

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

The Honorable R. Keith Kelly, Circuit Court Judge

Case No. 2014-CP-42-5088

Norman Lance Garner,

Respondent,

2016-001326

v.

State of South Carolina,

Appellant.

MOTION FOR BOND PENDING APPEAL

Pursuant to Rule 243(k) of the South Carolina Appellate Court Rules, Norman Lance Garner, the Respondent herein, moves the Court for an order granting him bail in this matter pending the resolution of this Appeal. This motion is based upon the following facts:

1. Respondent was convicted on August 8, 2013 on two counts of Criminal Sexual Conduct with a Minor, Second Degree. He was sentenced to twelve years' incarceration, with credit given for time served. He appealed his sentence and conviction; however, he withdrew that appeal and the appeal was dismissed in August of 2014.

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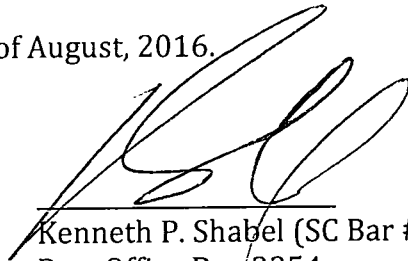
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S.C. SUPREME COURT

2. Respondent filed a Post-Conviction Relief Application on December 23, 2014. The order from his PCR case was filed on May 16, 2016. That Order granted Respondent Post-Conviction Relief. A copy of the Order is attached to this Motion as "Exhibit A".
3. Respondent is informed and believes there is a strong probability that he will prevail on appellate review, thus granting him a new trial in this matter.
4. The undersigned would submit that the Respondent would pose no danger to the community if he is released and will continue to submit himself to the Court's jurisdiction for further proceedings in this case.
5. Respondent has the support of numerous family members in the Spartanburg County area (see "Exhibit B" for affidavits).

Based upon the above, the Appellant hereby requests that this Court set a reasonable bond in this matter pending the final ruling by the appellate courts of South Carolina. This Motion is supported by the Affidavits attached to (and incorporated into) this Motion as "Appendix B".

Appellant so moves this 3rd Day of August, 2016.



Kenneth P. Shabel (SC Bar #16136)
Post Office Box 3254
Spartanburg, SC 29304
864-707.2020
FAX: 864.707.2030
Attorneys for Respondent

Other Counsel of Record:

ALICIA A. OLIVE
Assistant Attorney General
Post Office Box 11549
Columbia, SC 29211
803-734-3737
Attorneys for Appellant

APPENDIX A

NORMAN LANCE GARNER (SCDC #00222193)

STATE OF SOUTH CAROLINA

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: KENNETH P. SHABEL	Attorney for : <input checked="" type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant or <input type="checkbox"/> Self-Represented Litigant
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DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; Bankruptcy; Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court:

ORDER INFORMATION

This order ends does not end the case.
 Additional Information for the Clerk :

2016 MAY 16 AM 10:00
 STATE OF SOUTH CAROLINA
 CLERK OF COURT
 SPARTANBURG COUNTY

INFORMATION FOR THE JUDGMENT INDEX

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

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

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

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

R. Keith Kelly
 Circuit Court Judge

2165
 Judge Code

13 May 2016
 Date

For Clerk of Court Office Use Only

This judgment was entered on the 10 day of May, 2016 and a copy mailed first class or placed in the appropriate attorney's box on this 16 day of May, 2016 to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)
M. Hope Blackley
CLERK OF COURT

allison d. mahan, DC.

Court Reporter:

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

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2016 MAY 16 AM 10:00
M. HOPE BLACKLEY

FORM 4C INSTRUCTIONS—JUDGMENT IN A CIVIL CASE
(Instructions for Information Only-Not to be filed with Form 4C)

1. Form 4C-Judgment in a Civil Case has been modified to add order information and enrollment instructions for the clerk of court. The purpose of Form 4 has not changed with the exception that judgment information is provided when applicable.
2. Please note that the Form 4C must be attached to all orders that include information to enroll in the judgment index. The clerk will not be responsible for reading the order to determine enrollment information.

The attorney or prevailing party will prepare and attach the Form 4C when submitting the proposed order that includes judgment enrollment information for the judgment index. The judge will review and sign Form 4C when he or she signs an order that includes judgment enrollment information for the judgment index.

3. Form 4C is not required to be submitted to the Court with orders that do not include information to enroll in the judgment index. If the clerk receives such an order without Form 4C attached, the clerk should enter and process the order pursuant to Rule 58 and Rule 77(d), SC Rules of Civil Procedure (i.e., the clerk should serve notice of entry of the judgment by mail or provide the attorneys with copies of the signed order by other means).
4. The "Information for the Judgment Index" section should be completed when the judgment affects title to real or personal property or if any amount should be enrolled. In the "Judgment in Favor of" column, enter the name of the party to whom the judgment is awarded. In the "Judgment Against" column, enter the name of the person to whom the judgment is against. The judgment amount to be enrolled should be noted in the "Judgment Amount" column. As necessary, describe any property referenced in the order if it is to be enrolled in the judgment index. If there is no judgment information to enroll, indicate "N/A" in one of the boxes in this section of the form.
5. To enter information to accommodate multiple parties, additional Form 4Cs may be used as necessary. Additional space may be inserted on the form as necessary.
6. The section "For the Clerk of Court Office Use Only" should be completed by the clerk as it has been with the previous version of Form 4.
7. If the matter is on appeal to the Circuit Court, then the parties on the form should be changed from Plaintiff and Defendant to Appellant and Respondent.
8. If an arbitrator prepares an order after arbitration, the arbitrator should strike through "Circuit Court Judge" and indicate "Arbitrator" in the signature block.

9. If a Special Circuit Court Judge, Master in Equity, or Special Referee prepares an order after hearing a Circuit Court matter, then he or she should strike through the title "Circuit Court Judge" below the signature line and indicate the appropriate title.
10. When an Order of Foreclosure is filed, neither the parties or debt owed should be listed in the Information for the Judgment Index Section, unless the foreclosure order specifically requires entry of the full judgment amount before the foreclosure sale, pursuant to Section 29-3-650 of the SC Code.
11. If the deficiency judgment is waived in a Foreclosure action, indicate N/A in the "Judgment Amount To Be Enrolled" box.
12. Foreclosure actions should be ended by the Clerk of Court upon receipt of the Order of Foreclosure. Subsequent information, including deficiency judgments, can be added to the action after the case is ended. The Master in Equity should end the action in the MIE system upon the receipt of the Order of Foreclosure.
13. When judgment enrollment information is included in the Information for the Judgment Index Section (for example, when there is a deficiency judgment), only the parties who the judgment is for and against should be included in the Section. Subordinate parties and lienholders should not be included in the box if there is not a judgment amount specifically for or against them.
14. Form 4C is not required to be attached to Transcripts of Judgment and Confession of Judgment.

2016 MAY 16 AM 10:00
M. HOPE BLACKLEY

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF SPARTANBURG)	SEVENTH JUDICIAL CIRCUIT
)	
NORMAN LANCE GARNER)	
(SCDC #00222193),)	
)	ORDER GRANTING
Petitioner,)	POST-CONVICTION RELIEF
)	
Vs.)	
)	
STATE OF SOUTH CAROLINA,)	Docket Number:
)	<u>2014-CP-42-5088</u>
Respondent.)	

This matter comes before the Court by way of an Application for Post-Conviction Relief filed on December 23, 2014. The Respondent made its return on or about May 22, 2015. An evidentiary hearing into the matter was convened on March 25, 2016 at the Spartanburg County Courthouse.

The Applicant was present and represented by Kenneth P. Shabel, Esquire. Alicia A. Olive, Esquire, of the South Carolina Attorney General's Office, represented the Respondent. The Applicant testified on his own behalf. Max B. Singleton, Esquire, testified on behalf of the Respondent. The Court also had before it a copy of the records of the Spartanburg County Clerk of Court regarding the subject convictions, including multiple exhibits and transcripts. The Court also reviewed records from Applicant's file with the Department of Corrections, the relevant pleadings, and relevant appellate records. At the conclusion of the case, the Court requested that the attorneys submit briefs summarizing their legal position on the Applicant's grounds for Post-Conviction Relief. Those briefs were submitted and reviewed prior to this signing of this Order.

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 M. SOPHIE BLANKLEY

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. The Applicant was indicted on August 8, 2013 under Indictment Number 2012-GS-42-2818 on one count of Lewd Act upon a Minor. Applicant was represented by the Spartanburg County Grand Jury (December 2008 term) for two counts of criminal sexual conduct with a minor, second degree (2008-GS-42-7197, counts 1 and 2). Max B. Singleton, Esquire. The case went to trial, and the jury convicted him on August 8, 2013. He received a sentence of twelve years' incarceration, with credit given for time served. He appealed his sentence and conviction; however, he withdrew that appeal and the appeal was dismissed in August of 2014.

ALLEGATIONS

In the current application, and from the testimony presented, the Applicant alleged he was being held in custody unlawfully because of the ineffective assistance of his counsel at the trial of this case. In specific, he alleges the following deficiencies:

- (a) Failure to properly object to the improper hearsay testimony of four (4) different witnesses, each of whose testimony had the effect of bolstering the victim's testimony and prejudiced Applicant at trial;
- (b) Failure to object to the State's request to offer an expert witness, whose testimony had the effect of improper bolstering of and vouching for the victim's testimony and prejudiced Applicant at trial;
- (c) Failure to properly investigate Applicant's alibi defense;

- (d) Failure to properly advise Applicant about the admissibility of his prior criminal history; and
- (e) Failure to object to derogatory statements made about Applicant's character during the State's closing argument.

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 and arguments presented at the hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly. The Court has also reviewed the Memoranda of Law submitted by counsel of record for both sides. Set forth below are the relevant findings of fact and conclusions of law as required by South Carolina Code Annotated Section 17-27-80 (2003).

In a PCR action, "[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRCP). When ineffective assistance of counsel is 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 a fair result." Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 692 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the

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exercise of reasonable professional judgement. Butler, Id. The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). 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 proceedings would have been different." Cherry, 300 S.C. at 117-118, 385 S.E.2d at 625 (citing Strickland).

The Court finds that the Applicant has not met his burden of proof regarding his claim over his attorney's failure to properly investigate Applicant's alibi defense. Applicant presented no testimony at the PCR hearing regarding the claim, and therefore this claim is deemed abandoned.

The Court finds that the Applicant has not met his burden of proof regarding his claim over his attorney's failure to properly advise Applicant about the admissibility of his prior criminal history. Applicant has not shown by a preponderance of the evidence that the outcome of the proceeding would have been different had he been properly advised about the admissibility of his prior criminal history, which Applicant testified "played a role in his decision not to testify."

The Court finds that the Applicant has not met his burden of proof regarding his claim over his attorney's failure to object to derogatory statements made about Applicant's character during the State's closing argument. Again, the Applicant has not shown by a

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preponderance of evidence that the outcome of the proceeding would have been different had counsel objected to the statements.

However, the Court finds that Applicant has met his burden of proof regarding his claim over his attorney's failure to properly object to the improper hearsay testimony of four (4) different witnesses: Marquel Davis, Nolita Davis, Christopher Robinson, and Patricia Austin. Each of these witnesses were allowed to testify as to statements of the victim not otherwise permitted within any exception under S.C. Rules of Evidence, Rules 801 or 803. While such testimony is permissible corroboration, the limit to time and place excludes "details or particulars" of the incident from coming in. Simpkins v. State, 303 S.C. 364, 367, 401 S.E.2d 142, 143 (1991) (citations omitted). The identity of the accused is a prohibited detail under this rule. Jolly v. State, 314 S.C. 17, 21, 443 S.E.2d 566, 569 (1994). When these details or particulars are "merely cumulative to the victim's testimony," there is prejudice to a criminal defendant because this cumulative testimony "cannot be harmless, because it is precisely this cumulative effect which enhances the devastating impact of improper corroboration." Id. (citations omitted).

A failure to object will not lead to Post-Conviction relief if there was no prejudice by the failure. There is no prejudice if there is otherwise "overwhelming evidence of guilt." Huggler v. State, 360 S.C. 627, 634-636, 602 S.E.2d 753, 757-758 (2004). However, if there is no physical evidence or eyewitness corroboration to the allegation, corroboration is prejudicial. See, e.g., Vail v. State, 402 S.C. 77, 738 S.E.2d 503 (Ct. App. 2003).

Norman Garner was prejudiced by his attorney's failure to object to four different witnesses, each of which testified to inadmissible hearsay. The first of these witnesses, Marquel Davis, testified that the victim could not talk to him about what was wrong with

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her because "Norman" was with her. (Transcript p. 93, lines 6-10, and 14-25). Nolita Davis identified the perpetrator of the victim's abuse as "Buddy's brother" and "Mr. Garner." Patricia Austin, a forensic evaluator with the Children's Advocacy Center, testified that the victim identified Norman Garner as the man who abused her. (Transcript p. 175, line 23 – p. 175, line 6).

Officer Christopher Robinson testified that the victim's mother was there to file a report "stating that her family member improperly touched [her daughter] while she was there." (Transcript p. 117, lines 18-22). He testified that the report actually named the Petitioner directly. (Transcript p. 117, line 25 – p. 118, line 4). He testified that as a result of the report, he took out a warrant against the Petitioner. (Transcript p. 118, lines 8-9). He was allowed to testify to the very specifics of the allegations in the case:

She gave me a verbal and written – you know, the written statement. She – you know, she basically said that she was at – I believe it was her aunt's house. She was sick, not feeling well. Mr. Garner was there. Offered her some wine, I believe. Said that she also wanted to put some oil to rub on her chest to make her feel better. He also offered to give her a massage. During that massage, he tried to pull her pants down. He – I believe he said so he wouldn't get the oil on the pants. Also when he started rubbing her back, she stated that he kind of rubbed the side of her sides and tried to rub her breasts as well.

(Transcript p. 119, line 3-14).

Furthermore, the Court also finds that Applicant has met his burden of proof regarding his claim over his attorney's failure to object to the State's request to offer an expert witness. In accordance with S.C. Rules of Evidence, Rule 702 and case law cited in Applicant's and Respondent's briefs, counsel's failure to object to the nature of the expert witness testimony constitutes deficient performance.

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Witnesses (in general) cannot testify to whether another witness is being truthful. Burgess v. State, 329 S.C. 88, 495 S.E.2d 445 (1998). Such is the right and responsibility of the jury to decide. State v. Wright, 269 S.C. 414, 237 S.E.2d 764 (1977).

In the field of child sexual abuse treatment, case law over the last six years has helped clarify the limited role of experts - especially in cases where victim credibility is crucial.

In State v. Jennings, 394 S.C. 473, 716 S.E.2d 91 (2011), the Supreme Court reversed a conviction of two counts of lewd act on a minor based upon the admission the reports of a forensic interviewer. In Jennings, the Court found the reports to be cumulative of the victims' testimony. Id. At 479, 716 S.E. 2d at 94. It is improper for an expert witness to testify as to the veracity of the child's accusations. State v. Jennings, 394 S.C. 473, 480, 716 S.E.2d 91, 94 (2011). By definition, a forensic interviewer's job is to collect facts. State v. Kromah, 401 S.C. 340, 357, 737 S.E.2d 490, 499 (2013). The purpose of her testimony is to "lend credibility to the victim's allegations." Id. A forensic interviewer should avoid testifying at trial as to the following: (1) "that the child was told to be truthful"; (2) "direct opinion as to a child's veracity or tendency to tell the truth"; (3) "any statement that indirectly vouches for the child's believability, such as stating the interviewer has made a "compelling finding" of abuse"; (4) "any statement to indicate to a jury that the interviewer believes the child's allegations in the current matter"; or (5) "an opinion that the child's behavior indicated the child was telling the truth." Id.

In particular, the expert's testimony in Mr. Garner's case included the following:

- a. "We ask - instruct them to talk about things that are true." (Transcript p. 140, lines 15-16).

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CLERK OF COURT

- b. "Q: ...could it be that the problem is the experience, not that she's lying, but the experience of what happened to her? A: Well, absolutely." (Transcript p. 174, Lines 11-14).
- c. "Q: If those specifics and other statements given have been specific about what happened, who did it, how it happened, where it happened, the date it happened, again, would all of that be indicative of the fact that she's telling the truth, but she's having problems based on what she experience? A: Yes, absolutely." (Transcript p. 176, lines 7-12).

Having found these two deficiencies, the Court finds that Applicant has further shown by a preponderance of evidence that he was prejudiced by counsel's deficiencies and, further, that the results of the proceeding would have been different had counsel's performance fallen within "an objective standard of reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117918, 385 S.E.2d at 625 (citing Strickland).

The court finds that Applicant has shown by a preponderance of the evidence that his trial counsel was deficient in his representation and, further that he was prejudiced by the said deficiencies.


Based upon these findings of fact, and upon the applicable law of this State, **THEREFORE ORDERED, ADJUDGED AND DECREED** that the Applicant's application for Post-Conviction Relief is GRANTED.

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IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Applicant's convictions under indictment number 2012-GS-42-7197 is set aside and that the Applicant shall be given a new trial on this indictment.

AND SO IT IS ORDERED this 13 day of May, 2016.


R. KEITH KELLY
PRESIDING CIRCUIT COURT JUDGE
SEVENTH JUDICIAL DISTRICT

Spartanburg, South Carolina

2016 MAY 16 AM 10:00
M. HOPE BLACKLEY

APPENDIX B

To whom it may concern,

my name is Tocara Garner I am Norman Garner's oldest daughter. I am writing to you to reassure you that when he is out of jail he has family that is willing to help him in any kind of way. I will make it my duty to be sure he has a job & transportation to get to & from work. He will also have a home to reside at. My father is a wonderful man & he deserves to be home with his family.

Sincerely,

Tocara Garner

Sworn to before me this 28th day of June, 2016
Wendy Hallis Wendy Hollis
My Commission expires August 5th 2024

I Marva Dawkins is writting to you
in regards of Norman L Garner whom
is an brother of mine. He is a wonderful
brother, son, and father. we would love if
he could be able to come home and be with
his family and kids, we will make sure
that he get a job and work and also keep
and eye on him and see to it that he not
around any trouble. I know that Norman
will also do his part as well to keep on
track, work and keep him self together.
he is better of at home, it is plenty good
things he can do while at home.

sister - Renee Dawkins

mother - Catherine Dawkins

Notary: Wendy Hollis Wendy Hollis

Sworn before me this 28th day of June, 2016

My Commission expires August 5th 2024

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

The Honorable R. Keith Kelly, Circuit Court Judge

Case No. 2014-CP-42-5088

Norman Lance Garner,

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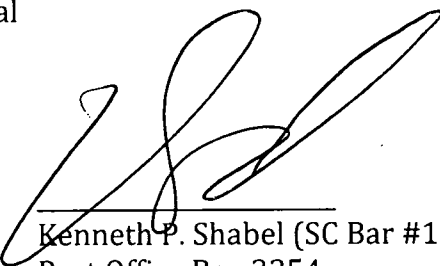
State of South Carolina,

Appellant.

PROOF OF SERVICE

I hereby certify that a copy of the foregoing Motion for Bond Pending Appeal was served upon all counsel of record and/or unrepresented parties by hand delivery to the offices listed as follows:

ALICIA A. OLIVE
Assistant Attorney General
Post Office Box 11549
Columbia, SC 29211



Kenneth P. Shabel (SC Bar #16136)
Post Office Box 3254
Spartanburg, SC 29304
864-707.2020
FAX: 864.707.2030
Attorneys for Respondent

August 3, 2015

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S.C. SUPREME COURT

KENNEDY|Brannon, PA

Wednesday, August 3, 2016

RECEIVED

VIA Regular Mail

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

AUG 08 2016

S.C. SUPREME COURT

**RE: Norman Lance Garner v. State of South Carolina
2014-CP-42-5088**

2016-001326

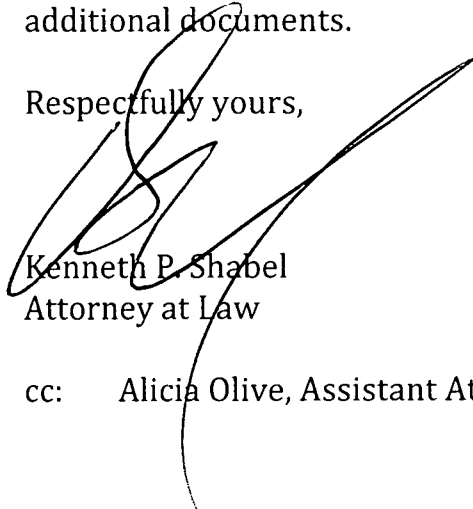
Dear Mr. Shearouse:

Please find enclosed an original and six copies of a Motion for Bond Pending Appeal the above-referenced case, along with proof of service of the same.

My interpretation of the rules are that a filing fee was not necessary in this case due to Mr. Garner's incarceration. Therefore, I am not enclosing a filing fee for this Motion. If you believe I am in error, please advise and I will immediately rectify the problem.

Do not hesitate to contact me if you have any additional questions or need additional documents.

Respectfully yours,

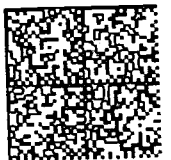

Kenneth P. Shabel
Attorney at Law

cc: Alicia Olive, Assistant Attorney General

KENNEDY | BRAMMOM, PA

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The Honorable Daniel E. Shearouse
Clerk of Court - South Carolina Supreme
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Columbia, SC 29211