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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Bentley D. Price, Circuit Court Judge

Appellate Case No. 2019-001470

John Doe,.....Respondent,

v.

The Diocese of Charleston, a Corporation Sole, and the
Bishop of the Diocese of Charleston in his official capacity,.....Defendants,

and

Richard Roe,.....Respondent,

v.

The Diocese of Charleston, a Corporation Sole, and the
Bishop of the Diocese of Charleston in his official capacity,.....Defendants,

Of which the Bishop of the Diocese of Charleston, in his
official capacity, is the.....Appellant.

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, the Appellant respectfully submits this Petition for Rehearing as to the Court's Order dismissing these appeals as interlocutory. The Court filed that Order on December 2, 2019, and this petition is timely under Rule 221(a), SCACR. The Appellant bases this petition on the general ground that the Court overlooked or misapprehended the special and exceptional circumstances that make the challenged order of the circuit court

immediately appealable. The Appellant fully sets forth the specifics of that position in the Argument section below.

STATEMENT OF THE CASE

These consolidated appeals arise from multiple orders in civil actions brought by the Respondents "John Doe" and "Richard Roe." The Respondents commenced those actions against The Diocese of Charleston, a Corporation Sole[1] and "the Bishop of the Diocese of Charleston, in his official capacity" based on allegations of past sexual abuse. John Doe alleged he was molested by two teachers at Sacred Heart School in 1970 and 1971. Richard Roe alleged he was molested by Fr. Frederick Hopwood in 1954 or 1955.[2] The Diocese timely moved to dismiss the two Complaints based upon common law charitable immunity and the *res judicata* effect of the 2007 class action settlement with (1) all individuals born on or before August 30, 1980 who claim to have been sexually abused as minors by the Diocese of Charleston personnel and (2) those individuals' spouses and parents.

The circuit court heard the motions to dismiss on December 14, 2018, and denied those motions in orders filed on March 4, 2019. The Appellants then answered the Complaints, raising First Amendment defenses and pleading that "the Bishop of the Diocese of Charleston, in his official capacity" was not a proper party. On March 29, 2019, 14 days after answering the Complaints, the Diocese moved for partial summary judgment seeking dismissal of all claims against "the Bishop of the Diocese of Charleston, in his official capacity." Prior to the hearing on

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[1] The true name of the Corporation Sole is "Bishop of Charleston, a Corporation Sole."

[2] The Doe claims occurred during the time Bishop Ernest Unterkoeffler served as Bishop of Charleston. Bishop Unterkoeffler retired as Bishop in 1990 and died in 1993. The Roe claims occurred during the service of Bishop John Russell who was appointed Bishop of Richmond in 1958. Bishop Russell retired in 1973 and died in 1993. The current Bishop, Bishop Robert Guglielmone, was appointed Bishop of Charleston in 2009.

the motions, the Diocese submitted additional authority in support, including the Bylaws of Bishop of Charleston, a Corporation Sole and the deposition testimony of Bishop Robert E. Guglielmone.

On July 17, 2019, the circuit court conducted a hearing on several pending motions, including the Appellants' Motions for Summary Judgment and motions by the Respondents to compel production of the materials and information that the Appellants claimed were confidential. At that hearing, the judge ordered the Appellants to respond to plaintiffs' overly broad discovery requests and ruled that the Court would hold a hearing on the objections to the discovery requests. However, the Court further noted that the Diocese should be prepared to produce all required documents within 24 hours of that review. The Court also denied summary judgment to the Bishop of the Diocese of Charleston, in his official capacity, by written order dated July 24, 2019.

After the July 2019 hearing, the Appellants produced the personnel files of Fr. Frederick Hopwood and Fr. William Croghan, the two priests the Respondent Roe alleges abused him. The Appellants redacted the names of any victims of childhood sexual abuse from the production to the Respondents. At the September hearing, the Court requested a copy of those files, together with a redaction log for an *in camera* review. The Appellants provided that information to the Court. On October 15, 2019, the Court ordered the Appellants to produce the Hopwood file without any redaction of victim names. The Court permitted redaction only for attorney-client communications and attorney work product. The Appellants commenced these appeals the next day.

The Appellants filed timely motions asking the circuit court to reconsider and reverse its decisions regarding production of confidential information and materials and the denial of

summary judgment. After the denial of those motions, the Appellants commenced separate appeals. The Respondents moved to dismiss the appeals, claiming the challenged orders were not immediately appealable. The Appellants filed returns in opposition, which set forth the reasons why the orders are, and must be, subject to immediate appellate review. The Court granted the motions to dismiss in an Order filed on December 2, 2019. In that Order, the Court also consolidated the two appeals.

ARGUMENT

I. The discovery order is immediately appealable because it compels the Appellants to produce confidential and personal information, and an appeal after a final judgment would not provide any meaningful recourse for the Appellants or innocent victims of sexual abuse impacted by the order.

In granting the motion to dismiss as to the discovery order, the Court cited only *Ex parte Whetstone*, 289 S.C. 580, 580, 347 S.E.2d 881, 881 (1986), for the proposition that "[a]n order directing a party to participate in discovery is interlocutory and not directly appealable under S.C. Code §14-3-330." Although *Whetstone* does contain that language, the discovery order in the present appeal is significantly different than the one involved in *Whetstone*. Therefore, that case is readily distinguishable and does not support any decision to dismiss these appeals.

In *Whetstone*, the circuit court ordered a non-party witness to appear for a deposition and to produce certain documents. The Supreme Court dismissed the witness' appeal, stating that a non-party ordered to participate in discovery could either comply with the order, thereby waiving any right to appeal, or refuse to comply, be held in contempt, and then appeal the contempt order. The Court further supported its decision by noting that the witness was a non-party, who could not suffer any "legal injury" (which would create the right to appellate review) unless and until there was a finding of contempt.

Significantly, there is no indication whatsoever that the witness in *Whetstone* claimed the testimony and documents compelled by the order were confidential or privileged. For all the opinion shows, the witness simply did not want to participate in the deposition or to produce the documents. Thus, the Supreme Court was not asked to consider, and made no ruling on, the issue of whether a discovery order is immediately appealable if it compels the production of confidential information.

In the present cases, the circuit court has ordered the Appellants to produce information and documents (with no redactions or other protections) that are highly confidential, and production of which will subject the Appellants, as well as innocent third parties, to immediate harm. Specifically, the order requires the Appellants to reveal the identities of adults who were sexually abused as children. As discussed below, the Appellants have a duty, both legal and moral, to keep those names secret, especially where those victims have chosen to guard their identities and to shun any publicity of their past trauma. The challenged order forces the Appellants to violate that duty, and once that proverbial genie has left the bottle, no appellate review would be of any consequence.

Numerous victims of sexual abuse have come forward over the years and the Appellants have respected and guarded their anonymity. Most, if not all, of those victims reached some type of confidential resolution with the Appellants, and many have received psychological counseling to help them deal with their abuse. The fact that victims are encouraged to report past sexual abuse and the counseling and pastoral support provided by Appellants could be drastically undermined if victims know that their identities will be provided to lawyers, who plan to contact them and ask about their traumatic pasts. Furthermore, complying with this order will force the Appellants to violate confidentiality provisions in the settlements reached with most, if not all, of

those past victims. This would, in turn, subject the Appellants to the threat of legal actions and damages for that breach. Thus, the order creates a real and immediate threat of harm to the Appellants.

Simply put, the challenged order must be appealed now if appellate review is to have any meaning. If the Appellants are forced to comply with that order before appealing, the confidential information will be disclosed. Even if the Court were later to agree with the Appellants on the merits of their arguments against the order, such a post-disclosure reversal of the order would be no remedy at all. At that point, the damage would be done and irreversible. In the truest sense, these cases present a "now or never" scenario for purposes of an appeal.

Furthermore, there is ample authority in South Carolina to support the immediate appealability of orders that compel a party to reveal or produce confidential information. As former Chief Justice Toal states in her treatise, "If an order requires a party to turn over documents, which the party feels are privileged or contain proprietary or confidential matters, compliance with the order without the ability to seek immediate appeal renders the protections afforded by the privilege or confidentiality a nullity." Toal, et al. *Appellate Practice in South Carolina* (2nd Ed.) at 94. Unless such an order is immediately appealable, it would be effectively unreviewable on appeal from a final judgment, as a reversal at that late stage would be no relief at all. *See BLH*

This Court's decisions in *BLH v. S.C. Dep't of Social Servs.*, 423 S.C. 422, 814 S.E.2d 638 (Ct. App. 2018), and *Doe v. Howe*, 362 S.C. 212, 607 S.E.2d 354, 355 (Ct. App. 2004), are instructive. In *Doe*, a former client sued his attorney and moved to proceed anonymously because the underlying civil action involved allegations of sexual abuse. The circuit court denied that request, and the client appealed. This Court noted that an order is appealable if it

"(1) conclusively determines the question, (2) resolves an important question independent of the merits, and (3) is effectively unreviewable on appeal from a final judgment." 362 S.C. at 216, 607 S.E.2d at 356. The Court then held that the challenged order met the appealability criteria because it "ha[d] the effect of revealing [the client's] identity, the very thing he was seeking to keep confidential." *Id.* at 217, 607 S.E.2d at 356.

In *BLH*, the plaintiff sought class certification for a group of adoptive parents who alleged their government subsidies were improperly reduced in the early 2000s. As part of that process, the plaintiff requested the production of the names and addresses of children who had been adopted during the relevant timeframe. The defendant objected to that information being released, as it was highly sensitive and confidential, and many of the children (or adults) affected might not even know they had been adopted. The circuit court entered a class certification order that required the information to be released, and the defendant appealed. Finding *Doe* to be instructive, this Court found that the order was immediately appealable, even though class certification orders usually are not. The Court noted that, like *Doe*, "this case involves the disclosure of personal and potentially sensitive information for which there would be 'no appellate remedy ... likely to repair any damage done by an improper disclosure.'" 423 S.C. at 429, 814 S.E.2d at 642 (quoting *Ex parte Capital U-Drive-It, Inc.*, 369 S.C. 1, 8, 630 S.E.2d 464, 468 (2006)).

As noted, the *BLH* Court also cited and relied upon *Ex parte Capital, supra*. In that case, a company attempted to unseal the divorce records of an employee who admittedly embezzled from it. The lower court entered an order allowing the company to examine the divorce records to inspect the employee's financial representations, and the employee appealed. The Supreme Court concluded that the order "determined a substantial matter forming the whole or part of the

family court proceedings in which [the company] sought access to the record of the [employee's] divorce." 369 S.C. at 5, 630 S.E.2d at 466. "Moreover, [the Court] agree[d] with courts which have been included to find such an order immediately appealable because, after a court file is unsealed and the information released, no appellate remedy is likely to repair any damage done by an improper disclosure." *Id.* at 8, 630 S.E.2d at 468 (emphasis added). "Compelling a party that disputes an unsealing order to forego an appeal until the conclusion of the underlying litigation would let the cat out of the bag, without any effective way of recapturing it if the [lower] court's directive was ultimately found to be erroneous." *Id.* (quoting *Siedle v. Putnam Invs., Inc.*, 147 F.3d 7, 9 (1st Cir. 1998)) (emphasis added).[3]

The principles applied in *Doe*, *BLH* and *Ex parte Capital* are also controlling in the present appeals. Just as in those cases, the challenged order requires the production and release of highly confidential information. Whether or not the circuit court should have ordered that production and release is a question that an appellate court must answer now. Otherwise, the Appellants will be denied any opportunity for meaningful review of the order. A post-judgment appeal would have been too late in *Doe*, *BLH* and *Ex parte Capital*, and such an appeal would be equally moot here.

The Court's brief Order granting the motions to dismiss gives no indication that the Court considered or applied *Doe*, *BLH* and *Ex parte Capital*. The Appellants respectfully submit that in failing to take those controlling authorities into account, the Court overlooked or misapprehended the key factor that makes the challenged order much more than the granting of a

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[3] *See also Knight Publishing Co. v. University of S.C.*, 295 S.C. 31, 367 S.E.2d 20 (1988) ("[a]n order allowing discovery of documents that a newspaper ultimately sought disclosed as the subject of [a] FOIA action was immediately appealable because it in effect determined the action and prevented an appealable judgment."), *overruled on other grounds*, *Simpson v. Sanders*, 314 S.C. 413, 445 S.E.2d 93 (1994).

garden variety motion to compel. Therefore, the Appellants have met the requisite standard for a rehearing pursuant to Rule 221(a), SCACR.

Furthermore, by citing and relying upon *Ex part Whetstone*, *supra*, the Court has, at least implicitly, endorsed the requirement that a party seeking to challenge a discovery order must first refuse to comply with that order and then appeal the resulting sanction (i.e. contempt). Although there is arguably some authority to that effect, it is important to note that the Supreme Court has recently granted an extraordinary writ and has requested briefing as to whether a finding of contempt is a necessary prerequisite to appellate review of a discovery order. *See* Order in *Mark C. Mosley v. Christine Alston*, Appellate Case No. 2019-001056 (filed October 3, 2019).[4] Significantly, one of the objections asserted against the discovery order in that case is the fact that it would require the defendant to release confidential medical information about third-parties. In that sense, *Mosley* and the present case involve analogous concerns.

Thus, to the extent it relied on a "contempt first" rule in granting the motions to dismiss, the Court should grant the current petition, reinstate these appeals, and then stay the appeals until the Supreme Court has issued a decision in *Mosley*. Alternatively, the Court could stay consideration of this petition (as well as all other proceedings in this Court and in the circuit court) until *Mosley* has been concluded.

II. The denial of the summary judgment motion is immediately appealable because it impacts the Appellants' substantial rights under the First Amendment to the United States Constitution.

In light of the clear authority supporting immediate appellate review of the discovery orders in these cases, the Court need not conduct a thorough review of the reasons why the denials of the summary judgment motions are immediately appealable. Rather, the Court can

[4] A copy of the Order is attached as an exhibit to this petition.

simply review those orders in conjunction with the discovery orders, regardless of the former's appealability. "An order not immediately appealable will nonetheless be considered if there is an appealable issue before the appellate court, and a ruling on appeal will avoid unnecessary litigation." Toal, et al. *Appellate Practice in South Carolina* (2nd Ed.) at 88 (citing *Pruitt v. Bowers*, 330 S.C. 483, 499 S.E.2d 250 (Ct. App. 1998)).

The circuit court's orders ignore the very fundamental freedom of religion enjoyed by religions and enshrined into the First Amendment's Free Exercise and Establishment clauses. The circuit court's decision overturns both the Church's determinations of how the Catholic Church exists in the civil, rather than the ecclesiastical, context. This constitutes a veritable attack on the Church's First Amendment rights and causes the Court to engage in an impermissible inquiry into canon law and Church doctrine. The ruling stands in stark contrast to nearly 150 years' of precedent that civil courts must accept, and give full effect to, the decisions of religious organizations regarding how the church will be organized and structured. The Appellants have demonstrated beyond any conceivable doubt or dispute that the Diocese of Charleston operates in civil law as the Corporation Sole, and that Corporation Sole is the only proper defendant in this action.

As with the order to produce confidential material regarding victims of sexual abuse, the circuit court's denial of summary judgment to the ecclesiastical office of Bishop is more than it seems. The substance of the challenged ruling means that an ecclesiastical office, and just the office not an individual holding that office, is being forced to engage with the civil law even though the ecclesiastical office does not have any civil law presence. The diocesan bylaws distinctly and expressly spell out that the Bishop of Charleston is <u>not</u> a civil law title, and "Bishop of Charleston, a Corporation Sole" is <u>the one and only</u> civil law entity with the legal

name of "Bishop of Charleston." The circuit court's decision reorders the allocation of both ecclesiastical and civil authority and constitutes governmental establishment of religion – determining how a church must function under state authority. This is true regardless of whether or not the circuit court intended that result.

Thus denial of summary judgment to the ecclesiastical office of Bishop of Charleston, which exists only in canon law, erroneously trod on the First Amendment rights of the Roman Catholic Diocese. The circuit court ignored the Church's own determinations regarding its presence in civil law, as well as the state's own law recognizing the Corporation Sole and the civil law presence of the Bishop of Charleston and the Catholic Diocese. In doing so, the circuit court engaged in its own reordering of the Catholic Diocese and interfered in a realm in which the civil government has no proper role.

Although it is true that the denial of a summary judgment motion is generally not appealable, the preceding discussion demonstrates that these orders are more than just summary judgment denials. Granted, the orders are called denials of the Appellants' summary judgment motions, but that label is not determinative. It is not the name or the type of an order that matters for purposes of appealability, but rather the order's overall impact. *See Morrow v. Fundamental Long-Term Care Holdings, LLC*, 412 S.C. 534, 773 S.E.2d 144 (2015). In *Morrow*, the Supreme Court concluded that an order was immediately appealable, regardless of what it was called, because it implicated the appellant's substantial rights.[5] As the Court stated, "Our review of the trial court order is not constrained by how the order is styled." *Id.* at 539, 773 S.E.2d at 147 (emphasis added). The Court further cited *Thornton v. S.C. Elec. & Gas Corp.*, 391 S.C. 297,

[5] Specifically, the order granted a request to bifurcate trial proceedings. The plaintiffs argued, and the Supreme Court agreed, that the order was immediately appealable because it impacted the plaintiffs' ability to pursue their direct liability claims against a corporate defendant.

304, 705 S.E.2d 479 (Ct. App. 2011), for the proposition that "an appellate court should look to the effect of an interlocutory order to determine its appealability." *Id.* at 540, 773 S.E.2d at 147 (emphasis added).

Here, the effect of the challenged ruling is not merely to force the Appellants to reassert a certain defense at a later stage of the proceedings.[6] Rather, the effect is to have the civil government intrude upon the internal structure and affairs of a religious institution. This is a violation of the Appellants' First Amendment protections – an issue, it is worth noting, that has nothing to do with the Respondents' claims or how they are eventually decided. The Appellants have established a legitimate civil law presence for responding to cases such as this one; the Respondents and the circuit court simply ignored that decision and named an improper entity. Again, by doing so, the circuit court violated the Appellants' constitutional rights, which are not only substantial, but also fundamental. Therefore, the circuit court's decision is far more than a typical denial of a summary judgment motion, and it is immediately appealable.

CONCLUSION

Both issues raised in this appeal involve orders that are immediately appealable. Yet, even if the Court were to determine that the ruling on the Appellants' summary judgment issue was not independently appealable at this time, it should nevertheless allow the entire appeal to proceed. The clearly established case law supports the appealability of the order forcing the Appellants to disclose highly confidential information, and considering the other issue on appeal would promote judicial efficiency. For these reasons, the Court should grant the Appellants'

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[6] The general rule against appellate review of a summary judgment denial stems from the fact that the moving party has later opportunities to reassert the grounds that supported the summary judgment motion.

petition, reverse the dismissal stated in the Order of December 2, 2019, and allow the entire appeal to proceed in the normal course.

Respectfully submitted,

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ATTORNEYS FOR APPELLANTS

December 10, 2019

16-441

The Supreme Court of South Carolina

Mark C. Mosley, Respondent,

v.

Christine Alston, Personal Representative of the Estate of Robert Alston, DaVita, Inc. d/b/a DaVita Walterboro Dialysis #3073, DVA healthcare Renal Care, Inc., DVA Renal Healthcare, Inc. DaVita Healthcare Partners, Inc., and Howard Elj,

Of which, DaVita, Inc., DVA Healthcare Renal Care, Inc. DVA Renal Healthcare, Inc., DaVita Healthcare Partners, Inc., and Howard Elj are, Petitioners.

Appellate Case No: 2019-001056

ORDER

Petitioners have filed a petition for an extraordinary writ to review a discovery order of the circuit court. Respondent opposes the petition. We grant the petition and direct the parties to brief the following issues:

(1) Does this matter involve exceptional circumstances warranting the issuance of a common law writ of certiorari to review the discovery order?

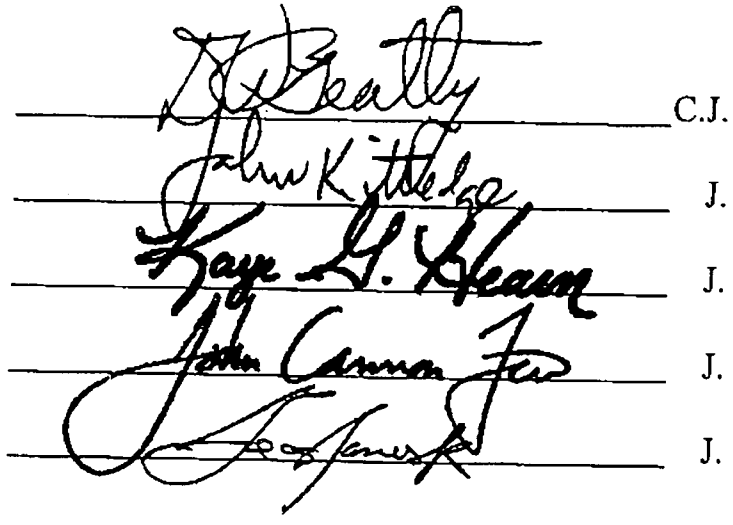
(2) Should a contempt order for failing to comply with a discovery order be required before an appeal may be taken to review a discovery order?

(3) If a contempt order is not required before a discovery order may be reviewed on appeal, what limitations should be placed on the ability to take an immediate appeal from a discovery order?

The parties shall, within twenty (20) days of the date of this order, agree on the content of an appendix in this matter. Within thirty (30) days after agreement on the appendix, Petitioners shall serve their brief(s) and the appendix on Respondent

and file fifteen (15) copies of the brief(s) and fifteen (15) copies of the appendix with the Clerk of this Court, with one copy of the brief(s) and appendix filed unbound. The Petitioners must also file with the Clerk proof that the brief(s) has been served, and a certificate that the brief(s) complies with Rule 211(b), SCACR. Within thirty (30) days after service of Petitioners' brief(s), Respondent shall serve his brief on Petitioners and file with the Clerk fifteen (15) copies of the brief, one copy of which shall be filed unbound. Any *amicus curaie* briefs shall be served and filed within thirty (30) days after service of Respondent's brief.

The parties will be advised if the Court wishes to schedule oral argument in this matter.



C.J.

J.

J.

J.

Columbia, South Carolina

October 3, 2019

cc:
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Richard Edward McLawhorn, Jr., Esquire
John E. Parker, Esquire
William Franklin Barnes, III, Esquire
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H. Woodrow Gooding, Esquire
The Honorable Perry Buckner
The Honorable Mylinda D. Nettles

THE STATE OF SOUTH CAROLINA
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APPEAL FROM CHARLESTON COUNTY
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The Diocese of Charleston, a Corporation Sole, and the
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Of which the Bishop of the Diocese of Charleston, in his
official capacity, is the.....Appellant.

PROOF OF SERVICE

The undersigned, an attorney in this matter for the Appellants, certifies that I have this **10th day of December, 2019**, served a copy of the **Petition for Rehearing** on counsel for the Respondent by causing it to be deposited in the United States mail with sufficient postage attached, addressed to: Lawrence E. Richter, Jr.; The Richter Firm, LLC; 622 Johnnie Dodds Blvd., Mt. Pleasant, SC 29464.

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December 10, 2019

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December 10, 2019

Via Hand Delivery

The Hon. Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate St.
Columbia, 29201

Re: John Doe / Richard Roe v. The Diocese of Charleston, et al.
Appellate Case No. 2019-001470
Our File No. 8724.252

Dear Ms. Kitchings:

Enclosed are the following materials: (1) the original and seven copies of the Petition for Rehearing, (2) the original and one copy of the Proof of Service, and (3) a check for the filing fee. Please file the originals and return the stamped copies to our courier. Thank you for your kind assistance.

Sincerely,

TURNER PADGET GRAHAM & LANEY P.A.

R. Hunter Rudd

for Richard S. Dukes, Jr.

RHB
Enclosures

cc: Lawrence E. Richter, Jr.