THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

The Honorable S. Jackson Kimball
Special Circuit Court Judge

Appellate Case No.: 2016-001700
Trial Court Case No.: 2015-CP-46-03931

Mark Anderko, ... Appellant,

v.

South Carolina Law Enforcement Division, ... Respondent.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF THE FACTS AND STATEMENT OF THE CASE

On or about April 19, 2004, the Appellant, then a citizen and resident of the State of Washington, was convicted in Kitsap County Superior Court for the offense of communicating with a minor for immoral purposes in violation of RCW 9.68A.090. (Order p. 1)(Transcript p. 7) (R. pp.). As a result of this conviction, the Appellant was required under the laws of the State of Washington, to wit: RCW 4.25.550, to register as a sex offender. *Id.* Thereafter, on or about November of 2004, the Appellant moved to York County, South Carolina where he duly registered as a sex offender with the York County Sheriff's Department, pursuant to S.C. Code Ann. § 23-3-430(A) of the South Carolina Code. (Order p. 1)(Transcript p. 8)(R. pp.). Between November 2004 and January 2012, the Appellant actively registered in person as a sex offender in York County and was also listed on the SORA registry. *Id.* In January of 2012, the Appellant moved back to Washington State and notified the York County Sheriff's Department of this move. *Id.* Since January of 2012, the Appellant has continually resided in and maintained his citizenship in the State of Washington. (Order pp. 1-2)(Transcript pp. 8-9)(R. pp.). Upon moving out of state, the Appellant was relieved of any obligation to actively register

in person with the York County Sheriff's Office and his listing on the SORA registry was amended to list the Appellant as being "out-of-state". (Order p. 2)(R. p.). On or about January 9, 2014, the Appellant's sex offender registry requirements in Washington were terminated by an Order of the Kitsap County Superior Court, State of Washington, pursuant to Washington law, to wit: RCW 9A.44.142, and the Appellant's name was duly removed from the applicable sex offender registry in the State of Washington. *Id.* However, in accordance with SORA, the Appellant remains listed as an "out-of-state" offender on the SORA registry. *Id.* The Appellant's April 19, 2004 conviction has not been reversed, overturned, or vacated on appeal. *Id.* The Appellant has not received a pardon based on a finding of not guilty specifically stated in the pardon for the April 19, 2004 conviction. *Id.* And, the Appellant has not been granted a new trial or verdict of acquittal for his April 19, 2004 conviction. *Id.* Nevertheless, on or about December 18, 2015, Appellant initiated this present action seeking declaratory relief. Respondent answered on or about January 15, 2016 and the matter was referred to The Honorable S. Jackson Kimball, Special Circuit Court Judge for the York County Court of Common Pleas for resolution. Judge Kimball heard the matter on or about June 21, 2016 with the parties stipulating to all relevant facts and, thereafter, Judge Kimball issued a written order in favor of the Respondent that was ultimately filed on July 28, 2016. This appeal followed.

STANDARD OF REVIEW

"A suit for declaratory judgment is neither legal nor equitable, but is determined by the nature of the underlying issue. An issue essentially one at law will not be transformed into one in equity simply because declaratory relief is sought." Felts v. Richland Cty., 303 S.C. 354, 356, 400 S.E.2d 781, 782 (1991) (citing generally Legette v. Smith, 226 S.C. 403, 85 S.E.2d 576 (1955)).

"Whether an individual must be placed on the sex offender registry is a question of law." Lozada v. S. Carolina Law Enf't Div., 395 S.C. 509, 512, 719 S.E.2d 258, 259 (2011) (citing Noisette v. Ismail, 299 S.C. 243, 247, 384 S.E.2d 310, 312 (Ct. App.1989)).

When an appeal involves stipulated or undisputed facts, an appellate court is free to review whether the trial court properly applied the law to those facts. WDW Properties v. City of Sumter, 342 S.C. 6, 10, 535 S.E.2d 631, 632 (2000) (citing J.K. Constr., Inc. v. Western Carolina Regional Sewer Authority, 336 S.C. 162, 519 S.E.2d 561 (1999).

"When reviewing a grant of summary judgment, appellate courts apply the same standard applied by the trial court pursuant to Rule 56(c), SCRCP." Turner v. Milliman, 392 S.C. 116, 121-22, 708 S.E.2d 766, 769 (2011) (citing Fleming v. Rose, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002)).[1]

[1] Due to the undisputed nature of the facts of this case, the trial court viewed this matter as essentially cross motions for summary judgment at the non-jury trial. (Transcript p. 41)(R. p.).

APPLICABLE SORA JURISPRUDENCE

SORA mandates registration for any individual "who has been convicted of, adjudicated delinquent for, pled guilty or nolo contendere, or found not guilty by reason of insanity **to an offense for which the person was required to register in the state where the conviction or plea occurred**...." S.C. Code Ann. § 23-3-430(A) (emphasis added). In addition, SORA mandates lifetime registration. *See* S.C. Code Ann. § 23-3-460 ("A person required to register pursuant to this article is required to register... for life"). Moreover, SORA also provides the only lawful avenues by which individuals can be removed from the registry. *See* S.C. Code Ann. § 23-3-430(E), (F), (G).

In South Carolina, Courts have also consistently and unequivocally held that registration pursuant to SORA is **NOT** punishment. *See* State v. Walls, 348 S.C. 26, 31, 558 S.E.2d 524, 526 (2002); Hendrix v. Taylor, 353 S.C. 542, 552, 579 S.E.2d 320, 325 (2003) (finding that "the length of time one must be listed on the sex offender registry is non-punitive, and it cannot constitute a deprivation of a constitutionally protected liberty interest."); In re Ronnie A., 355 S.C. 407, 409, 585 S.E.2d 311, 312 (2003) (finding that "sex offender registration, regardless of the length of time, is non-punitive and therefore no liberty interest is implicated."); In the Interest of Justin B., a Juvenile under the Age of Seventeen, Op. No. 27716 (S.C. Sup. Ct. filed May 3, 2017) (reaffirming the constitutionality of SORA and reaffirming unequivocally that SORA is not punishment).

Rather, the South Carolina Legislature has made abundantly clear that the intent of SORA is "to promote the state's fundamental right to provide for the public health, welfare, and safety of its citizens" and to "provide law enforcement with the tools needed in investigating criminal offenses." S.C. Code Ann. § 23-3-400.

ARGUMENT

I. The trial court did not err in finding that the Appellant is required to continue to have his name listed on the South Carolina Sex Offender Registry Act (SORA) registry because Appellant's initial registration was proper, constitutional, and in accordance with South Carolina law; and the Appellant does not meet any of SORA's statutory criteria for removal.

It is undisputed that the Appellant was convicted of an offense **for which** he was required to register in the State of Washington to wit: "communicating with a minor for immoral purposes (RCW 9.68A.090)" and that the Appellant did in fact so register in the State Washington. (Order p. 1)(Transcript p. 7) (R. pp.). As such, the Appellant conceded at the trial court that he was properly registered as a sex offender in accordance with SORA when he moved to York County in 2004. (Transcript p. 8)(R. p.) s*ee also* S.C. Code Ann. § 23-3-430(A) (requiring registration for anyone who was convicted or pled guilty to an offense "**for which the person was required to register in the state where the conviction or plea** occurred") (emphasis added). In addition, a plain reading of SORA indicates that the Appellant would in fact have to resume in person registration were he to return to the State of South Carolina in the future. *Id.*[2] Unquestionably, South Carolina's statute is written in the past tense such that any individual who was convicted and **was required** to register in the state of conviction, as is the Appellant's case, must register in accordance with SORA. S.C. Code Ann. § 23-3-430(A). As such, the intent of the South Carolina Legislature is clear and unambiguous, if an individual has ever been required to register in the state of conviction, the individual must register in South Carolina for life.

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2 At the trial court, the Appellant conceded that "there would be a strong public safety argument from SLED to keep him on the registry" in that scenario; however, the Appellant did not concede that he would in fact have to register in this scenario. (Transcript pp. 16-17) (R. pp.).

Id. see also S.C. Code Ann. § 23-3-460 ("A person required to register pursuant to this article is required to register... for life").

Accordingly, because the Appellant's initial registration was proper, constitutional, and in accordance with applicable South Carolina law; the decision in this matter on whether the Appellant should be removed from the SORA registry turns on whether the Appellant meets any of the statutorily available avenues of removal from SORA, which are set forth in detail in S.C. Code Ann. § 23-3-430 paragraphs (E), (F), and (G). Pursuant to § 23-3-430(E), "SLED shall remove a person's name and any other information concerning that person from the sex offender registry immediately upon notification by the Attorney General that the person's adjudication, conviction, guilty plea, or plea of nolo contendere for an offense listed in subsection (C) was reversed, overturned, or vacated on appeal and a final judgment has been rendered." S.C. Code Ann. § 23-3-430(E). Pursuant to § 23-3-430(F), an offender who receives a pardon "based on a finding of not guilty specifically stated in the pardon" shall be removed. S.C. Code Ann. § 23-3-430(F). And finally, pursuant to § 23-3-430(G) individuals exonerated subsequent to filing a petition for a writ of habeas corpus or a motion for a new trial are removed. S.C. Code Ann. § 23-3-430(G). However, the stipulated facts demonstrate and the Appellant concedes that he does not meet any of the statutory criteria that would entitle statutory removal from the SORA registry. (Order p. 2)(R. p.). As such, South Carolina law mandates that the Appellant remain listed on the SORA registry **for life**. *See* S.C. Code Ann. § 23-3-460. Accordingly, the trial court was correct in denying the Appellant's request for removal.

Furthermore, the South Carolina Supreme Court has also held unequivocally that a "court's equitable powers **must yield** in the face of an unambiguously worded statute."

Santee Cooper Resort, Inc. v. S. Carolina Pub. Serv. Comm'n, 298 S.C. 179, 185, 379 S.E.2d 119, 123 (1989)(emphasis added); *see also* Key Corporate Capital, Inc. v. County of Beaufort, 373 S.C. 55, 644 S.E.2d 675 (2007) (finding error in fashioning an equitable remedy in the face of an unambiguously worded statute setting forth certain remedies). As such, the trial court was without any authority whatsoever to simply remove the Appellant from the SORA registry outside the statutory scheme, and the trial court's decision should be upheld. *Id.*

Furthermore, were any court to fashion an equitable remedy in the face of an unambiguously worded statue would be a clear violation of the South Carolina Constitution's mandate for the separation of powers. *See* S.C. Const. art. I, § 8. The South Carolina Constitution specifically provides that "the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other." S.C. Const. art. I, § 8. The duration of sex offender registration is a matter of public policy that is solely in the province of the South Carolina Legislature. As such, any attempt by any court to invade the Legislature's exclusive province is a violation of the separation of powers and is unconstitutional. *Id.* In addition, the South Carolina Supreme Court has specifically held that

> [i]f a statute's language is plain, unambiguous, and conveys a clear meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." Buist v. Huggins, 367 S.C. 268, 276, 625 S.E.2d 636, 640 (2006) (internal quotes and citation omitted). Instead, the words of the statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation. *Id.* Moreover, "**it is beyond this Court's power to effect a change in the statutes enacted by the Legislature.**" State v. Corey D., 339 S.C. 107, 120, 529 S.E.2d 20, 27 (2000); *see also* Keyserling v. Beasley, 322 S.C. 83, 86, 470 S.E.2d 100, 101 (1996) (this

Court does "**not sit as a superlegislature to second guess the wisdom or folly of decisions of the General Assembly**").

Key Corporate Capital, Inc. v. County of Beaufort, 373 S.C. 55, 59, 644 S.E.2d 675 (2007) (emphasis added). As such, any attempt to remove the Appellant from the SORA registry beyond the statutory avenues available under SORA would be unconstitutional and impermissible. S.C. Code Ann. § 23-3-460; S.C. Const. art. I, § 8; Santee Cooper Resort, Inc. v. S. Carolina Pub. Serv. Comm'n, 298 S.C. 179, 185, 379 S.E.2d 119, 123 (1989); Key Corporate Capital, Inc. v. County of Beaufort, 373 S.C. 55, 644 S.E.2d 675 (2007); In the Interest of Justin B., a Juvenile under the Age of Seventeen, Op. No. 27716 (S.C. Sup. Ct. filed May 3, 2017) (noting that changes to SORA must be made by the South Carolina Legislature).

In addition, the trial court correctly found that the Appellant's continued listing on the SORA registry with an "out-of-state" designation passes constitutional muster. This out-of-state listing "is reasonably related to the legitimate state purpose of protecting the public and aiding law enforcement in limiting the risk that sex offenders pose to communities." *See* Hendrix v. Taylor, 353 S.C. 542, 550-51, 579 S.E.2d 320, 324 (2003). All out-of-state listings provide notice to South Carolina residents that an individual who would be registering otherwise is not and **should not** be residing in this State. As such, this knowledge is protection for the public and this knowledge also aids law enforcement in limiting the risk that sex offenders pose to communities. Further, the South Carolina Legislature intended for such out-of-state listings to remain in case individuals like the Appellant do in fact choose to return to the State of South Carolina. *See* S.C. Code Ann. § 23-3-460 (mandating registration in South Carolina "for life").

Moreover, the continued listing of out-of-state offenders serves as notice to both the public and to law enforcement that action may be necessary to insure compliance with SORA. Specifically, the continued listing of out-of-state offenders serves as notice to the public and to law enforcement should these individuals be found to be residing in the State of South Carolina and not registering. Absent a continued out-of-state listing, there would be no ability for the public or law enforcement to address this issue. In addition, as has been specifically noted by the South Carolina Supreme Court, "[r]egistering persons who committed crimes in another state when they move to South Carolina is a reasonable method of achieving... [the goal of protecting the public and aiding law enforcement]." Hendrix v. Taylor, 353 S.C. 542, 550-51, 579 S.E.2d 320, 324 (2003).

Further, all persons, including the Appellant, who must register under SORA are subject to uniform administrative and legal procedures. *Id.* Moreover, the Appellant is treated the same as all individuals who are properly registered in the State of South Carolina and the Appellant did not assert any disparate treatment. As such, there is no viable constitutional challenge in this matter. *See* Hendrix v. Taylor, 353 S.C. 542, 579 S.E.2d 320 (2003); In re Shaquille O'Neal B., 385 S.C. 243, 684 S.E.2d 549 (2009); Lozada v. S. Carolina Law Enf't Div., 395 S.C. 509, 719 S.E.2d 258 (2011); In the Interest of Justin B., a Juvenile under the Age of Seventeen, Op. No. 27716 (S.C. Sup. Ct. filed May 3, 2017). Accordingly, the trial court decision should be upheld and affirmed in its entirety.

II. The trial court did not err in failing to require the Respondent to remove the Appellant from the SORA registry because the Full Faith and Credit Clause has no application to this case.

As discussed in more detail above, it is undisputed that the Appellant's initial registration on the SORA registry was proper and that the Appellant does not meet any of the statutory criteria for removal pursuant to SORA. (Order p. 1-2)(Transcript p. 7) (R. pp.). As such, there is no legal authority for the Appellant to be removed from the SORA registry. *See* S.C. Code Ann. § 23-3-430; S.C. Code Ann. § 23-3-460 *see also* S.C. Const. art. I, § 8; Santee Cooper Resort, Inc. v. S. Carolina Pub. Serv. Comm'n, 298 S.C. 179, 185, 379 S.E.2d 119, 123 (1989); Key Corporate Capital, Inc. v. County of Beaufort, 373 S.C. 55, 644 S.E.2d 675 (2007); Argument I, *supra*.

Furthermore, the trial court correctly held that the Full Faith and Credit Clause of the United States Constitution has no application whatsoever to this case. U.S. Const. art. IV, § 1. Put simply, the order issued in the State of Washington (Order) dictates only that the Appellant does not have to actively register in the State of Washington, which is not in dispute in this action. However, as correctly noted by the trial court, this Order does not command the Respondent or the State of South Carolina to take any action whatsoever and does not have any effect whatsoever on the Appellant's continued "out-of-state" listing or subsequent registration requirement in the State of South Carolina. Rather, South Carolina jurisprudence clearly indicates that South Carolina's registration requirement is not affected by the registry laws in any other jurisdiction, and the Lozada and Hendrix cases are particularly instructive on this issue. Lozada v. S. Carolina Law Enf't Div., 395 S.C. 509, 719 S.E.2d 258 (2011); Hendrix v. Taylor, 353 S.C. 542, 552, 579 S.E.2d 320, 325 (2003). Lozada is a case where registration was not mandated by the State of Pennsylvania,

the state of conviction for Mr. Lozada. However, the South Carolina Supreme Court noted that registration was nevertheless proper in South Carolina in accordance with SORA and that the South Carolina courts had to give no particular deference to Pennsylvania law. Lozada v. S. Carolina Law Enf't Div., 395 S.C. 509, 514-15, 719 S.E.2d 258, 261 (2011) (noting that registration in the state of conviction is one of several alternative basis for registration in South Carolina). In Hendrix, an individual challenged South Carolina's lifetime registration requirement in the face of Colorado's law that allows a petition for removal after five years. Hendrix v. Taylor, 353 S.C. 542, 552, 579 S.E.2d 320, 325 (2003). The Supreme Court noted that "Appellant's argument fails because this Court has ruled that registering as a sex offender is a non-punitive imposition. Therefore, the length of time one must be listed on the sex offender registry is non-punitive, and it cannot constitute a deprivation of a constitutionally protected liberty interest. As such, Appellant has not shown a due process violation." Hendrix v. Taylor, 353 S.C. 542, 552, 579 S.E.2d 320, 325 (2003) (citing State v. Walls, 348 S.C. 26, 31, 558 S.E.2d 524, 526 (2002)). Put simply, the jurisprudence of this State and the intent of the South Carolina Legislature is clear – the fact that Washington law allows an individual to be removed from Washington's registry has no bearing on the South Carolina Legislature's mandate for lifetime registration in South Carolina. *See* S.C. Code Ann. § 23-3-460; Lozada v. S. Carolina Law Enf't Div., 395 S.C. 509, 719 S.E.2d 258 (2011); Hendrix v. Taylor, 353 S.C. 542, 552, 579 S.E.2d 320, 325 (2003). As such, the trial court correctly held that the Full Faith and Credit Clause of the United States Constitution has no bearing on this case.

Moreover, the Full Faith and Credit Clause does not support a cause of action against the Respondent in this matter. In essence, the Appellant is seeking to have South

Carolina's courts enforce and apply a Washington statute, to wit: RCW 9A.44.142. This would be impermissible and an affront to South Carolina's sovereignty. The United States Supreme Court has long recognized that "[e]very state is entitled to enforce in its own courts its own statues lawfully enacted...." Williams v. State of North Carolina, 317 U.S. 287, 295, 63 S.Ct. 2017, 212 (1942). In Sun Oil Co. v. Wortman, the United States Supreme Court acknowledged that a state cannot be compelled by the Full Faith and Credit Clause to substitute the statute of another state when "dealing with a subject matter concerning which it is competent to legislate." 486 U.S. 717, 722 (1988) (quoting Pacific Employers Ins. Co. v. Industrial Accident Comm'n, 306 U.S. 493, 501 (1939). In addition, in Alaska Packers Association v. Industrial Accident Commission, the United State Supreme Court recognized "that there are some limitations upon the extent to which a state will be required by the full faith and credit clause to enforce even the judgment of another state, in contravention of its own statutes or policy." 294 U.S. 532, 546-47 (1935). Moreover, the Court went on to state that the sovereignty of states to enforce their own laws is even more pressing because "a rigid and literal enforcement of the full faith and credit clause, without regard to the statute of the forum, would lead to the absurd result that, wherever the conflict arises, the statute of each state must be enforced in the courts of the other, but cannot be in its own." *Id.* at 547. To the extent that the Appellant sought for South Carolina courts to enforce a Washington statute that conflicts with South Carolina's sovereign law, the trial court correctly rejected this argument. Accordingly, the trial court's decision should be affirmed and upheld in its entirety.

III. The Appellant did not properly preserve his residency argument.

Appellant did not raise the residency issue espoused in Argument 1 of the Initial Brief of Appellant at the trial court. Rather, this issue was impermissibly raised for the first time on appeal. "It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review." Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). In addition, "[t]here are four basic requirements to preserving issues at trial for appellate review. The issue must have been (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity." State v. Rogers, 361 S.C. 178, 183, 603 S.E.2d 910, 912–13 (Ct. App. 2004) (citing Jean Hoefer Toal et al., Appellate Practice in South Carolina, 57 (2d ed.2002)). In this instance, Appellant's residency argument was not raised to the trial court with sufficient specificity nor was it ruled upon by the trial court. As such, this issue is not properly preserved for appellant review.

Nevertheless, Appellant's reliance on S.C. Regulation 73-270, which addresses only the permissible retention periods for certain information that is collected pursuant to SORA registration and which does not authorize or mandate removal of any SORA listing (out-of-state or otherwise), is misplaced and unavailing. South Carolina law mandates lifetime registration in a clear, unambiguous, and constitutional statute and S.C. Regulation 73-270 cannot overrule this statute. *See* S.C. Code Ann. § 23-3-460 (mandating registration in South Carolina "for life"). As such, to the extent preserved for appellate review, this argument is without merit. Accordingly, the lower court decision should be affirmed and upheld in its entirety.

CONCLUSION

In conclusion, based on the foregoing and the applicable laws of the State of South Carolina, this Court should uphold and affirm the trial court's decision in its entirety.

Respectfully Submitted,

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ATTORNEY FOR RESPONDENT

May 4, 2017

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

The Honorable S. Jackson Kimball
Special Circuit Court Judge

Appellate Case No.: 2016-001700
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Mark Anderko, ... Appellant,

v.

South Carolina Law Enforcement Division, ... Respondent.

PROOF OF SERVICE

I hereby certify that I served the **Initial Brief of Respondent** and **Respondent's Designation of Matter to Be Included in the Record on Appeal** on appellant by depositing a copy of the same in the United States mail, postage prepaid, and addressed to his attorney as follows:

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May 4, 2017

The Honorable Jenny Abbott Kitchings
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Re: Mark Anderko v. South Carolina Law Enforcement Division
Appellant Case No.: 2016-001700

Dear Madam Clerk:

In accordance with Rules 208 and 209, SCACR, enclosed for filing are the original and one copy of the **Initial Brief of Respondent** and the **Respondent's Designation of Matter to Be Included in the Record on Appeal.** I would appreciate your filing the originals and returning the clocked copies at your convenience. I have also enclosed the original **Proof of Service** for the same.

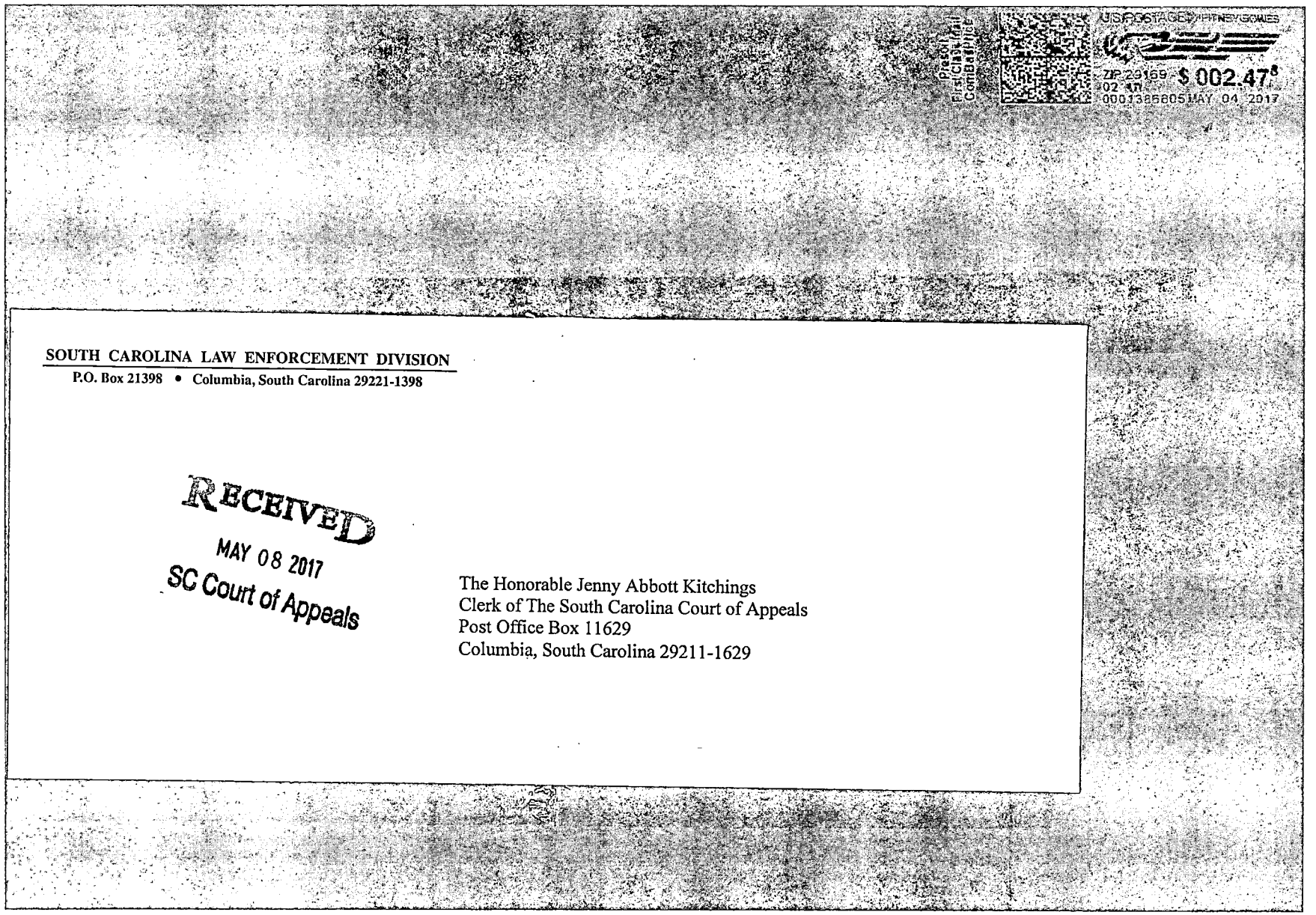
If you should have any questions or concerns, please do not hesitate to contact me.

With kind regards, I am
Sincerely,

Adam L. Whitsett
General Counsel

Enclosures – listed in text

Cc: C. Rauch Wise, Esquire
Christopher A. Wellborn, Esquire



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