

# Law Office of Leah B. Moody, LLC

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**S.C. SUPREME COURT**

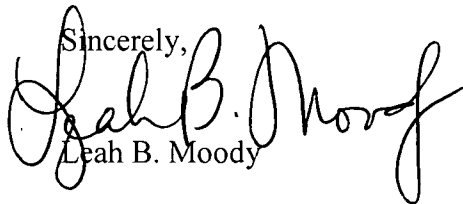
Mr. Daniel E. Shearouse  
The Supreme Court of South Carolina  
Post Office Box 11330  
Columbia, South Carolina 29221

**RE: Chuck Edward McCullough, #311608 v. State of South Carolina**  
**Case No.: 2013-CP-42-4979**

Dear Mr. Shearouse:

The York County Court of Common Pleas appointed my office to represent Chuck Edward McCullough 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

Enclosure

cc Chuck Edward McCullough  
Alicia Olive, Esquire  
Sharon Graham, SCCID  
M. Hope Blackley, Clerk of Court, Spartanburg County

IN THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM SPARTANBURG COUNTY  
Court of Common Pleas

S.C. SUPREME COURT

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The Honorable R. Ferrell Cothran, Jr., Presiding in Spartanburg County

C.A. No.: 2013-CP-42-4979

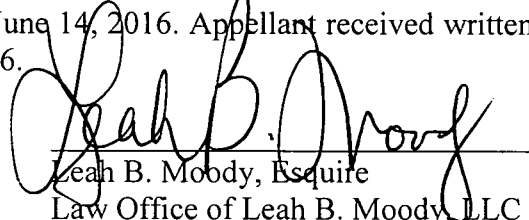
Chuck Edward McCullough, ..... Appellant,

v.

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

NOTICE OF APPEAL

Chuck Edward McCullough appeals the order of the Honorable R. Ferrell Cothran, Jr., dated June 8, 2016 and mailed on June 14, 2016. Appellant received written notice of entry of the final order on June 17, 2016.



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

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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SC SUPREME COURT

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APPEAL FROM SPARTANBURG COUNTY  
Court of Common Pleas

The Honorable R. Ferrell Cothran, Jr., Presiding in Spartanburg County

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Case Action No.: 2013-CP-42-4979

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Chuck Edward McCullough, ..... Appellant,

v.

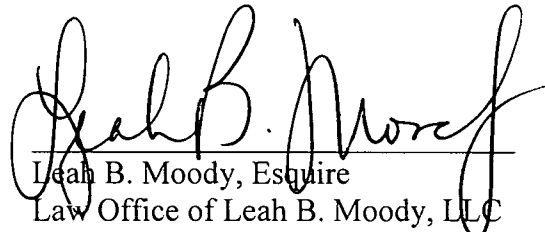
State of South Carolina, ..... Respondent.

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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 June 30, 2016 addressed to its attorney of record, Suzanne White, Post Office Box 11549, Columbia, South Carolina, 29211-1549.



Leah B. Moody, Esquire  
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June 30, 2016

cc Chuck Edward McCullough  
Daniel E. Shearouse, Clerk of Court, South Carolina Supreme Court  
Sharon A. Graham, SCCID  
M. Hope Blackley, Clerk of Court, Spartanburg County

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF SPARTANBURG )  
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 Chuck Edward McCullough, <sup>3/11/2016</sup> )  
 )  
 Applicant, )  
 )  
 v. )  
 )  
 State of South Carolina, )  
 )  
 Respondent. )  
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IN THE COURT OF COMMON PLEAS  
 FOR THE SEVENTH JUDICIAL CIRCUIT

Case No. 2013-CP-42-4979

**ORDER OF DISMISSAL**

This matter comes before the Court by way of an Application for Post-Conviction Relief filed December 16, 2013. Respondent made its Return on August 18, 2014. The Court convened an evidentiary hearing into the matter on January 13, 2016, at the Spartanburg County Courthouse. Applicant was present at the hearing and represented by Leah B. Moody, Esquire. Alicia A. Olive, Esquire, of the South Carolina Attorney General's Office, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant's plea counsel, Richard H. Whelchel, Esquire, also testified. The Court had before it copies of the plea transcript and the transcript of the hearing on the motion to reconsider the sentence, the records of the Spartanburg County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, and the pleadings. The Court first as follows:

**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. He was indicted at the May 2011 term of the Spartanburg County Grand Jury for possession with intent to distribute

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methamphetamine or cocaine base, third offense (2011-GS-42-2412), manufacturing methamphetamine, third offense (2011-GS-42-2413). Applicant was subsequently indicted at the May 2012 term of the Spartanburg County Grand Jury for unauthorized removal of a dead body (2012-GS-42-2465), exposing child to methamphetamine (2012-GS-42-2466), and unlawful conduct toward a child (2012-GS-42-2467). Applicant was represented by Richard Whelchel, Esquire, ("Counsel") and James Cheek, Esquire. On August 2, 2012, the Applicant pleaded guilty as indicted pursuant to North Carolina v. Alford.<sup>1</sup> The Honorable J. Mark Hayes, II, sentenced Applicant to concurrent terms of thirty years for manufacturing methamphetamine, ten years each for possession of methamphetamine and unlawful conduct toward a child, five years for exposing a child to methamphetamine, and sixty days for unauthorized removal of a dead body.

A timely Notice of was filed on Applicant's behalf. The South Carolina Court of Appeals dismissed the Applicant's appeal for failure to provide an explanation of any issues to be addressed on appeal pursuant to Rule 203(d)(1)(B)(iv), SCACR, on November 25, 2013. The Remittitur was returned to the circuit court on December 12, 2013.

## II. ALLEGATIONS

In his application, Applicant alleged he is being held in custody unlawfully for the following reasons:

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1. Ineffective assistance of counsel, in that;
    - a. Counsel failed to investigate,
    - b. Counsel failed to file a motion to suppress illegally seized evidence,
    - c. Counsel induced Applicant's guilty plea as a result of erroneous legal advice,
    - d. Counsel allowed his arguments to be influenced by law enforcement on the day of Applicant's plea,
    - e. Applicant did not have adequate time to prepare a response on day of plea.

<sup>1</sup> 400 U.S. 25 (1970).

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**III. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

The Court has reviewed the record in its entirety and has heard the testimony and arguments presented at the evidentiary hearing. The Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. The Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80.

**A. Summary of Testimony**

Applicant testified that Counsel should have objected to improper comments made at the plea hearing. He testified that the State did not make a recommendation regarding sentencing prior to the plea. Applicant testified that he backed out of an earlier plea prior to his August 12, 2012, plea because his wife, Carissa McCullough, was not there. Applicant testified that the next day Counsel brought him discovery and he asked what his chances were at trial. Applicant testified his wife pleaded guilty to the same charges. Applicant testified that Counsel told him he did not see him getting any more than ten years.

Applicant testified that Counsel failed to investigate—specifically, that he failed to investigate his prior record. Applicant testified he had two prior possession cases and did not have counsel on one. Applicant testified that one of those prior convictions was a possession of methamphetamine case that he was allowed to proceed on even though counsel was not present. Applicant testified that Counsel allowed his argument to be influenced. Applicant testified that the solicitor had made a comment at the plea that he was the "head" of the manufacturing operation. Applicant testified that Counsel did not object to this statement, but Applicant later admitted that his attorneys challenged these statements and asked the Court place a cooling aspect on the inflammatory comments made in crafting a sentence. Applicant testified that he did

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not review discovery, and did not discuss his prior record. Applicant testified that there was a motion to reconsider the sentence and a hearing was held on the motion. He testified that phone calls from the jail were introduced and that the print outs of the phone calls influenced the judge to make his decision. Applicant testified that his defense was that he was not manufacturing methamphetamine.

Counsel testified that he has been practicing law for thirty-four years. He testified he met with Applicant about a dozen times prior to the plea, and that he reviewed the discovery with Applicant. Counsel briefly summarized the State's evidence against Applicant, and stated that Applicant's wife, the child's mother, Carissa McCullough, gave consent to search her truck and gave a Mirandized statement and that their home was searched pursuant to a search warrant. Counsel stated his primary concern was that he wanted to give the Court time to think between hearing the facts of the case and sentencing Applicant because although the facts involved a deceased infant, there was no connection between the death of the child and the drugs. He stated he pointed this out to the judge.

Counsel stated that he never promises clients a particular sentence but that he gives them a range and advises them. Counsel testified that he advised Applicant of the elements of the charge and possible defenses. Counsel testified that Applicant had a difficult time understanding how he was facing a manufacturing methamphetamine third offense since he only had possession priors. Counsel testified he advised him about the statutes pertaining to enhancement of charges and that he explained that since he had at least two prior convictions, the charge was enhanced to third offense on that basis. Counsel testified he did not object to the 911 calls and that he was trying to get the judge to understand the death was not related to the drugs. Counsel testified that Applicant did not want to go to trial but he did not want to plead guilty. Counsel

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testified that at one point Applicant wanted to go to trial because he told Counsel he was not guilty. Counsel told him he could go to trial or he could enter an Alford plea. Counsel testified he explained to Applicant the nature of an Alford plea. Counsel testified that he was ready to go to trial, but Applicant wanted to plead.

**B. Ineffective Assistance of Plea Counsel**

In this post-conviction relief action, Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove 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." Id. at 442, 334 S.E.2d at 814 (citing Strickland v. Washington, 466 U.S. 668 (1984)).

The proper measure of performance is whether counsel provided representation within ~~the range of competence required in criminal cases.~~ Id. (citing Strickland, 466 U.S. at 687; Turner v. Bass, 753 F.2d 342 (4th Cir. 1985); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977)). The Court presumes counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. (citing Strickland, 466 U.S. at 690). Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The Court uses a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. at 117, 386 S.E.2d at 625. First, Applicant must prove counsel's performance was deficient. Id. Under this prong, the Court measures counsel's performance by "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688).

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Second, any deficient performance must have prejudiced 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, 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).

Based on the bulk of the testimony presented at the evidentiary hearing, this Court finds Applicant has failed to satisfy his burden of proving any deficiency in Counsel's performance or any prejudice resulting from any alleged deficiencies. This Court finds that Counsel is a seasoned professional in the area of criminal law and finds his testimony credible.

***Failure to challenge prior conviction***

Applicant alleged Counsel failed to investigate his prior convictions and challenge their use for enhancement purposes. Applicant asserts Counsel should have attacked his prior ~~possession charge because it resulted from an uncounseled plea and as a result would have~~ prevented the State from using the conviction as an enhancement. A criminal "defendant bears the burden of proof when collaterally attacking a prior conviction which the State seeks to use under a sentence enhancement statute." State v. Payne, 332 S.C. 266, 269, 504 S.E.2d 335, 336 (Ct. App. 1998) (finding defendant failed to produce any evidence to prove allegation that prior conviction was acquired without counsel in violation of Faretta v. California, 42 U.S. 80 (1975)). Here, Applicant had two prior convictions for possession of methamphetamine ~~offense from 2003 and a second offense from 2005. Counsel was familiar with Applicant's prior convictions and testified he explained the enhancement statutes to Applicant and explained that~~ because he had two prior convictions for possession of methamphetamine, the manufacturing

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charge was enhanced to a third offense. Applicant has failed to present evidence in support of his contention that his prior conviction was acquired in violation of the dictates of Faretta v. California, 422 U.S. 806. Therefore, Applicant has failed to show Counsel was deficient for not challenging the use of his prior conviction for enhancement purposes on that basis, or that he was prejudiced by the alleged deficiency. The Court finds counsel conducted a proper investigation, adequately conferred with Applicant, and was thoroughly competent in his representation. Accordingly, this allegation is denied and dismissed.

***Failure to move to suppress evidence***

Applicant alleged Counsel failed to file a motion to suppress illegally seized evidence. This Court finds this allegation is without merit. Based on the testimony at the PCR hearing and in the plea transcript, Carissa, the registered owner of the truck, gave verbal and written consent to search the vehicle after they were intercepted by investigators while travelling with their infant's body. Carissa also gave a statement after receiving Miranda warnings. Thereafter, ~~investigators obtained a search warrant for the couple's residence to look for poisons. Based on~~ the investigators' immediate observations upon entering the home, they also obtained a narcotics search warrant. The search of the truck produced drug paraphernalia. The search of the residence yielded additional evidence against Applicant. Applicant has made no showing that Counsel had any legal basis to move to suppress the evidence obtained as a result of the search warrants and Carissa's consent, or that such motion would have been successful. See Arnette v. State, 806 So.2d 556, 557, 413 S.E.2d 803, 804 (1992) (finding counsel not ineffective for failing to advise of potential defense where no evidence exists to support the defense).

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Regardless, a knowing and voluntary guilty plea waives any non-jurisdictional defects and defenses, including challenges to the sufficiency of the evidence. See Whetsell v. State, 276

S.C. 295, 297, 277 S.E.2d 891, 892 (1981) (citing Rivers v. Strickland, 264 S.C. 121, 213 S.E.2d 97 (1975); State v. Fuller, 254 S.C. 260, 174 S.E.2d 774 (1970)); See also Palacio v. State, 333 S.C. 506, 514, 511 S.E.2d 62, 67 (1999) (finding no deficiency where "it would have been futile for Attorney to have made such arguments"). Counsel testified he reviewed all discovery with Applicant, explained the charges against him and discussed any possible defenses he might have to those charges. Counsel testified that he was prepare to go to trial but Applicant decided to enter an Alford plea. Therefore, this Court finds Applicant has failed to show either deficiency or prejudice as to this allegation. Accordingly, this allegation is denied and dismissed.

***Counsel allowed arguments to be influenced by law enforcement***

Applicant alleges Counsel allowed his arguments to be influenced by law enforcement on the day of his plea. Applicant has produced no evidence in support of this allegation. At Applicant's plea, investigator Hutchins asked for the maximum sentence and stated he was "the head of the manufacturing of methamphetamine snake." (Plea Tr. p. 20, lines 4-6). In response, ~~and in mitigation, Counsel argued he did not see anything in the volumes of discovery he~~ received that indicated Applicant was the kingpin of meth producers in Spartanburg County. Counsel stated the real problem was that there was a young child who died. Counsel also argued that the autopsy showed that the child choked on his own vomit, and that there was "nothing to suggest that any meth lab, or any of the items there had anything to do with the child's death." (Plea Tr. p. 23, lines 1-2). Furthermore, James Cheek, who also assisted at the guilty plea, asked the Court to . . . take into consideration that there are some things that are really inflammatory and "ask[ed] the Court to put a cooling aspect on all of that as the Court fashion[ed] a sentence because there's nothing to show that any of [Applicant's] involvement with the drugs extended beyond himself and [Carissa's] use." (Plea Tr. p. 27, line 22-p. 28, line 2). In addition, Counsel

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made a motion to reconsider the sentence and a hearing was held on the motion on May 23, 2013. Ultimately, however, the Court did not change the sentence. This Court finds Applicant has failed to make any showing that Counsel was deficient in this regard or that he was prejudiced by any alleged deficiency. Accordingly, the allegation is denied and dismissed.

***Applicant did not have adequate time to prepare a response on day of plea***

Applicant alleges he did not have adequate time to prepare a response to the State's comments on the day of his plea. This Court finds Applicant has failed to produce any evidence in support of this allegation. Furthermore, 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)). Accordingly, this allegation is denied and dismissed.

**C. Involuntary Guilty Plea**

~~Applicant alleges he was induced to plead guilty as a result of erroneous legal advice.~~

This Court finds Applicant's guilty plea was entered freely and voluntarily. 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)). Therefore, statements made during a guilty plea should be considered conclusive unless a criminal inmate presents valid reasons why he should

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be allowed to depart from the truth of his statements. Crawford v. United States, 519 F.2d 347 (4th Cir.1975).

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)).

This Court finds 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. Counsel informed Applicant of his constitutional rights, and Applicant waived these rights, including the right to a jury trial, right to remain silent, and right to confront witnesses. Counsel was thoroughly competent in his representation and adequately advised Applicant regarding the advantages and disadvantages of pleading no contest, given the substantial evidence against him. Therefore, the Court finds Applicant has failed to show that Counsel's performance was deficient or that any alleged

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deficient performance prejudiced him. Accordingly, this Court hereby denies and dismisses Applicant's allegation that his guilty plea was involuntary

**D. 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, 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. 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), SCRCR, 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 procedure for appeal.

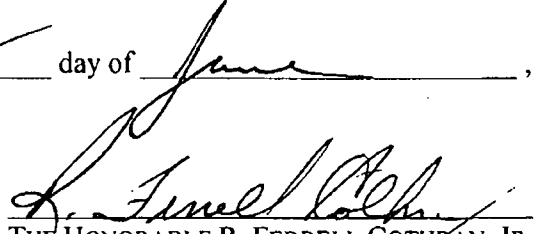
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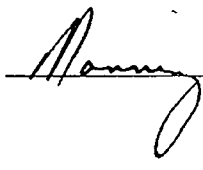


**IT IS THEREFORE ORDERED THAT:**

1. The Application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. Applicant must be remanded to the custody of the Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 8 day of June, 2016.

  
THE HONORABLE R. FERRELL COTHMAN, JR.  
Presiding Judge

, South Carolina

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

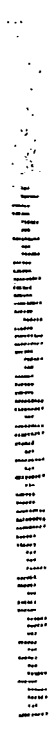
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# Law Office of Leah B. Moody, LLC

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**S.C. SUPREME COURT**

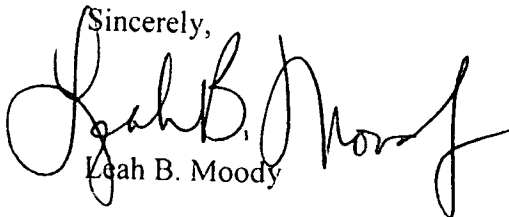
The Honorable M. Hope Blackley  
Spartanburg County Clerk of Court  
Post Office 3483  
Spartanburg, South Carolina 29304

**RE: Chuck Edward McCullough, #311608 v. State of South Carolina**  
**C.A. No.: 2013-CP-42-4979**

Dear Ms. Blackley:

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

Sincerely,



Leah B. Moody

Enclosures

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

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Post Office Box 11549  
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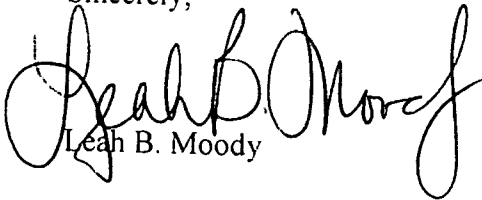
RE: Chuck Edward McCullough, #311608 v. State of South Carolina  
C.A. No.: 2013-CP-42-4979

Dear Ms. Olive:

The Spartanburg County Court of Common Pleas appointed my office to represent Chuck Edward McCullough 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

Enclosures

Cc Chuck Edward McCullough  
Daniel E. Shearouse, Clerk of Court, South Carolina Supreme Court  
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June 30, 2016

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

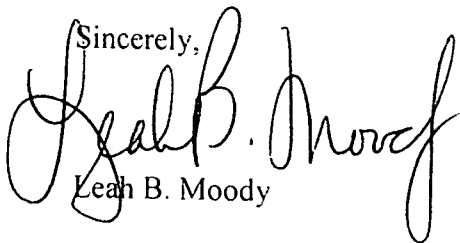
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**Case No.: 2013-CP-42-4979**

Dear Ms. Graham:

The York County Court of Common Pleas appointed my office to represent Chuck Edward McCullough 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

Enclosures

cc Chuck Edward McCullough  
Alicia Olive, Esquire  
Daniel E. Shearouse, Clerk of Court, South Carolina Supreme Court  
M. Hope Blackley, Clerk of Court, Spartanburg County

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TO:

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