

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

HONORABLE ROBIN B. STILWELL

2012-CP-23-3618

Brian W. Sturgeon, SCDC # 316514,

APPELLANT,

against

STATE OF SOUTH CAROLINA,

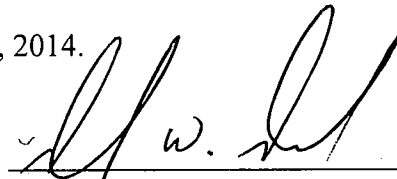
RESPONDENT.

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**NOTICE OF APPEAL**

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Brian W. Sturgeon appeals the denial of his Post Conviction Relief. The Post Conviction Relief Action was heard and denied by the Honorable Robin B. Stilwell, Circuit Judge on June 18, 2014 and Order issued on August 1, 2014 and filed on August 5, 2014. The Appellant received notice of the judgment on August 10, 2014.



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Rodney W. Richey  
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Other Counsel of Record:  
Karen Ratigan, Esquire  
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Columbia, SC 29211-1549

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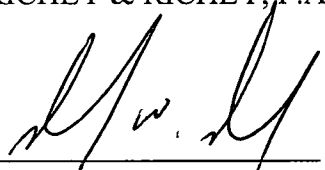
**PROOF OF SERVICE**

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I certify that I have served the Notice of Appeal on the State of South Carolina by depositing copy of it in the United States Mail, postage prepaid, on August 20, 2014, addressed to their attorney of record, Karen C. Ratigan, Office of Attorney General State of South Carolina, Post Office Box 11549, Columbia, SC 29211-1549.

Dated: August 20, 2014

RICHEY & RICHEY, P.A.



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Attorney for the Appellant  
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Greenville, South Carolina 29603  
(864) 467-0503

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

JUDGMENT IN A CIVIL CASE  
CASE NO: 2012CP2303618  
FILED - CLERK OF COURT  
GREENVILLE CO. S.C.  
PAUL B. WICKENSIMER  
2014 NOV 5 AM 9 54

Brian Sturgeon vs. South Carolina State Of

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):**  
SCRPC (Vol. Nonsuit);  Rule 43(k), SCRPC (Settled);  Rule 12(b), SCRPC;  Rule 41(a);  Other: \_\_\_\_\_
- ACTION STRICKEN (CHECK REASON):**  
 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;  Statement of Judgment by the Court;

Dated at Greenville, South Carolina, this .

Court Reporter:

\_\_\_\_\_  
PRESIDING JUDGE - Robin B Stilwell

This judgment was entered on the , and a copy mailed first class this . to attorneys of record or to parties (when appearing pro se) as follows:

Rodney Wade Richey PO Box 10916 Greenville,  
SC 29603-0916

Karen Christine Ratigan PO Box 11549 Columbia,  
SC 29211

\_\_\_\_\_  
ATTORNEY(S) FOR THE PLAINTIFF(S)

\_\_\_\_\_  
ATTORNEY(S) FOR THE DEFENDANT(S)

\_\_\_\_\_  
Paul B. Wickensimer - Greenville County Clerk Of Court  
- Clerk of Court

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF GREENVILLE )  
 )  
 Brian W. Sturgeon, )  
 S.C.D.C. No. 316514, )  
 )  
 Applicant, )  
 )  
 v. )  
 )  
 State of South Carolina, )  
 )  
 Respondent. )

IN THE COURT OF COMMON PLEAS  
 C.A. No. 2012-CP-23-3618

FILED-CLERK OF COURT  
 GREENVILLE CO. S.C.  
 PAUL B. WICKENSIMMER  
 2014 AUG 5 AM 9 54

**ORDER OF DISMISSAL**

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed May 31, 2012. The Respondent made its return on August 31, 2012. An evidentiary hearing into the matter was held on June 18, 2014, at the Greenville County Courthouse. The Applicant was present and represented by Rodney W. Richey, Esquire. Karen C. Ratigan, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

The Applicant testified on his own behalf at the PCR hearing. Also testifying was the Applicant's trial counsel, Everett P. "Bill" Godfrey, Jr., Esquire. The Court had before it the trial transcript, the Greenville County Clerk of Court records, the Applicant's South Carolina Department of Corrections records, the PCR application, the return, the appellate records, and Applicant's Exhibit 1.

**PROCEDURAL HISTORY**

The Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Greenville County Clerk of Court. The Applicant was indicted at the August 2008 term of the Greenville County Grand Jury for Assault and Battery with Intent to Kill (ABWIK) (2008-GS-23-5589) and Murder (2008-GS-23-5590) and at the March 2009

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*AS*

term for Kidnapping (2009-GS-23-1673). He was represented by Everett P. "Bill" Godfrey, Jr., Esquire.

After the State brought the case to trial, the Applicant was found guilty of ABWIK, Voluntary Manslaughter, and Kidnapping. On March 9, 2010 the Honorable Edward W. Miller sentenced the Applicant to concurrent terms of thirty years each for Voluntary Manslaughter and Kidnapping. Judge Miller levied a consecutive fifteen-year sentence for ABWIK.

A notice of appeal was filed at the South Carolina Court of Appeals. Joseph L. Savitz, III, Esquire of the South Carolina Commission on Indigent Defense, Division of Appellate Defense perfected the appeal. The Court of Appeals affirmed the convictions and sentences. State v. Sturgeon, Op. No. 2011-UP-531 (S.C. Ct. App. filed Dec. 2, 2011). The Remittitur was sent on December 20, 2011.

### ALLEGATIONS

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

1. Ineffective assistance of counsel:
  - a. Failed to investigate Hembree's GSR kit.
  - b. Failed to object to "substitute medical examiner."
  - c. Failed to call witnesses.
  - d. Failed to investigate Hembree's prior shooting.
  - e. Gave false testimony about the Applicant in opening statement.
  - f. Failed to get jury charges of involuntary manslaughter, self-defense, and accident.
  - g. Failed to object to solicitor's statements.
  - h. Was not present when jury called back into the courtroom.
  - i. Failed to investigate Finley's gunshot wound.
  - j. Failed to investigate Seaborn's deals with police in exchange for testimony.
  - k. Failed to call Hagin as a witness.
  - l. Failed to use Citgo video.
  - m. Failed to use Bowman's letter.
  - n. Failed to object to McKittrick's testimony:

AB?

- i. Failed to object to character testimony.
- ii. Failed to object to differing stories.
- iii. Failed to investigate whether he was under the influence of drugs at trial.
- o. Failed to object to Fuller's bad acts and deals to testify.
- p. Failed to acknowledge pre-trial motions to the trial judge.
- q. Failed to object to comment about prior bad acts.
- r. Failed to object to solicitor's opening statement.
- s. Failed to object to solicitor playing on the passion of the jury.
- t. Failed to put State's case through adversarial testing.
- u. Failed to object to Hembree in the courtroom during trial.
- v. Failed to put up a defense.
- w. Failed to object to consecutive sentence.
- x. Waived the Applicant's presence at the preliminary hearing.
- y. Failed to produce expert witness.
- z. Failed to get a mental evaluation for the Applicant.
- aa. Never got a plea bargain from the State.
- bb. Failed to investigate Gilstrap.
- cc. Failed to investigate or impeach Hembree.
- dd. Failed to consult the Applicant fully about the chain of custody for the DVD and the pink bucket.
- ee. Failed to point out that Seaborn said the Applicant was driving and Hembree said he was.
- ff. Failed to object to hearsay testimony from Hembree.
- gg. Failed to object to solicitor's prejudicial comment.
- 2. Trial judge erred in not charging self-defense.
- 3. Not "truely indicted by a grand jury."

The Applicant, through counsel, submitted an amendment to his application dated October 9, 2012, in which he alleged the following:

- 1. Ineffective assistance of counsel:
  - a. Failed to conscientiously discharge professional responsibilities.
  - b. Failed to effectively challenge search and seizure.
  - c. Failed to act as a diligent and conscientious advocate.
  - d. Failed to give complete loyalty.
  - e. Did not have Applicant's best interest in mind.
  - f. Failed to serve the cause in good faith.
  - g. Neglected necessary investigations and preparation.
  - h. Did not do necessary factual investigations.
  - i. Did not do necessary legal research.
  - j. Did not conscientiously gather information to protect rights.
  - k. Did not try to have the case settled in a manner that would have been to my best advantage.

- l. Did not advise me of all my rights or take any of the actions that were necessary to protect and preserve them.
- m. Never properly ascertained whether or not I actually understood or comprehended all of the issues involved in the case.
- n. Never properly consulted with me or kept me informed.
- o. Never explained to me or discussed with me any of the elements.
- p. Never made any attempt to ascertain whether or not I actually knew the elements of the crime charged or whether or not I understood exactly what "criminal element" meant.
- q. Never explained or discussed with me how the elements of the crime charged and the evidence that the prosecution planned to introduce into evidence against me related to one another and did not discuss how the sentencing would be done especially as it related to the elements of the crime as in State v. Boyd.
- r. Never informed me of any of the defenses that were available to me.
- s. Never intended to offer any defense to the court on my behalf.
- t. Never explained to me or discussed with me any kind of defense strategy.
- u. Never explained to me or discussed with me any of the tactical choices that were made or planned to be made.
- v. Dictated to me exactly how my case was going to be handled and offered no alternative options.
- w. Failed to properly acquaint herself with the law and facts surrounding my case and, as a result, there was a very serious error in the assessment of both the law and the facts.
- x. No defense at all was put in issue for me during the Court proceedings.
- y. Did not subject the prosecution's case to any adversarial testing.
- z. Failed to oppose the prosecution's case with any adversarial litigation.
- aa. Failed to function as the government's adversary in any sense of the word.
- bb. Failed to pursue any of the legal recourse that was available.
- cc. Failed to function as the counsel that the Constitution's Sixth Amendment guarantees.
- dd. Failed to call alibi witnesses on my behalf.
- ee. Failed to appeal my case.

At the PCR hearing, the Applicant proceeded solely upon the following issues. This Court finds all other issues have been abandoned.

- 1. Ineffective assistance of trial counsel:
  - a. Failure to investigate GSR test.

- b. Placed the Applicant's character in issue in opening statement.
- c. Failed to request a voluntary manslaughter charge.
- d. Failed to negotiate a plea bargain.
- e. Failed to object to consecutive sentence.
- f. Failed to cross-examine witnesses about "lack of a gun."
- g. Failed to object to Hembree's hearsay testimony.
- h. Failed to impeach Hembree about lying to the police about his name.
- i. Failed to cross-examine medical examiner, which violated the confrontation clause.

### **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 and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

#### **Ineffective Assistance of Counsel**

The Applicant alleges he received ineffective assistance of counsel. In a PCR action, "[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002).

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). In order to prove prejudice, an applicant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 300 S.C. 115, 117-18, 386

S.E.2d 624, 625 (1989). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052).

The Applicant stated he discussed the case with trial counsel and reviewed the discovery materials. The Applicant did not deny he was at the scene, but stated the murder victim died while he was fighting with William Hembree (the ABWIK victim). The Applicant stated trial counsel failed to investigate the issue of why Hembree's gunshot residue test was not sent to SLED. The Applicant stated trial counsel put his character in issue in his opening statement. The Applicant stated trial counsel should have acted in his best interest and requested a voluntary manslaughter charge. The Applicant stated trial counsel did not attempt to secure a plea offer. The Applicant stated trial counsel should have objected to the consecutive sentence as improper. The Applicant stated trial counsel should have cross-examined witnesses about the "lack of a gun" because the State had no evidence of a weapon. The Applicant stated trial counsel should have objected to Hembree's hearsay testimony. The Applicant stated trial counsel should have impeached Hembree because he initially did not give his correct name to the police. The Applicant stated the confrontation clause was violated because trial counsel did not cross-examine the medical examiner.

Trial counsel testified he filed discovery motions, reviewed those materials with the Applicant, and discussed his version of events. Trial counsel testified the defense strategy was always to argue self-defense and have the Applicant testify. Trial counsel testified he was sure they discussed Hembree's gunshot residue kit but noted there would realistically be residue on Hembree because he fought with the Applicant over the gun. Trial counsel testified the Applicant's D.N.A was matched in a Kentucky murder case and the District Attorney in

Kentucky and the Assistant Solicitor in this case agreed to a twenty-five year offer. Trial counsel testified the Applicant did not want to accept this offer because he said this was not a murder. Trial counsel testified he pointed out at trial the inconsistencies with Hembree's statement and testimony. Trial counsel testified there was no basis to object to the consecutive sentence.

This Court finds the Applicant failed to meet his burden of proving trial counsel should have investigated Hembree's gunshot residue kit. The Applicant stated Hembree's gunshot residue kit was never sent to SLED for testing. The Applicant stated he wanted this test to be completed because it would have tested positive. The Applicant admitted, however, that he and Hembree were struggling over the gun when it fired. Trial counsel testified, therefore, that Hembree's gunshot residue test would realistically have been positive. This Court finds the Applicant failed to demonstrate how the results of Hembree's gunshot residue test would have had any impact upon his case. See Skeen v. State, 325 S.C. 210, 481 S.E.2d 129 (1997) (holding applicant not entitled to relief where no evidence presented at PCR hearing to show how additional preparation would have had any possible effect on the result at trial).

This Court finds the Applicant failed to meet his burden of proving plea counsel did not obtain a plea offer in this case. Trial counsel testified that the Assistant Solicitor and the District Attorney from Kentucky agreed to make twenty-five year recommendations, but that the Applicant refused. This Court finds trial counsel's testimony is credible. This Court finds trial counsel negotiated an advantageous plea agreement and relayed it to the Applicant, who chose to reject it. This Court finds trial counsel fulfilled his responsibilities in this regard. See Davie v. State, 381 S.C. 601, 675 S.E.2d 416 (2009) (holding counsel's failure to convey the State's plea offer to defendant constituted deficient performance); see also Rule 1.2(a), RPC, Rule 407,

SCACR (noting it is axiomatic that an attorney cannot force his client to accept a plea offer and that the decision whether to accept or reject such an offer rests solely with the client).

This Court finds the Applicant failed to meet his burden of proving trial counsel put his character into issue during his opening statement. During his opening, trial counsel said “both [the Applicant] and Skip Hembree were running from the law at the time. They had outstanding warrants on them.” (Trial transcript, p.31). This Court finds that, given the defense strategy, this statement was not improper. Regardless, even assuming arguendo this statement was inadvisable, the Applicant cannot prove any resulting prejudice because of the overwhelming evidence of his guilt. See Franklin v. Catoe, 346 S.C. 563, 570 n. 3, 552 S.E.2d 718, 722 n. 3 (2001) (finding overwhelming evidence of guilt negated any claim that counsel’s deficient performance could have reasonably affected the result of defendant’s trial); Geter v. State, 305 S.C. 365, 367, 409 S.E.2d 344, 346 (1991) (concluding reasonable probability of a different result does not exist when there is overwhelming evidence of guilt).

This Court finds the Applicant failed to meet his burden of proving trial counsel did not properly handle Hembree’s testimony. The Applicant argues trial counsel should have objected to Hembree’s testimony that a doctor told him about his injuries. (Trial transcript, p.48, lines 9-11; p.49, lines 14-17). This Court finds there was no need to object, as these statements were not made for the truth of the matter asserted. See Rule 801(c), SCRE. The Applicant argues trial counsel should have impeached Hembree about having given a false name to the officers and having been involved in a prior shooting. This Court finds, however, that trial counsel impeached Hembree with inconsistencies between his statement and testimony and also questioned him about why he told police the Applicant’s name was Brian Sorgee (when he had known the Applicant’s true name). (Trial transcript, pp.53-64). This Court notes trial counsel is

a very experienced criminal defense attorney and did a fine job of cross-examining the State's key witness.

This Court finds the Applicant failed to meet his burden of proving trial counsel did not properly cross-examine witnesses. The Applicant argued trial counsel should have questioned witnesses about "the lack of a gun" because the State did not produce evidence of a weapon. This Court finds this allegation is entirely without merit, as the Applicant told the jury that both the ABWIK and Murder victims had been shot during a struggle. (Trial transcript, pp.147-48; pp.154-55). The Applicant argues trial counsel should have cross-examined the medical examiner about the trajectory of the murder victim's wounds. This Court finds the Applicant has failed to produce any reports or expert testimony as to what the medical examiner could have testified to about the murder victim's wounds. See Dempsey v. State, 363 S.C. 365, 370, 610 S.E.2d 812, 815 (2005) (finding that, as the applicant failed to have an expert testify at the evidentiary hearing, "any finding of prejudice is merely speculative"). This Court further finds the lack of cross-examination of the medical examiner did not amount to a violation of the confrontation clause.

This Court finds the Applicant failed to meet his burden of proving trial counsel should have requested a voluntary manslaughter charge. During the charge conference, trial counsel stated "my client does not want me to request a potential lesser included manslaughter charge. He has told me that he prefers to go up or down on murder." (Trial transcript, p.176). The Applicant did not dispute this assertion. Based upon the clear record, this Court finds trial counsel spoke to the Applicant about potential jury charges and the Applicant indicated he did not want charges on lesser-included offenses. See Strickland, 466 U.S., at 688, 104 S. Ct. at 2065 (noting a defense attorney has a duty to consult with the defendant regarding "important

decisions” in the overall defense strategy). This Court notes this is in keeping with the Applicant’s contention that this was not a murder. This Court further notes trial counsel requested – and received – a self-defense jury charge. This Court finds trial counsel implemented the defense strategy he had discussed with the Applicant and the Applicant failed to prove any deficiency.

This Court finds the Applicant failed to meet his burden of proving trial counsel should have objected to the consecutive sentence in this case. This Court finds the Applicant has failed to present any cognizable basis upon which trial counsel could have made such an objection to a lawful sentence.

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test – that trial counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that trial counsel committed either errors or omissions in his representation of the Applicant. This Court also finds the Applicant has failed to prove the second prong of Strickland – that he was prejudiced by trial counsel’s performance. This Court concludes the Applicant has not met his burden of proving counsel failed to render reasonably effective assistance. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

#### **All Other Allegations**

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this Order, this Court finds the Applicant failed to present any testimony, argument, or evidence at the hearing regarding such allegations. Accordingly, this Court finds the Applicant has abandoned any such allegations.

**CONCLUSION**


Based on all the foregoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations before or during his trial and sentencing proceedings. Counsel was not deficient and the Applicant was not prejudiced by counsel's representation. Therefore, this PCR application must be denied and dismissed with prejudice.

This Court advises the Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order if he wants to secure appropriate appellate review. His attention is also directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely filed.

**IT IS THEREFORE ORDERED:**

1. That the application for post-conviction relief be denied and dismissed with prejudice; and
2. That the Applicant be remanded to the custody of the Respondent.

**AND IT IS SO ORDERED** this 1 day of Aug, 2014.



Robin B. Stilwell  
Presiding Judge  
Thirteenth Judicial Circuit

Gville, South Carolina.

**RICHEY AND RICHEY**  
ATTORNEYS AT LAW

A PROFESSIONAL ASSOCIATION

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*pc*

August 20, 2014

**RECEIVED**

AUG 27 2014

**S.C. SUPREME COURT**

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

Re: Brian W. Sturgeon, SCDC# 316514 vs. The State of South Carolina  
Case No: 2012-CP-23-3618

John Forest Ham, Jr. SCDC# 240615 vs. The State of South Carolina  
Case No: 2011-CP-23-6136

Dear Mr. Shearouse:

Please find enclosed a Notice of Appeal and an affidavit of service for the same. Also, I have enclosed a copy of the Order from which the appeal is taken. Thank you for your help and if you should have any questions please feel free to call me.

RICHEY AND RICHEY, P.A.

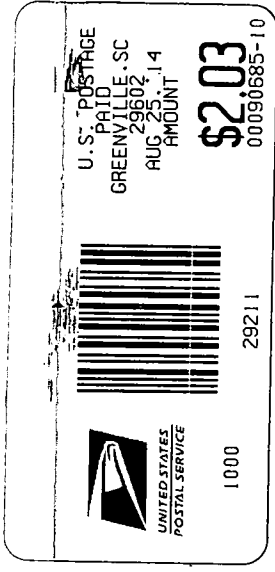
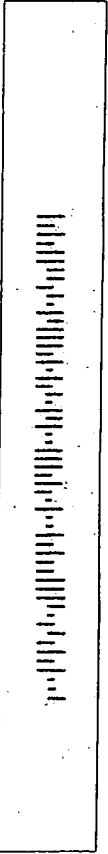
Yours truly,

  
Rodney Richey

RWR/

enclosures

cc: Karen Ratigan, Esquire



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

