

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM DORCHESTER COUNTY

Honorable Matte Murphy, Circuit Court Judge

CASE NO.: 2010-CP-18- 0747

Rodney Elliott ,Appellant

v.

State of South Carolina, Respondent.

MEMORANDUM IN SUPPORT OF APPEAL

STATEMENT OF FACTS

On July 24, 1998, the appellant was found guilty of criminal sexual conduct in the second degree. A notice of appeal was filed and the South Carolina Court of Appeals thereafter affirmed the conviction and sentence State v. Elliott, Op. 2000-UP-684 filed November 15, 2000.

An application for Post Conviction Relief was filed by the Appellant on July 25, 2001. Following an evidentiary hearing that petition was dismissed by the Honorable Diane Goodstein by order dated July 1, 2003

On May 1, 2007, the Appellant filed a second petition for Post conviction Relief. In that application he alleged, among other things, the following:

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S.C. SUPREME COURT

1.: "The Applicant alleges that he was denied his Sixth Amendment right to the effective assistance of counsel where counsel failed to investigate and procure evidence that the Applicant did not have any sexually transmitted diseases which would have shown that he was not the perpetrator of the sexual offenses committed."

2. "The Applicant alleges that he should be permitted to raise this allegation in the present application where the evidence is **after-discovered and if presented during trial, would have likely resulted in a verdict of not guilty.**"

3. "The Applicant alleges that he is entitled to raise this allegation in the present application based on an intervening decision by the United States Supreme Court which held that a criminal defendant is denied due process where forensic evidence discovered after trial would show that he is actually innocent of the crime which he is convicted." (Emphasis added)

On April 25, 2008, the Honorable Diane Goodstein issued a Conditional Order Of Dismissal of the Appellant's PCR on the grounds that it was a successive application for relief. The Appellant was granted 20 days to show why the order should not become final.

No response to the Conditional Order of Dismissal was ever file by the Appellant's court appointed PCR counsel, Joseph Ginn. Based upon counsel's failure to respond a "Final Order" of dismissal was issued on October 1, 2008.

On August 9, 2010, the South Carolina Supreme Court issued its Order suspending the appellant's PCR counsel from the practice of law. In the Matter of Joseph W. GINN, III, Respondent, 388 S. C. 436, 697 S. E. 2nd 572. The first grounds for suspension in that opinion was a complaint by the Appellant against Attorney Ginn for failing to properly represent him. In The opinion the Court noted:

In August 2007, respondent was appointed to represent Client A in a post-conviction relief (PCR) matter. Respondent worked on the matter until March 2008. From March 2008 until his interim suspension from the practice of law on October 1, 2009, respondent did not work on the case or communicate with Client A or his family. At the time Client A filed his grievance, he did not know the status of his PCR action, in spite of his several letters to respondent requesting information about the progress of his case.

On March 16, 2010, the Appellant filed his third Post Conviction Relief proceeding. In that application he alleged violation of due process and right and ineffective assistance of counsel due to Attorney Ginn's failure to represent him in the 2007 Post Conviction Proceeding and his failure to submit briefs to the Court.

**APPELLANT WAS ENTITLED TO A EVIDENTIARY HEARING OF HIS 2007
PETITION FOR POST CONVICTION RELIEF**

In his 2007 Petition for Post Conviction Relief the Appellant alleged newly discovered evidence. The South Carolina Code makes specific provision for an extension of time to file a Post Conviction Relief petition based upon after discovered evidence. Code Section 17-27-45 provides:

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

Exhibit "A" to this brief are the documents that the Appellant attached to his 2007 PCR petition relating to his allegations of newly discovered evidence. It reflects that the evidence in question was not received by him at the prison until sometime between November 17th and November 20th 2006. His 2007 petition was filed on May 1, 2007. This is well within the one year provided for in Code Section 17-27-45.

Therefore, on the face of the petition itself he was entitled to a hearing on the issue of newly discovered evidence.

INEFFECTIVE ASSISTANCE OF PCR COUNSEL

The representation that the Appellant received from attorney Ginn in his 2007 Post Conviction Relief proceeding was not merely ineffective - it **was no assistance at all**. The Order of the Supreme Court suspending Mr. Ginn from the practice of law () specifically states that “ From March 2008 until his interim suspension from the practice of law on October 1, 2009, respondent did not work on the case or communicate with Client A or his family. “

Attorney Ginn did not respond to the Conditional Order of Dismissal of April 25, 2008 nor did he appeal the final Order of Dismissal of October 1, 2008. Had Attorney Ginn responded to the Conditional Order of Dismissal of April 25, 2008, Appellant believes that the Judge would have realized that the Petition was for newly discovered evidence and was timely filed. Had he appealed the final Order of October 1, 2008, Appellant believes that the case would have been returned to the Trial Court for an evidentiary hearing.

With respect to the right to counsel in PCR proceedings South Carolina Code Section 17-28-60 provides “If the applicant is unable to pay court costs and expenses of counsel, these costs and expenses shall be made available to the applicant in amounts and to the extent provided pursuant to Section 17-27-60.”

Appellant would also note that South Carolina Code Section 17-28-60 provides that “The performance of counsel pursuant to this article shall not form the basis for relief in any post-conviction relief proceeding.” Despite the preclusion of post conviction relief for ineffective PCR counsel Appellant believes there are important issues that need to be decided by the Court. These are as follows:

IMPORTANT ISSUES

I. Was the appellant , by virtue of Attorney Ginn’s total inaction on his 2007 Petition denied his

statutory right to counsel under South Carolina Code Section 17-28-60 ?

II. Is the Appellant entitled to a belated appeal of his 2007 PCR under the authority of White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974) ?

III. Do the facts of this case amount to a violation of Appellant's constitutional right to due process because he never received his "day in court" on the 2007 PCR and he was clearly entitled to the same?

IV. Was the appellant denied his constitutional right to assistance of counsel due to Attorney Ginn's total failure to perform his duties?

CONCLUSION

The appellant lost his right to litigate his "newly discovered evidence" claim in his 2007 PCR through the total inaction of his appointed counsel, Joseph Ginn. The Supreme Court believed that Mr. Ginn's conduct in that regard was substantial enough to be listed as one of the grounds for Mr. Ginn to be suspended from the practice of law.

Appellant's 2007 Post Conviction Relief Petition on its face clearly alleged a claim that was cognizable by statute and which should have been granted a hearing. There is something abhorrent to the law that the Appellant lost his right to a hearing through no fault of his own but rather through total inaction of counsel.

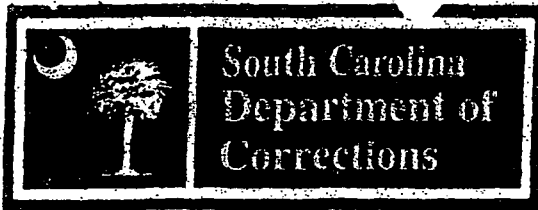
The Appellant believes that the questions set forth in the previous section of this brief all constitute important issues which should be addressed by the Court after full consideration on appeal.

At the very minimum the Court needs to address the issue as to whether the Appellant is entitled to a belated appeal of the denial of his 2007 Post Conviction Relief Petition under the authority and reasoning of White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974) .



Mark L. Archer
Attorney for Appellant
PO Box 971
Mount Pleasant, SC 29465
843-568-5870/Fax 800-338-9036

November 14, 2014



November 16, 2006

Brenda F. Shealy, Chief Deputy Clerk
Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

Re: Rodney Elliott, #251337 v. State

Dear Chief Deputy Clerk Shealy:

Please allow this letter to serve as a response to your correspondence to me dated November 6, 2006. In your correspondence you state as follows: "The Court asks that you please advise in writing on or before November 16, 2006, as to the allegations contained in Mr. Elliott's mandamus." If the Court requires a more formal response, I will be glad to provide one.

Mr. Elliott's Petition alleges that the South Carolina Department of Corrections (SCDC) has failed to provide him with a copy of an "SCDC Form M-71 of June 1996" that he claims will invalidate his conviction for Second Degree Criminal Sexual Conduct with a Minor. In response to your correspondence and Mr. Elliott's allegation, I have personally reviewed his current "hard copy" inmate medical file as well as his current computerized medical file. I found an SCDC Form M-71 dated July 27, 1998 but none for calendar year 1996.

It should be noted that the form requested by Mr. Elliott, if it exists, was completed during his prior term of incarceration with SCDC under a different SCDC inmate number (#235868). I have had SCDC Health Information Resources search for and find the medical file for Mr. Elliott's prior incarceration under SCDC #235868 and have personally reviewed the file. I did not find an "SCDC Form M-71" in this file. I did find one lab report which I have attached to this response. As the SCDC Form M-71 is used to report miscellaneous lab results, out of an abundance of caution, I have produced this document. I cannot respond to Mr. Elliott's claim that SCDC employees admitted the existence of the "SCDC Form M-71 of June 1996" as I have no idea who Mr. Elliott has spoken with and he has not identified anyone by name in his pleadings.

If you have any questions, please do not hesitate to contact me.

Respectfully,

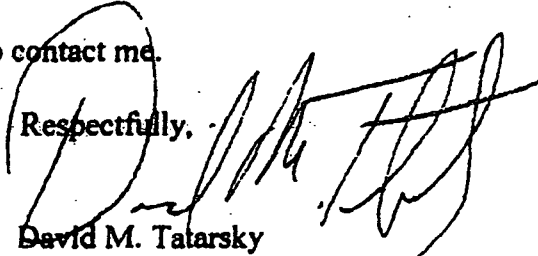

David M. Tatarsky
General Counsel

EXHIBIT A

CC: Rodney Elliott, #251337
Allendale Correctional Institution
P.O. Box 1151
Fairfax, SC 29827

323-102-2006-0

DEPT OF CORRECTIONAL

Exhibit N

ELLIOTT, RODNEY (COMPLETE) (H)		Age 31/08	Sex M	Control # 50825466226	Patient ID 3765RE	Phys DEVLIN
DOB 3/07/65		Fasting N/A	Account Number 39804075 CORRECTIONAL INST PO BOX 205 HWY 620 RIDGEVILLE, SC 29472-0000 (803) 375-3332			
TESTILIBP		Total Vol 0000				

Spec Date 11/18/96 11:30 Received 11/18/96 Reported 11/19/96 16:10 Seq#

TEST	RESULT	OUT OF RANGE	UNITS	LIMITS
STS-RFX+GC-DNA+C/D				
STS	Non-Reactive			Non-Reactive
N. GONORR. DNA PROBE				
NEGATIVE FOR NEISSERIA GONORRHOEA BY DNA PROBE.				

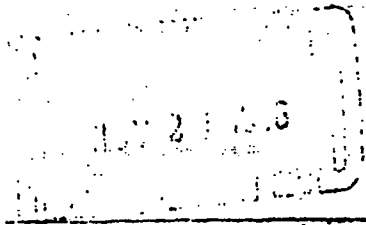
NOTE: TEST VALID FOR FEMALE ENDOCERVICAL AND MALE URETHRAL SPECIMENS ONLY.

White Blood Count		3.6 L	X 10 ⁻³ /uL	4.0- 10.5
Red Blood Count	4.93		X 10 ⁻⁶ /uL	4.10- 5.60
Hemoglobin	14.1		g/dL	12.5- 17.0
Hematocrit	41.7		%	36.0- 50.0
MCV	85		fL	80- 98
MCH	28.7		pg	27.0- 34.0
MCHC	33.9		g/dL	32.5- 35.5
Platelets	216		X 10 ⁻³ /uL	140- 415
Polys	49		%	45- 76
Lymphs	42		%	17- 44
Monocytes	5		%	3- 10
Eos	3		%	0- 4
Basos	1		%	0- 2
Polys (Absolute)	1.8		X 10 ⁻³ /uL	1.8- 7.8
Lymphs (Absolute)	1.5		X 10 ⁻³ /uL	0.7- 4.5
Monocytes (Absolute)	0.2		X 10 ⁻³ /uL	0.1- 1.0
Eos (Absolute Value)	0.1		X 10 ⁻³ /uL	0.0- 0.4
Baso (Absolute)	0.0		X 10 ⁻³ /uL	0.0- 0.2

LAB: BN LABCORP HOLDINGS DIRECTOR: FRANK HANCOCK MD DIR
1447 YORK COURT, BURLINGTON, NC 27215-2230

LAB: CR LABCORP HOLDINGS DIRECTOR: EUGENE D RUTLAND, JR MD
8 FARMFIELD AVE, CHARLESTON, SC 29407-0000

LAST PAGE OF REPORT



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REPORT

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Elliott vs - Stare

007-CP-18-
Exhibit No. 2

Lab Report

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS
Operations
ORDER TO REPORT

SCDC # 251337	Name ELLIOTT POONEY	Area F2B2
REPORT TO <u>MAILROOM</u> AT <u>Mon 11-20-06 1:00 PM</u>		
Bring All Belongings <input type="checkbox"/>		Bring State Clothing <input type="checkbox"/> Bring Nothing <input checked="" type="checkbox"/>
Date 11-17-06	Signed Hutchinson	RECEIVED NOV 20 2006 ACI POSTAL CENTER
Date 11-17-06	Inmate's Signature Landy L. Heath	
Date 11-19-06	Staff Member's Signature D. Eady	

Elliott-vs- State

2007-CP-18
Exhibit NO. D



Office of General Counsel
P.O. Box 2197-444 (Inmate 444) Road
Columbia, South Carolina 29221-1797

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11/20/06
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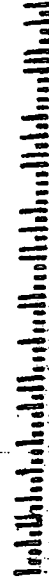
NOV 17 2006

ACI POSTAL CENTER



Rodney Elliott, #251337
Allendale Correctional Institution
P.O. Box 1151
Fairfax, SC 29027

2502741001-000



.THE STATE OF SOUTH CAROLINA

In The Supreme Court

APPEAL FROM DORCHESTER COUNTY

Honorable Matte Murphy, Circuit Court Judge

CASE NO.: 2010-CP-18- 0747

Rodney Elliott ,Appellant

v.

State of South Carolina, Respondent.

CERTIFICATE OF DELIVERY BY MAIL

I hereby certify that I have deposited a true and correct copy of the Appellant's Memorandum in Support of Appeal in the United States Mail with sufficient postage affixed thereto this 14th day of November, 2014 , addressed to

Megan Harrigan, Assistant Attorney General
South Carolina Attorney General's Office
P.O. Box 11549
Columbia, SC 29211

Rodney Elliott, 251337
MacDougall Correctional Institution
1516 Old Gilliard Road
Ridgeville, SC 29472-7408



MARK L. ARCHER, ESQUIRE
ATTORNEY FOR PLAINTIFF/APPELLANT
PO Box 971
Mount Pleasant, SC 29465
(843) 566-0118/Fax (843) 566-0336

ARCHER LAW OFFICE, PA

736 LAVALIER SQUARE
POST OFFICE BOX 971
MOUNT PLEASANT, SOUTH CAROLINA 29465-0971
(843) 566-0118/FAX 566-0336

November 14, 2014

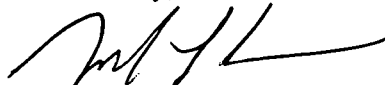
Hon. Daniel E. Shearous, Clerk of Court
Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

Rodney Elliott, #251337 v. State of South Carolina
CASE NO.: 2010-CP-18- 0747
Appellate case No: 2014-002323

Dear Sir/Madam:

Enclosed is my Memorandum in Support of Appeal as to why the above Post Conviction Relief Appeal should not be dismissed as a successive filing. By copy of this letter I am also serving both the Attorney General and my Client, Rodney Elliott.

Sincerely,



Mark L. Archer

MLA

Enclosures

cc: Megan E. Harrigan, Assistant Attorney General
Rodney Elliott

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S.C. SUPREME COURT

ARCHER LAW OFFICE, PA
Post Office Box 971
Mount Pleasant, South Carolina 29465

Hon. Daniel E. Shearous, Clerk of Court
Supreme Court of South Carolina
P. O. Box 11330
Columbia, SC 29211



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