STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
MAY 08 2013
S.C. Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas
J. Mark Hayes, II, Presiding Judge

Appellate Case No. 2012-213435

DONALD HUGH JOHNSON, 322348,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI

TARA DAWN SHURLING
Attorney and Counselor at Law

3614 Landmark Drive, Suite A
Columbia, S. C. 29204
(803) 738-8622
(803) 738-1600 (FAX)

ATTORNEY FOR PETITIONER.

INDEX

Index 1

Questions Presented 2

Statement of the Case 3

Evidence before the Lower Court 4

Argument 4

Standard of Review 4

Issue I 6

Issue II 8

Issue III 11

Conclusion 14

QUESTIONS PRESENTED

1. Did the Petitioner receive ineffective assistance of counsel prior and during his jury trial in violation of his rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, as well as Article I, Section 14, of the South Carolina Constitution?

2. Did the lower court err in denying the Petitioner's Application for Post-Conviction Relief where he met his burden of proof concerning his allegation that trial counsel was ineffective for failing to adequately research and give the client information on provisions of the Interstate Corrections Compact that might be available to protect the Petitioner, a former South Carolina police officer, if he were incarcerated.

3. Did the lower court err in denying the Petitioner's Application for Post-Conviction Relief where he met his burden of proof concerning his allegation that Trial counsel was ineffective for failing to relay to the Petitioner a conversation that he had with a sitting General Sessions Judge, who indicated that he would be inclined to give probation as a sentence if the Petitioner were to enter a guilty plea.

4. Did the lower court err in denying the Petitioner's Application for Post-Conviction Relief where he met his burden of proof concerning his allegation that Trial counsel was ineffective for failing to object, at any and all appropriate times, after the jury was sworn, to the introduction of evidence of prior bad acts by the State?

STATEMENT OF THE CASE

Donald Hugh Johnson, the Petitioner herein, was indicted in Spartanburg County for Criminal Sexual Conduct with Minors, Second Degree (2006-GS-42-1618), Criminal Sexual Conduct with Minors, Second Degree (2006-GS-42-1619), Criminal Sexual Conduct with Minors, Second Degree (2006-GS-42-1620), Contributing to Delinquency of a Minor (2006-GS-42-1621), and Committing or Attempting Lewd Act Upon Child Under Sixteen (2006-GS-42-1622).

On June 11, 2007 the Petitioner proceeded to trial by jury before the Honorable J. Derham Cole, presiding circuit judge. He was represented in the trial court by Andrew J. Johnston, Esquire. The Petitioner was found guilty as charged on all counts and was sentenced on June 13, 2007, to concurrent terms of eighteen (18 years) for each of the three counts of criminal sexual conduct with a minor, three (3) years for contributing to the delinquency of a minor and fifteen (15) years for committing or attempting lewd act upon child under sixteen.

A timely Notice of Appeal was filed at the South Carolina Court of Appeals. Tara Dawn Shurling, Esquire, perfected the appeal. The Court of Appeals affirmed the Appellant's conviction and sentence on December 22, 2009. State v. Donald Hugh Johnson, Opinion No. 2009-UP-606 (S.C. Ct. App. Filed December 22, 2009). The Petitioner was represented on direct appeal by Counsel herein. During the evidentiary hearing held on the Petitioner's Post-Conviction Relief case, he expressly waived any claims of ineffective assistance of Appellate Counsel. PCR Tr. p. 390, l. 3 – p. 391, l. 1.

Petitioner filed an Application for Post-Conviction Relief on October 6, 2010. An evidentiary hearing was convened on September 22, 2011 before the Honorable J. Mark Hayes, II, presiding judge. By written Order filed February 23, 2012, the court denied and dismissed the

application with prejudice. A Rule 59(e) SCRCP, Motion to Alter or Amend, was filed March 8, 2012. The State filed a Return and Motion to Dismiss Motion to Alter or Amend Denial of PCR Petition. An Order denying the State's Return and Motion to Dismiss was filed November 1, 2012. A timely Notice of Appeal was served and filed on November 19, 2012.

The Petitioner now asks that the writ be issued and that he be permitted to submit a full briefing on the issues summarized herein.

EVIDENCE BEFORE THE LOWER COURT

The Order of the lower court confirms that, in addition to the PCR testimony of the Petitioner and trial counsel, the Court had before it a copy of the Petitioner's trial transcript, a copy of the records of the Clerk of Court regarding the subject convictions and sentences, a copy of the Petitioner's records from the South Carolina Department of Corrections, the appellate briefs filed in this matter, a copy of the opinion of the South Carolina Court of Appeals, the State's Return and a copy of an exhibit introduced by the Petitioner and marked as Petitioner's Exhibit No. 1; Interstate Corrections Compact, S.C. Code Ann. §24-11-10, et seq.

ARGUMENT

Standard of Review

This Application for Post-Conviction Relief generally raises numerous specific allegations of ineffective assistance of counsel. The standard of review in a Post-Conviction Relief appeal is whether "any evidence of probative value" exists to support the Post-Conviction Relief Court's findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). The burden of proof is on the Applicant in a Post-Conviction Relief proceeding to prove the allegations raised in his Application for Relief and at his Post-Conviction Relief hearing. Thompson v. State, 340

S.C. 112, 531 S.E.2d 294 (2000); Rule 71.1(e), SCRCP. In evaluating an Application for Post-Conviction Relief, the moving party must demonstrate that trial counsel (1) failed to provide him with reasonable professional assistance of counsel under the prevailing standards for attorneys representing clients in criminal matters; and (2) that he was prejudiced by the errors and omissions of counsel such that he was deprived of a fair trial. Strickland v. Washington, 466 U.S. 668 (1984). In other words, the Applicant must show that but for counsel's errors and omissions, there is a reasonable probability that the result at trial would have been different. Id.; Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997). A reasonable probability has been defined by our Supreme Court as a probability sufficient to undermine confidence in the outcome of the trial. Ard v. Catoe, 372 S.C. 318, 330, 642 S.E.2d 590, 596 (2007).

On the one hand, where trial counsel articulates a valid reason for employing certain trial strategies, such conduct should not be deemed ineffective assistance of trial counsel. Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). On the other hand, counsel may not explain away errors and omissions which acted to prejudice his client's ability to receive a fair trial simply by labeling them matters of trial strategy or tactics. In the case of Ingle v. State, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002), the Supreme Court of South Carolina found that

> Counsel must articulate a **valid** reason for employing a certain strategy to avoid a finding of ineffectiveness. Where counsel articulates a strategy, it is measured against an objective standard of reasonableness.

(Emphasis in original) (Internal citations omitted).

ISSUE I

Did the Petitioner receive ineffective assistance of counsel prior to his jury trial in violation of his rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, as well as Article I, Section 14, of the South Carolina Constitution where trial counsel failed to adequately research and give the Petitioner information concerning provisions of the Interstate Corrections Compact that might be available to protect the Petitioner, a former South Carolina police officer, if he were incarcerated. Questions 1 and 2.

The Petitioner testified that one of his primary concerns, prior to trial, was the danger he might face in prison as a former law enforcement officer. The Petitioner served in law enforcement for twenty-seven years and additionally was a State Constable for three or four years. PCR Tr. p. 87, ll. 11-17. The Petitioner was afraid of serving time in South Carolina because his past efforts as an officer may have resulted in the incarceration of some of his potential fellow inmates. PCR Tr. p. 86, ll. 10-25. Trial counsel acknowledged this consideration was clearly a significant factor in the Petitioner's consideration of possible pleas in this case, and admitted that he should have asked someone with the South Carolina Department of Corrections what programs were available to cover such situations. PCR Tr. p. 18, l. 7- p. 19 l. 8.

The trial attorney was aware of the Petitioner's concerns for his safety and welfare in prison based on his former service as a police officer. PCR Tr. p. 16, ll. 13-24. He testified that he did not investigate procedures or programs, in place at the time, which might have provided some enhanced protection in prison. PCR Tr. p. 70, l. 25-p. 71, l. 5. Trial counsel believed that the Petitioner would be placed in some nature of protected custody, but worried that the isolation of this protective status would only worsen the Petitioner's experience in prison. PCR Tr. p. 71, ll. 7-16.

The Petitioner demonstrated that trial counsel failed to investigate a readily available

solution for addressing the Petitioner's concerns relating to the dangers of him serving jail time in South Carolina. Likewise, he has demonstrated that the failure of trial counsel to investigate what provisions were available to protect inmates, whose incarceration in South Carolina might be dangerous, negatively impacted the Petitioner's consideration of a potential plea bargain with the State.

The Interstate Corrections Compact found at S.C. Code Ann. § 24-11-10 et seq. provides that this State may send an inmate to another state, party to this Compact, when this State decides that it is necessary or desirable to transfer that inmate in order to provide adequate quarters and care or an appropriate program of rehabilitation or treatment. At the evidentiary hearing, trial counsel testified that he was unfamiliar with the Interstate Corrections Compact. He further testified that he would have inquired into the Compact, if he had known that it provided for inmates to be transferred to neighboring states. PCR Tr. p. 18, ll. 4-15. A number of states near South Carolina are party to the Interstate Compact. North Carolina, one of the many member states, has its version of the Compact codified at N.C. Gen. Stat. Ann. § 148-119 *et seq.* (1979).

On the facts of this case, trial counsel's failure to research and disclose the protections potentially available to the Petitioner under the act in question constituted ineffective assistance of counsel. The United States Supreme Court has determined that counsel has a constitutional duty to give certain advice concerning a guilty plea: the sentence that could or would result from the plea, the higher sentence that could result from a conviction at trial and the chances that a conviction could be obtained. See McMann v. Richardson, 397 U.S. 759, 769-71 (1970); Brady v. U.S., 397 U.S. 742, 756-57 (1970). A defendant would naturally need to know, before entering an un-negotiated plea or accepting a plea offer, the terms of any sentence he is likely to face

upon entry of the plea versus a conviction at trial.

Trial counsel's failure to communicate this sentencing possibility prejudiced the Petitioner in his contemplation of entering a plea versus going to trial. The Petitioner asserted, in his PCR testimony, that he would have pled guilty, his claim to innocence notwithstanding; if he had known that he could serve any term of imprisonment imposed by the Court out of state. PCR Tr. p. 88, ll. 9-20. The Petitioner now respectfully asserts that the lower court erred in finding that trial counsel was not ineffective for failing to explore the protections contained in the Interstate Corrections Compact. He asserts that relief should have been granted on this ground.[1]

ISSUE II

Did the Petitioner receive ineffective assistance of counsel prior to his jury trial in violation of his rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, as well as Article I, Section 14, of the South Carolina Constitution where Trial counsel was failed to relay to the Petitioner a conversation that he had with a sitting General Sessions Judge, who indicated that he would be inclined to give probation as a sentence if the Petitioner were to enter a guilty plea. Questions 1 and 3.

As discussed previously, *infra*, one of the Petitioner's primary concerns, prior to trial, was the danger he might face in prison, due to his former career as a law enforcement officer. Trial Counsel testified that he was aware of this concern and was aware that this was a significant factor in the Petitioner's to plead guilty. PCR Tr. p. 16, ll. 13-24, p. 17, ll. 20-24, p. 19, ll. 9-13, p.70, l. 25- p. 71, l. 5.

In his PCR testimony, Trial Counsel testified that he and opposing counsel had approached a sitting judge in talks about a possible resolution to the criminal charges. PCR Tr. p. 11, l. 22-p. 13, l. 6. During that conversation, the attorneys posed hypothetical inquiries to the

[1] Trial Counsel's failure to explore this possibility also resulted in his failure to even attempt to secure a plea deal that could have included participation in this program.

sitting judge to gage the potential sentence that judge might be inclined to give upon entry of a guilty plea. The sitting judge indicated that he might give the Petitioner a probationary sentence. PCR Tr. p. 11, l. 22-p. 13, l. 6. Trial Counsel testified that the State was not pleased with this information and decided not to extend a plea offer. Nevertheless, Trial counsel admitted at the evidentiary hearing that a defendant did not need a plea bargain with the State in order to enter a straight guilty plea. PCR Tr. p. 13, l. 21-p. 14, l. 4. Trial counsel admitted that he did not make any attempt to get his client on the docket for a plea entry in front of that particular sitting judge. PCR Tr. p. 15, ll. 10-21. He further testified that he could not recall if he had conveyed the subject matter of the conversation in question to the Petitioner. PCR Tr. p. 15, ll. 22-p. 16, l. 3. Trial counsel testified that he was unsure if he could have gotten the Petitioner to plead guilty and if he could have arranged for these pleas to be entered in front of that particular judge, however, he offered no testimony from which we can determine that he made an attempt to do either of these things. He acknowledged in his PCR testimony that, in retrospect, he should have at least asked the sitting judge if his client could enter a straight up guilty plea. PCR Tr. p. 18, ll. 15-18. Likewise, the record contains no evidence that Trial Counsel broached the subjection of a straight-up plea with prosecutor either.[2]

The information in question, if conveyed to the Petitioner, would likely have affected his decision to take his chances at trial. The Petitioner initially testified at the evidentiary hearing that he did not want to enter a plea, as he had maintained his innocence throughout this matter. PCR Tr. p. 85, ll. 15-23. That being said, the Petitioner also testified that he was aware of the damaging testimony being offered against him and the fact that the jury's verdict would likely turn upon a decision of credibility. PCR Tr. 85, l. 24-p. 86, l. 9. The Petitioner testified that he was not aware of the conversation between trial counsel and the sitting judge concerning

[2] See, Rule 14 (b), SCRCrimP.

potential sentences, prior to trial. PCR Tr. 87, ll. 18-23. [3]

Trial counsel was ineffective for not communicating to the Petitioner the information that he had received from the sitting circuit court judge. The Supreme Court of this State has found that it is incumbent upon a defense attorney to communicate with his client relevant information received in a case so that his client is enabled to make an informed decision on any proposals from the State. Davie v. State, 381 S.C. 601, 609, 675 S.E.2d 416, 420 (2009). This standard for communication is required by professional standards of performance established on a national and state-wide scale. See, Id. It is logical to conclude that an attorney would, likewise, be required to communicate any information that he has received from the Court which would be likely to affect the defendant's ability to make an informed decision on whether to proceed to trial or enter a guilty plea. In the instant case, the failure by counsel to communicate the results of his conversion with the prosecutor and a sitting circuit judge deprived the Petitioner of information which likely would have affected his position on the possibility of entering straight-up guilty pleas. This information certainly would have impacted the Petitioner's decision concerning whether to consider entering guilty pleas without a plea bargain in place with the State; as opposed to taking his chances at trial. The Petitioner now respectfully submits that the lower court erred in finding that Trial Counsel's failure to communicate this information to the Petitioner did not constitute ineffective assistance of counsel.

The Petitioner was prejudiced by Trial Counsel's failure to share the information gleaned from his conversation with the prosecutor and a sitting circuit judge. This is particularly true where, as previously demonstrated, Trial Counsel was aware that one of the Petitioner's primary

[3] As previously noted, trial counsel's failure to advise the Petitioner of his possible participation in the Interstate Corrections Compact negatively impacted his consideration of entering pleas in this case. Knowledge of this safety net, coupled with the strong possibility of a probationary sentence, would likely have influenced the Petitioner's consideration of entering pleas.

concerns was his fear, as a veteran law enforcement officer, of serving time in prison. This information, and the hope it would have generated concerning the possibility of receiving a probationary sentence was, based on the Petitioner's testimony, vital to his decision concerning whether to proceed to trial. The Petitioner was prejudiced by defense counsel's failure to disclose these communications, where he was ultimately convicted at trial and sentenced to serve time in prison. Trial counsel's failure in this regard is related to his failure to research and present to his client information concerning his possible participation in the Interstate Corrections Compact. The Petitioner would respectfully assert that the combination of these two critical pieces of information would likely have altered his decision with regard to whether to ask for leave to enter straight-up pleas on all his charges. Had the Petitioner been made aware of his right under the compact to request that his sentence be served out-of-state due to safety concerns, he would have had the security of knowing that if the presiding sentencing judge did not ultimately give him a probationary sentence, he could request to serve his sentence out of state. The lower court erred in failing to grant the Petitioner relief on this ground.

ISSUE III

Did the Petitioner receive ineffective assistance of counsel during his jury trial, in violation of his rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, as well as Article I, Section 14, of the South Carolina Constitution, where Trial Counsel failed to object the first, and every time, the prosecution sought to introduce evidence of prior bad acts by the Petitioner after the jury was sworn in the Petitioner's case. Questions 1 and 4.

Trial counsel did not properly preserve his objection to inadmissible evidence by renewing it, contemporaneously, after the swearing of the jury. Trial counsel objected, during a hearing on a motion *in limine*, to the State's proposed introduction of testimony by the Victim

that the Petitioner had attempted to have actual vaginal intercourse with her. Trial Tr. p. 34, l. 9-p. 36, l. 25. Unfortunately for the Petitioner, trial counsel did not renew this objection contemporaneously with the testimony being offered. The pretrial ruling upon a motion *in limine* is not a final determination, and the party seeking to object to the introduction of evidence must make a contemporaneous objection, when the evidence is introduced, to preserve the objection for appellate review. State v. Moses, 390 S.C. 502, 511, 702 S.E.2d 395, 400 (Ct. App. 2010).

As previously noted, Trial Counsel must provide a valid reason for employing a certain strategy to avoid a finding of ineffectiveness. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1995). The failure to object to the testimony in question cannot be explained away as trial strategy and therefore, should have been found to constitute ineffective assistance of counsel. Trial Counsel, himself, recognized the failure to object and did not attempt to explain away his shortcomings in this regard as any sort of trial strategy. Counsel acknowledged that the judge's ruling at the time of his objection was preliminary, and he agreed that he should have contemporaneously renewed the objection to preserve the issue for appellate review. PCR Tr. p. 20, l. 5-p. 23, l. 14. He forthrightly admitted that he should have raised the objection at the "appropriate moment." PCR Tr. p. 23, ll. 9-14. The Petitioner would argue that Trial counsel was all the more ineffective in failing to challenge this damaging testimony, considering his knowledge of the Petitioner's health condition, which prevented the Petitioner from maintaining an erection. PCR Tr. p. 27, l. 22-p. 28, l. 6.

The Petitioner was clearly prejudiced by Trial Counsel's failure to adequately preserve his objection to this line of improper and highly inflammatory testimony. Trial Counsel's failure to make a contemporaneous objection the first and every time this evidence was offered in the presence of the jury resulted in a finding by the South Carolina Court of Appeals that the issue of

the admissibility of victim's testimony concerning Petitioner's alleged attempt to have sexual intercourse with her was not preserved. The State v. Donald Hugh Johnson, Op. No. 2009-UP-606 (S.C. Ct. App. filed Dec. 22, 2009). The Court of Appeals affirmed the Petitioner's convictions on that basis. Id.

The Petitioner asserts that a challenge to the admission of the Victim's testimony regarding attempted actual intercourse would have been a strong issue on appeal. In a criminal sexual conduct case, common scheme or plan evidence will be admitted on a generalized basis only where there is a pattern of continuous illicit conduct. State v. Whitener, 228 S.C. 244, 89 S.E.2d 701 (1955); see also State v. McClellan, 283 S.C. 389, 323 S.E.2d 772 (1984). In other words, "[e]vidence of a defendant's prior and subsequent illicit sexual activities when closely similar to the charged offense is admissible." State v. Weaverling, 337 S.C. 460, 469, 523 S.E.2d 787, 791 (Ct. App. 1999); see also State v. Kirton, 381 S.C. 7, 671 S.E.2d 107 (2008).

In order to admit evidence of the prior bad act, it must be shown by clear and convincing evidence that the defendant committed the act. Weaverling, *supra*. Even if the prior bad act falls under a Rule 404(b), SCRE, exception, and is shown by clear and convincing evidence, the trial court must still exclude evidence of the prior bad act if the probative value of the bad act is outweighed by the danger of unfair prejudice to the defendant. Id; see also Rule 403, SCRE.

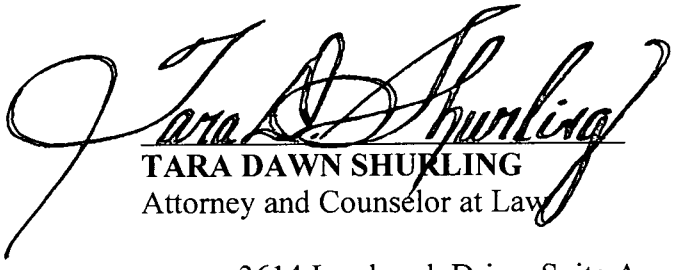
Trial counsel admitted, at the evidentiary hearing, that the Victim's testimony surpassed the acts charged against the Petitioner in that she testified that he tried to actually penetrate her with his penis. PCR Tr. p. 24, ll. 3-22; p. 29, ll. 17-22. In the lower court the Petitioner submitted that the disparity between the acts charged and the Victim's testimony concerning alleged attempted vaginal intercourse was significant enough to have made this evidence inadmissible under the weight of case authority and a Rule 404(b) prejudice versus probative value analysis.

He now submits that the lower court erred in denying the Petitioner a new trial on this ground.

CONCLUSION

Based upon all the arguments presented herein, and the authorities cited, the Petitioner asks this Honorable Court to grant the writ and allow full briefing on the issues summarized herein.

Respectfully submitted,



TARA DAWN SHURLING
Attorney and Counselor at Law

3614 Landmark Drive, Suite A
Columbia, South Carolina 29204
(803)738-8622
(803)738-1600 Fax
E-mail: tdslaw@shurlinglaw.com

ATTORNEY FOR PETITIONER

This 6th day of May, 2013.

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas
J. Mark Hayes, II, Presiding Judge

Appellate Case No. 2012-213435

DONALD HUGH JOHNSON, 322348,

PETITIONER,

v.

THE STATE OF SOUTH CAROLINA,

RESPONDENT.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the Petition for Writ of Certiorari in the above-entitled case has been served upon opposing counsel, Suzanne H. White, Assistant Attorney General, Office of the Attorney General, via U.S. Mail, postage prepaid, this 6th day of May, 2013.

Tara Dawn Shurling

TARA DAWN SHURLING
Attorney and Counselor at Law

ATTORNEY FOR PETITIONER.

SWORN TO BEFORE me this 6th day
of May, 2013.

Suzanne Graham (L.S.)
Notary Public for South Carolina
My Commission Expires: 2/28/23

LAW OFFICE OF

TARA DAWN SHURLING, PA

Attorney and Counselor at Law
3614 Landmark Drive
Suite A
Columbia, South Carolina 29204

E-Mail: tdslaw@shurlinglaw.com

(803) 738-8622
(Fax) (803) 738-1600

May 6, 2013

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

RE: Donald Hugh Johnson, 322348 v. State of South Carolina; 2010-CP-42-5375.

Dear Mr. Shearouse:

Enclosed for filing please find the original and six copies of the Petition for Writ of Certiorari and Certificate of Service in the above-captioned case. I would appreciate you returning two (2) clocked copies of the Petition and Certificate of Service in the envelope provided. The Appendix was filed and served. Thank you for your assistance in this matter. I remain,

Sincerely yours,

Tara Dawn Shurling
Attorney and Counselor at Law

TDS/sm
Enclosures
cc: Suzanne H. White, Assistant Attorney General (w/enclosure)
Donald Hugh Johnson, 322348 (w/enclosure)
Randy Scott Johnson (w/enclosure)

Law Office of
TARA DAWN SHURLING, PA
3614 LANDMARK DRIVE, SUITE D
COLUMBIA, SOUTH CAROLINA 29204

Priority Mail
ComBasPrice

UNITED STATES POSTAGE
PITNEY BOWES
$005.32⁰
02 1P
0002929654 MAY 06 2013
MAILED FROM ZIP CODE 29204

First Class Mail

The Honorable Daniel E. Shearouse
Supreme Court of SC
P.O. Box 11330
Columbia, SC 29211