

LAW OFFICES OF  
CAPERS, DUNBAR, SANDERS, BRUCKNER & BELLOTTI, LLP  
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April 10, 2013

**RECEIVED**

APR 11 2013

S.C. Supreme Court

**VIA FEDERAL EXPRESS**

Hon. Daniel E. Shearouse  
Clerk, Supreme Court of South Carolina  
1231 Gervais Street  
Columbia, South Carolina 29201

RE: Notice of Appeal  
Kenny Jackson v. State of South Carolina  
Case No. 2012-CP-02-1544

Dear Clerk,

Enclosed for filing please find one original and one copy of Notice of Appeal and Proof of Service in the above-referenced case. Please file the original, certify the copy and return the copy to the undersigned in the self-addressed, stamped envelope provided for your convenience. Thank you for your assistance in this matter.

Sincerely,

  
Ziva P. Bruckner

ZPB:pg

Enclosures

cc (w/encs): Ms. Megan E. Harrigan,  
Assistant Attorney General  
Division of Appellate Defense  
Mr. Kenny Jackson

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APR 11 2013

IN THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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**S.C. Supreme Court**

ON APPEAL FROM AIKEN COUNTY  
Court of Common Pleas  
Second Judicial Circuit

Doyet A. Early III, Circuit Court Judge

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Case No. 2012-CP-02-1544

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Kenny Jackson,  
S.C.D.C. No. 350150

Petitioner,

v.

State of South Carolina,

Respondent.

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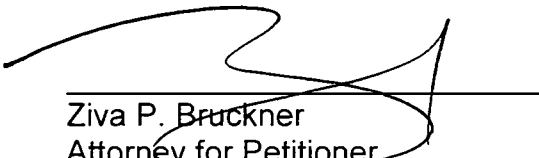
NOTICE OF APPEAL

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Ziva P. Bruckner  
South Carolina Bar No. 9025  
2604 Commons Boulevard  
Augusta, Georgia 30909  
Telephone (706) 722-7542  
Attorney for Petitioner

NOW COMES Kenny Jackson, by and through the undersigned attorney, who had been appointed to represent him in his Post Conviction Application, and files his Notice of Appeal to the Supreme Court of South Carolina from an order issued by Judge Doyet A. Early III, presiding Judge, Second Judicial Circuit, dismissing Petitioner's Petition for Post Conviction Relief, a copy of which is attached hereto and incorporated by reference herein. This Notice is submitted pursuant to Austin v. State, 305 S.C. 453 (1992). A copy of the order was received by the undersigned on March 14, 2013.

Respectfully submitted this 10th day of April, 2013.



Ziva P. Bruckner  
Attorney for Petitioner  
South Carolina Bar No. 9025

Capers, Dunbar, Sanders  
& Bellotti, LLP  
2604 Commons Boulevard  
Augusta, Georgia 30909  
Telephone: (706) 722-7542

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State of South Carolina,

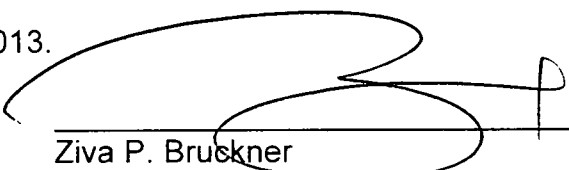
Respondent.

**PROOF OF SERVICE**

I certify that I have served the NOTICE OF APPEAL by depositing a copy  
of it in the U.S. Mail, postage prepaid, addressed to the following:

Ms. Megan E. Harrigan  
Assistant Attorney General  
P.O. Box 11549  
Columbia, South Carolina 29211-1549

This 10th day of April, 2013.

  
Ziva P. Bruckner  
Capers, Dunbar, Sanders & Bellotti, LLP  
2604 Commons Boulevard  
Augusta, Georgia 30909  
Telephone (706) 722-7542  
Attorney for Petitioner

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF AIKEN

Kermy Jackson, 350150,  
 Plaintiff

CASE NO  
N. 2-CP-02-1544

MOTION AND ORDER INFORMATION  
FORM AND COVER SHEET

State Of South Carolina  
 Defendant

Plaintiff's Attorney: Ziva P. Bruckner, Bar No. Address: 2614 Commons Blvd Augusta, GA 30909-2080 phone: (706) 722-7542 fax: e-mail: other:	Defendant's Attorney: Megan E. Harrigan, Bar No. Address: Post Office Box 11549 Columbia SC 29211-1549 phone: (803) 734-3737 fax: (803) 734-4113 e-mail: other:
<input type="checkbox"/> MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) <input type="checkbox"/> FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) <input checked="" type="checkbox"/> PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)	
SECTION I: Hearing Information	
Nature of Motion: Estimated Time Needed: Court Reporter Needed: <input type="checkbox"/> YES / <input type="checkbox"/> NO	
SECTION II: Motion/Order Type	
<input type="checkbox"/> Written motion attached <input checked="" type="checkbox"/> Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order.	
<i>Megan E. Harrigan</i> Signature of Attorney for <input type="checkbox"/> Plaintiff / <input checked="" type="checkbox"/> Defendant	March 4, 2013 Date submitted
SECTION III: Motion Fee	
<input type="checkbox"/> PAID - AMOUNT: <input checked="" type="checkbox"/> EXEMPT: <input type="checkbox"/> Rule to Show Cause in Child or Spousal Support (check reason) <input type="checkbox"/> Domestic Abuse or Abuse and Neglect <input type="checkbox"/> Indigent Status <input type="checkbox"/> State Agency v. Indigent Party <input type="checkbox"/> Sexually Violent Predator Act <input checked="" type="checkbox"/> Post-Conviction Relief <input type="checkbox"/> Motion for Stay in Bankruptcy <input type="checkbox"/> Motion for Publication <input type="checkbox"/> Motion for Execution (Rule 69, SCRPC) <input type="checkbox"/> Proposed order submitted at request of the court, or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: <input type="checkbox"/> Other:	
<b>JUDGE'S SECTION</b> <input type="checkbox"/> Motion Fee to be paid upon filing of the attached order. <input type="checkbox"/> Other:	JUDGE: _____ CODE: _____ Date: _____
CLERK'S VERIFICATION	
Collected by: _____ <input type="checkbox"/> MOTION FEE COLLECTED: _____ <input type="checkbox"/> CONTESTED - AMOUNT DUE: _____	Filed: <u>3-13-13</u> Date Filed: <u>3-13-13</u> CC, CP & GS <i>Amita K...</i> Deputy Clerk

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

JUDGMENT IN A CIVIL CASE  
 CASE NUMBER 2012CP0201544

Kenny Jackson	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
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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), SCRCP.
  - Rule 41(e), SCRCP (Vol. Nonsuit).
  - Rule 43(k), SCRCP (Settled);
  - Other: \_\_\_\_\_
- ACTION STRICKEN (CHECK REASON):
  - Rule 40(j) SCRCP;
  - Bankruptcy;
  - Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
  - Other: \_\_\_\_\_
- 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:

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**INFORMATION FOR THE JUDGMENT UNDER**

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Entered (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.

Circuit Court Judge	Judge Code	Date
		3/13/2013

**For Clerk of Court Office Use Only**

This judgment was entered on 3-13-13, and a copy mailed first class or placed in the appropriate attorney's box on 3-13-13, to attorneys of record or to parties (when appearing pro se) as follows:

Ziva Peleg Bruckner 2604 Commons Blvd Augusta, GA  
309092080

Megan Elizabeth Harrigan PO Box 11549 Columbia, SC  
29211

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

*Liz Godard by [Signature]*

Liz Godard - Clerk of Court

Court Reporter

STATE OF SOUTH CAROLINA  
COUNTY OF AIKEN

IN THE COURT OF COMMON PLEAS  
FOR THE SECOND JUDICIAL CIRCUIT

Kenny Jackson #350150

Case No. 2012-CP-02-1544

Applicant

ORDER OF DISMISSAL

State of South Carolina

Filed 3 13 13  
J. G. [Signature]  
C.C.P. # [Signature]  
Archie [Signature]  
Deputy Clerk

Respondent

PROCEDURAL HISTORY

This matter comes before the Court by way of an application for post-conviction relief filed June 26, 2012. The Respondent made its Return on September 11, 2012. An evidentiary hearing into the matter was convened on January 23, 2013, at the Aiken County Courthouse. The Applicant was present at the hearing and was represented by Ziva P. Bruckner, Esquire. The Respondent was represented by Assistant Attorney General Megan E. Harrigan of the South Carolina Attorney General's Office.

The records before this Court indicate that the Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Aiken County Clerk of Court. The Applicant was indicted during the March 2012 term of the Aiken County Grand Jury for two counts of Causing Death by Operating a Vehicle While under the Influence of Drugs or Alcohol (2012-GS-02-0446, -0447). Charles H.S. Lyons, III, Esquire, represented him. On March 14, 2012, Applicant appeared before the Honorable George C. James, Jr., where he pled guilty as indicted to both counts. Judge James sentenced Applicant to twenty-three years imprisonment and a \$25,100 fine for each count, with the sentences to run concurrently. Applicant did not appeal his convictions or sentence.

*[Handwritten signature]*

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

1. Due Process Violation.
2. Newly and after Discovered Evidence.
3. Ineffective Assistance of Counsel.
4. Belated Appeal; and
5. Subject Matter Jurisdiction.

At the evidentiary hearing, Applicant proceeded forward on allegations that Counsel was ineffective for advising Applicant that he would receive a sentence of no more than twenty years if he pled guilty and for failing to file an appeal on his behalf. Applicant abandoned and presented no evidence in regards to his allegations of Due Process Violation, Newly and After Discovered Evidence, and Subject matter jurisdiction. These allegations are deemed waived and are denied and dismissed with prejudice.

#### SUMMARY OF TESTIMONY PRESENTED

At the evidentiary hearing, Applicant testified on his own behalf. The State presented testimony from Applicant's plea counsel, Charles H.S. Lyons, III (herein "Counsel"). This Court also had before it a copy of the Applicant's guilty plea transcript, the records of the Aiken County Clerk of Court, and the Applicant's records from the South Carolina Department of Corrections.

During the evidentiary hearing, Applicant testified that he retained Counsel and met with him three times prior to his guilty plea. He testified that he reviewed all discovery materials with Counsel and discussed possible defenses with Counsel. He testified that he was unable to give Counsel any potential witnesses that could be called in his defense. Applicant testified that he wanted to plead guilty and did not want to proceed to trial. Applicant testified that he discussed plea offers made by the State with Counsel and Counsel assured him that he would receive no

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more than twenty years if he entered a guilty plea. Applicant acknowledged that Counsel and the plea court both advised him that each charge carries up to twenty-five years imprisonment and he could be sentenced up to fifty years imprisonment. However, Applicant testified that he only pled guilty because Counsel advised him that he would receive a sentence of no more than twenty years.

Applicant testified that he admitted to the plea court while under oath that he did drink prior to driving and that he was guilty. Applicant testified that he is indeed guilty. Applicant testified that he apologized to the victims during his guilty plea. Applicant testified that he informed the plea court he was satisfied with Counsel's representation and that Counsel had done everything within reason to properly represent him. Applicant testified that it was his decision to waive his constitutional rights and plead guilty.

Following Applicant's testimony, the State presented testimony from Counsel. Counsel testified that he has been practicing law for approximately twenty-six years and that at least fifty-percent of his practice is comprised of criminal defense work. He testified that he was retained to represent Applicant shortly after the incident giving rise to the charges. He testified that he met with Applicant "a number of times" at his office, as well as corresponded with him by phone and letter. Counsel testified that he discussed possible defenses with Applicant as well as trying to suppress evidence that could be introduced against him if he proceeded to trial. Counsel testified that he informed Applicant that the sentence range for each charge was one to twenty-five years for each count and that the court could run these sentences consecutively, which could result in a sentence of up to fifty years imprisonment.

Counsel testified that the evidence against evidence was strong, including a Blood Alcohol level of .222 BAC. Additionally, Counsel testified that Applicant gave a statement to

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law enforcement admitting that he had been drinking before driving and that numerous eyewitnesses had seen him driving erratically immediately before the fatal wreck. Counsel testified that he felt the State would be able to prove guilt beyond a reasonable doubt if Applicant proceeded to trial and he advised his client of his professional opinion. Counsel testified that he spoke with witnesses, watched Applicant's video interview with law enforcement, and thoroughly reviewed his blood testing with the hope of suppressing it. Counsel testified that Applicant informed him he wished to forego a trial and enter a guilty plea, which he felt was in his client's best interest.

Counsel testified that he met with the prosecuting Assistant Solicitor, Samuel B. Grimes, Jr., and Judge James in chambers prior to the guilty plea. Counsel testified that Judge James told counsels that he would give Applicant concurrent sentences if he pled guilty. Counsel testified that he informed Applicant that based on Judge James' assurances, he would receive a sentence of between one to twenty-five years if he pled guilty. Counsel elaborated that he told Applicant that a sentence of under twenty-five years would be "very gracious." Counsel testified adamantly that he never told applicant that he would receive a twenty year sentence, stating he has "absolutely no doubt [that] he did not tell him he would get twenty years or anything less than twenty-five years." Counsel testified that Applicant had no defense and he fully expected Applicant would receive a twenty-five year sentence. Counsel testified that he thinks Judge James' sentence of twenty-three years imprisonment was "very, very fair in light of the circumstances with two people dead."

Counsel testified that he discussed Applicant's appellate rights with him prior to his guilty plea and that the plea court also reviewed his right to appeal during the plea colloquy.



Counsel testified that Applicant never asked him to file an appeal on his behalf, nor did any member of Applicant's family request he file an appeal on Applicant's behalf.

#### FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Specifically, this Court finds that Counsel's credibility outweighs Applicant's credibility. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985):

##### *Ineffective Assistance of Counsel*

Applicant alleges that Counsel was ineffective for informing Applicant that he would receive a sentence of no more than twenty years imprisonment if he pled guilty and for failing to file an appeal on his behalf. In a post-conviction relief action, the Applicant has the burden of proving the allegations in his application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813.

The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable

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professional judgment. Burger, 286 S.C. 441, 334 S.E.2d 813. The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 385 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, the Applicant must show that 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. Hilly v. Lockhart, 474 U.S. 52, 106 S.Ct. 366 (1985). Below are this Court's findings in regards to each of Applicant's allegations of ineffective assistance of counsel.

*Counsel was ineffective for advising Applicant he would receive a sentence of no more than twenty years imprisonment*

After careful review based on the standard discussed above, this Court finds that the Applicant has failed to prove that Counsel was ineffective in his representation of the Applicant for informing Applicant that he would receive a sentence of no more than twenty years imprisonment. Counsel's credible testimony reveals that he informed Applicant of the sentence range for the charges, never promised Applicant he would receive a particular sentence of twenty years or less, and that Applicant understood his sentence exposure prior to entering his guilty plea. The guilty plea transcript reflects that the plea court asked both Counsel and Applicant if they were aware that each charge had a sentence range of up to twenty-five years and that

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Applicant told the plea court while under oath that he understood he could receive a sentence of up to twenty-five years on each count. The record also reflects that there was no recommendation or negotiation and that Applicant was pleading "straight up" without any promise of a particular sentence, which Applicant recognized under oath. This Court finds that Counsel's performance was reasonable and effective.

Additionally, this Court finds that the Applicant has failed to establish any prejudice resulting from Counsel's alleged ineffective assistance of counsel, as the Applicant stated numerous times during the evidentiary hearing that he was guilty and that he did not want to proceed to trial on these charges. Therefore, this Court finds that this allegation of ineffective assistance of counsel must be denied and dismissed.

*Counsel was ineffective for failing to file a direct appeal*

Applicant alleges that he is entitled to a belated direct appeal pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974). "[C]ounsel has a constitutionally imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are non-frivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing." Roe v. Flores-Ortega, 528 U.S. 470, 480, 120 S.Ct. 1029 (2000). "Even in cases when the defendant pleads guilty, the court must consider such factors as whether the defendant received the sentence bargained for as part of the plea and whether the plea expressly reserved or waived some or all appeal rights." Id. Absent extraordinary circumstances, there is no constitutional requirement that a defendant be informed of the right to a direct appeal from a guilty plea. Turner v. State, 380 S.C. 223, 224, 670 S.E.2d 373, 374 (2008). "One extraordinary circumstance which would require counsel to advise a defendant of the right to

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appeal from a guilty plea would arise when the defendant inquires about an appeal." Weatherly v. State, 319 S.C. 59, 61, 459 S.E.2d 838, 839 (1994).

After careful review based on the standard discussed above, this Court finds that Applicant has failed to carry his burden in this action. Counsel testified that he never received any requests from Applicant or any member of Applicant's family, to file an appeal on his behalf and had no reason to believe that Applicant wished to file an appeal. Counsel testified that he reviewed Applicant's right to appeal with him prior to his guilty plea and that the plea court also reviewed these rights during the guilty plea. This Court finds that Counsel's performance was reasonable and effective. Therefore, this Court finds that this allegation must be denied and dismissed.

#### CONCLUSION


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

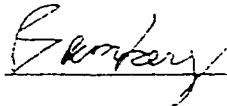
This Court notes that that Applicant must file and serve a notice of appeal within thirty days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right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

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice, and
2. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 6 day of March, 2013.

  
\_\_\_\_\_  
DOYET A. EARLY, III  
Presiding Judge  
Second Judicial Circuit

 South Carolina

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2604 Commons Boulevard  
AUGUSTA, GA 30909



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Hon. Daniel E. Shearouse, Clerk  
Supreme Court of South Carolina  
1231 Gervais Street

COLUMBIA, SC 29201



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