

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM FAIRFIELD COUNTY
Court of Common Pleas
Brian M. Gibbons, Presiding Judge

Appellate Case No. 2014-002528

RECEIVED

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S.C. SUPREME COURT
CHARLES CARMACK, 323818

Petitioner,

v.

THE STATE OF SOUTH CAROLINA,

Respondent.

**EXPLANATION OF ISSUES WHICH WARRANT REVIEW
ON APPEAL PURSUANT TO 243(c), SCACR**

In compliance with Rule 243 (c), SCACR, undersigned Counsel, acting on behalf of Petitioner, would respectfully ask this Honorable Court to consider the following in support of Petitioner's request that he be allowed to appeal the Order of Dismissal filed in this Post-Conviction Relief action on October 31, 2014. In his Reply to the Conditional Order of Dismissal filed in this PCR case, Petitioner argued the following.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Fairfield County. He was indicted at the September 2006 term of the Court of General Sessions for Fairfield County for four (4) counts of assault and battery with intent to kill (ABWIK) (2006-GS-20-408, 409, 410, 411) and possession of firearm during commission of a violent crime (200-GS-20-412). In the trial court he was represented by John T. Mobley, Esquire. On August 28-31, 2007, the Applicant proceeded to trial by jury. He was found guilty of two counts of the lesser included offense of assault and battery of a high and aggravated nature. He was acquitted of the weapons charge. The Applicant was sentenced by the Honorable Kenneth G. Goode, presiding circuit court judge, to ten (10) years on indictment 2006-GS-20-411, ten (10) years, consecutive, on indictment 2006-GS-20-408, five(5) years, consecutive, on indictment 2006-GS-20-409, and five (5) years, concurrent,

on indictment 2006-GS-20-408, for an aggregate sentence of twenty-five (25) years.

The Applicant perfected a direct appeal to the South Carolina Court of Appeals. The Applicant was represented on direct appeal by Jack B. Swerling, of the Richland County Bar. The Court of Appeals affirmed the Applicant's judgments and sentences. *State v. Carmack*, 388 S.C. 190, 694 S.E.2d 224 (2010). The Applicant subsequently filed a Petition for Rehearing which was denied by Order of the Court of Appeals. He then filed a Petition for Writ of Certiorari with the Supreme Court of South Carolina. That petition was denied by Order of the Court dated November 17, 2011. The Remittitur was returned to the lower court by Order dated November 28, 2011.¹

The Applicant was notified of the decision of the Supreme Court by letter dated November 22, 2011. The Applicant was not notified when the remittitur was returned to the lower court on November 28, 2011. In the correspondence from Appellate Counsel the Applicant was advised that this was "*the final step in the appeals process in South Carolina.*" He was advised that he could consider a "*process in federal court called Habeas Corpus*" but, he was additionally counseled that such action generally involves a "*constitutional question which does not exist in your case.*" Counsel did not inform the Applicant of his right to pursue another type of appeal in South Carolina pursuant to the Uniform Post-Conviction Relief Act under S.C. Code Ann. Section 17-27-10, et seq. In this same correspondence, Appellate Counsel referred the Applicant to the undersigned for a potential federal habeas action. *See, Attachment A.*

The Applicant did not hire the undersigned counsel until December 19, 2012, at which time more than one year had passed since the Applicant's receipt of the decision of the Supreme Court in his case in November, 2011. At that time Counsel advised the Applicant that it was too late to file a federal habeas action in his case. Counsel further advised the Applicant that even if he had filed such an action he would not have been likely to receive a favorable ruling in that effort if he had not have preserved federal constitutional issues at trial and on direct appeal. Upon further investigation, Counsel determined the following facts which the Applicant now asserts justify a finding that his current post-conviction relief application should be accepted as timely and heard on its merits.

- Appellate Counsel affirmatively advised the Applicant that he had exhausted all avenues for review in state court. In so doing, he lead the Applicant to believe that a federal habeas corpus action was the only thing he

¹ The State's Return and Motion to Dismiss dated September 19, 2013, as well as the Conditional Order of Dismissal entered in this matter, reference the submission of an *Anders* Brief in the Applicant's direct appeal. This portion of these documents, however, referenced the direct appeal in *State v. Owens, No. 203-UP- 355 (SC Ct. App. May 21, 2003)*. Therefore this portion of these documents obviously contain an inadvertent reference to the appellate history on another case.

could do if he desired to further challenge his judgments and sentences. Counsel then advised him that he had no issues in his case which were appropriate for federal review. In so doing, he overlooked the fact that the Applicant in fact had the right to develop a federal constitution claim, grounded in the Sixth and Fourteenth Amendments to the United States Constitution, by seeking state collateral review through a Post-Conviction Relief Application. In so advising the Applicant he misadvised him concerning the law in South Carolina and deprived him of the opportunity to raise claims of ineffective assistance of Trial and Appellate Counsel.

- The Applicant did not understand that there would be no further action on his appeal to the Supreme Court following his receipt of the letter from his Appellate Counsel in November, 2011. Following an adverse ruling in the Court of Appeals, Appellate Counsel filed a Petition for Rehearing. The Applicant did not understand that Appellate Counsel would not be taking measures to ask the Supreme Court to reconsider their decision just as he had when the Court of Appeals ruled against the Applicant.

The Applicant is aware of no authority that requires an attorney representing a client either at the trial stage, or on appeal, to advise a client of his right to raise claims of ineffective assistance of counsel in a PCR action. He would respectfully assert however, that there is a substantial difference between not advising the client about Post-Conviction Relief actions and misadvising him about whether he has any further avenues for relief within the state judicial system.

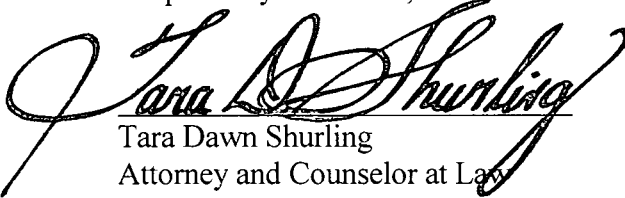
Appellate Counsel in this matter is a very experienced and well regarded lawyer. Counsel herein knows him to be a fine advocate and an ethical lawyer. She therefore does not assert that he intentionally mislead the Applicant about this matter. The end result however, was the same regardless of Appellate Counsel's intentions. Only after a significant period of incarceration did the Applicant learn enough about filing for PCR to trigger his decision to ask his family to hire someone to further investigate that option. Understandably, after having been advised by one of the finest lawyers in this state that that the Applicant had no further options to pursue, it took the Applicant awhile to convince his family of the need to hire him another lawyer. Ultimately the Applicant only missed the deadline found in S.C. Code Ann. §17-27-45(A) by thirty (30) days. His deadline under the 365 day rule found therein would have been November 27, 2012. Counsel herein filed this PCR action on December 27, 2012 after the Applicant's family hired her on December 19, 2012.

On the narrow facts of this case, the Applicant would assert that the statute of limitations should be equitably tolled to permit this application for relief to be heard on its merits.

Reply to Conditional Order of Dismissal, filed October 8, 2013, ATTACHMENT I, with attachment. A Final Order of Dismissal was filed on May 27, 2014. That Order was amended by the Amended Final Order of Dismissal filed October 31, 2014.

In light of the above, the Applicant respectfully submits that his appeal is not frivolous and addresses meritorious claims that, on the very narrow facts of this case, warrant review by this Honorable Court.

Respectfully submitted,



Tara Dawn Shurling
Attorney and Counselor at Law
S.C. Bar No. 5099

3614 Landmark Drive, Suite A
Columbia, South Carolina 29204
(803)738-8622
(803)738-1600 FAX

ATTORNEY FOR APPLICANT

This 15th day of December, 2014.

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM FAIRFIELD COUNTY
Court of Common Pleas
Brian M. Gibbons, Presiding Judge

CERTIFICATE OF SERVICE

CHARLES CARMACK, 323818

Applicant,

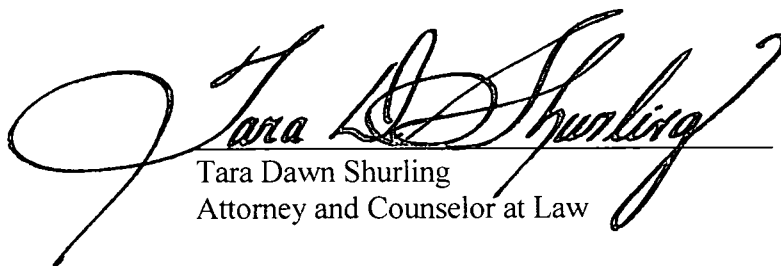
v.

THE STATE OF SOUTH CAROLINA,

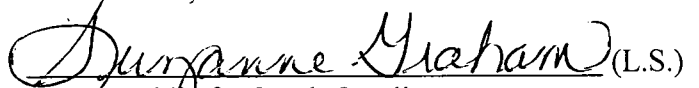
Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of the Applicant's Explanation of Issues which Warrant Review on Appeal pursuant to 243(c), SCACR in the above-entitled cause has been served upon opposing counsel, J. Croom Hunter, Assistant Attorney General, by mailing in an envelope properly addressed with postage prepaid on this 15th day of December, 2014.


Tara Dawn Shurling
Attorney and Counselor at Law

SWORN TO BEFORE me this 15th day
of December, 2014.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: 2/28/24

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF FAIRFIELD)

CHARLES CARMACK, #323818,) 2012-CP-20-505
Applicant,)

v.) REPLY TO CONDITIONAL
) ORDER OF DISMISSAL

THE STATE OF SOUTH CAROLINA,)
Respondent.)

2013 OCT 8 AM 10 52
FAIRFIELD COUNTY
CLERK OF COURT
BETTY JO BECKHAM

In response to the Conditional Order of Dismissal filed in this matter on September 19, 2013, the Applicant would show this Court the following:

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- The Applicant did not understand that there would be no further action on his appeal to the Supreme Court following his receipt of the letter from his Appellate Counsel in November, 2011. Following an adverse ruling in the Court of Appeals, Appellate Counsel filed a Petition for Rehearing. The Applicant did not understand that Appellate Counsel would not be taking measures to ask the Supreme Court to reconsider their decision just as he had when the Court of Appeals ruled against the Applicant.

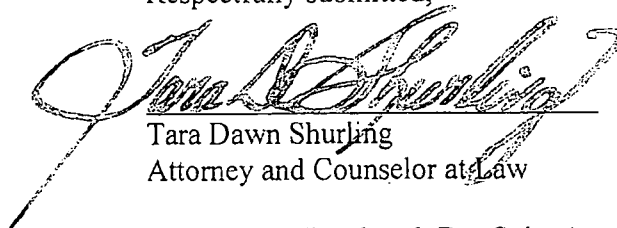
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Respectfully submitted,



Tara Dawn Shurling
Attorney and Counselor at Law

3614 Landmark Dr., Suite A
Columbia, S.C. 29204
(803) 738-8622
(803) 738-1600 (fax)
tdslaw@shurlinglaw.com

Attorney for the Applicant

This 7th day of October, 2013.

ATTACHMENT A

2013 OCT 8 AM 10 52

FAIRFIELD COUNTY
CLERK OF COURT
BETTY JO BECKHAM

November 22, 2011

Charles Carmack, #00323818
Broad River Correctional Institution
4460 Broad River Road
Columbia, South Carolina 29210

Dear Chuck:

I regret to inform you that the South Carolina Supreme Court denied our application to hear the case. I have enclosed a copy of the decision. This is the final step in the appeals process in South Carolina.

There is a process in the federal court called Habeas Corpus, but that generally involves a constitutional question which does not exist in your case. Should you or your mom wish to pursue a Habeas Corpus Petition, I would refer you to Tara Shurling at (803) 738-8622 who has done those in the past.

If you have any questions, please call the office collect and I will try to answer them. Please be assured that if I can do anything for you in the future, I will make every effort to do so.

Very truly yours,

Jack B. Swerling

JBS/kas
Enclosure

cc: Elizabeth Gregg (w/enc.)

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF FAIRFIELD)

CHARLES CARMACK, #323818,)
Applicant,)

2012-CP-20-505

v.)

CERTIFICATE OF SERVICE)

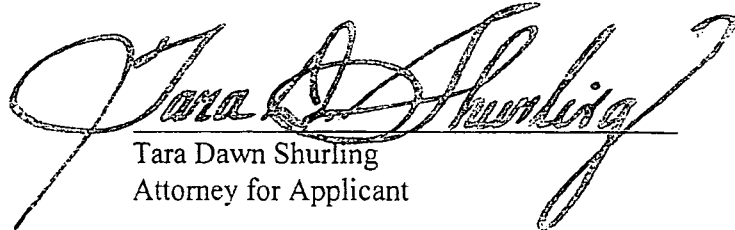
THE STATE OF SOUTH CAROLINA,)
Respondent.)

2013 OCT 8 AM 10 52
FAIRFIELD COUNTY
CLERK OF COURT
BETTY JO BECKHAM

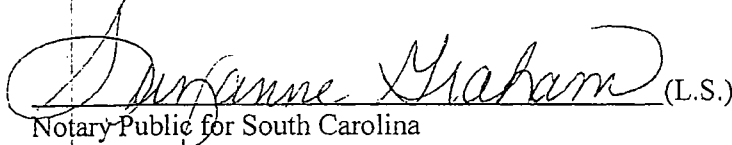
The undersigned hereby certifies that a true copy of the Reply to Conditional Order of Dismissal in the above matter has been served on opposing counsel this the 7th day of October, 2013, by mailing one (1) copy in a stamped envelope properly addressed to:

Suzanne H. White
Assistant Attorney General
Office of the Attorney General
P. O. Box 11549
Columbia, SC 29211

The original having been sent to the Fairfield County Clerk of Court for filing.


Tara Dawn Shurling
Attorney for Applicant

SWORN TO BEFORE ME this 7th day of
October, 2013.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: 2/28/2023

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF FAIRFIELD)

CHARLES CARMACK, #323818,)
) Applicant,)

2012-CP-20-505

v.)

CERTIFICATE OF SERVICE)

THE STATE OF SOUTH CAROLINA,)
) Respondent.)

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FAIRFIELD COUNTY
CLERK OF COURT
BETTY JO BECKHAM

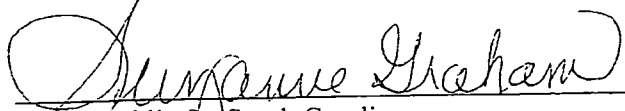
The undersigned hereby certifies that a true copy of the Reply to Conditional Order of Dismissal in the above matter has been served on the Honorable J. Ernest Kinard, Jr., this the 7th day of October, 2013, by mailing one (1) copy in a stamped envelope properly addressed to:

The Honorable J. Ernest Kinard, Jr.
Administrative Court Judge for the
Sixth Judicial Circuit
Post Office Drawer 1707
Camden, South Carolina 29201

The original having been sent to the Fairfield County Clerk of Court for filing.


Tara Dawn Shurling
Attorney for Applicant

SWORN TO BEFORE ME this 7th day of
October, 2013.


Notary Public for South Carolina (L.S.)

My Commission Expires: 2/28/2023

LAW OFFICE OF



TARA DAWN SHURLING, PA

Attorney and Counselor at Law

3614 Landmark Drive

Suite A

Columbia, South Carolina 29204

(803) 738-8622

(Fax) (803) 738-1600

E-Mail: tdslaw@shurlinglaw.com

December 15, 2014

RECEIVED

DEC 18 2014

S.C. SUPREME COURT

The Honorable Daniel E. Shearouse
South Carolina Supreme Court Clerk
Post Office Box 11330
Columbia, South Carolina 29211-1330

Re: Charles Carmack, #323818 v. State of South Carolina;
Appellate Case No. 2014-002528.

Dear Mr. Shearouse:

Enclosed please find an original and six (6) copies of my explanation for the appeal in the above captioned Post-Conviction Relief matter. I also enclosed two (2) extra copies which I would appreciate having clocked and returned to my office in the enclosed self-addressed stamped envelope. Thank you very much for your kind assistance. I remain,

Sincerely yours,

A handwritten signature in black ink that reads "Tara Dawn Shurling". The signature is written in a cursive, flowing style with a large, sweeping flourish at the end.

Tara Dawn Shurling
Attorney and Counselor at Law

TDS/sg

Enclosure

cc: J. Croom Hunter, Assistant Attorney General
Lorienne French, Legal Service Coordinate, Appellate Defense
Charles Carmack, #323818
Elizabeth Greggs