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RECEIVED

MAR 12 2020

March 10, 2020

S.C. SUPREME COURT

The Honorable Daniel E. Shearouse
The Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29221

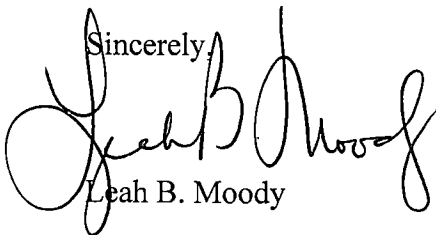
RE: Demetrius Derrick Henderson, #363944, vs. State of South Carolina
C.A. No.: 2018-CP-40-02755

Dear Mr. Shearouse:

The Richland County Court of Common Pleas appointed my office to represent **Demetrius Henderson** in his Post-Conviction Relief action. Please find enclosed for filing the original and two (2) copies of the Notice of Appeal and Proof of Service in the above-referenced case. Please return the clocked copies to me in the enclosed self-addressed, stamped envelope. Also enclosed is a copy of the Order Dismissing the Post-Conviction Relief Application.

Thank you for your assistance with this matter.

Sincerely,



Leah B. Moody

LBM/bd

Enclosures

cc Demetrius Henderson
Lindsey McCallister, Esquire, SC Attorney General's Office
The Honorable Jeanette McBride, Clerk of Court, Richland County
Sharon Graham, SCCID

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

MAR 12 2020

S.C. SUPREME COURT

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable J. Derham Cole, Presiding in Richland County

Case No. 2018-CP-40-02755


Demetrius Derrick Henderson, #363944, Appellant,

v.

State of South Carolina, Respondent.

NOTICE OF APPEAL

Demetrius Henderson appeals the order of the Honorable J. Derham Cole, dated January 22, 2020, and mailed on February 6, 2020. Appellant received written notice of entry of the final order on February 10, 2020.


Leah B. Moody, Esquire
Law Office of Leah B. Moody, LLC
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Other Counsel of record:
Lindsey A. McCallister, SC Attorney General's Office
Attorney for Respondent
Rembert C. Dennis Building
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IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

MAR 12 2020

S.C. SUPREME COURT

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable J. Derham Cole, Presiding in Richland County

Case No. 2018-CP-40-02755

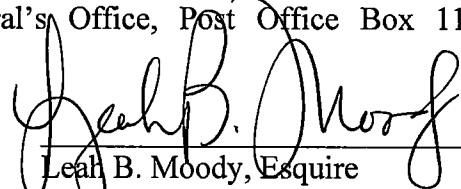
Demetrius Derrick Henderson, #363944, Appellant,

v.

State of South Carolina, Respondent.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on Lindsey A. McCallister, Esquire, SC Attorney General's Office, by depositing a copy of it in the United States Mail, postage prepaid, on March 10, 2020, addressed to its attorney of record, Lindsey A. McCallister, Esquire, SC Attorney General's Office, Post Office Box 11549, Columbia, South Carolina, 29211-1549.


Leah B. Moody, Esquire
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235 E. Main Street, Suite 115
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March 10, 2020

Cc Demetrius Henderson
Lindsey McCallister, Esquire, SC Attorney General's Office
The Honorable Jeanette McBride, Clerk of Court, Richland County
Sharon A. Graham, SCCID

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

Demetrius D. Henderson, #363944,)

C. A. No. 2018-CP-40-02755

Applicant,)

ORDER OF DISMISSAL

v.)

State of South Carolina,)

Respondent.)

CLERK OF COURT
SOUTH CAROLINA

2020 JAN 29 AM 10:14

RICHLAND COUNTY
FILED

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed May 22, 2018, by Demetrius Derrick Henderson (Applicant). The State (Respondent) filed a Return on August 24, 2018, requesting an evidentiary hearing. An evidentiary hearing into the matter was convened April 3, 2019, at the Richland County Courthouse before the undersigned. Applicant was present at the hearing and represented by Leah B. Moody, Esquire. Assistant Attorney General Lindsey A. McCallister of the South Carolina Attorney General's Office represented Respondent.

At the call of the case, PCR counsel for Applicant requested a continuance on his behalf. PCR counsel informed the Court Applicant did not wish to go forward with this hearing because he wanted to further amend his application, and he had only spoken with his attorney one time by phone. PCR counsel stated she was sufficiently prepared, had sent the file and documents to Applicant, and discussed the issues with him. This Court denied Applicant's motion for a continuance.

Applicant then testified on his own behalf. Megan Eigenbrot and Constantine Pournaras, Esquires, Applicant's trial counsel, testified on behalf of Respondent. This Court also had before it a copy of the records of the Richland County Clerk of Court, records from the South Carolina

Department of Corrections, the PCR application, Respondent's Return, the trial transcript, and Applicant's appellate records. After a review of the record and all evidence presented, this Court finds Applicant has failed to meet his requisite burden of proof and denies this application.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Richland County Clerk of Court. In October 2014, the Richland County Grand Jury indicted Applicant for grand larceny – value more than \$2000 but less than \$10,000 (2014-GS-40-6872); first-degree burglary (2014-GS-40-6873); trafficking in cocaine – more than 10 grams but less than 28 grams, first offense (2014-GS-40-6874); and possession of marijuana with intent to distribute (PWID), third offense (2014-GS-40-6877). Megan A. Eigenbrot (Eigenbrot) and Constantine Pournaras (Pournaras), Esquires, represented Applicant. Assistant Solicitors Joseph Shenkar and Britton All, Esquires, prosecuted the case. Applicant proceeded to trial before the Honorable D. Craig Brown and a jury on May 6-8, 2015. The jury found Applicant guilty as indicted. On May 8, 2015, Judge Brown sentenced Applicant to an aggregate term of imprisonment of twenty-nine years –three years for grand larceny; fifteen years for first-degree burglary; ten years for trafficking cocaine; and one year for PWID marijuana, all to be served consecutively.

Applicant then filed a timely notice of appeal. Kathrine H. Hudgins, Esquire, of the South Carolina Commission on Indigent Defense - Appellate Defense Division perfected the appeal pursuant to Anders v. California, 386 U.S. 738 (1967). The South Carolina Court of Appeals dismissed the appeal on May 31, 2017. State v. Henderson, Op. No. 2017-UP-231 (S.C. Ct. App. filed May 31, 2017). The remittitur was returned to the circuit court on June 16, 2017.

SUMMARY OF FACTS ADDUCED AT TRIAL

On the night of December 18, 2013, officers responded to a shots-fired call at the Reserve at Riverwalk apartment complex at 6:24 p.m. Tr. pp. 119, 122-23, 166. When the officers checked the area, they discovered Applicant lying facedown on the sidewalk outside one of the apartment buildings, suffering from multiple gunshot wounds. Tr. pp. 108, 126-27. Applicant was taken to the hospital, and the officers began an investigation. Tr. pp. 134-35, 143.

Witnesses reported seeing the boyfriend of the woman who lived in one of the nearby apartments talking to another person in a white Dodge Intrepid just after the shots were fired. Tr. pp. 99-100, 389. The Dodge Intrepid then quickly drove off. Tr. pp. 103-04. While officers were still on the scene, April Jenkins (Jenkins) arrived home and reported her apartment had been burglarized. Tr. pp. 205-08. Jenkins' boyfriend, Costell Johnson (Johnson), contacted police later that evening and gave a statement. Tr. pp. 389-90. Johnson died before trial from unrelated health problems. Tr. pp. 167, 204. He reported the person driving the Dodge Intrepid was his cousin, Travis Brimfield.

Brimfield eventually gave a statement to law enforcement admitting to shooting Applicant and fleeing the scene. Tr. pp. 183-84, 186. According to Brimfield, he and Johnson returned to Jenkins' apartment, where they sometimes stayed, and had trouble entering because a chair had been pushed against the door. Tr. pp. 168, 171. Once inside, the men quickly realized the apartment had been burglarized. Tr. pp. 175-76. Brimfield went to his room in the apartment, grabbed his gun, and went back outside. Tr. pp. 176-77. Brimfield then saw Applicant coming from around the side of the building and confronted him, asking multiple times if Applicant had been inside the apartment. Tr. pp. 177-79, 182. Applicant said yes and began moving backwards and reaching toward his pockets. Tr. p. 179, 182. Brimfield testified, "So that's when – when it

came into my head I was terrified and I was scared. So I just started shooting because either I was going to get shot or he was going to get shot.” Tr. p. 179. Applicant turned out to be unarmed, but a black TV remote control was found on or near his body. Tr. pp. 115, 129, 232, 385.

Law enforcement located Applicant’s car in the apartment complex’s parking lot. Tr. pp. 401-02. Several televisions and other items belonging to Jenkins were found inside the car, along with marijuana and a digital scale. Tr. pp. 239, 402-03. Cocaine was recovered from Applicant’s pocket. Tr. pp. 234, 236, 273, 275-76.

Additionally, at the time of the incident, Applicant was on probation with a GPS ankle monitor issued by the South Carolina Department of Probation, Parole, and Pardon Services. Tr. p. 29. The State sought to admit the GPS data from the day of incident, arguing it showed Applicant “casing” the apartment prior to the burglary and placed him at the scene. Tr. pp. 33-36, 294-96. Applicant’s counsel objected on the basis of unfair prejudice, but the trial judge ultimately admitted the evidence. Tr. pp. 29-32, 299. However, the testimony was limited, and the State was not permitted to refer to Applicant’s probation, but rather referred to “GPS data” generally. Tr. pp. 321-22.

ALLEGATIONS RAISED

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

1. Ineffective Assistance of Counsel
 - a. Failure to object to jury charge regarding criminal intent as burden-shifting;
 - b. Failure to object to jury charge on constructive possession in relation to trafficking charge as burden-shifting;
 - c. Failure to object to jury charge regarding permissible inference of intent to distribute based on weight of drugs as burden-shifting;
 - d. Failure to properly argue motion for directed verdict.

At the hearing, PCR counsel for Applicant orally amended the application to include additional claims of ineffective assistance of counsel for: (e) failure to preserve the issue of admission of the GPS monitoring evidence; (f) failure to properly argue the prejudicial versus probative analysis under Rule 403, SCRE; (g) failure to object to the credentials of the State's GPS expert; and (h) for stipulating to the chain-of-custody of the marijuana. Further, at the conclusion of Applicant's testimony, he requested to add another amendment, alleging (i) his attorneys erroneously advised him not to testify. Because all of these issues arise from the trial record and did not require additional witnesses to be present, the State consented to the amendments.

SUMMARY OF TESTIMONY PRESENTED AT EVIDENTIARY HEARING

Applicant testified he was arrested in 2015, and he previously had two other attorneys before Eigenbrot and Pournaras. Applicant testified he did not meet Pournaras until Pournaras came to tell him the case was going to trial. Applicant further testified he wanted a trial, and he told Eigenbrot he would not accept a plea agreement, even though the State made several offers. Applicant opined, however, his attorneys had no opportunity to prepare for trial because they were set on convincing him to plead guilty.

Applicant stated he and his attorneys "probably" reviewed the discovery in his case, but they did not tell him anything he did not already know, and they were not trying to find any "angle" for trial. Applicant denied his attorneys discussed the State's case or evidence with him. Applicant testified his attorneys only told him he could not testify because doing so would allow the State to bring up his past criminal history. Applicant testified he was unaware of who would be testifying at his trial. According to Applicant, his attorneys merely kept trying to convince him to accept a plea agreement even though he repeatedly told them no.

Applicant explained he felt the jury instruction given by the trial court regarding criminal intent for trafficking was burden-shifting because it painted his character in a negative light. Applicant testified the instruction should have informed the jury they were free to accept or reject the inference of criminal intent. Applicant further testified he felt the jury instruction informing the jury they could infer criminal intent for trafficking based on the weight of the drugs was also burden-shifting. Applicant explained he believed the instruction should have been based on the weight of "the situation," not the weight of the drugs and the instruction as given denied him a fair trial.

Applicant further testified he believed his attorneys were ineffective because they did not properly argue a motion for a directed verdict. According to Applicant, he believed the State did not have enough evidence and his testimony would have made a difference. Applicant also testified his attorneys should have pursued the issue of a mistrial due to the State's witness who mentioned Applicant's ankle monitor.¹

Applicant testified his attorneys "let the State have a field day" with his previous criminal record by letting the jury know he was wearing an ankle monitor. Applicant testified his attorneys should have objected to any testimony having to do with the ankle monitor as prohibited by Rules 403 and 404, SCRE, and the witness should not have been permitted to testify. Applicant acknowledged his attorneys asked for the jury to be dismissed to address the issue, but by that point it was already in the jury's mind that he was on an ankle monitor.

¹ The assistant solicitor asked the officer, "Did you notice anything about his clothing or was there -- was he wearing just regular clothes? Did you notice anything in his possession or do you remember anything in particular?" The officer answered, "I remember that there were TV remotes, which was highly unusual. I remember the *ankle bracelet*. Other than that, I remember a good bit of --" Tr. p. 129 (emphasis added).

Applicant asserted this statement by the witness tarnished his character, which was burden-shifting.

Applicant also testified his attorneys gave him erroneous advice as to whether he should testify. Applicant explained his attorneys told him "the State would have a field day" with his previous record, which changed his mind about testifying. Applicant testified he believed he had a defense, but his attorneys did not investigate any of the State's witnesses or potential witnesses prior to trial. Applicant testified his defense was that he was shot in a "drug deal gone bad," but his attorneys told him no one would believe him and pushed him to plead guilty instead. Applicant testified he understood the PCR court could not dismiss the charges, and he just wanted to start over and have a fair chance at presenting a defense.

Eigenbrot testified she was appointed to Applicant's case through her position at the Public Defender's Office. Eigenbrot explained she was made first chair on the case when the previous attorney left in January 2015, but Pournaras had been involved as second chair the entire time. Eigenbrot testified she received the file from the previous attorney, who had been actively preparing the case for trial, and the attorney remained available to her for questions if needed. Further, Eigenbrot testified she met with Applicant eight times, including the week of trial.

Eigenbrot further testified she discussed the State's case with Applicant at length. Eigenbrot agreed she told Applicant she thought he should plead guilty, and the State made multiple plea offers. Eigenbrot testified the best offer was for burglary in the second degree, violent, plus grand larceny for a sentencing range of ten-to-fifteen years. Eigenbrot stated the offer had an expiration date of May 1, 2015, at noon, and she sat at the jail with Applicant to give him time to accept it.

Eigenbrot further testified Applicant told her it was a “drug deal gone bad,” and the shooter framed him. Eigenbrot explained the problem with Applicant’s version of events was that a witness in the apartment complex called 911 immediately after hearing the shots, so there was no way the shooter would have had time to put the items from the victim’s apartment in Applicant’s car. She explained it was difficult to argue this was a set-up because the witness who called 911 saw the shooter fleeing shortly thereafter. Eigenbrot testified she believed the drugs had come from the house, but there was no solid evidence to show the home’s occupants were drug dealers. Eigenbrot also explained both the shooter and the person with the shooter gave statements to the police, and the shooter admitted to the shooting. However, law enforcement determined the shooting was self-defense.

Eigenbrot also testified she and Applicant discussed his right to testify, and the week of trial Applicant indicated he wanted to testify. Eigenbrot stated she and Pournaras practiced cross-examination with him and explained his prior record would be used, so Applicant ultimately chose not to testify. Eigenbrot explained she advised Applicant not to testify because it would open the door to his prior record. She also testified she was concerned with his demeanor on the stand and her ability to control his testimony.

Eigenbrot testified the attorneys were given proposed jury charges the day before closing arguments, she reviewed them, and she argued the first-degree burglary charge should not be given. Eigenbrot explained she argued for burglary in the second degree, nonviolent, instead. Ultimately, the judge gave both charges. She testified the instructions given were standard charges from the judge’s charge book, and she did not see any basis for objection to the charges. Eigenbrot conceded she probably did not review the specific charges with Applicant, but she and

Pournaras discussed them together. Eigenbrot also testified she had previously explained to Applicant how the weight of the drugs would be used to prove trafficking and intent to distribute.

Pournaras testified he became involved in the case as second chair; he focused on attacking the GPS data, preparing the defense arguments regarding the “nighttime” element of the first-degree burglary charge, and he argued the directed verdict motion. Pournaras testified the defense believed there was a genuine issue of whether it was “nighttime” as defined by the statute, and he researched weather data for the incident date to help make the argument. Further, Pournaras testified he did not have much material to work with in making a directed verdict motion because every issue he argued was a jury question. Pournaras stated he believed the State presented enough evidence on each element for the case to be sent to the jury.

Pournaras also testified there was a pre-trial hearing on whether the GPS data should be admitted. Pournaras explained he argued the data was more prejudicial than probative because it came from a GPS ankle monitor, which suggested Applicant had a previous criminal record. In addition, Pournaras testified he argued the data was not precise enough to add any value. Pournaras testified the judge ruled the data could be admitted, but the State was not permitted to divulge the source of the data, and the testifying witness could not be identified as an employee of the Department of Probation, Parole, and Pardon Services. Pournaras further testified when the witness stated the data came from an “ankle bracelet,” he asked for a mistrial, which was denied. Pournaras explained the judge offered to give a curative instruction, but both he and Eigenbrot felt it would draw more attention to the issue.

Pournaras agreed he and Eigenbrot reviewed the jury instructions together. Pournaras testified the defense wanted a more precise instruction regarding the element of “nighttime.” Pournaras explained this was an ongoing act up until the shooting, at which time the witnesses

reported they were still able to see the scene outside. However, Pournaras testified he did not see anything objectionable in the instructions as given, and he believed them to be a correct statement of the law. Pournaras stated he did not recall reviewing the proposed jury instructions with Applicant, but they discussed the elements of the offenses.

Pournaras testified he started meeting with Applicant once the case was put on the trial docket. Pournaras further testified he discussed with Applicant Applicant's right to testify, and engaged in a mock direct and cross-examination of Applicant to illustrate the difficulty of testifying. Pournaras stated he did not tell Applicant not to testify, but he advised Applicant he did not think it would be a good idea for Applicant to take the stand. Pournaras also testified he was candid with Applicant that he did not find Applicant's version of events credible, but he also explained if Applicant did not testify, there would be no other evidence for the jury to consider. According to Pournaras, Applicant later decided not to testify at trial.

Pournaras explained the statements Applicant made after his arrest made it difficult to present any other version of the facts because those statements could be used for impeachment. Pournaras testified he reviewed the State's timeline with Applicant and how the State could corroborate its version of events through the 911 callers who saw the shooter flee, which did not give anyone time to plant evidence in his car. Further, Pournaras testified he explained to Applicant the fact Applicant was found with twenty grams of cocaine, which alone is very valuable, created a serious problem with the argument of a "drug deal gone bad" because it is not logical to assert Brimfield and Johnson shot Applicant in order to steal weed, but then planted the cocaine and other items recovered from Applicant's car. Pournaras testified the defense realized it did not have any good options between Applicant testifying without a credible story or not testifying at all and leaving the jury only with the State's evidence, so they focused on

negotiating a plea deal. According to Pournaras, he and Eigenbrot clearly advised Applicant they thought he should plead guilty and warned him he would have a less favorable outcome if convicted after a trial.

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

This Court viewed the evidence presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony and evidence accordingly in its discussion below. Further, this Court has reviewed the Clerk of Court records regarding the subject convictions, the trial transcript, Applicant's appellate records, and the legal arguments made by the attorneys. This Court finds the combined record of the trial transcript and the testimony from the evidentiary hearing establishes Applicant received effective assistance of counsel, and this application should be denied. Set forth below are the relevant findings of fact and conclusion of law as required by S.C. Code Ann. § 17-27-80 (2014).

In a post-conviction relief action, the 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 "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813. The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. at 117, 300 S.C. 115. First, the applicant must prove counsel's performance was deficient. Id. Under this prong, courts measure an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, any 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." Id. at 117-18, 300 S.C. 115.

Allegations 1(a), 1(b), and 1(c) - Failure to object to jury charges regarding criminal intent, constructive possession, and permissible inference of intent to distribute based on weight of drugs as burden-shifting

The relevant jury instructions as given at trial were as follows:

[I]n order to establish criminal liability, criminal intent is required. For example, the mental state required to be proven by the State for a particular crime might be purpose, intent, knowledge, recklessness, or criminal negligence. Criminal intent must be proven by the State beyond a reasonable doubt.

Criminal intent is always a matter that must be determined by the jury from the circumstances surrounding the situation. There is no way, ladies and gentlemen, to prove intent with mathematical certainty. There is no way that medical science can dissect a person's brain and determine what the person had in mind. So the law says that criminal intent may be inferred from the circumstances shown to have existed. This is how you make a determination of whether or not the element requiring intent was present.

It is not necessary to establish intent by direct and positive evidence. But intent may be established by inference in the same way as any other fact, by taking into consideration the acts of the parties and all the facts and circumstances of the case.

Criminal intent is a mental state, a conscious wrongdoing. It is up to you to determine what the Defendant intended to do based on the circumstances shown to have existed. Criminal intent can arise from action or a failure to act. It may arise from negligence, recklessness, or an indifference to duty or to consequences that is considered by law to be the equivalent of criminal intent.

...

To prove possession, the State must prove beyond a reasonable doubt that the Defendant had both the power and the intent to control the disposition or use of the cocaine. Possession may be either actual or constructive. Actual possession means that the cocaine was in the actual physical custody of the Defendant. Constructive possession means that the Defendant had dominion and control or the right to exercise dominion and control over either the cocaine itself or the property in which the cocaine was found.

Mere presence at the scene where the drugs were found is not enough to prove possession. The Defendant's knowledge and possession may be inferred when a substance is found on the property under Defendant's control. However, this inference is simply an evidentiary fact to be taken into consideration by you, along with other evidence in the case, and to be given the weight you decide it should have.

...

[T]he Defendant, ladies and gentlemen, is also charged with possession with intent to distribute marijuana. The State must prove beyond a reasonable doubt the Defendant possessed marijuana with intent to distribute it. Distribute means to deliver other than by administering or dispensing a drug. Intent may be shown by acts and conduct of the Defendant and other circumstances from which you naturally and reasonably infer intent.

In determining whether the Defendant had the intent to distribute the marijuana, you may consider the circumstance's surrounding Defendant's alleged possession. You may also consider the amount of the substance alleged to have been possessed, the manner in which it was allegedly possessed, the place where it was allegedly possessed, and other factors which you consider to be important. You must find that the Defendant did not intend to have the marijuana solely for his own use.

Furthermore, possession of more than 28 grams or one ounce of marijuana creates an inference that the Defendant possessed the marijuana with the intent to distribute it. Again, this inference does not relieve the State from proving beyond a reasonable doubt that the Defendant had the intent to distribute. It is simply an evidentiary fact to be taken into consideration by you, along with the other evidence in the case, and to be given the weight you decide it should have.

Tr. pp. 544-45, 548-51. Defense counsel did not object to the charges given, either before or after the judge read them to the jury. Tr. pp. 496-99, 555.

“A charge is sufficient if, when considered as a whole, it covers the law applicable to the case.” State v. Ezell, 321 S.C. 421, 425, 468 S.E.2d 679, 681 (Ct. App. 1996). “The substance of the law is what must be charged to the jury, not any particular verbiage.” State v. Adkins, 353 S.C. 312, 318-19, 577 S.E.2d 460, 464 (Ct. App. 2003). “Jury instructions must be considered as a whole and, if as a whole, they are free from error, any isolated portions which might be misleading do not constitute reversible error.” State v. Jackson, 297 S.C. 523, 526, 377 S.E.2d 570, 572 (1989).

After reviewing the specific instructions complained of by Applicant, and considering the instructions as a whole, this Court finds defense counsel were not deficient in failing to object. The instructions as given were not burden-shifting as they correctly state the law in South Carolina as to each of these issues, and therefore, counsel had no reason to object.

Applicant testified he believed the instruction should have informed the jury they were free to accept or reject the inference of criminal intent. The Court finds the instruction did just that. The instruction informed the jury, “Criminal intent is always a matter that must be determined by the jury from the circumstances surrounding the situation. . . . [I]ntent *may be* established by inference in the same way as any other fact, by taking into consideration the acts of the parties and all the facts and circumstances of the case. . . . *It is up to you to determine* what the Defendant intended to do based on the circumstances shown to have existed.” Tr. pp. 544-45 (emphasis added). As a whole, this instruction clearly informs the jury of their right to determine criminal intent based on a variety of considerations, and states merely that it can be inferred, not that it must be inferred.

Applicant’s contention the instruction regarding the weight of the drugs should have been based on the weight of “the situation,” not the weight of the drugs, is wholly without merit as

that is not the law in South Carolina. See S.C. Code Ann. § 44-53-370(d) (2015) (creating permissive inference that possession of more than one gram of cocaine constitutes possession of cocaine with intent to distribute). Further, Eigenbrot credibly testified she had previously explained to Applicant how weight would be used to prove trafficking and intent to distribute, and Pournaras credibly testified he and Eigenbrot discussed all of the elements of each charge with Applicant. Applicant was therefore on notice of these issues prior to the commencement of trial.

In any event, because defense counsel were not deficient in not raising objections to these charges, Applicant has failed to meet his burden of proof, and this Court finds defense counsel were not constitutionally ineffective on these grounds. These allegations are denied and dismissed.

Allegation 1(d) - Failure to properly argue motion for directed verdict

Applicant testified he felt his attorney did not properly argue a motion for a directed verdict, although he did not specify what he thought his attorney should have done differently. Rather, according to Applicant, he believed the State did not have enough evidence, and his testimony would have made a difference. Applicant also testified his attorneys should have pursued the issue of a mistrial due to the State's witness who mentioned Applicant's ankle monitor.

When considering a motion for directed verdict, the trial court is concerned with the existence of evidence, not its weight. State v. Walker, 349 S.C. 49, 53, 562 S.E.2d 313, 315 (2002). The role of the trial court is only to determine "whether the evidence presented is sufficient to allow a reasonable juror to find the defendant guilty beyond a reasonable doubt." State v. Bennett, 415 S.C. 232, 781 S.E.2d 352 (2016). If there is any direct or circumstantial evidence reasonably tending to prove the guilt of the accused, the appellate court

must affirm the trial judge's ruling. State v. Cherry, 361 S.C. 588, 593-94, 606 S.E.2d 475, 478 (2004). "In deciding motions for a directed verdict. . . the evidence and all reasonable inferences which may be drawn from it must be viewed in the light most favorable to the non-moving party. If more than one reasonable inference can be drawn from the evidence, the case must be submitted to the jury." Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 611, 518 S.E.2d 591, 597 (1999). "[U]nless there is a total failure of evidence tending to establish the charge laid in the indictment, the trial judge's ruling upon a motion for a directed verdict must stand absent an error of law." State v. Nix, 288 S.C. 492, 496, 343 S.E.2d 627, 629 (Ct. App. 1986).

This Court has reviewed the relevant portion of the transcript and finds no deficiency in Pournaras's handling of this motion. Tr. pp. 478-89. At the close of the State's case, Pournaras renewed the defense motion for a mistrial, as well the objections to the testimony of the GPS expert. Tr. pp. 478-49. The trial judge declined to change his ruling on either of those issues. Tr. pp. 479-80. Pournaras then argued for a directed verdict as to the first-degree burglary charge, raising the issue of whether the State had sufficiently proved the "nighttime" element of the offense. Tr. p. 480. Pournaras noted although it was dark by the time the officers arrived on scene, the first witness testified it was light enough to see from his apartment window to the back of the parking lot. Tr. p. 480. Pournaras further argued the distribution case was insufficient because, although the drugs were found in Applicant's car, there was no testimony as to whether he knew it was there or why it was there. Tr. p. 481. Pournaras then argued the State had not presented any evidence to prove the value of the items taken from the apartment was over \$2,000, nor had the State proved its trafficking case because those drugs were found in

Applicant's pants after the pants had been removed and handled by other parties. Tr. p. 481. The trial court denied the motions. Tr. pp. 488-89.

This Court finds there was a clear factual issue for the jury at the close of the State's evidence, and the trial court correctly denied the motion. As the trial court noted, the standard for a case to be submitted to the jury is an "any direct or circumstantial evidence" standard, which is a high bar for defense counsel to overcome. Further, whether Applicant's testimony would have made any difference is irrelevant because the appropriate time for a directed-verdict motion is after the State's case, but before the defense's. This Court finds no deficiency with Pourmaras's handling of the motion. This allegation is therefore denied and dismissed.

Allegation 1(e) - Failure to preserve the issue of admission of the GPS monitoring evidence

At the start of the evidentiary hearing, Applicant indicated his intention to proceed on a claim of ineffective assistance of counsel for failing to preserve the issue of the admission of the GPS monitoring evidence. However, Applicant did not present any evidence or testimony as to this issue, either through his own testimony or that of his trial counsel. Because Applicant failed to present any evidence as to this issue, the Court finds it was waived.

In any event, the admission of the GPS evidence was raised by appellate counsel on appeal pursuant to Anders.² State v. Henderson, Op. No. 17-UP-231 (S.C. Ct. App. filed May 31, 2017). The Court of Appeals apparently considered the issue on the merits after receiving Applicant's *pro se* brief, indicating the issue was in fact preserved.

For both of these reasons, this Court denies relief and dismisses the allegation.

Allegation 1(f) - Failure to properly argue the prejudicial versus probative analysis under Rule 403, SCRE

² Anders v. California, 386 U.S. 738 (1967).

Applicant contends his attorneys did not properly argue the GPS evidence was more prejudicial than probative under Rule 403, SCRE. The trial transcript clearly refutes this allegation, and therefore, this Court denies relief on this ground.

At the time of the incident, Applicant was on probation with a GPS ankle monitor issued by the South Carolina Department of Probation, Parole, and Pardon Services. Tr. p. 29. The State sought to admit the GPS data from the day of the incident, arguing it showed Applicant “casing” the apartment prior to the burglary and placed him at the scene. Tr. pp. 33-36, 294-96. Applicant’s counsel objected on the basis of unfair prejudice, but the trial judge ultimately admitted the evidence, characterizing it as “highly, highly probative.” Tr. pp. 29-32, 299. The State was not permitted to refer to Applicant’s probation, but merely referred to “GPS data” generally. Tr. pp. 321-22.

“All evidence is meant to be prejudicial; it is only *unfair* prejudice which must be [scrutinized under Rule 403].” State v. Gilchrist, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998) (quoting United States v. Rodriguez-Estrada, 877 F.2d 153, 156 (1st Cir. 1989)); see also United States v. Mohr, 318 F.3d 613, 619-20 (4th Cir. 2003) (“Rule 403 only requires suppression of evidence that results in unfair prejudice – prejudice that damages an opponent for reasons other than its probative value, for instance, an appeal to emotion...”). The admission of evidence is well within the trial judge’s discretion, and his decision will not be overturned on appeal absent an abuse of that discretion. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002). “A trial judge’s decision regarding the comparative probative value and prejudicial effect of relevant evidence should be reversed only in exceptional circumstances.” State v. Dial, 405 S.C. 247, 260, 746 S.E.2d 495, 501 (Ct. App. 2013).

Here, the trial court engaged in weighing the probative value of evidence placing Applicant at the scene of the crime versus the prejudicial effect of such evidence. In order to limit prejudice due to how the data was obtained, the trial court prohibited the State from referring to Applicant's prior conviction or his probation, and merely referred to "GPS data." Tr. pp. 321-22. Accordingly, this Court finds Applicant has failed to prove his attorneys were deficient in arguing for the exclusion of the evidence, nor has he proved any prejudice because he has failed to show the trial court abused its discretion by admitting the evidence. Therefore, this allegation is denied and dismissed.

Allegation 1(g) - Failure to object to the credentials of the State's GPS expert

Applicant alleges his counsel were constitutionally ineffective because they failed to object to the credentials of the State's GPS expert. However, Applicant offered no basis for an objection or put forth any evidence as to why the witness should not have been found qualified. Accordingly, this Court finds no deficiency in counsels' performance.

An expert may testify if such "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." Rule 702, SCRE; see also Knoke v. South Carolina Dep't of Parks, 324 S.C. 136, 478 S.E.2d 256 (1996). However, expert testimony is not rendered inadmissible simply because it embraces an ultimate issue to be decided by the trier of fact. Id. (citing Rule 43(m)(3), SCRPC). Generally, "the qualification of an expert witness and the admissibility of an expert's testimony are matters within the trial judge's discretion. An abuse of discretion arises from an error of law or a factual conclusion that is without evidentiary support." Lee v. Suess, 318 S.C. 238, 285, 457 S.E.2d 344, 345 (1995).

Here, the GPS expert testified he had worked in the GPS field for eight years and had been trained by at least five GPS providers on the use and interpretation of GPS data. Tr. p. 326.

He further testified he keeps abreast the latest technology in the field, and he had retrained several times as the technology changed. Tr. pp. 326-327. Finally, he testified he had previously testified in court as an expert and had consulted with both the prosecution and defense in other cases regarding how GPS works and how to interpret the data. Tr. p. 327. Defense counsel did not object to his qualification as an expert. Tr. p. 327.

This Court finds Applicant's attorneys were not deficient in failing to object, as the State presented sufficient information for the witness to qualify. See id. ("The test for qualification is a relative one that is dependent on the particular witness's reference to the subject."). Even if defense counsel had objected to the witness's qualifications, "defects in an expert witness's education and experience go to the weight, rather than the admissibility, of expert's testimony." Gooding v. St. Francis Xavier Hosp., 326 S.C. 248, 253, 487 S.E.2d 596, 598 (1997). "The qualification of an expert witness and the admissibility of the expert's testimony are matters within the trial court's discretion," and the objection is likely to have been overruled. Id. Accordingly, because this Court finds neither deficiency nor prejudice, this allegation is denied and dismissed.

Allegation 1(h) – Stipulation to the chain-of-custody of the marijuana

Although Applicant asserted prior to the evidentiary hearing he wished to raise an allegation his attorneys were constitutionally ineffective for stipulating to the chain-of-custody of the marijuana evidence introduced at trial, Applicant never mentioned the issue in his testimony or elaborated on any specifics of this allegation. Because Applicant failed to offer any proof to support this allegation, the Court finds it was waived and denies relief. In any event, the Court has reviewed the transcript and finds no deficiency with counsels' decision to stipulate to the chain of custody in this instance. Tr. p. 66. As previously discussed, Applicant's own testimony at the evidentiary hearing was that this incident was a "drug deal gone bad." Applicant has never

disputed that the drugs found at the scene were indeed cocaine and marijuana, and he has not presented this Court with any basis on which the Court could possibly find counsel constitutionally ineffective for agreeing to this stipulation. The allegation is therefore dismissed.

Allegation 1(i) – Advice regarding Applicant’s right to testify

Applicant testified his attorneys gave him erroneous advice as to whether he should testify. Applicant explained his attorneys told him “the State would have a field day” with his previous record, which changed his mind about testifying. Applicant testified he believed he had a defense, but his attorneys did not investigate any of the State’s witnesses or potential witnesses prior to trial. Applicant testified his defense was that he was shot in a “drug deal gone bad,” but his attorneys told him no one would believe him and pushed him to plead guilty instead.

Pournaras explained the statements Applicant made after his arrest made it difficult to present any other version of the facts because those statements could be used for impeachment. Pournaras testified he explained to Applicant the fact Applicant was found with twenty grams of cocaine, which alone is very valuable, created a serious problem with Applicant’s story of a “drug deal gone bad” because it is not logical to assert Brimfield and Johnson shot Applicant in order to steal weed, but then planted the cocaine and other items recovered from Applicant’s car. Pournaras testified the defense realized it did not have any good options between Applicant testifying without a credible story or not testifying at all and leaving the jury only with the State’s evidence.

Similarly, Eigenbrot testified she and Applicant discussed his right to testify, and the week of trial Applicant indicated he wanted to testify. Eigenbrot stated she and Pournaras practiced cross-examination with him and explained how his prior record would be used, so Applicant ultimately chose not to testify. Eigenbrot explained she advised Applicant not to

testify because it would open the door to his prior record. She also testified she was concerned with his demeanor on the stand and her ability to control his testimony.

The Supreme Court ably summed up the competing interests which contribute to a defendant's decision to testify or not in Brown v. State, 340 S.C. 590, 533 S.E.2d 308, (2000).

The Fifth Amendment provides that “[n]o person ... shall be compelled in any criminal case to be a witness against himself.” The decision to testify or not is a perilous one. If a defendant does not testify, he forgoes the opportunity to tell the jury his version of events. On the other hand, if a defendant chooses to testify, he subjects himself to cross-examination, including possible impeachment with prior convictions. If a defendant chooses not to take the stand in his own defense, the trial judge must, if requested, instruct the jury that the defendant's failure to testify cannot be held against him or considered by the jury in any manner during its deliberations. A defendant's decision to testify or not must be made with knowledge of the consequences of either choice.

Id. at 594, 533 S.E.2d at 310 (internal citations omitted).

A review of the record reveals the trial judge clearly explained Applicant's right to testify, how his prior record might be used against him if he did so, and the instruction to be given to the jury should Applicant decline to exercise his right. Tr. pp. 490-91. The trial judge also inquired whether Applicant had discussed the matter with his attorneys, and Applicant stated he had, and he did not need any more time to make his decision. Tr. p. 492. Applicant then informed the trial court he did not wish to testify. Tr. p. 492. Further, the Court finds Eigenbrot and Pournaras credible on this issue, while finding Applicant's testimony is not credible.

The Court finds Eigenbrot and Pournaras informed Applicant of his right to testify, as well as the consequences of exercising that right and of waiving it. The Court finds credible counsels' assessment the risks outweighed the benefits of Applicant's testimony, and they reasonably advised him not to testify. Further, Applicant has presented no evidence he was unconstitutionally prevented from testifying or that his decision to waive his right was not freely

and voluntarily made. Finally, this Court finds Applicant has failed to meet his burden of proving he was prejudiced by counsels' allegedly deficient advice not to testify. Applicant testified only that he would have presented a "drug deal gone bad" defense, but he offered no detail. Pournaras, on the other hand, credibly explained why the story Applicant planned to present to the jury had he testified was not believable and likely would not have resulted in a successful defense. See United States v. Rashaad, 249 F. App'x 972, 973 (4th Cir. 2007) ("[I]n order to prove ineffective assistance of counsel based on his claim that his attorney prevented him from exercising his right to testify at the pre-trial hearing, Rashaad must show both that his attorney violated his right to testify and that his testimony had a 'reasonable probability' of changing the outcome.").

Therefore, because neither Eigenbrot nor Pournaras was deficient, and in any event, Applicant did not prove he was prejudiced by his attorneys' allegedly deficient advice, this Court denies relief as to this ground and dismisses this allegation.

CONCLUSION

Based on the foregoing, the 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.

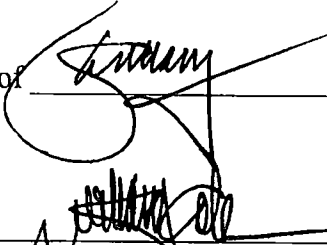
The Court notes Applicant must file and serve a notice of appeal within thirty days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRPC, provides that if 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.

IT IS THEREFORE ORDERED THAT:

1. The application for post-conviction relief is denied and dismissed with prejudice; and
2. Applicant will remain in the custody of the South Carolina Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 22nd day of January, 2019.



J. DERHAM COLE
Presiding Judge
Fifth Judicial Circuit

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

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2018CP4002755

Demetrius Derrick Henderson #363944

State Of South Carolina

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: _____

Attorney for : Plaintiff Defendant or 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.
- 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 _____
- 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 : _____

2020 JAN 29 10:18
RICHLAND COUNTY
FILED
C.P. CLERK & F.C.

INFORMATION FOR THE PUBLIC 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
		\$
		\$
		\$

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.**

Circuit Court Judge _____ Judge Code _____ Date _____

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this 29 January 2020 to attorneys of record or to parties (when appearing pro se) as follows:

Demetrius Derrick Henderson Leah B. Moody
#363944

Lindsey Ann McCallister

Demetrius Derrick Henderson
#363944

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court

Jeanette W. McBride

Law Office of Leah B. Moody, LLC

Leah B. Moody
Lbmatty@comporium.net

235 East Main Street, Suite 115
Post Office Box 1015 (29731)
Rock Hill, South Carolina 29730

March 10, 2020

The Honorable Jeanette McBride
Richland County Clerk of Court
Post Office Box 2766
Columbia, South Carolina 29202

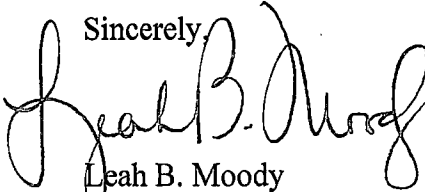
RE: Demetrius Derrick Henderson, #363944, vs. State of South Carolina
C.A. No.: 2018-CP-40-02755

Dear Mrs. McBride:

The Richland County Court of Common Pleas appointed my office to represent **Demetrius Henderson** in his Post-Conviction Relief action. Please find enclosed a copy of the Notice of Appeal and Proof of Service in this matter.

If you have any questions or concerns, please feel free to contact my office. Thank you for your assistance in this matter.

Sincerely,



Leah B. Moody

LBM/bd

Enclosures

cc Demetrius Henderson
Lindsey McCallister, Esquire, SC Attorney General's Office
The Honorable Daniel E. Shearouse, Clerk of Court, South Carolina Supreme Court
Sharon Graham, SCCID

Law Office of Leah B. Moody, LLC

Leah B. Moody
Lbmatty@comporium.net

235 East Main Street, Suite 115
Post Office Box 1015 (29731)
Rock Hill, South Carolina 29730

March 10, 2020

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South Carolina Attorney General's Office
Post Office Box 11549
Columbia, South Carolina 29211

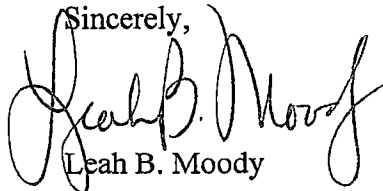
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Sincerely,



Leah B. Moody

LBM/bd

Enclosures

cc Demetrius Henderson

The Honorable Daniel E. Shearouse, Clerk of Court, South Carolina Supreme Court
The Honorable Jeanette McBride, Clerk of Court, Richland County
Sharon Graham, SCCID

Law Office of Leah B. Moody, LLC

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March 10, 2020

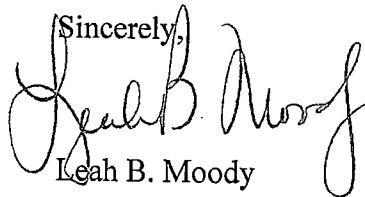
Ms. Sharon A. Graham
SC Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11433
Columbia, South Carolina 29211

RE: Demetrius Derrick Henderson, #363944, vs. State of South Carolina
C.A. No.: 2018-CP-40-02755

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Sincerely,

Leah B. Moody

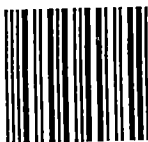
LBM/bd

Enclosures

cc Demetrius Henderson
Lindsey McCallister, Esquire, SC Attorney General's Office
The Honorable Daniel E. Shearouse, Clerk of Court, South Carolina Supreme Court
The Honorable Jeanette McBride, Clerk of Court, Richland County



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The Honorable Daniel E. Shearouse
The Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29221