

Law Office of Leah B. Moody, LLC

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July 13, 2015

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

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JUL 27 2015

RE: Robert Horton v. State of South Carolina
Case No.: 2013-CP-42-3065

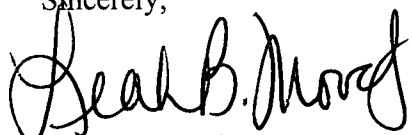
S.C. Supreme Court

Dear Mr. Shearouse:

The York County Court of Common Pleas appointed my office to represent Robert Horton in his Post-Conviction Relief action. Please find enclosed for filing the original and two (2) copies of the Notice of Appeal, Proof of Service, and one (1) copy of the Order of Dismissal in the above-referenced case. Please return the clocked copies to me in the enclosed self-addressed, stamped envelope.

Thank you for your assistance with this matter.

Sincerely,



Leah B. Moody

LBM/ts

Enclosure

cc Robert Horton
Suzanne White, Esquire
Sharon Graham, SCCID
Hope Blackley, Clerk of Court, Spartanburg County

IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

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JUL 27 2015

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

S.C. Supreme Court

Roger Couch, Presiding in Spartanburg County

Case No. 2013-CP-42-3065

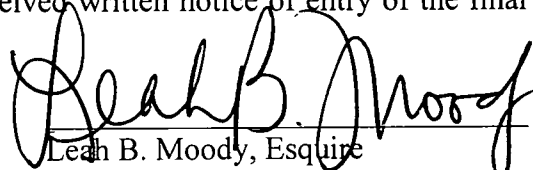
Robert Horton, Appellant,

v.

State of South Carolina, Respondent.

NOTICE OF APPEAL

Robert Horton appeals the order of the Honorable Roger Couch, dated July 7, 2015 and mailed on July 8, 2015. Appellant received written notice of entry of the final order on July 10, 2015.



Leah B. Moody, Esquire
Law Office of Leah B. Moody, LLC
235 E. Main Street, Suite 115
Post Office Box 1015
Rock Hill, South Carolina 29731

Other Counsel of record:
Suzanne White, SC Attorney General's Office
Rembert C. Dennis Building
Post Office Box 11549
Columbia, South Carolina 29211-1549
(803) 734-3970

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JUL 27 2015

S.C. Supreme Court

IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Roger Couch, Presiding in Spartanburg County

Case No. 2013-CP-42-3065

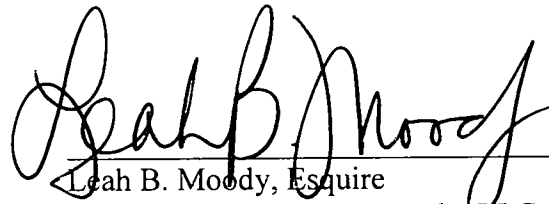
Robert Horton, Appellant,

v.

State of South Carolina, Respondent.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on Suzanne White by depositing a copy of it in the United States Mail, postage prepaid, on July 21, 2015 addressed to its attorney of record, Suzanne White, Post Office Box 11549, Columbia, South Carolina, 29211-1549.



Leah B. Moody, Esquire
Law Office of Leah B. Moody, LLC
235 E. Main Street, Suite 115
Post Office Box 1015
Rock Hill, South Carolina 29731

July 21, 2015

cc Robert Horton
Sharon A. Graham

STATE OF SOUTH CAROLINA)
)
 COUNTY OF SPARTANBURG)
)
)
 Robert S. Horton, #351540,)
)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
)
 Respondent.)
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 _____)

IN THE COURT OF COMMON PLEAS
 SEVENTH JUDICIAL CIRCUIT

2013-CP-42-3065

ORDER OF DISMISSAL

M. HOPE BLACKLEY

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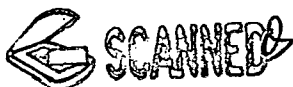
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 SPARTANBURG COUNTY

This matter comes before the Court by way of an Application for Post-Conviction Relief filed July 17, 2013. The Respondent made its Return on or about July 2, 2014. An evidentiary hearing into the matter was convened on March 26, 2015, at the Spartanburg County Courthouse. The Applicant was present at the hearing and was represented by Leah B. Moody, Esquire. Suzanne H. White, Esquire, of the South Carolina Attorney General's Office, represented the Respondent.

At the hearing, the Applicant testified on his own behalf. Michael D. Brown, Esquire, ("Counsel") also testified. This Court also had before it a copy of the records of the Spartanburg County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the Return, the appellate records, and the trial transcript.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. He was indicted at the July 2009 term of the Spartanburg County Grand Jury for criminal sexual conduct with a minor - 2nd degree, but the indictment was later amended and Applicant was re-indicted at the



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November 2011 term (2009-GS-42-3879). The Applicant was represented by Michael D. Brown, Esquire. On July 12, 2012, the Applicant proceeded to trial after which he was found guilty of criminal sexual conduct with a minor – 2nd degree. The Honorable J. Derham Cole sentenced Applicant to eighteen years.

A Notice of Appeal was filed by the Applicant. However, the South Carolina Court of Appeals dismissed Applicant's appeal as untimely served on May 6, 2013. State v. Horton, No. 2013-UP-904 (Ct. App. May 16, 2013). The Remittitur was issued on May 24, 2013.

ALLEGATIONS

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

- a. Ineffective assistance of Counsel, in that;
 - i. Counsel failed to file a timely notice to appeal,
 - ii. Counsel failed to call important witnesses,
 - iii. Counsel failed to present evidence relevant to Applicant's defense,
 - iv. Counsel failed to present expert testimony of Applicant's physical disabilities,
 - v. Counsel failed to exploit the great inconsistencies in the State's evidence,
 - vi. Counsel failed to impeach the credibility of the alleged victim with a relevant CPS report from Greenville County,
 - vii. Counsel failed to object to alleged victim arousing the passion and prejudice of the jury by bringing blue security pillow on stand with her,

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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) (citing Rule 71.1(e), SCRCF). Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that “counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result.” Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, Id. The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

First, the Applicant must prove that counsel’s performance was deficient. Under this prong, attorney performance is measured by its “reasonableness under professional norms.” Cherry, 300 S.C. at 117, 385 S.E.2d at 625, *citing* Strickland. Second, counsel’s deficient performance must have prejudiced the Applicant such that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. “A reasonable probability is a probability

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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).

Applicant testified that he retained Counsel to represent him on the charge. Applicant testified that he discussed his innocence with Counsel and provided Counsel with all of the pertinent facts. Applicant testified that Counsel discussed possible plea offers for fifteen, twelve and then zero to ten years, but Applicant refused to plead to a charge he did not commit.

Applicant testified that Counsel failed to call witnesses to assist with Applicant’s defense. Applicant testified that Counsel failed to call Applicant’s wife as a witness. However, Applicant acknowledged that his wife was called as a witness by the State and Counsel had the opportunity to cross-examine her. Applicant testified that Counsel failed to call Porchia Moore, the person who performed the initial DSS investigation and met with the victim. Applicant testified that Counsel said he was aware of what Ms. Moore would testify to and it would not help. Applicant also alleged that Counsel failed to call Katherine Foster, who was another DSS worker involved with the victim.

Applicant testified that Counsel failed to present relevant evidence regarding Applicant’s medical disability and how various medications affected Applicant. Applicant testified that he provided Counsel with medical notes after the first day of trial; however, Applicant stated that there were three years between his arrest and trial and Counsel failed to obtain any medical testimony or expert.

Counsel testified that he was retained to represent the Applicant on the charges. Counsel testified that he advised the Applicant not to share information with his wife regarding the trial strategy because Counsel knew that the wife would testify on behalf of the State, but Applicant did not listen and shared information with her about strategy. Counsel testified that he never



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discussed calling an expert to testify regarding the DNA and never discussed calling any of Applicant's doctors to testify. Counsel testified that he discussed the physical issues Applicant faced as a result of back surgery with Applicant prior to trial. Counsel testified that both the Applicant and his wife testified about Applicant's prior surgeries. Counsel testified that there was never an issue of potential contamination of the DNA. However, Counsel testified that he was able to cross-examine the State's expert as to why only the Applicant's DNA was sought to corroborate their suspicions. As to Porchia Moore and Katherine Foster, Counsel testified that he had the opportunity to see Moore in Laurens County.

This Court finds the testimony of Counsel to be more credible than that of the Applicant. Prejudice from trial counsel's failure to interview or call witnesses cannot be shown where the witnesses do not testify at post-conviction relief. Underwood v. State, 309 S.C. 560, 420 S.E.2d 20 (1992); Bassette v. Thompson, 915 F.2d 932 (4th Cir. 1990), cert. denied, 499 U.S. 982 (1991). The Applicant's mere speculation as to what a witnesses' testimony would have been cannot, by itself, satisfy his burden of showing prejudice. Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993); Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995). An Applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial. Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998). This Court finds that the Applicant failed to present testimony from any of the witnesses he alleges that Counsel failed to call at trial. The Court would be required to speculate as to what their testimony would be and how it might have affected the Applicant's trial. Therefore, the Applicant has failed to meet his burden of proof as to this claim.

Applicant testified that Counsel failed to highlight inconsistencies in the State's case,

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including the differences between the two videos of interviews with the victim. Applicant insisted that Counsel should have brought out the inconsistencies in his cross-examination of witnesses or during the closing arguments. Applicant also argued that Counsel was ineffective for failing to aggressively cross-examine the victim and the SLED agent. Counsel did not question the SLED agent about the fact that there was only one person's DNA present, when there should have been two people's DNA present if the story was true. Counsel testified that he did cross-examine both the victim and the State expert. Counsel testified that he cross-examined the expert as to why she only tested for the Applicant's DNA.

The nature and scope of cross-examination is inherently a matter of trial tactics. United States v. Nersesian, 824 F.2d 1294, 1321 (2nd Cir. 1987). "[A] defendant has a 'burden of supplying sufficiently precise information,' of the evidence that would have been obtained had his counsel undertaken the desired investigation and of showing 'whether such information would have produced a different result.'" United States v. Rodriguez, 53 F.3d 1439, 449 (11th Cir. 1995). The Applicant did not proffer any questions counsel allegedly failed to ask, and did not present any testimony showing the witnesses' answers at trial would have been different. Accordingly, the Applicant has not shown that a different approach to cross-examination would have been beneficial to the defense.

Applicant testified that he wanted Counsel to present evidence regarding the prior DSS case involving the victim and prior allegations and a situation in which his wife stated that she caught her daughter masturbating. Counsel testified that the possibility of presenting issues of prior sexual knowledge or allegations was dealt with pre-trial motions. Counsel also testified that he was able to raise the inference of prior knowledge of sexual behavior on the victim's behalf based upon questions regarding the victim's father's viewing of pornography.

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Applicant testified that Counsel failed to object when the victim, who was seventeen years old at the time of trial, came up to testify on the stand carrying a security blanket. Counsel testified that he did not raise an issue about the victim's security blanket because he was not aware of it until she came into the courtroom with it.

This Court finds that the Applicant failed to meet his burden of proof as to these claims. The Applicant produced no evidence or testimony that any additional argument would have allowed evidence regarding prior assault allegations related to the victim be presented at trial. There was also no evidence that an objection made to the victim's security blanket would have affected the outcome of the trial. Therefore, this claim is denied. This Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Applicant failed to demonstrate counsels' performance was unreasonable under prevailing professional norms. Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625; Stalk v. State, 383 S.C. 559, 563, 681 S.E.2d 592, 594 (2009). Therefore, all allegations in this application for post-conviction relief, other than the request for a belated review of direct appeal issues, must be denied and dismissed with prejudice.

Direct Appeal

The Applicant alleged that Counsel failed to perfect a direct appeal on Applicant's behalf following Applicant's request. Trial counsel must ensure that a criminal defendant is made fully aware of his appeal rights. White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974). In the absence of an intelligent waiver by the defendant, counsel must either initiate an appeal or comply with the procedure required by Anders v. California.¹ White, Id. Where the post-conviction relief judge determines that the applicant did not freely and voluntarily waive their appellate rights, the

¹386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed. 2d 493 (1967).

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applicant may petition the South Carolina Supreme Court for review of direct appeal issues pursuant to White v. State. See Rule 227(g)(1), SCACR; Davis v. State, 288 S.C. 290, 342 S.E.2d 60 (1986).²

Applicant testified that Counsel failed to file a timely notice of appeal. Applicant testified that before the jury returned, Counsel told Applicant that he would file a notice of appeal on Applicant's behalf if they were not successful. Applicant asserted that his family attempted to contact Counsel following the trial in regards to the appeal, but were unable to.

Counsel testified that he did not recall a conversation regarding Applicant's desire to appeal and did not file a notice of appeal on Applicant's behalf. Counsel testified that following the trial, he did receive a request from the Applicant's brother for a copy of Applicant's file.

This Court finds the testimony of both Applicant and Counsel to be credible as this issue, so out of an abundance of caution; this Court finds that the Applicant is entitled to a belated review of his direct appeal issues. The Court affirmatively finds that the Applicant did not knowingly and voluntarily waive his right to a direct appeal. The Applicant's lack of a direct appeal can be remedied by a petition for belated review of his direct appeal issues pursuant to White v. State, supra.

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Summary

This Court finds in regards to the allegations of ineffective assistance of counsel, Counsel's testimony was credible, while the Applicant's testimony was not credible. This Court further finds Counsel adequately conferred with the Applicant, conducted a proper investigation, was thoroughly competent in his representation, and that Counsel's conduct does not fall below

² "Even where the post-conviction relief judge makes this finding, he may not grant relief on this basis. Instead, **the applicant must petition this Court for a White v. State review.**" [Emphasis added]. Davis, 288 S.C. at 291, n. 1, 342 S.E.2d at 60.

the objective standard of reasonableness.

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test – that Counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that 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 Counsel’s performance. This Court concludes the Applicant has not met his burden of proving Counsel failed to render reasonably effective assistance. See Frasier supra. Therefore, this allegation is denied.

CONCLUSION

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

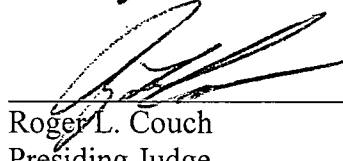
This Court cautions Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel’s assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCR, provides that if the applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant’s behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

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J. HOPE BLANCHETT

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice with the exception of a finding that the Applicant is entitled to a belated review of his direct appeal issues; and
2. Within thirty days of service of this Order, counsel for the Applicant must file a Notice of Appeal to secure the appropriate belated review of the Applicants' convictions. Counsel and the Applicant are directed to Davis v. State, 288 S.C. 290, 342 S.E.2d 60 (1986) and South Carolina Appellate Court Rule 227(g) for the appropriate procedure for securing belated appellate review.
3. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 7th day of July, 2015.



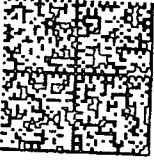
Roger L. Couch
Presiding Judge

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M. HOPE BLACKLEY
Clerk of Court, Spartanburg County
Post Office Box 3483
Spartanburg, South Carolina 29304-3483

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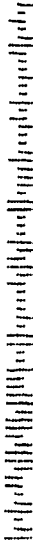
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Rock Hill, SC 29730

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July 13, 2015

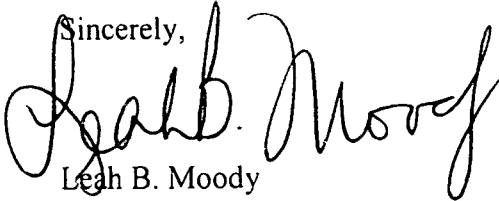
The Honorable Hope Blackley
Spartanburg County Clerk of Court
Post Office 3483
Spartanburg, South Carolina 29304

RE: Robert S. Horton v. State of South Carolina
Case No.: 2013-CP-42-3065

Dear Ms. Blackley:

Please find enclosed the Notice of Appeal and the Proof of Service in the above-referenced matter.

Sincerely,



Leah B. Moody

LBM/TS

Enclosures

cc Robert Horton
Suzanne White, Assistant Attorney General
Daniel E. Shearouse, Clerk of Court, South Carolina Supreme Court
Sharon Graham, SCCID

Law Office of Leah B. Moody, LLC

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July 13, 2015

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

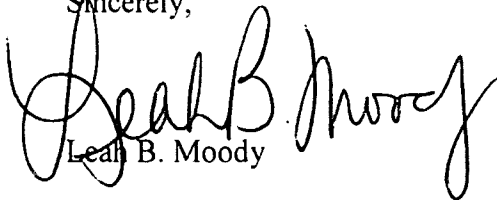
RE: Robert Horton v. State of South Carolina
C.A. No.: 2013-CP-42-3065

Dear Ms. White:

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

If you have any questions or concerns, please feel free to contact my office. Thank you.

Sincerely,


Leah B. Moody

LBM/ts

Enclosures

cc Robert Horton
Daniel E. Shearouse, Clerk of Court, South Carolina Supreme Court
Hope Blackley, Clerk of Court, Spartanburg County
Sharon Graham, SCCID

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July 13, 2015

Ms. Sharon A. Graham
SC Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11433
Columbia, South Carolina 29211-1433

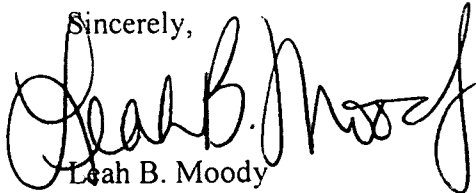
RE: Robert Horton v. State of South Carolina
Case No.: 2013-CP-42-3065

Dear Ms. Graham:

The York County Court of Common Pleas appointed my office to represent Robert Horton in his Post-Conviction Relief action. Please find enclosed the Notice of Appeal and Proof of Service the above-referenced matter.

Thank you for your attention in this matter.

Sincerely,



Leah B. Moody

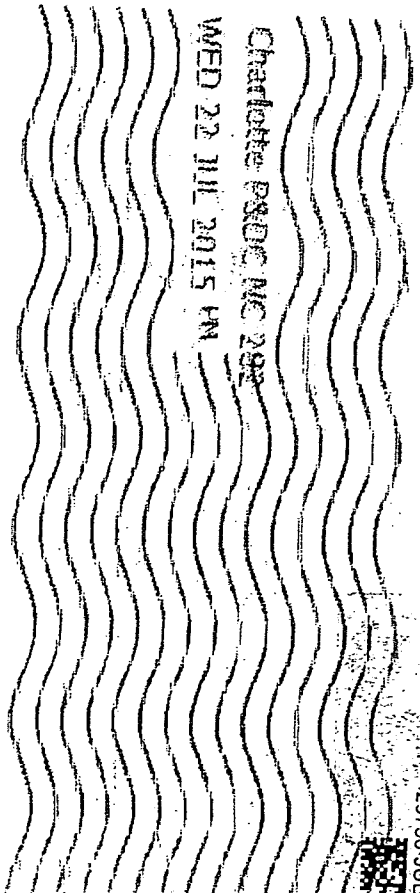
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Enclosures

cc Robert Horton
Suzanne White, Esquire
Daniel E. Shearouse, Clerk of Court, South Carolina Supreme Court
Hope Blackley, Clerk of Court, Spartanburg County



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Rock Hill, South Carolina 29730



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The Honorable David E. Shearouse
The Supreme Court of South Carolina
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