

In THE State OF SOUTH CAROLINA
In the Supreme Court

RECEIVED

JUL 18 2016

APPEAL FROM SPARTANBURG County
Court of Common Pleas

S.C. SUPREME COURT

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

CA. NO. 2013-CP-42-4979

Chuck Edward McCullough Appellant,

v.

State of South Carolina Respondent.

MOTION TO REMAND
under (SCACR) Rule 224(a)

July 13, 2016
Other Counsel of Record:
Alicia Olive, S.C. Attorney General Office
Rembert C. Dennis Building
P.O. Box 11549
Columbia, S.C. 29211
(803) 734-3970

S/ Chuck Edward McCullough
Chuck Edward McCullough Inmate # 311608
McCormick Correctional Inst. F-1-236
386 Redemption Way
McCormick, S.C. 29899

IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM SPARTABURG COUNTY
Court of Common Pleas

THE Honorable R. Ferrell Cottrhan Jr., Presiding In Spartanburg County

CASE ACTION NO: 2013-CP-42-4979

RECEIVED

Chuck Edward McCullough Appellant

JUL 18 2016

v.

State of South Carolina Respondent.

S.C. SUPREME COURT

AFFIDAVIT OF PROOF OF SERVICE

I, Chuck Edward McCullough, certify that I have served the notice of Motion to Remand (SCACR) Rule 224(a) on Daniel E. Shearouse, Clerk of South Carolina Supreme Court by depositing a copy of it in the United States Mail, postage prepaid, on July 13 2016 addressed to Mr. Daniel E. Shearouse, the Supreme Court of South Carolina Post Office Box 11330 Columbia, South Carolina 29221

5/ Chuck Edward McCullough

Sworn and Subscribed before me
on this 13 day of July 2016

Chuck Edward McCullough # 311608

Inmate SCDC

J. Franklin

Notary Public for South Carolina
My Commission Expires on 12-16-2019

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

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(Note: Attachment #3 is the Complete Motion sent to Leah Moody)

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Argument

I. ORDER failed to Comply with S.C. Code 17-27-80, Rule 52(a) SCRCP.	2
II. Counsel failed to uphold S.C. 17-27-80, and failed to file 59(E) SCRCP.	3

IN THE STATE OF SOUTH CAROLINA
IN The Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

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

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

Chuck Edward McCullough Appellant,

State of South Carolina^{v.} Respondant.

NOTICE OF MOTION TO REMAND
under (SCACR) Rule 224 (a)

Chuck Edward McCullough, NOW brings this matter before the Court of Appeals by way of a "MOTION TO REMAND" order of dismissal to the PCR Court, pursuant to (SCACR) Rule 224(a); Bryson v. State 328 S.C. 236, 493 S.E.2d 500 (1997).

The contention of this motion is for (2) procedural reasons that are extraordinary circumstances that are as follows:

I.

The order dismissing Appellant's Post-Conviction relief application received on June 17, 2016, filed with this court on June 30, 2016 fails to comply with S.C. Code ANN § 17-27-80 (1985) and Rule 52 (a) SCRCP. Because
2003

(SEE: page 6, Attachment # 1) (Order of Dismissal p. 11) In Section D. All Other Allegations the language in this section does not contain specific finding of facts and conclusion of law with regard to each issue raised in his application and at the hearing thereon. (SEE: page 7, Attachment # 2) This is evidence that there does exist issues that are not specifically addressed in the order. Pruitt v. State 310 S.C. 254, 423 S.E.2d 127 (1992); McCray v. State 305 S.C. 329, 408 S.E.2d 241 (1991).

Appellant ask the Court to exercise its discretion to remand this matter to the Post-Conviction Relief Judge to make proper findings of facts, conclusions of law, and "in the interest of Justice" allowing Appellant his fair "Bite of the Apple" to have his meritorious issues preserved for appellant review.

II.

PCR Counsel Leah Moody failed in upholding her obligation, as counsel, by complying with the rules set forth under S.C. Code ANN § 17-27-80, SCRCP 52(a) and failed to uphold her clients continuous request to file a Rule 59(E) SCRCP on his behalf addressing the merits, and preserving the issues for appellant review. (SEE: page 10, Attachment # 3) (Motion to Alter or Amend Judgement, Proof of Service) (p. 8-18 ATT. 3)

IN Light of Marlar v. State 375 S.C. 407, 653 S.E.2d 266 (2007) (Cat. 410) "[C]ounsel preparing proposed orders should be meticulous in doing so, opposing counsel should call any omissions to the attention of the PCR Judge prior to issuance of the order, and the PCR Judge should

Carefully review the order prior to signing it. Even after an order is filed, counsel has an obligation to review the order and file a Rule 59(e) SCRPC (Motion to alter or Amend Judgement) if the order fails to set forth the findings and the reasons for those findings as required by 17-27-80 and Rule 52(a) SCRPC. (Fruitt v. State 310 S.E. 2d at 256, 423 S.E. 2d at 128.

Appellant should not have to suffer because of a error by his counsel. Appellant has done all he can do while represented by counsel. (SEE: page 10- Attachment # 3) This is evidence that there was a timely motion to preserve issues submitted by Applicant to his attorney within the 10 days allowed. The motion included issues not ruled on, objections that needed reconsideration to get proper rulings and to preserve them for review. Also Appellant addressed Counsel that page 6 was missing from the order (see also page 11. Attachment #3)

(SEE: page 11. Attachment #4) This is evidence that Leah Moody recieved Appellants Rule 59(E), because she addresses the issue of Page 6 missing from the order that was submitted to her on June 20, 2016. Counsel failed to file the motion and confer with her Client in regards to the issues in the motion. It is misrepresentation! again, Appellant should not suffer because of counsels actions.

Ultimately, after the PCR hearing that was held on January 13, 2016. Appellant wrote a letter to his counsel dated January 19, 2016. (SEE: page 19. Attachment #5) This is evidence that Appellant was concerned about his issues being preserved for review. Evidence shows the court that Appellant exercised "Due Diligence" and sought to do all he could do to make sure counsel would uphold his "fair bite of the Apple"

In the "Interest of Justice", Appellant request that it will follow the holdings in McCullough v. State 320 S.C. 270, 272, 464 S.E. 2d 340, 341 (1995) ("remanding matter to PCR court, despite the fact that no Rule 59(e) SCRPC motion had been filed, and admonishing all those involved to carefully prepare and review PCR orders to ensure they specifically address the issues raised and make conclusions of law.") See also Bryson v. State supra.

Conclusion

For the reasons outlined above, Appellant respectfully ask the Court to grant this Motion to Remand.

July 13, 2016
Other Counsel of Record:
Alicia Olive, S.C. Attorney General's Office
Rembert C. Dennis Building
P.O. Box 11549
Columbia, S.C. 29211
(803) 734-3970

I so move,
SI Chuck Edward McCullough
Chuck Edward McCullough Inmate # 311608
McCormick Correctional Inst. F1-236
386 Redemption way
McCormick, S.C. 29899

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), 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 procedure for appeal.

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2016 JUN 13 PM 1:12
M. LOPE BLANKLEY

Attachment

1

2307

Law Office of Leah B. Moody, I.L.C

235 East Main Street
Post Office Box 1015
Rock Hill, South Carolina 29731
lbmatty@comporium.net

Phone: (803) 327-4192

Fax: (803) 329-1344

January 5, 2015

Suzanne White, Esquire
Office of the Attorney General
P. O. Box 11549
Columbia, SC 29211

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

Dear Ms. White:

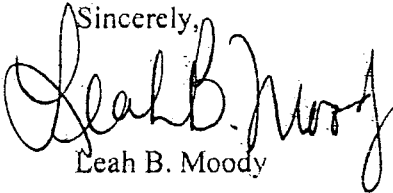
Please be informed that the following amendments need to be made to Mr. Chuck Edward McCullough's PCR Application in the above-referenced matter.

The amendments to Mr. McCullough's PCR Application would be amended under Question 10 and may be generally described as:

- (1) Prosecutorial Misconduct;
- (2) Unconstitutional Sentence Enhancement;
- (3) Subject Matter Jurisdiction; and
- (4) Judicial Misconduct.

If you have any questions or concerns, please feel free to contact my office.

Sincerely,



Leah B. Moody

Attachment

2

LBM/scm

Cc: Chuck Edward McCullough
The Honorable M. Hope Blackley

State of South Carolina)
County of Spartanburg)
Chuck Edward McCullough)
#31608)
Case no. 2013-CP-42-4979

v.

State of South Carolina) AFFIDAVIT of CERTIFICATE of SERVICE

I, Chuck Edward McCullough, hereby certifies that a letter (MOTION to Alter or Amend Judgement) pursuant to (SCR Civ.P.) Rule 59(e) has been served to Attorney for Mr. McCullough Leah B. Moody, ON June 20 2016 by placing in the United States Mail, Postage Prepaid card addressed as follows:

Law Office of Leah B. Moody, LLC
235 E. Main St. Suite 115
P.O. Box 1015 (29731)
Rock Hill, South Carolina, 29730

Attachment # 3

Chuck E. McCullough 6-20-16
Applicant 2013-CP-42-4979

Sworn and Subscribed before me on this 20th day of June 2016.

Michael Carwine Michael Carwine
Notary Public for South Carolina

My Commission Expires July 09, 2026



"Judge not according to
the appearance, but judge righteous
Judgement."

John 7:24

Received order on June 17, 2016

Dear Mrs. Moody, Page 6 of the order is missing.

PLEASE! file this Rule 59(e) motion for me.

It is within the 10 days allowed. PLEASE! Help me
with my only opportunity for preserving my issues
and a fair chance for reconsideration. MS. OLIVE
only chose what she wanted in the order. It is
obvious. PLEASE! I need you to file this!
Then, file my appeal.

Your client,

Chuck E. McCallough
6-20-16

C.C. Leah Moody
C.C. P. Ale

State of South Carolina)
 County of Spartanburg)
 Chuck Edward McCullough)
 #311608)
 Applicant,)
 v.)
 State of South Carolina)
 Respondant.)

IN The Court of Common Pleas
 For the Seventh Judicial Circuit
 Case No. 2013-CP-42-4979
 (S.C. Civ. P.) Rule 59 E
MOTION TO ALTER OR AMEND
Judgement

This matter comes before the Court by way of a motion to alter or amend judgement, pursuant to Rule 59(e) (S.C. Civ. P.) Rule 71.1(a) (S.C. Civ. P.) instructs parties to follow rules of Civil Procedure. Opposing Counsel should call any omissions to the attention of the (PCR) Judge prior to issuance of the Order... (S.C. code 17-27-80) The Order has already been issued, therefore, the reasons for applicants Rule 59(E) is as follows with objections:

I.

The following issues were raised at (PCR) hearing. The order of Dismissal fails to give a ruling on the issues.

A. Due Process Violation

1. There was testimony at the (PCR) that the Plea Judge misinformed Mr. McCullough of the direct consequences of the plea for a third offense under (S.C. code) 44-53-375 (B)(3). when the Statutes language is plain that the sentence can be either suspended probation granted, or both, and the court says it can't. Then

Page 1 of 7

it violates the defendant's right of Due Process. Ultimately, it violates the fundamental fairness of the Statute, and lawmakers intent of the Statute as well the fairness and integrity of the plea process. Pursuant to Boykin v. Alabama

There was not a ruling for this issue. This issue needs to be preserved for appellant review.

2. There was testimony that certain recorded phone calls were used and inadmissible after withdrawn from evidence. It affected the fundamental fairness of the plea and affected the outcome of the plea, motion to reconsider. There was not a ruling for this issue. This issue needs to be preserved for appellant review.

II.

The following issues were ruled on. Applicant's reason for this (59(E)) motion is because Applicant has stated his objections to the ruling and ask to Alter, Amend and Reconsider the following:

A. Counsel failed to investigate prior Record.

Page 6 is missing from the order. The order on Page 7 says that applicant failed to present evidence in support of his contention that his prior conviction was acquired in violation of Faretta v. California 442 U.S. 806

Page 2 of 7

Attachment
3

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Attachment # 3

"OBJECTION"

Exhibits were presented at the PCR hearing that showed that Applicant on his first Drug charge, he had appointed counsel and was not represented by counsel on the day of the plea. Applicant signed (pro se) and still had counsel. He did not waive counsel, as testimony and evidence showed, He paid restitution of \$500.00 to the PD office. There is no hybrid representation in S.C.

Applicant also presented a letter after Due Diligence of trying to obtain the transcript, the Clerk of Court said that those records had been destroyed. Applicant's reason for the transcript was to prove he unknowingly proceeded (pro se) without being warned of the dangers of self-representation as required by Faretta v. California 422 U.S. 806 and can not be used for enhancement.

("where record of a prior conviction is silent as to presence of counsel, it is presumed that Sixth Amendment rights of the defendant have been violated and conviction of such defendant under recidivist statute is invalid unless state can show affirmatively waiver of counsel.") Brown v. State, 483 F.2d 116.

Applicant ask the court to reconsider ruling with consideration to grant PCR Relief, remand for resentencing as Second offense, or NEW TRIAL.

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Attachment #3

B. INVOLUNTARY Guilty Plea

Page 9 in the order of dismissal says that, "This court finds Applicant's guilty plea was entered Freely and voluntarily."

"OBJECTION"

The order of dismissal has completely disregarded testimony from the PCR Judge, and PCR Counsel for the applicant. Testimony and evidence showed that the Plea judge "MISINFORMED" applicant of the direct consequences of the plea for (S.C. code) 44-53-375(B)(3). The Plea judge stated on (T.S.p.17 Line 6-9)

Line 6. The Court: And do you understand that what ever sentence

7. I impose that particular charge, that it cannot
8. be -- that no probation can be given and that
no parts of the sentence can be suspended?

9. Mr. McCullagh: Yes, sir.

at the time of sentencing the statute's language allowed a third offense under (S.C. code 44-53-375 B.3.) that where all prior convictions are for possession pursuant to subsection (A) may have the sentence suspended or probation granted ... This Misinformation violated Due Process, the right to a fundamental fair trial, undermined the fairness of the Statute and is in violation of Boykin v. Alabama 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969).

("A guilty plea is considered INVOLUNTARY and thereby invalid if the defendant is in total ignorance of the range of

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Attachment #3

punishment the plea carries.") 21 AM. Jur Criminal law § 601

"A statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the law makers." State v. Sweat 386 S.C. at 350, 688 S.E.2d at 575. Therefore the Misinformation is "AN abuse of discretion." the sentence is Procedurally unreasonable.

Applicant ask the Court to reconsider the ruling with consideration to Grant PCR Relief, remanding for resentencing with consideration for Suspended sentence, Probation, or NEW TRIAL.

C. Ineffective Assistance of Counsel

Page 10 and 11 in the "order of Dismissal" says that "the Court finds Applicant has failed to show that Counsel's performance was deficient or that any alleged deficient performance prejudiced him.

"OBJECTION"

Applicant did at (PCR) prove counsel was ineffective pursuant to Hill v. Lockhart 474 U.S. 52 (1985). Plea Counsel testified at (PCR) that he understood the language in (S.C. code 44-53-375 B.3.). He also testified that he could not recall discussing the statute with Mr. McCullough. Ultimately, however, failing to object to the "MISINFORMATION" from the Judge, that he could not

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Attachment # 3

suspend the sentence nor grant probation, correcting that information, and protecting his clients right to Due Process rendered the plea involuntary and a violation of the Sixth, and Fourteenth Amendments of the Constitution, Boykin v. Alabama.

"His performance fell below the professional norms that is an objective standard of reasonableness demanded by the Sixth amendment." McMann v. Richardson 397 U.S. 759, 771 (1970)

Plea Counsel also testified that Applicant was scared on the day of the plea, that on minute Applicant wanted to go to trial, then wanted to plea. Counsel testified he didn't know what his client wanted to do, but yet allowed Applicant to plea guilty. This is evidence the plea was induced. Applicant plea believing that he wouldn't get more than 10 years. He (counsel) never testified that he directly discussed the case with his client, He Generalized.

PREJUDICE was proven at PCR when Plea Counsel failed to correct the Misinformation from the Judge, and ask the court to consider that Mr. McCullough's prior record reflects only possession charges pursuant to Subsection (A) of 44-53-375 and ask for a suspended sentence or probation or both. Prejudice is injected at that point, because of that failure it undermined the confidence in the outcome of the plea. Had counsel done his job, there exist a probability that the outcome could have been more favorable to the defendant.

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("petitioner prejudiced to the extent that there exists a probability that counsel's deficient performance affected the outcome of petitioner's trial")

Simmons v. State 308 S.C. 481, 419 S.E.2d 225 (1992)

Applicant ask the Court to reconsider the ruling. Due Process would require that Applicant be resentenced, or a NEW TRIAL granted with the help of effective Counsel. Also give a ruling on the issue of failing to object to Misinformation from the plea Judge, regarding consequences of (44-53-375 B.3).

Applicant ask respectfully, that this Rule 59(e) (SCR Civ.P.) be filed and granted with respect to the matters addressed therein. Therefore, preserving issues for Appellate review, if the PCR is not granted after Reconsideration.

I so move,

Chuck E. McCullough 311608 6-20-16
Chuck E. McCullough Applicant

c.c. : Leah Moody
c.c. copy : personal file page 7 of 7

Law Office of Leah B. Moody, LLC

Leah B. Moody
Lbmatty@comporium.net

235 East Main Street, Suite 115
Post Office Box 1015 (29731)
Rock Hill, South Carolina 29730
Telephone (803) 327-4192
Facsimile (803) 329-1344

June 30, 2016

Chuck Edward McCullough, #311608
McCormick Correctional Institution
386 Redemption Way
McCormick, SC 29899

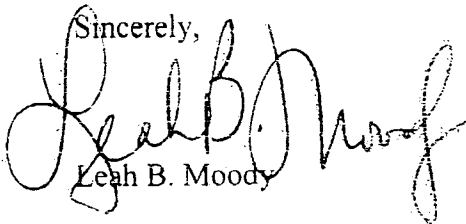
RE: Chuck Edward McCullough, #311608 v. State of South Carolina
Case No.: 2013-CP- 42-4979

Dear Mr. McCullough:

Please find enclosed a filed copy of the Order Denying Relief, Notice of Appeal, and Proof of Service regarding your case with my office. I contacted the SC Attorney General's Office regarding the page 6. It appears the Spartanburg Clerk of Court left the page out and they sent it to me.

If you have any questions or concerns, please feel free to contact our office.

Sincerely,



Leah B. Moody

Enclosures

Attachment
4

Page 17 of 20

Attachment # 4

In The State of South Carolina
County Spartanburg

Chuck Edward McLaughlin #31105
applicant

State of South Carolina
Respondent

In The Court of Common Pleas

Affidavit of Service

CA NO: 2013-CP-42-4979

I, Chuck Edward McLaughlin, hereby certify that I have served one letter, original, with concerns for filing S9 E Motion, and Transcript from Motion to Reconsider, by depositing Letter in United States Mail, Postage Received on Jan 19 2016 addressed to attorney for applicant Leah B. Moody as follows:

Law Office of Leah B. Moody, LLC
235 East Main St
P.O. Box 1015
Rock Hill, S.C. 29731

by Chuck E. McLaughlin
Chuck Edward McLaughlin #31105

Sworn to and Subscribed before me
this 19th day of January, 2016
Henry G. Martin

Notary Public for South Carolina
My Commission Expires on
Jul 21 2018

Attachment
5

Chuck Edward McCreagh #311608

APCE F-1-236

586 Redemption way

McLinnick, S.C. 29097

Date: Jan. 19, 2016

Law Office of Leah S. Moody, LLC

235 East Main Street

P.O. Box 1015

Rock Hill, S.C. 29731

In RE. Transcript of Motion to Reconsider; Filing Rule 59(E) SCR Civ.P.

Dear Mrs. Moody:

First, I want to remind you to send me a copy of the Reconsideration transcript, as you said you would. Please also send me a copy of Mr. Whelchel's case file

Secondly: In the event (PCR) was unsuccessful, I ask you at court to file a 59 E (SCR Civ.P.) on my behalf. I want you to make sure the court gives findings of fact with supporting law on each issue raised bringing that each issue is properly preserve for review. Pursuant to S.C. Code § 17-27-50 and Rule 59(a) (SCR Civ.P.).

(SCR Civ.P.) Rule 71.1: instructs parties to follow rules of Civil Procedure

(SCR Civ.P.) Rule 59(E): Motion to alter or amend if the order fails to set forth the findings and the reasons for those findings as required by section 17-27-50 (S.C. code of law) and Rule 59(a) (SCR Civ.P.)

page 1 of 2

cc. p. 19c
original copy

Page 19 of 20

Attachment # 5

SC Code § 17-27-80 (2003): PCR Court must make specific findings of fact and state expressly its conclusions of law relating to each issue presented.

Supreme Court Held: Counsel preparing a proposed order should be meticulous in doing so, opposing counsel should call any omissions to the attention of the (PCR) Judge prior to issuance of the order and the (PCR) Judge should carefully review the order prior to signing it. Even after an order is filed a Rule 59(E) (S.C.R.Civ.P.) (motion to alter or amend) if the order fails to set forth the findings and the reason for those findings as required by section SC Code 17-27-80, Rule 52(a) S.C.R.C.P.

Markus v. State 375 S.C. 407, 653 S.E.2d 266 (2007)
("preserving the issues by Rule 59(E) S.C.R.C.P.")

McCullough v. State 320 S.C. 270, 272; 464 S.E.2d 340, 341 (1995)
("Remanding matter to PCR court despite the fact that no Rule 59(E) motion had been filed, and admonishing all parties to carefully prepare and review PCR orders to ensure that they specifically address the issues raised and made conclusions of law.")

Being I'm represented by counsel, I can not file a motion to the court, or read the order before the 10 days is up. Therefore, I renew my request and ask you to file this 59E motion if the issues were not preserved.
Thank you for patients.

God Bless.

Mark C. McCullough 1-19-16

Page 2 of 2

Page 20 of 20

Attachment # 5

Chuck Edward McCallough # 311608

McCormick Correctional Institute F-1-236

386 Redemption Way

McCormick, SC 29899

Mr. Daniel E. Shearouse

The Supreme Court of South Carolina

Post Office Box 11330

Columbia, South Carolina 29221

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

RECEIVED

JUL 13 2016

MCCI
MAIL ROOM

THE DEPARTMENT OF CORRECTIONS HAS NOT
INSPECTED OR CENSORED THIS ITEM. THEREFORE,
THE DEPARTMENT CANNOT ASSUME RESPONSIBILITY
FOR ITS CONTENTS.

MEMORANDUM CORRECTIONAL INST.
S.C. DEPARTMENT OF CORRECTIONS

LEGAL MAIL
MAIL ROOM