STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS



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Appeal from Anderson County
Honorable R. Lawton McIntosh, Circuit Court Judge
Appellate Case Tracking No. 2019-001502

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The State, Respondent,

vs.

Dustin Lee Hooper, Appellant.

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**MOTION TO DISMISS**

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Respondent, through its undersigned counsel, would respectfully show unto this Court as follows:

I.

This case has an extensive procedural history. Appellant went to trial on March 6, 2019. On March 8, 2019, the trial court issued an order indicating it was deferring sentencing until after an appeal has concluded. Shortly thereafter on March 15, 2019, Appellant filed a Motion to Reconsider pursuant to Rule 29, SCRCrimP. (See Motion for Reconsideration, attached as Exhibit A). On July 25, 2019, the trial court held a hearing on the Motion to Reconsider. At the hearing, the trial court entered sentence for Appellant. (See Sentencing Sheet, attached as Exhibit B). On the same date as the hearing, the trial court orally denied the Motion to Reconsider. On August 8, 2019, Appellant served and filed a Motion for Relief of Judgment Pursuant to Rule 60(b)(1) in which he made the same arguments made in the Motion to Reconsider. (See Motion for Relief of Judgment Pursuant to Rule 60(b)(1), attached as Exhibit C). Appellant then filed on

August 9, 2019, a Motion to Amend seeking to rename the Motion for Relief of Judgment as a Motion to Vacate Judgment. (See Motion to Amend, attached as Exhibit D). At the same time, he filed his Motion to Vacate Judgment, again making the same arguments made in the Motion to Reconsider and the Motion for Relief of Judgment. (See Motion to Vacate Judgment, attached as Exhibit E). On August 27, 2019, Judge McIntosh filed an Order stating: "The Motion to Amend, Motion to Vacate Judgment and Motion for Relief of Judgment in case number 2017-GS-04-0365 is DENIED without the necessity of a formal hearing." (See Order Denying Motion, attached as Exhibit F). Subsequently, on August 29, 2019, the trial court held a hearing on the various motions filed by Appellant. On the same date, the trial court issued a second order denying Appellant's Motion to Vacate Judgment. (See Order Denying Defendant's Motion to Vacate, attached as Exhibit G). Appellant served and filed his Notice of Appeal on August 30, 2019.

II.

The appeal in this case is untimely and should be dismissed. Appellant served and filed his first Motion to Reconsider, which was considered and ruled upon by the trial court on July 25, 2019. As a result of the denial of his Motion to Reconsider, Appellant should have served and filed a Notice of Appeal no later than August 5, 2019. Instead, he served and filed a subsequent motion—albeit one that does not exist under the South Carolina Rules of Criminal Procedure—untimely on August 8. Even considering his attempt to amend the motion, the second motion was still an incorrect attempt at a subsequent motion to reconsider. The trial court did not have jurisdiction to consider the second motion. As a result, his Notice of Appeal from the denial of his second motion was untimely. See State v. Pfeiffer, 427 S.C. 10, 828 S.E.2d 764 (2019) ("Successive Rule 29(a) motions are generally not permitted."); Elam v. S.C. Dep't of Transp., 361 S.C. 9, 15, 602 S.E.2d 772, 775 (2004) ("[A] second motion for

reconsideration . . . is appropriate only if it challenges something that was altered from the original judgement as a result of the initial motion for reconsideration." (discussing Coward Hund Constr. Co. v. Ball Corp., 336 S.C. 1, 3–4, 518 S.E.2d 56, 58 (Ct. App. 1999))).

Additionally, because sentencing did not occur until July 25, 2019, a Motion to Reconsider would not have been proper until after sentencing. See Rule 29, SCCrimP. Appellant's first Motion to Reconsider was considered by the Court on July 25 and orally denied the same day. It should be considered timely made and denied. However, even if the first Motion to Reconsider was a nullity because Appellant was not sentenced until July 25, 2019, his second motion was required to have been served and filed no later than August 5, 2019. See Rule 29, SCCrimP ("Except for motions for new trials based on after-discovered evidence, post-trial motions shall be made within ten (10) days after the imposition of the sentence."). Instead, the motion was made on August 8, 2019, and was untimely. (See Exhibit C and note the date of filing with the Clerk of Court on the bottom of the Motion).

As a result, this Court does not have jurisdiction to hear this appeal because a timely Notice of Appeal was not served. See State v. Devore, 416 S.C. 115, 119, 784 S.E.2d 690, 692 (Ct. App. 2016) ("The requirement of service of the notice of appeal is jurisdictional, i.e., if a party misses the deadline, the appellate court lacks jurisdiction to consider the appeal and has no authority or discretion to 'rescue' the delinquent party by extending or ignoring the deadline for service of the notice." (quoting USAA Prop. & Cas. Ins. Co. v. Clegg, 377 S.C. 643, 651, 661 S.E.2d 791, 795 (2008))); Rule 203(b)(2), SCACR ("After a plea or trial resulting in conviction or a proceeding resulting in revocation of probation, a notice of appeal shall be served on all respondents within ten (10) days after the sentence is imposed. When a timely post-trial motion is made under Rule 29(a), SCRCrimP, the time to appeal shall be stayed and shall begin to run from receipt of written notice of entry of an order granting or denying such motion.").

WHEREFORE, Respondent prays that the Court hold this matter in abeyance until ruling on this motion, and dismiss this appeal as untimely; and for such other and further relief as the Court may deem just and proper.

Respectfully submitted,

ALAN WILSON
Attorney General

WILLIAM M. BLITCH, JR.
Senior Assistant Deputy Attorney General

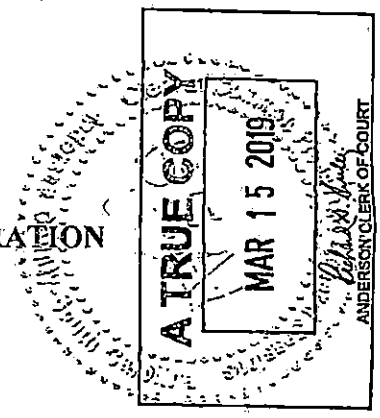
BY: _____
William M. Blitch, Jr.
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

January 22, 2020

# EXHIBIT A

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA<br>COUNTY OF ANDERSON | ) | IN THE COURT OF GENERAL SESSIONS<br>TENTH JUDICIAL CIRCUIT |
| State of South Carolina<br><br>Plaintiff, | ) | C.A. Nos.: 2017-GS-04-0365 |
| Vs. | ) | **MOTION FOR RECONSIDERATION** |
| Dustin Lee Hooper,<br>Defendant. | ) | |



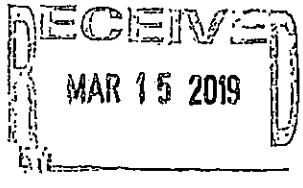

Plaintiff, by and through his counsel, respectfully moves for reconsideration this Court's Order, filed on March 6, 2019, and allege as follows:

## STATEMENT OF FACTS

On October 28, 2016, Defendant Dustin Hooper (hereinafter referred as Hooper) started his day at 7 a.m. He worked a double shift at the Twisted Flame and got out around 10:30 p.m. He went home to shower; and, he had to go to TL Hanna to help jumpstart his friend DJ's car at around 11:00 p.m. After managing to get through the post-game, Westside traffic, he and DJ went to Christopher Steven Cauley's house off Highway 24. They were there momentarily; and, proceeded to Clemson where they had learned of Halloween festivities. They got to the Pier around 12:30 a.m.

DJ knew people at the Pier and pushed through the crowd to join other friends. Dustin and Steven sat on the front hood of the car and watched the traffic of party goers going in and out of the Pier. The crowd, which had enjoying the festivities for several hours, was not something that either Dustin or Steven wished to contend. Following approximately thirty (30) minutes, they left for a bonfire of which they had become aware.

Dustin drove them to the bonfire, which was roughly ten minutes away. They got to the bonfire sometime around 1:15 a.m. They didn't really know anyone there either; and, the



managed to hang out for another thirty (45) minutes, due to the fact that it was not nearly as crowded. Around 2:00 a.m., they got a call from DJ, who's car would not start again. They got in the car and headed back to the Pier.

They returned to the Pier to find DJ at wit's end regarding the issue of his car's inability to start. They managed to get the care started once again; and, recognized that this evening which had been nothing but a headache, needed to come to an end. The three of them said their goodbyes and left the Pier.

Initially, Dustin was to follow Steven back to his residence off of 24. However, as he traveled Clemson Blvd. toward Anderson, Dustin felt the day had been long enough; and, he simply wanted to go home. Therefore, rather than go to Steven's house, he stayed on Clemson Blvd. in order to have a straight path to his own home.

On October 29, 2016 at 2:32 a.m., a call was made to 911 from an unnamed citizen. The call was dispatched. The caller relayed the following:

(a) That a red sedan with a tag number JKB851 was all over the road;

(b) That he was following the vehicle passing KIA dealership in Anderson.

Officer Charlie Coon (hereinafter referred as "Coon") responded to the call and located a black car that was of a similar make-at the 28 Bypass overpass of Clemson Blvd. Coon is a reserve in the ACSO. His primary employment is at Piedmont Honda and works only when his children are not with him. Officer Coon saw Hooper's car and recognized that may be the vehicle that the caller had discussed. He checked the tag with dispatch; and, it was a match. He immediately blue-lighted the vehicle; and, subsequently, made a traffic stop.

About the same time, two troopers were coming from the opposite direction and saw that Deputy Coon had engaged his blue light for what appeared to be the vehicle for which they were looking. They performed a U-turn arrived; and, upon arrival, offered assistance to Deputy Coon.

Deputy Coon, who's aforementioned experience left him with experience that was far less than the trooper's experience, gladly accepted the trooper's offer to take over the investigation related to the stop. Additionally, Deputy Coon's vehicle, or the one that he used once a week, was not equipped with a dash cam. Deputy Coon did not have a button cam on his uniform, either.

When the troopers arrived, they pulled in behind in Coon's vehicle. Coon's vehicle, whose blue lights remained active, was between Hooper and the troopers' vehicles. Approximately five minutes into the stop and line of questioning, Coon moved his vehicle.

At that point, Hooper was subjected to the field sobriety tests. Trooper Griffin determined that Hooper failed the tests, placed him under arrest for DUI. Hooper was then transported to ACDC, where he was asked to take the breath test. Hooper refused to undergo the breath test.

In trial, Officer Coon testified that he saw Hooper making "hard right turns" when he was attempting to make the traffic stop. On the same token, he testified that Hooper never touched the curb. He did not offer that Hooper had done anything in approaching the traffic light. Coon stated that the car assigned to him by ACSO did not have a dash cam for purposes of videotaping statute (SC Code Ann. § 56-5-2953).

The jury returned a verdict in favor of the State, thus this motion.

## ARGUMENT

### DEFENDANT'S ARREST AND CONVICTION SHOULD BE REVERSED FOR NON-COMPLIANCE WITH THE STATUTE FOR S.C. CODE ANN. § 56-5-2953.

**The video recording did not include the traffic stop conducted by Officer Coon.**

Hooper posits that his arrest and conviction should be reversed for failure to comply with the statute on the videotaping requirement. Under South Carolina law, a person who commits DUI offense "must have his conduct at the incident site...video recorded". S.C. Code Ann. §56-5-2953(A). The law requires a law enforcement agency to be equipped with recording equipment. It mandates:

> (A) A person who violates Section 56-5-2930, 56-5-2933, or 56-5-2945 must have his conduct at the incident site and the breath test site video recorded.
>
> (1)(a) The video recording at the incident site must:
>
> (i) not begin later than the activation of the officer's blue lights;
>
> (ii) include any field sobriety tests administered; and
>
> (iii) include the arrest of a person for a violation of Section 56-5-2930 or Section 56-5-2933, or a probable cause determination in that the person violated Section 56-5-2945, and show the person being advised of his Miranda rights.

In the case of the *Town of Mt. Pleasant v. Roberts*, this Court stated that "the purpose of section 56-5-2953 . . . is to create direct evidence of a DUI arrest." Town of Mt. Pleasant v. Roberts, 393 S.C. 332, 347, 713 S.E.2d 278, 285 (2011). Hooper believes that this evidence shall include the stop itself. This is all the more pronounced when the statute provided that the recording begins not later than the activation of the officer's blue lights. Normally, blue lights are activated as a sign and/or warning that a certain individual has violated a law or ordinance, and as such should yield to the law enforcer's investigation. This signals the start of the investigation.

Hooper argues that the law intended for the stop to be recorded as well, because it is the only way to safeguard the public from baseless, invalid and unlawful stops. Hooper posits that this is the rationale for requiring that the recording begins not later than the activation of the officer's blue lights.

In this particular case, the video recording showed nothing of the stop. The video started with the patrol cars already parked, and the blue lights activated. In fact, the recording device was behind Coon's activated blue lights, until such time as Troopers R.G. Griffin (hereinafter referred as "Griffin") and Ridgeway, came on the scene at 00:00:24 (as enumerated by Griffin's in-car camera).

Coon testified that he was responding to a call about a reckless driver in a sedan with tag JKB851. There was no description of the driver. Coon opined that Hooper was "making "hard right turns", prior to turning onto Walker Drive, where Coon effected the stop. Common sense dictate that this could not be the case. Hooper could not have made such a turn without striking the curb. There was no physical evidence showing damage on the right side of Hooper's vehicle, indicating an inability to safely navigate from the point of blue-light initiation until he stopped in the well-lit front of a business.

Hooper believes that without the video showing the stop, the reason for the stop could not be ascertained. That Coon responded to an anonymous tip does not, standing alone, constitute a probable cause. The conclusory statement of the caller had no corroboration. There was not a single specific statement defining what was in fact reckless to the caller. Aside from the tag, there was no other means to identify Hooper as the reckless driver, subject of the anonymous tip. If it were true that Coon observed Hooper was making hard right turns, then it would have been impossible for Coon to see Hooper's tag.

Coon's testimony on how he came to stop Hooper, was improbable based on physical evidence and common sense.

**The arresting officer did not comply with Section 56-5-2953.**

A. Officer Charlie Coon was the arresting officer.

While Section 56-5-2953 does not define the term "arresting officer". The court had the occasion to determine such in the case of State v. Landis, 362 S.C. 97 (2004). In *Landis*, Trooper Davis observed a vehicle driven by Landis weaving and straddling the center lane. A State Transport Police Officer initiated the blue lights; and, pulled Landis over to the side of the interstate. He was followed by Trooper Davis.

Transport Officer removed Landis from the car and Trooper Davis performed the field sobriety test, determined Landis was impaired and arrested him. There was no videotape of the incident. Landis argued that the State Transport Police Officer was the arresting officer, for which the requirements of Section 56-5-2953 must be met. The circuit court ruled that Trooper Davis was the arresting officer. S.C. Court of Appeals affirmed. It ruled that "*Trooper Davis was the "arresting officer" as that phrase is ordinarily understood. Trooper Davis personally observed Landis driving prior to the traffic stop. He arrived at the scene simultaneously with the State Transport Officer. Trooper Davis pulled in directly behind the Transport Officer and approached just after Landis had been removed from his vehicle. Moreover, trooper Davis conducted the field sobriety test, determined Landis was impaired, and placed him under arrest for DUI.*" Id.

*Landis* also cited the case of State v. Garvin in determining the arresting officer.

> The term "arrest" has a technical meaning, applicable in legal proceedings. It implies that a person is thereby restrained of his liberty by some officer or agent of the law, armed with lawful

> process, authorizing and requiring the arrest to be made. It is intended to serve, and does serve, the end of bringing the person arrested personally within the custody and control of the law, for the purpose specified in, or contemplated by the process.

State v. Garvin, 341 S.C. 122, 55 S.E.2d 591 (Ct. App. 2000) as cited in *Landis*.

Hooper asserts that Coon was the arresting officer. He was the one who responded to the anonymous tip/call; and, who admitted that he observed and followed Hooper while the latter was driving. It was Coon who determined that there was probable cause for stopping, and himself performed the traffic stop. Coon restrained Hooper's liberty, because the whole time that they were waiting for the two troopers, Hooper could not leave the site, voluntarily. Coon was the one who brought Hooper within the custody and control of the law, when he handed him over to the troopers. Coon was present the whole time Hooper was performing the sobriety test, until the latter was transported to the ACDC. Coon was the arresting officer responsible for meeting the statutory requirements of Section 56-5-2953. However, Coon failed to produce a videotape of the DUI arrest because his patrol car had no dash cam.

**B. Coon failed to produce the required videotape nor to submit the mandated sworn affidavit.**

Hooper is cognizant that the failure by an arresting officer to produce the required videotape is not alone a ground for dismissal, provided the arresting officer submits a sworn affidavit certifying that the video recording at the time of the arrest was in an inoperable condition and stating the reasonable efforts taken to maintain the equipment operable. (§ 56-5-2953(B)).

Here, Coon did not submit a sworn affidavit as mandated by law.

**Even with totality of circumstances, the statute on videotaping was not complied with.**

**A. Recording was done long after the**

**activation of the blue lights.**

Despite the fact that Coon was the officer who allegedly observed Hooper's violation that led to the stop, Coon was unable to record the stop and conduct the field sobriety tests (FSTS) because the car he was issued was not equipped with dash cams.

The statute requires law enforcement agencies to provide its patrol vehicles with video camera equipment. This law has been in effect since June 28, 1998-Act 434. On October 29, 2016, Anderson County Sheriff's Office had not complied with this mandate. In the case of *Town of Mt. Pleasant*, the Court found that the protracted failure to equip its patrol vehicles with video cameras defeated the intent of the Legislature. *Id.*

In the above-mentioned case, Officer Bruce Burbage of the Town of Mount Pleasant's Police Department effected a traffic stop of Treva Roberts. Officer Burbage performed three field sobriety tests on Roberts, which she failed. Officer Burbage arrested Roberts for DUI, transported him to the police department, and was offered a breathalyzer test. Roberts refused.

Officer Burbage failed to record the initial traffic stop, field sobriety tests or the arrest at the incident site in videotape. Officer Burbage presented an Affidavit showing that at the time he was operating the vehicle, that it was not equipped with videotaping device. The State argued that the statute requiring videotaping of the DUI did not apply to Town since the law controlled a stop "once the law enforcement vehicle is equipped with a videotaping device". The State contended that since its vehicles were not equipped with video cameras, then the videotaping requirement did not apply to it.

The Court of Appeals noted that there were municipalities whose law enforcement agencies had not placed cameras in patrol cameras long after the law was enacted. The Court of Appeals ruled that the *Town of Mount Pleasant* should not be rewarded for continually evading

their duty under the statute. *Id.* The Court of Appeals found that their behavior and lack of compliance within a reasonable amount of time was sanctionable. *Id.*

The ruling in the *Town of Mount Pleasant* is applicable in the instant case. ACSO had not equipped Coon's patrol car with a dash cam, despite the fact his only purpose on the one day a week that he worked was to monitor traffic. ACSO had not equipped Coon's patrol car with a dash cam, despite the fact that the statute had been active for nearly eight (8) years. This Court should not condone the county and ACSO's consistent non-compliance with the statute.

**A. Missing Audio Recording**

Hooper advances that the State also failed to comply with the statute when it submitted a video which was missing a segment of audio recording.

The video started with a parked patrol car, with activated blue lights. At 00:00:24, two troopers came in view approaching a car. At this point, Hooper has not been shown in the video. At 00:02:45, the troopers and Coon were shown at the side of the patrol car debating who will handle the field sobriety test. At 00:03:04, Trooper Griffin moved his vehicle from the view. At this point, the audio recording stopped, and came back on at 00:03:54 when Griffin returned to where Hooper and the other trooper were standing. During this 50 second-gap of no audio, Hooper was shown conversing with Coon and Ridgeway. All of these were not recorded. Hooper believes that this prevented the jury from hearing the entire audio recording. This prevented Hooper from preparing his defense and denied him his due process.

It is clear that the video submitted did not comply with the requirements of the statute for videotaping DUI arrests. The video did not show Coon conducting the traffic stop. Coon as arresting officer did not comply with the law on videotaping DUI. Even the Troopers' video did not comply with §56-5-2953. It showed the blue lights already activated, which meant the

camera was engaged long after the blue lights were initiated, in contravention of the clear language of the law. The video contained missing pieces. Hooper asserts that the video is inadmissible for being tainted.

Law enforcement is bound to laws concerning Driving Under the Influence, just as Dustin Hooper was.

> "[A] court must abide by the plain meaning of the words of a statute. When interpreting the plain meaning of a statute, courts should not resort to subtle or forced construction to limit or expand the statute's operation."

State v. Jacobs, 393 S.C. 584, 587, 713 S.E.2d 621, 622 (2011).

"By requiring a law enforcement agency to videotape a DUI arrest, the Legislature clearly intended strict compliance with the provisions of section 56–5–2953 and, in turn, promulgated a severe sanction for noncompliance." *Town of Mt. Pleasant* at 349.

In *Town of Mount Pleasant v. Roberts,* Justice Beatty, writing for the Court, found that "the Town failed to establish any statutory exception to excuse its noncompliance"; and, affirmed Judge Nicholson's reversal of Roberts's conviction and subsequent dismissal. *Id.* at 350.

Hooper reiterates that the video is inadmissible for failure to comply with the requirements of §56-5-2953, and for having been tainted. As such, Defendant deserves to have his arrest and conviction reversed.

**CONCLUSION**

For the foregoing reasons, Defendant respectfully prays that this Court reconsider its decision to deny Defendant's Motion to Dismiss the case, and to overturn the jury's ruling which was based on error of law.

{SIGNATURE FOLLOWS}

Donald L. Smith (SC Bar #: 6699)
122 N. Main Street
Anderson SC 29621
Telephone: (864) 642-9284
Facsimile: (864) 642-9285
attorneydonaldsmith@gmail.com
*Attorney for Defendant*

Anderson, South Carolina
March 15, 2019.

# EXHIBIT B

STATE OF SOUTH CAROLINA

COUNTY OF ANDERSON
STATE VS.
DUSTIN LEE HOOPER

AKA:
Race: White Sex: M Age: 25
DOB: 01/30/1993 SS#: 594-29-4283
Address: 108 Acorn Dr
City, State, Zip: Anderson, SC 29621-2403
DL# 101777182 SID#

*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2017GS0400365
A/W: 5102P0769367
Date of Offense: 10/29/2016
S.C. Code §: 56-05-2930(A)
CDR Code #: 3356

SENTENCE SHEET

Sentence deferred until termination of Appeal

In disposition of the said indictment comes now the Defendant who was ☐ CONVICTED OF or ☐ PLEADS
TO: Driving A Vehicle While Under The Influence Of Alcohol And/Or Drugs
In violation of § 56-05-2930(A) of the S.C. Code of Laws, bearing CDR Code # 3356
☐ NON-VIOLENT ☐ VIOLENT ☐ SERIOUS ☐ MOST SERIOUS ☐ Mandatory GPS (CSC w/minor 1st or CSC w/minor 3rd) ☐ §17-25-45

The charge is: ☐ As indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. _____ (def.'s initials)
The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Wes Stolarski 102843
~~Stan Overby, Jr.~~, Assistant Solicitor SC Bar #

Defendant

Attorney for Defendant 6699 SC Bar #

WHEREFORE, the Defendant is committed to the ☐ State Department of Corrections ☑ County Detention Center,
for a determinate term of 30 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years
and/or to pay a fine of $3,000 provided that upon the service of 5 Mo days/months/years and/or payment
of $1,500; plus costs and assessments as applicable*; the balance is suspended with probation for 6 Mo
months/years and subject to South Carolina Department of Probation, Parole and Pardon Service standard conditions of probation, which are incorporated by reference.

☐ CONCURRENT or ☐ CONSECUTIVE to sentence on: _____
☐ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by SC Department of Corrections _____
☐ The Defendant is to be placed on Central Registry of Child Abuse and Neglect purs

Pursuant to 18 U.S.C. Section 922, it is unlawful for a person convicted of a viola Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

Sentence Still deferred Until after appeal - per Stan. 7/25/19 KG

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Orde
Total: $ _____ plus 20% fee $ _____
Payment Terms: _____
☐ Set by SCDRPPS _____
Recipient: _____
Obtain (
Attend
May se
Substa
Rando
Fine m
pmts. (
$ _____
Other: _____

A TRUE COPY
OCT 21 2019
CLERK OF COURT

| | | |
|---|---|---|
| *Fine: | | $ 1500.00 |
| §14-1-206 (Assessments 107.5%) | | $ 1612.50 |
| §14-1-211 (A)(1)(Conv. Surcharge) | $100 | $ 100.00 |
| §14-1-211 (A)(2)(DUI Surcharge) | $100 | $ 100.00 |
| §56-5-2995 (DUI Assessment) | $12 | $ 12.00 |
| §56-1-286 (DUI Breath Test) | $25 | $ 25.00 |
| Proviso (Public Def/Prob) | $500 | $ |
| §14-1-212 (Law Enforce. Funding) | $25 | $ 25.00 |
| §14-1-213 (Drug Court Surcharge) | $150 | $ |
| §50-21-114 (BUI Breath Test Fee) | $50 | $ |
| §56-5-2942(J) (Vehicle Assessment) | $40/ea | $ |
| 3% to County (if paid in installments) | $ | 161.24 7-25-19 |
| TOTAL | | $ 3475.74 |

☐ Appointed PD or appointed other counsel,
Proviso requires $500 be paid to Clerk during probation and shall be collected before any other fees.

Sentence issued by Stipulation of parties on 7-25-19

Presiding Judge: _____
Judge Code: 215
Sentence Date: 7-25-19

Clerk of Court/~~Deputy Clerk~~: Richard A. Hiller
Court Reporter: L. Scott

SCCA/217 (04/2018)

# EXHIBIT C

| | |
|---|---|
| STATE OF SOUTH CAROLINA<br>COUNTY OF ANDERSON | IN THE COURT OF GENERAL SESSIONS<br>TENTH JUDICIAL CIRCUIT |
| State of South Carolina<br>Plaintiff,<br>Vs.<br>Dustin Lee Hooper,<br>Defendant. | C.A. Nos.: 2017-GS-04-0365<br><br>**MOTION FOR RELIEF OF JUDGMENT PURSUANT TO RULE 60(b)(1)** |



Plaintiff, by and through his counsel, respectfully moves for reconsideration this Court's Order, filed on March 6, 2019, and allege as follows:

## STATEMENT OF FACTS

On October 28, 2016, Defendant Dustin Hooper (hereinafter referred as Hooper) started his day at 7:00 a.m. He worked a double shift at the Twisted Flame and got out around 10:30 p.m. He went home to shower; and, he had to go to TL Hanna to help jumpstart his friend DJ's car at around 11:00 p.m. After managing to get through the post-game, Westside traffic, he and DJ went to Christopher Steven Cauley's house off Highway 24. They were there momentarily; and, proceeded to Clemson where they had learned of Halloween festivities. They got to the Pier around 12:30 a.m.

DJ knew people at the Pier and pushed through the crowd to join other friends. Dustin and Steven sat on the front hood of the car and watched the traffic of party goers going in and out of the Pier. The crowd, which had enjoying the festivities for several hours, was not something that either Dustin or Steven wished to contend. Following approximately thirty (30) minutes, they left for a bonfire of which they had become aware.

Dustin drove them to the bonfire, which was roughly ten minutes away. They got to the bonfire sometime around 1:15 a.m. They didn't really know anyone there either; and, they

managed to hang out for another thirty (45) minutes, due to the fact that it was not nearly as crowded. Around 2:00 a.m., they got a call from DJ, who's car would not start again. They got in the car and headed back to the Pier.

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On October 29, 2016 at 2:32 a.m., a call was made to 911 from an unnamed citizen. The call was dispatched. The caller relayed the following:

(a) That a red sedan with a tag number JKB851 was all over the road;

(b) That he was following the vehicle passing KIA dealership in Anderson.

Officer Charlie Coon (hereinafter referred as "Coon") responded to the call. It should be noted that Coon is a reserve in the ACSO. His primary employment is at Piedmont Honda and works only when his children are not with him. Given this fact, the only responsibilities he had were related to being in a patrol car addressing matters such as those involving traffic. On this night, the last Friday prior to Halloween, it was understood that festivities relating to the celebration of Halloween would be significant. Therefore, it would be imperative for law enforcement to be prepared for the potential onslaught of "drunk drivers". Officer Coon's vehicle did not have a video camera in violation of section 56–5–2953 (D),

"The Department of Public Safety is responsible for purchasing, maintaining, and supplying all videotaping equipment for use ***in all law enforcement vehicles used for traffic enforcement.***" § 56–5–2953(D). (Emphasis added),

Officer Coon located a black car that was of a similar make-at the 28 Bypass overpass of Clemson Blvd. Officer Coon saw Hooper's car and recognized that may be the vehicle that the caller had discussed. He checked the tag with dispatch; and, it was a match. He immediately blue-lighted the vehicle; and, subsequently, made a traffic stop. He was unable to make the necessary video.

About the same time, two troopers were coming from the opposite direction and saw that Deputy Coon had engaged his blue light for what appeared to be the vehicle for which they were looking. They performed a U-turn arrived; and, upon arrival, offered assistance to Deputy Coon. Deputy Coon "handed off" his stop of Mr. Hooper to the highway patrolman, Russell Griffin..

In trial, Officer Coon testified that he saw Hooper making "hard right turns" when he was attempting to make the traffic stop. On the same token, he testified that Hooper never touched the curb. He did not offer that Hooper had done anything in approaching the traffic light. Coon stated that the car assigned to him by ACSO did not have a dash cam for purposes of videotaping statute (SC Code Ann. § 56-5-2953).

The jury returned a verdict in favor of the State, thus this motion.

## ARGUMENT

## DEFENDANT'S ARREST AND CONVICTION SHOULD BE REVERSED FOR NON-COMPLIANCE WITH THE STATUTE FOR S.C. CODE ANN. § 56-5-2953.

### A. The video recording did not include the traffic stop conducted by Officer Coon.

Hooper posits that his arrest and conviction should be reversed for failure to comply with the statute on the videotaping requirement. Under South Carolina law, a person who commits

DUI offense "must have his conduct at the incident site...video recorded". S.C. Code Ann. §56-5-2953(A). The law requires a law enforcement agency to be equipped with recording equipment. It mandates:

> (A) A person who violates Section 56-5-2930, 56-5-2933, or 56-5-2945 must have his conduct at the incident site and the breath test site video recorded.
>
> (1)(a) The video recording at the incident site must:
>
> (i) not begin later than the activation of the officer's blue lights;
>
> (ii) include any field sobriety tests administered; and
>
> (iii) include the arrest of a person for a violation of Section 56-5-2930 or Section 56-5-2933, or a probable cause determination in that the person violated Section 56-5-2945, and show the person being advised of his Miranda rights.

In the case of the *Town of Mt. Pleasant v. Roberts*, this Court stated that "the purpose of section 56-5-2953 . . . is to create direct evidence of a DUI arrest." Town of Mt. Pleasant v. Roberts, 393 S.C. 332, 347, 713 S.E.2d 278, 285 (2011). Hooper believes that this evidence shall include the stop itself. This is all the more pronounced when the statute provided that the recording begins not later than the activation of the officer's blue lights. Normally, blue lights are activated as a sign and/or warning that a certain individual has violated a law or ordinance, and as such should yield to the law enforcer's investigation. This signals the start of the investigation.

Hooper argues that the law intended for the stop to be recorded as well, because it is the only way to safeguard the public from baseless, invalid and unlawful stops. Hooper contends

that this is the rationale for requiring that the recording begins not later than the activation of the officer's blue lights.

It is understood that there are exceptions to the hard and fast rule that the entire event be recorded. These include where a camera has become inoperable; a situation where the defendant has crashed his car and suffered significant injuries; etc. However, the exceptions must be expressed in a sworn affidavit.

Coon testified that he was responding to a call about a reckless driver in a sedan with tag JKB851. There was no description of the driver. Coon opined that Hooper was "making "hard right turns", prior to turning onto Walker Drive, where Coon effected the stop. Since a hard-right turn is a 90° turn, common sense indicates that this could not be the case. Hooper could not have made such a turn without striking the curb. There was no physical evidence showing damage on the right side of Hooper's vehicle, indicating an inability to safely navigate from the point of blue-light initiation until he stopped in the well-lit front of a business.

Hooper believes that without the video showing the stop, the reason for the stop could not be ascertained. That Coon responded to an anonymous tip does not, standing alone, constitute a probable cause. The conclusory statement of the caller had no corroboration. There was not a single specific statement defining what was in fact reckless to the caller. Aside from the tag, there was no other means to identify Hooper as the reckless driver, subject of the anonymous tip. If it were true that Coon observed Hooper was making hard right turns, then it would have been impossible for Coon to see Hooper's tag.

Coon's testimony on what he observed Hooper doing following initiating his blue lights, was improbable based on the lack of physical evidence and common sense.

**B. Coon failed to submit the mandated sworn affidavit.**

Hooper is cognizant that the failure by law enforcement to produce the required videotape is not alone a ground for dismissal. However, the exception must be explained in a sworn affidavit. In Hooper, the State intentionally failed to provide an affidavit. They very simply did not have an exception upon which to base an affidavit. (§ 56-5-2953(B)).

Here, Coon's vehicle did not possess a camera. Therefore, he did not submit a sworn affidavit as mandated by law.

**C. The lack of a camera in Coon's patrol car violates the statute, requiring same.**

Despite the fact that Coon was the officer who allegedly observed Hooper's violation that led to the stop, Coon was unable to record the stop and conduct the field sobriety tests (FSTS) because the car he was issued was not equipped with dash cams.

The statute requires law enforcement agencies to provide its patrol vehicles with video camera equipment. This law has been in effect since June 28, 1998-Act 434. On October 29, 2016, Anderson County Sheriff's Office had not complied with this mandate. In the case of *Town of Mt. Pleasant*, the Court found that the protracted failure to equip its patrol vehicles with video cameras defeated the intent of the Legislature. *Id.*

In the above-mentioned case, Officer Bruce Burbage of the Town of Mount Pleasant's Police Department effected a traffic stop of Treva Roberts. Officer Burbage performed three field sobriety tests on Roberts, which she failed. Officer Burbage arrested Roberts for DUI, transported him to the police department, and was offered a breathalyzer test. Roberts refused.

Officer Burbage failed to record the initial traffic stop, field sobriety tests or the arrest at the incident site in videotape. Officer Burbage presented an Affidavit showing that at the time he was operating the vehicle, that it was not equipped with videotaping device. The State argued that the statute requiring videotaping of the DUI did not apply to Town since the law controlled a

stop "once the law enforcement vehicle is equipped with a videotaping device". The State contended that since its vehicles were not equipped with video cameras, then the videotaping requirement did not apply to it.

The Court of Appeals noted that there were municipalities whose law enforcement agencies had not placed cameras in patrol cameras long after the law was enacted. The Court of Appeals ruled that the *Town of Mount Pleasant* should not be rewarded for continually evading their duty under the statute. Id. The Court of Appeals found that their behavior and lack of compliance within a reasonable amount of time was sanctionable. Id.

The ruling in the *Town of Mount Pleasant* is applicable in the instant case. ACSO had not equipped Coon's patrol car with a dash cam, despite the fact his only purpose on the one day a week that he worked was to monitor traffic. ACSO had not equipped Coon's patrol car with a dash cam, despite the fact that the statute had been active for nearly eighteen (18) years. Moreover, *Mount Pleasant's* opinion was issued five years ago. This Court should not condone the county and ACSO's consistent non-compliance with the statute.

Law enforcement is bound to laws concerning Driving Under the Influence, just as Dustin Hooper was.

> "[A] court must abide by the plain meaning of the words of a statute. When interpreting the plain meaning of a statute, courts should not resort to subtle or forced construction to limit or expand the statute's operation."

State v. Jacobs, 393 S.C. 584, 587, 713 S.E.2d 621, 622 (2011).

"By requiring a law enforcement agency to videotape a DUI arrest, the Legislature clearly intended strict compliance with the provisions of section 56–5–2953 and, in turn, promulgated a severe sanction for noncompliance." *Town of Mt. Pleasant* at 349.

In *Town of Mount Pleasant v. Roberts,* Justice Beatty, writing for the Court, found that

"the Town failed to establish any statutory exception to excuse its noncompliance"; and, affirmed Judge Nicholson's reversal of Roberts's conviction and subsequent dismissal. *Id.* at 350.

Hooper reiterates that the video is inadmissible for failure to comply with the requirements of §56-5-2953, and for having been tainted. As such, Defendant deserves to have his arrest and conviction reversed.

**CONCLUSION**

For the foregoing reasons, Defendant respectfully prays that this Court vacate its decision to deny Defendant's Motion to Dismiss the case. Defendant bases his request on inadvertence for failing to address the State's lack of an exception to the absence of video; and, the failure to provide a sworn affidavit to supplement the exception, to overturn the jury's ruling which was based on error of law.

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Facsimile: (864) 642-9285
attorneydonaldsmith@gmail.com
*Attorney for Defendant*

Anderson, South Carolina
August 5, 2019.

# EXHIBIT D

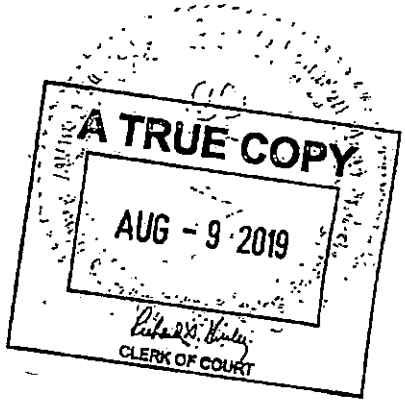
| | |
|---|---|
| STATE OF SOUTH CAROLINA<br>COUNTY OF ANDERSON | IN THE COURT OF GENERAL SESSIONS<br>TENTH JUDICIAL CIRCUIT |
| State of South Carolina<br><br>Plaintiff,<br><br>Vs.<br><br>Dustin Lee Hooper,<br>Defendant. | C.A. Nos.: 2017-GS-04-0365<br><br>**MOTION TO AMEND** |

Defendant, by and through his counsel, respectfully submits this to Motion to Amend his Motion for Relief of Judgment, which he filed on August 5, 2019.

On March 6, 2019, Defendant was convicted of DUI after a jury trial. Defendant filed a timely Motion to Reconsider.

On August 5, 2019, Defendant filed a Motion for Relief from Judgment pursuant to Rule 60(b)(1). In his motion, Defendant prayed for this court to vacate its judgment based on inadvertence. Defendant avers that that State failed to address the lack of an exception to the absence of video and the failure to provide a sworn affidavit to supplement the exception. The court failed to rule on this issue.

Defendant mistakenly named its previous motion and requests this court to allow him to amend or rename his previous motion into Motion to Vacate Judgment. Defendant posits that the contents of the motion as well as the prayer for relief should control the nature of the motion. Furthermore, the state will not be prejudiced by this request to amend or rename Defendant's motion, which was timely filed.




AUG 0 9 2019

BY:

## CONCLUSION

For the foregoing reasons, Defendant respectfully prays that in the interest of justice, this Court allow Defendant to amend and/or rename his duly filed Motion to Relief from Judgment, into Motion to Vacate Judgment.

Donald L. Smith (SC Bar #: 6699)
122 N. Main Street
Anderson SC 29621
Telephone: (864) 642-9284
Facsimile: (864) 642-9285
attorneydonaldsmith@gmail.com
*Attorney for Defendant*

Anderson, South Carolina
August 9, 2019.

# EXHIBIT E

| | |
|---|---|
| STATE OF SOUTH CAROLINA<br>COUNTY OF ANDERSON | IN THE COURT OF GENERAL SESSIONS<br>TENTH JUDICIAL CIRCUIT |
| State of South Carolina<br><br>Plaintiff,<br><br>Vs.<br><br>Dustin Lee Hooper,<br>Defendant. | C.A. Nos.: 2017-GS-04-0365<br><br>**MOTION TO VACATE JUDGMENT** |

Plaintiff, by and through his counsel, respectfully moves for reconsideration this Court's Order, filed on March 6, 2019, and allege as follows:

## STATEMENT OF FACTS

On October 28, 2016, Defendant Dustin Hooper (hereinafter referred as Hooper) started his day at 7:00 a.m. He worked a double shift at the Twisted Flame and got out around 10:30 p.m. He went home to shower; and, he had to go to TL Hanna to help jumpstart his friend DJ's car at around 11:00 p.m. After managing to get through the post-game, Westside traffic, he and DJ went to Christopher Steven Cauley's house off Highway 24. They were there momentarily; and, proceeded to Clemson where they had learned of Halloween festivities. They got to the Pier around 12:30 a.m.

DJ knew people at the Pier and pushed through the crowd to join other friends. Dustin and Steven sat on the front hood of the car and watched the traffic of party goers going in and out of the Pier. The crowd, which had enjoying the festivities for several hours, was not something that either Dustin or Steven wished to contend. Following approximately thirty (30) minutes, they left for a bonfire of which they had become aware.

Dustin drove them to the bonfire, which was roughly ten minutes away. They got to the bonfire sometime around 1:15 a.m. They didn't really know anyone there either; and, they

managed to hang out for another thirty (45) minutes, due to the fact that it was not nearly as crowded. Around 2:00 a.m., they got a call from DJ, who's car would not start again. They got in the car and headed back to the Pier.

They returned to the Pier to find DJ at wit's end regarding the issue of his car's inability to start. They got the care started once again; and, recognized that this evening which had been nothing but a headache, needed to come to an end. The three of them said their goodbyes and left the Pier.

Initially, Dustin was to follow Steven back to his residence off of 24. However, as he traveled Clemson Blvd. toward Anderson, Dustin felt the day had been long enough; and, he simply wanted to go home. Therefore, rather than go to Steven's house, he stayed on Clemson Blvd. in order to have a straight path to his own home.

On October 29, 2016 at 2:32 a.m., a call was made to 911 from an unnamed citizen. The call was dispatched. The caller relayed the following:

(a) That a red sedan with a tag number JKB851 was all over the road;

(b) That he was following the vehicle passing KIA dealership in Anderson.

Officer Charlie Coon (hereinafter referred as "Coon") responded to the call. It should be noted that Coon is a reserve in the ACSO. His primary employment is at Piedmont Honda and works only when his children are not with him. Given this fact, the only responsibilities he had were related to being in a patrol car addressing matters such as those involving traffic. On this night, the last Friday prior to Halloween, it was understood that festivities relating to the celebration of Halloween would be significant. Therefore, it would be imperative for law enforcement to be prepared for the potential onslaught of "drunk drivers". Officer Coon's vehicle did not have a video camera in violation of section 56–5–2953 (D),

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The ruling in the *Town of Mount Pleasant* is applicable in the instant case. ACSO had not equipped Coon's patrol car with a dash cam, despite the fact his only purpose on the one day a week that he worked was to monitor traffic. ACSO had not equipped Coon's patrol car with a dash cam, despite the fact that the statute had been active for nearly eighteen (18) years. Moreover, *Mount Pleasant's* opinion was issued five years ago. This Court should not condone the county and ACSO's consistent non-compliance with the statute.

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State v. Jacobs, 393 S.C. 584, 587, 713 S.E.2d 621, 622 (2011).

"By requiring a law enforcement agency to videotape a DUI arrest, the Legislature clearly intended strict compliance with the provisions of section 56–5–2953 and, in turn, promulgated a severe sanction for noncompliance." *Town of Mt. Pleasant* at 349.

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Hooper reiterates that the video is inadmissible for failure to comply with the requirements of §56-5-2953, and for having been tainted. As such, Defendant deserves to have his arrest and conviction reversed.

## CONCLUSION

For the foregoing reasons, Defendant respectfully prays that this Court vacate its decision to deny Defendant's Motion to Dismiss the case. Defendant bases his request on inadvertence for failing to address the State's lack of an exception to the absence of video; and, the failure to provide a sworn affidavit to supplement the exception, to overturn the jury's ruling which was based on error of law.

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attorneydonaldsmith@gmail.com
*Attorney for Defendant*

Anderson, South Carolina
August 9, 2019.

# EXHIBIT F

'19 AUG 28 AM 10:35:56
Anderson, SC COC, CP/GS

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF GENERAL SESSIONS FOR THE TENTH JUDICIAL CIRCUIT |
| State of South Carolina | ) | ORDER DENYING MOTION |
| Plaintiff | ) | |
| Vs. | ) | Case Number: 2017-GS-04-0365 |
| Dustin Lee Hooper, | ) | |
| Defendant | ) | |

The Motion to Amend, Motion to Vacate Judgment and Motion for Relief of Judgment in case number 2017-GS-04-0365 is DENIED without the necessity of a formal hearing.

Anderson, SC
August 27, 2019

R. Lawton McIntosh
Judge, Tenth (10th.) Judicial Circuit

SEP 04 2019

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CLERK OF COURT

# EXHIBIT G

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|---|---|---|
| STATE OF SOUTH CAROLINA<br>COUNTY OF ANDERSON | ) | IN THE COURT OF GENERAL SESSIONS<br>TENTH JUDICIAL CIRCUIT |
| THE STATE OF SOUTH CAROLINA<br>VS.<br><br>Dustin Lee Hooper,<br>DEFENDANT. | ) | INDICTMENT # 2017-GS-04-0365<br><br>**ORDER DENYING DEFENDANT'S MOTION TO VACATE** |

This matter came before the Court on August 29th, 2019 on the Defendant's Motion to Vacate the verdict in the above-referenced case. The State was represented by Stanford L. Overby, Jr. of the Tenth Circuit Solicitor's Office. The Defense was represented by Donald L. Smith, Esq. of the Anderson County Bar. The Court heard arguments and finds as follows:

1. The officer who is the "arresting officer" pursuant to S.C. Code § 56-5-2953(B) was Trooper Russell Griffin, as that term is defined in State v. Landis, 362 S.C. 97,606 S.E.2d 503 (S.C. Ct. App. 2004).
2. Trooper Griffin produced a video in compliance with S.C. Code § 56-5-2953.
3. While the Court takes note that the first deputy who conducted the traffic stop was not equipped with a camera, Trooper Griffin was the individual required to produce and did so pursuant to the statute. No affidavit was required on the part of the first deputy because Trooper Griffin was the arresting officer.

Therefore, IT IS ORDERED that Defendant's motion to vacate judgment is denied.

IT IS SO ORDERED.

'19 AUG 29 PM4:50:02
Anderson, SC COC, CP/GS

R. Lawton McIntosh
Presiding Judge
10th Judicial Circuit

August 29 2019

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CLERK OF COURT

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS



Appeal from Anderson County
Honorable R. Lawton McIntosh, Circuit Court Judge
Appellate Case Tracking No. 2019-001502

The State, Respondent,

vs.

Dustin Lee Hooper, Appellant.

**PROOF OF SERVICE**

I, Caroline Collins, certify that I have served the Motion to Dismiss on Appellant by having delivered a copy of same addressed to:

Donald L. Smith, Esquire
122 N. Main Street
Anderson, South Carolina 29621

I further certify that all parties required by Rule to be served have been served.

This 22nd day of January, 2020.

CAROLINE COLLINS
Administrative Coordinator
Office of Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3727

ALAN WILSON
ATTORNEY GENERAL



January 22, 2020

The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: State v. Dustin Lee Hooper
Appellate Case No. 2019-001502

Dear Ms. Kitchings:

Enclosed please find the original and six (6) copies of a Motion to Dismiss along with proof of service for filing in the above-referenced appeal.

Sincerely,

William M. Blitch, Jr.
Senior Assistant Deputy Attorney General

Enclosures
cc: Donald L. Smith, Esquire
Victim Advocacy Division