SCARLET B. MOORE
Attorney at Law
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GREENVILLE, SC 29606
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RECEIVED
AUG 10 2015
S.C. SUPREME COURT

August 6, 2015

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

RE: Seth Aaron Stearns v. State of South Carolina
11-CP-23-01468

Dear Clerk,

Enclosed please find a Notice of Appeal on behalf of Seth Aaron Stearns in the above titled matter, which is an action pursuant to the Post Conviction Relief Act. I was appointed to represent Mr. Stearns pursuant to the Rule 608 appointments, and Mr. Stearns is indigent. I have also included a Certificate of Service of the Notice of Appeal on the parties to this matter, in addition to a Certificate of Service upon the Greenville County Clerk of Court.

If I can be of further assistance, please do not hesitate to contact me. With kind regards, I remain

Very Truly Yours,

Scarlet B Moore

Scarlet B. Moore, Esq.
Counsel for Appellant

SBM/s

Enclosures

Cc: Brian T. Petrano, Esq.

scarlet28@msn.com

RECEIVED

AUG 10 2015

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court of South Carolina

Appeal from Greenville County
Greenville County Court of Common Pleas Court
Hon. Judge Eugene C. Griffith, Jr., Presiding Judge
Pursuant to An Order Dated June 29, 2015, and
Clocked on July 14, 2015.

Docket No. 2011-CP-23-01468

Seth Aaron Stearns.....Appellant,

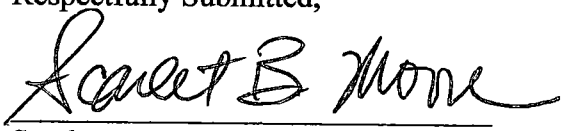
Versus

State of South Carolina..... Respondent.

NOTICE OF APPEAL

TO: THE RESPONDENT ABOVE NAMED, through your counsel of record, you are hereby notified of the APPEAL by SETH AARON STEARNS of the Order issued in the above titled action by the Honorable Eugene C. Griffith, Jr. Counsel for Mr. Stearns received written notice of the entry of the order or judgment in this matter on July 20, 2015.

Respectfully Submitted,



Scarlet B. Moore, #72534
Attorney for Appellant
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(864) 214-5805
(864) 752-0930 (FAX)

August 6, 2015.

Counsel of Record:

Brian T. Petrano, Esq.
Office of the Attorney General
P.O. Box 11549
Columbia, S.C. 29211

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO: 2011CP2301468

Seth Aaron Stearns *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*):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy:

☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other: _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded;
☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; ☐ Statement of Judgment by the Court:

Dated at Greenville, South Carolina, this .

Court Reporter:

_____

PRESIDING JUDGE - Eugene C. Griffith, Jr.

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:

Scarlet Bell Moore PO Box 17615 Greenville, SC 29606

ATTORNEY(S) FOR THE PLAINTIFF(S)

Brian T. Petrano PO Box 11549 Columbia, SC 29211

ATTORNEY(S) FOR THE DEFENDANT(S)

_____

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

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

Seth Aaron Stearns, #327380,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
13th JUDICIAL CIRCUIT
Case No. 2011-CP-23-1468

ORDER OF DISMISSAL

PROCEDURAL HISTORY

This matter comes before this Court by way of an application for post-conviction relief (PCR) filed February 28, 2011. The Respondent made its Return on June 28, 2011. Through appointed counsel, Applicant filed a filed a *pro-se* "Motion to Amend 'PCR' Application" on May 27, 2011. He subsequently filed "Applicant's Second Motion to Amend PCR Application," dated April 20, 2014, and "Applicant's 3rd Motion to Amend PCR Application, dated August 12, 2014. A hearing into the matter was convened on December 17, 2014. The applicant was represented by Scarlett Moore, Esquire. The Respondent was represented by Brian T. Petrano of the Attorney General's Office.

The records before this Court reflect that the Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Greenville County. The Applicant was indicted at the

December 2005 term of the State Grand Jury for trafficking methamphetamines (conspiracy) (2005-GS-47-0025).

While on bond after the original charge, the Applicant absconded. Ultimately the Applicant was tried in absentia. The jury found the Applicant guilty and the Honorable Alexander S. Macaulay sealed the sentence on December 13, 2007. Eventually the Applicant was apprehended in South Dakota and on March 25, 2008, the Applicant appeared in court and Judge Macaulay sentenced him to thirty (30) years imprisonment: 2005GS4725, CDR # 0370 S.C. Code § 44-53-0375(C)(2)(c) Drugs / Trafficking in ice, crank or crack - 400 g or more.

A notice of appeal was filed at the South Carolina Court of Appeals. Robert M. Pachak, Esquire of the South Carolina Office of Appellate Defense perfected the appeal in the form of an Anders[1] brief.[2] The Court of Appeals dismissed the appeal. State v. Stearns, Op. No. 2010-UP-167 (S.C. Ct. App. Filed march 1, 2010).

In his Application, dated February 28, 2011, the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of trial counsel:
   a. Failure to object to prejudicial remarks made by solicitor during closing argument.
2. Ineffective assistance of appellate counsel:
   a. Failure "to seek discretionary review to State's highest court on claim of error, for exhaustion purposes."

Applicant's first "motion to amend 'PCR' Application" elaborated upon the factual bases of his allegations in his original application. In addition, the

[1] Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed. 493 (1967).
[2] The issue presented on appeal was "Whether the trial court erred in charging the jury that the testimony of an accomplice need not be corroborated?" (Final Brief of Appellant, p. 3).

Applicant argued that the testimony of the State's witnesses were not credible because the witnesses were influenced by plea agreements. In "Applicant's Second Motion to Amend PCR Application" he alleged ineffective assistance of trial counsel citing trial counsel's "failure to object to the sufficiency of the indictment," failure to argue "'[m]aterial [v]ariance' where state showed proof of several smaller conspiracies" failure "to object to Agent Dorsey's testimony when offering him as an expert," and failure to object to testimony of co-conspirators, among other things. The Applicant further alleged ineffective assistance of appellate counsel, claiming that appellate counsel raised an issue not properly preserved for appellate review, and that "the more meritorious issue was whether the Directed Verdict was properly denied.

Applicant additionally argued in "Applicant's 3rd Motion to Amend PCR Application," that "counsel highly prejudiced Applicant when he opened the door to the results of Kenny Lavender's polygraph test," claiming that this "implied to the jury to believe not only was Kenny Lavender polygraph tested . . . [b]ut that all other co-conspirators may also have been tested before testifying, to corroborate their and Applicant's involvement." Applicant further argued that "counsel should have never brought up the polygraph test because they aren't considered reliable and are questionable."

In making its decision, the Court had before it the available records of the State Grand Jury Clerk of Court regarding the subject convictions, and/or the Applicant's records from the South Carolina Department of Corrections, the

SCAJ

Applicant's Application, the trial transcript, the sentencing transcript, and the *Respondent's Return.*

At the hearing before this Court, the Respondent made an oral motion regarding the *pro se* amendments and argued that they were not properly before this Court.[3]

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. This Court found the testimony of counsel to be more credible than the testimony of Applicant as to all allegations raised in the application and at the hearing.

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), SCRCP). 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.

[3] See, e.g., Jones v. State, 348 S.C. 13, 558 S.E.2d 517 (2002); Foster v. State, 298 S.C. 306, 379 S.E.2d 907 (1989).

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 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).

At the PCR hearing, Applicant testified that he retained his trial counsel, Matthew Kappel, Esquire, and paid him $15,000 for his services. Applicant testified that he discussed his case with Counsel both in person and over the phone. Applicant further testified that he reviewed all of the State's evidence and witnesses against him. Applicant also testified that Counsel initially asked for a

plea agreement entailing a seven-year sentence, but the State offered a sentence of twelve years. The State later changed its offer to fifteen, which the Applicant decided to decline. Applicant claims he and his family were aware of the April 7 court date, but not of the December trial. He admits that he did not communicate with Counsel after his flight and before sentencing. Applicant testified that he is filing for post-conviction relief because it is his "last chance." Applicant claimed he fled [to South Dakota] because he was afraid of an unfavorable trial outcome.

At the hearing, Applicant reiterated some of the claims made in his PCR applications. Applicant stated that he was concerned that Counsel did not argue material variance or withdrawal from conspiracy, and that these were important issues for him. Furthermore, Applicant noted that Counsel failed to object to the State's offering to introduce drugs into evidence. Applicant also stated that Counsel failed to object to remarks in the State's closing that some of Applicant's co-conspirators killed people, which Applicant claimed was prejudicial.

Counsel testified that he has practiced law in the state of South Carolina since 1998 and that approximately seventy percent of his practice consists of criminal defense, amounting to over fifty criminal trials. Counsel testified that he was retained by Applicant's family, and that he met with Applicant "a number of times" both while Applicant was in and out of jail. Counsel reviewed all discovery materials and discussed potential plea deals with the Attorney General's office. Counsel testified that the plea offer was approximately fifteen years, but that he advised Applicant of the possibility of a thirty-year sentence following a trial.

Moreover, the State's position was strengthened before trial because Applicant's co-conspirators were convinced to plead guilty and testify at trial. Counsel testified that he was not able to expound deeply on the plea-bargaining process because Applicant made the decision to reject the plea offer. Applicant "never wanted to plea."

Counsel testified that he had no contact with the Applicant before trial because Applicant removed his GPS monitor and absconded. Applicant was tried in absentia. Counsel testified that he did not have a good-faith basis to request a continuance or object to a trial in absentia. Counsel also stated that he had previously discussed with the Applicant the consequences of breaking the terms of his bond and failing to show for court.

Counsel testified that during the trial he attempted to object to the entry of the drugs into evidence based on their irrelevancy, but the Court allowed entry due to a finding of conspiracy.[4] Counsel also testified that in cross-examination of the State's expert witness, he brought out the fact that Kenny Lavender had failed a polygraph, which undermined his credibility.[5] Counsel also stated that he chose this course of action because the advantage of opening the door to his polygraph results and showing that the witness was not credible outweighed any risk that the jury might infer that other co-conspirators had passed the polygraph. Thereafter, the State offered the plea agreements for the other witnesses into evidence because the plea agreements referenced their polygraphs. Counsel admitted that he was

[4] Trial transcript, p. 493; objection renewed p. 499.
[5] Trial transcript, p. 205; 410; 649, etc.

aware of the risk of the implication that other witnesses had passed polygraph exams, but was willing to let it go to the jury because there was no physical evidence against the defendant; rather, the State presented only the self-interested testimony of co-conspirators. Counsel further stated that he and Applicant came to the decision that, if Applicant was named as a co-conspirator by the other defendants, Counsel and Applicant would argue that they were only doing so to gain a more favorable sentence for themselves. Counsel was familiar with the argument of "withdrawal from a conspiracy," but deemed that argument inappropriate due his and Applicant's decision to deny involvement in the conspiracy and because it did not adequately deal with the fact that the State had over four-hundred grams of methamphetamine in its possession. Counsel also testified that he did not object to statements by the Attorney General about co-conspirators use of guns, because he believed that these statements would make the testimony of the co-conspirators less credible in the minds of the jury. Counsel later filed a Notice of Appeal, but did not hear from the State after doing so.

This Court finds the testimony of Counsel to be most credible. This Court also finds that the Applicant has failed to meet his burden of proof and has not presented any evidence of any deficient conduct on Counsel's behalf that would have undermined the jury's verdict.

Counsel failed to object to the sufficiency of the indictment

Applicant alleged that Counsel was deficient in failing to object to the sufficiency of the indictment. This Court finds this allegation without merit.

Counsel would have no legal basis on which to object to the sufficiency of this indictment. An indictment is sufficient "if the offense is stated with sufficient certainty and particularity to enable the court to know what judgment to pronounce, the defendant to know what he is called upon to answer, and if an acquittal or a conviction thereon may be pleaded as a bar to any subsequent prosecution." Winns v. State, 363 S.C. 414, 418, 611 S.E.2d 901, 903 (2005) (citing Joseph v. State, 351 S.C. 551, 561, 571 S.E.2d 280, 285 (2002)).

Counsel's performance was deficient when he opened the door to the results of co-conspirator's polygraph results on cross examination

With regard to the Applicant's allegation that Counsel was deficient in his cross-examination of the State's witness, which opened the door to the results of his co-conspirator's polygraph examination, this Court finds that the Applicant has failed to meet his burden of proof. The nature and scope of cross-examination is inherently a matter of trial tactics. The Applicant has the burden of providing that counsel's performance was deficient and that counsel's deficient performance prejudiced the Applicant such that there is a reasonable probability that but for counsel's errors, the outcome of the trial would have been different. Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. Moreover, where trial counsel articulates a valid reason for employing a certain strategy, such conduct should not be deemed ineffective assistance of counsel. See Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313. The Applicant has not shown that a different approach on cross examination would have been beneficial to the defense. Accordingly, Applicant has failed to meet his burden of proof.

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Counsel failed to object to object to State's offer to introduce drugs into evidence

The Applicant alleged that Counsel was ineffective for failing to object to the State's offer to introduce drugs into evidence. This allegation has no factual basis and is unsupported by Counsel's testimony and the trial transcript.[6]

Counsel failed to object to prejudicial remarks in the State's closing and also failed to argue material variance and withdrawal from conspiracy.

With regard to the Applicant's allegations that Counsel was ineffective in failing to object to prejudicial remarks in the State's closing and failing to argue "material variance" and withdrawal from conspiracy, this court finds that the Applicant has failed to meet his burden of proof. This Court finds that Counsel articulated a valid reason that he did not object to the State's closing remarks and his choice not to make the aforementioned arguments. *Id.* 317 S.C. 292, 294, 454 S.E.2d 312, 313. At the hearing, Counsel testified that he didn't object to comments by the solicitor that the State's witnesses, Applicant's co-conspirators, were dangerous and participated in undesirable behaviors because trial counsel wanted to leave the jury with the impression that the witnesses were not credible. Counsel testified that he and Applicant decided that they would argue that the Applicant was not a part of the conspiracy at all, which would be inconsistent with arguments of withdrawal. Moreover, Counsel's decision not to argue material variance was valid trial strategy, as this course of action may have undermined their argument that Applicant was not a part of the conspiracy. The Applicant has

[6] Trial transcript, p. 493; objection renewed p. 499.

not shown that Counsel's performance fell below an objective standard of reasonableness or that Counsel's performance was prejudicial.

Ineffective Assistance of Appellate Counsel

A defendant is constitutionally entitled to effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985). "However, appellate counsel is not required to raise every non-frivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523 (1990). Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745 (1983). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985).

The Applicant must show that appellate counsel's performance was deficient and that he was prejudiced by the deficiency. Thrift, at 537; Gilchrist v. State, 364 S.C. 173, 612 S.E.2d 702 (2005); Anderson v. State, 354 S.C. 431, 581 S.E.2d 834 (2003). When a claim of ineffective assistance of counsel is based upon failure to raise viable issues, the court must examine the record to determine "whether appellate counsel failed to present significant and obvious issues on appeal." Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986). Generally, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. Id. Additionally, the

Applicant's appeal was an Anders appeal and the South Carolina Court of Appeals found no issue(s) of arguable merit.[7]

This Court finds that this allegation must be denied and dismissed as Applicant cannot establish that he would have been successful on appeal absent counsel's allegedly unprofessional errors. Specifically, there is no reasonable likelihood that Applicant would have been successful on appeal, had appellate counsel sought discretionary review by the Supreme Court, after Applicant's appeal was dismissed by the Court of Appeals. Moreover, Applicant offered no additional testimony or evidence in support of his allegation at the hearing. Therefore, this allegation must be denied and dismissed with prejudice.

Summary

This Court finds in regards to the allegations of ineffective assistance of trial and appellate counsel, Applicant's testimony as a whole 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 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

[7] In Anders v. California, the United States Supreme Court announced the procedure an appointed attorney should follow if that attorney believes the client's appeal is frivolous and without merit. 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). Under Anders, the defendant must be given time to respond and to raise any additional points after his attorney submits the Anders brief. Id. The court then is obligated to conduct a "full examination" of the record to determine whether the appeal is "wholly frivolous." Id.

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, his allegations of ineffective assistance of trial and appellant council are 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), SCRCP, 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.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and

2. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 29th day of June, 2015.

Eugene C. Griffith, Jr.
Presiding Judge

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August 6, 2015

Paul B. Wickensimer, Clerk
Greenville County Courthouse
305 E. North Street
Greenville, SC 29601-2121

RE: Seth Aaron Stearns v. State of South Carolina
11-CP-23-01468

Dear Clerk,

Enclosed please find a Notice of Appeal on behalf of Seth Aaron Stearns in the above titled matter.

If I can be of further assistance, please do not hesitate to contact me. With kind regards, I remain

Very Truly Yours,

Scarlet B. Moore, Esq.
Counsel for Appellant

SBM/s

Enclosures

Cc: Brian T. Petrano, Esq.
Clerk, South Carolina Supreme Court

scarlet28@msn.com

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THE STATE OF SOUTH CAROLINA
In The Supreme Court of South Carolina

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Pursuant to An Order Dated June 29, 2015, and
Clocked on July 14, 2015.

Docket No. 2011-CP-23-01468

Seth Aaron Stearns.....Appellant,

Versus

State of South Carolina..... Respondent.

CERTIFICATE OF SERVICE

I certify that, on August 6, 2015, I served a copy of the Notice of Appeal in this action, dated August 6, 2015, on counsel of record by mailing the Notice to his address as so stated below, and mailed to the Greenville County Clerk of Court, 305 E. North Street, Greenville, SC 29601-2121, and by depositing it in the U.S. Mail, in an envelope with sufficient postage affixed.

Respectfully Submitted,

Scarlet B. Moore

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Attorney for Appellant
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August 6, 2015.

Counsel of Record:

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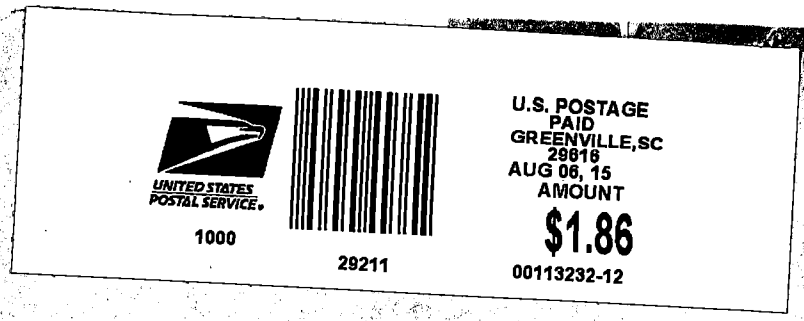

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