

Law Office of Leah B. Moody, LLC

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February 22, 2016

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FEB 25 2016

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

S.C. SUPREME COURT

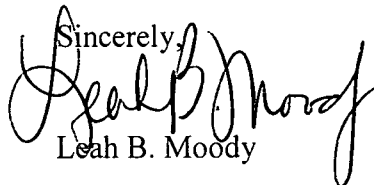
RE: Donald Altman v. State of South Carolina
Case No.: 2013-CP-46-02535

Dear Mr. Shearouse:

The York County Court of Common Pleas appointed my office to represent Donald Altman 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/jh
Enclosure

cc Donald Altman
Rutledge Johnson, Esquire
David Hamilton, Clerk of Court, York County
Sharon Graham, SCCID

IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM YORK COUNTY
Court of Common Pleas

Alison Renee Lee, Presiding in York County

Case No. 2013-CP-46-02535

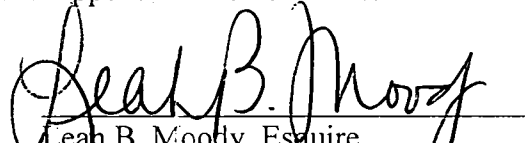
Donald Altman, Appellant,

v.

State of South Carolina, Respondent.

NOTICE OF APPEAL

Donald Altman appeals the order of the Honorable Alison Renee Lee, dated January 12, 2016 and mailed on January 25, 2016. Appellant received written notice of entry of the final order on January 26, 2016.


Leah B. Moody, Esquire
Law Office of Leah B. Moody, LLC
235 E. Main Street, Suite 115
Post Office Box 1015
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Other Counsel of record:
J. Rutledge Johnson, 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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FEB 25 2016

S.C. SUPREME COURT

IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM YORK COUNTY
Court of Common Pleas

Alison Renee Lee, Presiding in York County

Case No. 2013-CP-46-02535

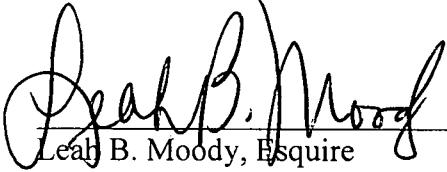
Donald Altman, Appellant,

v.

State of South Carolina, Respondent.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on Rutledge Johnson by depositing a copy of it in the United States Mail, postage prepaid, on 2/22, 2016 addressed to its attorney of record, Rutledge Johnson, 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

February ²²~~16~~, 2016
cc Donald Altman
Rutledge Johnson, Esq.
David Hamilton, Clerk of Court, York County
Sharon A. Graham, SCCID

STATE OF SOUTH CAROLINA)
 COUNTY OF YORK)
)
 Donald Altman, #261468,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 SIXTEENTH JUDICIAL CIRCUIT

Case No. 2013-CP-46-02535

ORDER OF DISMISSAL

FILED - RECEIVED
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 DAVID HAMILTON
 C.C.C.P. CLERK
 YORK COUNTY, SC

This matter comes before the Court by way of an application for Post-Conviction Relief (“PCR”). Applicant Donald Altman (“Applicant”) filed the application on August 22, 2013. The State of South Carolina (“Respondent”) made its Return and moved to dismiss the application on December 3, 2013. A hearing was convened November 19, 2014, at the York County Courthouse. Applicant was present at the hearing and was represented by counsel, Leah B. Moody, Esquire. Respondent was represented by Assistant Attorney General J. Rutledge Johnson, Esquire. After reviewing all of the testimony and evidence presented at the hearing, along with a review of all records provided to the Court, the Court finds that there are no constitutional deprivations or other grounds on which to grant relief and denies and dismisses this application with prejudice.

PROCEDURAL HISTORY

Applicant presently is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the York County Clerk of Court. Applicant was indicted by the July 2001 term of the York County Grand Jury for Shoplifting, four counts of Possession of Stolen Goods, and Altering or Possessing an Altered License Plate. Erik Delaney, Esquire, (“Delaney”) represented Applicant on his charges. On July 26, 2011, Applicant proceeded to a jury trial before the Honorable John C. Hayes, III. Applicant was found guilty and sentenced to confinement for ten years for Shoplifting, 3rd or subsequent offense; ten years, consecutive, for Possession of Stolen Goods, 3rd or subsequent offense; ten years, concurrent, for the other Possession of Stolen Goods charges; and five years, concurrent, for Altering or Possessing an Altered License Plate. A notice of appeal was filed on Applicant’s behalf. The South Carolina

and

Court of Appeals affirmed the Applicant's conviction and sentence. *See State v. Altman*, 2013 WL 8539478, at *1 (Ct. App. Aug. 7, 2013). The Remittitur was issued on August 23, 2013.

In his PCR application, Applicant alleges that he is unlawfully being held in custody because of the ineffective assistance of his trial counsel in failing to request a *Neil v. Biggers* ("Biggers")¹ hearing concerning the identification of Applicant; prosecutorial misconduct for failure to provide certain evidence; and constitutional violations under both the South Carolina Constitution and the United States Constitution.²

SUMMARY OF TESTIMONY PRESENTED AT EVIDENTIARY HEARING

At the evidentiary hearing, the Court had before it Applicant's trial transcript, the records from the York County Clerk of Court regarding the convictions, and Applicant's records from the South Carolina Department of Corrections.

Applicant first testified on his own behalf. Applicant testified that Delaney failed to object to testimony from a State witness, Michelle Williams, concerning her identification of Applicant based upon a photograph. According to Applicant, Officer Ryan Thomas, the investigating officer, ("Officer Thomas") testified at trial that he never showed witness Michelle Williams, manager of Family Dollar ("Williams"), any photos of Applicant. Williams, however, testified at trial that Officer Thomas did show her a photograph of Applicant the day after Applicant's alleged shoplifting from Family Dollar. Applicant testified that Delaney should have objected to Williams' testimony concerning Applicant's identification because no photograph actually existed. Applicant testified that he was prejudiced by an identification based upon a photograph that does not exist. Applicant stated that Respondent used Williams' testimony regarding the alleged photograph to convict him. Applicant also testified that Delaney failed to ask for a mistrial based upon Williams' identification. According to Applicant, the Court of Appeals held that Delaney failed to preserve the issue by not objecting to the identification at the time it was provided.

¹ 409 U.S. 188, 93 S. Ct. 375 (1972).

² Applicant's grounds for PCR included, *inter alia*, "violat[i]ons of the 5th and 14th Amendment[s] of the Constitution." During his PCR hearing, Applicant specifically focused on his trial counsel's ineffective assistance and Respondent's alleged *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963), violation. The Court, thus, will interpret Applicant's claims of constitutional deprivations as specifically including his trial counsel's ineffective assistance and Respondent's *Brady* violation.

Applicant, further, testified that Delaney improperly failed to request a *Biggers* pre-trial identification hearing concerning the alleged photograph before the trial began. Applicant also testified that Respondent's failure to provide the photograph to Applicant constituted a *Brady v. Maryland*³ ("Brady") violation.

Delaney testified that he did not think a *Biggers* hearing was necessary because he did not believe a photograph existed at the beginning of the trial. Delaney, moreover, testified that the assistant solicitor, Mr. Johnson, informed the trial court that a photograph, in fact, did not exist. Delaney further testified that, at trial, Williams explained that she knew Applicant from seeing him multiple times in the store and that he stole items from the store. Delaney also testified that he moved for a directed verdict based upon the reliability of Williams' testimony.

Delaney testified that he did not file a Rule 29 Motion for Reconsideration. Delaney testified, however, that he filed an appeal but could not remember its basis.

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 provided at the PCR hearing. This Court, further, has had the opportunity to observe the witnesses presented at the hearing, 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.

A. Ineffective Assistance of Counsel

Applicant submits Delaney rendered ineffective assistance of counsel because Delaney failed to request a *Biggers* hearing related to witness identification. In a PCR action, the applicant bears the burden of proving the allegations in his application. *Hyman v. State*, 397 S.C. 35, 42, 723 S.E.2d 375, 378 (2012). 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, 687, 104 S. Ct. 2052, 2064 (1984). Claims of ineffective assistance of counsel are evaluated under a two-prong test. *See Suber v. State*, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007). First, the applicant must prove that counsel's performance was deficient. *Holden v. State*, 393 S.C. 565, 572, 713 S.E.2d 611, 615 (2011). Under this prong, the court measures an attorney's performance by its "reasonableness under

³ 373 U.S. 83, 83 S. Ct. 1194 (1963).

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professional norms.” *Caprood v. State*, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000). Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). To receive relief, a PCR applicant must overcome this presumption. *Cherry v. State*, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989). 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.” *Suber*, 371 S.C. at 558, 640 S.E.2d at 886.

“A criminal defendant may be deprived of due process of law by an identification procedure which is unnecessarily suggestive and conducive to irreparable mistaken identification.” *State v. Taylor*, 360 S.C. 74, 81, 600 S.E.2d 523, 526 (2004). “An in-court identification of an accused is inadmissible if a suggestive out-of-court identification procedure created a very substantial likelihood of irreparable misidentification.” *State v. Moore*, 343 S.C. 282, 286, 540 S.E.2d 445, 447 (2000).

“In *Neil v. Biggers*, the United States Supreme Court set forth a two-pronged inquiry to determine whether due process requires suppression of an eyewitness identification.” *State v. Liverman*, 398 S.C. 130, 138, 727 S.E.2d 422, 426 (2012). Under *Biggers*, courts are required to assess, under the totality of the circumstances, whether an eyewitness identification “resulted from unnecessary and unduly suggestive police procedures, and if so, whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed.” *Id.* In determining the reliability of an identification obtained through an unduly suggestive procedure, the Court considers the following factors: (1) the witness’s opportunity to view the defendant at the time of the crime; (2) the witness’s degree of attention; (3) the accuracy of the witness’s prior description of the defendant; (4) the level of certainty exhibited by the witness during the identification procedure; and (5) the length of time between the alleged criminal action and the identification procedure. *See Neil v. Biggers*, 409 U.S. 188, 199–200, 93 S. Ct. 375, 382 (1972).

Applicant testified that Delaney should have requested a *Biggers* hearing concerning Williams’ testimony about being presented a photograph of Applicant the day after the alleged shoplifting. Applicant also alleges Delaney was ineffective in that he failed to object to Williams’ testimony regarding the identification.

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During trial, Williams testified that Officer Thomas presented her with a photograph of Applicant the day after the alleged shoplifting. *See* Transcript of Record at 84:2–23. In fact, Officer Thomas had never been trained on how to conduct a photo line-up. *Id.* The assistant solicitor, Mr. Johnson, also informed the trial court that he was not aware of any single photo showing, *id.* at 97:3–4, and that there was no photograph at trial, *id.* at 99:19–23. Delaney objected to Williams’ testimony by making a directed verdict motion at the end of Respondent’s case. Delaney specifically argued that an identification based upon a single photograph would be overly suggestive. Delaney further contended that without Williams’ identification, Respondent did not have an identification of Applicant. The trial court ruled against Delaney’s motion for directed verdict finding that although a single photo identification was suggestive, the reliability of Williams’ identification would not be affected because Williams testified she had seen Applicant on numerous occasions before the subject incident. *See* Transcript of Record at 97:13–21.

Delaney did not provide ineffective assistance of counsel in the instant matter. At the time of discovery, Delaney was not provided with any evidence indicating that a photograph was presented to Williams to identify Applicant. *See* Transcript of Record at 98:24–25 to 99:1–7. Delaney, thus, would not have been alerted to request a *Biggers* hearing concerning Williams’ identification of Applicant. Delaney testified during the PCR hearing, that he was not aware of any photograph being presented to Williams. Officer Thomas, moreover, testified, during trial, that he did not perform a photo line-up in this case. Transcript of Record at 75:2–4.

Furthermore, concerning Delaney’s failure to simultaneously object to Williams’ testimony concerning the alleged photograph, Delaney cross-examined Williams on the suggestiveness of being presented a single photo of Applicant. Transcript of Record 84:6–25. Delaney also made a directed verdict motion that focused specifically on the alleged suggestiveness of the single-photo identification procedure once he was aware of Williams’ testimony which contradicted Officer Thomas’ testimony.

However, assuming, *arguendo*, that Delaney was deficient in not requesting a *Biggers* hearing and by failing to timely object to Williams’ testimony, Applicant would not be able to satisfy the second prong of the ineffective assistance of counsel analysis. Applicant cannot show that, “but for” Delaney’s alleged unprofessional conduct, the trial result would have been different. Williams’ testimony regarding being shown a photograph of Applicant was only part

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of her testimony. Williams testified that she saw Applicant steal the subject items from Family Dollar on the day in question. Transcript of Record 78:12-14. Williams was about 12 feet away from Applicant when Applicant allegedly stole the items. *Id.* at 79:15:25. Williams then attempted to locate Applicant after he left the store. *Id.* at 79:4-10. She wrote down his license plate number and provided it to Officer Thomas. *See id.* Williams also provided Officer Thomas with a description of Applicant: white male with a tan "odd shape . . . railroad hat." *Id.* at 80:1-7. Officer Thomas similarly testified that Williams informed him that Applicant shoplifted from Family Dollar and was a white male wearing a tan hat. *See* Transcript of Record 53:8-21.

Williams testified several times that she was familiar with Applicant before the date of the underlying incident. Specifically, she had seen Applicant in the days immediately prior to the alleged incident. Transcript of Record at 78:25-79:1 ("[I] had seen him in prior days before [the incident]."). Williams was asked during trial whether she recognized Applicant on the date of the incident in question, to which she responded, "yes, sir." *Id.* at 79:2-3. Williams also testified that she had seen Applicant about 20 times prior to the alleged incident. *Id.* at 118:8-12. She specifically recognized Applicant because of a prior situation involving Applicant and his girlfriend, Brenda Sims ("Sims"). *See id.* at 118:17-19. About a week or two before the alleged shoplifting, Sims needed to use the restroom while at the Family Dollar and, thus, was provided a key to the restroom, which is located in the store's stockroom. *Id.* at 118:21-23. Located in the stockroom is a backdoor to the store. *Id.* Brenda went out the back door and, simultaneously, set off the fire alarm. *Id.* at 118:25-119:1. Upon hearing the fire alarm, Williams thought that Sims and Applicant were attempting to rob her. *Id.* at 119:2-3. Williams, thus, testified that "at that point on, I knew when they both came into the store, I had to watch them [be]cause nobody ever goes out my back door and sounds the alarm. That's why I distinctly remember who he is." *Id.* at 119:6-9.

Respondent, thus, produced ample testimony concerning the identification of Applicant, outside of Williams' testimony about the alleged photograph. Accordingly, the trial record contained sufficient direct and circumstantial evidence for the jury to conclude that Applicant committed the underlying offense. Applicant, therefore, cannot satisfy the second prong that, but for Delaney's unprofessional conduct, the trial result would have been different. Delaney, therefore, did not provide ineffective assistance of counsel.

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B. *Brady v. Maryland* Violation

Applicant also contends that Respondent committed a *Brady* violation by not providing Applicant with the alleged photograph during discovery. “*Brady* provides that a criminal defendant is denied due process when the prosecution suppresses evidence that is favorable to him.” *State v. Hill*, 368 S.C. 649, 654, 630 S.E.2d 274, 277 (2006). A *Brady* claim “is complete if the accused can demonstrate (1) the evidence was favorable to the accused, (2) it was in the possession of or known to the prosecution, (3) it was suppressed by the prosecution, and (4) it was material to guilt or punishment.” *Gibson v. State*, 334 S.C. 515, 524, 514 S.E.2d 320, 324 (1999). *Brady* governs both impeachment evidence and exculpatory evidence. *United States v. Bagley*, 473 U.S. 667, 676, 105 S. Ct. 3375, 3380 (1985).

Williams testified that Officer Thomas showed her a photo of Applicant. Officer Thomas, however, testified that he did not show Williams a photograph. The State’s attorney also informed the court there was no photograph. See Transcript of Record at 97:3–4; Transcript of Record at 99:18–23. Applicant, thus, cannot show that the photograph was in Respondent’s possession and that it was suppressed by Respondent. Applicant, moreover, cannot demonstrate that even if such photo did exist, that the photo was favorable to Applicant. Therefore, since Applicant has not demonstrated that Respondent had possession of a photograph of Applicant, that Respondent wrongfully suppressed such photo, and that the alleged photo was favorable to Applicant, Applicant has not shown that Respondent committed a *Brady* violation.

CONCLUSION

Based on all of the foregoing, this Court finds that Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for PCR is denied and dismissed with prejudice.

This Court notes that Applicant must file and serve a Notice of Appeal within thirty 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, 409 S.E.2d 395 (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 an applicant’s behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

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ORDER

IT IS THEREFORE ORDERED:

1. That the Application for PCR shall be denied and dismissed with prejudice; and
2. The Applicant shall remain remanded to the custody of Respondent.

AND IT IS SO ORDERED.

Alison Renee Lee

ALISON RENEE LEE

Presiding Judge

January 12, 2016
Columbia, South Carolina

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State of South Carolina
The Circuit Court of the Fifth Judicial Circuit

ALISON RENEE LEE
JUDGE

1701 MAIN ST., ROOM 324
POST OFFICE BOX 192
COLUMBIA, SOUTH CAROLINA 29202-0192
TELEPHONE: (803) 576-1765
FAX: (803) 576-1760

January 12, 2016

David Hamilton
York County Clerk of Court
P.O. Box 649
York, South Carolina 29745

Re: Case Nos. 2013-CP-46-02535

Dear Mr. Hamilton:

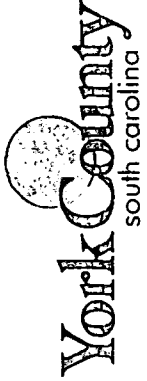
Please clock and file the enclosed Order and provide copies to counsel.

Sincerely,

Chadwick S. Devlin
Law Clerk to the Honorable Alison Renee Lee

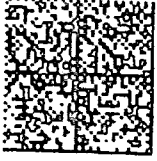
DAVID HAMILTON
C.C.C.P. & C.S.
YORK COUNTY, SC

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February 22, 2016

FEB 25 2016

The Honorable David Hamilton
York County Clerk of Court
Post Office Drawer 649
York, South Carolina 29745

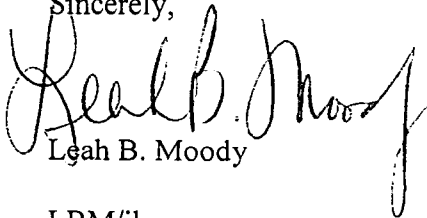
S.C. SUPREME COURT

RE: Donald Altman v. State of South Carolina
Case No.: 2013-CP-46-02535

Dear Mr. Hamilton:

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

Sincerely,


Leah B. Moody

LBM/jh

Enclosures

cc Donald Altman
Rutledge Johnson, Esquire
Daniel E. Shearouse, South Carolina Supreme Court
Sharon Graham, SCCID

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S.C. SUPREME COURT

February 22, 2016

Rutledge Johnson, Esquire
South Carolina Attorney General's Office
Post Office Box 11549
Columbia, South Carolina 29211

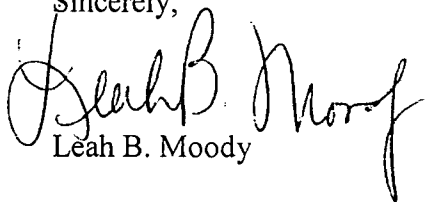
RE: Donald Altman v. State of South Carolina
C.A. No.: 2013-CP-46-02535

Dear Mr. Johnson:

The York County Court of Common Pleas appointed my office to represent Donald Altman 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/jh

Enclosures

Cc Donald Altman
Daniel E. Shearouse, South Carolina Supreme Court
David Hamilton, Clerk of Court, York County
Sharon Graham, SCCID

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February 22, 2016

S.C. SUPREME COURT

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

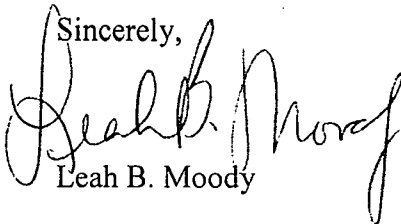
RE: Donald Altman v. State of South Carolina
Case No.: 2013-CP-46-02535

Dear Ms. Graham:

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Thank you for your attention in this matter.

Sincerely,



Leah B. Moody

LBM/jh
Enclosures

cc Donald Altman
Rutledge Johanson, Esquire
Daniel E. Shearouse, South Carolina Supreme Court
David Hamilton, Clerk of Court, York County



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Post Office Box 1015

Rock Hill, South Carolina 29730

TO:

The Honorable Daniel E. Shearouse
The Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211-1330

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