVICE

I, Ashley A. McMahan, certify that I have served the within Notice of Appeal on Respondent by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

Megan H. Jameson, Asst. Deputy Attorney General
S.C. Attorney General's Office
PO Box 11549
Columbia, SC 29211-1549

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

Aug 2nd, 2019



ASHLEY A. MCMAHAN, ESQUIRE

MCMAHAN & TAYLOR, ATTORNEYS, LLC

PO Box 5501
West Columbia, SC 29171
803-219-1110

ORIGINAL

FILED

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF LEXINGTON 2019 JUL 26) PH 2:27 FOR THE ELEVENTH JUDICIAL CIRCUIT

Ivis Ahimara Reyes Yedra,
Applicant,

LISA M. COMER
CLERK OF COURT
10/13/19

Case No.: 2017-CP-32-04132

v.

ORDER DENYING APPLICANT'S MOTION
TO ALTER OR AMEND PURSUANT TO
SCRCP 59(a) and (e)

State of South Carolina,
Respondent.

This matter comes before this court by way of Applicant's "Motion to Alter or Amend Pursuant to SCRCP 59(a) and (e)," served and filed on June 21, 2019, asking this court to alter or amend its previously issued order of dismissal denying Applicant's application for post-conviction relief. Respondent made its return to the motion and requested it be summarily dismissed. After reviewing Applicant's motion and Respondent's return, this court finds no basis for altering or amending its previously issued order of dismissal and summarily denies and dismisses Applicant's motion.

Procedural History

The records before this court show Applicant is not presently confined in the South Carolina Department of Corrections as she served her sentence and was release form incarceration. On October 15, 2013, Applicant was indicted by the South Carolina State Grand jury for two counts of trafficking in marijuana pursuant to a multi-defendant, multi-county indictment for unlawful drugs stemming from a large scale marijuana growing operation throughout the midlands area (2013-GS-47-0019, Count 1 & Count 4).

On August 7, 2014, Applicant appeared before Judge Donald B. Hocker, circuit court judge, where she pled guilty to two counts of the lesser-included offense of manufacturing marijuana (first offense). Applicant was represented by Steven E. Amster of the Florida State Bar, who was admitted *pro hac vice*. Assistant Attorney General Larry Wedekind of the South Carolina Attorney General's Office prosecuted the case. Pursuant to negotiations entered into between Applicant and the State for a negotiated five year sentence, Judge Hocker sentenced Applicant to concurrent terms of five years imprisonment. Applicant did not appeal her conviction or sentence.

Current Post-Conviction Relief Action

More than three years later on November 7, 2017, Applicant, through retained counsel Ashley A. McMahan, filed an application for post-conviction relief, alleging she was entitled to post-conviction relief based on constitutionally ineffective counsel, specifically:

1. Counsel did not advise Applicant of immigration consequences pursuant to Padilla v. Kentucky, 559 U.S. 356 (2010).
2. Counsel had a conflict of interest in that counsel represented all co-defendants in this State Grand Jury investigation and failed to discuss or obtain a waiver for Applicant
3. Counsel failed to discuss the defense of and raise the issue of mere presence with the client and told Applicant that there was no evidence she was involved with a crime
4. Counsel failed to file an appeal
5. Counsel informed Applicant she would only have to serve 18 months of her sentence

Respondent served its return to the application on May 7, 2018, seeking summary dismissal of all claims beyond whether Applicant was denied her right to appellate review of her negotiated guilty plea pursuant to White v. State, 263 S.C. 110, 119, 108 S.E.2d 35, 39 (1974), based on the expiration of the one year statute of limitations as set forth in S.C. Code Ann. § 17-

27-45(A) of the Uniform Post-Conviction Procedure Act.

Thereafter, the parties were informed by Court Administration that the transcript of Applicant's plea proceeding was unable to be produced. The parties jointly moved to reconstruct the record of the plea proceeding, which was granted by this court. On February 20, 2019, the parties convened before Judge Hocker for a reconstruction hearing. Testimony was taken from plea counsel, the prosecutor, and Applicant. Following testimony, Judge Hocker found the record was sufficiently reconstructed for meaningful appellate and collateral review. An order memorializing these findings was filed on March 6, 2019.

On February 27, 2019, Applicant, through counsel McMahan, filed an amended application adding the following additional grounds for relief:

1. Mr. Amster was ineffective in failing to move to quash the indictment for lack of probable cause against Ms. Reyes Yedra in that the State Grand Jury heard no testimony of her involvement with the underlying investigation and her name was only given to the State Grand Jury when it was read from the indictment as it was being presented.

2. Mr. Amster was not her attorney in this case, rather it was a Stephen Paul Gant who was admitted *pro hac vice* to represent Ms. Reyes Yedra and the Applicant never spoke to Mr. Gant at all throughout the entire process. She met with Mr. Amster one time prior to her plea, at a hotel.

On April 1, 2019, an evidentiary hearing was held before this court. Applicant was present and was represented by counsel McMahan. Respondent was represented by Senior Assistant Deputy Attorney General Megan Harrigan Jameson of the South Carolina Attorney General's Office. Applicant proceeded forward on the grounds listed in her original application and her amended application.

At the start of the hearing, Respondent renewed its motion to renew its motion to dismiss all allegations beyond whether Applicant is entitled to pleaded appellate review of her negotiated

guilty plea pursuant to White. Following argument from both parties, this court took Respondent's motion to dismiss under advisement and proceeded forward with a full evidentiary hearing. At the hearing, testimony was taken from plea counsel, the prosecuting attorney, one of Applicant's co-conspirators Osniel Garcia, and Applicant. At the conclusion of the hearing, this court took the matter under advisement.

Thereafter, on June 11, 2019, this court issued an order of dismissal denying and dismissing the application in its entirety. In this order, this court denied Respondent's motion to dismiss all allegations beyond whether Applicant is entitled to pleaded appellate review of her negotiated guilty plea pursuant to White. Specifically, this court found:

In the present case, while the statute of limitations should not be equitably tolled based on the extraordinary circumstances, in consideration of judicial economy and efficiency, this court denies Respondent's motion to dismiss the application based on the statute of limitations, even though it may be appropriate, and instead addresses the merits of Applicant's claims below.

This court then addressed and denied all of Applicant's seven grounds of ineffective assistance of counsel, finding Applicant failed to meet her requisite burden of proof as to each allegation.

This order of dismissal was filed and served on both parties on July 11, 2019.

Current Motion before the Court

On July 21, 2019, Applicant served a copy of her "Motion to Alter or Amend Pursuant to SCRCP 59(a) and (e)" on Respondent and this court. In her "Motion to Alter or Amend Pursuant to SCRCP 59(a) and (e)," Applicant asserts the court's order of dismissal incorrectly denied relief as to six¹ of her seven grounds for relief and requests this court "reconsider its order denying her application." Applicant then goes through the issues one by one, arguing the court

incorrectly decided each issue. Applicant does not alleged any argument was overlooked or misapprehended by this court, but rather, insists the court's rulings were erroneous and asks the court to reconsider to grant post-conviction relief in Applicant's favor. In its return, Respondent requested the motion be summarily dismissed.

Applicant's Motion to Alter or Amend is Denied

After careful review of the motion and response, this court is unable to discover anything it overlooked, misapprehended, improperly included, or omitted in its order of dismissal or how the order of dismissal should be altered or amended. This court issued a detailed thirty-three page order of dismissal thoroughly addressing all of the claims raised by Applicant and this order contains the required findings of fact and conclusions of law necessary to dispense with Applicant's allegations as required by S.C. Code Ann. § 17-27-80 and Rule 52(a), SCRPC. Accordingly, there is no need for this Court to alter or amend its order in any way as all of Applicant's arguments in support of post-conviction relief are preserved for appellate review.

Additionally, as Applicant is not requesting an alteration or amendment to the order, but rather, Applicant is asking the Court to reconsider its ruling and grant Applicant post-conviction relief, this Court finds such a request is more properly addressed through the appellate process—not a motion pursuant to Rule 59, SCRPC. See Burgess v. State, 402 S.C. 92, 95, 738 S.E.2d 264, 265 (Ct. App. 2013) (“The supreme court emphasized that to properly preserve an issue for appellate review, it is incumbent upon a party in a PCR action to file a Rule 59(e) motion in the event the PCR court fails to make specific findings of fact and conclusions of law regarding an issue.”); Smith v. State, 404 S.C. 493, 505, 745 S.E.2d 378, 384 (Ct. App. 2012) (“Our supreme

¹ Applicant does not challenge this Court's ruling that she is not entitled to belated appellate

court has made it abundantly clear that, where a PCR court fails to set forth findings and the reasons for those findings, the issue is not preserved for appellate review if the petitioner fails to make a Rule 59(e) motion requesting the PCR court make specific findings of fact and conclusions of law on the allegations.”); Marlar v. State, 375 S.C. 407, 410, 653 S.E.2d 266, 267 (2007) (noting the proper use of a Rule 59, SCRPC motion in PCR proceedings is to request the PCR court to make adequate findings of facts and conclusions of law pursuant to S.C. Code Ann. § 17-27-80 to preserve issues for appellate review); Humbert v. State, 345 S.C. 332, 337, 548 S.E.2d 862, 865 (2001) (holding when a PCR court fails to rule on an issue, the petitioner must file a Rule 59(e), SCRPC, motion requesting a ruling on the issue to preserve it for review). See also Wilder Corp. v. Wilke, 330 S.C. 71, 77, 497 S.E.2d 731, 734 (1998) (“Post-trial motions are not necessary to preserve issues that have been ruled upon at trial; they are used to preserve those that have been raised to the trial court but not yet ruled upon by it.”) (citing Hubbard v. Rowe, 192 S.C. 12, 5 S.E.2d 187 (1939)).

In conclusion, this court’s Order properly and fully addressed all allegations raised by Applicant. Having carefully reviewed the entire record in this matter, this court finds no basis for altering or amending its prior ruling.² Therefore, this court hereby denies Applicant’s Motion in its entirety, and affirms the previous Order of Dismissal.


If Applicant desires appellate review of this Order and the Order of Dismissal, a notice of appeal must be filed and served within thirty days of the service of this Order. Applicant is directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the

review of his negotiated guilty plea proceeding pursuant to White.

² The court, in its discretion, has considered this matter based upon the motions submitted by the parties and the post-conviction relief file, since oral argument will not aid the court in reaching

appropriate procedures to follow after notice of the appeal has been timely filed.

AND, IT IS SO ORDERED this 26 day of July, 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 2017CP3204132**

Ivis Ahimara Reyes Yedra		South Carolina State of	
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PLAINTIFF(S)	DEFENDANT(S)
Submitted by:	Attorney for: <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant <input type="checkbox"/> 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), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit);
 Rule 43(k), SCRPC (Settled); Other: _____
- ACTION STRICKEN (CHECK REASON):** Rule 40(j) SCRPC; 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.

Circuit Court Judge	Judge Code	Date
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For Clerk of Court Office Use Only

This judgment was entered on 26th of June 2019, and a copy mailed first class or placed in the appropriate attorney's box on 26th of June 2019, to attorneys of record or to parties (when appearing pro se) as follows:

Ashley A. McMahan
PO Box 5501 West Columbia, SC 29169

Megan Harrigan Jameson
PO Box 11549 Columbia, SC 29211

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter

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.



Ashley McMahan <ashley@macvance.com>

Most recent order / Orden judicial más reciente

1 message

Ashley McMahan <ashley@mcmahantaylor.com>
To: ahimara.reyes@yahoo.com

Fri, Aug 2, 2019 at 1:32 PM

Is attached. I am filing your appeal today. I am sending a copy to you in the mail.

Se adjunta. Estoy presentando su apelación hoy. Te estoy enviando una copia por correo.

-Ashley

Ashley A. McMahan, Esquire

McMAHAN & TAYLOR
ATTORNEYS

PO Box 5501
West Columbia, SC 29171
803-219-1110

 **Yedra, Ivis - order denyinh 59e.pdf**
191K

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF LEXINGTON) FOR THE ELEVENTH JUDICIAL CIRCUIT

Ivis Ahimara Reyes Yedra,) Case No.: 2017-CP-32-04132
Applicant,)

v.)

State of South Carolina,)
Respondent.)

ORDER OF DISMISSAL

This matter comes before this court by way of an application for post-conviction relief filed on November 7, 2017, by counsel Ashley A. McMahan on behalf of Ivis Ahimara Reyes Yedra (Applicant), alleging she was entitled to post-conviction relief based on constitutionally ineffective counsel. The State of South Carolina (Respondent) served its return to the application on May 7, 2018, seeking summary dismissal of all claims beyond whether Applicant was denied her right to appellate review of her negotiated guilty plea pursuant to White v. State, 263 S.C. 110, 119, 108 S.E.2d 35, 39 (1974), based on the expiration of the one year statute of limitations as set forth in S.C. Code Ann. § 17-27-45(A) of the Uniform Post-Conviction Procedure Act. Thereafter, Applicant, through counsel McMahan, amended her application.

An evidentiary hearing was held on April 1, 2019, before this court. Applicant was present and was represented by counsel McMahan. Respondent was represented by Senior Assistant Deputy Attorney General Megan Harrigan Jameson of the South Carolina Attorney General's Office. At the hearing, testimony was taken from plea counsel, the prosecutor, one of Applicant's co-conspirators, Osniel Garcia, and Applicant.

Following a thorough review of the record in its entirety, and the testimony and evidence presented at the evidentiary hearing, this court finds Applicant has failed to establish any constitutional violations and denies this application with prejudice.

PROCEDURAL HISTORY

Applicant is **not** presently confined in the South Carolina Department of Corrections as she served her sentence and was released from incarceration. On October 15, 2013, Applicant was indicted by the South Carolina State Grand jury for two counts of trafficking in marijuana pursuant to a multi-defendant, multi-county indictment for unlawful drugs stemming from a large scale marijuana growing operation throughout the midlands area (2013-GS-47-0019 Count 1 & Count 4).

On August 7, 2014, Applicant appeared before Judge Donald B. Hocker, circuit court judge, where she pled guilty to two counts of the lesser-included offense of manufacturing marijuana (first offense). Applicant was represented by Steven E. Amster of the Florida State Bar, who was admitted *pro hac vice*. Assistant Attorney General Larry Wedekind of the South Carolina Attorney General's Office prosecuted the case. Pursuant to negotiations entered into between Applicant and the State for a negotiated five year sentence, Judge Hocker sentenced Applicant to concurrent terms of five years imprisonment. Applicant did not appeal her conviction or sentence.

CURRENT ACTION BEFORE THE COURT

In her application filed more than three years after her negotiated guilty plea, Applicant alleges she was held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel
 - a. Counsel did not advise Applicant of immigration consequences pursuant to Padilla v. Kentucky, 559 U.S. 356 (2010);
 - b. Counsel had a conflict of interest in that counsel represented all co-defendants in this State Grand Jury investigation and failed to discuss or obtain a waiver for Applicant;

- c. Counsel failed to discuss the defense of and raise the issue of mere presence with the client and told Applicant that there was no evidence she was involved with a crime;
- d. Counsel failed to file an appeal; and
- e. Counsel informed Applicant she would only have to serve 18 months of her sentence.

As her requested relief, Applicant states she is seeking a vacation of her convictions and a new trial.

On May 7, 2018, Respondent filed its return and partial motion to dismiss, seeking summary dismissal of all claims beyond whether Applicant was denied her right to appellate review pursuant to White as barred by the statute of limitations pursuant to S.C. Code Ann. 17-27-45.

An evidentiary hearing into the matter was initially scheduled for November 7, 2018, at the Lexington County Courthouse before this court. Applicant was present at the hearing, alongside her attorney, Ashley McMahan. Respondent was represented by Senior Assistant Deputy Attorney General Megan Harrigan Jameson of the South Carolina Attorney General's Office. At the start of the hearing, Applicant and Respondent jointly moved to reconstruct the record of Applicant's plea proceeding after being advised by Court Administration that records from the court reporter were unavailable, in part because the court reporter has subsequently retired since the guilty plea. This court granted this joint motion and ordered the parties attempt to reconstruct the plea proceeding before the plea judge. An order to this effect was filed on November 9, 2018.

On February 20, 2019, the parties convened before Judge Hocker for a reconstruction hearing. Testimony was taken from plea counsel, the prosecutor, and Applicant. Following testimony, Judge Hocker found the record was sufficiently reconstructed for meaningful

appellate and collateral review. An order memorializing these findings was filed on March 6, 2019.

On February 27, 2019, Applicant, through counsel McMahan, filed an amended application adding the following additional grounds for relief:

1. Mr. Amster was ineffective in failing to move to quash the indictment for lack of probable cause against Ms. Reyes Yedra in that the State Grand Jury heard no testimony of her involvement with the underlying investigation and her name was only give to the State Grand Jury when it was read from the indictment as it was being presented.
2. Mr. Amster was not her attorney in this case, rather it was a Stephen Paul Gant who was admitted *pro hac vice* to represent Ms. Reyes Yedra and the Applicant never spoke to Mr. Gant at all throughout the entire process. She met with Mr. Amster one time prior to her plea, at a hotel.

On April 1, 2019, an evidentiary hearing was held before this court. Applicant was present and was represented by attorney Ashley McMahan. Respondent was represented by Senior Assistant Deputy Attorney General Megan Harrigan Jameson of the South Carolina Attorney General's Office. Applicant proceeded forward on the grounds listed in her in original applicant and her amended application. At the hearing, testimony was taken from plea counsel, the prosecutor, one of Applicant's co-conspirators Osniel Garcia, and Applicant.

SUMMARY OF TESTIMONY PRESENTED AT THE EVIDENTIARY HEARING

At the start of the hearing, Respondent renewed its motion to dismiss all allegations beyond whether Applicant is entitled to pleaded appellate review of her negotiated guilty plea pursuant to White.

Respondent argued that pursuant to the Uniform Post-Conviction Procedure Act, "an application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision on appeal, whichever is later." S.C. Code Ann. §

17-27-45(a). Respondent argued that Applicant filed her application more than three years after she entered her pleas, and accordingly, was barred by the statute of limitations from raising all claims beyond whether she is entitled to belated appellate review pursuant to White. See Wilson v. State, 348 S.C. 215, 218, 559 S.E.2d 581, 582-83 (2002) (holding the one-year limitations period in which to file a petition for post-conviction relief does not apply where the defendant alleges he was denied a direct appeal due to ineffective assistance of counsel). Respondent asked this court to summarily dismiss all allegations beyond whether Applicant was entitled to White relief.

In response, Applicant argues the statute of limitations as set forth in S.C. Code Ann. § 17-27-45 should be equitably tolled because of “extraordinary circumstances,” such as Applicant’s unfamiliarity with the English language. Applicant asserts there were only four Spanish-speaking inmates and no Spanish-speaking counselors at her institution, and accordingly, she was unaware of post-conviction relief procedures in South Carolina based on this language barrier.

Respondent replied that there is no recognized authority in South Carolina that allows for the tolling of the statute of limitations in a situation such as Applicant’s.

This court took Respondent’s partial motion to dismiss under advisement and proceeded forward with Applicant’s full evidentiary hearing.

At the evidentiary hearing, Applicant testified first on her own behalf through the assistance of an interpreter. She testified there were approximately four inmates at her institution who spoke Spanish and she relied on these inmates to translate for her because she does not speak English. She testified that for the majority of her incarceration, none of the social workers or counselors spoke Spanish but that towards the end of her imprisonment, her social worker

spoke Spanish. She testified this social worker never advised her of her right to file a post-conviction relief action and neither did any inmates.

Applicant testified she had only been in the United States for ten days when law enforcement arrived at the house where she was living to serve the search warrant. She testified she is from Cuba and entered the United States in Laredo, Texas, after traveling through eight other countries. She presented her entry documentation as Applicant's Ex. #1, showing her date of entry into the United States was August 22, 2013. She testified Osniel Garcia, one of her charged co-conspirators with whom she was residing when the search warrant was executed, had helped her come to the United States from Cuba. She testified she was residing at the home on Catalina Boulevard in North, South Carolina with Garcia for approximately a week when the search warrant was executed. However, she testified she was not in the home very often, as she and Garcia were out exploring the area since she had just arrived in the country. She testified she never went into the garage or either of the locked bedrooms that contained marijuana and was unaware the plants were there. She testified she did not smell marijuana in the house but explained that she has never been around marijuana before and accordingly does not know what marijuana smells like. She elaborated that marijuana is illegal in Cuba and she was not familiar with marijuana or its smell while in Cuba. She testified that she was at the house while the search warrant was executed and the marijuana plants were large and reached the ceiling.

Applicant testified that Steven Amster was her attorney before the plea and represented her at the plea but that she had also been represented by another attorney, Stephan Gantt. She testified that she met with Gantt at a court appearance with Amster. She knew Amster was representing her and she knew to call Amster about her case. She testified she spoke with Amster by phone once and spoke with his secretary multiple times. She testified she met with Amster in

the days before the plea at a hotel in the Lexington area. She elaborated that this meeting was also with Garcia and she never met with Amster alone. She testified that she knew Amster was representing Garcia and several other co-conspirators and that she discussed this with Amster. She testified that Amster explained she would have to waive any conflict from this mutual representation and also told her that it would be in her best interest to waive any potential conflict, which she did. She could not recall if Judge Hocker reviewed a waiver of conflict with her on the record during her plea and testified she generally does not recall much of what Judge Hocker asked her during her plea. She was not sure if Judge Hocker advised her of her right to appeal and acknowledged that she never asked Amster to file an appeal following her negotiated guilty plea.

She testified that she told Amster she had only been in the United States for ten days at the time the search warrant was executed and she did not have any knowledge of the marijuana. She testified that Amster told her the State did not have any evidence establishing that she knew the marijuana was at the residence but the State would likely present multiple law enforcement officers who would testify it would have been impossible for Applicant to not have known the marijuana was in the home based on the quantity of plants and smell. She testified that Amster told her the jury would likely be prejudiced against her and her immigrant co-defendants and would likely convict her at trial. She testified that Amster presented her and the other co-conspirators with a plea offer for a negotiated five years of imprisonment and Amster advised her to accept the plea offer because she would likely be convicted and faced up to twenty-five years of imprisonment. She testified that she accepted the State's plea offer for a negotiated five years of imprisonment because she feared she would received a sentence of twenty-five years of imprisonment of convicted at trial. She testified that Amster said the plea offer was the same for

all co-conspirators—a negotiated five years of imprisonment—and the offer required all the co-conspirators to accept the offer or none would get the benefit of the offer. She testified there was no signed plea agreement but acknowledged she signed the sentencing sheets acknowledging she wanted to accept the State's negotiated plea offer for a five year sentence the day before the plea. She testified Amster showed her the sentencing sheets and told her that she could either sign the sheet or proceed to a jury trial. She testified Amster advised her she would likely only have to serve eighteen months in the department of corrections before being released. She testified that she felt intimidated by Amster to take the plea offer. She testified that she accepted the five year plea offer because she did not want to risk receiving a harsher sentence if convicted at trial.

Applicant testified that she consulted with another attorney after meeting with Amster. She elaborated that this attorney advised her that she should ask Amster to see the evidence against her. She testified that she then asked Amster to see the evidence but she never saw the video of the execution of the search warrant. However, she acknowledged she was present at the home during the execution of the search warrant and saw the marijuana plants.

She testified that Amster never explained the defense of mere presence to her when she told him she was unaware of the marijuana. However, she testified that Amster did discuss with her that law enforcement would present evidence that she was living in the home and should have known the marijuana was there based on smell. She testified that she would not have pled guilty if Amster had explained mere presence to her and explained that she could have been acquitted based on a mere presence defense. She testified further that Amster never explained the State's burden of proof, the elements of the offenses, or that the weight of the marijuana impacted her charges.

Applicant testified that Amster never advised her of the immigration consequences of her guilty plea. Specifically, she testified that Amster never told her that pleading guilty to these offenses would prohibit her from becoming a permanent resident of the United States.

She testified that she knew Amster practiced law in Miami, Florida, but she was under the impression that Amster was also licensed to practice law in South Carolina. She did not learn that Amster was not a member of the South Carolina Bar until after she was released from incarceration.

Plea counsel Steven Amster testified next. Amster testified that he has been practicing law for twenty-six years and that his practice primarily involves criminal defense with a focus on cases dealing with immigration aspects. He testified that he is a member of the Florida State Bar but has also practiced in other jurisdictions on a case-by-case basis. He testified that he was admitted to practice in South Carolina on a *pro hac vice* status on this case to represent Applicant and a number of her co-conspirators. He testified that he was recommended to Applicant and her co-conspirators by someone who knew a bondsman who had a connection to the group. He testified that he had several attorneys admitted to practice in South Carolina who acted as local counsel and assisted with the case. He testified that Stephan Gantt, a fellow Florida attorney, was also admitted *pro hac vice* to represent several of the co-conspirators, including Applicant, but that Amster eventually became lead counsel and handled all of the guilty pleas himself. He testified that he advised all of his clients, including Applicant, of a potential conflict of interest arising from jointly representing the various co-conspirators and all clients waived any conflict including Applicant. He testified that this discussion of potential conflicts and the waiver came early on during his representation of Applicant. He testified that because all of his clients were offered the same favorable plea offer for reduced charges and a negotiated five year sentence and

none of the clients wanted to go to trial, he did not believe there was any conflict of interest in representing them jointly. He testified that he recalled Judge Hocker also advising Applicant and her co-conspirators of the conflict of interest on the record during the plea proceeding and Applicant and all other co-conspirators waived any conflict of interest. Amster testified that he met with all his clients involved in the case shortly after he was retained and again before the plea. He acknowledged that he never met with Applicant individually.

Amster testified further that he reviewed the discovery in this case, including the discovery particularly pertaining to Applicant. Regarding Applicant, Amster testified that the evidence established that Applicant was present at the home on Catalina Boulevard on North, South Carolina when the search warrant was executed and that she had clothing, a suitcase, and other personal belongings at the home indicating she was residing there. Amster testified that he was aware that Applicant had not been residing at the home for very long and that she asserted she had no knowledge of the marijuana grow operation. Amster testified that he had numerous discussions with the prosecutor about dismissing the charges against Applicant (and a number of the other female co-conspirators) based on a lack of evidence that Applicant and the other females had an active participation in the marijuana growing operations. Amster testified that the prosecutor refused to dismiss the charges against Applicant based on his belief that the odor from the marijuana was so strong and obvious that it was impossible for Applicant not to have know large quantities of marijuana were being grown on the premises. Amster testified this was going to be the State's theory of the case as to Applicant and the other female co-conspirators at trial and Amster was very concerned that Applicant would be convicted at trial based on such an argument. He elaborated that the prosecutor advised him that he planned to present several law enforcement witnesses to testify regarding the strong odor in the home when the search warrant

was executed and that Applicant was present at the home. He testified that he was also concerned that a Lexington County jury might be prejudiced against Applicant and her co-conspirators who were primarily non-English speaking immigrants charged with drug crimes.

Amster also testified that approximately 90% to 95% of his clients have immigration concerns and that because of this, he has a basic understanding of immigration law. He testified that this includes a large number of Cuban clients who were similarly situated to Applicant. He testified that his general practice when advising Cuban clients is to advise clients they will receive deportation orders as a result of their guilty pleas or convictions but that no deportation action will likely occur because the United States does not currently have a deportation agreement with Cuba. He testified that he has no independent recollection of what immigration advice he gave Applicant specifically but that he has no reason to believe he deviated from his standard advice in her case. Amster could not recall if Judge Hocker advised Applicant of immigration consequences during her guilty plea. Amster could not recall if he advised Applicant of her right to file an appeal of her guilty plea but thinks Judge Hocker likely did during the plea proceeding.

Amster testified that he recalled viewing all of the evidence with Applicant and their final meeting before the guilty plea. He testified that he also presented Applicant with the plea offer from the State for a negotiated five year term of imprisonment. He elaborated that this was the same offer made to all of his clients. He testified he explained possible early release scenarios to Applicant but never promised her that she would only have to serve eighteen months or any other particular sentence. He testified that this is in accordance with his standard practice not to guarantee any particular early release to clients. He testified that he understood the State's plea offer to be a global plea deal that would be revoked if any motions were filed to delay the case.

He testified that he explained the plea offer to Applicant and she accepted the plea offer because she did not want to risk a lengthy sentence if convicted at trial. He testified that neither Applicant nor any of the other co-conspirators were interested in cooperating with law enforcement to secure a more favorable plea offer.

Amster testified that he did not file a motion to quash Applicant's indictment because he had no basis to do so. He testified that Applicant was properly indicted because she was present during the execution of the search warrant and was clearly living in the home which established probable cause as law enforcement testified to before the South Carolina State Grand Jury. He testified that he explained conspiracy to Applicant and that her charges were based on being part of the larger marijuana grow conspiracy.

Osniel Garcia, one of the co-conspirators who pled guilty at the same time as Applicant, testified next. He testified that he knew Applicant from Cuba, assisted in her entry into the United States and that she was staying with him at his residence on Catalina Boulevard in North, South Carolina at the time the search warrant was executed. He testified that he never told Applicant there was a marijuana growing operation at the home but he did tell Applicant not to enter the two locked rooms in the house where marijuana plants were found. He testified that he did not tell Applicant not to enter the locked garage but told her that it was used for storage. He testified that the house did not smell like marijuana because he had filters in place to mask any scent from the plants. He testified that Applicant was generally only at the home in the evenings because he tried to keep her out of the home as much as possible. Garcia testified that he does not smoke marijuana but only grows it. He testified that he had been growing the plants that were recovered during the search warrant for approximately six months. He testified that this was his first time growing marijuana and that he was working independently and no one was supervising

his grow operation. He testified that Amster was his attorney and he did not have any other counsel and does not know who was admitted *pro hac vice* to represent him. He testified that he only met with Amster two times; once at a hotel in Spartanburg and once in court. He testified that Applicant also met with Amster at the hotel and they discussed the case and that the possible sentence was twenty-five years of incarceration if convicted at trial. He testified that Amster presented him and Applicant with the plea offer for five years imprisonment, but he was confused on the actual term to the plea.

He testified that he does not remember most of the conversation with Amster about the case. He testified that Amster did not translate any of the documents. Garcia testified that he believes Amster told him that he was representing other co-conspirators and he did not have any objection to Amster representing the other co-conspirators. However, he testified that Amster did not explain conflict of interest. He testified that he thought Amster had a license to practice law in South Carolina. He testified that he did not see the sentencing sheets until the day of the guilty plea. He testified that Amster did not advise him of his right to file an appeal from his negotiated guilty plea.

Next, the State presented testimony from Lawrence Wedekind, former Assistant Attorney General at the South Carolina Attorney General's Office who prosecuted Applicant's and her co-conspirators. He testified that he has been practicing law for over twenty years and is currently in private practice. He testified that he was formerly an Assistant Attorney General at the South Carolina Attorney General's Office and prosecuted Applicant and her co-conspirators as his role lead counsel for the House of Green conspiracy. He testified that the House of Green conspiracy centered on numerous residences throughout rural areas of the midlands where couples were in charge of "grow houses" that grew large marijuana plants of a very high quality. He testified that

the houses were all outfitted very similarly with specific lighting, watering systems, and feeding operations to maximize the yield of marijuana grown at each house. He elaborated that the houses also had posted schedules providing the growers with specific instructions as to when to feed, water, and care for the marijuana plants. He testified the houses were managed by “middle management” who traveled through the midlands checking on the houses and were responsible for collecting the marijuana and transporting it to the cartel in Miami, Florida area. He testified that law enforcement was tipped off to the conspiracy when the middle management began selling a quantity of the marijuana around the Columbia area, which led to law enforcement surveilling the middle managers and eventually the various grow houses after the middle management visited each one in a vehicle equipped with GPS tracking equipment. He testified that the middle managers received a large shipment of fertilizer, indicating the crops were likely going to be harvested and shipped to Miami, and based on that information, law enforcement decided to obtain and execute search warrants on the homes. He testified that Applicant and Garcia were one of the couples operating a grow house on Catalina Boulevard in North, South Carolina, and both were present when the search warrant was executed. He testified that law enforcement present at the home during the execution of the search warrant testified before the State Grand Jury that Applicant was present at the home and appeared to be residing there during the execution of the search warrant.

Wedekind testified that Amster argued to him that the charges against Applicant should be dropped based on mere presence. Wedekind testified that he declined to dismiss the charges against Applicant because she was present at and residing in the home and providing aid to Garcia and/or the cartel and that the short length of time she was at the home was irrelevant. He testified that he offered all of the grow house operators the same favorable plea deal—a

negotiated five year sentence to lesser-included offenses—because he was hoping these defendants would testify against the middle management defendants. He testified that he gave a deadline for accepting the State's plea offer but did not place any additional terms on the plea offer such as a requirement that all co-defendants accepted the plea offer or none would benefit from it. He testified that the offer was the only one extended and Applicant and her fellow co-conspirators could either accept the five year plea offer or proceed to trial and risk a twenty-five year sentence if convicted.

He testified that he was aware that Amster represented multiple co-conspirators. He testified that he spoke with local counsel or other counsel who were admitted *pro hac vice* but the majority of his communications were with Amster. He testified that Amster sent him a letter of representation for his various clients, including Applicant, and he recalled expressing his concern to Amster that he was representing multiple defendants. He testified that Judge Hocker brought up the multiple representation issue at the plea hearing and advised each defendant of the potential conflict of interest and had each defendant waive the potential conflict on the record before the court would accept the guilty pleas. Wedekind testified that he also asked Judge Hocker to advise each defendant of potential immigration consequences stemming from the guilty plea and Judge Hocker advised the defendants of any immigration consequences.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This court has thoroughly reviewed the record in its entirety. Additionally, this court heard the testimony presented at the evidentiary hearing and was able to observe the witnesses presented at the evidentiary hearing, which allowed the court to scrutinize the credibility of all witnesses presented. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80.

Respondent's Motion to Dismiss Based on the Statute of Limitations

At the start of the hearing, Respondent moved to summarily dismiss all of Applicant's allegations beyond whether she is entitled to belated appellate review of her negotiated guilty plea pursuant to White as barred by the statute of limitations pursuant to S.C. Code Ann. § 17-27-45(a).

Pursuant to Section 17-27-45(a),

An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision on appeal, whichever is later.

The South Carolina Supreme Court has held that the statute of limitations shall apply to all applications filed after July 1, 1996. Peloquin v. State, 321 S.C. 468, 469 S.E.2d 606 (1996). A motion for summary judgment may properly be used to raise the defense of statute of limitations. McDonnell v. Consolidated School District of Aiken, 315 S.C. 487, 445 S.E.2d 638 (1994). However, the one-year limitations period in which to file a petition for post-conviction relief does not apply where the defendant alleges she was denied a direct appeal due to ineffective assistance of counsel. Wilson v. State, 348 S.C. 215, 218, 559 S.E.2d 581, 582-83 (2002). S.C. Code Ann. § 17-27-70(c) authorizes the court to "grant a motion by either party for summary disposition of [an] application when it appears from the pleadings . . . that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law."

In the present case, Applicant pled guilty to all offenses on August 7, 2014. She did not pursue a direct appeal. Therefore, pursuant to S.C. Code Ann. § 17-27-45, any post-conviction relief action must have been filed on or before August 8, 2015. The court notes that had

Applicant appealed during that period, the plea transcript may have been available. Applicant filed her application on November 7, 2017, after the expiration of the one-year time limit as statutorily proscribed, and therefore, Respondent argues all allegations beyond whether Applicant is entitled to belated appellate review pursuant to White should be dismissed for failure to file within the time mandated by Uniform Post-Conviction Procedure Act.

In her application and at the hearing, Applicant argues the statute of limitations as set forth in S.C. Code Ann. § 17-27-45 should be equitably tolled because of “extraordinary circumstances,” such as Applicant’s unfamiliarity with the English language. In support of this argument, Applicant testified she does not speak English, was one of only a handful of inmates at her institution that spoke Spanish, and her counselors at her institution did not speak Spanish. She asserts that because she was unable to communicate effectively during her period of incarceration, she was unable to timely file her post-conviction relief application and asks this Court to apply equitable tolling principles.

In reply, Respondent submits there is no authority to toll the statute of limitations in this case. Respondent argues this case is most akin to Leamon v. State, 363 S.C. 432, 611 S.E.2d 494 (2005), where the South Carolina Supreme Court held that a defendant’s incarceration in another state does not toll the running of the statute of limitations and explained an applicant has a full year to submit a post-conviction petition and ignorance of the statute of limitations is not an excuse for late filing. Id., 363 S.C. at 435, 611 S.E.2d at 496.

Our courts have held that “statutes of limitations are not simply technicalities, but are fundamental to a well-ordered judicial system.” Moates v. Bobb, 322 S.C. 172, 176, 470 S.E.2d 402, 404 (Ct. App. 1996). The South Carolina Court of Appeals in Moates explained:

Statutes of limitations embody important public policy considerations in that they stimulate activity, punish negligence, and promote repose by giving security and

stability to human affairs. One purpose of a statute of limitations is to relieve the courts of the burden of trying stale claims when a plaintiff has slept on his rights. Another purpose of a statute of limitations is to protect potential defendants from protracted fear of litigation.

Id. Statutes of limitations should be followed as strict rules in order to set a hard deadline to ensure an organized legal system.

However, in rare circumstances, the statute of limitations will be equitably tolled to allow a petitioner the opportunity to exercise his or her rights when they were denied the chance to do so. This doctrine has been specifically extended into the context of post-conviction relief cases, as well. Equitable tolling has been deemed available where (1) extraordinary circumstances prevented the plaintiff from filing despite his or her due diligence; (2) the plaintiff actively pursued his or her judicial remedies by filing a defective pleading during the statutory period or the claimant has been induced or tricked by the defendant's misconduct into allowing the filing deadline to pass; and (3) the plaintiff, despite all due diligence, is unable to obtain vital information bearing on the existence of his or her claim. Pelzer v. State, 378 S.C. 516, 521, 662 S.E.2d 618, 619-20 (Ct. App. 2008). Pelzer explains that the court typically applies the extraordinary circumstances doctrine when the plaintiff has been actively misled by another party. "It has been held that equitable tolling applies principally if the plaintiff is actively misled by the defendant about the cause of action or is prevented in some extraordinary way from asserting his or her rights." Id. However, the equitable tolling doctrine does not require wrongful conduct on the part of the State, such as fraud or misrepresentation. Id.

Pelzer explained the doctrine should be limited to very exclusive circumstances. "[E]quitable tolling, which allows a plaintiff to initiate an action beyond the statute of limitations deadline, is typically available only if the claimant was prevented in some extraordinary way from exercising his or her rights, or, in other words, if the relevant facts present sufficiently rare

and exceptional circumstances that would warrant application of the doctrine.” Pelzer, 378 S.C. at 521, 662 S.E.2d at 620. Pelzer cited to an opinion from the Fourth Circuit Court of Appeals in denying equitable tolling to a party as “particularly illuminating:”

[A]ny invocation of equity to relieve the strict application of a statute of limitations must be guarded and infrequent, lest circumstances of individualized hardship supplant the rules of clearly drafted statutes. To apply equity generously would loose the rule of law to whims about the adequacy of excuses, divergent responses to claims of hardship, and subjective notions of fair accommodation. We believe, therefore, that any resort to equity must be reserved for those rare instances where-due to circumstances external to the party's own conduct-it would be unconscionable to enforce the limitation period against the party and gross injustice would result.

Pelzer, at 378 S.C. 522-23, 662 S.E.2d at 621 (citing Harris v. Hutchinson, 209 F.3d 325, 330 (4th Cir.2000) (holding habeas petitioner's missing filing deadline due to erroneous advice from counsel not extraordinary circumstance requiring equitable tolling)).

In Pelzer, a post-conviction relief applicant notarized and mailed his application before the statute of limitations expired, but mailed it to the Office of Appellate Defense instead of to the county Clerk of Court for filing. 378 S.C. at 518, 662 S.E.2d at 619. The Office of Appellate Defense forwarded it to the Clerk, but it was not received by the Clerk until after the statute of limitations had expired. Id. at 518-19, 662 S.E.2d at 619. The circuit court dismissed the application as untimely. The South Carolina Court of Appeals affirmed, finding that mailing did not constitute filing and “the narrow window by which Pelzer's application missed the statute of limitations [could not] be considered as so exceptional a circumstance as to warrant equitable tolling.” Id. at 522, 662 S.E.2d at 621.

The South Carolina Supreme Court has also chosen not to extend the doctrine of equitable tolling to situations where the applicant claimed he was ignorant of the statute of limitations because he was incarcerated in another state, as argued by Respondent. See Leamon,

363 S.C. 432, 611 S.E.2d 494 (holding incarceration in another state does not toll the running of the statute of limitations).

However, our courts have held that the statute of limitations should be equitably tolled for the filing of a post-conviction relief application in limited circumstances. See Ferguson v. State, 382 S.C. 615, 677 S.E.2d 600 (2009) (finding the statute of limitations should be equitably tolled when a mentally incompetent PCR applicant was prevented from timely filing by his mental incompetency, and the applicant should proceed with his PCR action only if the application was filed within one year of the applicant regaining competency); Mose v. State, 420 S.C. 500, 803 S.E.2d 718 (2017) (allowing equitable tolling where the applicant notarized and relinquished control of his application to prison authorities for mailing seventeen days prior to the filing deadline, but due to circumstances outside applicant's control, the application was not filed until three days past the deadline). Equitable tolling has also been allowed where "extraordinary circumstances prevented the plaintiff from filing despite his or her diligence" and where "the plaintiff, despite all due diligence, is unable to obtain vital information bearing on the existence of his or her claim." Pelzer, 378 S.C. at 521, 662 S.E.2d at 621.

In the present case, while the statute of limitations should not be equitably tolled based on the extraordinary circumstances, in consideration of judicial economy and efficiency, this court denies Respondent's motion to dismiss the application based on the statute of limitations, even though it may be appropriate, and instead addresses the merits of Applicant's claims below.

Ineffective Assistance of Counsel

Applicant has alleged plea counsel, Steven Amster, was constitutionally ineffective in seven specific ways: (1) failing to advise Applicant of immigration consequences of her guilty plea; (2) failing to discuss a potential conflict of interest in representing Applicant and several

co-conspirators and failing to obtain a waiver of said conflict; (3) failing to discuss and raise the defense of mere presence; (4) failing to file an appeal; (5) misadvising Applicant that she would only be required to serve eighteen months of incarceration; (6) failing to move to quash the indictment for lack of probable cause; and (7) failing to properly be admitted *pro hac vice* to represent Applicant. After reviewing the record, the testimony presented at the evidentiary hearing, and the exhibits introduced, this court finds that Applicant has failed to meet her requisite burden of proof as to all of these allegations. Each allegation is addressed individually below:

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008).

In a post-conviction relief action, an applicant bears the burden of proving the allegations in his or her 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, the 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, 466 U.S. 668; Butler, 286 S.C. at 442, 334 S.E.2d at 814.

Strickland does not guarantee perfect representation, only a “reasonably competent attorney.” 466 U. S. at 687 (quoting McMann v. Richardson, 397 U.S. 759, 770 (1970)). Representation is constitutionally ineffective only if it “so undermined the proper functioning of the adversarial process” that the defendant was denied a fair proceeding. Strickland, 466 U.S. at 686. Just as there is no expectation that competent counsel will be a flawless strategist or

tactician, an attorney may not be faulted for a reasonable miscalculation or lack of foresight or for failing to prepare for what appear to be remote possibilities. Id.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668. First, an applicant must prove that counsel's performance was deficient. Id.; 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 an 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). The 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 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.

Although courts may not indulge "post hoc rationalization" for counsel's decision making that contradicts the available evidence of counsel's actions, Wiggins v. Smith, 539 U.S. 510, 526-527 (2003), neither may they insist counsel confirm every aspect of the strategic basis for his or her actions. There is a "strong presumption" that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than "sheer neglect." Yarborough v. Gentry, 540 U. S. 1, 8 (2003). After an adverse verdict at trial even the most experienced counsel may find it difficult to resist asking whether a different strategy might have been better, and, in the

course of that reflection, to magnify their own responsibility for an unfavorable outcome. Strickland, however, calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind. Id. at 688; Harrington v. Richter, 562 U.S. 86 (2011).

With respect to prejudice, an applicant must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. It is not enough "to show that the errors had some conceivable effect on the outcome of the proceeding." Id. at 693. Counsel's errors must be "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id. at 687. See Harrington, 562 U.S. 86. With respect to guilty plea counsel, an applicant must establish there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52 (1985).

"Surmounting Strickland's high bar is never an easy task." Padilla v. Kentucky, 559 U.S. 356, 371 (2010), and the strong societal interest in finality has "special force with respect to convictions based on guilty pleas." United States v. Timmreck, 441 U.S. 780, 784 (1979). An ineffective assistance of counsel claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the Strickland standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. Strickland, 466 U.S. at 689–690. Even under de novo review, the standard for judging counsel's representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is

“all too tempting” to “second-guess counsel’s assistance after conviction or adverse sentence.” Id. 466 U.S. at 689; see also Bell v. Cone, 535 U. S. 685, 702 (2002); Lockhart v. Fretwell, 506 U. S. 364, 372 (1993). The question is whether an attorney’s representation amounted to incompetence under “prevailing professional norms,” not whether it deviated from best practices or most common custom. Strickland, 466 U.S at 690.

In assessing prejudice under Strickland, the question is not whether a court can be certain counsel’s performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. Wong v. Belmontes, 558 U.S. 15 (2009); Strickland, 466 U.S. at 693. Instead, Strickland asks whether it is “reasonably likely” the result would have been different. Id. 466 U.S. at 696. This does not require a showing that counsel’s actions “more likely than not altered the outcome,” but the difference between Strickland’s prejudice standard and a more-probable-than-not standard is slight and matters “only in the rarest case.” Id. 466 U.S. at 693, 697. The likelihood of a different result must be substantial, not just conceivable. Id. at 693. Harrington, 562 U.S. 86.

“A guilty plea is a solemn, judicial admission of the truth of the charges against an individual; thus, a criminal inmate’s right to contest the validity of such a plea is usually, but not invariably, foreclosed.” Dalton v. State, 376 S.C. 130, 137, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing Blackledge v. Allison, 431 U.S. 63, 74 (1977)). “Indeed, where a thorough colloquy is conducted, courts must exercise caution in setting aside the guilty plea.” Garren v. State, 423 S.C. 1, 12, 813 S.E.2d 704, 712 (2018); see Jamison v. State, 410 S.C. 456, 469-71, 765 S.E.2d 123, 129-30 (2014) (observing that “guilty plea[s] must be treated as final in the vast majority of cases” and instructing that caution must be exercised so as not to “undermine the solemn nature of a guilty plea and the finality that generally attaches to a guilty plea”).

Based on this standard set forth above and the testimony of the witnesses in this case, this court finds Applicant has failed to meet her requisite burden of establishing any constitutional ineffectiveness of counsel as to any of her allegations.

Allegation that counsel failed advise Applicant of immigration consequences

Initially, Applicant argues plea counsel failed to properly advise her of immigration consequences stemming from her guilty plea.

Our South Carolina Supreme Court recently addressed an attorney's duty to advise a defendant of immigration consequences and presumptive deportation in Taylor v. State, 422 S.C. 222, 810 S.E.2d 862 (2018):

"[A]dvice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel." Padilla v. Kentucky, 559 U.S. 356, 366 (2010). If the deportation consequences of a particular plea are unclear or uncertain, "a criminal defense attorney need do no more than advise a non-citizen client that pending criminal charges may carry a risk of adverse immigration consequences." Id. at 369. However, where the terms of the relevant immigration statute are "succinct, clear, and explicit" in defining the removal consequence, counsel has an "equally clear" duty to give correct advice. Id. at 368–69.

Pursuant to federal law, an alien admitted to the United States who is convicted of a violation of "any law or regulation of a State, the United States, or a foreign country relating to a controlled substance ... other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is *deportable*." 8 U.S.C.A. § 1227(a)(2)(B)(i) (emphasis added).

Taylor, 422 S.C. at 225-26, 810 S.E.2d at 863. The South Carolina Supreme Court elaborated that because Taylor pled guilty to an offense that automatically made him removable, counsel had a duty to properly advise Taylor of the mandatory nature of the immigration consequences from his guilty plea. Id. 422 S.C. at 228, 810 S.E.2d at 865.

In the present case, Applicant testified that Amster never advised her of the immigration consequences of her guilty plea. In contrast, Amster testified that the vast majority of his clients have immigration consequences associated with their criminal charges and his standard practice

is to always advise clients they will be issued deportation orders as a result of their convictions. He explained that because Applicant is a Cuban national and the United States does not currently have a deportation agreement with Cuba, Applicant would not likely be removed from the country based on these deportation orders but that she nonetheless would receive deportation orders as a result of her guilty plea. He testified that he has no reason to believe he deviated from his standard practice in this case. Additionally, Amster and Wedekind both testified that they believed Judge Hocker reviewed immigration consequences with Applicant at the plea proceeding and the record from the reconstructed plea proceeding also establishes Judge Hocker reviewed immigration consequences with Applicant and her co-defendant. See Reconstruction Tr. p. 31-32.

This court finds Amster's testimony to be credible and controlling as to this allegation, establishing that he did indeed properly advise Applicant she would receive deportation orders as a result of her guilty plea. Accordingly, as Amster properly advised her as to the immigration consequences of her guilty plea, including the mandatory nature of deportation orders based on her plea, Applicant has failed to establish any deficiency of counsel. This allegation is denied and dismissed with prejudice.

Allegation that counsel had a conflict of interest and failed to obtain a waiver

Next, Applicant argues counsel had a conflict of interest because he represented numerous other co-conspirators and failed to discuss this conflict with her or obtain a waiver of any conflict of interest. The uncontroverted testimony before this court is that Applicant and Amster discussed that he was representing several other co-conspirators with her before her plea proceeding and Applicant waived any conflict. Additionally, Amster, Wedekind, and Judge Hocker all confirmed that any potential conflicts arising from this concurrent representation was

addressed on the record during the plea proceeding and Applicant knowingly, voluntarily, and intelligently waived any conflict on the record prior to the entry of her guilty plea.

“A criminal defendant’s Sixth Amendment right to effective assistance of counsel includes a right to counsel ‘unhindered by a conflict of interest.’ ” Gonzales v. State, 419 S.C. 2, 9, 795 S.E.2d 835, 839 (2017) (quoting Cuyler v. Sullivan, 446 U.S. 335, 345-50, 355 (1980) and Holloway v. Arkansas, 435 U.S. 475, 483 n. 5 (1978)). When counsel is burdened by an actual conflict of interest, he “breaches the duty of loyalty, perhaps the most basic of counsel’s duties.” Gonzales, 419 S.C. at 9, 795 S.E.2d at 839 (quoting Strickland, 466 U.S. at 692).

“The mere possibility defense counsel may have a conflict of interest is insufficient to impugn a criminal conviction.” Lomax v. State, 379 S.C. 93, 101, 665 S.E.2d 164, 168 (2008) (quoting State v. Gregory, 364 S.C. 150, 152–53, 612 S.E.2d 449, 450 (2005)). Indeed, “until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance.” Id. at 102, 665 S.E.2d at 168 (quoting Duncan v. State, 281 S.C. 435, 438, 315 S.E.2d 809, 811 (1984)). “To establish a violation of the Sixth Amendment right to effective counsel due to a conflict of interest arising from multiple representation, a defendant who did not object at trial must show an *actual* conflict of interest adversely affected his attorney’s performance.” Thomas v. State, 346 S.C. 140, 143, 551 S.E.2d 254, 256 (2001) (emphasis added) (citing Jackson v. State, 329 S.C. 345, 354, 495 S.E.2d 768, 773 (1998)). However, “a defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice to obtain relief.” Staggs v. State, 372 S.C. 549, 551–52, 643 S.E.2d 690, 692 (2007).

The South Carolina Supreme Court has noted that an actual conflict of interest occurs, when a defense attorney places himself in a situation inherently conducive to divided loyalties. If a defense attorney owes duties to a party whose interests are

adverse to those of the defendant, then an actual conflict exists. The interests of the other client and the defendant are sufficiently adverse if it is shown that the attorney owes a duty to the defendant to take some action that could be detrimental to his other client.

Duncan, 281 S.C. at 438, 315 S.E.2d at 811 (internal marks omitted) (quoting Zuck v. Alabama, 588 F.2d 436, 439 (5th Cir.1979)); see also Thomas, 346 S.C. at 143–44, 551 S.E.2d at 256 (citing Jackson, 329 S.C. at 354, 495 S.E.2d at 773) (“An actual conflict of interest occurs where an attorney owes a duty to a party whose interests are adverse to the defendant’s.”).

A defendant may waive an actual conflict of interest so long as the waiver is made knowingly, intelligently, and voluntarily. Jordan v. State, 406 S.C. 443, 450–51, 752 S.E.2d 538, 541–42 (2013) (citing Thomas, 346 S.C. at 144, 551 S.E.2d at 256 (“To be valid, a waiver of a conflict of interest must not only be voluntary, it must be done knowingly and intelligently.”); United States v. Swartz, 975 F.2d 1042, 1048–50 (4th Cir.1992) (holding that a waiver is not knowing, intelligent, and voluntary unless the defendant knows the precise form of the conflict of interest that eventually results); Hoffman v. Leeke, 903 F.2d 280, 289 (4th Cir. 1990)(“A defendant cannot knowingly and intelligently waive what he does not know.”).

In the present case, the evidence presented establishes Applicant was aware that Amster represented Garcia and numerous other co-conspirators, Amster informed her of potential conflict of interest arising from this concurrent representation, and Applicant knowingly, voluntarily, and intelligently waived this conflict on the record at her plea proceeding before the presiding judge of the guilty plea. Accordingly, Applicant has failed to meet her requisite burden of proof and this allegation is denied and dismissed with prejudice.

Allegation that counsel failed to discuss and raise the defense of mere presence

Next, Applicant argues counsel was ineffective for failing to discuss the defense of mere presence with her despite telling her there was no evidence she was involved with a crime. This

allegation is refuted by the testimony of Amster and Applicant, who both testified they discussed that Applicant had only arrived at the home a short time before the search warrant was executed and that Applicant asserted she had no knowledge of the marijuana grow operation, and that in response to those conversations, Amster explained he would try to have the charges dismissed against Applicant. Amster then approached Wedekind and asked for the charges to be dismissed based on the minimal evidence of Applicant's involvement and Wedekind responded that the length of time Applicant was at the home was irrelevant and the State would not be dismissing her charges. Amster then presented Applicant with the best plea offer he received for five years imprisonment but explained that Applicant could proceed to trial if she wished. He also advised Applicant that the State intended to present numerous law enforcement officers to testify about the overwhelming smell of marijuana. After these discussions, Applicant elected to accept a favorable plea deal from the State for a negotiated five years imprisonment rather than risk conviction and a possible twenty-five year prison sentence if convicted at trial. Applicant has failed to meet her requisite burden of establishing any deficiency of counsel or prejudice. This allegation is denied and dismissed with prejudice.

Allegation that counsel failed to file an appeal on Applicant's behalf

Applicant also assert plea counsel was ineffective for failing to file an appeal following her negotiated guilty plea. Both Amster and Applicant could not recall if they discussed Applicant's right to appeal her negotiated guilty plea and neither could recall if Judge Hocker advised Applicant of her appellate rights during her plea proceeding. However, Applicant provided no testimony that she inquired about her appellate rights or otherwise made any sort of indication she wished to pursue a direct appeal following her negotiated guilty plea.

Counsel has a constitutionally-imposed duty to consult with a defendant about an appeal when there is reason to think either: (1) that a rational defendant would want to appeal; or (2) that this particular defendant reasonably demonstrated to counsel that he or she was interested in appealing. Roe v. Flores-Ortega, 528 U.S. 470 (2000). “Acts inconsistent with the continued assertion of a right, such as a failure to insist upon the right, may constitute waiver.” Bonnette v. State, 277 S.C. 17, 18, 282 S.E.2d 597, 598 (1981).

In White v. State, 263 S.C. 110, 119, 108 S.E.2d 35, 39 (1974), the South Carolina Supreme Court held that even though a post-conviction relief court found the applicant had never voluntarily and intelligently abandoned his appeal, the Court has no jurisdiction to grant a belated appeal. However, where an accused establishes in a post-conviction relief hearing that he or she was unconstitutionally deprived of his or her statutory right to a direct appeal, the South Carolina Supreme Court, upon an appeal of the post-conviction relief decision, will review the lower court record and pass upon all issues properly raised and argued as if the direct appeal has been perfected. Id. 263 S.C. at 119, 108 S.E.2d at 39-40.

Here, Applicant has failed to establish she ever wished to file an appeal or requested Amster file an appeal on her behalf following her negotiated guilty plea. This court finds Applicant has failed to meet her requisite burden of proof as to this allegation. This allegation is denied and dismissed with prejudice.

Allegation that counsel misadvised Applicant she would only be required to serve 18 months

Applicant also assert plea counsel was ineffective for misadvising her she would only have to serve an active sentence of eighteen months imprisonment before being released from custody. Amster testified he informed Applicant the State’s plea offer was for a negotiated five years of imprisonment and that she may be eligible for some type of early release but never

guaranteed her she would only have to serve any particular sentence. He also testified his standard practice not to guarantee any particular early release to clients. This court finds Amster's testimony as to this issue to be credible and dispositive on the issue. Applicant has failed to meet her requisite burden of establishing any deficiency of counsel. This allegation is denied and dismissed with prejudice.

Allegation that counsel failed to move to quash the indictment

Applicant also assert plea counsel was ineffective for failing to move to quash the indictment for lack of probable cause against her because "the State Grand Jury heard no testimony of her involvement with the underlying investigation and her name was only give to the State Grand Jury when it was read from the indictment as it was being presented." This allegation is directly refuted by the transcripts from the State Grand Jury proceedings, introduced under seal as Court's Ex. # 1 at the evidentiary hearing, which establishes the law enforcement officer present for the execution of the search warrant testified before the State Grand Jury that Applicant was present at the home during the execution of the search warrant and evidence established she appeared to be residing at the home. See Tr. of Special Agent Dennis Tracy on Oct. 15, 2013, p. 12. Accordingly, there was sufficient probable cause for the indictment against Applicant and no valid ground on which Amster could have filed a motion to quash. Accordingly, this allegation is denied and dismissed with prejudice.

Allegation that counsel was not properly admitted to represent her

Finally, Applicant asserts Amster was not admitted *pro hac vice* to represent her. Specifically, Applicant alleges, "Mr. Amster was not her attorney in this case, rather it was a Stephen Paul Gant who was admitted *pro hac vice* to represent Ms. Reyes Yedra and the

Applicant never spoke to Mr. Gant at all throughout the entire process. She met with Mr. Amster one time prior to her plea, at a hotel.”

However, at the evidentiary hearing, Applicant testified she knew Amster was her attorney, consistently communicated with Amster and his staff throughout her criminal proceedings, met with Amster to review the plea offer shortly before her plea, and entered her guilty plea with Amster as counsel. Applicant has failed to establish she was unaware Amster was her attorney, that she did not want Amster to represent her, or that her decision to plead guilty was in any way impacted by Amster representing her rather than Gantt. Applicant has failed to meet her requisite burden of proof as to this allegation. This allegation is denied and dismissed with prejudice.

CONCLUSION


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

This court notes that if Applicant wishes to appeal this order, Applicant, through her counsel of record, must file and serve a notice of appeal within thirty days from the receipt of this Order. See Rule 203 and 243, 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 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. This application for post-conviction relief is denied and dismissed with prejudice.

AND IT IS SO ORDERED this 11 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 2017CP3204132**

Ivis Ahimara Reyes Yedra		South Carolina State of	
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PLAINTIFF(S)	DEFENDANT(S)
Submitted by:	Attorney for: <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant <input type="checkbox"/> 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), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit);
 Rule 43(k), SCRPC (Settled); Other: _____
- ACTION STRICKEN (CHECK REASON):** Rule 40(j) SCRPC; 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.

Circuit Court Judge	Judge Code	6/11/2019 Date
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For Clerk of Court Office Use Only

This judgment was entered on June 11th 2019, and a copy mailed first class or placed in the appropriate attorney's box on June 11th 2019, to attorneys of record or to parties (when appearing pro se) as follows:

Ashley A. McMahan PO Box 5501 West Columbia, SC
29169

Megan Harrigan Jameson PO Box 11549 Columbia, SC
29211

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

LISA COMER/jp

Court Reporter

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), SCRCF.

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.



Columbia SC 290
FRI 02 AUG 2019 PM

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