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November 24, 2015

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

RECEIVED

NOV 25 2015

S.C. SUPREME COURT

RE: State of South Carolina v. Willie Ritter, #337044
Case No. 2014-CP-40-05384

Dear Mr. Shearouse:

Please find enclosed the following documents in the above entitled action:

- (1) Notice of Appeal;
- (2) Proof of Service of the Notice of Appeal on the Respondent.
- (3) A copy of the Order to be challenged.

Please return a clocked copy of Notice of Appeal and Proof of Service to me in the self-addressed and stamped envelope enclosed for your convenience.

Under Rule 240(d), SCACR, no filing fee is required in post-conviction relief cases. Thank you for your help in this matter. Thank you.

Sincerely,



William B. von Herrmann

WBvH/wss
Enclosures

cc: J. Clayton Mitchell, Esquire
S.C. Attorney General's Office
Post Office Box 11549
Columbia, South Carolina 29211
(803)-734-3737
Attorney for Respondent

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2014-CP-40-05384

RECEIVED

NOV 25 2015

S.C. SUPREME COURT

State of South Carolina

Respondent,

v.

Willie Ritter, #337044,

Appellant.

NOTICE OF APPEAL

Willie Ritter appeals the Order of Dismissal of the Honorable G. Thomas Cooper, Jr. dated October 27, 2015 denying his Post-Conviction Relief application. Appellant received written notice of entry of this Order on November 9, 2015.

November 24, 2015



William B. von Herrmann
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Attorney for Appellant

Other Counsel of Record:
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(803) 734-3737

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2014-CP-40-05384

RECEIVED

NOV 25 2015

State of South Carolina,

Respondent,

v.

Willie Ritter, #337044,

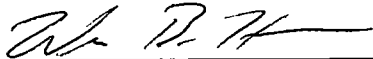
Appellant.

S.C. SUPREME COURT

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on the State of South Carolina by depositing a copy of it in the United States Mail, postage prepaid, on November 24, 2015, addressed to its attorney of record, J. Clayton Mitchell, C/O South Carolina Attorney General's Office, Post Office Box 11549, Columbia, SC 29211.

November 24, 2015



William B. von Herrmann
216 Elm Street, The Kimber Building
Conway, South Carolina 29526
(843)488-1030
Attorney for Appellant

Willie Ritter

State of South Carolina

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: _____

Attorney for : Plaintiff Defendant or Self-Represented Litigant

DISPOSITION TYPE (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), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit);
 Rule 43(k), SCRPC (Settled); Other _____
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; 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 (formal order to follow) Statement of Judgment by the Court

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

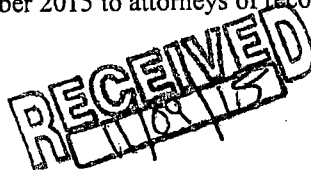
Circuit Court Judge _____ Judge Code _____ Date _____

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this 29 October 2015 to attorneys of record or to parties (when appearing pro se) as follows:

William Bertram Von Herrmann

Megan Harrigan Jameson



ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court _____

Jeanette W. McBride

RICHLAND COUNTY
 FILED
 2015 OCT 29 AM 8:31
 JEANETTE W. MCBRIDE
 C.C. & G.

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

Willie Ritter, #337044,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

2014-CP-40-05384

ORDER OF DISMISSAL

This matter comes before the Court pursuant to an application for post-conviction relief (PCR) filed September 10, 2014. Respondent made its Return on March 12, 2015, requesting an evidentiary hearing be convened. William Bertram von Herrmann, Esquire, was retained by Applicant.

An evidentiary hearing was held on July 15, 2015, at the Richland County Courthouse. Applicant was present and represented by Counsel von Herrmann. J. Clayton Mitchell, Esquire, of the South Carolina Attorney General's Office represented Respondent.

At the PCR hearing, Applicant testified on his own behalf. Also testifying were Applicant's plea counsel, Jan S. Strifling, Esquire. The Court had before it the Richland County Clerk of Court records, Applicant's South Carolina Department of Corrections records, the PCR application, the Return, the guilty plea and sentencing transcripts, and the motion for reconsideration hearing transcript.

I. PROCEDURAL HISTORY

Applicant is currently incarcerated with the South Carolina Department of Corrections pursuant to the Richland County Clerk of Court's orders of commitment. The Richland County Grand Jury indicted Applicant at the September 2007 term of General Sessions for Homicide by

RICHLAND COUNTY
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JEANETTE W. BOBDE
C.C.P. & J.S.

Child Abuse (2007-GS-40-4465). Counsel Strifling represented Applicant.

On July 20, 2009, the Applicant pleaded guilty as indicted. Sentencing was deferred until September 21, 2009, where the Honorable Paul M. Burch sentenced Applicant to twenty (20) years' imprisonment. On September 25, 2009, Applicant filed a motion to reconsider the sentence. The court denied the motion on October 31, 2011, and also denied Applicant's motion to vacate the guilty plea.

A notice of appeal was filed at the South Carolina Court of Appeals. Counsel von Herrmann perfected the appeal. The South Carolina Court of Appeals affirmed the Applicant's conviction and sentence on June 18, 2014. State v. Ritter, Op. No. 2014-UP-232 (S.C. Ct. App. filed June 18, 2014). The Remittitur was sent on July 3, 2014.

In this action, Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Unintelligent and involuntary plea in that counsel misadvised Applicant as to the sentence he would receive.
2. Ineffective assistance of counsel in that counsel failed to file a motion to vacate the guilty plea.

II. APPLICABLE LAW

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel 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, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel

G 2

rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove counsel's performance was deficient. Id. Under this prong, courts measure an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, any 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." Id. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, the Applicant must show 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, 59 (1985).

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court has reviewed the Clerk of Court records regarding the subject convictions, the transcripts, Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, the appellate records, and the legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80 (2003), this Court makes the following findings of fact based upon all of the probative evidence presented.

As a matter of general impression, this Court finds Applicant's testimony and assertions to be not credible. In contrast, this Court finds counsel's testimony to be credible and persuasive



on all matters. These credibility findings have been applied to the Court's findings and conclusions set forth below.

Involuntary and Unintelligent Guilty Plea

Applicant argues he did not plead guilty knowingly and voluntarily. This Court finds otherwise and concludes that Applicant's guilty plea was entered knowingly, freely and voluntarily. Applicant alleges he was advised that a sentence under homicide by child abuse could be suspended. He further alleges that if he was aware that the charge carried a minimum twenty (20) year sentence, then he would have gone to trial. This Court finds Applicant's testimony not credible.

To find a guilty plea is voluntarily and knowingly entered into, the record must establish the defendant had a full understanding of the consequences of his plea and the charges against him. Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L.Ed.2d 274 (1969). Defendant's knowing and voluntary waiver of statutory or constitutional rights must be established by a complete record, and "may be accomplished by colloquy between court and defendant, between court and defendant's counsel, or both." Roddy v. State, 339 S.C. 29, 34, 528 S.E.2d 418, 421 (2000) (citing State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993)). A guilty plea is a solemn, judicial admission of the truth of the charges against an individual; thus, a criminal inmate's right to contest the validity of such a plea is usually, but not invariably, foreclosed. Dalton v. State, 376 S.C. 130, 137-38, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing Blackledge v. Allison, 431 U.S. 63, 97 S. Ct. 1621, 52 L.Ed.2d 136 (1977)). Therefore, statements made during a guilty plea should be considered conclusive unless a criminal inmate presents valid reasons why he should be allowed to depart from the truth of his statements. Crawford v. United States, 519 F.2d 347 (4th Cir.1975).

GT 4

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At the hearing, Counsel testified as to the background of the case. He testified he was prepared to go to trial on the charge of homicide by child abuse. Counsel discussed the plea negotiations he entered into with the prosecuting solicitor. Applicant was first offered a plea to voluntary manslaughter without any negotiations or recommendations as to sentence. This offer was made to Applicant's public defender at the time. The offer was made in July 2008 and was on the table until May 20, 2009. Applicant rejected that offer. Counsel explained Applicant did not want to plead guilty because his mother was very ill and was hospitalized. The State then revoked the offer, and the case was set for trial on July 20, 2009.

Counsel testified he advised Applicant that the sentence for homicide by child abuse could be suspended as was routinely done. Counsel testified he thoroughly researched the issue and believed a suspended sentence for homicide by child abuse to be legal. Applicant testified Counsel failed to advise him that the minimum sentence was twenty (20) years, thus rendering his guilty plea involuntarily entered. This Court finds this testimony not credible. This Court finds Counsel's testimony credible and persuasive on the issue. Counsel properly advised Applicant that the sentence could be suspended and that the statutory minimum was twenty (20) years' imprisonment. Counsel also credibly testified that he met with Judge Burch as part of a pretrial conference where Judge Burch indicated that he believed the sentence could be suspended. Counsel, acting on Judge Burch's position, properly advised his client of the judge's position on the legality of suspending the sentence. Counsel also emphasized that he requested a suspended sentence with little to no active time in his Second Sentencing Memorandum. Notably, this Court finds persuasive Counsel's testimony that circuit court judges were routinely suspending sentences that carried life imprisonment. Counsel von Herrmann also noted that while he was a prosecutor, it was his position that a homicide by child abuse sentence could be

GR 5

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suspended. (Reconsideration Tr. p. 4, lines 8-13). It was therefore, very reasonable for Counsel to advise Applicant that Judge Burch could suspend the sentence and that he would request a suspended sentence.

It is clear that Judge Burch believed the sentence could be suspended but chose not to do so.

THE COURT: For that particular offense, the maximum possible penalty is up to life imprisonment with a minimum sentence of 20 years. However, that is not what we term a mandatory minimum sentence . . . when I say it's not a mandatory minimum sentence, that means that that minimum sentence portion of the statute can be suspended, as I understand the law.

(Plea Tr. p. 4, line 21 – p. 5, line 9). Judge Burch also acknowledged that judges were routinely suspending sentences on charges that carried up to life imprisonment: "I mean, there's not a mistake as far as the transcript; that was the understanding of most judges at that time that that was what the law was." (Reconsideration Tr. p. 15, lines 1-3). It is also clear from the record that Applicant knowingly pled guilty with the full understanding of the sentencing range. Applicant advised Judge Burch that he was not promised anything in exchange for his plea. (Plea Tr. p. 7, lines 13-16). This Court finds Applicant's testimony that he was promised the sentence would be suspended to be not credible. Applicant was fully aware that Judge Burch would determine the sentence.

Applicant further argues Counsel was ineffective in light of State v. Jacobs, 393 S.C. 584, 713 S.E.2d 621 (2011) which held that S.C. Code Ann. § 24-21-410 does not give trial judges the authority to suspend sentences for crimes punishable by death or life imprisonment. Homicide by child abuse carries up to life imprisonment. S.C. Code Ann. 16-3-85(C)(1). This argument is without merit. While Jacobs was a statutory construction case, Counsel cannot now be deemed ineffective for advocating a sentence that would have benefitted Applicant and that was routinely

G 6

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ordered.¹ On that point, Counsel cannot be deemed ineffective for advising Applicant of Judge Burch's view on the legality of suspending the sentence. When Applicant pled, circuit judges were routinely suspending sentences that carried life imprisonment. It was therefore very reasonable for Counsel to advise Applicant of the possibility that the sentence could be suspended and to advocate for its suspension. However, this Court finds Counsel did not promise the sentence would be suspended. Our supreme court has maintained that criminal defense attorneys are not expected to be clairvoyant. See Thornes v. State, 310 S.C. 306, 426 S.E.2d 764 (1993) ("This Court has never required an attorney to anticipate or discover changes in the law, or facts which did not exist, at the time of the trial."). See Wolfe v. State, 326 S.C. 158, 165, 485 S.E.2d 367, 371 (1997).

This Court finds Applicant has failed to show any resulting prejudice. Applicant's testimony that he would have gone to trial if he was advised that the sentence would not be suspended is not credible. Counsel's testimony, on the other hand, is credible and persuasive on the issue. Counsel's testimony that he advised Applicant of the sentencing range and noted that while the law was unclear, judges routinely suspended sentences and that it would be up to the plea judge whether to suspend the sentence. Importantly, when imposing the sentence, Judge Burch noted he was going to sentence Applicant to *less* time than he originally thought. (Sentencing Tr. p. 36, line 24 – p. 37, line 12). This is persuasive evidence that while Judge Burch believed the sentence to be suspendable, he did not believe the facts warranted such a sentence. The record reflects that Applicant was further advised by the plea court of the maximum and minimum sentence he could receive on the charge. (Plea Tr. p. 4, lines 21-24);

¹ This Court notes that it is unlikely that the State could successfully challenge any sentence that carried life which had been suspended without running afoul of the *ex post facto* clause. See U.S.C.A. Const. art. 1 § 10; Bouie v. City of Columbia, 378 U.S. 347 (1964) (holding that "an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an *ex post facto* law").

GA 7

See Wolfe v. State, 326 S.C. 158, 164, 485 S.E.2d 367, 370 (1997) (any possible misconceptions about sentence length cured by colloquy at guilty plea hearing). Therefore, Applicant cannot prove that he was prejudiced.

This Court finds the record reflects Applicant was advised of the waiver of his constitutional rights by the plea court. This Court finds very credible Counsel's testimony regarding his preparations and advice concerning the case and the amount of time Applicant was facing. The record reflects Applicant admitted his guilt to the plea court. This Court finds Applicant's testimony regarding a promise of a particular sentence not credible. Applicant was fully informed of the nature and consequences of his plea. Further, Applicant chose to plead guilty on the advice of counsel in part because of the jury panel composition. Counsel testified that there were a number of school teachers, nurses, and working mothers with young children on the panel. Counsel testified he did not believe it was likely that Applicant would be acquitted. Applicant chose to plead guilty. He also agreed with Counsel that they did not draw a favorable panel. Correspondingly, this Court finds Applicant's testimony regarding his potential sentencing range to be neither credible nor supported by the record.

This Court finds the plea judge correctly found Applicant's plea was freely, voluntary, and intelligently made. This allegation is denied and dismissed with prejudice.

Failure to File a Motion to Vacate the Guilty Plea

Applicant also alleges that Counsel was ineffective for failing to file a motion to vacate Applicant's guilty plea on the grounds that it was not entered voluntarily. Counsel properly filed a motion for reconsideration on September 25, 2009. Counsel von Herrmann was then retained by Applicant. A hearing was held on October 31, 2011, where Applicant argued that the conviction should be vacated in light of Jacobs and because the plea was not entered freely,

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knowingly, and voluntarily.² Applicant did not present arguments consistent with the filed motion to reconsider. Applicant appealed Judge Burch's decision. The court of appeals affirmed Applicant's conviction and ruled that Applicant's arguments to vacate the sentence were not timely raised as required by Rule 29(a), SCRCrimP.

Applicant now argues Counsel was ineffective in failing to properly file a motion to vacate Applicant's sentence. This allegation is without merit. Applicant presented no evidence to support this contention. This Court finds Counsel filed the appropriate motion under Rule 29(a), SCRCrimP, rather than a motion to vacate the sentence. The authority to change a sentence rests exclusively with the sentencing judge and is within his or her discretion State v. Smith, 276 S.C. 494, 498, 280 S.E. 2d 200, 202 (1981). A judge or other sentencing authority is to be accorded very wide discretion in determining an appropriate sentence and must be permitted to consider any and all information that reasonably might bear on the proper sentence for the particular defendant given the crime committed. Wasman v. United States, 468 U.S. 559, 563 (1984). This Court finds Counsel's performance was objectively reasonable under the prevailing professional norms.

This Court finds Applicant failed to meet his burden in proving prejudice. Applicant has failed to prove that a motion to vacate the conviction and sentence would have been successful either at the circuit level or the appellate level. The record before this Court and testimony provided at the hearing firmly convinces this Court that Applicant would have been no better off in filing a motion to vacate the sentence. This Court further finds Applicant failed to show how the denial of a motion to vacate would have been successful on appeal. See State v. Fogle, 256 S.C. 149, 155, 181 S.E.2d 483, 485 (1971) (holding an appellate court has "no jurisdiction to

² This Court finds Applicant has waived any challenge to Counsel von Herrmann's performance at the motions hearing by having said counsel represent him in this action.

correct a sentence alleged to be excessive when it is within the limit prescribed by law,") (internal citations omitted). This allegation is denied and dismissed with prejudice.

All Other Allegations

As to any and all allegations that were raised in this matter and not specifically addressed in this order, the Court finds Applicant failed to present any evidence regarding such allegations. Accordingly, the Court finds Applicant has abandoned any such allegations.

IV. CONCLUSION

Based on the foregoing, the 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, this application for post-conviction relief must be denied and dismissed with prejudice.

The Court notes Applicant must file and serve a notice of appeal within thirty (30) days from PCR counsel's receipt 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, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.


10

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IT IS THEREFORE ORDERED THAT:

1. The application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. Applicant shall remain in the custody of the South Carolina Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 27 day of October, 2015.



G. THOMAS COOPER, JR.
Presiding Judge

Camden, South Carolina

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November 24, 2015

The Honorable Jeanette W. McBride
Clerk of Court for Richland County
Post Office Box 2766
Columbia, South Carolina 29202

RE: State of South Carolina v. Willie Ritter, #337044

Dear Madam Clerk:

Please find enclosed an original and one copy of a Notice of Appeal in the above referenced case as well as an original and one copy of a Proof of Service in this matter.

Please return a clocked copy of each document to me in the self-addressed and stamped envelope enclosed. Thank you for your help in this regard.

Sincerely,
VON HERRMANN LAW FIRM

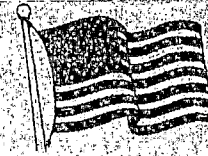


William B. von Herrmann

WBvH/wss

Enclosures

cc: J. Clayton Mitchell, Esquire
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Attorney for Respondent



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