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404 Main Street, Greenwood, South Carolina 29646

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July 11, 2017

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

RECEIVED

JUL 14 2017

Re: *Ricky Dennis Gentry v. State of South Carolina*
Case No. 2015-CP-42-00664

S.C. SUPREME COURT

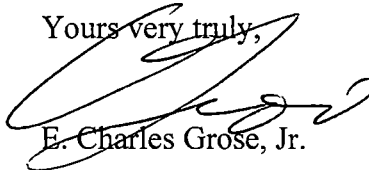
Dear Mr. Shearouse:

Enclosed please find Mr. Gentry's Notice of Appeal, along with a certificate of service. Also, enclosed please find the written orders dated April 7, 2017 and June 8, 2017. Please note that I am retained and will be representing Mr. Gentry on appeal. Accordingly, enclosed is a copy of my letter of this date requesting the transcript.

Thank you for your attention to this matter. Please let me know if you have any questions or require additional information.

With kindest regards, I am

Yours very truly,



E. Charles Grose, Jr.

cc: Valerie Garcia Giovanoli, Esquire

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM Spartanburg COUNTY
Court of Common Pleas
Robin B. Stilwell, Circuit Court Judge

Case No. 2015-CP-42-00664

RECEIVED

JUL 14 2017

S.C. SUPREME COURT

Ricky Dennis Gentry,.....Petitioner,

v.

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

Notice of Appeal

The petitioner, Ricky Dennis Gentry, appeals the order of the Honorable Robin B. Stilwell, dated April 7, 2017, dismissing his application for post-conviction relief (“PCR”). This appeal is taken from the order of Judge Stilwell dated June 8, 2017 and filed June 12, 2017, denying Mr. Gentry’s Rule 59(e), SCRCR motion. Counsel for Mr. Gentry received written notice of entry of this order by email on June 12, 2017.

Pursuant to Rule 243(c), SCACR, Mr. Gentry has three grounds for appeal. First, the PCR court did not apply the appropriate standard of review. This Court recently reaffirmed the standard of review for the State’s motion for summary dismissal:

When considering the State's motion for summary dismissal, where no evidentiary hearing has been held, the PCR judge must assume facts presented by the applicant are true and view those facts in the light most favorable to the applicant.

Robertson v. State, 418 S.C. 505, 519, 795 S.E.2d 29, 36 (2016) (citing *McCoy v. State*, 401 S.C. 363, 369, 737 S.E.2d 623, 626 (2013)). This standard is in the nature of a Rule 12(b)(6) standard of review. The well pled PCR Application raises newly discovered evidence and was filed “within one year of receiving the statements from his co-defendant,” the final order of dismissal “finds a sufficient reason has not been shown why the Conditional Order of Dismissal should not become final,” without addressing S.C. Code Ann. § 17-27-45(C), which provides:

If the applicant contends that there is evidence of material facts not previously presented and heard that requires vacation of the conviction or sentence, the application must be filed under this chapter within one year after the date of actual discovery of the facts by the applicant....

Robertson also reaffirmed the applicability of § 17-27-45(C). 418 S.C. at 513, 795 S.E.2d at 33.

Second, the PCR court’s order also overlooks South Carolina’s application of the discovery rule in post-conviction relief cases. It is well within the court’s equitable discretion to toll the limitations period for any appropriate duration. *See Ferguson v. State*, 382 S.C. 615, 618, 677 S.E.2d 600, 602 (2009) (equitable tolling of the PCR limitations period may be applied where “circumstances preventing a petitioner from making a timely filing were both beyond the petitioner’s control and unavoidable despite due diligence”). *See McCoy, supra* (discovery rule applies to PCR actions).

Third, the PCR court’s order relies on *Hayden v. State*, 278 S.C. 610, 299 S.E.2d 854 (1983) for summary dismissal without an evidentiary hearing. *Hayden*, however, reversed the grant of post-conviction relief **following** an evidentiary hearing. *Hayden*, therefore, supports Mr. Gentry’s contention that the PCR court did not apply the correct

standard of review. In fact, the PCR court's order makes factual findings that are not possible without conducting an evidentiary hearing.

Respectfully submitted,

By 

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(864) 538-4405 (fax)
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Attorney for the Riucky Dennis Gentry

July 11, 2017
Greenwood, South Carolina

Other Counsel of Record:

Valerie Garcia Giovanoli, Esquire
S.C. Attorney General's Office
PO Box 11549
Columbia, SC 29211-1549

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

JUL 14 2017

S.C. SUPREME COURT

APPEAL FROM Spartanburg COUNTY
Court of Common Pleas
Robin B. Stilwell, Circuit Court Judge

Case No. 2015-CP-42-00664

Ricky Dennis Gentry,.....Petitioner,

v.

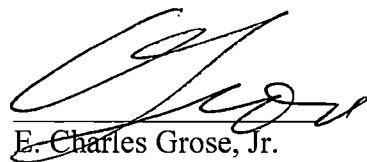
State of South Carolina,.....Respondent.

Certificate of Service

I certify that I have served a copy of this pleading on the State of South Carolina by placing a copy in the US Mail, postage prepaid, on the date reflected below, addressed to

Valerie Garcia Giovanoli, Esquire
S.C. Attorney General's Office
PO Box 11549
Columbia, SC 29211-1549

July 11, 2017



E. Charles Grose, Jr.
The Grose Law Firm, LLC.
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(864) 538-4466

STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG)
)
Ricky Dennis Gentry, #287215)
)
Applicant,)
)
v.)
)
State of South Carolina,)
)
Respondent.)

IN THE COURT OF COMMON PLEAS
IN THE SEVENTH JUDICIAL CIRCUIT

2015-CP-42-0664

FINAL ORDER OF DISMISSAL

2017 APR 21 AM 9:13
HOPE BLANCHETT

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed by Ricky Dennis Gentry (Applicant) on February 10, 2015. Respondent made its Return and Motion to Dismiss on April 21, 2016, requesting the application be summarily dismissed.

After reviewing the pleadings in this matter and all of the records attached thereto, a Conditional Order of Dismissal was filed May 19, 2016, provisionally denying and dismissing this action, while giving Applicant 20 days from the date of service of said Order in which to show why the dismissal should not become final. Attached to this Final Order and incorporated herein by reference is a Certificate of Service dated May 19, 2016, serving the above-mentioned Conditional Order of Dismissal on Applicant's PCR counsel, E. Charles Grose, Jr., Esquire (PCR Counsel).

In a document captioned "Response to Conditional Order of Dismissal" and dated July 11, 2016, Applicant argues that he is in possession of newly discovered evidence. Applicant's alleged newly discovered evidence consists of two, written statements by Applicant's co-defendants, both of whom were known to Applicant at the time of his trial.

On March 23, 2017, a hearing was convened to hear Respondent's motion to dismiss at the Spartanburg County Courthouse. Applicant was present and represented by E. Charles Grose, Jr., Esquire. Valerie Garcia Giovanoli, Esquire, of the Office of the Attorney General, represented Respondent. At the hearing, Applicant argued that one of the co-defendant statements was newly discovered evidence because the co-defendant did not testify at trial.¹ Respondent argued that although the particular co-defendant did not testify at trial, that Applicant's trial counsel referenced him in his opening statements. Thus, it is abundantly clear that not only was this witness discoverable at the time of trial, that he was in fact discovered prior to trial.

This Court had before it the records of the Spartanburg County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, Applicant's prior PCR records, Applicant's appellate records, trial transcript, the application, Respondent's Return and Motion to Dismiss, the Conditional Order of Dismissal, and Applicant's response to the Conditional Order of Dismissal. This Court has had the opportunity to review the record and hear the arguments of the parties and makes the following findings of fact and conclusions of law.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed Applicant's responses to the Conditional Order of Dismissal in their entirety, in conjunction with the original pleadings, heard the arguments presented to the Court, and finds a sufficient reason has not been shown why the Conditional Order of Dismissal should not become final. This Court finds Applicant's responses do not present a *prima facie* showing of newly discovered evidence warranting an evidentiary hearing and therefore have

¹ Applicant concedes that the other co-defendant testified at Applicant's trial to the same contents of his statement that Applicant now offers as newly discovered evidence.



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H. HOPE GILCHRIST

failed to provide sufficient reasons why the Conditional Order of Dismissal should not become final.

A co-defendant known to Applicant prior to trial, who is now serving a sentence arising from the same incident, coming forward with an exculpatory statement over twelve (12) years after Applicant's conviction does not rise to the definition of after-discovered evidence warranting a new trial, as envisioned by the Court in Hayden v. State, 278 S.C. 610, 299 S.E.2d 854 (1983). Applicant was aware of his co-defendant prior to his trial and could have obtained the co-defendant's testimony for his trial. Therefore, having failed to present any actual, newly discovered evidence, Applicant cannot overcome the procedural bars of untimeliness and successiveness. Therefore, the application must be dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act.

CONCLUSION

IT IS THEREFORE ORDERED that for the reasons set forth in the Court's Conditional Order of Dismissal, the application for post-conviction relief is hereby **DENIED AND DISMISSED WITH PREJUDICE**.

This Court hereby advises Applicant that he must file and serve a Notice of Appeal within 30 days of the service of this Order to secure appellate review. See Rule 203, SCACR. Applicant's attention is directed to Rule 243, SCACR., for the procedures following the filing and service of the notice of appeal.

AND IT IS SO ORDERED this 7 day of April, 2017.



ROBIN B. STILWELL
Presiding Judge
Seventh Judicial Circuit

Greenville South Carolina

2017 APR 21 AM 9:43
M. HOPE BLACKBURN

STATE OF SOUTH CAROLINA)
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COUNTY OF SPARTANBURG)
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Ricky Dennis Gentry,)
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Applicant,)
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vs.)
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State of South Carolina,)
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Respondent.)
_____)

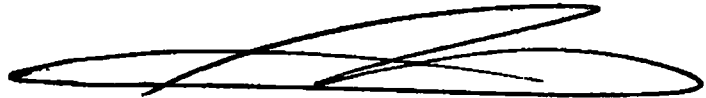
IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

**ORDER DENYING MOTION TO
ALTER OR AMEND ORDER
PURSUANT TO RULE 59(e)**

C. A. No.: 2015-CP-42-0664

This matter comes before the Court pursuant to the Applicant's Motion to Alter or Amend the Court's Order dated on or about April 7, 2017, and filed on or about April 21, 2017, pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure. After having had the opportunity to carefully review the Motion, the same is respectfully denied.

AND IT IS SO ORDERED.



ROBIN B. STILWELL

June 8, 2017
Greenville, South Carolina

2017 JUN 12 AM 9:45
M. HOPE BLACKLEY

STATE OF SOUTH CAROLINA)
)
 COUNTY OF SPARTANBURG)
)
 Ricky Dennis Gentry, #287215)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)
 _____)

IN THE COURT OF COMMON PLEAS
 FOR THE SEVENTH JUDICIAL CIRCUIT

Case No.: 2015-CP-42-0664

CONDITIONAL ORDER OF DISMISSAL

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 SPARTANBURG COUNTY
 2015 MAY 19 AM 9:09
 M. JOUPE BLACKLEY

This matter comes before this Court by way of an application for post-conviction relief (“PCR”) filed by Ricky Dennis Gentry (“Applicant”) on February 10, 2015. The State (“Respondent”) made its return, requesting the application be summarily dismissed.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Spartanburg County. Applicant was indicted at the June 2001 term of the Spartanburg County Grand Jury for murder (2001-GS-42-1299), possession of a weapon during the commission of a violent crime (2001-GS-42-1299), and assault and battery with intent to kill (ABWIK) (2001-GS-42-1298). Applicant was subsequently indicted at the August 2002 term of the Spartanburg County Grand Jury for armed robbery (2002-GS-42-4294), accessory before the fact to armed robbery (2002-GS-42-4293), accessory before the fact to assault and battery with intent to kill (2002-GS-42-4273), and accessory before the fact to murder (2002-GS-42-4274). Applicant was represented on the charges by John B. White, Esquire, Thomas Killoren, Esquire, and Shannon Phillips, Esquire. Applicant proceeded to trial on September 9-13, 2002, on all offenses except possession of a weapon during the commission of a violent crime. A jury found Applicant guilty of accessory before the fact to



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armed robbery and accessory before the fact to ABWIK. Applicant was found not guilty on the remaining charges. The Honorable J. Derham Cole sentenced Applicant to confinement for a period of thirty years for accessory before fact to armed robbery and twenty years to accessory before the fact to ABWIK, to run concurrent.

A timely Notice of Appeal was filed on the Applicant's behalf. Although briefs were filed in the Court of Appeals, the South Carolina Supreme Court certified the case by Order dated March 8, 2004 to address subject matter jurisdictional issues. Oral arguments were held on May 25, 2004. The South Carolina Supreme Court affirmed the Applicant's conviction in State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005). The Remittitur was issued on March 23, 2005.

2006-CP-42-541

The Applicant then filed an application for post-conviction relief (PCR) on February 17, 2006. The Applicant raised the following issues in his first PCR:

1. Ineffective assistance of counsel; and
2. Trial court lacked subject matter jurisdiction.

An evidentiary hearing was convened on September 19, 2007 before the Honorable Roger J. Couch at the Spartanburg County Courthouse. Applicant was present and represented by Fletcher N. Smith, Esquire. S. Prentiss Counts of the South Carolina Attorney General's Office represented the Respondent. Following the submission of all testimony, the Honorable Roger J. Couch denied and dismissed the application by order dated April 6, 2009.

Applicant then subsequently filed a Petition for Writ of Certiorari challenging the post-conviction relief court's decision. The Court of Appeals issued an Order on April 21, 2011 affirming the post-conviction relief court's decision. The Remittitur was sent down on May 12, 2011.



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M. HOPE BLACKLEY

2013-CP-42-0531

In his second application for post-conviction relief, filed on January 25, 2013, the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. "5th, 6th, 14th amendment violations";
2. "Due process violations";
3. "Subject matter jurisdiction";
4. "Ineffective assistance of counsel"; and
5. "Fraud on the court".

The Respondent made its Return and Motion to Dismiss on January 23, 2014. On March 12, 2013, the Honorable J. Derham Cole issued a Conditional Order of Dismissal, provisionally denying and dismissing the action. By Final Order signed July 18, 2014 the Judge Cole denied and dismissed the application. Applicant did not appeal.

CURRENT APPLICATION

In his third and current application for post-conviction relief, the Applicant alleges that he is being held unlawfully for the following reasons:

1. "There exists evidence of material facts not previously presented and heard, that require vacation of the conviction and sentence in the interest of justice S.C. Code Ann. § 17-27-20."
 - a. "Copies of statements from Michael Osbey and Tommie Smith are attached. These witnesses establish that Mr. Gentry did not know that there would be a robbery, assault and battery with intent to kill, or murder."

Before this Court are the records of the Spartanburg County Clerk of Court regarding the subject convictions, the Applicant's records from the South Carolina Department of Corrections, Applicant's previous PCR records, Applicant's current PCR application and Respondent's Return and Motion to Dismiss.

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M. HOPKINS
BLACKLEY

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Successiveness

The Court finds that the current application for post-conviction relief must be summarily dismissed because it is successive to the previous application for post-conviction relief. S.C. Code Ann. § 17-27-90 (2003) states:

All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence, or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which, for sufficient reason, was not asserted or was inadequately raised in the original, supplemental or amended application.

Successive applications are disfavored and the burden is on Applicant to establish that any new ground raised in a subsequent application could not have been raised by him in a previous application. Foxworth v. State, 275 S.C. 615, 274 S.E.2d 415 (1981); Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991).

Applicant has failed to establish any sufficient reason why his current grounds for relief could not have been raised in his previous applications. Though Applicant attaches statements from two individuals indicating he did not know that a robbery was going to take place, Applicant has failed to show why he could not have produced these statements or witnesses in his first PCR action. If, as the statements suggest, these individuals were present the night that the robbery occurred in 2001, then plainly Applicant was aware of these witnesses at the time of his first PCR in 2006. Therefore, Applicant has failed to show a sufficient reason why he could not have raised this claim in his first or subsequent PCR actions.

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BY HOPE BISHOP CRILEY



Accordingly, this Court finds that the current allegations could have been raised in Applicant's prior applications for post-conviction relief and thus the current application is successive and barred under S.C. Code § 17-27-90. Applicant has failed to establish sufficient reason why he could not have raised his current allegations in his previous applications for post-conviction relief; therefore, he has failed to meet the burden imposed upon him. Land v. State, 274 S.C. 243, 262 S.E.2d 735 (1980); Aice v. State, 409 S.E.2d 392 (1991).

Statute of Limitations

This Court further finds that this Application for post-conviction relief must also be summarily dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act. S.C. Code Ann. §17-27-10 to -160. S.C. Code Ann. §17-27-45(a) provides the following:

An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision upon an appeal, whichever is later.

The South Carolina Supreme Court has held that the statute of limitations shall apply to all applications filed after July 1, 1996. Peloquin v. State, 321 S.C. 468, 469 S.E.2d 606 (1996). The Applicant was convicted of the offenses he challenges in this application on September 2002. The Remittitur was sent down on March 23, 2005. The Applicant was therefore required to file his application before March 23, 2006. This Application was filed on February 10, 2015, which was well beyond the expiration of the statute of limitations.

A motion for summary judgment may properly be used to raise the defense of statute of limitations. McDonnell v. Consol. Sch. Dist. of Aiken, 315 S.C. 487, 445 S.E.2d 638 (1994). In addition, S.C. Code Ann. § 17-27-70(c) (2003) authorizes the Court to "grant a motion by either

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SPARTANBURG COUNTY
2016 MAY 19 AM 9:09
M. HOPE BLACKBURN

party for summary disposition of [an] application when it appears from the pleadings . . . that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Accordingly, this Court finds that this application must be summarily dismissed for failure to file within the time mandated by the Uniform Post-Conviction Procedure Act.

Newly Discovered Evidence

Finally, Applicant asserts he is entitled to a new trial based on after-discovered evidence. Specifically, Applicant asserts the statements attached to his application, which were made by Tommie Smith and Michael Osbey, constitute after-discovered evidence. A defendant requesting a new trial based on after discovered evidence must show that the evidence:

- (1) is such as would probably change the result if a new trial was had;
- (2) has been discovered since the trial;
- (3) could not by the exercise of due diligence have been discovered before the trial;
- (4) is material to the issue of guilt or innocence; and
- (5) is not merely cumulative or impeaching.

Hayden v. State, 278 S.C. 610, 611-12, 299 S.E.2d 854, 855 (1983).

After reviewing the record, including the transcript from Applicant's trial, this Court finds that Applicant has not shown that the alleged evidence meets *any* of the requirements for after-discovered evidence. Applicant has failed to address why such purported evidence could not have, by the exercise of due diligence, been discovered before the trial. Before a Court will hold an evidentiary hearing, the applicant must make a prima facie showing that he is entitled to relief. Welch v. MacDougall, 246 S.C. 258, 143 S.E.2d 455 (1965) ("It is, therefore, incumbent upon the applicant to make at least a prima facie showing entitling him to relief."). Applicant has failed to make such a prima facie showing that he is entitled to relief based on the information set forth and, therefore, this Court finds he is not entitled to an evidentiary hearing in the matter.

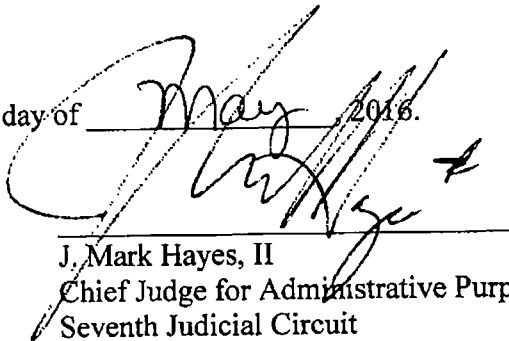
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II. CONCLUSION

Pursuant to S.C. Code Ann. §17-27-70(b), the Court intends to dismiss this Application with prejudice unless the Applicant provides specific reasons, factual or legal, why the Application should not be dismissed in its entirety. The Applicant is granted twenty (20) days from the date of service of this Order upon him to show why this Order should not become final. The Applicant shall file any reasons he may have with the Spartanburg County Clerk of Court and shall serve opposing counsel at the following address:

Office of the Attorney General
PCR Division – 7th Circuit
Alicia A. Olive, Esquire
P.O. Box 11549
Columbia, SC 29211

AND IT IS SO ORDERED this 18th day of May 2016.



J. Mark Hayes, II
Chief Judge for Administrative Purposes
Seventh Judicial Circuit

Spartanburg, South Carolina

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SPARTANBURG COUNTY
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M. HOPE BLACKLEY

Spartanburg County

Spartanburg County Court House
180 Magnolia Street
P. O Box 3483
Spartanburg, SC 29304-3483

Phone (864) 596-2591
Fax (864) 596-2239



M. Hope Blackley
Clerk of Court
May 18, 2016

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

IN THE COURT OF COMMON PLEAS

7TH JUDICIAL CIRCUIT

Applicant

CASE # 2015 CP 42-1064

VS

CERTIFICATE OF SERVICE

Respondent

I certify that, on this date, I served a copy of the Additional Pet. of Dismissal
In this action dated 5-18 2016 on 5-18-16

By mailing to him/her, at his/her last known address, by depositing it in the U.S. Mail, in an envelope with sufficient postage affixed, addressed as follows:

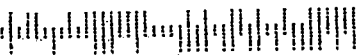
Judex Hancock
E. Charles Crose, Jr.

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M. HOPE BLACKLEY

5-18-16
(Date)

Corrie Steef
(Signature)

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PAID
GREENWOOD, SC
29646
JUL 11, 17
AMOUNT
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R2305K141918-03

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