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October 14, 2015

RECEIVED

OCT 20 2015

S.C. SUPREME COURT

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

RE: Tommy Montgomery v. State of South Carolina, Case No.: 2013-CP-10-4035

Dear Mr. Shearhouse:

Enclosed for filing is the Notice of Appeal (original and clocked copy) in the above Post Conviction Relief (PCR) case. Also enclosed are the following:

- (1) Proof of Service of the Notice of Appeal on the Respondent;
- (2) The Order of Dismissal &
- (3) A Request for Representation on Appeal.

The Applicant-Appellant was represented by me as an indigent pursuant to my contract with the South Carolina Commission on Indigent Defense (SCCID) to handle PCR cases. By copy of this letter, I am forwarding a duplicate set of documents to the SCCID.

The Request for Representation on Appeal and the Affidavit in Support thereof are signed by me as attorney for Applicant-Appellant. If you need anything further, do not hesitate to contact me. Thank you for your time and attention to this matter.

Sincerely,



Rodney D. Davis

South Carolina Bar #: 12396

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Charleston, SC 29405

(843) 323-4353

Davis@LowcountryLawOffice.com

Enclosure(s). As stated above.
RDD/mmt

cc: J. Rutledge Johnson, Assistant Attorney General
Kimberly McCall, Appellate Division, SCCID

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Roger E. Henderson, Circuit Court Judge

RECEIVED

Case No.: 2013-CP-10-4035

OCT 20 2015

S.C. SUPREME COURT

Tommy Montgomery,

Appellant,

v.

State of South Carolina,

Respondent.

NOTICE OF APPEAL

Tommy Montgomery appeals the denial of his Post Conviction Relief application in this case. The Application for relief was denied, following an evidentiary hearing before the Honorable Roger E. Henderson on July 23, 2015.

October 16, 2015


Rodney D. Davis

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Attorney for Appellant

Other Counsel of Record:

J. Rutledge Johnson

Assistant Attorney General

Office of the Attorney General, State of South Carolina

PO Box 11549

Columbia, SC 29211-1549

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

RECEIVED

Roger E. Henderson, Circuit Court Judge

OCT 20 2015

Case No.: 2013-CP-10-4035

S.C. SUPREME COURT

Tommy Montgomery,

Appellant,

v.

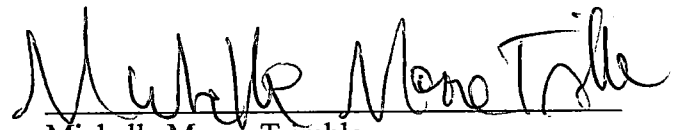
State of South Carolina,

Respondent.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on the State by mailing a copy of it to the address of record, J. Rutledge Johnson, P.O. Box 11549, Columbia, South Carolina 29211-1549, on October 16, 2015.

October 16, 2015



Michelle Moore Trimble
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Attorney for Appellant

Other Counsel of Record:
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P.O. Box 11549
Columbia, SC 29211-1549
Attorney for Respondent

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Roger E. Henderson, Circuit Court Judge

Case No.: 2013-CP-10-4035

Tommy Montgomery,

Appellant,

v.

State of South Carolina,

Respondent.

FILED
2015 OCT 16 PM 3:11
JULIE J. ARMSTRONG
CLERK OF COURT

NOTICE OF APPEAL

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October 16, 2015


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Other Counsel of Record:
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Roger E. Henderson, Circuit Court Judge

Case No.: 2013-CP-10-4035

Tommy Montgomery,

Appellant,

v.

State of South Carolina,

Respondent.

BY _____

JULIE J. ARMSTRONG
CLERK OF COURT

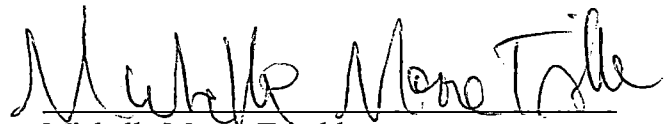
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FILED

PROOF OF SERVICE

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October 16, 2015



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Attorney for Appellant

Other Counsel of Record:
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Attorney for Respondent

CC
AG
AT
BS
SOL

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)
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Tommy Montgomery, #346324,)
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Applicant,)
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v.)
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State of South Carolina,)
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Respondent.)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

2013-CP-10-4035

ORDER OF DISMISSAL

FILED
2015 SEP 22 PM 12:05
JULIE J. ARNESTAD
CLERK OF COURT

This matter comes before the Court by way of an Application for Post-Conviction Relief filed July 11, 2013. Respondent made its Return on December 3, 2013. An evidentiary hearing into the matter was convened on July 23, 2015 at the Charleston County Courthouse. Rodney Davis, Esquire represented Applicant. J. Rutledge Johnson, Esquire, of the South Carolina Attorney General's Office, represented Respondent.

At the hearing, Applicant testified on his own behalf. Megan Ehrlich, Esquire also testified. This Court had before it a copy of the records of the Charleston County Clerk of Court, records from the South Carolina Department of Corrections, the application, the State's Return and the guilty plea transcript.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Charleston County Clerk of Court. The Applicant was indicted at the December 2011 term of the Charleston County Grand Jury for murder (2011-GS-10-7917). The Applicant was represented by Megan Ehrlich, Esquire.

The Applicant pled guilty as indicted. On June 26, 2013, the Honorable R. Markley Dennis sentenced the Applicant to confinement for a period forty (40) years. The Applicant did not appeal his convictions or sentences.

In his original Application, the Applicant failed to make allegations or claims to support his application for post-conviction relief.

In his amended Application for post-conviction relief filed on January 3, 2014, the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. "Ineffective Assistance of Counsel"
 - a. "Failing to fully investigate the evidence and witnesses in the case"
 - b. "Failing to obtain full discovery until June 2013 (the month of the guilty plea)"
 - c. "Failing to provide full discovery to the Applicant"
 - d. "Failing to have the fingerprint evidence independently evaluated"
 - e. "Failing to have the DNA evidence independently evaluated"

At the hearing, the Applicant proceeded on his claims of ineffective assistance of plea counsel.

SUMMARY OF TESTIMONY

At the evidentiary hearing, Applicant testified that he and Counsel met frequently and received the Rule 5 materials, but did not get all of it until six (6) days before the guilty plea. These documents included information about the murder weapon and DNA analysis. Applicant stated Counsel reviewed the evidence with him, including fingerprint evidence. There was a plea offer in January, but Applicant did not think there had been a sufficient investigation at that point. Applicant did not remember discussing his palm print on a bottle at the scene with Counsel. Applicant claims



the palm print on the bottle represented a drinking motion, not a stabbing motion. He discussed this with Counsel.

Applicant testified he was faced with the decision to pursue a trial and face life without parole or accept a guilty plea offer. Applicant also testified the plea offer was available for six (6) months, and he did not want the State to retract its offer. Applicant admitted that he chose to accept the plea because he was facing the possibility of life without parole. Applicant also admitted that although there was an option for trial, he did not believe it was a viable one. Applicant claimed Counsel did not fully investigate this case because DNA evidence was received only six (6) days before his guilty plea.

Applicant also claimed Counsel was ineffective for not investigating witnesses because no witnesses could be found to substantiate his third-party guilt claim. Applicant stated there could have been other suspects and that someone dug a grave, of which Counsel had pictures. Applicant stated the investigation went cold and does not know the other suspects' names other than "Caveman." Counsel and the defense team could not find any other suspects.

Additionally, Applicant claimed Counsel failed to have the fingerprint evidence and DNA independently tested. Applicant claims the coroner and SLED reports differed and did not notice this until after the guilty plea. Applicant testified there were no eye-witnesses to the crime and that the forensic evidence was the only evidence linking Applicant to the crime.

Applicant further alleged that the DNA evidence was not collected correctly. Applicant's DNA was obtained from him through a search warrant, which was faulty, but Counsel stated not to be surprised by a second, correct search warrant. The DNA was collected via a buccal swab. While this issue was discussed with Counsel, Applicant stated it was not discussed as to how to suppress

this evidence if there was a trial. Applicant then stated he did not think there was another legitimate option other than a guilty plea. Applicant opined it would not have been a good trial because of the lack of evidence, but that he did not want to risk life without parole. He thought a plea was the best option at the time. Applicant further stated if he had asked for more time, the State would have taken the plea offer off of the table and sought life without parole.

Applicant lastly testified when he sat down with Detective Goldstein, he was on medications and that he was under the influence of these medications when the buccal swab was obtained. Applicant claimed he was bi-polar and had post-traumatic stress disorder because he saw his father kill his mother and that he was molested from age 9 to 14.

On cross-examination, Applicant admitted he pled guilty to avoid facing the possibility of life without parole for murder. He also admitted that he waived his constitutional rights to a jury trial. He admitted there were no promises other than the negotiations and that there were no threats to get him to plead guilty. He further admitted he was satisfied with Counsel's representation.

Counsel testified the offer was on the table for five-six months. She testified she received the DNA analysis later because the State found an issue with the first search warrant and buccal swab, so they obtained a second search warrant for Applicant, and the results of test were not received until close in time to the guilty plea. Counsel stated she did not have the DNA evidence independently analyzed. Counsel also testified she hired an expert to analyze the fingerprint and palm print evidence and got an independent evaluation to help explain the evidence at trial.

Counsel then testified she continuously obtained discovery materials, including other suspects' DNA reports, although she did not know why others were suspects. Counsel stated she did not request a continuance because it was clear that Applicant wanted to plead guilty. If Applicant



would have wanted a continuance, she would have requested one. Counsel testified she had been a public defender since 2006 and was familiar with the Solicitor's policy on plea offers. She lastly testified this policy often applies to cases like this one.

On cross-examination, Counsel testified she has known Applicant since 2009 because she represented him on a prior charge. Counsel stated Applicant has significant mental health issues and hired Dr. Susan Knight to evaluate him. Dr. Knight saw him the morning of the plea and found Applicant competent.

Counsel testified she received discovery in different stages leading up to trial. She always thought this case would proceed to trial and was surprised when the State gave Applicant another option. While Applicant was not served with a notice from the State to seek life without parole, Counsel testified if Applicant had not accepted the plea offer, then he would have been served with it.

Counsel testified she hired an investigator who went to the shallow grave site and took pictures. She would have used this information at a trial. Counsel stated there were no eye-witnesses to the crime and that her investigator attempted to get information on the victim. Counsel testified she obtained an independent analysis of the fingerprints and palm print, which helped her form a strategy. Counsel admitted she did not get the second buccal swab independently analyzed because of the plea, but if there had been a trial, she would have gotten an independent analysis.

Counsel also testified she would have raised all suppression issues and the third party guilt issue if a trial had commenced. Counsel stated she had a second attorney meet with Applicant to make him understand the gravity of the situation. Counsel lastly stated she did not force or threaten Applicant to plead guilty and that it was Applicant's decision to plead guilty.



On re-direct examination, Counsel testified Applicant's trial was docketed for the July term of General Sessions, so she had Applicant transported to court a few weeks early because of his medications. Counsel stated she did not apply any pressure to Applicant to plead guilty. Counsel had Ted Smith meet with Applicant to ensure Applicant understood the situation. Applicant wanted the hope of being released one day. Counsel reiterated that if Applicant did not accept the plea offer, the State would have filed a notice to seek life without parole.

Applicant was recalled as a witness and testified his case was put on the July 18th docket, that he did not remember his fingerprints being independently analyzed and that he was not told by Counsel that he could request a continuance or else he would have.

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 at the post conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (2003).

Ineffective Assistance of Counsel

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), 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. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064 (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. With respect to guilty plea counsel, the Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366 (1985).

This Court finds the Applicant's testimony regarding Counsel's ineffectiveness is not credible while also finding Counsel's testimony is credible.

This Court also finds Counsel provided effective assistance of counsel in this case. Counsel advised Applicant of all of the charges and the sentences the charges carried. Counsel negotiated with the State in Applicant's best interest. Applicant also testified he pled guilty because he did not want to risk a trial and face life without parole. Applicant admitted nobody threatened him to plead guilty, and there were no promises other than the negotiations to entice him to plead guilty. This



Court finds Applicant made the decision to plead guilty on his own accord with the help of learned counsel. Additionally, this Court finds Applicant made this decision freely and voluntarily without any threats or promises from anyone else. Furthermore, this Court finds that it was ultimately the Applicant's decision to plead guilty.

This Court also finds Counsel effectively represented Applicant with respect to the DNA and finger/palm print evidence. Counsel testified she hired an independent expert to review and aid her in understanding the finger/palm print evidence in the case and would have utilized this expert had Applicant chosen to pursue a trial. Counsel also testified that while she did not retain a DNA expert, she would have, had Applicant chosen a trial. She further testified that because the second DNA analysis from the buccal swab came in only six (6) days before the guilty plea, she did not have time to retain an expert. Nevertheless, Applicant, knowing this, chose to plead guilty because, in his words, he knew the State would take the plea offer off of the table if he did not accept it, and he did not want to risk life without parole. Not only does this Court find Counsel acted more than reasonably under the circumstances, but also that Applicant can prove no resulting prejudice due to the fact that he knew about the analyses and chose to accept the offer regardless. Thus, this allegation is denied.

Additionally, this Court finds Applicant can prove no prejudice for Counsel's alleged failure to locate witnesses to establish a third-party guilty claim. 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, 425 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). While Applicant claims Counsel failed to locate witnesses on his behalf, Applicant failed to produce these witnesses at the PCR hearing, and therefore, can prove no resulting prejudice. Nevertheless, Counsel testified she and her investigator attempted to locate witnesses in this case, and the only name they were able to investigate was "Caveman." This Court finds Counsel acted in a reasonable manner given the information she was provided. Thus, this allegation is denied.

This Court further finds Counsel was effective in her representation concerning the discovery in the case. While Applicant claimed Counsel did not provide him with complete discovery until the month of the plea, Counsel testified she received the discovery continuously in stages until the plea. The major part of the discovery that was not given to Applicant until the month of the plea was the DNA analysis because, as Counsel testified, the State got a second search warrant for Applicant's DNA, and the results were not available until then. Moreover, Applicant admitted he met frequently with Counsel and received the Rule 5 materials. This Court finds the Applicant has failed to meet his burden of proving counsel's performance was deficient or that he was prejudiced thereby.

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. Therefore, these allegations 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 also finds as to all other allegations that Applicant failed to present evidence of such claims and thus, this Court deems them abandoned.

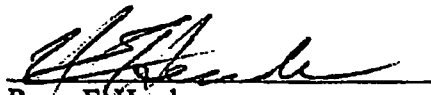
This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has 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. Applicant’s 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!


Roger E. Henderson
Presiding Circuit Court Judge
Ninth Judicial Circuit

September 12 2015
Chesterfield, South Carolina

2013-CP-10-4035

STATE OF SOUTH CAROLINA)
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COUNTY OF CHARLESTON)
)
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TOMMY MONTGOMERY,)
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Applicant.)
)
-versus-)
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STATE OF SOUTH CAROLINA,)
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Respondent.)

IN THE SUPREME COURT OF SOUTH CAROLINA
Case No.: 2013-CP-10-4035

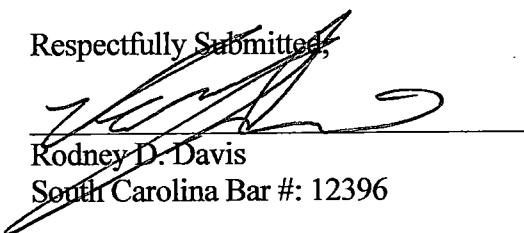
REQUEST FOR REPRESENTATION ON APPEAL

On behalf of the request of the above-named Applicant, to be represented by the South Carolina Commission of Indigent Defense, Appellate Division (SCCID), the undersigned attorney would show unto this Honorable Court that:

1. He is the attorney for the Applicant-Appellant in the above captioned case. The Applicant-Appellant was in custody during and taken into custody immediately following the Post Conviction Relief (PCR) hearing and was not available to personally sign this request;
2. The Applicant-Appellant was represented by the undersigned attorney as an indigent, pursuant to a contract with the SCCID;
3. The Applicant-Appellant has been informed that he may request assistance from the SCCID Appellate Division in perfecting his appeal;
4. A timely Notice of Intent to Appeal has been filed on the Applicant-Appellant's behalf;
5. The Applicant-Appellant has been informed that nothing requires SCCID Appellate Division to pursue this appeal unless that office's Chief Attorney is satisfied that there is arguable merit to this appeal and that he cannot afford to hire an attorney.

At this time, the Applicant-Appellant requests the aid of the SCCID Appellate Division in perfecting his appeal to the South Carolina Court of Appeals.

Respectfully Submitted,

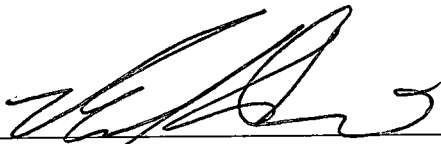

Rodney D. Davis
South Carolina Bar #: 12396

10/16, 2015
Charleston, South Carolina.

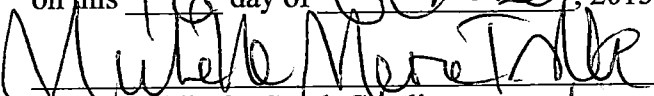
STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

VERIFICATION

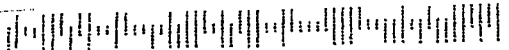
PERSONALLY appeared before me, Rodney D. Davis, being first duly sworn, deposes and says that he has read the foregoing *Request for Representation on Appeal* and the same is true of his knowledge except those matters alleged on information and belief, and as to those matters, he believes them to be true.



Rodney D. Davis
South Carolina Bar #: 12396

SWORN to and subscribed to me
on this 10 day of October, 2015.


Notary Public for South Carolina
My Commission expires 3/28/2016



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U.S. POSTAGE
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The Honorable Daniel E. Shearhouse
Clerk, Supreme Court of South Carolina
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