

LAW OFFICE OF
C. RAUCH WISE
Attorney & Counselor at Law
305 Main Street
Greenwood, SC 29646
e-mail rauchwise@gmail.com

RECEIVED

SEP 09 2013

S.C. SUPREME COURT

C. Rauch Wise

Telephone
(864) 229-5010
Facsimile
(864) 229-2665

September 4, 2019

Daniel E. Shearouse, Clerk
Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

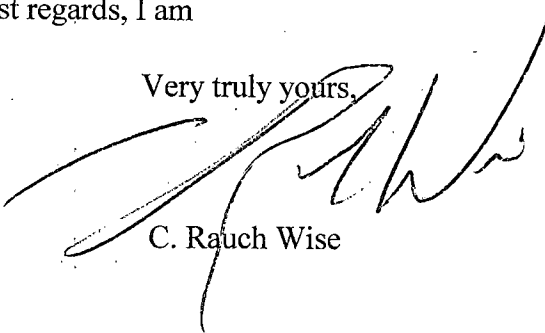
Re: Joe Lewis Holmes, #244813 vs State of South Carolina,
Lower Case No. 2016-CP-10-6293

Dear Mr. Shearouse:

I am enclosing herewith for filing the original Notice of Appeal together with the original Affidavit of Service regarding the above matter. Your help is greatly appreciated.

With kindest regards, I am

Very truly yours,



C. Rauch Wise

CRW/slt
Enclosure

cc Benjamin Limbaugh
Hon. Jennifer B. McCoy

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

SEP 09 2019

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Jennifer B. McCoy, Circuit Court Judge

S.C. SUPREME COURT

Lower Court Case № 2016-CP-10-6293

Joe Lewis Holmes, #244813, Appellant,


vs.

State of South Carolina, Respondent.

NOTICE OF INTENT TO APPEAL

Joe Lewis Holmes appeals the Order of the Honorable Jennifer B. McCoy dated July 23, 2019 filed on August 6, 2019, and the Order filed June 24, 2019.

September 4th, 2019



C. Rauch Wise
Attorney at Law
305 Main Street
Greenwood, SC 29646
(864) 229-5010

Attorney for Appellant

OTHER COUNSEL OF RECORD

Benjamin Limbaugh
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211-1549

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

SEP 09 2019

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Jennifer B. McCoy, Circuit Court Judge

S.C. SUPREME COURT

Lower Court Case No 2016-CP-10-6293

Joe Lewis Holmes, #244813, Appellant,

vs.

State of South Carolina, Respondent

AFFIDAVIT OF SERVICE

PERSONALLY appeared before me Sandy Traynham who, after being duly sworn, deposes and says that she is the Secretary for C. Rauch Wise, Attorney for the Appellant in the above entitled case. That on September 4, 2019, she did deposit in the United States Mail with proper postage affixed thereto a copy of the Notice of Appeal in the above case addressed to Benjamin Limbaugh, Office of the Attorney General, P.O. Box 11549 Columbia, South Carolina 29211 and Hon. Jennifer B. McCoy, 100 Broad Street, Suite 348, Charleston, SC 29401

SWORN to and Subscribed
before me this 4th day

Sandy Traynham

of Sept, 2019/

[Signature] (L.S.)
Notary Public for South Carolina

My Commission expires: 12/7/2019

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AT

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)
)
Joe Lewis Holmes, #244813,)
)
Applicant,)
)
)
vs.)
)
State of South Carolina,)
)
Respondent.)

IN THE COURT OF COMMON PLEAS
C/A NO.: 2016-CP-07-6293

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ORDER

DENYING APPLICANT'S MOTION
TO ALTER OR AMEND THE COURT'S
FINAL ORDER OF JUNE 24, 2019

FILED
AUG - 6 PM 4: 04
JULIE J. ARMSTRONG
CLERK OF COURT

THIS MATTER came before the court by way of Applicant's fifth post-conviction relief (PCR) application on the grounds of newly discovered evidence. An evidentiary hearing into the matter was convened on March 18, 2019, at the Charleston County Courthouse. Applicant was present at the hearing and was represented by C. Rauch Wise, Esquire. Respondent was represented by Assistant Attorney General Benjamin Limbaugh of the South Carolina Attorney General's Office.

Before this court were the records of the Charleston County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the record on appeal, Applicant's appellate records, the State's return, and Applicant's PCR application.

By written order dated June 21, 2019, and filed on June 24, 2019, this court determined that the Applicant failed to prove he is entitled to post-conviction relief based on his allegation of newly discovered evidence, specifically the recanted testimony of Alexander Galliard. The Applicant timely filed a Motion to Alter or Amend pursuant to Rule 59(e) SCRCF on July 2, 2019.

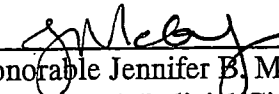
After considering the record in this matter, the arguments of counsel, and the applicable legal authorities, this court respectfully **DENIES** the Applicant's Motion to Alter or Amend and reaffirms its decision in the Order entered on June 24, 2019.

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IT IS, THEREFORE, ORDERED that the Applicant's Motion to Alter or Amend the court's June 24, 2019 Order is hereby denied.

July 23, 2019
Charleston, South Carolina



Honorable Jennifer B. McCoy
Judge, Tenth Judicial Circuit
Ninth

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JULIE J. ARMSTRONG

CLERK OF COURT, C.P. & G.S.
100 BROAD STREET, SUITE 106
CHARLESTON, SC 29401-2258

RETURN SERVICE REQUESTED



clerkofcourt.charlestoncounty.org

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CLARENCE RAUCH WISE
305 MAIN ST
GREENWOOD SC 29646-2757

NOTICE OF ENTRY OF JUDGMENT/ORDER PURSUANT TO RULE 77 SCRPC

Order Denying Pltffs Motion to Alter or Amend

CASE NO: 2016CP1006293

Joe Lewis Holmes VS South Carolina State of

This judgment was entered on the 06th day of August, 2019, and notice mailed first class on Thursday, August 08, 2019, to all counsel of record and/or all parties entitled to receive notice.

You may view and download this document at <http://clerkofcourt.charlestoncounty.org> or obtain a copy in person at the Clerk of Court's Office during regular Charleston County business hours.

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STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

Joe Lewis Holmes, #244813,
Applicant,

v.

State of South Carolina,
Respondent.

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

2016-CP-10-6293

ORDER OF DISMISSAL

FILED
2019 JUN 24 AM 11:17
JULIE J. ARISTON
CLERK OF COURT

I.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Charleston County. Applicant was indicted at the January 1997 term of the Charleston County Grand Jury for murder (1997-GS-10-0606). H. Stanley Feldman, Esquire, represented Applicant on that charge. Cameron L. Marshall, prosecuted the case. Applicant proceeded to trial on October 20-22, 1997 before the Honorable Daniel F. Pieper, after which a jury found guilty as indicted. Judge Pieper sentenced him to confinement for life without parole (LWOP).

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Holmes, Op. No. 99-MO-049 (S.C. Sup. Ct. filed June 25, 1999).

2000-CP-10-2042

Applicant subsequently filed his first PCR application on May 30, 2000, alleging ineffective assistance of trial counsel, prosecutorial misconduct, and relief from judgment order. An evidentiary hearing into the matter was convened at the Charleston County Courthouse before

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the Honorable R. Markley Dennis, Jr. Applicant was present and represented by Daniel A. Beck. By written Order dated March 28, 2002, Judge Dennis denied and dismissed the application.

2004-CP-10-0560

Applicant then filed a *second* application for post-conviction relief on February 9, 2004 alleging that the trial court lacked subject matter jurisdiction. An evidentiary hearing into the matter was convened on January 18, 2005 at the Charleston County Courthouse before the Honorable Deadra L. Jefferson. Applicant was present at the hearing and represented by Andrew Grimes, Esquire. Adrienne L. Turner of the South Carolina Attorney General's Office represented Respondent. On February 23, 2005, Judge Jefferson denied and dismissed the application with prejudice. A timely Notice of Appeal and a Johnson Petition for Writ of Certiorari was perfected by Robert Pachak of the South Carolina Office of Appellate Defense. On September 27, 2006, the South Carolina Court of Appeals denied the Petition and dismissed the case.

2006-CP-10-4461

Applicant filed a *third* PCR application on November 14, 2006, alleging ineffective assistance of PCR counsel. On April 10, 2008, the Honorable Roger M. Young, Sr., by written order dismissed the action with prejudice.

2010-CP-10-5612

Applicant subsequently filed a fourth application for post-conviction relief alleging:

1. "Does Petitioner have a created liberty interest in statutory state appointed PCR counsel?"
2. "The State's Post Conviction Procedure process is an inadequate remedy for the hearing of federal constitutional claims."
3. "Were the jury instructions given in the instant case unconstitutional and burden-shifting in violation of due process?"
4. "Is Petitioner's conviction unconstitutional under State v. Belcher?"

On March 17, 2011, by written Order, the Honorable Kristi Harrington dismissed the Application with prejudice.

II.

In his *fifth* and current PCR action, Applicant is alleging the following grounds for relief:

1. Newly-discovered evidence.
 - a. Applicant has recently discovered new evidence which should entitle him to a new trial.
 - b. "Alexander Gaillard will testify that he did not see me with a firearm. He will testify that he was threatened in order to get him to testify against me. I received this information from Mr. Gaillard shortly after December 14, 2015."
2. Ineffective assistance of trial counsel and post-conviction relief counsel.
 - a. Trial counsel and post-conviction relief counsel failed to adequately investigate and prepare the case for trial and post-conviction relief hearing.
 - b. "Neither my trial counsel nor my PCR counsel ever obtained an expert on the issue of the trajectory of the bullet that killed Kenneth Washington. The bullet that killed Mr. Washington traveled from the right shoulder blade downward through the aorta and into the fifth and sixth ribs. Appendix 470, 11 15-25. (Testimony Dr. Leigh Thorne) 702, (autopsy report). The path traveled by the bullet is inconsistent with the testimony which was that Mr. Washington was shot while running away from assailant.

On October 5, 2018 a hearing was held in Charleston County in front of Honorable Michael G. Nettles on the State's motion to dismiss the application. The Court dismissed Applicant's ineffective assistance of counsel allegations and allowed him to proceed on the newly-discovered evidence grounds, specifically, on the recanted testimony of Alexander Gaillard.

Statement of Facts

This case involves the murder of Kenneth Washington in Charleston County in the morning hours of July 19, 1996. At approximately 6:00 am that morning, Applicant and Steven Mark O'Brian approached a group of people "hanging out" in hopes of buying crack cocaine. Washington sold Applicant crack cocaine. An argument immediately ensued between Applicant and Washington about whether the crack was real or fake. Washington and his friend, Antwan Venning attempted to leave the scene and began walking toward Venning's jeep. Applicant was

handed a gun from another bystander, William Phillips. Applicant fired at least two shots at Washington as he was walking away. Washington was shot below the right shoulder blade, lacerating the aorta and causing him to bleed to death. Applicant and the group of onlookers who witnessed the argument and shooting fled.

Before fleeing, Phillips retrieved his gun from Applicant and shot one of the jeeps tires. Simultaneously, Alexander Gaillard took an unloaded shotgun from the back of the jeep. Phillips, Gaillard, and Maurice Simmons proceeded to Gaillard's home to stash the shotgun. The three were stopped and questioned by police on their way back to the crime scene. Shortly after the incident, Venning and O'Brian voluntarily gave statements to police, identifying Applicant as shooting the victim.

During an intensive search of almost two weeks by the North Charleston Police Department, Applicant turned himself in on July 31, 1996.

Findings of Facts 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, which allowed the Court to scrutinize the credibility 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 (1985).

Applicant has alleged numerous instances of ineffective assistance of counsel against trial counsel, William Brunson. Each allegation is addressed fully 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 trial. 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. See generally 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, 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.

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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, 539 U.S. at 526-527, 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) (per curiam). 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." Id. 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; Harrington, 562 U.S. 86.

"Surmounting Strickland's high bar is never an easy task." Padilla v. Kentucky, 559 U.S. 356, 371 (2010). 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

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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. 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. 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. at 693, 697. The likelihood of a different result must be substantial, not just conceivable. Id. at 693; Harrington, 562 U.S. 86.

Based on this standard set forth above, this Court finds Applicant has failed to meet his requisite burden of establishing any constitutional ineffectiveness of counsel as to any of his various allegations. Applicant’s allegation is addressed fully below:

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Newly Discovered Evidence

This Court finds Applicant has wholly failed to set forth a *prima facie* case, which would permit this application based on newly discovered evidence. The Uniform Post-Conviction Relief Act states a person may institute a post-conviction relief action if “there exists evidence or material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice.” S.C. Code Ann. § 17-27-20(A)(4). If the applicant contends there is evidence of material fact not previously presented, the post-conviction relief application must be filed within one year after the date of actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence. S.C. Code Ann. §17-27-45(C). An applicant requesting a new trial based on after-discovered evidence after a conviction must show that the evidence:

- (1) Is such as would probably change the result if a new trial was had;
- (2) Has been discovered since the trial;
- (3) Could not by the exercise of due diligence have been discovered before the trial;
- (4) Is material to the issue of guilt or innocence; and,
- (5) Is not merely cumulative or impeaching.

Hayden v. State, 278 S.C. 610, 611, 299 S.E.2d 854, 855 (1983) (citing *State v. Caskey*, 273 S.C. 325, 256 S.E.2d 737 (1979)).

As an initial matter, this Court finds the testimony of Alexander Gaillard and Joe Holmes is not credible. The determination of whether new evidence is credible for purposes of a new trial rests with the trial court. *State v. Porter*, 269 S.C. 618, 621, 239 S.E.2d 641, 643 (1977). In particular, “our jurisprudence recognizes the gatekeeping role of the trial court in making a credibility assessment.” *State v. Mercer*, 381 S.C. 149, 168, 672 S.E.2d 556, 565 (2009) (citing *Porter*, 269 S.C. at 621, 239 S.E.2d at 643). “When testimony is in direct conflict and depends

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largely on the credibility of the new evidence, the trial judge is charged with the duty of assessing the evidence.” *State v. Deese*, 266 S.C. 534, 538 225 S.E.2d 175, 176 (1976) (citing *State v. Fowler*, 264 S.C. 149, 155, 213 S.E.2d 447, 450 (1975)). Moreover, where the ground for a new trial is the recantation of testimony, the closest scrutiny should be applied, as this type of testimony is ordinarily unreliable. *State v. Wright*, 269 S.C. 414, 421, 237 S.E.2d 764, 768 (1977). Additionally, inconsistency in statements undermines the possibility that the result of a new trial would be different. *See Johnson v. Catoe*, 345 S.C. 389, 548 S.E.2d 587 (2001) (holding the petitioner failed to meet the requirement for a new trial such that the evidence would probably change the result if a new trial were granted when the witnesses upon which the newly discovered evidence was based made prior inconsistent statements and, therefore, was not credible).

At the evidentiary hearing, Alexander Gaillard testified that he was pressured into his testimony at the original trial. Mr. Gaillard testified at the evidentiary hearing that he did not see Applicant with a gun, as he was at the front of the gas station when the shooting occurred. Mr. Gaillard testified that he was never in a position to see anyone with a gun that night and that he did not have a line of sight to the incident location. Applicant testified that he never had a gun that night and that the gun was William Phillips’. Applicant testified that Mr. Phillips was originally charged with murder in this case. Applicant testified that Mr. Phillips had possession of the gun before and after the shooting. The record indicates that both Antwan Venning and William Phillips both testified at trial that Applicant was the shooter. The testimony of Mr. Venning and Mr. Phillips both place the gun in Applicant’s hands during the shooting. The recantation of Mr. Gaillard does not have a probability of changing the result of a new trial and is merely cumulative to the testimony of Mr. Venning and Mr. Phillips.

This Court finds Applicant has failed to make a *prima facie* showing he is entitled to relief

based on the information set forth above. Specifically, this Court finds Applicant has wholly failed to establish the information presented at the evidentiary hearing would: (1) change the result if a new trial were had; (2) is not merely cumulative or impeaching. This Court further finds the inconsistency in Gaillard's statements are unreliable and undermine the possibility the result of a new trial would be different. Accordingly, this application must be denied and dismissed with prejudice.

CONCLUSION

Based on all the foregoing, this Court finds and concludes 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.

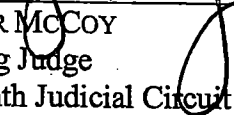
This Court notes Applicant must file and serve a notice of appeal within thirty days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. *See* Rule 203, SCACR. Pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991), an applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

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IT IS THEREFORE ORDERED:

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

AND IT IS SO ORDERED this 21st day of June, 2019.

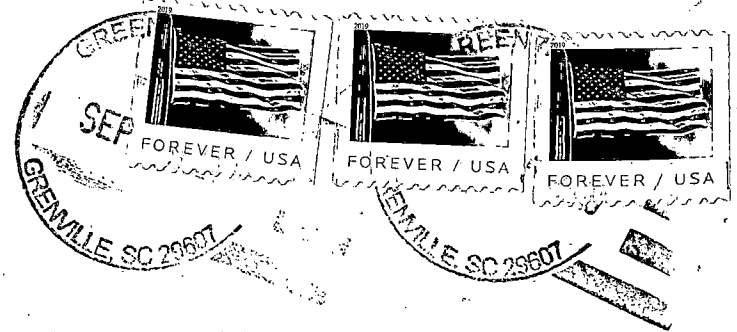


JENNIFER MCCOY
Presiding Judge
Fourteenth Judicial Circuit

Charleston, South Carolina

Handwritten initials

LAW OFFICE OF
C. RAUCH WISE
Attorney & Counselor at Law
305 Main Street
Greenwood, SC 29646



Daniel E. Shearouse, Clerk
Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211