STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Fairfield County
The Honorable R. Lawton McIntosh, Circuit Court Judge

Appellate Case No. 2019-000936

THE STATE, Respondent,

v.

DARRYL EUGENE COLEMAN, Appellant.

INITIAL BRIEF OF RESPONDENT

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I.

Whether the trial judge abused his discretion by excluding Victim's 2017 conviction for possession with intent to distribute cocaine when the trial judge properly weighed the State v. Colf factors and determined the probative value of the prior conviction was substantially outweighed by the danger of unfair prejudice? And if the trial judge erred in excluding Victim's prior conviction, whether any error was harmless in light of the overwhelming evidence against Appellant?

II.

Whether the trial judge abused his discretion in denying Appellant's motion for a speedy trial when Appellant did not assert his right to a speedy trial until approximately ten years after he was arrested and Appellant admitted that he did not suffer any prejudice from the delay?

STATEMENT OF THE CASE

In February 2009, the Fairfield County Grand Jury indicted Appellant for one count of criminal sexual conduct with a minor, second degree. On May 20-22, 2019, a jury trial was held in the Fairfield County Court of General Sessions with the Honorable R. Lawton McIntosh presiding. Appellant was represented by Hemphill Pride, Esq. The State was represented by Assistant Solicitor Julie Hall of the Sixth Circuit Solicitor's Office. At the conclusion of trial, the jury convicted Appellant as indicted. The trial judge sentenced Appellant to a term of twelve years' imprisonment. Appellant filed a timely notice of appeal and an initial brief.

STATEMENT OF FACTS

The victim (Victim) in this case was born in 1994. (Tr. 63, 145). Appellant was born in 1971. In December 2008, Victim was fourteen years old and Appellant was thirty seven. On December 15, 2008, Victim was at her home in Chester County with her cousin, Catherine, and her cousin's boyfriend, Hoover. (Tr. 64-65). Appellant called Hoover and asked if he wanted to go fishing. (Tr. 64-65). Victim left her home with Catherine and Hoover and travelled to Appellant's residence. (Tr. 67). Appellant lived in Fairfield County. (Tr. 137).

After arriving at Appellant's home, Victim began to watch TV in Appellant's living room. (Tr. 74). At some point in the afternoon, Catherine and Hoover left Appellant's home, thereby leaving Victim alone with Appellant. (Tr. 74-75). Victim realized that she was alone with Appellant when Appellant asked her to come to his bedroom. (Tr. 75). Appellant told Victim that Hoover and Catherine had left and that she should come into his bedroom to watch TV. (Tr. 75). Victim initially sat on Appellant's bed and began to watch TV while Appellant went to the bathroom. (Tr. 76). When Appellant emerged from the bathroom, he was not wearing any pants or underwear. (Tr. 77). Appellant told Victim to take off her clothes. (Tr. 77). Victim told Appellant that she did not want to take her clothes off, but Appellant pushed her backwards onto the bed and began to forcibly remove her clothes. (Tr. 77). Appellant engaged in sexual intercourse with Victim with vaginal penetration. (Tr. 78, 82). After Appellant finished having sex with Victim, Victim went to the bathroom and cleaned herself off with a rag. (Tr. 79). Appellant then took Victim home and dropped her off at the top of her street. (Tr. 80). Victim met her parents and her uncle who were walking up the street when she was dropped off by Appellant. (Tr. 80-81). When Victim told her parents about the assault, Victim's father and Uncle fired gunshots in the direction of Appellant's vehicle as Appellant sped away. (Tr. 81).

Victim was taken to the hospital by her parents. (Tr. 81). Upon arriving at the hospital, Victim was examined by sexual assault examination nurse, Robin Baker. During her examination, Baker found tears and abrasions on Victim's vagina that where consistent with sexual assault. (Tr. 110-13). Portions of Victim's pants were cut by law enforcement and sent to SLED for analysis. (Tr. 201). A portion of Victim's pants that contained semen matched a DNA sample provided by Appellant. (Tr. 208-09). The probability of the DNA profile from the semen sample on Victim's pants matching anyone other than Appellant is one in 77 trillion. (Tr. 209).

Appellant testified in his own defense at trial. According to Appellant, he went to the bathroom shortly after Victim, Catherine, and Hoover arrived at his home. (Tr. 246). After Appellant emerged from the bathroom, Hoover and Catherine were gone and Victim was sitting on a couch by herself. Appellant testified that Victim began to take her clothes off. (Tr. 247). Appellant admitted that he thought about having sex with Victim, but decided against it after Victim began to bleed. (Tr. 247-48). According to Appellant, Victim attempted to perform oral sex on Appellant. (Tr. 248, 258-59). Appellant admitted that his penis went inside Victim's mouth, but he claimed he eventually pulled his penis out of her mouth and began to masturbate. (Tr. 248, 258-59). Appellant then ejaculated. (Tr. 248). At the conclusion of trial, Appellant was convicted of criminal sexual conduct with a minor, second degree.

STANDARD OF REVIEW

"The admission of evidence concerning past convictions for impeachment purposes remains within the trial [court's] discretion, provided the [trial court] conducts the analysis mandated by the evidence rules and case law." State v. Dunlap, 346 S.C. 312, 324 550 S.E.2d 889, 896 (Ct. App. 2001). An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000).

"The trial court's ruling on a motion for speedy trial is reviewed under an abuse of discretion standard." State v. Hunsberger, 418 S.C. 335, 342, 794 S.E.2d 368, 371 (2016).

ARGUMENT

I.

The trial judge did not abuse his discretion by excluding Victim's 2017 conviction for possession with intent to distribute cocaine when the trial judge properly weighed the State v. Colf factors and determined the probative value of the prior conviction was substantially outweighed by the danger of unfair prejudice. Even if the trial judge erred in excluding Victim's prior conviction, any error was harmless in light of the overwhelming evidence against Appellant.

Appellant argues the trial judge erred in prohibiting Appellant from impeaching Victim with a 2017 conviction under Rule 609(a)(1) SCRE. Specifically, Appellant argues the trial judge did not properly balance the State v. Colf[1] factors when declining to allow Appellant to impeach Victim with evidence of a conviction for possession with intent to distribute cocaine that occurred nine years after Appellant sexually assaulted Victim. Appellant's argument is meritless. The trial judge did not abuse his broad discretion in excluding evidence of Victim's 2017 conviction for possession with intent to distribute cocaine because the trial judge properly weighed the State v. Colf factors and determined the probative value of a conviction that occurred nine years after the crime for which Appellant was on trial was substantially outweighed by the danger of unfair prejudice. However, even if the trial judge erred in excluding Victim's 2017 conviction, any error was entirely harmless in light of the overwhelming evidence against Appellant.

Rule 609(a)(1) of the South Carolina Rules of Evidence provides that when a party attacks the credibility of a witness, "Evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted." Rule 609(a)(1) SCRE. Rule 609(b) states that evidence of a conviction under this rule is not

[1] State v. Colf, 337 S.C. 622, 525 S.E.2d 246 (2000)

admissible if a period of more than ten years has passed from the date of the conviction or the witnesses' release from confinement as a result of that conviction. Rule 609(b) SCRE. However, a court may, in the interest of justice, admit a conviction older than ten years if the court determines the probative value of the conviction substantially outweighs its prejudicial effect. Rule 609(b) SCRE.

The South Carolina Supreme Court has enumerated five factors that our state's trial judges must consider in determining the admissibility of a witness's prior conviction. The five factors are: 1. The impeachment value of the prior crime; 2. The point in time of the conviction and the witness's subsequent history; 3. The similarity between the past crime and the charged crime; 4. The importance of the defendant's testimony; and 5. The centrality of the credibility issue. State v. Colf, 337 S.C. 622, 627, 525 S.E.2d 246, 248 (2000). "These factors are not exclusive; trial courts should exercise their discretion in light of the facts and circumstances of each particular case." Id. If the witness is someone other than the accused and has a prior conviction of a crime punishable by death or imprisonment for more than one year, "the trial court must balance the Colf factors and determine whether, under Rule 403, the probative value of the conviction is substantially outweighed by the danger of unfair prejudice and/or other relevant considerations set forth in Rule 403." State v. Robinson, 426 S.C. 579, 595, 828 S.E.2d 203, 211 (2019). "The burden of establishing inadmissibility of the conviction is upon the opponent of the evidence." Id.

Here, Appellant sought to impeach Victim with evidence of a 2017 conviction for possession with intent to distribute cocaine. (Tr. 69-71). Victim was not the accused; therefore, the trial judge properly balanced the Colf factors and employed an analysis of the probative

value and prejudicial effect of the conviction under Rule 403 SCRE. The trial judge made the following ruling:

> The Court: First this alleged event took place 11 years ago, we've been over that all morning long, and this conviction was – that was in 2009. It's alleged – well, not alleged because she pled to it, was in 2017. I mean, that's a long period of time. I don't see that it has any impeachment value quite frankly, Mr. Pride, other than to say, "You are not a good person. You're not a good person." I don't believe that just because somebody had that charge it calls into question whether their memory has been affected, whether they have any kind of lack of the ability to recall things that happened 11 years ago. She hadn't picked up any of the charges from what I hear or from what I can tell from what y'all are saying, so the impeachment value is very low in this case. I think that credibility on the other hand to everybody in this case, because it's going to be a she said/he said type of case it it's like other ones I've had in the past, right now I don't have anything before me because we hadn't got out of the gate yet. But it seems to me that credibility is going to be a big part of this case and so that is a huge factor. And then to allow this crime that has no relevance or correlation back to an alleged criminal sexual conduct event that happened 11 years ago, I think, falls squarely under 403, that the probative value is greatly outweighed by the danger of undue prejudice to the witness and to the State and therefore I'm not going to allow it in.

(Tr. 72-73, lines 14-25, lines 1-15).

In the preceding ruling, the trial judge properly balanced the Colf factors and conducted a Rule 403 analysis. In making his ruling, the trial judge began with the first Colf factor: the impeachment value of the prior crime. The trial judge appropriately found Victim's subsequent conviction didn't have "any impeachment value" other than to suggest that Victim was not a good person. (Tr. 72, lines 18-20). Contrary to Appellant's assertion, a conviction that occurred nine years after the crime Victim accused Appellant of committing has no bearing on whether Victim was telling the truth when she accused Appellant of having sex with her in 2008. Victim had no criminal record as of the date of the offense in 2008. Therefore, any subsequent convictions Victim obtained after 2008 have no effect on her credibility and were appropriately excluded at trial.

The second, third, and fourth Colf factors are either irrelevant or weigh in favor of exclusion. The second factor, the point in time of conviction and the witness's subsequent history, was properly considered by the trial judge as weighing in favor of exclusion. As the trial judge noted, Victim had not even been charged with the offense of possession with intent to distribute cocaine in 2008, let alone been convicted of the offense. Therefore, an offense that occurred after Victim made her accusations against Appellant has no bearing on Victim's credibility when she made the accusation. The trial judge properly weighed this factor in deciding to exclude Victim's conviction. The third Colf factor, the similarity between the past crime and the charged crime, is irrelevant to Victim. Victim was not the accused; therefore, there is no charged crime to compare with a past crime. However, even if the third Colf factor was applicable to this case, there is no similarity between criminal sexual conduct and possession with intent to distribute cocaine. The fourth Colf factor is inapplicable to this case because Victim was not a defendant. Appellant concedes the fourth factor is inapplicable in this case. (Initial Brief of Appellant 7).

In regards to the fifth Colf factor, the centrality of the credibility issue, the trial judge appropriately acknowledged that credibility was "a huge factor." (Tr. 73, line 8). However, notwithstanding that Victim's credibility was an important factor, the trial judge nonetheless appropriately determined that Victim's prior conviction should be excluded. Appellant argues "As the Court noted in Robinson, '...[W]hen credibility is central to a case, the introduction of prior convictions for impeachment purposes becomes even more legitimate.' 426 S.C. at 606, 828 S.E.2d at 217." (Initial Brief of Appellant 8). However, Appellant ignores the operative word, "prior", from our Supreme Court's opinion in Robinson. Here, the conviction at issue was a subsequent conviction and not a prior one. Indeed, the trial judge recognized as much in his

ruling when he noted "And then to allow this crime that has no relevance or correlation back to an alleged criminal sexual conduct event that happened 11 years ago, I think, falls squarely under 403." (Tr. 73, lines 8-11). The trial judge properly concluded, that although Victim's credibility was an important issue, the fact that her conviction occurred nine years after the allegations made against Appellant weighed in favor of excluding the conviction.

After properly weighing the Colf factors, the trial judge then conducted an analysis of the probative value of the Victim's conviction under Rule 403 SCRE. The trial judge weighed the probative value of Victim's conviction and weighed it against the conviction's prejudicial effect. The trial judge concluded "the probative value is greatly outweighed by the danger of undue prejudice to the witness and to the State and therefore I'm not going to allow it in." The trial judge acted within his discretion and properly excluded Victim's conviction.

Harmless Error

Even if the trial judge erred in excluding Victim's conviction, any error was entirely harmless in light of the overwhelming evidence presented against Appellant. It is inconceivable that Victim's conviction for possession with intent to distribute cocaine that occurred nine years after she was sexually assaulted by Appellant would have any bearing on the jury's guilty verdict when Appellant admitted to committing a sexual battery on Victim when she was 14, there were tears and abrasions on Victim's vagina that were consistent with sexual assault, and Appellant's semen was located on Victim's pants. (Tr. 110-13, 208-09, 248, 258-59). Even if the jury had doubts about Victim's credibility, Appellant rendered any doubts null and void when he admitted that he committed a sexual battery against a fourteen year old girl. Appellant was guilty of criminal sexual conduct with a minor by his own admission. Therefore, any error committed by the trial judge was harmless. Appellant's conviction and sentence should be affirmed.

II.

The trial judge did not abuse his discretion in refusing to grant Appellant's motion for a speedy trial when Appellant did not assert his right to a speedy trial until approximately ten years after he was arrested and Appellant admitted that he did not suffer any prejudice from the delay.

Appellant next argues the trial judge erred in denying Appellant's speedy trial motion, because the trial judge considered the fact that there was a victim in Appellant's case when denying Appellant's motion. Appellant's argument is meritless. The trial judge appropriately weighed and considered each of the factors enumerated by the United States Supreme Court in Barker v. Wingo in denying Appellant's motion. The trial judge did not abuse his discretion in denying Appellant's speedy trial motion because Appellant waited approximately ten years after he was arrested to assert his right to a speedy trial and Appellant admitted that he did not suffer prejudice from the delay. (Tr. 31-32). Accordingly, the trial judge properly denied Appellant's motion for a speedy trial.

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." U.S. Const. amend. VI. "A speedy trial means a trial without unreasonable and unnecessary delay." Hunsberger, 418 S.C. at 342, 794 S.E.2d at 371. "The right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances." Beavers v. Haubert, 198 U.S. 77, 87 (1905). "'A speedy trial does not mean an immediate one; it does not imply undue haste, for the State, too, is entitled to a reasonable time in which to prepare its case; it simply means a trial without unreasonable and unnecessary delay.'" State v. Langford, 400 S.C. 421, 441, 735 S.E.2d 471, 481-82 (2012) (quoting Wheeler v. State, 247 S.C. 393, 400, 147 S.E.2d 627, 630 (1966)).

The approach accepted by the United States Supreme Court "is a balancing test, in which the conduct of both the prosecution and the defendant are weighed." Barker v. Wingo, 407 U.S.

514, 530 (1972). "We can do little more than identify some of the factors which courts should assess in determining whether a particular defendant has been deprived of his right." Id. Accordingly, the United States Supreme Court has suggested courts examine the following four factors: "Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." Id. None of the four aforementioned factors are "either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant." Wingo 407 U.S. at 533.

Here the trial judge properly considered and weighed the Wingo factors in denying Appellant's speedy trial motion. The trial judge made the following ruling on Appellant's speedy trial motion:

> The Court: As to your motion for speedy trial, I think that you—that's a lot closer call quite frankly, but I'm going to deny it as well. The length is totally unreasonable, 11 years. There's not been assigned a reason for that delay, so the State loses on two of the four issues. At the same time we didn't have [Appellant] assert his right to a speedy trial until last year, and so after he did assert that right the trial was scheduled. And there's been no real evidence – there's been no evidence of prejudice to him caused by the delay. In fact, I made a note in my notes during the course of this trial that [counsel for Appellant] had made the discussion that witness' memories would fade and they would not be able to remember things as well as they could have earlier, and therefore that's going to be a problem. But most of the things I heard were their memory – lack of memory was collateral issues, not issues that are made facts to be established in this case, I'm still going to deny you're your motion because you hadn't established a prejudice here to my satisfaction, I don't think there is.

(Tr. 225-26 lines 20-25, lines 1-14). As the aforementioned ruling demonstrates, the trial judge weighed the four Wingo factors before denying Appellant's motion.

The first two Wingo factors weigh slightly against the State. The general reason given by the State for the delay in Appellant's trial was a backlog of cases and the military deployment of the State's chief investigator. (Tr. 33-45). However, Appellant concedes "there is no evidence

that the State deliberately attempted to delay trial as a means to hamper the defense." (Initial Brief of Appellant 13). Appellant's concession is significant in light of our Supreme Court's opinion in State v. Hunsberger. In Hunsberger the Supreme Court remarked "The State's justifications for delay in trying a defendant are weighted differently: (1) a deliberate attempt to delay trial as a means to hamper the defense weighs heavily against the State; (2) negligence or overcrowded dockets weigh less heavily against the State, but are ultimately its responsibility." Hunsberger 418 S.C. at 346, 794 S.E.2d at 374. Although the length of the delay in Appellant's case weighs against the State, the reason for the delay weighs less heavily against the State.

The third and fourth Wingo factors weigh against Appellant. As the trial judge noted in his ruling, Appellant did not assert his right to a Speedy trial until November 2018. (Tr. 43, 225-26). While not dispositive, the South Carolina Supreme Court noted in Hunsberger that this factor weighs heavily against Appellant. The Supreme Court noted "Failure by the accused to assert the right will make it more difficult for the accused to carry his burden of proving that he was denied a speedy trial." Hunsberger 418 S.C. at 349, 794 S.E.2d at 375. Here, Appellant asserted his right to a speedy trial on November 1, 2018, approximately 10 years after he was arrested for sexually assaulting Victim. (Tr. 43). Once Appellant asserted his right to a speedy trial, the State called Appellant's case for trial approximately seven months later. The seven month delay between Appellant's assertion of his right to a speedy trial and the date of his trial was not unreasonable. Therefore, this factor should away against Appellant in this Court's analysis.

The fourth Wingo factor, prejudice to the defendant, weighs heavily against Appellant, because Appellant was unable to show he was prejudiced by the delay. The United States Supreme Court noted in Wingo that a defendant's claim of prejudice should be evaluated in light

of three interests: "(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired. Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." Wingo 407 U.S. at 532. When asked by the trial judge if he could identify any way that his defense of Appellant was impaired, Counsel for Appellant admitted that he didn't suffer any harm from the delay. (Tr. 31). Counsel for Appellant stated "Your Honor, I acknowledge that I'm in a – not in a great position to show injurious harm as a result of the delay, I'll have to come up front with you on that." (Tr. 31, lines 21-23). Counsel for Appellant went even further in admitting he didn't suffer prejudice with the following explanation:

> Mr. Pride: Now, Judge, prejudice, that's where I got hurt, okay? That's where I got hurt. And I don't want to make a frivolous argument on that and have to concede that I can't make an argument to demonstrate prejudice, only to say that perhaps – not even perhaps, my client's memory may not be as good then as it was 11 years ago. But that's also true with the State's witnesses.

(Tr. 32, lines 8-14)

Therefore, even if Appellant was able to prove that he was presumptively prejudiced from the ten year delay, he admitted through counsel that he could not prove he suffered actual prejudice from the delay because his defense wasn't weakened in any way. Furthermore, Appellant did not spend any lengthy amount of time incarcerated pre-trial[2] which further indicates he wasn't prejudiced by the delay. Appellant asserts that prejudice was not

[2] The record indicates that Appellant was not in custody for any lengthy period of time while awaiting trial. The Assistant Solicitor referenced Appellant signing bond paper work on January 7, 2008. (Tr. 27). This date must be incorrect because the date of offense was December 15, 2008. Therefore, it is more likely Appellant bonded out of jail on January 7, 2009. In making his speedy trial motion, Counsel for Appellant argued that Appellant lived in the community and was available to give a DNA sample for the State's Schmerber motion at any time and yet the State did not seek a sample from Appellant until January 2019. (Tr. 40). Furthermore, Appellant received no credit for any time served on his sentencing sheet. (Sentencing Sheet).

"persuasively rebutted by the prosecution." (Initial Brief of Appellant 16). The State did not need to rebut prejudice, when Appellant admitted that he did not suffer any prejudice. Given the nature of Appellant's defense, he could not have possibly been prejudiced by a delay. Appellant claimed that he did not have sex with Victim because she was bleeding, but admitted he inserted his penis into Victim's mouth. (Tr. 246-48, 257-59). Therefore, Appellant's defense was that he committed a sexual battery against a fourteen year old girl, but not the particular sexual battery the State accused him of committing. Appellant admitted his guilt in his own testimony. Appellant's defense would have been unsuccessful no matter how long of a delay he endured before his trial.

Finally, Appellant argues the trial judge erred in considering the fact that there was a victim in denying Appellant's motion for speedy trial. Appellant's argument fails for two reasons. First, the trial judge never based his ruling on this factor. After weighing the Wingo factors on the record, the trial judge noted: "And I could take note of the fact that we have a victim involved in this case, we have a victim involved in this case, and she has her own constitutional rights as well." (Tr. 226, lines 14-17). The trial judge did not base his ruling on this consideration. In fact, when the trial judge made this comment, he had already gone through each of the Wingo factors on the record. However, even if the trial judge had considered the presence of a Victim in his deliberations, he would not have abused his discretion in denying Appellant's motion. The factors in prescribed by the United States Supreme Court in Wingo are not exclusive, but "Rather, they are related factors and must be considered together with such other circumstances as may be relevant." Wingo 407 U.S. at 533. Therefore, it would not have been improper for the trial judge to consider the presence of a victim as a relevant circumstance in making his decision. The trial judge properly weighed the Barker v. Wingo factors and did not

abuse his discretion in denying Appellant's speedy trial motion. Appellant's conviction and sentence should be affirmed.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court should be affirmed.

Respectfully submitted,

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March 31, 2020

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THE STATE, Respondent,

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PROOF OF SERVICE

I, Sally Ellison, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

Katherine H. Hudgins, Esquire
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I further certify that all parties required by Rule to be served have been served.
This thirty-first day of March, 2020.

Sally Ellison

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RE: State v. Darryl Eugene Coleman
Appellate Case No. 2019-000936

Dear Ms. Hudgins:

I am sending you a copy of the Initial Brief of Respondent and Designation of Matter in the above-referenced case. I will also send you a copy via electronic mail.

Sincerely,

Scott Matthews
Assistant Attorney General
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JSM/ab
Enclosures

cc: Honorable Jenny A. Kitchings (original enclosed)
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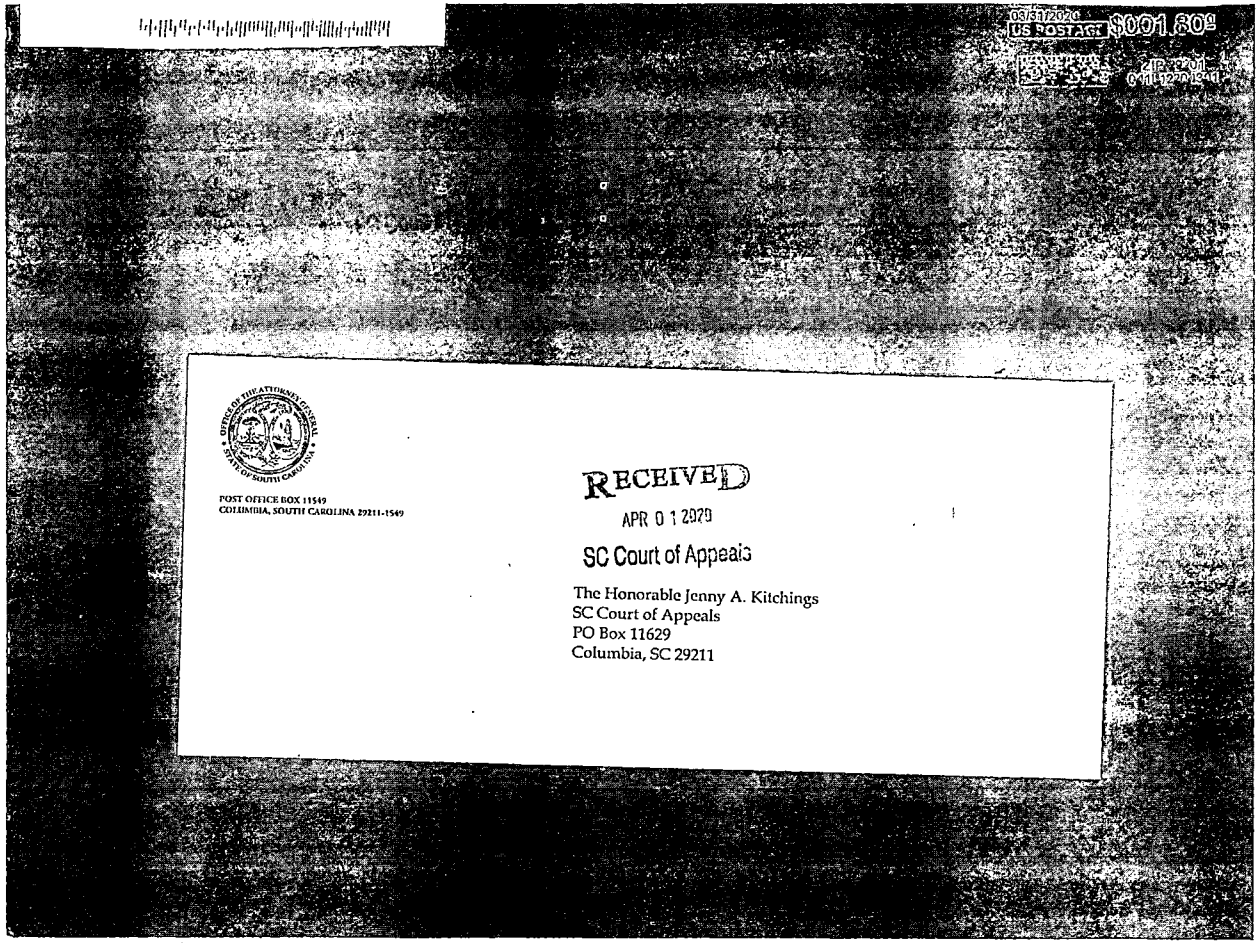
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