

**COPY**

STATE OF SOUTH CAROLINA  
COUNTY OF CHESTERFIELD

) IN THE COURT OF COMMON PLEAS  
) FOURTH JUDICIAL CIRCUIT  
) Case No. 2014-CP-1442

**RECEIVED**

Billy Lee Lisenby, Jr.,  
"AKA Malik Al-Shabaz" #200273,

SEP 17 2014

Plaintiff,

**SC Court of Appeals**

versus

) ORDER OF DISMISSAL OF  
) PLAINTIFF'S ACTION, GRANTING  
) DEFENDANTS' REQUEST FOR  
) SANCTIONS AND INJUNCTIVE  
) RELIEF

C. Heath Ruffner, Interim Sheriff Kip Kiser,  
Sanford Parker and Chesterfield Sheriff's Office,

Defendants.

This matter was before the Court on July 31, 2014 pursuant to the Defendants' Notice of Motion and Motion to Dismiss and for Sanctions filed on July 2, 2014, and the Defendants' Notice of Motion and Motion for Injunctive Relief filed on July 17, 2014.

This case arises from the filing of a Motion for Writ of Mandamus by the Plaintiff on June 25, 2014. Therein, the Plaintiff requests that the "Court compel the Defendants to turn over to the Plaintiff the names of the 'Reserve Officers in Sheriff Sanford Parker's Program' and the various information Plaintiff requested pursuant to the 'Freedom of Information Act.'" The Plaintiff's Motion also states, "Plaintiff needs this valuable information and the names of the reserve officers, to support his claim for actual innocences [sic], and his petition for a pardon." Attached hereto as Exhibit A is a copy of the Plaintiff's Freedom of Information Act (hereinafter "FOIA") request dated April 15, 2013.

The Defendants filed an Answer on July 2, 2014 asserting various defenses to the Plaintiff's request, and seeking sanctions pursuant to Rule 11, *SCRCP*, and S.C. Code Ann. § 15-36-10 (the "South Carolina Frivolous Civil Proceedings Sanctions Act"), as well as dismissal of the Plaintiff's action with prejudice. The Defendants also filed a Notice of Motion and Motion

to Dismiss and for Sanctions on July 2, 2014.

During the pendency of this action, on July 10, 2014, the Plaintiff issued another FOIA request, attached hereto as Exhibit B, addressed to the Chesterfield County Sheriff's office requesting "the V.H.S. of my 68 mile chase that occurred on March 4<sup>th</sup>, 2008." In response, the Defendants filed a Notice of Motion and Motion for Injunctive Relief regarding the July 10, 2014 FOIA request, and future FOIA requests from the Plaintiff.

### BACKGROUND

In April, 2008, the Chesterfield County Grand Jury indicted the Plaintiff on two counts of assault with intent to kill (AWIK) and one count of failure to stop for a blue light. On April 21, 2008, the Plaintiff's jury trial began without him in attendance, but he arrived, at the latest, half way through direct examination of the State's first witness. The jury found the Plaintiff guilty on one count of AWIK and for failing to stop for a blue light, and the Court sentenced the Plaintiff to thirteen years' imprisonment in the South Carolina Department of Corrections. The Plaintiff filed a Notice of Appeal but later moved to withdraw that, and on September 2, 2008, his appeal was dismissed.<sup>1</sup>

Since the Plaintiff's convictions in 2008, he has filed numerous collateral challenges to the convictions in both state and federal court. This Court is aware of the following such actions filed by the Plaintiff: four (4) actions for post-conviction relief, six (6) federal habeas petitions, one (1) state habeas petition, and one (1) prior suit in the Chesterfield County Court of Common Pleas, all of which were dismissed. The Court takes judicial notice of the Order of the Honorable David C. Norton, United States District Judge in case number 12-cv-02666, attached hereto as Exhibit C, and the Order of Dismissal of this Court in case number 2010-CP-13-95, attached hereto as Exhibit D.

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<sup>1</sup> See Order of the Honorable David C. Norton, attached hereto as Exhibit C.

Additionally, the Court takes judicial notice that the South Carolina Supreme Court has issued an Order in Appellate Case Number 2012-212299 in which the Supreme Court prohibited the Plaintiff “from filing any further collateral actions in the circuit court challenging his convictions from 2008 for failure to stop for a blue light and assault with intent to kill without first obtaining permission to do so from this Court.” A copy said Order, dated July 16, 2012, is attached hereto as Exhibit E. On two separate occasions after the issuance of said Order by the South Carolina Supreme Court, the Plaintiff sought permission to file post-conviction relief actions, and the Court takes judicial notice of Orders from the South Carolina Supreme Court dated February 10, 2014, in Appellate Case Number 2014-000221, attached hereto as Exhibit F, and Order dated April 7, 2014, in Appellate Case Number 2014-000644, attached hereto as Exhibit G, both of which denied the Plaintiff’s motion for permission to file these post-conviction relief actions.

#### DISMISSAL OF PLAINTIFF’S MOTION FOR WRIT OF MANDAMUS

To obtain a writ of mandamus requiring the performance of an act, the petitioner must show: (1) a duty to perform the act; (2) the ministerial nature of the act; (3) the petitioner’s specific legal right for which discharge of the duty is necessary; and (4) a lack of any other legal remedy. *E.g., Wilson v. Preston*, 378 S.C. 348, 662 S.E.2d 580 (2008); *Porter v. Jedziniak, supra*; *Willimon, supra*. Mandamus is based on the theory that an officer charged with a purely ministerial duty can be compelled to perform that duty in case of refusal. *Wilson v. Preston, supra*. Rule 65(f)(1), *SCRPC*, concerning remedial writs requires that “Such notice and motion shall be supported by affidavit or verified complaint setting forth clearly the facts entitling the moving the party to such writ.” For the reasons set forth below, the Court hereby denies the Plaintiff’s request for Writ of Mandamus.

**A. Violation of South Carolina Supreme Court Order**

As stated herein, the Order of the South Carolina Supreme Court dated July 16, 2012, attached hereto as Exhibit E, specifically states that the Plaintiff is prohibited “from filing any further collateral actions in the circuit court challenging his convictions from 2008 for failure to stop for a blue light and assault with intent to kill without first obtaining permission to do so from this Court.” The Plaintiff argued at the hearing on the Defendants’ motions that the present case was not a collateral action to challenge his 2008 convictions. However, on its face, the Plaintiff’s Motion for Writ of Mandamus is clearly another attempt to collaterally attack the 2008 convictions. He makes reference to the “68 mile chase” which resulted in his 2008 convictions and further states that he “needs this valuable information and the names of these reserve officers, to support his claim for actual innocences [sic], and his petition for a pardon.” Therefore, this Court finds the Plaintiff’s argument that this case is not a collateral attack on his 2008 convictions as unpersuasive.

This Court is unaware of any Order of the South Carolina Supreme Court granting the Plaintiff permission to file the present action. The Plaintiff did not present any such evidence to the Court at the hearing on the Defendants’ motions, nor did the Plaintiff indicate to the Court that he had even made such request to the South Carolina Supreme Court.

Upon being questioned by the Court, the Plaintiff admitted that he had violated the Supreme Court Order, and the Court finds probable cause that a contempt of court has occurred. Also present for a hearing in an unrelated case involving the Plaintiff was the Assistant Attorney General, and the Court requested that the Attorney General’s office investigate the possible contempt of court and, if appropriate, seek an indictment from the Chesterfield County Grand Jury for contempt of the South Carolina Supreme Court’s Order.

Therefore, the Plaintiff's request for Writ of Mandamus is denied on the basis that he did not obtain prior permission from the South Carolina Supreme Court to file the present action in direct violation of the South Carolina Supreme Court's Order dated July 16, 2012.

**B. Dismissal of Chesterfield County Sheriff's Office**

The Defendants seek dismissal of the "Chesterfield County Sheriff's Office" as there is no such legal entity, the proper party defendant being the Sheriff of Chesterfield County. The Court agrees and, therefore, dismisses the Chesterfield County Sheriff's Office as a defendant in this action.

**C. Dismissal of Defendants Ruffner, Kiser and Parker**

First, as set forth in item B above, the proper party defendant in this case is the Sheriff of Chesterfield County, none of whom are the Defendants named by the Plaintiff in this action. Second, a writ of mandamus "cannot be issued against a person in his individual versus official capacity." *Cricket Cove Ventures, LLC v. Gilland*, 390 S.C. 312, 328, 701 S.E.2d 39, 48 (Ct. App. 2010).

Further, to the extent that the action filed by the Plaintiff may be construed to make any claim against these Defendants pursuant to the South Carolina Tort Claims Act, these Defendants are improper parties pursuant to S.C. Code Ann. § 15-78-70.

Based on the foregoing, Defendants Ruffner, Kiser and Parker are dismissed as parties to this action.

**D. Rule 65(f)(1), SCRPC**

Rule 65(f)(1), SCRPC, requires that a notice and motion for a writ of mandamus "shall be supported by affidavit or verified complaint setting forth clearly the facts entitling the moving party to such writ." The Plaintiff's Motion for Writ of Mandamus does not include a

verification nor was it supported by an affidavit. Therefore, the Plaintiff has failed to meet the clear requirements of Rule 65(f)(1) regarding remedial writs and, therefore, this action must be dismissed on that basis.

**E. Plaintiff's request is moot**

On June 13, 2014, the Plaintiff issued a FOIA request to the South Carolina Criminal Justice Academy which essentially sought the same information previously requested from the Chesterfield County Sheriff, a copy of the Plaintiff's request attached hereto as Exhibit H. On June 17, 2014, the Director of the South Carolina Criminal Justice Academy responded to the Plaintiff by providing the requested information, a copy of which is attached hereto as Exhibit I. As a result, the Plaintiff's FOIA request to the Chesterfield County Sheriff dated April 15, 2013 and this action seeking a writ of mandamus to require a response to that request are now moot. Therefore, this action should be dismissed.

For the foregoing reasons, the Plaintiff's request for writ of mandamus is denied and the Plaintiff's action is dismissed with prejudice.

**DEFENDANTS' REQUEST FOR SANCTIONS**

In their Answer and Motion filed on July 2, 2014, the Defendants request sanctions against the Plaintiff pursuant to Rule 11, *SCRPC* and/or S.C. Code Ann. § 15-36-10 (the "South Carolina Frivolous Civil Proceedings Sanctions Act").

The Act, § 15-36-10(A)(4) provides in part:

An attorney or pro se litigant participating in a civil or administrative action or defense may be sanctioned for:

- (a) filing a frivolous pleading, motion, or document if:
  - (i) the person has not read the frivolous pleading, motion, or document;
  - (ii) a reasonable attorney in the same circumstances would

believe that under the facts, his claim or defense was clearly ~~not warranted under existing law and that a good faith or reasonable argument did not exist for the extension, modification, or reversal of existing law;~~

- (iii) a reasonable attorney presented with the same circumstances would believe that the procurement, initiation, continuation, or defense of a civil cause was intended merely to harass or injure the other party; or
  - (iv) a reasonable attorney presented with the same circumstances would believe the pleading, motion, or document is frivolous, interposed for merely delay, or merely brought for any purpose other than securing proper discovery, joinder of parties, or adjudication of the claim or defense upon which the proceedings are based;
- (b) making frivolous arguments a reasonable attorney would believe were not reasonably supported by the facts; or
  - (c) making frivolous arguments that a reasonable attorney would believe were not warranted under the existing law or if there is no good faith argument that exists for the extension, modification, or reversal of existing law.

The Act, § 15-36-10(E) further provides:

In determining if an attorney, party, or a pro se litigant has violated the provisions of this section, the court shall take into account:

- (1) the number of parties;
- (2) the complexity of the claims and defenses;
- (3) the length of time available to the attorney, party, or pro se litigant to investigate and conduct discovery for alleged violations of the provisions of subsection (A)(4);
- (4) information disclosed or undisclosed to the attorney, party, or pro se litigant through discovery and adequate investigation;
- (5) previous violations of the provisions of this section;
- (6) the response, if any, of the attorney, party, or pro se litigant to the allegation that he violated the provisions of this section; and
- (7) other factors the court considers just, equitable, or appropriate under the circumstances.

Under the Act, § 15-36-10(G):

Sanctions may include:

- (1) an order for the party represented by an attorney or pro se litigant to pay the reasonable costs and attorney's fees of the prevailing party under a motion pursuant to this section. Costs shall include, but not be limited to, the following: the time required of the prevailing party by the frivolous proceeding, and travel expenses, mileage, parking, costs of reports, and any additional reasonable consequential expenses of the prevailing party resulting from the frivolous proceeding;
- (2) an order for the attorney to pay a reasonable fine to the court; or
- (3) a directive of a nonmonetary nature, including injunctive relief, designed to deter a future frivolous action or an action in bad faith.

Rule 11(a), *SCRCP* provides in part:

Every pleading, motion or other paper of a party represented by an attorney shall be signed in his individual name by at least one attorney of record who is an active member of the South Carolina Bar, and whose address and telephone number shall be stated. A party who is not represented by an attorney shall sign his pleading, motion or other paper and state his address. . . . The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion or other paper; that to the best of his knowledge, information and belief there is good ground to support it; and that it is not interposed for delay.

Rule 11(a) further states that "If a pleading, motion, or other paper is signed in violation of this Rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction. . . ."

The record before the Court is replete with evidence that the Plaintiff has abused his right of access to the courts to the point that this Court must step in. Not including the present action, after the Plaintiff's jury trial and convictions in April, 2008, the Plaintiff has filed twelve (12) other various actions collaterally attacking his 2008 convictions, all of which were dismissed. Despite the Plaintiff's argument to the contrary, it is clear to this Court that the present action is yet another attempt to collaterally attack his 2008 convictions, and that the filing of this action is

in violation of the South Carolina Supreme Court's Order dated July 16, 2012.

The Court has carefully considered the factors enumerated in Section 15-36-10(E) and based upon that consideration specifically finds by a preponderance of the evidence that the Plaintiff has engaged in both filing and continuing a frivolous claim such that sanctions under the Act are appropriate. Further, the Court finds that the Plaintiff has violated Rule 11(a), *SCRCP*, such that sanctions under that rule are appropriate.

A. **Restriction on the filing of actions in the Fourth Judicial Circuit.**

As recited above, the Act specifically provides that sanctions may include "a directive of a nonmonetary nature, including injunctive relief, *designed to deter a future frivolous action* or an action in bad faith." (Emphasis added). As in *In re Maxton*, 325 S.C. 3, 478, S.E.2d 679 (1996), the Plaintiff in this case has filed repetitive and frivolous actions that have wasted the court's time and resources and has interfered with the fair administration of justice.

The Court has the utmost respect for a person's right of access to the courts. However, when that right of access has been abused repeatedly as it has by the Plaintiff, sanctions, including placing certain conditions upon that access, are appropriate. Based upon all of the foregoing, I find that the Plaintiff shall be barred from filing any action in the Fourth Judicial Circuit of the State of South Carolina without leave of court from the Chief Administrative Judge for a period of ten (10) years from the date of this Order. Should the Plaintiff attempt to file any such actions without first obtaining leave of court as set forth herein, the Clerk of Court shall not file such actions and shall return the same to the Plaintiff.

The Plaintiff is hereby put on notice and warned that should he file any action without first obtaining leave of court in violation of this Order, that he may be held in contempt of court.

## DEFENDANTS' REQUEST FOR INJUNCTIVE RELIEF

The Defendants have requested the following injunctive relief: (1) an injunction prohibiting the Plaintiff from submitting any further FOIA requests concerning his convictions from 2008 for failure to stop for a blue light and assault with intent to kill to any of the Defendants, the Chesterfield County Sheriff, Chesterfield County, or any of its or their departments, agencies or other county wide elected officials without first obtaining permission to do so from this Court; and (2) an Order providing that the Chesterfield County Sheriff does not have to respond to the Plaintiff's July 10, 2014 FOIA request for "the V.H.S. of my 68 mile chase that occurred on March 4<sup>th</sup>, 2008."

The Court appreciates the purpose of the Freedom of Information Act to provide that public business be performed in an open and public manner including the right of citizens to access public documents. However, it is apparent to the Court that the FOIA requests at issue in this case are part and parcel of the Plaintiff's continued attempts to collaterally attack his 2008 convictions for failure to stop for a blue light and assault with intent to kill. Given the fact that the Plaintiff participated in a jury trial on these charges, and subsequently filed some twelve (12) additional actions involving these same charges, he has had more than ample opportunity to review any and all documents and information relating to those convictions.

The Plaintiff's July 10, 2014 FOIA request to the Chesterfield County Sheriff requests a copy of "the V.H.S. of my 68 mile chase that occurred on March 4<sup>th</sup>, 2008." The Plaintiff also states in that request "that if I was to view the V.H.S. of my chase instead of the D.V.D. that would be my key to getting out of prison." Such a request is nonsensical and unreasonable and, even considering the broad purpose of FOIA, the Sheriff should not be required to respond to the Plaintiff's request.

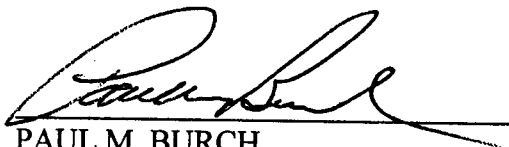
Given the entire record of the Plaintiff's actions concerning his 2008 convictions for failure to stop for a blue light and assault with intent to kill, the Court find that the Defendants' request for injunctive relief is reasonable and necessary. Therefore, the Chesterfield County Sheriff does not have to respond to the Plaintiff's FOIA request for "the V.H.S. of my 68 mile chase that occurred on March 4<sup>th</sup>, 2008." Additionally, the Plaintiff is enjoined from submitting any further FOIA requests concerning his convictions from 2008 for failure to stop for a blue light and assault with intent to kill to any of the Defendants, the Chesterfield County Sheriff, Chesterfield County, or any of its or their departments, agencies or other county wide elected officials without first obtaining permission to do so from the Chief Administrative Judge for the Fourth Judicial Circuit of the State of South Carolina.

The Plaintiff is hereby put on notice and warned that should he submit any such FOIA requests without first obtaining leave of court in violation of this Order, that he may be held in contempt of court.

IT IS THEREFORE ORDERED:

- a. That the Plaintiff's action is hereby dismissed with prejudice;
- b. That the relief requested by the Defendants is granted as set forth in the body of this Order; and
- c. That the parties hereto are ordered to strictly comply with the directives of this Court contained in the body of this Order.

AND IT IS SO ORDERED.

  
PAUL M. BURCH  
CHIEF ADMINISTRATIVE JUDGE  
FOURTH JUDICIAL CIRCUIT

August 24, 2014  
Pageland, South Carolina.

# Exhibit A

Billy Lee Lisenby JR, #200273

200 Prison Rd. SMU #48

Tyger River Care Inst.

Enoree S.C. 29335

Chesterfield County Sheriff's Office

Interim Sheriff Kip Kiser

200 West Main St.

Chesterfield S.C. 29709

Dated: April 15<sup>th</sup> 2013

RE: FOIA

Dear MR. Kiser,

I would like for you to provide me with the following info. based on the Freedom of Information Act:

1. I would like a list of all the officers that have been under the Reserve Officer Program under Sheriff Sam Packee while he was in office in Chesterfield County.
2. I would like a copy of Sheriff Packee's roster of various deputies who purported to be Class 1 officers who are no longer on the payroll and do not work regular hours, or any recorded hours, for C'Field County.
3. I would like to know the names of the "Reserve Deputies" who were allowed to patrol Chesterfield County, yet never underwent the training or certification required by the Criminal Justice Academy, and were not on record with the Academy.
4. I would like to know the names of the "Reserve Officers" MR. Kiser terminated.

I would like the above info. IF there is a fee let me know. I will give you 25-30 days to respond or I'll be forced to file a civil action to obtain this important info.

Thanking you in advance!

Billy

Received  
4-18-13

LEGAL MAIL

# **Exhibit B**

Billy Lee Lisenby JR, #200273  
Lieber Corr. Inst.  
P.O. Box 205  
Ridgerille S.C. 29472

REC.  
7-17-14  
By Mail

ChesterField County Sheriff's Office      Dated: July 10<sup>th</sup> 2014  
109 Scotch Rd.  
ChesterField S.C. 29709

Dear Sheriff,

I had the pleasure of speaking with former Sheriff Sam Parker, and he advised me, that if I was to view the V.H.S of my chase instead of the D.V.D that would be my key to getting out of prison.

Now I am requesting based upon the Freedom of Information Act that you send me the V.H.S of my 68 mile chase that occurred on March 4<sup>th</sup> 2008.

Your time and help will be more than highly appreciated.

Thanking you in advance!

Billy

# **Exhibit C**



Lisenby has earned Platinum status in the frequent filer club. He has filed an array of federal and state collateral challenges to his 2008 convictions and subsequent proceedings.

**A. First PCR Application**

On August 11, 2008, Lisenby filed an application for post-conviction relief (PCR), alleging, inter alia, ineffective assistance of trial counsel. He was represented by counsel at the PCR hearing. On February 6, 2009, the PCR court denied Lisenby's application. On February 12, 2009, Lisenby filed a Notice of Appeal of the denial of his first PCR application. After receiving several extensions, Lisenby filed a Petition for Writ of Certiorari on January 21, 2010, which the South Carolina Supreme Court denied on May 13, 2011. The remittitur was issued on June 1, 2011.<sup>2</sup>

**B. First Federal Habeas Petition**

While Lisenby's appeal of the denial of his first PCR application was pending, he filed a habeas corpus petition in federal court on March 12, 2009. On August 31, 2009, Lisenby moved for voluntary dismissal of the federal habeas petition. The magistrate judge issued an R&R on September 30, 2009, recommending dismissal without prejudice with leave to re-file once the state court resolved Lisenby's appeal of the denial of his first PCR application. Presciently, the magistrate judge "caution[ed] the Petitioner to be mindful of the AEDPA's one year statute of limitations period," noting that the limitations period would only be tolled while a "properly filed" PCR application was pending. R&R 12, No. 09-cv-00705, ECF No. 53. On October 26, 2009, this court affirmed the R&R and dismissed the first federal habeas petition without prejudice.

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<sup>2</sup> As explained infra, the one-year statute of limitations for filing a federal habeas petition began to run on this date.

**C. Second PCR Application**

On September 17, 2009—prior to resolution of the appeal of the denial of his first PCR application—Lisenby filed a second PCR application. The PCR court dismissed Lisenby's ineffective assistance of counsel claims as untimely and successive on April 18, 2010, while finding his claim of newly discovered evidence to be without merit. On May 3, 2010, Lisenby filed a motion to alter or amend the judgment pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure. This motion was denied on August 4, 2010. An appeal was dismissed by the South Carolina Supreme Court on September 9, 2010.

**D. Second Federal Habeas Petition**

On October 5, 2009—while the above three actions were all pending—Lisenby filed a second federal habeas petition. On March 18, 2010, in response to a motion for summary judgment, Lisenby consented to a dismissal of the second federal habeas petition without prejudice. The magistrate judge issued an R&R on July 30, 2010, recommending dismissal without prejudice but once again “caution[ing] Petitioner to be mindful of the AEDPA's one year statute of limitations period.” R&R 14, No. 09-cv-02627, ECF No. 56. On August 19, 2010, this court dismissed the second federal habeas petition without prejudice.

**E. Third Federal Habeas Petition**

On October 4, 2010, Lisenby filed a third federal habeas petition, again while the appeal of the denial of his first PCR application was pending. On April 20, 2011,

Lisenby filed a motion for voluntary dismissal of the third federal habeas petition.<sup>3</sup> The magistrate judge issued an R&R on May 31, 2011, recommending that the petition be dismissed without prejudice. On June 15, 2011, this court affirmed the R&R and dismissed the third federal habeas petition without prejudice.

#### **F. Fourth Federal Habeas Petition**

On October 8, 2010, Lisenby filed a fourth federal habeas petition. Lisenby failed to file a timely response to a motion for summary judgment. The magistrate judge ordered Lisenby to notify the court by September 27, 2011 whether he wished to prosecute his case. The deadline was extended to October 12, 2011. No response was filed. The magistrate judge issued an R&R on October 17, 2011, recommending dismissal with prejudice for failure to prosecute. On November 8, 2011, this court affirmed the R&R and dismissed the fourth federal habeas petition with prejudice.

#### **G. Third PCR Application**

On November 15, 2010, Lisenby filed a third PCR application. The state court dismissed Lisenby's ineffective assistance of counsel claims as untimely and successive on June 6, 2011, while finding his claim of newly discovered evidence to be without merit. On June 8, 2011, Lisenby filed a motion to alter or amend the judgment. This motion was denied on September 8, 2011. Lisenby appealed the denial of his third PCR

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<sup>3</sup> Shortly thereafter, on May 13, 2011, the South Carolina Supreme Court dismissed the appeal of the denial of Lisenby's first PCR application. Lisenby has filed with the court a letter he received from the South Carolina Commission on Indigent Defense. In this letter, dated May 16, 2011, the Commission advised Lisenby that he had exhausted his state court remedies and notified him that there is "now a one-year statute of limitations for filing an application for a writ of habeas corpus in federal court." Pet'r's Compl. Ex. 1, No. 12-cv-02666, ECF No. 1-1 at 97.

application to the South Carolina Supreme Court. On October 25, 2011, his appeal was dismissed.

#### **H. Fifth Federal Habeas Petition**

On June 9, 2011, Lisenby filed a fifth federal habeas petition. On January 19, 2012, Lisenby filed a motion for voluntary dismissal of his petition. The court granted the motion and dismissed the fifth federal habeas petition without prejudice on January 23, 2012.

#### **I. Fourth PCR Application**

On June 29, 2011, Lisenby filed a fourth PCR application. The state court dismissed the action as untimely and successive on January 10, 2012. On July 16, 2012, the South Carolina Supreme Court dismissed Lisenby's appeal and prohibited him from "filing any further collateral actions in the circuit court challenging his convictions from 2008 . . . without first obtaining [the South Carolina Supreme Court's] permission." No. 12-cv-02666, ECF No. 46-1 at 2.

#### **J. State Habeas Petition**

On March 7, 2012, Lisenby filed a state habeas corpus petition, arguing his trial and PCR counsel erred by not pursuing an insanity defense to his 2008 charges. The state court "summarily dismissed" the action on May 7, 2012, finding that Lisenby squandered multiple prior opportunities to raise the insanity issue and failed to state a claim upon which relief may be granted. No. 12-cv-02666, ECF No. 41-3. Lisenby appealed, and on January 23, 2013, the South Carolina Court of Appeals filed an order requiring Lisenby

to show cause why the denial of his state habeas petition was improper. Lisenby did not respond, and his appeal was dismissed on March 27, 2013.<sup>4</sup>

#### K. Sixth Federal Habeas Petition

On September 11, 2012,<sup>5</sup> Lisenby filed his sixth and most recent federal habeas petition pursuant to 28 U.S.C. § 2254. In his petition, Lisenby claims: (1) trial counsel was ineffective in failing to notify Lisenby of his trial date, failing to object to the jury trial proceeding in his absence, failing to request a continuance, and failing to request a jury instruction as to his absence from the beginning of the trial; (2) trial counsel committed perjury by stating she notified Lisenby of his trial date by mail; (3) trial counsel violated Lisenby's right to be present at every stage of trial and pick his jurors; and (4) trial counsel failed to object to the charge of AWIK, which is no longer recognized in South Carolina. Lisenby filed an amended petition on December 18, 2012, raising additional ineffective assistance of counsel claims and other grounds for relief.

On February 13, 2013, respondent filed a motion for summary judgment. In her R&R, Magistrate Judge Kaymani D. West recommends that this court deny Lisenby's petition and grant respondent's motion for summary judgment. The magistrate judge did not address the merits of Lisenby's claims, finding this, Lisenby's sixth federal habeas petition, to be untimely. Lisenby filed objections to the R&R on June 4, 2013.

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<sup>4</sup> In her memorandum in support of summary judgment in the instant case, respondent states that Lisenby's state court remedies have not been exhausted because the appeal of the denial of Lisenby's state habeas petition is still pending. *See* Resp't's Mem. Supp. Mot. Summ. J. 18, 32. However, as stated above, the appeal has since concluded.

<sup>5</sup> The prison mailbox rule, established in *Houston v. Lack*, 487 U.S. 266 (1988), entitles a prisoner to a presumption of filing on the date he delivers his legal papers to prison authorities for forwarding to the district court.

## II. STANDARD OF REVIEW

Petitioner appears pro se in this case. Federal district courts are charged with liberally construing petitions filed by pro se litigants to allow for the development of a potentially meritorious case. See Hughes v. Rowe, 449 U.S. 5, 9-10 (1980). Pro se petitions are therefore held to a less stringent standard than those drafted by attorneys. See Gordon v. Leeke, 574 F.2d 1147, 1151 (4th Cir. 1978). Liberal construction, however, does not mean that the court may ignore a clear failure in the pleading to allege facts that set forth a cognizable claim. See Weller v. Dep't of Soc. Servs., 901 F.2d 387, 390-91 (4th Cir. 1990).

This court is charged with conducting a de novo review of any portion of the magistrate judge's R&R to which specific, written objections are made. 28 U.S.C. 636(b)(1). The court may adopt the portions of the R&R to which the petitioner did not object, as a party's failure to object is accepted as agreement with the conclusions of the magistrate judge. Thomas v. Arn, 474 U.S. 140, 149-50 (1985). The recommendation of the magistrate judge carries no presumptive weight, and it is this court's responsibility to make a final determination. Mathews v. Weber, 423 U.S. 261, 270-71 (1976).

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) provides relief to a person in custody pursuant to the judgment of a state court if the custody is "in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). AEDPA imposes a one-year statute of limitations period that begins to run on the date a petitioner's conviction becomes final. Id., § 2244(d)(1); Harris v. Hutchinson, 209 F.3d 325, 327 (4th Cir. 2000). The time during which a properly filed application for

collateral review is pending does not count towards the statute of limitations. 28 U.S.C. § 2244(d)(2); Pace v. DiGuglielmo, 544 U.S. 408, 417-18 (2005).

Summary judgment shall be granted “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). Where a party “fails to make a showing sufficient to establish the existence of an element essential to his case,” Rule 56(a) mandates entry of summary judgment against that party. Celotex v. Catrett, 477 U.S. 317, 322 (1986). In deciding whether there is a genuine issue of material fact, the evidence is viewed in the light most favorable to the non-moving party with all justifiable inferences drawn in its favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986).

### III. DISCUSSION

Lisenby objects to the magistrate judge’s R&R on two main grounds: (1) he objects to the finding that his sixth federal habeas petition is untimely; and (2) he objects to the finding that he is not entitled to equitable tolling of the statute of limitations.

#### **A. Timeliness**

First, the magistrate judge recommends that Lisenby’s sixth federal habeas petition is barred by the one-year statute of limitations. The court agrees. Lisenby chose not to pursue a direct appeal of his convictions but instead filed his first PCR application on August 11, 2008. He appealed the denial of his first PCR application to the South Carolina Supreme Court, which dismissed the appeal and issued its remittitur on June 1, 2011. Lisenby had one year from June 2, 2011 to file a federal habeas petition. See 28 U.S.C. § 2244(d)(1)(A); Gonzalez v. Thaler, 132 S. Ct. 641, 653-54 (2012). Because Lisenby did not file the instant petition until September 11, 2012, it is time barred.

Lisenby contends that this court improperly dismissed his fifth federal habeas petition, which should prevent a finding that the sixth federal habeas petition is untimely. Pet'r's Obj. 1-2. On January 23, 2012, this court dismissed the fifth federal habeas petition without prejudice. Thirteen days earlier, the state court had dismissed Lisenby's fourth PCR application. Lisenby argues that because the fourth PCR application was no longer pending, there was no reason to dismiss the fifth federal habeas petition. See Pet'r's Obj. 6 (arguing that had the court not "dismissed his fifth habeas corpus [petition] illegally he would've followed through with it, because he had nothing to exhaust" in state court). As such, Lisenby believes that the filing date of his instant federal habeas petition should relate back to the filing date of his fifth federal habeas petition.

Lisenby fails to point out that the fifth federal habeas petition was dismissed for no reason other than Lisenby's own motion for voluntary dismissal. See Pet'r's Req. for Voluntary Dismissal, No. 11-cv-01443, ECF No. 54. Lisenby also fails to mention that he appealed the denial of his fourth PCR application after he voluntarily dismissed his fifth federal habeas petition. By voluntarily dismissing his fifth federal habeas petition and proceeding with the appeal of his fourth PCR application, Lisenby ran the risk that the South Carolina Supreme Court would agree with the PCR court that the fourth PCR application was properly dismissed as untimely and successive. The Supreme Court not only upheld the PCR court's decision, but barred Lisenby from filing any future collateral actions challenging his 2008 convictions without permission. Because Lisenby's third and fourth PCR applications were dismissed as untimely and successive and his state

habeas petition was “summarily dismissed,”<sup>6</sup> none of these actions tolled the one-year limitations period for filing a federal habeas petition that ran from June 2, 2011 to June 2, 2012. See Pace, 544 U.S. at 417 (holding that state collateral actions found to be untimely and successive are not “properly filed” under § 2244(d)(2) and do not toll the statute of limitations); see also Graham v. Johnson, 168 F.3d 762, 780 (5th Cir. 1999) (holding that to construe a second § 2554 petition as a “continuation” of a prior § 2254 petition that was dismissed without prejudice “would eviscerate the AEDPA limitations period”).

For these reasons, the court agrees with the magistrate judge that Lisenby’s federal habeas petition is time barred.<sup>7</sup>

#### B. Equitable Tolling

Next, the magistrate judge recommends that no extraordinary circumstances justify tolling of the statute of limitations.

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<sup>6</sup> With specific regard to the state habeas petition, it was not properly filed in the state circuit court because Lisenby raised an issue that was procedurally barred. See Keeler v. Mauney, 500 S.E.2d 123, 124 (S.C. Ct. App. 1998) (holding that a petitioner is “procedurally barred from petitioning the circuit court for a writ of habeas corpus where the matter alleged is one which could have been raised in a PCR application”).

<sup>7</sup> Lisenby was not without opportunities to bring his federal habeas claims. First, Lisenby could have prosecuted his claims in his fourth federal habeas action, because the South Carolina Supreme Court issued its remittitur following dismissal of the appeal of the denial of Lisenby’s first PCR application *before* this court dismissed the fourth federal habeas action. Instead, Lisenby did not even respond to the motion for summary judgment, and the fourth federal habeas action was dismissed, *with prejudice*, for failure to prosecute. Second, because the fifth federal habeas petition was filed after the South Carolina Supreme Court issued its remittitur, Lisenby could have prosecuted his federal habeas claims in his fifth federal habeas action. He chose not to do so when he moved for voluntary dismissal of the fifth federal habeas petition. Third, even after this court dismissed Lisenby’s fifth federal habeas petition, he had approximately four months in which to file a timely federal habeas petition. Lisenby waited until September 2012 to file, i.e., more than three months after the limitations period expired.

A petitioner seeking equitable tolling bears the burden of establishing he has diligently pursued his rights but some extraordinary circumstance prevented him from making a timely filing. Pace, 544 U.S. at 418. Equitable tolling is only appropriate in “those rare instances where – due to circumstances external to the party’s own conduct – it would be unconscionable to enforce the limitation period against the party and gross injustice would result.” Rouse v. Lee, 339 F.3d 238, 246 (4th Cir. 2003) (en banc). To be entitled to equitable tolling, an otherwise time-barred petitioner must present: “(1) extraordinary circumstances, (2) beyond his control or external to his own conduct, (3) that prevented him from filing on time.” Id. The Fourth Circuit has cautioned that “any invocation of equity to relieve the strict application of a statute of limitations must be guarded and infrequent, lest circumstances of individualized hardship supplant the rules of clearly drafted statutes.” Harris, 209 F.3d at 330.

First, petitioner’s claim that he “had no idea that his statute of limitations was up in June of 2012” is belied by the evidence. Pet’r’s Resp. Opp’n Resp’t’s Mot. Summ. J. 1; see also Pet’r’s Obj. 4 (professing ignorance of the June 2012 statute of limitations deadline). Lisenby was advised twice by the magistrate judge, and once by the South Carolina Commission on Indigent Defense, of the running of the one-year statute of limitations. At any rate, a petitioner’s ignorance of the statute of limitations does not justify equitable tolling. See R&R 19 (citing United States v. Sosa, 364 F.3d 507, 512 (4th Cir. 2004)).

Next, Lisenby argues that because the South Carolina Department of Corrections (SCDC) transferred to a computer system in 2012 and he is “computer illiterate,” he should be excused from failing to make a timely filing. Pet’r’s Obj. 3. Courts have held

that similar conclusory claims of computer illiteracy did not present the rare case of extraordinary circumstances. See Cadet v. United States, No. 12-cv-472, 2012 WL 4854381, at \*4 (E.D. Va. Oct. 11, 2012); Szadziewicz v. Salazar, No. 09-cv-7576, 2010 WL 2985840, at \*4 (C.D. Ca. July 19, 2010); Boone v. Washington, No. 105-cv-104, 2006 WL 663901, at \*2 (S.D. Ga. Feb. 10, 2006). Lisenby additionally claims that SCDC lost “all [his] legal boxes between March and April 2012” and they were not returned until November 2012, and argues this should excuse his tardy filing. Pet’r’s Obj. 5. Notably, the loss of legal materials did not prevent Lisenby from filing a state habeas petition on March 7, 2012. In addition, the fact that this is Lisenby’s sixth federal habeas petition “would suggest at least a minimal familiarity with the issues he wished to bring before the court.” R&R 20.

Lisenby further objects to the magistrate judge’s finding that his particular scenario is “substantially different” that of the petitioner in Pettinato v. Eagleton, 466 F. Supp. 2d 641 (D.S.C. 2006), who was granted equitable tolling. Pet’r’s Obj. 1. In Pettinato, the petitioner filed an untimely federal habeas petition. The petitioner had previously filed a state PCR application, which the PCR court did not specifically dismiss as untimely. Petitioner filed a Rule 59(e) motion to alter or amend the judgment denying his PCR application, but the state court failed to rule on the motion for six years. In the meantime, the petitioner moved to hold his federal habeas petition in abeyance pending the outcome of his PCR application. The district court found these circumstances rose to the level of extraordinary circumstances justifying equitable tolling of the federal statute of limitations. Id. at 654-55.

Unlike in Pettinato, Lisenby's numerous PCR applications received orders dismissing his claims as untimely and successive. Lisenby received timely rulings on all of his applications and motions, as opposed to Pettinato. Furthermore, Lisenby did not attempt to hold his federal petitions in abeyance. He either requested their dismissal or caused dismissal for failure to prosecute. Therefore, this court agrees with the magistrate judge's determination that the facts of Lisenby's case are substantially different than those of Pettinato.

Finally, Lisenby's objects to the magistrate judge's interpretation of the United States Supreme Court's recent ruling in Martinez v. Ryan, 132 S. Ct. 1309 (2012). Pet'r's Obj. 7. He claims the Martinez Court made it "appropriate to allow [him] to file within (1) year" of March 20, 2012—the date the Court decided Martinez—and he objects to the magistrate's finding that Martinez did not create a new rule of constitutional law entitling him to an extended filing deadline of March 20, 2013. Id. The court agrees with the R&R where it finds Lisenby "is not entitled to a one-year statute of limitations period running from when Martinez was decided because Martinez . . . did not establish a new rule of constitutional law." R&R 21; see United States v. Braber, No. 05-cr-15, 2012 WL 3990243, at \*1 n.2 (W.D. W. Va. Sept. 10, 2012) (citing Adams v. Thaler, 679 F.3d 312, 322 n.6 (5th Cir. 2012)) ("[T]he court's decision [in Martinez] was an 'equitable ruling' that did not establish 'a new rule of constitutional law.'"). Lisenby's petition remains untimely.

#### IV. CONCLUSION

For the reasons set forth above, the court **AFFIRMS** the magistrate judge's R&R and **GRANTS** respondent's motion for summary judgment.

The court also **DENIES** a certificate of appealability because petitioner has failed to make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

**AND IT IS SO ORDERED.**

A handwritten signature in black ink, appearing to read "D. Norton", written in a cursive style.

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**DAVID C. NORTON**  
**UNITED STATES DISTRICT JUDGE**

**July 30, 2013**  
**Charleston, South Carolina**

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# **Exhibit D**

STATE OF SOUTH CAROLINA

COUNTY OF CHESTERFIELD

Billy Lee Lisenby, Jr., a/k/a Malik Al-Shabazz,

Plaintiff,

versus

Chesterfield County Sheriff Sam Parker;  
Sgt. John Spencer Vaughn, Jr. and Magistrate  
Ronald Davis Cundiff,

Defendants.

**COPY**

IN THE COURT OF COMMON PLEAS  
FOURTH JUDICIAL CIRCUIT

Case No. 2010-CP-13-9

2010 JUN 8 PM 2 00  
FAYE L. SELLERS  
CLERK OF COURT  
CHESTERFIELD COUNTY, SC

ORDER OF DISMISSAL

A True Copy Attest

*Faye L. Sellers*  
CLERK OF COURT C.P. & G.S.  
CHESTERFIELD COUNTY, SC

This matter came before the Court at a regular term of Common Pleas Non-Jury on May 25, 2010. The Defendants filed a Motion to Dismiss or for Summary Judgment on various grounds. Present at the hearing were the Plaintiff, proceeding *pro se*, and counsel for the Defendants, C. Heath Ruffner.

This action arises out of an incident on March 4, 2008, in which the Plaintiff led the Defendant John Spencer Vaughn, Jr. and other law enforcement officers on a high speed chase covering approximately sixty eight miles. The Plaintiff was subsequently convicted in the General Sessions Court of assault with intent to kill and sentenced to thirteen years. The Plaintiff's Complaint makes various allegations concerning the high speed chase and the criminal charges resulting therefrom and seeks actual and punitive damages against the Defendants.

The Summons and Complaint with which the Defendants in this matter were served were filed on April 6, 2010 as evidenced by the date stamp of the Chesterfield County Clerk of Court. The Defendants answered the Plaintiff's suit setting up various defenses and moving for dismissal and summary judgment on the grounds that the Plaintiff's Complaint fails to state facts sufficient to constitute a cause of action pursuant to Rule 12(b)(6) of the *South Carolina Rules of Civil Procedure*; that the Plaintiff's Complaint is time barred under the two year statute of limitations pursuant to S.C. Code Ann. § 15-78-110, as amended; that the Defendants are improper parties pursuant to S.C. Code Ann. § 15-78-70, as amended; and that summary judgment was appropriate inasmuch as there is no genuine issue of material fact. The Defendants also moved

7217

for an Order striking all reference to punitive damages from the Complaint pursuant to S.C. Code Ann. § 15-78-120.


The South Carolina Tort Claims Act governs all tort actions against governmental entities. Under S.C. Code Ann. § 15-78-110, "Any action brought pursuant to this chapter is forever barred unless an action is commenced within two years after the date of loss was or should have been discovered. . . ." Under the general two-year statute of limitations, the Plaintiff in this case had until March 5, 2010, to commence his action by filing and serving his Complaint. The Court finds that the Plaintiff's action, if any, against the Defendants arising out of the incident on March 4, 2008, would be within the scope of the South Carolina Tort Claims Act, S.C. Code Ann. § 15-78-10, *et. seq.*, and the Act's applicable two-year statute of limitations. The Plaintiff has, therefore, failed to commence his action within the applicable two-year statute of limitations and granting the Defendant's Motion to Dismiss on that basis is appropriate.

The Defendants also raised other grounds for dismissal in their motion but the Court finds it is not necessary to address those grounds in light of the ruling on the statute of limitations issue.

IT IS THEREFORE ORDERED:

That the Plaintiff's Complaint is dismissed with prejudice for the reasons set forth herein.

IT IS SO ORDERED.

  
PAUL M. BURCH  
CIRCUIT COURT JUDGE  
FOURTH JUDICIAL CIRCUIT

June 6<sup>th</sup>, 2010  
Pageland, South Carolina.

# **Exhibit E**

# The Supreme Court of South Carolina

Billy Lee Lisenby, Jr., Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2012-212299

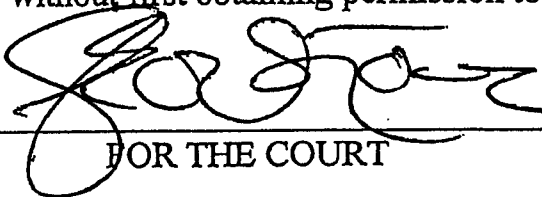
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## ORDER

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This matter is before the Court by way of a notice of appeal from the denial of petitioner's fourth application for post-conviction relief. Petitioner has also submitted the explanation required by Rule 243(c), SCACR. We find petitioner has failed to show there is an arguable basis for asserting the determination by the circuit court was improper. Accordingly, we dismiss the notice of appeal in this matter.

Moreover, we hereby prohibit petitioner from filing any further collateral actions in the circuit court challenging his convictions from 2008 for failure to stop for a blue light and assault with intent to kill without first obtaining permission to do so from this Court.

  
CJ.  
FOR THE COURT

Columbia, South Carolina

July 16, 2012

cc:

Karen Christine Ratigan

Billy Lee Lisenby, Jr., 200273

The Honorable Faye L. Sellers

**Exhibit F**

# The Supreme Court of South Carolina

Billy Lee Lisenby, Jr., Petitioner.

Appellate Case No. 2014-000221

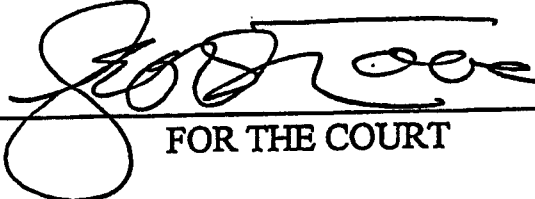
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## ORDER

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In 2008, petitioner was convicted for failing to stop for a blue light (2008-GS-13-00351) and assault with intent to kill (2008-GS-13-00352). By order dated July 16, 2013, this Court prohibited petitioner from filing any further collateral action challenging those convictions in the circuit court without first obtaining permission from this Court to do so.<sup>1</sup>

Petitioner now seeks permission to file a post-conviction relief action in the circuit court regarding those convictions. The motion is denied.

  
C.J.  
FOR THE COURT

Columbia, South Carolina  
February 10, 2014

cc: Mr. Billy Lee Lisenby, Jr., 00200273  
Office of the Attorney General  
The Honorable Faye L. Sellers

**RECEIVED**

FEB 11 2014

Referred to

PR / dm

Answered

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<sup>1</sup> This order was issued in Appellate Case Number 2012-212299 which arose out of the post-conviction relief case filed as 2011-CP-13-00259.

# **Exhibit G**

The Supreme Court of South Carolina  
**RECEIVED**

SE  
copy to  
Daniel  
for

Billy Lee Lisenby, Jr., Petitioner.

APR - 8 2014

Appellate Case No. 2014-000644

ATTORNEY GENERALS  
OFFICE

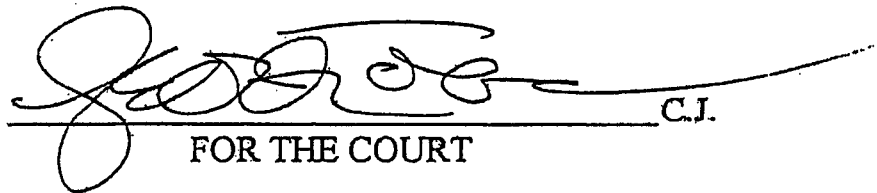
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ORDER

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In 2008, petitioner was convicted for failing to stop for a blue light (2008-GS-13-00351) and assault with intent to kill (2008-GS-13-00352). By order dated July 16, 2012, this Court prohibited petitioner from filing any further collateral actions challenging those convictions in the circuit court without first obtaining permission from this Court to do so.<sup>1</sup>

Petitioner now moves for permission to file a post-conviction relief action in the circuit court regarding the above convictions. The motion is denied.

  
C.J.  
FOR THE COURT

Columbia, South Carolina  
April 7, 2014

cc: Billy Lee Lisenby, Jr., 00200273  
Office of the Attorney General

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<sup>1</sup> This order was issued in Appellate Case Number 2012-212299.

# **Exhibit H**

Billy Lee Lisenby JR, #200213

P.O. Box 205

Lieber C.I

Bidgeville S.C. 29472

Dated: June 13<sup>th</sup>, 2014

RE: F.O.I.A Request

Criminal Justice Academy

Attn: F.O.I.A Coordinator

5400 Broad River Rd.

Columbia S.C. 29212

CSA-01500  
06/14/14

Dear F.O.I.A Coordinator,

I would like the names of all the officers in former Sheriff Sanford Parker's "Reserve Officer Program" in Chestnutfield County. Also I would like the names of any officer that was in his department without certification from 2003 to the present day.

This request is pursuant to the Freedom of Information Act.

Thanking you in advance!

Billy Lee Lisenby

Proof of Service

I swear under penalty of perjury that I have sent a copy of the enclosed F.O.I.A request to the Criminal Justice Academy on June 13<sup>th</sup>, 2014.

RECEIVED

SEP 17 2014

SC Court of Appeals



# Exhibit I



# South Carolina Criminal Justice Academy

June 14, 2014

Billy Lee Lisenby, Jr., Inmate #200273  
Post Office Box 205  
Lieber Correctional Institution  
Ridgeville, South Carolina 29472

RE: Freedom of Information Act Request

Dear Mr. Lisenby:

I received your correspondence dated June 13, 2014 requesting information pursuant to the Freedom of Information Act. According to our records the Chesterfield County Sheriff's Office did not have any reserve officers from 2003 until present.

According to our records, based on the information provided to us by Sheriff Robert Lee, the following individuals did not hold lawful certification from 2003 until present due to failure to comply with the Training Act (failure to have them regularly on the payroll):

William B. Harper  
Marvin F. Murray  
Robert B. Robeson  
Gerry Ward

Richard T. Malloy  
David Oliver  
David W. Russell

Additionally, the following individuals were not certified during their employment with Chesterfield Sheriff's Office from 2003 until present for other various reasons:

Rivers B. Hailey, III  
Christy S. Jacobs  
James R. Thurman

Otis T. Harrington  
Cedrick L. McManus  
Robert L. Winburn

Sincerely,

*Hubert F. Harrell*  
Hubert F. Harrell  
Director

HFH:bad