

# Law Office of Leah B. Moody, LLC

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**RECEIVED**

MAY 23 2016

**S.C. SUPREME COURT**

May 16, 2016

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

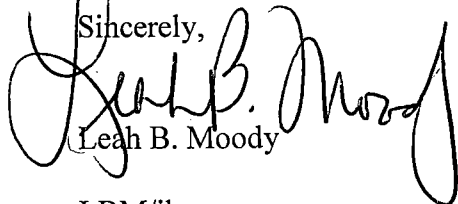
**RE: Kenneth Nelson v. State of South Carolina**  
**Case No.: 2014-CP-42-1532**

Dear Mr. Shearouse:

The Spartanburg County Court of Common Pleas appointed my office to represent Kenneth Nelson 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 Kenneth Nelson  
Alicia Olive, Esquire  
Hope Blackley, Clerk of Court, Spartanburg County  
Sharon Graham, SCCID

IN THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM SPARTANBURG COUNTY  
Court of Common Pleas

Honorable J. Larry Hyman, Presiding in Spartanburg County

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Case No. 2014-CP-42-1532

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Kenneth Nelson, ..... Appellant,

v.

State of South Carolina, ..... Respondent.

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MAY 23 2016

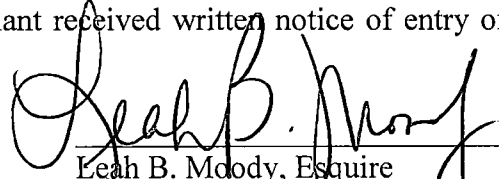
S.C. SUPREME COURT

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NOTICE OF APPEAL

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Kenneth Nelson appeals the order of the Honorable J. Larry Hyman, dated May 3, 2016 and mailed on May 13, 2016. Appellant received written notice of entry of the final order on May 16, 2016.



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Leah B. Moody, Esquire  
Law Office of Leah B. Moody, LLC  
235 E. Main Street, Suite 115, 29730  
Post Office Box 1015  
Rock Hill, South Carolina 29731

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

IN THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM SPARTANBURG COUNTY  
Court of Common Pleas

J. Larry Hyman, Presiding in Spartanburg County

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Case No. 2014-CP-42-1532

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Kenneth Nelson, ..... Appellant,

v.

State of South Carolina, ..... Respondent.

RECEIVED

MAY 23 2016

S.C. SUPREME COURT

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PROOF OF SERVICE

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I certify that I have served the Notice of Appeal on Alicia Olive by depositing a copy of it in the United States Mail, postage prepaid, on May 17, 2016 addressed to its attorney of record, Alicia Olive, 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, 29730  
Post Office Box 1015  
Rock Hill, South Carolina 29731

May 16, 2016

cc Kenneth Nelson  
Alicia Olive, Esquire  
Hope Blackley, Clerk of Court, Spartanburg County  
Sharon A. Graham, SCCID

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF SPARTANBURG )  
 )  
 Kenneth W. Nelson., #163540, )  
 )  
                                   Applicant, )  
 )  
                                   v. )  
 )  
 State of South Carolina, )  
 )  
                                   Respondent. )

IN THE COURT OF COMMON PLEAS  
 IN THE SEVENTH JUDICIAL CIRCUIT

Case No.: 2014-CP-42-1532

**ORDER OF DISMISSAL**

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed April 15, 2014. Respondent made its Return on October 23, 2014, requesting that an evidentiary hearing be held. An evidentiary hearing into the matter was convened at the Spartanburg County Courthouse before the undersigned on November 13, 2015. Applicant was present at the hearing and was represented by Leah B. Moody, Esquire. Alicia A. Olive, Esquire, represented Respondent.

At the evidentiary hearing, Applicant testified on his own behalf. The State presented testimony from James Cheek, Esquire. This Court also had before it the records of the Spartanburg County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the plea transcript, and the pleadings.

**I. PROCEDURAL HISTORY**

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. Applicant was indicted at the October 2012 term of the Spartanburg County Grand Jury for two counts of exposure of private parts in a lewd and lascivious manner (2012-GS-42-5000, and -5000(A)). Applicant was subsequently indicted at the June 2013 term of the Spartanburg County Grand Jury for

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committing or attempting to commit a lewd act upon a child under the age of sixteen (2013-GS-42-2868). Applicant was represented by James Cheek, Esquire ("Counsel"). On October 10, 2013, Applicant pleaded guilty to all charges as indicted pursuant North Carolina v. Alford, 400 U.S. 25 (1970).<sup>1</sup> The Honorable Roger L. Couch sentenced Applicant to concurrent terms of fifteen years for lewd act upon a minor, suspended on the service of imprisonment for ten years to five years of probation,<sup>2</sup> and imprisonment for six months on each charge of exposure of private parts in a lewd and lascivious manner. Applicant did not appeal his sentence or convictions.

### Allegations

Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel; specifically:
  - a. Failure to advise Applicant on the evidence compiled against him;
  - b. Failure to question Applicant on his understanding of the charges being brought against him;
  - c. Failure to sufficiently confer with Applicant;
  - d. Failure to request and provide discovery materials to Applicant;
  - e. Counsel misconduct;
  - f. Conflict of interest in that Counsel was friends with the Solicitor;
2. Involuntary guilty plea; specifically
  - a. Applicant "was never afforded the information needed to knowingly submit a guilty plea."
3. Prosecutorial misconduct.

During his testimony, Applicant voluntarily withdrew his claims of prosecutorial misconduct, "counsel misconduct," conflict of interest, and failure of counsel to request or provide discovery.

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<sup>1</sup> As part of the plea agreement, the State dismissed an indictment for criminal sexual conduct ("CSC") with a minor in the second degree.

<sup>2</sup> The State recommended a ten year cap and concurrent sentencing.

## II. SUMMARY OF TESTIMONY PRESENTED

Applicant testified that he did not want to plead. Applicant testified he did not sign up for the opportunity to speak with Counsel, but that Counsel just showed up at the jail. Applicant testified that Counsel knew there was no evidence of a crime and he allowed the case to go on. Applicant testified that Counsel did not want the case to go to trial. Applicant testified that he thought the judge would sentence him to time-served. Applicant testified that Counsel said he did not have to accept the offer and that he would get time-served if he accepted the offer. Applicant testified Counsel did not discuss an Alford plea with him or explain what it meant. Applicant testified that he reviewed discovery with Counsel but did not review the evidence with him. Applicant testified that Counsel did not explain the charges to him. Applicant testified he did receive discovery materials. With regard to his allegation that Counsel had a conflict of interest, Applicant testified that Counsel was cordial with the State and that he did not know if there was a conflict and that he did not have proof.

Applicant testified that he did not have "evidence sheets" in the discovery materials, that he did not do the crime, and that the State did not have any evidence. Applicant testified Counsel did not discuss with him the sentences he faced. Applicant testified Counsel did not suggest that he go to trial. Applicant testified if he had gone to trial he could have beat the charge or received a lesser sentence. Applicant testified that he answered the plea judge's questions on the advice of Counsel. He testified that Counsel did not tell him how to answer, and told him that the judge did not have to accept his plea, so it was in his best interest to answer them.

On cross-examination, Applicant admitted that the plea judge reviewed the charges against him and told him that he could receive up to fifteen years on the lewd act charge. Applicant admitted that the plea judge also informed him that it did not have to follow the State's

recommended cap of ten years and that he could sentence him to up to fifteen years. Applicant also agreed that the judge reviewed the sentences he faced on the indecent exposure charges. Applicant agreed that Counsel reviewed discovery with him but that there was no evidence. Applicant agreed that the plea judge explained what an Alford plea was. Applicant admitted the plea judge asked him if anyone had made any promises or assurances to get him to plead, including any promises about length of sentence, and that he told the judge no. Applicant testified he should have told him a promise was made to him but that he got nervous. Applicant acknowledged that as part of the plea the State dismissed a charge of criminal sexual conduct with a minor, second degree. Applicant testified he did not know he was waiving his constitutional rights by pleading guilty and that Counsel never went over those rights with him. Applicant agreed that he agreed at the guilty plea hearing that he thought he would be convicted if he went to trial.

Counsel testified that Roger Poole initially represented Applicant and handled the preliminary hearing. Counsel testified that by the time the case was transferred to him, Applicant had already had his preliminary hearing and had decided to plead guilty. Counsel testified that Poole had worked with the State to get the charges reduced to lewd act instead of CSC with a minor, second degree, which reduced the sentencing range and seriousness of the conviction. Counsel testified that he never told Applicant he would receive a sentence of time-served. He stated that the only conversation they might have had with regard to time-served would have been a discussion about ensuring he received credit for the time he had already served. Counsel testified Poole and Applicant discussed the plea offer and then the case was referred to him. Counsel stated he spoke to Applicant a week before the plea, the day before the plea, and the day of the plea. Counsel testified that Applicant sought alcohol counseling and that he brought it up

at the plea hearing and provided the judge with written records evidencing that treatment. Counsel testified he hoped for less than ten years, but that he made no promises to Applicant with respect to what sentence he would receive. Counsel testified that sentences of time-served would rarely have happened, particularly in this case since one of the victim's guardians would be there and ask for time. Counsel testified that he explained to Applicant all of the rights he would be waiving by pleading no contest. He stated that he usually does this three times and makes sure that all of his clients, regardless of their level of education, understand what they are doing. Counsel testified he had no concerns about whether Applicant understood the rights he was giving up by pleading no contest.

Counsel testified he reviewed discovery with Applicant, discussed the elements of the charges as well as the potential penalties and potential defenses. Counsel testified that Applicant asserted he was intoxicated during these events and could not remember anything to be able to assert any kind of defense. Counsel testified he did not see how Applicant could have asserted any defense. He further testified that based on the evidence and based on the fact that Applicant had no recollection of the events due to his state of intoxication, he concluded that the State would have succeeded in showing that Applicant was guilty beyond a reasonable doubt. Counsel testified that there was no physical evidence but that there would have been testimonial evidence in the form of the victims' testimony and the forensic interviews. Counsel testified it was Applicant's choice to enter the plea.

### **III. 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, and closely pass upon their credibility. This Court

has weighed 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).

As a matter of general impression, this Court finds Counsel's testimony to be more credible than Applicant's testimony.

#### **A. Ineffective Assistance of Counsel**

In a PCR action, Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). The applicant “must first demonstrate that counsel was deficient and then must also show the deficiency resulted in prejudice.” Walker v. State, 407 S.C. 400, 404-05, 756 S.E.2d 144, 146 (2014). “The two-part test adopted in Strickland also applies to challenges to guilty pleas based on ineffective assistance of counsel.” Holden v. State, 393 S.C. 565, 572, 713 S.E.2d 611, 615 (2011).

The applicant must first show that counsel’s performance “fell below an objective standard of reasonableness under prevailing professional norms.” Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. “Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” Id. (citing Strickland, 466 U.S. at 690). Second, counsel's deficient performance must have prejudiced the Applicant such that “there is a reasonable probability that, but for counsel’s unprofessional errors, he would not have [pleaded] guilty, but would have insisted on going to trial.” Thompson v. State, 340 S.C. 112, 116, 531 S.E.2d 294, 297 (2000).

Regarding the Applicant's claims of ineffective assistance of counsel, this Court finds Applicant has failed to meet his burden of proving either deficiency or prejudice. This Court finds that Applicant's attorney demonstrated the normal degree of skill, knowledge, professional judgment, and representation that is expected of an attorney who practices criminal law in South Carolina. State v. Pendergrass, 270 S.C. 1, 239 S.E.2d 750 (1977). This Court finds that Counsel adequately conferred with Applicant in preparation for his plea. During these conferences with Applicant, Counsel discussed the pending charges, the elements of the charges and what the State was required to prove, the potential penalties, Applicant's constitutional rights, Applicant's version of the facts, and possible defenses or lack thereof. This Court further finds that Counsel conducted a proper investigation and provided thorough representation. This Court finds the record also reflects that the plea judge reviewed questions with Applicant and Applicant said he understood the nature of the charges against him and knew what evidence the State had against him. This Court finds that Counsel successfully negotiated a favorable plea offer for Applicant. Therefore, this Court finds Applicant failed to satisfy his burden of proving that Counsel rendered deficient performance.

This Court likewise finds that Applicant failed to satisfy his burden of proving prejudice. According to the testimony at the PCR hearing and the transcript of Applicant's guilty plea, the State agreed to dismiss an indictment for CSC with a minor in the second degree as part of Applicant's plea arrangement. This Court finds that the charge he pleaded to made him parole eligible, which was a significant benefit. This Court finds Counsel did not promise Applicant that he would receive a particular sentence. Counsel testified that the victims would have testified at Applicant's trial. In addition, based on the plea transcript, this Court finds that Applicant made multiple statements to law enforcement and to the Department of Social Services concerning

these events, and Counsel discussed those statements with Applicant, including the chances they could be used against him at trial. Based on the PCR hearing and the record, this Court finds Applicant has failed to show there is a reasonable probability that but for any alleged deficiency of Counsel, he would not have pleaded guilty but would have insisted on going to trial.

Accordingly, Applicant's allegations of ineffective assistance of counsel are denied and dismissed.

#### **B. Involuntary Guilty Plea**

Applicant claims his no contest plea was involuntary. An applicant asserting a constitutional violation must frame the issue as one of ineffective assistance of counsel. Al-Shabazz v. State, 338 S.C. 354, 363-64, 527 S.E.2d 742, 747 (2000) (citing Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517 (1993); Hyman v. State, 278 S.C. 501, 299 S.E.2d 330 (1983); Richardson v. State, 310 S.C. 360, 426 S.E.2d 795 (1993)). An applicant who pleads guilty on the advice of counsel may collaterally attack the plea only by showing (1) counsel was ineffective and (2) there is a reasonable probability that but for counsel's errors, the defendant would not have pled guilty and would have insisted on going to trial. Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001) (citing Hill v. Lockhart, 474 U.S. 52; Jackson v. State, 342 S.C. 95, 535 S.E.2d 926 (2000); Thompson v. State, 340 S.C. 112, 531 S.E.2d 294 (2000); Rayford v. State, 314 S.C. 46, 443 S.E.2d 805 (1994)).

An applicant alleging that his guilty plea was induced by ineffective assistance of counsel must prove that counsel's advice was not "within the competence demanded of attorneys in criminal cases." Hill v. Lockhart, 474 U.S. at 56. Applicant must also prove prejudice. Id. at 52. When determining issues relating to guilty pleas, the court will consider the entire record, including the transcript of the guilty plea, and the evidence presented at the post-conviction relief

hearing. Anderson v. State, 342 S.C. 54, 57, 535 S.E.2d 649, 657 (2000) (citing Harres v. Leeke, 282 S.C. 131, 318 S.E.2d 360 (1984)). Admissions “made during a guilty plea should be considered conclusive unless [an applicant] presents valid reasons why he should be allowed to depart from the truth of his statements.” Dalton v. State, 376 S.C. 130, 137-38, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing Crawford v. United States, 519 F.2d 347 (4th Cir. 1975); Edmonds v. Lewis, 546 F.2d 566 (4th Cir. 1976)).

This Court finds that the record fully supports the knowing and voluntary nature of Applicant's guilty plea. Applicant has presented no reason why he should be allowed to depart from the truth of his statements made at the plea hearing. At his plea, Applicant admitted he believed that if the State's evidence, which was recited at the plea hearing, was presented to a jury, it would more than likely result in his conviction, and that he and Counsel reviewed that evidence in making the decision to offer a no contest plea. Applicant told the plea court that no one had threatened him or promised him anything, including a particular sentence, to plead guilty. Applicant has failed to show that Counsel's performance was deficient or that any alleged deficient performance prejudiced him. Accordingly, this Court hereby denies and dismisses Applicant's allegation that his guilty plea was involuntary.

#### **C. All Other Allegations**

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this Order, this Court finds the Applicant failed to present any testimony, argument, or evidence at the hearing regarding such allegations. Accordingly, this Court finds the Applicant has abandoned any such allegations.

#### **IV. CONCLUSION**

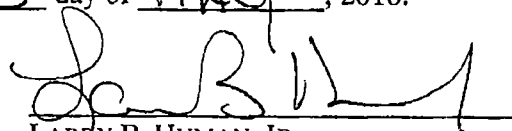
Based on the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, his application must be denied and dismissed with prejudice.

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 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on the Applicant's behalf. Applicant 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 3 day of May, 2016.



LARRY B. HYMAN, JR.  
Presiding Judge  
Seventh Judicial Circuit

Conway, South Carolina

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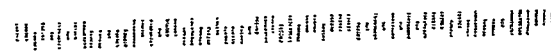
**M. HOPE BLACKLEY**  
Clerk of Court, Spartanburg County  
Post Office Box 3483  
Spartanburg, South Carolina 29304-3483

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235 E. Main St., Ste 115 PO Box 1015  
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CFS 2014-1532

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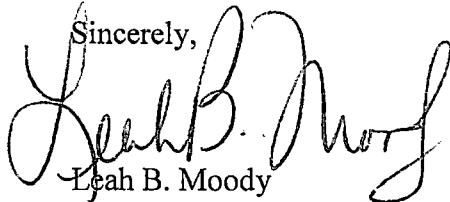
The Honorable Hope Blackley  
Spartanburg County Clerk of Court  
Post Office 3483  
Spartanburg, South Carolina 29304

**RE: Kenneth Nelson v. South Carolina**  
**Case No.: 2014-CP-42-1532**

Dear Ms. Blackley:

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

Sincerely,



Leah B. Moody

LBM/jh

Enclosures

cc Kenneth Nelson  
Alicia Olive, Assistant Attorney General  
Daniel E. Shearouse, Clerk of Court, South Carolina Supreme Court  
Sharon Graham, SCCID

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May 16, 2016

Alicia Olive, Esquire  
South Carolina Attorney General's Office  
Post Office Box 11549  
Columbia, South Carolina 29211

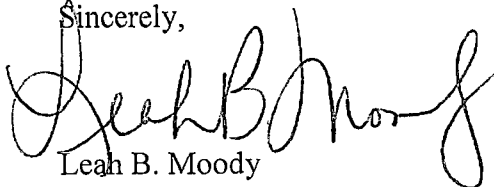
RE: Kenneth Nelson v. State of South Carolina  
C.A. No.: 2014-CP-42-1532

Dear Ms. Olive:

The Spartanburg County Court of Common Pleas appointed my office to represent Kenneth Nelson 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 Kenneth Nelson  
Daniel E. Shearouse, Clerk of Court, South Carolina Supreme Court  
Hope Blackley, Clerk of Court, Spartanburg County  
Sharon Graham, SCCID

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May 16, 2016

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

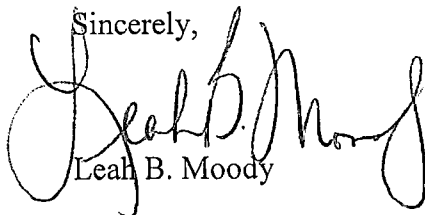
**RE: Kenneth Nelson v. State of South Carolina**  
**Case No.: 2014-CP-42-1532**

Dear Ms. Graham:

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

Thank you for your attention in this matter.

Sincerely,



Leah B. Moody

LBM/jh

Enclosures

cc Kenneth Nelson  
Alicia Olive, Esquire  
Daniel E. Shearouse, Clerk of Court, South Carolina Supreme Court  
Hope Blackley, Clerk of Court, Spartanburg County

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Law Office of Leah B. Moody, LLC  
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TO:

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

