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December 14, 2016

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

The Honorable Rhonda Dale McElveen
Clerk, Barnwell County
PO Box 723
Barnwell, SC 29812-0723

RE: Joseph Simmons, #362201 v. State of South Carolina
2015-CP-06-153

Dear Mr. Shearouse and Ms. McEleveen:

Enclosed for filing is a Notice of Appeal in the above-referenced case. Also enclosed are the following:

(1) Proof of Service of the Notice of Appeal;
(2) A copy of the Order which is to be challenged on appeal; and
(3) Prior Order of Appointment of Counsel.

As I was appointed to represent Mr. Simmons in his PCR proceeding, I anticipate that the Office of Appellate Defense will represent Mr. Simmons in this appeal.

Yours very truly,

LSB

Lance S. Boozer

cc: Julie A. Coleman, AAG
Office of Appellate Defense
Joseph Simmons, #362201

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
DEC 16 2016
S.C. SUPREME COURT

APPEAL FROM BARNWELL COUNTY
Court of Common Pleas

The Honorable Robert E. Hood, Circuit Court Judge

Case No. 2015-CP-06-153

Joseph Simmons, #362201,.....Petitioner,

v.

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

NOTICE OF APPEAL

The Petitioner appeals the Honorable Robert E. Hood's Order dated November 9, 2016, denying post-conviction relief to the Petitioner. Undersigned counsel received notice of entry of the Order on December 8, 2016. A copy of the Order on appeal is attached to this notice.

Respectfully submitted,

Lance S. Boozer
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APPEAL FROM BARNWELL COUNTY
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Joseph Simmons, #362201,.....Petitioner,

v.

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

PROOF OF SERVICE

I, Lance S. Boozer, attorney for Petitioner, certify that I have today served within Notice of Appeal upon the Respondent by depositing a copy of it in the United States Mail, postage prepaid, addressed to Assistant Attorney General Julie A. Coleman, P.O. Box 11549, Columbia, SC 29211. I further certify that all parties required by Rule to be served have been served this 14th day of December, 2016.

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STATE OF SOUTH CAROLINA COUNTY OF BARNWELL	)	IN THE COURT OF COMMON PLEAS SECOND JUDICIAL CIRCUIT
Joseph O'neal Simmons, #362201, Applicant, v. State of South Carolina, Respondent.	)	2015-CP-06-00153 **ORDER OF DISMISSAL**

This matter comes before the Court by way of a post-conviction relief (PCR) application filed on May 5, 2015. Respondent submitted its Return and Motion for a More Definite Statement on July 23, 2015. An evidentiary hearing into the matter was convened on September 21, 2016, at the Aiken County Courthouse. Applicant was present at the hearing and was represented by Lance Boozer, Esquire. Respondent was represented by Assistant Attorney General Julie A. Coleman of the South Carolina Attorney General's Office.

I. PROCEDURAL HISTORY

The records before this Court indicate that Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Barnwell County Clerk of Court. Applicant was true bill indicted during the February 2014 term of the Barnwell County Grand Jury for criminal sexual conduct with minor – second degree (2014-GS-06-000081). Applicant was represented by Glenn Walters, Sr., Esquire. On November 17, 2014, Applicant pled guilty as indicted without negotiations or recommendations before the Honorable Doyet A. Early, III. Judge Early sentenced Applicant to a ten year term of imprisonment. Applicant did not appeal his conviction or sentence.

Applicant filed a timely application for post-conviction relief on May 5, 2015.

II. ALLEGATIONS

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

1. Ineffective Assistance of Counsel
    a. Failed to move to suppress evidence under the Fourth Amendment.
    b. Failed to move to quash the indictment.
2. Involuntary Guilty Plea
    a. Plea counsel did not advise Applicant with all the facts before this guilty plea.

III. GUILTY PLEA TRANSCRIPT

Before the evidentiary hearing on September 21, 2016, Respondent informed this Court that the transcript from the guilty plea was no longer in existence and needed to be reconstructed.[1] Respondent presented testimony from Susannah M. Ringler, Esquire, who prosecuted the case, and Glenn Walters Sr., Esquire, who were both present at the plea. After testimony was presented, this Court found that the guilty plea record had been reconstructed.

IV. SUMMARY OF RELEVANT TESTIMONY PRESENTED

At the PCR hearing, Applicant testified on his own behalf. Respondent presented testimony from Plea Counsel Glenn Walters, Sr. (hereinafter "Plea Counsel").

Applicant

Applicant testified that he hired Plea Counsel to represent him sometime in January or February of 2013. He stated that he met with Plea Counsel nine or ten times before his guilty plea at his office because he was out on bond. He stated that he did not recall reviewing discovery, discussing any possible defenses, or giving his attorney any potential leads to

[1] The transcript from Applicant's guilty plea was lost and could not be recovered.

investigate. Applicant stated that he faced a twenty year sentence if he had gone to trial, but he pled guilty and received a sentence of ten years imprisonment.

Applicant testified that Plea Counsel never tried to defend him. He stated that they spent one hour or less in each meeting and they never discussed his case. He stated that they never discussed defenses or evidence except for the interview of the victim and the psychiatrist. He stated that he told Plea Counsel that he wanted to go to trial because he was innocent. Applicant stated that Plea Counsel never explained to him the time that he faced, which led him to plead guilty involuntarily.

Applicant stated that Plea Counsel failed to file a pretrial motion to suppress his cell phone, which was confiscated without a warrant. He stated that Plea Counsel never explained why he did not move to suppress it, and if he had, Applicant would have challenged this evidence and gone to trial. Applicant testified that Plea Counsel was ineffective for failing to challenge a false statement in the arrest warrant and the officer's affidavit to obtain the warrant—the officer said that the victim was between the ages of eleven and fourteen, but the victim actually admitted that she was twelve years old. However, Applicant agreed that the age of twelve is, in fact, between the ages of eleven and fourteen.

Applicant testified that the indictments were improper because they did not sufficiently state the elements of the crime and because the dates were different from the arrest warrant. He stated that he wanted Plea Counsel to investigate the background of the twelve year old victim to see what kind of person she was, because she was an out-of-control teenager and he got all the blame for the crime because he was an adult.

Applicant stated that Plea Counsel never explained his parole eligibility to him. He stated that if he had known about his parole eligibility he would have gone to trial rather than plead.

Applicant further stated that Plea Counsel told him that he could not file a PCR application. He stated that he never wanted to plead guilty, but Plea Counsel told him he had to.

Plea Counsel

Plea Counsel testified that he had been practicing law for twenty-five years. He stated that he was retained in this case and he met with Applicant about nine or ten times. He testified that his standard procedure is to file Rule 5 and Brady motions and send a copy to his clients, and he did that in this case. Plea Counsel stated that they discussed the elements of the charge and Applicant's version of the facts. He stated that he reviewed the evidence with Applicant, including the pictures of the victim from his cell phone and the interview statement on videotape. He explained that they began to review the videotape, but Applicant did not want to watch it, so they turned it off. He stated that he placed no restrictions on Applicant viewing this video; he could have burned a copy for himself if he had wanted to.

Plea Counsel testified that they did not have any good defenses to pursue because Applicant admitted to him that he committed the crime and he had pictures of the victim on his cell phone. He explained that, before the guilty plea, Applicant told him that he was still sleeping with the mother of the victim, and Applicant's strategy was to have the victim's mother talk the victim out of testifying at trial. Plea Counsel did not agreed that this was going to be a successful strategy; he did not want to attempt to change or suppress anyone's testimony. Plea Counsel stated that Applicant was convinced that the victim would not testify against him, but he was incorrect; the victim was very aggressively willing to testify against him at trial.

Plea Counsel described the State's evidence against Applicant as overwhelming. He stated that, ultimately, it was Applicant's decision to plead guilty. Plea Counsel stated that he

agreed with that decision, and he still believes that it was in Applicant's best interest to plead guilty.

Plea Counsel testified that the arrest warrants and the indictments were never at issue in this case. He stated that he saw no legal reason to challenge the facts or the dates of these documents. Plea Counsel testified that he saw no legal reason to challenge the admission of Applicant's cell phone. He stated that he saw no legal reason to investigate the twelve-year-old victim's "out of control" behavior. He recalled that he did explain parole eligibility to Applicant. Plea Counsel stated that there was no reason to move to suppress Applicant's statement or any other witness statements. He stated that he did not tell Applicant that he could not file a PCR application, and even if he had said that, Applicant clearly did file an application.

V. APPLICABLE LAW

In a post-conviction relief action, the applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as 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 produced a just result." Strickland v. Washington, 466 U.S. 668, (1984); Butler, 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 exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813 (1985). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. 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 proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. With respect to guilty pleas, the Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart , 474 U.S. 52, 106 S.Ct. 366 (1985).

VI. 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 at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

As a matter of general impression, this Court finds Applicant's testimony and assertions to be not credible. In contrast, this Court finds Plea Counsel's testimony to be credible and persuasive. These credibility findings have been applied to the Court's findings and conclusions set forth below.

INEFFECTIVE ASSISTANCE OF COUNSEL

Applicant alleges Plea Counsel was ineffective in his advice surrounding his guilty plea. In post-conviction relief cases, an applicant asserting a constitutional violation must frame the

issue as one of ineffective assistance of counsel. See Al-Shabazz v. State, 338 S.C. 354, 363, 527 S.E.2d 742, 747 (1999) (citing Drayton v. Evatt, 312 S.C. 4, 9, 430 S.E.2d 517, 520 (1993)). An applicant who pleads guilty on the advice of counsel may collaterally attack the plea only by showing that (1) counsel was ineffective and (2) there is a reasonable probability that but for counsel's errors, the applicant would not have pled guilty and would have insisted on going to trial. Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001) (citations omitted). An applicant alleging his guilty plea was induced by ineffective assistance of counsel must prove that counsel's advice was not "within the range of competence demanded of attorneys in criminal cases." Hill v. Lockhart, 474 U.S. 52, 56, 106 S. Ct. 366, 369 (1985).

Applicant has failed to meet his burden in proving Plea Counsel was ineffective in any regard. This Court finds that Plea Counsel properly relayed the State's plea negotiations and went over the discovery with Applicant, as well as fully explained the possible outcomes in sentencing.

Furthermore, this Court finds that Applicant has not shown that he was prejudiced by any of Plea Counsel's actions as he has failed to show that he would not have pled guilty but would have gone to trial but for Plea Counsel's actions. Accordingly this allegation must be dismissed.

Failure to move to suppress evidence

Applicant alleges that Plea Counsel was ineffective for failing to move to suppress the evidence against him. This allegation is meritless and must be denied.

Plea Counsel credibly testified at the evidentiary hearing that he saw no issues with the evidence against him. There was no reason to move to suppress Applicant's cell phone or the photos from it or any of the witnesses' statements. There was no reason to investigate the victim's alleged "out of control" behavior because this could not be used as a defense; the victim was only

twelve years old. Any motions to suppress this evidence would have been unsuccessful, and thus cannot be prejudicial.

Applicant has failed to prove that Plea Counsel was ineffective in any regard to this allegation and that any failure to object prejudiced him, and this allegation is denied and dismissed with prejudice.

Failure to move to quash the indictment

Applicant has failed to present any probative evidence that any of Plea Counsel's inactions in regard to this allegation were ineffective and prejudicial, and this allegation is denied and dismissed with prejudice.

This Court finds that the indictment in this case was properly executed and fully explained all elements of the charge. The victim was twelve years old when the crime was committed, which falls between the eleven-to-fourteen year age range required of this charge by S.C. Code Ann. § 16-3-655 (1976). This Court finds Applicant was true bill indicted during the February 2014 term of the Barnwell County Grand Jury, and there was no legal reason for the indictment to be quashed. Plea Counsel was not ineffective for failing to move to quash this indictment.

Furthermore, Applicant has failed to prove any prejudice from Plea Counsel's choice not to move to quash the indictment. Even if the indictment had been quashed based on some error, Applicant could have been re-indicted and taken to trial. This Court finds that Plea Counsel's choice not to move to quash would not have changed Applicant's decision to plead guilty, and thus Applicant has failed to prove prejudice.

Because Applicant has failed to meet his burden of proof for both prongs on the Strickland test, this allegation is denied and dismissed with prejudice.

 Pett

OVERWHELMING EVIDENCE

Applicant cannot meet his burden to show that he was prejudiced by any alleged deficiencies because there is overwhelming evidence of his guilt. See Franklin v. Catoe, 346 S.C. 563, 570 n. 3, 552 S.E.2d 718, 722 n. 3 (2001), cert. denied, 535 U.S. 1114, 122 S.Ct. 2332, 153 L.Ed.2d 162 (2002) (finding overwhelming evidence of guilt negated any claim that counsel's deficient performance could have reasonably affected the result of the defendant's trial); Geter v. State, 305 S.C. 365, 367, 409 S.E.2d 344, 346 (1991) (concluding reasonable probability of a different result does not exist when there is overwhelming evidence of guilt); cf. Ford v. State, 314 S.C. 245, 248, 442 S.E.2d 604, 606 (1994) (holding respondent failed to prove prejudice from trial counsel's failure to request an alibi charge where there was overwhelming evidence of guilt).

Applicant had explicit photographs of the twelve year old victim on his cell phone that were going to be used against him at trial. There was a videotaped statement of the victim being interviewed by a psychiatrist, and the victim was "very aggressively" willing to testify against him at trial.

Applicant did not dispute the accuracy of the evidence against him. This is clearly overwhelming evidence of Applicant's guilt. As a result, Applicant can show no prejudice from any of the allegations raised in his PCR application as no deficiency on behalf of Plea Counsel could have reasonably changed the outcome of trial, and this Court finds that this application should be denied.

INVOLUNTARY GUILTY PLEA

Applicant argues his plea was not given freely and voluntarily. This Court finds otherwise and concludes that Applicant's plea was entered freely and voluntarily. To find a guilty

plea is voluntarily and knowingly entered into, the record must establish the defendant had a full understanding of the consequences of his plea and the charges against him. Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L.Ed.2d 274 (1969). Defendant's knowing and voluntary waiver of statutory or constitutional rights must be established by a complete record, and "may be accomplished by colloquy between court and defendant, between court and defendant's counsel, or both." Roddy v. State, 339 S.C. 29, 34, 528 S.E.2d 418, 421 (2000) (citing State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993)). A guilty plea is a solemn, judicial admission of the truth of the charges against an individual; thus, a criminal inmate's right to contest the validity of such a plea is usually, but not invariably, foreclosed. Dalton v. State, 376 S.C. 130, 137-38, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing Blackledge v. Allison, 431 U.S. 63, 97 S. Ct. 1621, 52 L.Ed.2d 136 (1977)). Therefore, statements made during a guilty plea should be considered conclusive unless a criminal inmate presents valid reasons why he should be allowed to depart from the truth of his statements. Crawford v. United States, 519 F.2d 347 (4th Cir.1975).

Applicant claims his plea was given involuntarily because Plea Counsel failed to advise him on parole eligibility and did not fully advise him of the facts before his plea. This Court finds that the record reflects that Applicant was fully advised of the rights he was giving up by pleading guilty. Applicant presented no credible evidence as to why he should be able to depart from his statements at the plea hearing. This Court finds very credible Plea Counsel's testimony that he advised Applicant of all facts and risks of pleading guilty, including parole eligibility.

The record reflects Applicant fully admitted his guilt to the plea court. "A guilty plea constitutes a waiver of nonjurisdictional defects and claims of violations of constitutional rights." Jamison v. State, 410 S.C. 456, 467, 765 S.E.2d 123, 129 (2014) (citing State v. Rice, 401 S.C. 330, 331-32, 737 S.E.2d 485, 485-86 (2013); Hyman v. State, 397 S.C. 35, 44, 723 S.E.2d 375,

379 (2012)). Notably the South Carolina Supreme Court has held "[a] guilty plea represents a break in the chain of events which has preceded it in the criminal process." Id. (citations omitted). "When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea." Id. (citing Rice, 401 S.C. at 332, 737 S.E.2d at 486). Therefore, this Court finds the plea judge correctly found Applicant's plea was freely, voluntary, and intelligently made. Accordingly, this allegation must be denied and dismissed with prejudice.

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, this Court finds the Applicant failed to present any testimony, argument, or evidence at the hearing regarding such allegations. Accordingly, this Court finds the Applicant has abandoned any such allegations.

VII. CONCLUSION

Based on all the foregoing, this Court finds and concludes that the 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.

This Court notes that Applicant must file and serve a notice of appeal within thirty days from the receipt by counsel 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 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate

review, post-conviction relief counsel must serve and file a Notice of Appeal on the Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the application for Post-Conviction Relief is denied and dismissed with prejudice; and

2. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 9 day of NOV, 2016.

R. Hood

ROBERT E. HOOD
Presiding Judge
Second Judicial Circuit

Columbia, South Carolina

STATE OF SOUTH CAROLINA)
COUNTY OF BARNWELL)
Joseph Oneal Simmons,)
Plaintiff(s),)
-vs-)
South Carolina State of,)
Defendant(s).)

IN THE COURT OF COMMON PLEAS
SECOND JUDICIAL CIRCUIT
CASE NO.: 2015CP0600153
APPOINTMENT OF COUNSEL OR GAL
(*Select one.*)

☒ ORDER
☐ AMENDED ORDER

TYPE OF CASE/PROCEEDING: (*Check one.*)

☐ Post-Conviction Relief (PCR)/habeas case
☐ SVP case
☐ Minor Name Change
☐ Adoption
☐ Custody and/or Visitation
☒ Other: Post Convict Rel 500
☐ Juvenile
☐ Abuse and Neglect

It appears Joseph Oneal Simmons, who is a litigant in this case, is entitled to court-appointed counsel or a guardian ad litem.

It further appears that: (*Select only one.*)

☒ counsel/guardian ad litem has not yet been appointed by the court; therefore, an appointment for counsel/guardian ad litem is necessary.

☐ counsel or a guardian ad litem was previously appointed by the court but has indicated either a possible conflict of interest, an entitlement to exemption, or other good cause warranting the appointment of new counsel or guardian ad litem based on:

☐ counsel was previously appointed by the court but has not indicated that the litigant has retained private counsel and is no longer entitled to appointed counsel.

☐ court appointed counsel has obtained , Esquire as substitute counsel pursuant to Rule 608(h)(2); provided, however, only the member who originally received the appointment and who sought substitute counsel shall receive credit.

☐ Other: .

FILED FOR RECORD
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BARNWELL COUNTY

Therefore, it is ordered that Lance S. Boozer hereby is appointed as (*Select one.*)

☒ counsel ☐ lead counsel (*if capital PCR case*) ☐ guardian ad litem for the above-named person. Any counsel or GAL previously appointed is/are hereby relieved.

☐ (*If Death Penalty PCR Case*) It is further ordered that , Esquire, is hereby appointed as second counsel in this capital PCR case.

The clerk of court is directed to forward a copy of this order to all persons entitled to notice.

IT IS SO ORDERED
June 2, 2015

Constance B. Mansfield
☐ Circuit Judge ☒ Clerk of Court
Deputy

Plaintiff Attorney:

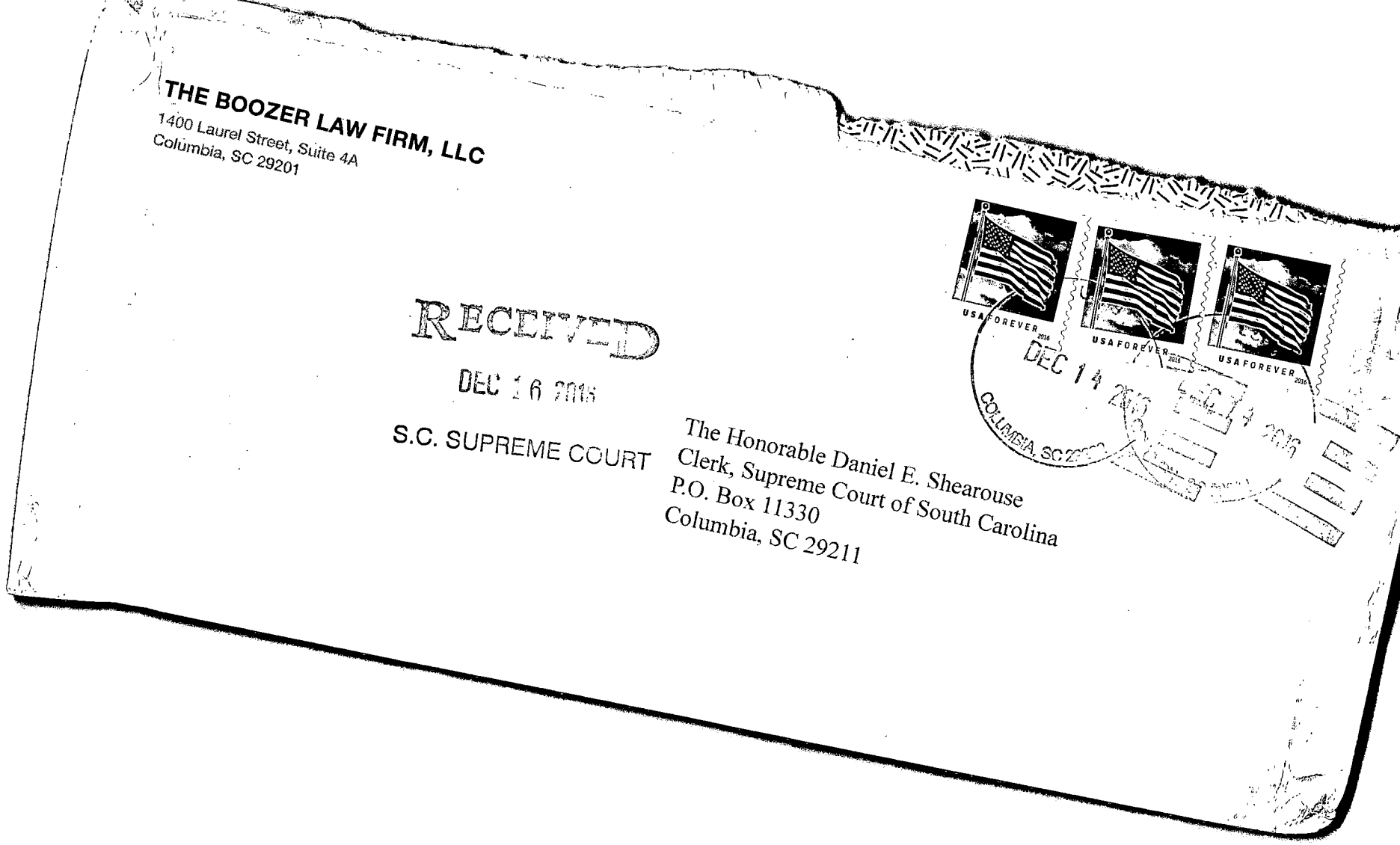
Lance S. Boozer	
807 Gervais St., Suite 203	
Columbia, SC 29201	

Defendant Attorney:

Daniel Francis Gourley II	
P.O Box 11549	
Columbia, SC 29211	

NOTICE: SC Supreme Court Order of September 29, 2006, requires appointed counsel entitled to payment from the Office of Indigent Defense (OID) to register the case online with OID within fifteen (15) days of this appointment at www.sccid.sc.gov, and further directs that reimbursement vouchers be submitted directly to SCCID and not to the trial judge or clerk of court. See SCCID website for further details.

CP20 (08/08)
SCCA/267 (03/07)



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