

**STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

Appeal from Dorchester County
Diane S Goodstein, Circuit Court Judge

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STATE OF SOUTH CAROLINA,

Respondent, **SC SUPREME COURT**

v

KENNETH HARRY JUSTUS,

Appellant

INITIAL BRIEF OF RESPONDENT

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APPELLANT’S STATEMENT OF ISSUE ON APPEAL

The guilty plea judge committed reversible error by granting State’s motion to disqualify Justus’ appointed counsel, Maite Murphy, simply because she had represented an investigator employed by the Solicitor’s Office in an unrelated domestic matter

STATEMENT OF THE CASE

Appellant murdered Justin Breganzer within the confines of Lieber Correctional Institution on July 26, 2005. Appellant was arrested for the murder on August 2, 2005. On October 20, 2005, appellant was indicted by the Dorchester County grand jury for murder (05-GS-18-1265) (Tr 12/11/08, pp 54-76, Tr 2/16-17/06, p 11)

The State sought the death penalty against appellant and served him with its Notice of Intent to Seek the Death Penalty on August 11, 2005 (Tr 2/16-17/06, p 11, Tr 12/11/06, pp 18-19). On July 31, 2007, appellant was served with Notice of Aggravating Circumstances (Tr 12/11/06, p 18-19).

This Court assigned this capital case to the Honorable Diane Shafer Goodstein, Circuit Court Judge. Appellant was originally represented by court-appointed attorneys Marva Hardee-Thomas and Maite Murphy. In February of 2006, Ms. Hardee-Thomas and Ms. Murphy were removed from the case for different reasons, and Walter Bailey and Norbert Cummings were substituted as court-appointed capital defense counsel. The case was eventually scheduled for trial the week of December 15, 2008.

On December 11, 2008, appellant pled guilty to murder before Judge Goodstein.¹ In his guilty plea, appellant admitted his guilt to Justin Breganzer's murder. At the conclusion of the guilty plea proceeding, Judge Goodstein accepted appellant's plea after finding it was freely, voluntarily,

¹Prior to appellant's guilty plea, a hearing pursuant to State v. Blair, 275 S.C. 529, 273 S.E.2d 536 (1981) was conducted at which Doctors Donna Schwartz-Watts and Jeffrey Ford testified appellant was competent to stand trial or plead guilty and to assist his attorneys in his defense. Appellant's attorneys also informed the court that in their opinion appellant was competent. At the conclusion of the Blair hearing, Judge Goodstein found and concluded appellant was competent *and* able to assist his attorneys with his defense.

¹ and knowingly entered (Tr 12/11/08, pp 1-76) The State continued to seek the death penalty against appellant for Justin Breganzer's murder

After the required twenty-four (24) hour waiting period, the sentencing phase began on December 15, 2008 and concluded on December 16, 2008 On December 23, 2008, in a written sentencing order read into the record, Judge Goodstein found the State had proven beyond a ¹ reasonable doubt the following statutory aggravating circumstance *The murder was committed by a person with a prior conviction for murder* S C Code Ann Section 16-3-20(C)(A)(2) In addition to finding the aggravating circumstance, Judge Goodstein sentenced appellant to death for Justin Breganzer's murder (Tr 12/15/08, pp 1-172, Tr 12/16/08, pp 1-24, Tr 12/23/08, pp 1-14 & Sentencing Order) This appeal followed

¹

RESPONDENT'S STATEMENT OF FACTS

On July 26, 2005, appellant brutally beat and eventually stabbed Justin Breganzer ("Justin") to death. Appellant used a shank to murder the victim. Appellant was thirty-eight (38) years old at the time he murdered Justin. Justin was just twenty-two (22) years old at the time of his death. (Tr 12/11/08, pp 1-76)

At the time of Justin's murder, appellant was incarcerated at Lieber Correctional Institution, a maximum security prison, serving two (2) consecutive life sentences for two (2) separate murders from Oconee County. Appellant was convicted in Oconee County on October 6, 1998 of the murder of Randal Eades and the murder of Kitty Smith. The murder of Mr. Eades and the murder of Mrs. Smith were unrelated. Appellant pled guilty to both murders and accompanying armed robbery charges. In addition to the consecutive life sentences for the two (2) Oconee murders, appellant received thirty (30) year sentences on the armed robbery indictments. (Tr 12/11/08, pp 62-64)

The victim in the present case, Justin, was also incarcerated at Lieber. The victim's incarceration at Lieber came as a result of walking away from a litter detail, which resulted in a conviction for escape. The victim was on the litter detail after having been sentenced to an active Youthful Offender Act (YOA) sentence for carbreaking and grand larceny. Pursuant to Department of Corrections (DOC) guidelines, any person convicted of escape must be housed at a maximum security facility. Justin had approximately two (2) months remaining on his sentence at the time of his murder. (Tr 12/11/08, pp 62-63)

The Evidence

On July 26, 2005, shortly after 10 00 p m , a prison guard found Justin's lifeless body lying in a pool of blood in his cell. A trail of blood drops and bloody footprints led from Justin's cell to

the area of appellant's cell Appellant's bloody palm print was also found on a stairway post leading to appellant's cell, which was on a lower level of the cell block from Justin's cell Justin's blood was also found on appellant's clothing located inside appellant's cell in appellant's prison locker Appellant's boots also contained Justin's blood on them Appellant's boots also matched the boot prints leaving the victim's cell and heading toward appellant's cell Appellant's fingerprint was found in Justin's cell on a tobacco wrapper Appellant's thumb print, in Justin's blood, was also found in Justin's cell on the sink (Tr 12/11/08, pp 62-65, 12/15/08, pp 13-70, 78-90)

The autopsy determined Justin had been badly beaten and stabbed eleven (11) times with a sharp object (Tr 12/15/08 p 112-117) Law enforcement recovered the shank, used to stab Justin, in the bottom of the toilet in the victim's cell (Tr 12/15/08, p 36) A wooden handle wrapped with cloth, similar to prison uniform cloth, was also recovered in the sewer drain which collects material coming from the prison sewer system (Tr 12/15/08, pp 33-35) The handle had a piece of metal in it A forensic expert microscopically compared the broken blade, found in the toilet, to the metal in the handle and determined the blade and the handle were at one time joined together (Tr 12/15/08, p 81) The pathologist determined Justin died from one of his eleven (11) stab wounds This stab wound penetrated Justin's heart (Tr 12/15/08, pp 113-115) At his guilty plea, appellant admitted he murdered Justin (Tr 12/11/08, pp 34-76)

The Penalty Phase

A Appellant's prior record

In the penalty phase, the State introduced appellant's extensive criminal record Appellant was convicted in 1985 of house breaking *and* grand larceny and malicious injury to personal property In 1987, appellant was convicted of two (2) counts of auto-breaking *and* larceny,

possession of a controlled substance, possession of tools used for a crime, and driving under the influence Appellant was convicted in 1995 of attempting to possess prescription drugs by fraud and conspiracy to obtain drugs by fraud As previously stated, appellant was convicted in 1998 of the two (2) Oconee County murders, and the two (2) accompanying armed robbery charges (Tr 12/15/08, pp 10-12)

B Appellant s prison disciplinary record

The State also introduced appellant's record of disciplinary violations while incarcerated Appellant had disciplinary violations in 2000 for refusing to work, possession or use of drugs (2 counts), and under the influence In 2001 appellant had numerous disciplinary violations for possession or use of drugs and one violation for refusing to take a urine test In 2003, appellant was convicted of possession of contraband In 2004, appellant had disciplinary violations for possession of drugs During this same year, appellant had a violation for refusing to follow orders Justin's murder occurred in 2005 (Tr 12/15/08, pp 19-20)

C The Prior Murders Committed by Appellant

During the penalty phase, the State also introduced facts and circumstances surrounding the previous Oconee County murders to establish appellant's character and future dangerousness

(The Eades Murder)

On January 30, 1997, Randal Eades was murdered on the front porch of his home, located about three (3) miles northwest of Walhalla, S C Mr Eades operated a small grocery store directly across Highway 28 from his residence Eades was at home alone at the time he was murdered (Tr 12/15/08, pp 118-133, 137-141)

On the evening of Eades' murder, appellant was dropped off near Eades' home by his

girlfriend Appellant approached the home on foot carrying a firearm When the victim's dogs began to bark, Eades came out on his front porch Appellant shot Eades at least twice as Eades stood on his porch Appellant then stole money and a gun from Eades' bedroom Appellant also dragged Eades' body to the side of the home and dumped it over an embankment Eades' body was discovered by his wife upon her returning to the home later that evening (Tr 12/15/08, pp 118-133, 137-141)

Appellant shot Eades with a shotgun The pathologist determined Eades had been hit with numerous bird-shot pellets from the top of his head to down below his waist and mid-thigh All of the bird-shot wounds were superficial, except for one pellet that penetrated an eye and would have blinded the victim in that eye Appellant also shot Eades with at least one 00 buck-shot load These pellets hit Eades from his left cheek down to his left thigh or groin area His jaw was fractured by one pellet One pellet went through his lung, his heart, the ventricle, and the aorta Another pellet perforated the thoracic aorta and the lung Still another pellet lodged in Eades' spine, which would probably have paralyzed him And, another pellet went through his genitals Eades bled to death from his gunshot wounds (Tr 12/15/08, pp 118-126)

Eades was fifty-one (51) years old at the time of his death Appellant's murder and armed robbery of Eades remained unsolved for approximately one (1) year (Tr 12/15/08, pp 118-133, 136-141)

(The Smith Murder)

On January 4, 1998, Kitty Smith was murdered in her business located on Highway 11 in Oconee County Mrs Smith, a widow of a retired U S Army veteran, was operating the Highway 11 Grocery that evening when appellant entered her store carrying a shotgun Appellant shot Mrs

Smith with the shotgun and then robbed the store of several thousand dollars, a duffel bag, some bank bags, and Mrs Smith's credit cards (Tr 12/15/08, pp 127-139)

A witness, who came into the store after Mrs Smith was shot, testified appellant pointed the shotgun in his direction and attempted to shoot him but the gun did not fire but only clicked The witness ran and pushed his wife out of the store, and they fled together down Highway 11 (Tr 12/15/08, pp 142-147)

Several days later appellant was arrested in Athens, Georgia after using one of Mrs Smith's stolen credit cards Police found in appellant's motel room several thousand dollars in cash, the bank bags, and the duffel bag (Tr 12/15/08, pp 136-139) Appellant confessed to Mrs Smith's murder and eventually confessed to the Eades' murder (Tr pp 139-141)

Mrs Smith was sixty-four (64) years old at the time of her murder and was five (5) ft three (3) inches tall and weighed approximately one hundred and forty (140) pounds Appellant shot Mrs Smith with buckshot in the upper chest One of Mrs Smith's arms was up when appellant shot her with the shotgun Like Mr Eades, Mrs Smith also bled to death as a result of the gunshot wound to her chest (Tr 12/15/08, pp 73-77)

D Justin s Murder

In the penalty phase, the State also introduced the facts and circumstances surrounding Justin's murder at Lieber Correctional Justin was twenty-two (22) years old, stood five (5) ft six (6) inches tall, and weighed approximately one hundred and forty-six (146) pounds Appellant was thirty-eight (38) years old at the time he murdered Justin (Tr 12/15/08, pp 21, 112-118)

The autopsy determined Justin had multiple injuries to his body His nose was fractured, and he had several bruises on his cheeks He also had lacerations along each eyebrow and had superficial

scratch wounds to his face. There were three (3) wounds to his left ear. The pathologist testified the most likely cause of the injuries to the face and head were as a result of being hit with a fist. Justin also had a total of eleven (11) stab wounds, one of which was directly to the heart. In addition to three (3) stab wounds to his chest, Justin had stab wounds to the abdomen, arms, left hand, and one in the back of the upper shoulder. (Tr. 12/15/08, pp. 112-118)

The Sentencing Order

On December 23, 2008, Judge Goodstein issued her twelve (12) page sentencing order which she read into the record. The order was filed with the Dorchester County Clerk of Court the same day.

A Procedural Background

In the sentencing order, Judge Goodstein initially recounted the procedural posture of the case. Judge Goodstein noted the State had timely served its intention to seek the death penalty and notice of aggravating circumstances. She explained appellant pled guilty to murder on December 11, 2008 and the twenty-four (24) hour waiting period was observed. She pointed out the sentencing hearing began on December 15th and concluded on December 16th, 2005. After reviewing the testimony, the complete record, and the applicable law, Judge Goodstein made the following findings of fact and conclusions of law.

B Blair Hearing

In the sentencing order, Judge Goodstein indicated a Blair hearing had been conducted at the start of the proceedings to ascertain whether appellant was competent to stand trial or subsequently to enter a plea of guilty to murder. She noted that during the hearing the court heard from a psychiatrist and an internist. Specifically, Doctor Schwartz-Watts, an expert in forensic psychiatry,

testified she met with appellant seven (7) times, most recently on the morning of the guilty plea. In her opinion, appellant was clearly competent under the Blair standard, and appellant had sufficient present ability to consult with his attorneys with a reasonable degree of rational understanding, and he had a rational as well as a factual understanding of the proceedings against him. In this regard, Judge Goodstein cited State v. Weik, 356 S.C. 76, 81, 587 S.E.2d 683, 685 (2002). Additionally, Dr. Jeffrey Ford, appellant's internist, testified concerning appellant's physical health and whether it would affect his competency to stand trial.² Dr. Ford stated he examined appellant three (3) times including the morning of the guilty plea and appellant's physical condition neither prevented him from understanding the nature of the charges against him, nor from participating with counsel in preparing his defense at trial. Dr. Ford further stated appellant suffered from no physical condition that would prevent him from competently participating in a trial or plea. Judge Goodstein also noted appellant's attorneys believed their client was clearly competent to plead or go to trial based on their interactions with appellant before the trial and on the morning of the guilty plea. Judge Goodstein then noted in the order that she had found appellant was competent. Judge Goodstein found appellant had both a rational as well as a factual understanding of the proceedings against him and was able to consult with counsel and assist in his defense.

C. Factual Background

Judge Goodstein then briefly recited the factual background of the case after noting the basic facts were not in dispute. She pointed out appellant was incarcerated at Lieber Correctional Facility in July of 2005 while serving two (2) life sentences and two thirty (30) year sentences as a result of two (2) murders and two (2) armed robberies which occurred in Oconee County. She noted the

²Appellant has hepatitis C.

victim Justin was also housed at Lieber serving a sentence for escape after walking away from a litter detail while serving a YOA sentence. Judge Goodstein noted that on July 26th, just after 10 00 pm, the victim's body was discovered in a pool of blood in his own cell. Justin had been severely beaten and repeatedly stabbed with a fatal stab wound to the heart. SLED processed the crime scene, and numerous items were recovered which were later directly linked to appellant, including fingerprints in the victim's cell, one of which was in the victim's blood. Judge Goodstein also pointed out the murder weapon was found in the toilet in the victim's cell and the corresponding handle was found in the prison sewer system, which was forensically matched to the murder weapon. Judge Goodstein also noted there was a trail of blood from the victim's cell to an area of the prison where appellant resided. She noted a bloody footprint and a palm print matched appellant. Judge Goodstein also pointed out that during a search of appellant's cell a bloody towel and a bloody SCDC uniform were found in appellant's locker. She also pointed out SLED matched several blood samples on this clothing to the victim. Judge Goodstein noted there were also boots located in appellant's locker which SLED matched the tread positively to the boot print leading from the victim's cell to appellant's cell. Judge Goodstein also highlighted that in addition to the evidence provided by the State, appellant admitted his guilt to the murder of Justin during the guilty plea.

D Defendant s Guilty Plea

Judge Goodstein next summarized in detail appellant's guilty plea of December 11, 2008. She noted at the start of the plea an *in camera* hearing was conducted with appellant and his attorneys to determine appellant's position concerning the waiver of his 5th Amendment rights. During this hearing, Mr. Bailey examined appellant about his desire to waive his 5th Amendment rights along with other constitutional rights. Judge Goodstein noted appellant affirmatively stated

he wished to waive his 5th and 6th Amendment rights and all his rights to enable him to plead guilty, including his right to trial by jury, right to call witnesses, right to cross-examine witnesses, to object to evidence, to challenge testimony, and to offer experts. After stating he wished to waive all these rights and others, appellant stated he wished to waive all rights he had commensurate with a jury trial in order to enter a plea of guilty to murder.

Judge Goodstein further highlighted she then examined appellant to determine his position concerning his attorneys' ability to make certain statements which would waive his 5th and 6th Amendment rights, since they would be acting as his agents during the proceedings. Judge Goodstein pointed out appellant affirmatively stated he understood his rights and consented to his attorneys making statements that would waive his 5th Amendment rights.

Judge Goodstein further noted after concluding the *in camera* examination she collected personal information from appellant as follows. Appellant was 41 years old and completed the 10th grade in school at Walhalla High School before dropping out, and he never got his GED. He worked after dropping out of school at a number of companies, each length of employment ranging from one (1) to two (2) and a half (½) years. His last job was apparently ten (10) years ago just before he was arrested for the crimes in Oconee County. He had one child who was sixteen (16) years old.

Judge Goodstein also noted she reviewed appellant's past drug, alcohol, and mental health history, which included the following. In the early 1990's, appellant completed drug and alcohol treatment. In 1998, appellant stated he was evaluated by a psychiatrist and was placed on medication, but was taken off that medication in 1999 with the consultation of a doctor. While located in Lieber, appellant stated he took two (2) or three (3) medicines for his health care. Currently, appellant takes Remeron nightly to deal with chronic anxiety. Judge Goodstein noted

appellant was clear that he had no problem that might interfere with his ability to understand the proceedings

In the sentencing order, Judge Goodstein further highlighted she examined appellant concerning the waiver of his constitutional rights. She pointed out she inquired about his desire to waive his right to remain silent, his right not to incriminate himself, his right to require the state to prove his guilt beyond a reasonable doubt, and his right to confront witnesses, and he understood each of these rights and wished to waive them

E The Aggravating Circumstance

In the sentencing order, Judge Goodstein found the State proved the aggravating circumstance it alleged beyond a reasonable doubt. Judge Goodstein found the murder of Justin Breganzer was committed by a person with a prior conviction for murder. Judge Goodstein found appellant was previously convicted of the murders of Randall Eades and Kitty Smith in 1998 in Oconee County, the State having introduced appellant's prior criminal record into evidence. She also noted appellant admitted the same by his plea of guilty, the facts were undisputed in the testimony, and appellant admitted their existence. Judge Goodstein also recounted in detail the facts surrounding the two (2) Oconee County murders, including that appellant had been in Ms. Smith's store on an occasion previous to her murder, and she had extended credit to him, and that appellant confessed to both the murder of Ms. Smith and the murder of Mr. Eades after his arrest for the Oconee County murders. Judge Goodstein also recounted in the sentencing order that following his guilty pleas to the two (2) murders and two (2) armed robberies in Oconee County, appellant received a life sentence for each murder and thirty (30) year sentences for armed robbery and, as a result, was taken into the custody of SCDC. Judge Goodstein affirmatively found the murder of

Justin Breganzer was committed by one with a record of having committed a previous murder (Sentencing Order, pp 7-12)

F Mitigating Factors

In the sentencing order, Judge Goodstein noted appellant was engaged, appropriate, concerned, made notes, and responded to the Court's questions along with his own counsel's questions, and was cooperative at all times in the process. She noted he was intently paying attention during the hearings pre-trial, during the guilty plea, and sentencing phase.

Judge Goodstein pointed out appellant prohibited his attorneys from offering any evidence in mitigation or arguing against the imposition of the death penalty. Judge Goodstein found based on appellant's testimony and the other evidence bearing on his competency, as well as, by statements of his attorneys, and the court's observations, it was clear appellant freely, voluntarily, knowingly, and intelligently waived his right to present mitigation evidence and to contest the aggravating circumstance.

Judge Goodstein also pointed out counsel for appellant informed the court they were ready and willing to present evidence in mitigation had appellant allowed them to proceed. She also noted counsel had secured experts in appellant's behalf along with a plan to present an affirmative contest on his behalf on aggravating circumstances with a mitigating circumstance case. Judge Goodstein also highlighted that at closing arguments, both of appellant's attorneys reiterated that this was their client's wishes, this decision was not their wishes for their client, they had attempted for well over a year to convince appellant to present some case even if he was going to enter a guilty plea to the murder of Justin Breganzer, but they were unsuccessful in those efforts. Continuing, Judge Goodstein explained that counsel stated they reviewed their client's options and all his rights during

each step of the process and the rights he would be waiving by entering a guilty plea. Judge Goodstein found that despite counsel's efforts, appellant was firm in his decision to plead guilty and seek the death penalty and not allow or present mitigation evidence. Judge Goodstein also noted she questioned appellant extensively regarding his taking such a position. Judge Goodstein found the record abundantly showed appellant was competent and made this decision freely, voluntarily, intelligently, and knowingly.

Judge Goodstein also found she was not bound by appellant's wishes regarding sentencing. She determined, as fact finder and sentencer, she must search the record to find any mitigating circumstances and review those in light of the aggravating circumstances before rendering a sentence. She noted, as previously stated, appellant was at all times appropriate in his conduct during the proceedings.

Judge Goodstein considered appellant's mental health, which she noted was discussed extensively. She noted that initially she made a determination that appellant was competent. Judge Goodstein pointed out this determination was reviewed and reaffirmed throughout the entire proceeding. She also highlighted she had been aware of appellant's physical condition, specifically, his having hepatitis C.

Judge Goodstein pointed out the forensic psychiatrist found appellant suffered from no mental illnesses and appellant's internist found his medical health did not adversely affect his competency to participate in the guilty plea or trial. Judge Goodstein found there was no affirmative evidence of what role, if any, substance abuse played in appellant's conduct. However, she found that given appellant's numerous disciplinary infractions for drug use while at SCDC, his drug use may have played a role, however the evidence was insufficient for the court to so find.

In the sentencing order, Judge Goodstein pointed out she had reviewed all the statutory mitigating circumstances outlined in S.C. Code Ann. Section 16-3-30(C)(b)(1)-(10)(Supp. 2001). After careful study of the record, the testimony of the forensic psychiatrist and appellant's internist, the factual basis of the guilty plea, examination of appellant by the court, and the lack of mitigating circumstances presented by appellant under his specific direction, Judge Goodstein could not find any statutory mitigating circumstance which would apply to appellant in the present case (Sentencing Order, p. 11).

Judge Goodstein did find the evidence supported a non-statutory mitigating circumstance, acceptance of responsibility. She found appellant confessed his guilt after being arrested and steadfastly maintained his desire to be punished. She also found appellant in his allocution took responsibility for all three (3) murders, the Oconee County murders, and Justin's murder, and expressed his concern for the victim's families' closure. She noted his allocution "may be the antithesis of hubris. However, it was not controlling on the court's decision" as to sentence (Sentencing Order, p. 11).

G. Victim Impact

Judge Goodstein noted she heard from Sandra Carter, the mother of Justin Breganzer. Mrs. Carter testified about the victim's upbringing, the challenges he encountered, how he had turned a corner in his life, and how his incarceration had rehabilitated his life. She also testified the victim had taken the GED after dropping out of high school a couple of years earlier and scored in the top four percent (4%). Continuing, she testified how the victim had become a teaching assistant while at Lieber and about the victim's desire to open a book shop after serving his sentence. Mrs. Carter testified to having a close loving relationship with her son even through the tough stretches of his

parents' divorce Mrs Carter also told the court how Justin's murder had left her broken hearted Judge Goodstein also noted she heard from Steve Smith, Ms Smith's loving son, who described his mother for the court

Sentencing Decision

Having carefully considered all relevant facts and circumstances, including the existence of the statutory aggravating circumstance beyond a reasonable doubt, as well as the presence of mitigating circumstances, Judge Goodstein found and concluded appellant should be sentenced to death Judge Goodstein further found and concluded the death penalty was warranted under the evidence in this case, and it was not the result of prejudice, passion, or any other arbitrary factor (Sentencing Order p 12)

ARGUMENT

Judge Goodstein did not abuse her discretion in removing appellant's *court-appointed* 2nd chair capital counsel and replacing her with Norbert Cummings more than two (2) years and nine (9) months prior to trial, nor given this record can appellant show prejudice from the removal of *appointed counsel* entitling him to a new trial (vacation of his guilty plea) or sentencing hearing

The Issue

Appellant raises only one (1) issue on appeal from his guilty plea and resulting death sentence. Appellant alleges Judge Goodstein committed reversible error in excusing his earlier court-appointed 2nd chair capital-defense counsel Maite Murphy in February of 2006.

Ms. Murphy was excused more than two (2) years and nine (9) months before appellant's guilty plea and sentencing hearing. After Ms. Murphy was removed, Norbert Cummings was appointed to represent appellant. Walter Bailey also represented appellant from late February of 2006 until his guilty plea and sentencing proceeding in December of 2008.

As the record shows, Judge Goodstein did not abuse her discretion in removing 2nd chair appointed counsel. Additionally, given this record, appellant cannot show prejudice from the removal of appointed counsel entitling him to a new trial (i.e. vacation of his guilty plea) or sentencing proceeding.

How the Issue Arose Below

Appellant was indigent (See Orders of Appt.) Pursuant to S.C. Code Ann. Section 16-3-26 (B)(1), the circuit court **appointed** two (2) attorneys to represent appellant. Originally, Marva Hardee-Thomas and Maite Murphy were appointed to represent appellant (Tr. 2/16-17/06, pp. 1-11 & Orders of Appt.). Ms. Hardee-Thomas was originally appointed *as counsel* on August 9, 2005 *before* the State filed its Notice of Intent to Seek the Death Penalty. After the State filed its Notice

of Intent to Seek the Death Penalty, a hearing was held into the appointment of death penalty counsel on October 26, 2005 (See Orders of Appt) The Court formally appointed Ms Hardee-Thomas as first chair capital defense counsel on November 30, 2005 The Court substituted former 1st Judicial Circuit Solicitor Walter M Bailey as first chair capital defense counsel on February 16, 2006 due to the illness/pregnancy of Ms Hardee-Thomas (Tr 2/16-17/08, pp 6-10 & Order Substituting Counsel, February 16, 2006)

Maite Murphy learned that she would be representing appellant around September 4th to September 20th, 2005 when she filed a motion for discovery (Tr 2/16-17/06, pp 11, 74-75) *Ms Murphy* was formally appointed by the court to represent appellant on October 26, 2005 (Tr 2/16-17/06, p 11 & Order of Appt , November 10, 2005) The formal Order appointing her as counsel was issued on November 10, 2005 and filed with the Dorchester Clerk of Court on November 15, 2005 (Order of Appt , November 10, 2005)

In the same month, November of 2005, three (3) to four (4) months after appellant's arrest for this murder, Solicitor David Pascoe informed Judge Goodstein that there may be a conflict of interest in *Ms Murphy* serving as appointed capital counsel (Tr 2/16-17/06, p 12, 18) Solicitor Pascoe informed the court *Ms Murphy* was currently representing Solicitor Pascoe's chief investigator, Tim Stephenson, in his divorce, and the chief investigator was a potential witness and may be called in this capital case (Tr 2/16-17/06 pp pp 101, ln 19 -102, ln 3)

The Motion

On November 22, 2005, just three (3) to four (4) months after appellant's arrest, the Solicitor asked Judge Goodstein to determine whether there was a conflict of interest or not by filing a "Motion to have the Court Determine Whether Defense Counsel has an Actual Conflict of Interest "

(Tr 2/16-17/06, p 12, 18, & Motion filed November 22, 2005) At this time, Solicitor Pascoe did not ask Judge Goodstein to remove Ms Murphy from the case, but, as an officer of the court, made the court aware of the issue and asked the court to determine whether a conflict existed or not (Tr 2/16-17/06 pp 101, ln 19 -102, ln 3) The Motion was based on concerns the Solicitor had in light of this Court's recent decision in State v Gregory, 364 S C 150, 612 S E 2d 449 (2005) (See Motion)

The Hearing on the Motion

Judge Goodstein convened a hearing into the matter on *February 16th and 17th 2006* (See Tr 2/16-17/06, pp 1-111) Appellant was present at the hearing along with Mr Bailey, Ms Murphy, Solicitor Pascoe, his chief investigator, the Deputy Solicitor, and an attorney appointed to represent the investigator³ (Tr 2/16-17/06, p 1, 10) Also present at the hearing was William "Bill" Nettles who had been appointed by the court to represent appellant solely for the purposes of this hearing (Tr 2/16-17/06, p 10)

Testimony was taken from Professor John Freeman and Professor Robert Wilcox of the University of South Carolina School of Law (Tr 2/16-17/06, pp 31-52, 65-70) Testimony was also taken from the Solicitor's chief investigator, appellant, and Ms Murphy (Tr 2/16-17/06, pp 19-30, 52-59, 83-85, 87-91, 71-77) Based on the testimony at the hearing, and the arguments and representations of counsel, including Bill Nettles, Judge Goodstein removed Ms Murphy from the case (Tr 2/15-16/06, p 111) In ruling on the motion, Judge Goodstein stated as follows

³Ms Hardee-Thomas was also present at this hearing and was formally relieved as counsel at the beginning of the hearing due to a high-risk pregnancy, and **Mr Bailey was appointed** to replace Ms Hardee-Thomas (Tr 2/15-16/06, pp 6-10, Order Substituting Counsel, February 16, 2006) Appellant agreed to this substitution

THE COURT Okay I am prepared to rule if anybody has anything else they need to tell me

(No response audible)

THE COURT I am satisfied under these circumstances that I cannot risk the possibility of Mr Stevenson [the chief investigator] being called in this case and needing to be cross-examined

I cannot do that in this case At the end of the day, that is what makes the difference That is what makes the difference, based on what Mr Nettles tells me

Do I think that the representation terminated? I think it doesn't really matter because it is the potentiality of Mr Stevenson being called and it is the attorney-client privilege information that Ms Murphy possesses as a result of her representation in the context of the preparation of the separation agreement

In these circumstances and in this case, that is a concern for the ability of Mr Justus to be fully represented that I cannot allow

So that would be the decision of the Court, and I will have to get an Order on that What I would like to do is I am - - what I've got to do now is - - I really would like to talk to counsel because I don't want this to languish I want to substitute counsel and move this case along

That is going to be the Order of the Court

(Tr 2/15-16/06, p 111, ll 1-22) Mr Cummings was appointed to replace Ms Murphy as 2nd chair capital counsel on **February 22, 2006** (See Order Substituting Counsel, issued March 2, 2006, filed March 6, 2006) The case proceeded forward toward trial for more than **two (2) years and nine (9) months** with Mr Bailey and Mr Cummings as capital counsel (See all transcripts)

The Guilty Plea

Prior to jury selection **in December of 2008**, appellant indicated he wished to plead guilty (Tr 10/1/2008, pp 1-16, Tr 12/11/08 pp 1-76) Appellant also indicated long before the scheduled

trial date that he did not wish for his attorneys to present any mitigation case, and he wanted to receive the death penalty (Tr 12/15/08, pp 157-172, 12/16/08 pp 19-22) ⁴ Despite appellant's wishes, Walter Bailey and Norbert Cummings conducted a full mitigation investigation and had experts and witnesses prepared to testify to mitigation if appellant changed his mind (Tr 12/15/08, pp 157-172, 12/16/08 pp 1-8, 19-22) Appellant did not change his mind and pled guilty on December 11, 2008 and would not offer any mitigation evidence during the penalty phase (Tr 12/11/08, pp 1-76, 12/15/08, pp 1-172, & 12/16/08, pp 1-24)

During his guilty plea, appellant informed the court he was fully satisfied with Mr Bailey and Mr Cummings as his attorneys, they had done everything he had asked them to do, and, there was nothing he wanted them to do that they had not done (Tr pp 12/11/08, pp 66-70) Appellant informed Judge Goodstein several times during his death penalty proceeding he had instructed his attorneys not to offer mitigation evidence in his case (Tr pp 12/11/08, pp 20-33, 12/15/08, pp 157-172, 12/16/08, pp 1-8) Judge Goodstein found appellant's decision in this regard was made of his own free will and was knowingly and intelligently made with the advice of competent counsel ⁵ (Tr pp 12/11/08, pp 20-33, 12/15/08, pp 157-172, 12/16/08, pp 1-8) In his allocution at the close of the penalty phase, appellant informed Judge Goodstein that he was pleading guilty because he wanted to accept responsibility for his actions, and he believed the death penalty was the only

⁴Trial counsel had appellant evaluated due to his persistence in wanting to plead guilty and his instructions not to offer any mitigation Trial counsel also sought and obtained advice or an opinion on their ethical duty in regard to their client's wishes from Desa Ballard, Esq (Tr 10/1/2008, pp 1-16, Tr 12/11/08 pp 1-76 12/15/08, pp 157-172, 12/16/08 pp 1-8, 19-22)

⁵Mr Bailey and Mr Cummings advised Petitioner against not offering any mitigation, however, appellant would not waiver in his decision in this regard (Tr pp 12/11/08, pp 20-33, 12/15/08, pp 157-172, 12/16/08, pp 1-8)

appropriate sentence in this case (See Court's Exhibit 1, Tr 12/16/08, pp 1-8, 22-24)

Standard of Review

The question whether court-appointed counsel should be relieved or discharged is a matter addressed to the discretion of the trial judge State v Graddick, 345 S C 383, 548 S E 2d 210 (2001), State v Sims, 304 S C 409, 405 S E 2d 377 (1991), State v Hyman, 276 S C 559, 281 S E 2d 209 (1981), State v Marshall, 273 S C 552, 257 S E 2d 740 (1978), State v Childers, 358 S C 614, 595 S E 2d 872 (Ct App 2004), *affirmed in part reversed in part*, 373 S C 367, 645 S E 2d 233 (2007)

The Law

The right of an accused to assistance of counsel does not include the right to the appointment of counsel of choice, or to a special rapport or even a meaningful relationship with appointed counsel Williams v United States, 486 U S 153 (1988), Morris v Slappy, 461 U S 1, 103 S Ct 1610 (1983) *See also* United States v Gonzalez-Lopez, 548 U S 140, 126 S Ct 2557 (2006) (" the right to counsel of choice does not extend to defendants who require counsel to be appointed for them *See* Wheat, 486 U S at 159, 108 S Ct 1692, Caplin & Drysdale, 491 U S at 624, 626, 109 S Ct 2646 ")

Even where the issue is the Sixth Amendment right to the choice of retained counsel, which is not before this Court, a defendant does not have an absolute right to be represented by preferred counsel State v Sanders, 341 S C 386, 534 S E 2d 696 (2000) Even where the issue is the Sixth Amendment right to retained counsel of choice, the right of the defendant to choose his counsel must be balanced against the court's need to maintain the highest ethical standards of professional conduct Id In balancing these interests, the court will consider whether the defendant's

constitutional right to counsel is outweighed by the government's interest in disqualifying his attorney Id. See also Wheat v. United States, 486 U.S. 153, 159, 108 S.Ct. 1692 (1988)(even when Sixth Amendment counsel of choice is at issue, the trial court has discretion to disallow first choice counsel that would create serious risk of conflict of interest) Nor may a defendant demand that a court honor his waiver of conflict-free representation Gonzalez-Lopez, *supra*, referencing Wheat 486 U.S. at 159-160, 108 S.Ct. 1692

Failure to Preserve and Waiver of the Issue

The issue appellant raises to this Court was waived and abandoned when appellant pled guilty on December 11, 2008 State v. Easler, 584 S.E.2d 117 (S.C. 2003)(the South Carolina Supreme Court does not recognize conditional guilty pleas) The guilty plea in state court acts as a waiver of all *non-jurisdictional defects* and defenses occurring prior to the plea including *alleged* statutory and constitutional violations Rivers v. Strickland, 264 S.C. 121, 213 S.E.2d 97 (1975), State v. Passaro, 567 S.E.2d 862, 866 (2002) (A free and voluntary guilty plea acts as a waiver of all non-jurisdictional defects and defenses) See also State v. O'Leary, 393 S.E.2d 186, 187 (1990)(impermissible for a defendant to preserve constitutional issues while entertaining a guilty plea, the trial court may not accept the plea on such terms) Because this issue was waived and abandoned by Petitioner's guilty plea, and because it cannot be preserved, this ground must be dismissed with prejudice

Additionally, this issue was waived and abandoned by appellant, and not preserved for appellate review, when appellant pled guilty on December 11, 2010 and raised no objection at his guilty plea or sentencing proceeding preserving this issue (See Tr. 12/11/08, Tr. 12/15/08, & Tr. 12/08) State v. Lopez, 352 S.C. 373, 574 S.E.2d 210 (2002)(defendant challenging free and

voluntary nature of plea was procedurally barred on appeal where the issue was not raised to the court that accepted the plea) “It is clear that the proper avenue in which to challenge a guilty plea which is not objected to at the time of its entry is through post conviction relief” In the Interest of Antonio H., 324 S C 120, 122, 477 S E 2d 713, 713 (Ct App 1996)(holding issue whether trial court erred in determining competency was procedurally barred on appeal where the issue was not raised at the time of the plea), *citing Jeter v State*, 308 S C 320, 417 S E 2d 594 (1992), *See also State v Barton*, 325 S C 522, 481 S E 2d 439, 443 n 6 (Ct App 1997)(stating that “any challenge to the knowing and voluntary nature of a guilty plea could be raised only in a petition for post-conviction relief”) Appellant raised no objection at his guilty plea to a violation of his Sixth Amendment right to counsel Appellant raised no objection during his entire sentencing proceeding alleging a violation of his Sixth Amendment right to counsel The issue appellant raises to this Court was waived and abandoned and is not preserved for appellate review Therefore, this appeal must be dismissed

The Lack of Merit of the Issue

Appellant argues in his brief Judge Goodstein committed reversible error in excusing appointed counsel Ms Murphy because he had developed a working relationship or rapport with her, and her removal violated his Sixth Amendment right to counsel (See BOA) Appellant cannot show his Sixth Amendment right to counsel was violated because the Sixth Amendment does not guarantee a “meaningful relationship” between an accused and his attorney Morris v Slappy, supra, n 6 (reversing the lower appellate court for trying to create a constitutional right the Supreme Court had never recognized) Nor does the Sixth Amendment right to counsel guarantee the right to appointed counsel of choice or a special rapport with appointed counsel Williams v United States,

supra, Morris v Slappy The underlying basis of appellant's claim in this appeal is not constitutionally recognized This appeal must be dismissed

Nor did Judge Goodstein abuse her discretion in removing appointed counsel from the case and replacing her with Mr Cummings, even if this had been a case which involved counsel of choice, i e first choice retained counsel State v Gregory, 364 S C 150, 612 S E 2d 449 (2005) In Gregory, this Court *reversed the conviction* of the defendant where the defendant's counsel simultaneously represented the defendant in a criminal case, and the assistant solicitor who was handling the defendant's case, in an unrelated family court case This Court found there was an actual conflict, because the defense attorney placed himself in a situation inherently conducive to divided loyalties Id, *relying on* Duncan v State, 281 S C 435, 315 S E 2d 8009 (1984), Zuck v State of Alabama, 588 F 2d 436, 439 (5th Cir 1979), and People v Castro, 657 P 2d 932 (Colo 1983) And, there being an actual conflict of interest, this Court found the defendant was not required to demonstrate prejudice to obtain relief Id The conviction was vacated and the case remanded for a new trial Id This case is no different

There is no question the Solicitor's chief investigator was an employee of the 1st Circuit Solicitor's Office and an integral member of the prosecution team in this capital case (Tr 2/15-16/06, pp 11-12, 52-63) The chief investigator testified that he had already begun investigating this death penalty case in preparation for trial, he had interviewed one (1) witness at Lieber and taken photographs of portions of the prison the morning after Justin's murder (Tr 2/16-17/06, pp 11-12, 52-63) The record also shows the chief investigator was to interview all witnesses in preparation of this death penalty case for trial and testify if necessary if any witness contradicted their statements at trial (Tr 2/16-17/06, pp 52-63)

Appellant's earlier appointed counsel, Ms Murphy, had an actual conflict of interest in simultaneously representing appellant in this capital case and the Solicitor's chief investigator in a domestic matter Id. The chief investigator testified Ms Murphy represented him *in his divorce*, which was ongoing, and he was unwilling to waive that conflict of interest and allow her to represent appellant in this matter while simultaneously representing him in the domestic case (Tr 2/16-17/06, pp 19-30, 52-63) The record shows the chief investigator retained Ms Murphy in June of 2005, approximately two (2) months before appellant's arrest in this capital murder case (Tr 2/16-17/06, p 19) The chief investigator testified that Ms Murphy never withdrew from her representation of him in the divorce (Tr 2/16-17/06, p 20) The chief investigator testified Ms Murphy quoted him a \$1,000 fee to handle the entire divorce (Tr 2/16-17/06, p 21) The chief investigator testified Ms Murphy agreed to allow him to pay the entire amount over time, and he had paid around \$600 to \$700 of the agreed fee (Tr 2/16-17/06, pp 22-23) ⁶ The chief investigator testified he sought legal advice from Ms Murphy or her law firm regarding both the separation and the divorce approximately a month and a half to two (2) months after the separation agreement was filed (Tr 2/16-17/06, pp 20, 25, ln 15 - 26, ln 3, 27) The chief investigator also testified he and Ms Murphy had discussed in her office "- - that if she was to represent Mr Justus and represent me that that would be a conflict She asked me how I felt about that, and I told her how I felt about that " (Tr 2/16-17/06, p 28, ln 24 - 25, ln 4) The chief investigator also testified that between June of

⁶Appellant produced an invoice from Ms Murphy's firm which purported to bill the chief investigator only for the separation agreement and not the divorce (i.e. a divisible divorce), however, the invoice was not generated until after the filing of the State's Motion regarding the conflict The chief investigator testified he had never seen the invoice until it was shown to him on the stand in February of 2006 (Tr 2/16-17/06, p 23, 27) According to the record, the invoice was generated on December 6th, 2005, which would have been after the Solicitor called Ms Murphy about the conflict and after the Motion (Tr 2/16-17/06, p 27, ln 17 -ln 4)

2005, when he retained Ms Murphy, and August 2nd (when appellant was arrested), he had conversations with Ms Murphy that he felt were privileged. In fact, the investigator testified he felt like all of his conversations with his attorney regarding his divorce proceeding were privileged (Tr 2/16-17/06, pp 4-12)

Ms Murphy admitted that prior to representing appellant she was retained to represent and did represent the chief investigator (Tr 2/16/07, p 17). She admitted there was no written agreement of representation (Tr 2/16/07, p 71, ln 15-17). She asserted the chief investigator only retained her to do the separation agreement (Tr 2/16-17/06, p 71-72). She testified she quoted him a \$1,000 fee only for the separation agreement, and told him they would talk about the divorce later on (Tr p 2/16-17/06, pp 71-71). She claimed there was no written agreement of representation because the chief investigator did not have all of the money to pay for the separation (Tr 2/16-17/06, pp 71-71). However, she admitted she never sent a letter terminating the representation (Tr 2/16-17/06, pp 75, ll 4-6). She also admitted she never told the chief investigator that she was no longer representing him (Tr 2/16-17/06, p 75, ll 8-12). She also admitted she talked to the chief investigator on November 22, 2005, and at that time she did not tell the chief investigator or the Solicitor that she no longer represented the chief investigator (See Tr 2/16-17/06, pp 75, ln 13 - 76, ln 10). Her explanation was she was not asked that question during the phone conversation with the Solicitor and the chief investigator (Tr 2/16-17/06, p 76, ll 7-9).

Professor Freeman testified there was an actual conflict of interest (Tr 2/16-17/06, pp 31-52). Professor Freeman testified the representation was simultaneous (Tr 2/16-17/06, p 38, ln 17 - 39, ln 4). Professor Freeman pointed to the facts that the client (the chief investigator) talked with Ms Murphy about the divorce, he testified she is representing him *in the divorce* and there was

no notice of withdrawal from Ms Murphy to the client and *no notice to the court* that she was withdrawing from the representation (Tr 2/16-17/06, pp 41, ln 18 - 44, ln 1) Professor Freeman testified there was an *actual conflict* of interest in Ms Murphy *simultaneously* representing appellant in this capital case and the Solicitor's chief investigator in the domestic matter (Tr 2/16-17/06, pp 31-52) Professor Freeman also testified that even if the representation had terminated, there was a potential conflict of interest because the attorney (Ms Murphy) could have to impeach the chief investigator at the capital trial (Tr 2/16-17/06, pp 34-36) Accordingly, appellant cannot show an abuse of discretion by Judge Goodstein given the testimony in the record Id., Wheat, Gonzalez-Lopez, State v Graddick, 345 S C 383, 548 S E 2d 210 (2001), State v Sims, 304 S C 409, 405 S E 2d 377 (1991), State v Hyman, 276 S C 559, 281 S E 2d 209 (1981)

Furthermore, Rule 1 7 of the Rules of Professional Conduct provides that “ a lawyer shall not represent a client if the representation involves a concurrent conflict of interest A concurrent conflict of interest exists if

(1) the representation of one client will be directly adverse to another client, or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to *another client*, *a former client* or a third person or by a personal interest of the lawyer ”

(emphasis added) Notwithstanding this section, a lawyer may represent a client if “(4) each affected client gives informed consent, confirmed in writing ” Rule 1 7, (b)(1)-(4), S C Rules of Professional Conduct The chief investigator refused to give consent to the representation or give consent in writing (Tr 2/16-17/06, pp 19-30, 52-63) There is no merit to this ground Wheat, Gonzalez-Lopez, Gregory, Graddick, Sims, Hyman, Rule 1 7, (b)(1)-(4), S C Rules of Professional Conduct

Furthermore, Professor Wilcox testified there was at least a potential conflict of interest and possibly an actual conflict of interest in Ms Murphy representing appellant and representing the chief investigator in the domestic case (Tr 2/16-17/06, pp 65-69) And, Professor Wilcox was not prepared to say the representation of the chief investigator was over, and he also testified that in this case a waiver would be needed from both appellant and the chief investigator (Tr 2/16-17/06, pp 65-69) Again, Judge Goodstein did not abuse her discretion in removing Ms Murphy from this case and replacing her with Mr Cummings⁷

Additionally, William “Bill” Nettles, who was appointed to represent appellant at the hearing on this issue, informed the court he believed there was a spoliation issue regarding the chief investigator’s potential trial testimony that he would be unwilling to waive because it was not in appellant’s best interests to waive that issue⁸ (Tr 2/16-17/06, pp 78-83, 85-86, 90-91) The trial judge stated on the record that if the chief investigator was not a material witness in the capital murder case, counsel had probably made the chief investigator a material witness by his questioning

⁷In his brief, appellant states Judge Goodstein held the representation of the chief investigator was over after the filing of the separation agreement (BOA, p 7, *quoting* Tr 2/16-17/06, p 47, ln 7-48, ln 1) However, this statement by Judge Goodstein was made before Professor Wilcox testified, and before Ms Murphy testified and was cross-examined Additionally, at the close of the hearing when Judge Goodstein finally ruled, she stated as follows “Do I think that the representation [of the chief investigator] terminated? I think it doesn’t really matter because it is the potentiality of Mr Stevenson being called and it is the attorney-client information that Ms Murphy possesses as a result of her representation in the context of the preparation of the separation agreement In these circumstances and in this case, that is a concern for the ability of Mr Justus to be fully represented that I cannot allow (Tr 2/15-16/06, ll 7-15)

⁸The Solicitor’s chief investigator had gone to Lieber the morning after the murder of Justin Breganzer and taken pictures of the crime scene and other areas of the prison After receiving SLED’s crime scene photographs, the Solicitor’s chief investigator deleted his photographs from his camera (Tr 2/16-17/06, pp 19-30, 52-63)

of him on this issue (Tr 2/16-17/06 pp 64, ln 25 - 65, ln 2, 109, ln 4-8) Mr Nettles also told the Court *there was a conflict of interest*, that his client (appellant) wished to waive the conflict, but that he did not agree with that waiver (Tr 2/16-17/08, pp 85-86, 90-91, 106-108) ⁹

The learned trial judge, in an abundance of caution, chose to remove Ms Murphy and replace her with Mr Cummings based on Mr Nettles' statement to the court that there was a conflict of interest and the potential for a conflict evolving further as the case proceeded to trial and at trial ¹⁰ (Tr 2/16-17/08, pp 111) Judge Goodstein simply did not abuse her discretion Wheat v United States, 486 U S 153, 159, 108 S Ct 1692 (1988)(even when Sixth Amendment counsel of choice is at issue, the trial court has discretion to disallow first choice counsel that would create serious risk of conflict of interest) Similarly, a defendant may not demand that a court honor his waiver of conflict-free representation Gonzalez-Lopez, *supra*, referencing Wheat 486 U S at 159-160, 108 S Ct 1692

In his brief, appellant relies on State v Sanders, 341 S C 386, 534 S E 2d 696 (2000), in support of his position that his death sentence should be overturned and his guilty plea vacated Appellant's reliance on Sanders is misplaced Sanders is not controlling on this issue

Sanders involved the violation of *the right to counsel of choice*, not appointed counsel Id Furthermore, Sanders involved the disqualification of an attorney because *the attorney was a [alleged] potential witness*, not because of a conflict of interest in the attorney representing the

⁹Additionally, in a later hearing, Mr Bailey conceded there was a conflict of interest (See Tr 4/27/06, p 26, ll 6-13)

¹⁰While Mr Nettles told the court appellant would waive the current conflict, he made clear appellant would not waive any future conflict that might develop (Tr 2/16-17/06, pp 106-108)

defendant and simultaneously representing a potential witness in the case in a domestic matter where the witness was also a member of the prosecution team Gregory is controlling on these facts and the issue before Judge Goodstein *See Gregory, supra* (counsel could not simultaneously represent criminal defendant and assistant solicitor who was prosecuting the case in a domestic matter, a conflict of interest existed and holding defendant was not required to show prejudice and the conviction must be vacated), *relying on Duncan, Zuck, and Castro* As such, Judge Goodstein did not abuse her discretion in removing appointed second chair counsel two (2) years and nine (9) months before the eventual trial date, for the reasons stated, and replacing her with experienced capital litigation counsel Norbert Cummings

Furthermore, appellant's assertion in his brief that the Solicitor had improper motives for removal of Ms Murphy is not supported by the record First, the Solicitor had nothing to do with the removal of Ms Hardee-Thomas She was removed at her own request and with her client's consent due to her high risk pregnancy Walter Bailey was substituted as appellant's first chair capital counsel with appellant's consent (See Tr 2/16-17/06)

Second, the record shows the Solicitor notified Ms Murphy and the court of the conflict issue just a few months after both Petitioner's arrest and Ms Murphy's beginning to represent appellant This was one (1) month or less after she was formally appointed as 2nd chair capital defense counsel (Tr 2/16-17/06 pp 101, ln 19 -102, ln 3 & Order of Appointment, November 2005) The record also shows the Solicitor notified the court of the conflict issue as an officer of the court (Tr 2/16-17/06 pp 101, ln 19 -102, ln 3) Further, the record shows the Solicitor did not immediately move or request that Ms Murphy be relieved but asked the court, by way of a motion, to determine if there

was a conflict or not in light of Gregory (Tr 2/16-17/06 pp 101, ln 19 -102, ln 3 & Motion) ¹¹ It was only after consulting with numerous attorneys and two (2) ethics experts and hearing the testimony and representations of counsel at the February 16-17, 2006 hearing, that the Solicitor asked Judge Goodstein to remove Ms Murphy (Tr 2/16-17/06, p 102, ll 4-14) ¹² The Solicitor was not acting improperly but was instead protecting the integrity of any conviction or death sentence he might obtain on behalf of the State *See Gregory* (conviction reversed where there was actual conflict in representing the criminal defendant and the assistant solicitor who prosecuted the case in an unrelated domestic matter, holding no prejudice need be shown) ¹³

As this Court is well aware, a trial judge is concerned with many important factors in making a decision such as the one in this case. A trial judge's duty is to see that the defendant and the State receive a fair and impartial trial. A trial judge must be concerned with the efficient use of judicial resources, must protect the integrity of the court, and prevent the appearance of impropriety or a conflict of interest. A trial judge should insure there are no divided loyalties between the attorney

¹¹Gregory was decided April 18, 2005, approximately seven (7) months before this issue arose and before the Solicitor filed his motion in this case

¹²At the close of the hearing on the motion, Solicitor Pascoe stated that it was only after the filing of the motion, "and after talking to half a dozen criminal attorneys who currently practice death penalty law, and solicitors who try death penalty cases, two ethics experts, and Don Zelenka of the Attorney General's Office " who all thought this issue was not even "a close call ," that he took the position that "in the interest of these proceedings, Ms Murphy needs to be taken off the case " (Tr 2/16-17/06, pp 6-10)

¹³Appellant refers in his brief to the fact the Solicitor eventually did not call the chief investigator as a witness. However, appellant ignores several critical facts in this regard. The motion on this issue was filed in November 2005 and the hearing was held in February 2006, long before the eventual trial date. Most importantly, appellant pled guilty, therefore, there was no guilt phase, and appellant did not contest the State's aggravating circumstance presentation in the penalty phase and refused to offer any mitigation evidence.

and the defendant. Given this record, Judge Goodstein did not abuse her discretion in removing Ms. Murphy for the reasons stated on the record (Tr. 2/15-16/06, p. 111, ll. 1-22). Wheat, Gonzalez-Lopez, Gregory. This appeal must be dismissed.

Lack of Prejudice

Nor can appellant show any prejudice from *the removal of appointed counsel* given this record. *Contrast* United States v. Gonzalez-Lopez, 548 U.S. 140, 126 S.Ct. 2557 (2006) (where the Court held when the defendant is deprived of his Sixth Amendment right to *first choice retained counsel*, he need not show prejudice). Ms. Murphy was *court-appointed counsel* due to appellant's indigency and pursuant to South Carolina statutory law. See S.C. Code Ann. Section 16-3-26 (B)(1). Ms. Murphy was removed two (2) years and nine (9) months prior to appellant's trial date and eventual guilty plea and sentencing proceeding. Ms. Murphy was replaced by another appointed attorney, Norbert Cummings, an experienced capital litigator.¹⁴ Walter Bailey, a recognized death penalty expert,¹⁵ also defended appellant and remained on the case from his appointment in mid-February 2006 until and through appellant's guilty plea and sentencing proceeding in December of 2008. The record shows Mr. Bailey and Mr. Cummings conducted a complete and thorough mitigation investigation and had mitigation witnesses and experts prepared to testify should appellant change his mind prior to the conclusion of his guilty plea and sentencing proceeding. The record shows appellant told Judge Goodstein he was completely satisfied with the services of Mr. Bailey.

¹⁴The record shows Mr. Cummings is an experienced capital litigator. (See Tr. 10/1/08, p. 9, ll. 1-6).

¹⁵See *The South Carolina Capital Trial 2nd Edition*, S.C. Bar 2009.

and Mr Cummings, and they had done everything he had asked him to do in the case ¹⁶

Additionally, appellant, of his own free will and accord chose to enter a knowing, voluntary, and intelligent plea of guilty and not contest guilt. Even if he had not entered a plea, the evidence against appellant was overwhelming. (See Respondent's Statement of Facts)

Approximately a year before his trial, appellant indicated he would not offer any mitigation evidence (Tr 12/16/08). During his sentencing proceeding, appellant refused to allow his attorneys to offer mitigation evidence even though Mr Bailey and Mr Cummings had conducted a full and thorough mitigation investigation and were prepared to offer a mitigation case at the sentencing proceeding (Tr 12/15/08 & Tr 12/16/08). Appellant refused to allow his attorneys to offer mitigation evidence even though his attorneys recommended and counseled appellant to offer mitigation evidence (Tr 12/11/08, 12/15/08 & Tr 12/16/08).

In the sentencing phase, the State established the aggravating circumstance, *the prior murder conviction*, beyond any doubt. In the sentencing phase, the State established appellant had an extensive criminal record, and was serving two (2) life sentences for two separate murders from Oconee County at the time he brutally murdered Justin. The State also established appellant's

¹⁶Appellant argues in his brief, that he pled guilty and asked for the death penalty as a result of Judge Goodstein's ruling on this issue (See BOA, p 11, ll 3-4, *citing* Tr 12/11/08, p 23, ll 4-9) **The record does not support this assertion.** The record on this cited page contains no reference to Judge Goodstein's ruling on this issue and does not indicate appellant pled guilty and sought the death penalty because of Judge Goodstein's ruling on this issue (Tr 12/11/08, p 23, ll 4-9). Appellant also asserts that Judge Goodstein recognized that her decision on this issue influenced appellant's decision to plead guilty and seek the death penalty (See BOA, p 11, ll 4-6, *citing* Tr 12/15/08, p 162, ln 18- p 163, ln 5) **The record does not support this assertion either.** The record on these cited pages does not indicate Judge Goodstein recognized that her decision on this issue caused appellant to plead guilty or seek the death penalty. The court discusses its ruling on this issue only as it relates to a delay in Petitioner's trial (See Tr 12/15/08, p 162, ln 18 - p 163, ln 5). Appellant cannot demonstrate prejudice.

incarceration in a maximum security institution for life did nothing to dissuade appellant from committing his third (3) unrelated murder of another human being. Finally, in his allocution, appellant told Judge Goodstein the death penalty was the only appropriate penalty for the murder of Justin (Court's Exhibit 1).

Quite simply, appellant cannot demonstrate prejudice from the removal of *appointed counsel* where appellant was represented by two (2) extremely competent appointed capital defense attorneys for two (2) years and nine (9) months before his plea and sentencing proceeding, appellant stated he was completely satisfied with their services, appellant pled guilty, the evidence of his guilt was overwhelming, the aggravating circumstance was established beyond any doubt, the evidence of his bad character and future dangerousness was proven, against the advice of counsel he refused to offer mitigation evidence by his own choice, and appellant asked the sentencing court to impose the death penalty. This appeal must be dismissed.

CONCLUSION

The issue appellant raises to this Court is not preserved for appellate review because appellant pled guilty, could not preserve any objection below, and preserved no objection below. Additionally, appellant waived and abandoned this issue when he pled guilty. Furthermore, the underlying basis of appellant's claim in this appeal is not constitutionally recognized. Finally, given this record, Judge Goodstein did not abuse her discretion in removing Ms. Murphy as appointed counsel for the reasons stated and replacing her with Norbert Cummings, nor can appellant show prejudice from her removal and replacement with Mr. Cummings. For the above stated reasons, appellant's conviction of murder and resulting death sentence should be affirmed and this appeal

dismissed¹⁷

Respectfully submitted,

HENRY D MCMASTER
Attorney General

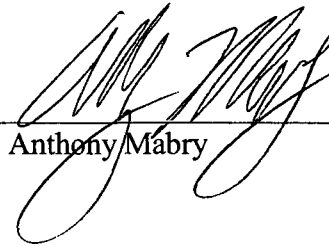
JOHN MCINTOSH
Chief Deputy Attorney General

DONALD J ZELENKA
Assistant Deputy Attorney General

J ANTHONY MABRY
Assistant Attorney General

DAVID M PASCOE
Solicitor, 1st Judicial Circuit

By



Anthony Mabry

October 8, 2010

¹⁷Respondent also respectfully submits the sentence in this case was appropriate under the facts and not the result of passion, prejudice, or any arbitrary factor State v Gaskins, 284 S C 105, 326 S E 2d 132 (1985)(death penalty properly imposed for murder of fellow inmate by a defendant with prior convictions for murder), State v Atkins, 397 S E 2d 87 (1990)(death sentence properly imposed for murder where defendant had prior conviction for murder), State v Locklair, 341 S C 352, 535 S E 2d 420 (2000)(death penalty properly imposed where defendant had prior conviction for murder)

**STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

Appeal from Dorchester County
Diane S. Goodstein, Circuit Court Judge

STATE OF SOUTH CAROLINA,

Respondent,

v

KENNETH HARRY JUSTUS,

Appellant

**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

Respondent proposes the following be included in the Record on Appeal

Indictment (2 pages) 2008-GS-18-1265

Orders Appointing Marva-Hardee Thomas as counsel

Order Substituting Walter Bailey as counsel and relieving Ms. Thomas

Order Appointing Maite Murphy as counsel

Motion to Have the Court Determine Whether Defense Counsel Has A

Order Substituting Norbert Cummings as counsel and relieving Ms. Murphy

Transcript February 16-17, 2006, pp. 1-112

Transcript April 27, 2006 (misdated April 27, 2009), pp. 1-64

Transcript October 1, 2008, pp. 1-17,

Transcript December 11, 2008, pp. 1-79,

Transcript December 15, 2008, pp 1-179,

Transcript December 16, 2008, pp 1-26,

Court's Exhibit 1, (1 page), Defendant's Allocution

Transcript December 23, 2008, pp 1-16,

Sentencing Order, pp 1-12

I certify that this Designation contains no matter which is irrelevant to this appeal



J. ANTHONY MABRY
Assistant Attorney General
P O Box 11549
Columbia, SC 29211-1549
(803) 734-3665

October 8, 2010

 ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Dorchester County

Diane S Goodstem, Circuit Court Judge

RECEIVED

MAY 24 2010

SC SUPREME COURT

THE STATE,

RESPONDENT,

V

KENNETH HARRY JUSTUS,

APPELLANT

INITIAL BRIEF OF APPELLANT

JOSEPH L SAVITZ, III
Senior Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S C 29211-1589
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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

The guilty plea judge committed reversible error by granting State's motion to disqualify Justus' appointed counsel, Maite Murphy, simply because she had represented an investigator employed by the Solicitor's Office in an unrelated domestic matter

STATEMENT OF THE CASE

On December 11, 2008, Kenneth Harry Justus, 41, pleaded guilty in Dorchester County, before Judge Diane S. Goodstein, to an indictment (2005-GS-18-1265) charging him with the stabbing murder of Justin Matthew Bergenzer, 22, in July 2005.

Both men were inmates at Lieber Correctional Institution in Ridgeville, South Carolina. Bergenzer was sent to Lieber (which houses South Carolina's most violent male offenders) for walking away from a litter detail (that is, for escaping) required under his sentence for breaking into an automobile. Justus was serving two consecutive life sentences for the shotgun murders and robberies of convenience-store owners Randall Eades (51) and Kitty Smith (64) in 1997 and 1998. Justus' motive for killing Bergenzer by stabbing him 11 times remains (on the record at least) obscure.

The State served notice of its intent to seek the death penalty, relying on Justus' prior convictions (by guilty plea) for murder. See S.C. Code § 16-3-20(c)(a)(2) ("The murder was committed by a person with a prior conviction for murder.")

At sentencing, in accordance with Justus' directions, defense counsel did not challenge the State's case in aggravation and made no other effort to mitigate punishment. In closing argument, counsel stated, "[R]egardless of my personal opinions on this, I feel like in order to represent my client's interests, I must ask the court to consider the imposition of the death penalty for our client as opposed to a life sentence, I think it is our responsibility to pass that along to the court and urge the court that is the sentence he wants." December 16, 2008 Tr. p. 21, lines 1 – 4. On December 23, 2008, the judge sentenced Justus to death from the bench and by written order.

Justus and the undersigned now challenge the constitutionality of his guilty plea and death sentence pursuant to the Sixth and Fourteenth Amendments to the United States Constitution and respectfully ask the Supreme Court to reverse both *

Justus is infected with the hepatitis C virus, which is in the process of destroying his liver. Convicted murderers must surely be near the end of the list of transplant recipients if they are on it at all. Most likely, this disease will claim Justus' life before the State's machinery of death.

ARGUMENT

The guilty plea judge committed reversible error by granting State's motion to disqualify Justus' appointed counsel, Maite Murphy, simply because she had represented an investigator employed by the Solicitor's Office in an unrelated domestic matter

Maite Murphy and Marva Hardee-Thomas were initially appointed to represent Kenneth Justus at trial. When Hardee-Thomas was relieved as counsel for medical reasons, former Solicitor Walter Bailey stepped in. The State then filed a motion to relieve Murphy as counsel, asserting an actual conflict of interest.

Murphy is currently representing Tim Stephenson, the Chief Investigator for the First Circuit Solicitor's Office in a pending Family Court matter. She began representing Inv Stephenson prior to her appointment on the defendant's case. Inv Stephenson will be a potential witness for the State and has been and will continue to be directly involved in the preparation of the defendant's case for trial.

ROA p. * (motion to relieve counsel)

On February 16 and 17, 2006, the judge heard testimony and arguments on the State's motion to disqualify Murphy.

The Solicitor represented that Investigator Stephenson had retained Murphy "to handle his divorce" prior to the Bergenzer murder and her subsequent appointment to the Justus case, and that she continued to represent Stephenson in his ongoing divorce. February 2006 Tr. p. 11, line 7 – p. 12, line 10. Investigator Stephenson testified that he hired Murphy "[t]o do my divorce. The separation agreement was what we discussed first, and to go all the way through with the divorce." February 2006 Tr. p. 19, line 22 – p. 20,

line 4 Murphy explained that she had agreed to handle Stephenson's separation, but not his divorce, as he did not have sufficient funds to cover even the cost of the separation

There are separate actions The separation agreement is one action and down the road, if he wants to come back, we will do the separate action for divorce

February 2006 Tr p 72, lines 2 – 6

As far as Murphy was concerned, she no longer represented Stephenson February 2006 Tr p 73, lines 22 – 23 Stephenson claimed that Murphy had agreed to handle both separation and divorce for a flat fee of \$1000 February 2006 Tr p 21, line 18 – 23 He still owed Murphy several hundred dollars February 2006 Tr 22, line 22 – p 23, line 20

The judge held, “[I]t’s clear that Ms Murphy’s representation of him is over with the filing of the order approving the separation agreement ” February 2006 Tr p 47, line 7 – p 48, line 1 Defense counsel objected to the disqualification of Murphy

He wants her to be his lawyer He is a death penalty defendant on trial for his life and he has got no right to pick his lawyer He takes who the court appoints, as long as they are qualified and appointed by the court Ms Murphy was appointed and he’s got a rapport with her He wants her to represent him in this case [I]t’s just crucial in a death penalty case for a defendant to have confidence in their lawyer and to think that their lawyer will be the best and do the best for them

February 2006 Tr p 105, lines 2 – 14

Counsel observed, somewhat presciently in light of subsequent events, “If he feels that way about her professional ability, it is much less likely that problems will arise in a death penalty case where a defendant wants to go *pro se* because he doesn’t like his lawyer or any number of things ” February 2006 Tr p 105, lines 15 – 19 He noted, “The reason [the Solicitor] brought this to the court’s attention is because he thought a decision should be

made, but I think he has kind of tightened up into a real advocacy role here, wanting to get rid of her, and I don't really understand why " February 2006, Tr p 105, line 24 – p 106, line 3

As if to illustrate counsel's point, the Solicitor recklessly accused that the defense of being "willing to compromise Mr Justus' defense to keep Ms Murphy on this case" February 2006 Tr p 101, lines 13 – 16 When the judge asked the Solicitor whether he intended to call Stephenson as a witness, his answer was evasive and peckish

I didn't say he's a witness, no, ma'am I didn't say he is a witness I said "likely to be a witness" Don't misconstrue what I said, please

February 2006 Tr p 95, lines 4 – 21

In addition to his purported concern for Justus' rights, the Solicitor relied upon State v Gregory, 364 S C 150, 612 S E 2d 449 (2005), as authority for his motion to disqualify Murphy In Gregory the defense lawyer "simultaneously represent[ed] Gregory and the assistant solicitor who was handling his criminal case" over the objections of both counsel and the defendant, which is obviously a different scenario entirely 612 S E 2d 451

But what was Investigator Stephenson's role in the prosecution of Justus? "Superfluous" defines it He made one trip to Lieber, took "four or five" photographs "where I thought the incident took place" and interviewed "one person [a] correctional officer" February 2006 Tr p 24, line 24 – p 56, line 6, February 2006 Tr p 61, lines 7 – 11 As the homicide occurred in a state prison facility, SLED led the investigation Stephenson appears to have been a bystander He did not obtain a statement from the correctional officer he spoke with and eventually deleted the photographs he had taken because SLED's were better February 2006 Tr p 83, line 11 – p 85, line 1

Defense counsel observed

I think [it] clear that Mr Stephenson at this point and time is not only not a material witness [h]e is not a witness at all There is nothing he could testify to if called by the State unless he gains more knowledge, and he was assigned by the State to do some more work on the case What he would testify to would be objectionable as hearsay and irrelevant for any number of reasons So he is not a witness for the State at this point [F]or the State to assign new duties to him and make him a witness, knowing that it is their position it would be a conflict, I think would be misconduct

February 2006 Tr p 103, lines 3- 16

Based on Stephenson's failure to preserve the photographs he had taken, the judge predicted that Stephenson "would only be a witness called by the defense " February 2006 Tr p 106, line 25 – p 107, line 2 Defense counsel informed the judge they had no intention of calling Stephenson as a witness February 2006 Tr p 104, lines 8 – 20 Perhaps more important, Justus himself waved any conflict arising from Murphy's former representation of Stephenson February 2006 Tr 85, line 16 – p 91, line 12

"I don't think a judge can tell me how to investigate a case," the Solicitor insisted, "[N]obody fortunately can tell me how to prosecute a case " February 2006 Tr p 92, line 17 – p 94, line 24 In the Solicitor's view, Murphy represented Stephenson simply because Stephenson said so February 2006 Tr p 99, lines 16 – 20

The judge ultimately ruled

I am satisfied under these circumstances that I can not risk the possibility of Mr Stephenson being called in this case and needing to be cross-examined Do I think that the representation terminated? I think it doesn't really matter because it is the potentiality of Mr Stephenson being called and it is the attorney-client privilege information that Ms Murphy possesses as a result of her representation in the context of the preparation of the separation agreement In

these circumstances and in this case, that is a concern for the ability of Mr Justus to be fully represented that I can not allow

February 2006 Tr p 111, lines 1 – 15

On April 27, 2006, Bailey and Murphy's replacement, Norbert Cummings, alleged that the Solicitor's misrepresentations at the February 2006 hearing to disqualify Murphy approached prosecutorial conduct

The first, Your Honor, was the misrepresentation that Tim Stephenson was an important State's witness. He was represented as the Chief Investigator of the Solicitor's Office and went to the crime scene, interviewed multiple witnesses, took photographs, and he was, of course, none of the above. He took four photographs, which he deleted or did not develop from his camera and interviewed one sole, single witness without taking a statement.

The second thing, Your Honor, that occurred at that hearing that the defense feels constituted misconduct, was that when it became apparent that Mr Stephenson didn't have any knowledge of anything that he could testify too, [the firsthand Solicitor] basically threatened to actually create a conflict by involving Mr Stephenson in the case from that point on.

The defendant in this case was extremely prejudiced by this, because it made a non-witness for the State a potential, although unwanted, witness for the defense and the conundrum that was created through no fault of Mr Justus, Ms Murphy or anybody on the defense team, directly resulted in the court having to issue its order to relieve Ms Murphy, that Mr Justus wanted to keep in [this] case.

April 2006 Tr p 10, line 12 – p 12, line 8

The Solicitor responded, "I never went in there and said that Investigator Stephenson was going to be an important or material witness. The whole reason we had that hearing was

that it was my opinion that he was going to be a potential witness ” April 2006 Tr p 25, lines 11 – 15 The judge affirmed her earlier ruling

As a result, Justus decided to plead guilty and ask for a death sentence December 11, 2008 Tr p 23, lines 4 - 9 The judge herself recognized that her disqualification of Murphy had been a factor in his decision December 15, 2008 Tr p 162, line 18 – p 163, line 5 Stephenson did not participate at the guilty plea or at sentencing

* * *

Before addressing to the heart of the issue presented by this appeal, two irrelevant collateral issues should be identified The first concerns Murphy’s status as *appointed* counsel

Some distinction arises between defendants who retain attorneys to defend them and defendants for whom attorneys are appointed Generally, a defendant has the right to retain counsel of his own choice An indigent defendant may not, however, insist on the appointment of a particular attorney *Once established the attorney-client relationship should be protected by the courts without distinction as to whether the attorney is retained or appointed* [Citations omitted and emphasis added]

Kalapesky v State, 256 S W 3rd 442, 450 (Tex Ct App 2008) The second relates to the nature of the attorney-client relationship between Murphy and Stephenson As the judge recognized, “it doesn’t really matter”

[W]here an attorney has received confidential information from a prospective client, the attorney may be disqualified from representing another individual on the grounds of actual or presumed conflict, despite the absence of an actual attorney-client relationship

Youngblood v Sanders, 212 W Va 885, 579 S E 2d 864, 871 (2002) (footnote omitted)

The controlling authority in this State is State v. Sanders, 341 S.C. 386, 534 S.E.2d 696 (2000), *not* State v. Gregory. In Sanders, the trial judge removed defense counsel on the State's motion after it expressed an "unsubstantiated concern" that defense counsel "might be called as a witness." 534 S.E.2d at 698. This Court found the defendant's Sixth Amendment right to counsel had been violated and set forth a balancing test:

Where this Sixth Amendment right is invoked, the court must balance the defendant's right to his own freely chosen counsel against the need to maintain the highest ethical standards of professional responsibility. In balancing these interests, the court will consider whether the defendant's constitutional right to counsel is outweighed by the government's interest in disqualifying his attorney.

Id. at 697 - 8 (citations omitted). The case of Commonwealth v. Cassidy, 390 Pa. Super. 359, 568 A.2d 693 (1989), elaborates:

When a defendant's selection of counsel, under the particular facts and circumstances of the case, places the fairness and integrity of the defendant's trial in jeopardy, the defendant's right to counsel of choice may be justifiably denied. However, a *presumption* must first be recognized in favor of the defendant's counsel of choice, to overcome that presumption, there must be a demonstration of an *actual conflict or a showing of a serious potential for conflict*. *The right to counsel of choice should not be interfered with in cases where the potential conflict of interest or highly speculative*

568 A.2d at 698 (citations omitted and emphasis added). In recognition of the presumption in favor of a defendant's selected counsel, "[c]ourts generally give substantial weight to defense counsel's representations regarding conflicts of interest." United State v. Agosto, 675 F.2d 965, 974 (8th Cir. 1982).

The cornerstone of the Sixth Amendment to the United States Constitution is the right of the accused "to have the Assistance of Counsel for his defense." See Gideon v.

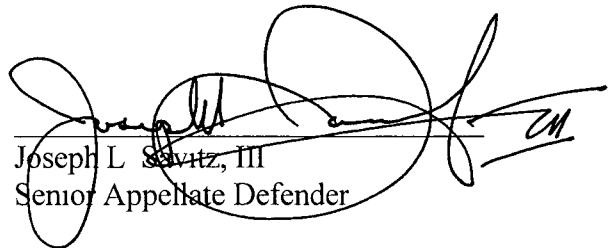
Wainwright, 372 U S 335 (1963), and Powell v Alabama, 287 U S 45 (1932) As in State v Sanders, the Solicitor moved to disqualify Murphy simply on the basis of her former representation in an unrelated domestic matter of an investigator employed by the Solicitor's Office with only peripheral involvement in Justus' case

Disqualification of defense counsel on the State's motion should be limited to those rare occasions where the State is able to establish a substantial risk that representation of the present client will involve the use of privileged information acquired in the course of representing the former client Youngblood v Sanders, 575 S E 2d at 869 The Solicitor's qualifications and evasions in the present case fell woefully short of the showing necessary to disqualify defense counsel

CONCLUSION

Based on the foregoing, Kenneth Harry Justus and the undersigned respectfully ask the Court to reverse his guilty plea and death sentence pursuant to the Sixth and Fourteenth Amendments and remand for further proceedings

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Joseph L. Savitz, III', is written over a horizontal line. The signature is stylized with large loops and a long horizontal stroke extending to the right.

Joseph L. Savitz, III
Senior Appellate Defender

ATTORNEY FOR APPELLANT

This 24th day of May, 2010

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Dorchester County

Diane S Goodstein, Circuit Court Judge

THE STATE,

RESPONDENT,

V

KENNETH HARRY JUSTUS,

APPELLANT

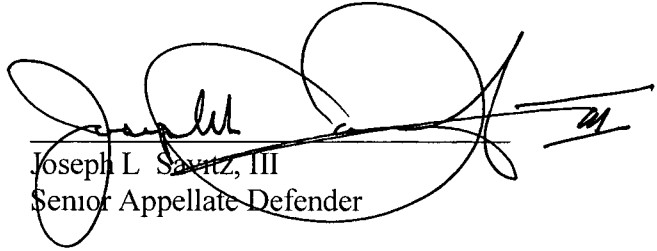
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

Appellant proposes the following be included in the Record on Appeal

- (1) Pre-Trial Hearings,
- (2) Guilty Plea Hearings,
- (3) Indictment No 05-GS-18-1265 (murder),
- (4) State's Motion to Disqualify Counsel,
- (5) Notice of Intent to seek Death Penalty,
- (6) Notice of evidence in Aggravation,
- (7) Sentencing order,
- (8) Indictment for prior offense,
- (9) Court's Exhibit 1 (defendant's statement in allowtion),
- (10) Ethics letter from Desa Ballard

I certify that this designation contains no matter which is irrelevant to this appeal

May 24th, 2010



Joseph L. Savitz, III
Senior Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S C 29211-1589
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MAY 01 2012



S.C. SUPREME COURT

**State of South Carolina
The Circuit Court of the Ninth Judicial Circuit**

Kristi Lea Harrington
Judge

300 B California Avenue
Moncks Corner SC 29461
Phone (843) 719 4433
Fax (843) 719 4929
kharrington@sccourts.org

April 25, 2012

To The Honorable Daniel E Shearouse
The Supreme Court of South Carolina
P O Box 11330
Columbia, SC 29211

Re Kenneth Harry Justus v State of South Carolina (2011-CP-18-1933)
Capital Post-Conviction Relief Status

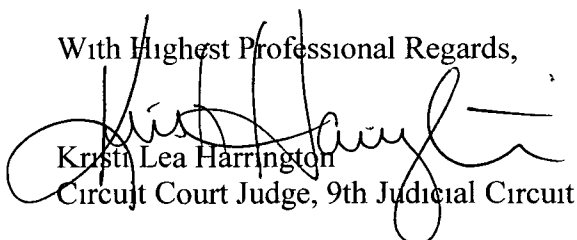
Dear Mr Shearouse

Pursuant to an Order of the Supreme Court dated February 24, 2012, I have been assigned to preside over the capital Post-Conviction Relief action filed by Kenneth Harry Justice. Consistent with the deadlines in the Order, Jeffery Bloom and L Lesesne Hendricks, Jr were appointed as counsel for Mr Justus by order dated March 26, 2012. Furthermore, a Scheduling Order was issued on April 24, 2012, setting the date for the hearing on the merits to begin March 18, 2013. My office has contacted Motte Talley to request that the hearing be set for the aforementioned date in Dorchester County.

Based on the procedural history of this case, I believe good cause has been shown by Applicant's counsel to justify a continuance, as set forth in S C Code Ann § 17-27-160. Although Mr Justus filed his Application for Post-Conviction Relief while his direct appeal was pending on October 4, 2011, and the State filed its Return on November 16, 2011, Applicant's counsel has informed the Court that they have just begun to review transcripts, have only met with Mr Justus on one occasion, and are in the process of determining what issues are relevant and meritorious. Thus, they have requested additional time to ensure they are able to completely investigate and prepare an Amended Application and for the hearing on the merits.

Enclosed please find a copy of the Order Appointing Counsel and the Scheduling Order for the Court's records. Please do not hesitate to contact me with any questions or concerns.

With Highest Professional Regards,


Kristi Lea Harrington
Circuit Court Judge, 9th Judicial Circuit

cc South Carolina Court Administration
[Enclosures]

STATE OF SOUTH CAROLINA)
)
COUNTY OF DORCHESTER)
)
KENNETH HARRY JUSTUS)
SCDC #6029)
APPLICANT)
)
VS)
)
WILLIAM R. BYARS, JR.)
COMMISSIONER S.C. DEPT. OF)
CORRECTIONS, and THE STATE)
OF SOUTH CAROLINA,)
RESPONDENTS)

IN THE COURT OF COMMON PLEAS
FOR THE FIRST JUDICIAL CIRCUIT
Case No. 2011-CP-18-1933

ORDER OF APPOINTMENT
OF COUNSEL IN A
CAPITAL-PCR CASE

This matter came before the Court on March 20, 2012, for a hearing to appoint counsel for Kenneth Justus, the Applicant (hereinafter, "Applicant"), in this capital post-conviction relief (hereinafter, "PCR") matter. The undersigned Circuit Court Judge is assigned to this case by the S.C. Supreme Court and has statewide jurisdiction of this matter. This hearing was scheduled by this Court, at the Charleston County Courthouse, for the purpose of appointing counsel for the Applicant in this capital-PCR. The State was present and represented by Assistant Attorney General Anthony Mabry. The Applicant was present as was attorney Jeffrey P. Bloom.

The Court had an opportunity to question the Applicant and he stated that he does request the Court to appoint counsel, and he desires to proceed with his PCR case. The Court made inquiry into the Applicant's indigence, and determined that the Applicant is in fact indigent and as such qualifies for the appointment of counsel.

The Court finds that attorney Bloom is competent and qualified to serve as lead counsel in this capital-PCR. Attorney Bloom has previously been counsel in a number of capital-PCR cases as well as being certified by the S.C. Supreme Court to be lead

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2/26/12

counsel in the trial of a capital case. Additionally, attorney Bloom – although he maintains his main office in Columbia, S C – is a resident of and member of the Calhoun County Bar and regularly practices in the First Circuit so he qualifies as local counsel in this matter.

Based upon good faith representations by attorney Bloom that a substantial portion of any mitigation investigation may likely occur in and around Oconee County because the Applicant is from that area, the Court accepts attorney Bloom's suggestion to appoint an attorney from the upstate area to serve as co-counsel. Thus, the Court appoints as co-counsel, attorney L. Lesesne Hendricks, Jr., who has an active civil and criminal litigation practice in Pickens and Oconee Counties.

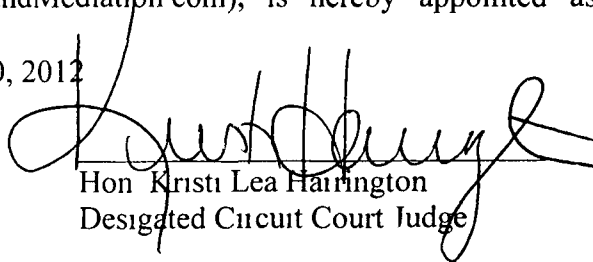
This Order is issued pursuant to S C Code Ann §17-27-160, *See also* S C Code Ann §16-3-26(B).

IT IS THEREFORE ORDERED

- 1 That attorney Jeffrey Bloom, of 1911 Pickens Street, Columbia, S C , 29201 (Tel 803-256-7001, Fax 803-256-7002, E-mail IPBloom803@aol.com), is hereby appointed as lead counsel, effective March 20, 2012.
- 2 That attorney L. Lesesne Hendricks, Jr., of 101-A North East Main Street, Easley, S C 29640 (Tele 864-859-7160, Fax 864-859-5399, E-mail llhendricks@CarolinaLawandMediation.com), is hereby appointed as co-counsel, effective March 20, 2012.

AND IT IS SO ORDERED

Dated March 26, 2012
Charleston, S C


Hon. Kristi Lea Harrington
Designated Circuit Court Judge

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIRST JUDICIAL CIRCUIT
COUNTY OF DORCHESTER	)	Case No 11-CP-18-1933
	)	
KENNETH IUSTUS	)	
SCDC #6029	)	
APPLICANT	)	
	)	SCHEDULING ORDER
VS	)	
	)	
WILLIAM R BYARS, JR	)	
COMMISSIONER, S C DEPT OF	)	
CORRECTIONS, and THE STATE	)	
OF SOUTH CAROLINA,	)	
<u>RESPONDENTS</u>	)	

This matter comes before me for the purpose of issuing a Scheduling Order in this capital-PCR case. The State is represented by Assistant Attorney General J. Anthony Mabry. The Applicant, Kenneth Justus (hereinafter, "Applicant"), is represented by attorneys Jeffrey P. Bloom and L. Lesesne Hendricks.

The incident arose on July 26, 2005. On December 11, 2008, the Applicant entered a guilty plea in the Dorchester County General Sessions Court. On December 15 through 16, 2008, the trial court held a sentencing hearing. On December 23, 2008, the trial court sentenced the Applicant to death. Applicant's guilty plea and sentence were affirmed on direct appeal. *State v. Justus*, 392 S.C. 416, 709 S.E.2d 668 (May 9, 2011). *cert. den. Justus v. South Carolina*, 132 S.Ct. 1095 (Jan. 17, 2012). On October 4, 2011, Applicant filed an Application for Post-Conviction Relief (hereinafter, "Application"). On or about November 16, 2011, the State filed its Return to the Application (with an extension to file such Return as agreed to by Applicant's counsel at that time). On February 24, 2012, the S.C. Supreme Court assigned the undersigned Circuit Court Judge

jurisdiction of this case On March 20, 2012, this Court held an appointment hearing at the Charleston County Courthouse, and appointed attorneys Bloom and Hendricks

Based on representations from Applicant's counsel on their need to conduct a thorough, adequate, and effective investigation of Applicant's case, and preparation for an evidentiary hearing, this Court finds it reasonable and necessary for the effective representation of counsel for the Applicant to schedule the PCR evidentiary hearing date as set forth below and herein *See generally* *Sears v Upton* ___ U S ___, 130 S Ct 3259, 177 L Ed 2d 1025 (2010), *Rompilla v Beard* 545 U S 374 (2005), *Wiggins v Smith* 539 U S 510 (2003), *Ard v Catoe*, 372 S C 318, 642 S E 2d 590 (2007), *Rehearing denied by Ard v Catoe* 2007 S C LEXIS 157 (S C , Apr 4, 2007), U S Sup Ct *cert den* by, Motion granted by *Ozmint v Ard* 2007 U S LEXIS 10840 (U S , Oct 1, 2007), *Nance v Ozmint*, 367 S C 547, 626 S E 2d 878 (2006), *rehearing denied*, 2006 S C LEXIS 85 (S C , Mar 8, 2006) *cert denied Ozmint v Nance*, 549 U S 943, 127 S Ct 131, 166 L Ed 2d 253 (Oct 2, 2006) (citing *Wiggins*), *Von Dohlen v State* 360 S C 598, 602 S E 2d 738 (2004) (same)

Therefore this Court finds it reasonable, necessary and appropriate to set this case for a PCR evidentiary hearing (hereinafter, "PCR hearing") on March 18, 2013, at the Dorchester County Courthouse If Applicant's counsel determines it necessary to request a continuance, or any other matters which might delay this case as scheduled, then Applicant's counsel shall inform this Court, with notice to the State, no less than 45 (forty-five) days – by February 1, 2013 – prior to the scheduled PCR hearing so that the Court can timely consider such a motion, as well as any response from the State Furthermore, an initial Amended Application shall be filed by Applicant s counsel not



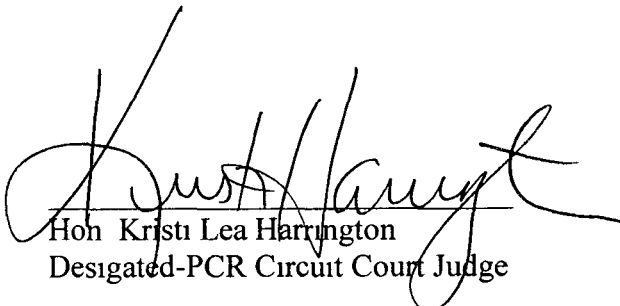
less than 60 (sixty) days – by January 17, 2013 – prior to the PCR hearing, and, any Final Amended Application shall be filed by Applicant’s counsel not less than 30 (thirty) days – by February 15, 2013 – before the PCR hearing Any amendments to the Application after February 15, 2013, must be made with a motion to this Court under the appropriate rules and applicable law

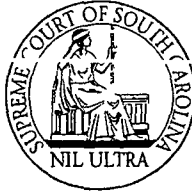
This Order is issued pursuant to *In Re Stays of Execution in Capital Cases*, 321 S C 544, 471 S E 2d 140 (1996), S C Code §17-27-160 (S C Code Ann), *See also* §16-3-26(B) (S C Code Ann), and other law as set forth herein

IT IS THEREFORE ORDERED

- 1 That the PCR evidentiary hearing in this matter is set for March 18, 2013
- 2 Any request or motion for a continuance shall be made by Applicant’s counsel no later than February 1, 2013
- 3 An initial Amended Application shall be filed by Applicant’s counsel by January 17, 2013, and, any Final Amended Application shall be filed by Applicant’s counsel by February 15, 2013 Any amendments made to the Application after February 15, 2013, must be made with a motion to this Court under the appropriate rules and applicable law
- 4 Any discovery issues shall be addressed by this Court as the need arises, and upon notice by the parties
- 5 AND IT IS SO ORDERED

Dated April 24, 2012
Charles S C


Hon Kristi Lea Harrington
Designated-PCR Circuit Court Judge



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734 1080

FAX (803) 734 1499

February 24, 2012

Chief Appellate Defender Robert M. Dudek
South Carolina Commission on Indigent Defense
P O Box 11589
Columbia, SC 29211

Re The State v. Justus, Kenneth Harry

Dear Counsel:

Enclosed is the order issued in the above entitled matter.

Very truly yours,

CLERK

DES/dmh

Enclosure

cc Assistant Deputy Attorney General Donald J. Zelenka
Assistant Attorney General J. Anthony Mabry
Solicitor David Michael Pascoe, Jr.
The Honorable Kristi Lea Harrington
Motte L. Talley, Esquire

The Supreme Court of South Carolina

The State,

Respondent,

v

Kenneth Harry Justus,

Appellant

ORDER

Appellant pled guilty to murder and was sentenced to death *State v Justus*, 392 S C 416, 709 S E 2d 668 (2011) The United States Supreme Court denied certiorari on January 17, 2012 *Justus v South Carolina*, 2012 WL 117608 (U S S C)

Appellant now seeks a stay of execution, pursuant to *In re Stays of Execution in Capital Cases*, 321 S C 544, 471 S E 2d 140 (1996), so that he can pursue post-conviction relief (PCR) The State does not oppose the motion

The request for a stay of execution is granted The stay shall remain in effect to the extent provided by this Court in *In re Stays of Execution in Capital Cases*

The Honorable Kristi Lea Harrington is hereby assigned to the PCR action appellant has filed Judge Harrington shall retain jurisdiction over this case regardless of where she may be assigned to hold court and may schedule such hearings as may be necessary at any time without regard to whether there is a term of court scheduled

Judge Harrington shall conduct a hearing on appellant's desires regarding counsel within thirty days of the date of this order Within sixty days of the date of this order, Judge Harrington shall issue a scheduling order setting forth the schedule that shall be followed in this matter, including the date of the hearing on the merits The scheduling order may be amended as

necessary A copy of the scheduling order and any amended scheduling order shall be provided to counsel, this Court and Court Administration In addition to appellant's obligation to notify the Clerk of this Court of the status of this matter every sixty days under In re Stays of Execution in Capital Cases, supra, Judge Harrington is requested to provide the Clerk of this Court and Court Administration with an update on the status of this matter every one hundred and twenty days


C J
FOR THE COURT

Columbia, South Carolina

February 24, 2012

 ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Dorchester County
Diane S. Goodstein, Circuit Court Judge

RECEIVED

JAN 20 2012

SC Supreme Court

THE STATE,

RESPONDENT,

V

KENNETH HARRY JUSTUS,

APPELLANT

MOTION FOR A STAY OF EXECUTION AND
FOR THE APPOINTMENT OF A
POST-CONVICTION RELIEF JUDGE

Counsel for Kenneth Harry Justus moves this Court for a stay of execution and to appoint a post-conviction relief judge so that post-conviction counsel can be appointed by the post-conviction relief judge

I

This Court affirmed petitioner's murder conviction and death sentence in State v. Kenneth Harry Justus, 393 S.C. 416, 709 S.E.2d 668 (2011)

II

A petition for writ of certiorari to the United States Supreme Court, Kenneth Justus v. South

Carolina, No 11-6809, was then filed on October 6, 2011 after an order granting a sixty day extension until October 6, 2011 was granted by Chief Justice Roberts on August 2, 2011. The Court denied certiorari in its order dated January 17, 2012. A copy of that order is attached to this motion.

IV

Petitioner has filed an application for post-conviction relief, in the Dorchester County Court of Commons Pleas due to the potential one hundred and eighty day federal habeas statute of limitations if South Carolina becomes an “opt in” state and “opt in” is made retroactive. In that application for post-conviction relief, a filed copy of which is attached to this motion, while reserving the right to amend once counsel is appointed, petitioner has asserted the following grounds of ineffective assistance of counsel:

- (a) Counsel was ineffective for failing to investigate and identify mitigation witnesses, in derogation of the Sixth Amendment to United States Constitution, simply because petitioner expressed a desire to not challenge the state’s case where it was apparent his decision was based upon the loss of his counsel of choice, Mattie Murphy.
- (b) Whether defense counsel was ineffective by failing to present a case in mitigation, in derogation of the Sixth amendment to the United States Constitution, simply because petitioner expressed that desire at one point and State v. Winkler makes it apparent that defense counsel has the discretion to present a case in mitigation during a death penalty case.
- (c) Counsel was ineffective for failing to retain necessary experts to examine petitioner regarding his decision to plead guilty and waive mitigation where it was apparent his decision was based, at least in part, upon the loss of his desired counsel of choice, and defense counsel failed to put the state’s case in aggravation to any meaningful adversarial test.

V

Present counsel cannot take a position on the issue of ineffective assistance of appellate counsel. That is a matter for post-conviction counsel and the post-conviction court to determine.

VI

Based on the above, petitioner requests that this Court issue a stay of execution and appoint a post-conviction relief judge so that the appointed post-conviction relief judge can hold a hearing to appoint post-conviction counsel. This will allow petitioner to pursue his state court post-conviction relief action which is already filed in the Abbeville County Court of Common Pleas.

WHEREFORE, counsel for Kenneth Justus requests that this Court issue a stay of execution and appoint a post-conviction relief judge so that the appointed post-conviction relief judge can hold a hearing to appoint post-conviction counsel so that petitioner can pursue post-conviction relief with the assistance of counsel in the Abbeville County Court of Common Pleas upon the grounds of ineffective assistance of counsel, and any other grounds that may arise from post-conviction counsel's investigation of this case.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'R. M. Dudek', is written over a horizontal line.

Robert M. Dudek
Chief Appellate Defender

Attorney for Appellant

January 20, 2012

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Dorchester County
Diane S Goodstein, Circuit Court Judge

THE STATE,

RESPONDENT,

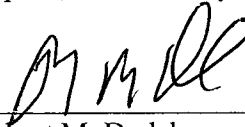
V

KENNETH HARRY JUSTUS,

APPELLANT

CERTIFICATE OF SERVICE

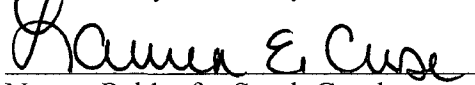
The undersigned attorney hereby certifies that a true copy of the motion for a stay of execution and to appoint a post-conviction relief judge in the above-referenced case has been served upon opposing counsel, J Anthony Mabry, Esquire, this 20th day of January, 2012



Robert M Dudek
Chief Appellate Defender

Attorney for Appellant

SUBSCRIBED AND SWORN TO before me
this 20th day of January, 2012

 (L S)
Notary Public for South Carolina
My Commission Expires August 23, 2014

FORM 5

STATE OF SOUTH CAROLINA

COUNTY OF DORCHESTER

Kenneth Harry Justus

Full name and prison number (if any) of Applicant

v

State of South Carolina

CERTIFIED TO
2011 OCT 24 AM 11:00

THE COURT OF COMMON PLEAS

CLERK OF COURT
DORCHESTER COUNTY

2011-cp-18-1933

APPLICATION FOR

POST-CONVICTION RELIEF

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1 Place of detention Lieber Correctional Institution

2 Name and location of Court which imposed sentence Dorchester County Court of General Sessions

3 Name(s) of co-defendant(s) (if any) _____

4 The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed

(a) 2005-GS-18-1265

(b) _____

(c) _____

5 The date upon which sentence was imposed and the terms of the sentence

(a) December 23, 2008- Death Sentence

- (b) _____
(c) _____
- 6 Check whether a finding of guilty was made
(a) after a plea of guilty X
(b) after a plea of not guilty _____
(c) after a plea of nolo contendere _____
- 7 Did you appeal from the judgment of conviction or the imposition of sentence?
Yes
- 8 If you answered "yes" to (7), list
(a) the name of each Court to which you appealed
1 South Carolina Supreme Court
11 _____
111 _____
(b) the result in each such Court to which you appealed
1 Affirmed
11 _____
111 _____
(c) the date of each such result
1 May 9, 2011
11 _____
111 _____
(d) if known, citations of any written opinion or orders entered pursuant to such results
1 State v Kenneth Harry Justus, 393 S C 416, 709 S E 2d 668 (May 9, 2011)
11 _____
111 _____
- 9 If you answered 'no' to (7), state your reasons for not so appealing
(a) _____
(b) _____
(c) _____
- 10 State concisely the grounds on which you base your allegation that you are being held in

custody unlawfully

(a) Ineffective assistance of counsel in violation of the Sixth Amendment

(b) _____

(c) _____

11 State concisely and in the same order the facts which support each of the grounds set out in (10)

(a) Counsel was ineffective for failing to investigate and identify mitigation witnesses, in derogation of the Sixth amendment to United States Constitution, simply because petitioner expressed a desire to not challenge the state's case where it was apparent his decision was based upon the loss of his counsel of choice, Mattie Murphy

(b) Whether defense counsel was ineffective by failing to present a case in mitigation, in derogation of the Sixth amendment to the United States Constitution, simply because petitioner expressed that desire at one point and state v. Winkler makes it apparent that defense counsel has the discretion to present a case in mitigation during a death penalty case

(c) Counsel was ineffective for failing to retain necessary experts to examine petitioner regarding his decision to plead guilty and waive mitigation where it was apparent his decision was based, at least in part, upon the loss of his desired counsel of choice, and defense counsel failed to put the state's case in aggravation to any meaningful adversarial test

12 Prior to this application have you filed with respect to this conviction

(a) any petition in a State Court under South Carolina law? None other than the mandatory appeal to the State Supreme Court

(b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? No

(c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No

(d) any other petitions, motions or applications in this or any other Court? No

13 If you answered "yes" to any part of (12), list with respect to each petition, motion or application

(a) the specific nature thereof

i n/a

ii n/a

III n/a

IV n/a

(b) the name and location of the Court in which each was filed

I n/a

II n/a

III n/a

IV n/a

(c) the disposition thereof

I n/a

II n/a

III n/a

IV n/a

(d) the date of each such disposition

I n/a

II n/a

III n/a

IV n/a

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition

I n/a

II n/a

III n/a

IV n/a

14 Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

No

15 If you answered "yes" to (14) identify

(a) which grounds have been presented

I n/a

II _____

III _____

(b) the proceedings in which each ground was raised

i n/a

ii _____

iii _____

16 If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented

(a) This is the first PCR

(b) _____

(c) _____

17 Were you represented by an attorney at any time during the course of

(a) your arraignment and plea? Yes

(b) your trial, if any? Yes

(c) your sentencing? Yes

(d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes

(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? Yes

18 If you answered "yes" to one or more parts of (17), list

(a) the name and address of each attorney who represented you

i Walter M Bailey, Jr , Esquire 101 Spring Road, Summerville, SC 29483

ii Norbert Cummings, Cummings Law Firm, 100 S Main St , Ste B, Summerville, SC 29483

iii Joseph L Savitz, III, Esquire, 1330 Lady Street, Ste 401, Columbia, SC 29211

iv Robert M Dudek, Esquire, 1330 Lady Street, Ste 401, Columbia, SC 29211

(b) the proceedings at which each such attorney represented you

i Mr Baily and Mr Cummings - trial

ii Mr Dudek and Mr Savitz- appeal

iii _____

19 State clearly the relief you seek in filing this application

New Trial

20 Are you now under sentence from any other court that you have not challenged?

No

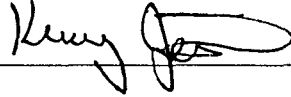
STATE OF SOUTH CAROLINA

County of DORCHESTER

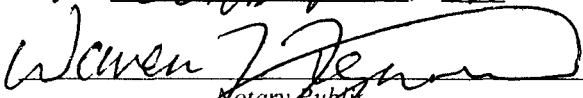
)
)
)

VERIFICATION

I, Kenneth Harry Justus, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application, that I know the contents thereof, that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application, and that the matters and allegations therein set forth are true



SWORN to and subscribed before me this 4th
day of October, 2011

 (L S)
Notary Public

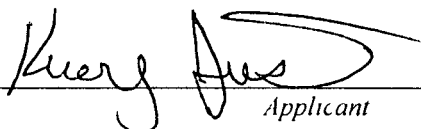
My Commission Expires Sept 22 2018

VERIFIED
2011 OCT -4 AM 11:00
CLERK OF DISTRICT COURT

**APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

I, Kenneth Harry Justus, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

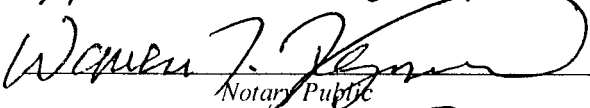
- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security therefor.



Applicant

SWORN or affirmed to and subscribed before me this

4th day of OCTOBER, 2011



Notary Public

My Commission Expires

Sept. 22, 2018

FILED
2011 OCT -4 AM 11:00
CLERK OF COURT
DEPT. OF JUSTICE

**Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001**

William K. Suter
Clerk of the Court
(202) 479 3011

January 17, 2012

Mr. Robert M. Dudek
SC Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Fourth Floor
Columbia, SC 29201

Re Kenneth Harry Justus
v South Carolina
No. 11-6809

Dear Mr. Dudek:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is denied.

Sincerely,



William K. Suter, Clerk

RECEIVED

JAN 19 2012

SC OFFICE OF
APPELLATE DEFENSE

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Dorchester County
Diane S. Goodstein, Circuit Court Judge

RECEIVED

FEB - 2 2012

STATE OF SOUTH CAROLINA,

Respondent,

S C Supreme Court

v

KENNETH HARRY JUSTUS,

Appellant

RETURN TO MOTION FOR STAY OF EXECUTION

Appellant, Kenneth Harry Justus, a death row inmate at Lieber Correctional Facility, has filed a Petition for Stay of Execution with this Court asking this Court to issue a Stay of Execution in order that he may pursue post-conviction relief (PCR) and to appoint a PCR judge.¹ Justus has previously filed an application for post-conviction relief in Dorchester County. The specific grounds alleged by Justus entitle Justus to a Stay of Execution pursuant to In re Stays of Execution in Capital Cases, 321 S C 544, 471 S E 2d 140 (1996) to pursue post-conviction relief because the issues satisfy the condition precedent of being of a general nature of the issues which are appropriate for post-conviction relief.²

¹Respondent previously requested this Court appoint a PCR judge by letter

²Respondent makes no representation to this Court regarding the merits of any of the allegations Petitioner/Movant has alleged in his PCR application

WHEREFORE, having made a Return, the State agrees that Justus is entitled to a Stay of Execution to pursue a post-conviction relief application, and Respondent requests this Court to appoint a PCR judge to preside over Petitioner's/Movant's PCR action in Dorchester County, so that an appointment of counsel hearing may be conducted

Respectfully submitted,

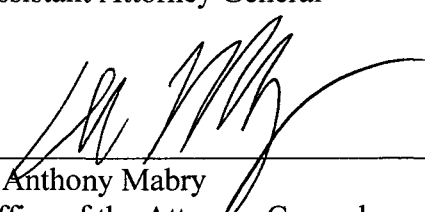
ALAN WILSON
Attorney General

JOHN W MCINTOSH
Chief Deputy Attorney General

DONALD J ZELENKA
Assistant Deputy Attorney General

J ANTHONY MABRY
Assistant Attorney General

By



J Anthony Mabry
Office of the Attorney General
P O Box 11549
Columbia, SC 29211
(803) 734-6305

P O Box 11549
Columbia, SC 29211

February 2, 2012

**STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

Appeal from Dorchester County
Diane S Goodstein, Circuit Court Judge

STATE OF SOUTH CAROLINA,

Respondent,

v

KENNETH HARRY JUSTUS,

Appellant

CERTIFICATE OF SERVICE

I, **Anthony Mabry**, hereby certify that I have served the *Return to Motion for Stay of Execution* in the foregoing action by depositing copy in the InterAgency Mail to Robert M Dudek, Chief Appellate Defender, Division of Appellate Defense, 1330 Lady Street, Suite 401, Columbia, SC 29201 this 2nd day of February, 2012



ANTHONY MABRY
Assistant Attorney General



ALAN WILSON
ATTORNEY GENERAL

February 2, 2012

RECEIVED

FEB - 2 2012

Honorable Daniel E Shearouse
Clerk, South Carolina Supreme Court
P O Box 11330
Columbia, SC 29211

SC Supreme Court

Re The State v Kenneth Harry Justus

Dear Mr Shearouse

Enclosed please find the original and six (6) copies of the ***Return to Motion for Stay of Execution*** in the above-referenced case for filing. By copy of this letter, I am serving opposing counsel with same.

Sincerely,

Lonetta B Brawley
Legal Assistant to Anthony Mabry
Assistant Attorney General

/lbb
Enclosure

cc Robert M Dudek, Esquire



SCCID

SOUTH CAROLINA COMMISSION ON INDICENT DEFENSE

Division of Appellate Defense
1330 Lady Street Suite 401
Columbia South Carolina 29201 3332
Post Office Box 11589
Columbia South Carolina 29211 1589
Telephone (803) 734 1330
Facsimile (803) 734 1397

Robert M Dudek Chief Appellate Defender
Wanda H Carter Deputy Chief Appellate Defender

January 20, 2012

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

RECEIVED

JAN 20 2012

S C Supreme Court

Re The State v Kenneth Justus

Dear Mr Shearouse

Enclosed please find an original and six copies of the motion for a stay of execution and to appoint a post-conviction relief judge along with a certificate of service

Sincerely,

Robert M Dudek
Chief Appellate Defender

RMD lec

Enclosure

cc J Anthony Mabry, Esquire

**Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001**

William K Suter
Clerk of the Court
(202) 479 3011

January 17, 2012

Clerk
Supreme Court of South Carolina
Post Office Box 11330
Columbia, SC 29211

Re Kenneth Harry Justus
v South Carolina
No 11 6809
(Your No 26971)

Dear Clerk

The Court today entered the following order in the above entitled case

The petition for a writ of certiorari is denied

Sincerely,



William K Suter, Clerk

RECEIVED

JAN 19 2012

SC SUPREME COURT

Hopkins, Debbie

From Robert M Dudek <RDudek@sccid.sc.gov>
Sent Thursday, January 12, 2012 4:26 PM
To Hopkins, Debbie
Subject State v. Kenneth Harry Justus

Debbie

What follows is the explanation you wanted about why I assisted Mr. Justus in filing a PCR while he is still pending on certiorari in the United States Supreme Court. Pursuant to the Anti-Terrorism and Effective Death Penalty Act of 1994, there is an "opt-in" provision for states if their PCR provisions provide for an offer of counsel and other provisions. If a state becomes an "opt-in" state, then the federal habeas statute of limitations would be 180 days. That means a death row inmate can only have 180 days where he is not in court after his conviction was affirmed or rehearing was denied.

In Justus, I used the normal 90 days plus a 60-day extension before I filed the certiorari petition in the United States Supreme Court. Consequently, **if** our state ever becomes an "opt-in" state – probably as decided by the Justice Department at some time in the future – **and** it is made retroactive, Mr. Justus would have used 150 days (90 + 30) of his total allotted 180-day "dead time." Consequently, he would have a very small window of 30 days left to cover the time between certiorari being denied, assuming it is in the U.S. Supreme Court, and filing for PCR and filing for federal habeas if our Supreme Court one day denies certiorari in PCR. It takes time to find counsel and file a good habeas petition under the best of circumstances. (By the way, I understand this case has been distributed for conference tomorrow in the U.S. Supreme Court.)

Thus, although I do not like advising them to file PCR applications such as this one, I have to assume the worst for our death penalty clients. Meaning, at times they file for PCR before certiorari is ruled upon in the U.S. Supreme Court to protect them in the event *we/become an opt-in state and opt-in is made retroactive*. These being death penalty cases, I simply cannot assume we will never be an "opt-in" state and "opt-in" will not be retroactive.

This is a catch-22 situation for me since I can obviously be a target in PCR, but I am representing Mr. Justus now, so I have to protect him in the event his case goes into federal habeas at a later date. If certiorari is denied in the United States Supreme Court, I will file a stay of execution and request that the Court assign a PCR judge at that time as I always have done in the past. Please let me know if you need additional information.

Robert M. Dudek
Chief Appellate Defender
Commission on Indigent Defense
Appellate Division
PO Box 11589
Columbia, South Carolina 29211
(803) 734-1330

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K Suter
Clerk of the Court
(202) 479 3011

October 12, 2011

Clerk
Supreme Court of South Carolina
Post Office Box 11330
Columbia, SC 29211

RECEIVED

OCT 14 2011

SC SUPREME COURT

Re Kenneth Harry Justus
v South Carolina
No 11 6809
(Your No 269171)

Dear Clerk

The petition for a writ of certiorari in the above entitled case was filed on October 6, 2011 and placed on the docket October 12, 2011 as No 11 6809

Sincerely,

William K Suter, Clerk

by

Gail Johnson
Case Analyst



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

ORIGINAL

Division of Appellate Defense
1330 Lady Street Suite 401
Columbia South Carolina 29201 3332
Post Office Box 11589
Columbia South Carolina 29211 1589
Telephone (803) 734 1330
Facsimile (803) 734 1397

Robert M Dudek Chief Appellate Defender
Wanda H Carter Deputy Chief Appellate Defender

October 6, 2011

RECEIVED

OCT - 6 2011

S C Supreme Court

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

Re Kenneth Harry Justus v State of South Carolina

Dear Mr Shearouse

Please be advised that I have filed a petition for writ of certiorari in this case with the United States Supreme Court today I have attached a copy of that petition

Please contact me if you have any questions

Sincerely,

Robert M Dudek
Chief Attorney

RMD/lec
Enclosure

cc J Anthony Mabry, Esquire



Division of Appellate Defense
1330 Lady Street Suite 401
Columbia South Carolina 29201 3332
Post Office Box 11589
Columbia South Carolina 29211 1589
Telephone (803) 734 1330
Facsimile (803) 734 1397

Robert M Dudek Chief Appellate Defender
Wanda H Carter Deputy Chief Appellate Defender

RECEIVED

OCT - 6 2011

S C Supreme Court

October 6, 2011

Honorable William K Suter
Clerk, Supreme Court of the United States
1 First Street, N E
Washington, DC 20543

Re Kenneth Harry Justus v State of South Carolina

Dear Mr Suter

Enclosed are the petition for writ of certiorari, a motion for leave to proceed *in forma pauperis*, and an affidavit of Kenneth Harry Justus in support of motion to proceed *in forma pauperis*. The certificate of service is attached to the original petition. Representing the State of South Carolina is J Anthony Mabry, Esquire, of the Office of the Attorney General, Post Office Box 11549, Columbia, South Carolina 29211-1549. His phone number is (803) 734-3727. I represent petitioner Louis Michael Winkler. The other information required by Rule 29.5 is contained above. If additional information is desired, please contact me.

Sincerely,

Robert M Dudek
Attorney at Law

RMD\lec

Enclosure

cc Honorable Daniel E Shearouse
J Anthony Mabry, Esquire

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2011

No 11-

RECEIVED

OCT - 6 2011

KENNETH HARRY JUSTUS,

Petitioner, **SC Supreme Court**

v

STATE OF SOUTH CAROLINA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE
SOUTH CAROLINA SUPREME COURT

ROBERT M DUDEK
Attorney at Law

Chief Appellate Defender
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211-1589
(803) 734-1330

CAPITAL CASE

QUESTION PRESENTED

Whether petitioner was denied his Sixth Amendment right to his appointed counsel of choice where the court granted the State's motion to disqualify his previously appointed counsel simply because she had represented an investigator employed by the Solicitor's Office in an unrelated domestic matter, where that investigator did not testify, where the state supreme court also recognized the weakness of the alleged "conflict," and where petitioner and his attorney both waived any conflict?

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2011

No 11-

KENNETH HARRY JUSTUS,

Petitioner,

v

STATE OF SOUTH CAROLINA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE
SOUTH CAROLINA SUPREME COURT

Counsel for Kenneth Harry Justus petitions the Court to issue a writ of certiorari to review the decision of the South Carolina Supreme Court affirming his conviction following his guilty plea for murder and his death sentence

CITATION TO OPINION BELOW

The South Carolina Supreme Court's opinion is reported as State v. Kenneth Harry Justus, 393 S C 416, 709 S E 2d 668 (2011) and is reproduced in the Appendix to this petition at pages A1-A6

JURISDICTION

The final judgment of the South Carolina Supreme Court in this case was entered on May 9, 2011. On July 29, 2011 an application to extend the time for filing this petition for writ of certiorari from August 7, 2011 until October 6, 2011 was forwarded to Chief Justice Roberts. On August 2, 2011 the Chief Justice granted the petition to extend the time for filing this petition until today, October 6, 2011. App 7

The Court has jurisdiction pursuant to 28 U.S.C. §1257(a), since Petitioner Justus is asserting the deprivation of a right secured by the United States Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Sixth and Fourteenth Amendments which provide, in pertinent part

Amendment VI In all criminal prosecutions, the accused shall enjoy the right to have the Assistance of Counsel for his defense

Amendment XIV No State “shall deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws”

STATEMENT

On December 11, 2008, Kenneth Harry Justus, 41, pleaded guilty in Dochester County, South Carolina before Judge Diane S. Goodstein, to an indictment charging him with the stabbing murder of Justin Matthew Bergenzer, 22, in July 2005.

Both men were inmates at Lieber Correctional Institution in Ridgeville, South Carolina. Bergenzer was sent to Lieber (which houses South Carolina's most violent male offenders) for escaping, walking away from a litter detail required under his sentence for breaking into an automobile. Justus was serving two consecutive life sentences for the shotgun murders and robberies of convenience-store owners Randall Eades (51) and Kitty Smith (64) in 1997 and 1998. Justus' motive for killing Bergenzer by stabbing him 11 times remains obscure.

The State served notice of its intent to seek the death penalty, relying on Justus' prior convictions (by guilty plea) for murder. See S.C. Code § 16-3-20(c)(a)(2) ("The murder was committed by a person with a prior conviction for murder.") App. 9-11.

Maite Murphy and Marva Hardee-Thomas were initially appointed to represent Kenneth Justus at trial. When Hardee-Thomas was relieved as counsel for medical reasons, the former Circuit Solicitor Walter Bailey, now in private practice, stepped in.¹ Maite Murphy was Petitioner's counsel of choice in Dochester County. Murphy later was selected to be a judge, the Master in Equity for Dochester County. The State filed a motion to relieve Murphy as counsel, asserting an actual conflict of interest.

Murphy is currently representing Tim Stephenson, the Chief Investigator for the First Circuit Solicitor's Office in a pending Family Court matter. She began representing Inv. Stephenson prior to her appointment on the defendant's case. Inv. Stephenson will be a potential witness for the State and has been and will continue to be

¹ As Circuit Solicitor, Bailey prosecuted numerous death penalty defendants.

directly involved in the preparation of the defendant's case for trial

On February 16 and 17, 2006, the judge heard testimony and arguments on the State's motion to disqualify Murphy

The Solicitor represented that Investigator Stephenson had retained Murphy "to handle his divorce" prior to the Bergenzer murder and her subsequent appointment to the Justus case, and that she continued to represent Stephenson in his ongoing divorce R p 11, line 7 – p 12, line 10 Investigator Stephenson testified that he hired Murphy "[t]o do my divorce The separation agreement was what we discussed first, and to go all the way through with the divorce" R p 19, line 22 – p 20, line 4 Murphy explained that she had agreed to handle Stephenson's separation, but not his divorce, as he did not have sufficient funds to cover even the cost of the separation

There are separate actions The separation agreement is one action and down the road, if he wants to come back, we will do the separate action for divorce

R p 72, lines 2 – 6

As far as Murphy was concerned, she no longer represented Stephenson R p 73, lines 22 – 23 Stephenson claimed that Murphy had agreed to handle both separation and divorce for a flat fee of \$1000 R p 21, line 18 – 23 He still owed Murphy several hundred dollars R 22, line 22 – p 23, line 20

The judge held, "[I]t's clear that Ms Murphy's representation of him is over with the filing of the order approving the separation agreement" R p 47, line 7 – p 48, line 1 Defense counsel objected to the disqualification of Murphy

He wants her to be his lawyer He is a death penalty defendant on trial for his life and he has got no right to pick his lawyer He takes who the court appoints, as long as they are qualified and appointed by the court Ms Murphy was appointed and he's got a rapport with her He wants her to represent him in this case [I]t's just crucial

in a death penalty case for a defendant to have confidence in their lawyer and to think that their lawyer will be the best and do the best for them

R p 105, lines 2 – 14

Counsel observed, somewhat presciently in light of subsequent events, “If he feels that way about her professional ability, it is much less likely that problems will arise in a death penalty case where a defendant wants to go *pro se* because he doesn’t like his lawyer or any number of things” R p 105, lines 15 – 19 He noted, “The reason [the Solicitor] brought this to the court’s attention is because he thought a decision should be made, but I think he has kind of tightened up into a real advocacy role here, wanting to get rid of her, and I don’t really understand why” R p 105, line 24 – p 106, line 3

As if to illustrate counsel’s point, the Solicitor recklessly accused the defense of being “willing to compromise Mr Justus’ defense to keep Ms Murphy on this case” R p 101, lines 13 – 16 When the judge asked the Solicitor whether he intended to call Stephenson as a witness, his answer was evasive and peckish

I didn’t say he’s a witness, no, ma’am I didn’t say he is a witness I said “likely to be a witness” Don’t misconstrue what I said, please

R p 95, lines 4 – 21

In addition to his purported concern for Justus’ rights, the Solicitor relied upon State v Gregory, 364 S C 150, 612 S E 2d 449 (2005), as authority for his motion to disqualify Murphy In Gregory the defense lawyer “simultaneously represent[ed] Gregory and the assistant solicitor who was handling his criminal case” over the objections of both counsel and the defendant, which is obviously a entirely different scenario 612 S E 2d 451

But what was Investigator Stephenson’s role in the prosecution of Justus? “Superfluous”

defines it. He made one trip to Lieber prison when the death occurred, took “four or five” photographs “where I thought the incident took place” and interviewed “one person [a] correctional officer.” R. p. 24, line 24 – p. 56, line 6, R. p. 61, lines 7 – 11. As the homicide occurred in a state prison facility, SLED² led the investigation. Stephenson appears to have been a bystander. He did not obtain a statement from the correctional officer he spoke with and eventually deleted the photographs he had taken because SLED’s were better. R. p. 83, line 11 – p. 85, line 1.

Defense counsel observed

I think [it] clear that Mr. Stephenson at this point in time is not only not a material witness. [h]e is not a witness at all. There is nothing he could testify to if called by the State unless he gains more knowledge, and he was assigned by the State to do some more work on the case. What he would testify to would be objectionable as hearsay and irrelevant for any number of reasons. So he is not a witness for the State at this point. [F]or the State to assign new duties to him and make him a witness, knowing that it is their position it would be a conflict, I think would be misconduct.

R. p. 103, lines 3- 16

Based on Stephenson’s failure to preserve the photographs he had taken, the judge predicted that Stephenson “would only be a witness called by the defense.” R. p. 106, line 25 – p. 107, line 2. Defense counsel informed the judge they had no intention of calling Stephenson as a witness. R. p. 104, lines 8 – 20. Perhaps more important, Justus himself waved any conflict arising from Murphy’s former representation of Stephenson. R. 85, line 16 – p. 91, line 12.

“I don’t think a judge can tell me how to investigate a case,” the Solicitor insisted, “[N]obody fortunately can tell me how to prosecute a case.” R. p. 92, line 17 – p. 94, line 24. In the Solicitor’s view, Murphy represented Stephenson simply because Stephenson said so. R. p. 99,

² South Carolina Law Enforcement Division

lines 16 – 20

The judge ultimately ruled

I am satisfied under these circumstances that I cannot risk the possibility of Mr Stephenson being called in this case and needing to be cross-examined Do I think that the representation terminated? I think it doesn't really matter because it is the potentiality of Mr Stephenson being called and it is the attorney-client privilege information that Ms Murphy possesses as a result of her representation in the context of the preparation of the separation agreement In these circumstances and in this case, that is a concern for the ability of Mr Justus to be fully represented that I cannot allow

R p 111, lines 1 – 15

On April 27, 2006, Bailey and Murphy's replacement, Norbert Cummings, alleged that the Solicitor's misrepresentations at the February 2006 hearing to disqualify Murphy approached prosecutorial conduct

The first, Your Honor, was the misrepresentation that Tim Stephenson was an important State's witness He was represented as the Chief Investigator of the Solicitor's Office and went to the crime scene, interviewed multiple witnesses, took photographs, and he was, of course, none of the above He took four photographs, which he deleted or did not develop from his camera and interviewed one sole, single witness without taking a statement

The second thing, Your Honor, that occurred at that hearing that the defense feels constituted misconduct, was that when it became apparent that Mr Stephenson didn't have any knowledge of anything that he could testify too, [the firsthand Solicitor] basically threatened to actually create a conflict by involving Mr Stephenson in the case from that point on

The defendant in this case was extremely prejudiced by this, because it made a non-witness for the State a potential, although unwanted,

witness for the defense and the conundrum that was created through no fault of Mr Justus, Ms Murphy or anybody on the defense team, directly resulted in the court having to issue its order to relieve Ms Murphy, that Mr Justus wanted to keep in [this] case

R p 128, line 12 – p 130, line 8

The Solicitor responded, “I never went in there and said that Investigator Stephenson was going to be an important or material witness. The whole reason we had that hearing was that it was my opinion that he was going to be a potential witness.” R p 143, lines 11 – 15. The judge affirmed her earlier ruling.

As a result, Justus decided to plead guilty and ask for a death sentence. R p 299, lines 4 - 9. The judge herself at the December 15, 2008 hearing, with former solicitor Walter Bailey and Norbert Cummings representing petitioner recognized that her disqualification of Murphy had been a factor in his decision. R p 516, line 18 – p 517, line 5. Stephenson did not participate at the guilty plea or at sentencing.

At sentencing on December 16, 2008, in accordance with Justus’ directions defense counsel did not challenge the State’s case in aggravation and made no other effort to mitigate punishment. In closing argument counsel stated, “[R]egardless of my personal opinions on this, I feel like in order to represent my client’s interests, I must ask the court to consider the imposition of the death penalty for our client as opposed to a life sentence, I think it is our responsibility to pass that along to the court and urge the court that is the sentence he wants.” R p 555, lines 1-4. On December 23, 2008, the judge sentenced Justus to death from the bench and by written order. R p 574, lines 3-8.

Petitioner’s attorneys argued on his mandatory direct appeal to the South Carolina Supreme Court that Murphy’s unnecessary and erroneous removal as petitioner’s trial attorney of choice

contributed to his decision instructing his new lawyers not to challenge the evidence in aggravation and to present any evidence in mitigation during his subsequent guilty plea. Final brief at p. 11. In South Carolina a defendant must waive jury sentencing to plead guilty, and he must then be sentenced by a judge only. See, S.C. Code §16-3-20(B). App. 9-11. Further, in South Carolina any one juror, out of the twelve, can prevent a death sentence by simply refusing to vote with the majority and imposing a life sentence as “an act of mercy.” See Rosemond v. Catoe, 383 S.C. 320, 329-330, 680 S.E.2d 5, 10-11 (2009).

The state Supreme Court here held

We acknowledge that it is a close question whether Murphy’s representation of Stevenson was ongoing or had concluded. Moreover, it is fairly debatable whether Stevenson’s potential testimony presented an actual conflict of interest. However, given the conflicting evidence before the trial court, and giving deference to its findings of fact, we find no abuse of discretion in the disqualification of Murphy.

App. 4

REASONS FOR GRANTING THE WRIT

WHAT CONSTITUTES JUSTIFICATION FOR REMOVAL OF APPOINTED COUNSEL OF CHOICE VERSUS THE ARBITRARY REMOVAL DUE TO AN ALLEGED “ACTUAL CONFLICT” IS UNSETTLED IN VARIOUS JURISDICTIONS AND THIS COURT’S GUIDANCE ON THIS FUNDAMENTAL SIXTH AMENDMENT RIGHT TO COUNSEL ISSUE IS NEEDED HERE, THE JUDGE GRANTED THE STATE’S MOTION TO DISQUALIFY JUSTUS’ APPOINTED COUNSEL OF CHOICE SIMPLY BECAUSE SHE PREVIOUSLY HAD REPRESENTED AN INVESTIGATOR EMPLOYED BY THE SOLICITOR’S OFFICE IN AN UNRELATED DOMESTIC MATTER

Before addressing the heart of the issue presented by the appeal, and now this certiorari petition, two irrelevant collateral issues should be identified. The first concerns Murphy’s status as *appointed* counsel.

Some distinction arises between defendants who retain attorneys to defend them and defendants for whom attorneys are appointed. Generally, a defendant has the right to retain counsel of his own choice. An indigent defendant may not, however, insist on the appointment of a particular attorney. *Once established the attorney-client relationship should be protected by the courts without distinction as to whether the attorney is retained or appointed* [Citations omitted and emphasis added.]

Kalapesky v. State, 256 S.W.3d 442, 450 (Tex. Ct. App. 2008). The second relates to the nature of the attorney-client relationship between Murphy and Stephenson.

[W]here an attorney has received confidential information from a prospective client, the attorney may be disqualified from representing another individual on the grounds of actual or presumed conflict, despite the absence of an actual attorney-client relationship.

Youngblood v. Sanders, 212 W. Va. 885, 579 S.E.2d 864, 871 (2002) (footnote omitted).

The controlling authority in South Carolina at the time of petitioner’s trial was State v. Sanders, 341 S.C. 386, 534 S.E.2d 696 (2000), *not* State v. Gregory. In Sanders, the trial judge removed defense counsel on the State’s motion after it expressed an “unsubstantiated concern” that

defense counsel “might be called as a witness ” 534 S E 2d at 698 Sanders was represented by his sister, Brenda Sanders, who was not a lawyer in South Carolina, but she was admitted to represent her brother pro hac vice to act as his co-counsel The South Carolina Supreme Court found the defendant’s Sixth Amendment right to counsel had been violated and set forth a balancing test

Where this Sixth Amendment right is invoked, the court must balance the defendant’s right to his own freely chosen counsel against the need to maintain the highest ethical standards of professional responsibility In balancing these interests, the court will consider whether the defendant’s constitutional right to counsel is outweighed by the government’s interest in disqualifying his attorney

Id at 697 - 8 (citations omitted) The case of Commonwealth v Cassidy, 390 Pa Super 359, 568 A 2d 693 (1989), elaborated

When a defendant’s selection of counsel, under the particular facts and circumstances of the case, places the fairness and integrity of the defendant’s trial in jeopardy, the defendant’s right to counsel of choice may be justifiably denied However, a *presumption* must first be recognized in favor of the defendants counsel of choice, to overcome that presumption, there must be a demonstration of an *actual conflict or a showing of a serious potential for conflict* *The right to counsel of choice should not be interfered with in cases where the potential conflict of interest is highly speculative*

568 A 2d at 698 (citations omitted and emphasis added) In recognition of the presumption in favor of a defendant’s selected counsel, “[c]ourts generally give substantial weight to defense counsel’s representations regarding conflicts of interest ” United State v Agosto, 675 F 2d 965, 974 (8th Cir 1982) Here, counsel Murphy, now a judge, stated as an officer of the court that her representation of Stevenson was over, and that there was no conflict Murphy wanted to continue representing petitioner, and petitioner wanted Murphy to remain his attorney of choice Yet, as seen above, the South Carolina Supreme Court here held that where it “was fairly debatable” whether Stevenson’s

potential testimony constituted a conflict of interest – where predictions of his very limited role or no role were proven accurate since *he did not even testify* – the state Supreme Court nonetheless found no Sixth Amendment right to counsel Constitutional error. It can hardly be said the state Supreme Court here gave substantial weight to Murphy’s unequivocal statement that there was no conflict of interest in this case.

The cornerstone of the Sixth Amendment to the United States Constitution is the right of the accused “to have the Assistance of Counsel for his defense.” See Gideon v. Wainwright, 372 U.S. 335 (1963), and Powell v. Alabama, 287 U.S. 45 (1932). As in State v. Sanders, the Solicitor moved to disqualify Murphy for a peripheral reason. Here, simply on the basis of her former representation in an unrelated domestic matter of an investigator employed by the Solicitor’s Office with only tangential involvement in Justus’ case. Thus the opinions of South Carolina Supreme Court, and the opinions of courts other jurisdictions, show a lack of clear constitutional guidance from this Court on when appointed counsel of choice may be disqualified based on the State’s motion citing an alleged conflict or the purported greater good of the integrity of the system over the defendant’s right to his counsel of choice.

“Once an attorney is serving under a valid appointment by the court and an attorney-client relationship has been established, the court may not arbitrarily remove the attorney over the objections of both the defendant and the attorney.” Harling v. United States, 387 A.2d 1101 (1978), United States v. Cunningham, 672 F.2d 1064, 1071 (2d Cir. 1982), United States v. Arnedo-Sarmiento, 524 F.2d 591, 592 (2d Cir. 1975). Therefore, “once counsel is appointed, the attorney-client relationship is no less voidable than if the counsel had been retained by the defendant.” People v. Harlan, 54 P.3d 871 (Colo. 2002), quoting People v. Isham, 923 P.2d 190,

193 (Colo Ct App 1995), See also, Stearnes v Clinton, 780 S W 2d 216 (Tex Cr App 1989)

The Supreme Court of South Carolina stated that while their decision in State v Gregory, 364 S C 150, 612 S E 2d 449 (2005) was a “far more compelling case for relieving counsel,” State v Justus, 392 S C 416, 419, 709 S E 2d 668, 670 (2011), that same court expressed serious doubt as to whether Murphy’s representation of the secondarily involved investigator was continuing and whether it amounted to a conflict of interest *Id*

Courts generally apply a balancing test that weighs, on one hand, the defendant’s desire for and right to continued representation by counsel of choice and, on the other, maintaining the integrity of judicial system by avoiding conflicts of interest Wheat v United States, 486 U S at 158, citing, United States v Reese, 699 F 2d 803, (6th Cir 1983), In re Grand Jury Subpoena Served Upon Doe, 781 F 2d 238, 250-251 (2nd Cir 1986), cert denied *sub nom* Roe v United States, 475 U S 1108 (1986) (“[C]ourts have the power and duty to disqualify counsel where the public interest in maintaining the integrity of the judicial system outweighs the accused’s constitutional right”) That a defendant desires the continued representation of appointed counsel is “entitled to great weight ” Rodriguez v District Court for the City and County of Denver, 719 P 2d 699, 707 (Colo 1986) The desire of petitioner and counsel Murphy relationship to continue was clear It is apparent it was not given “great” or even respectful weight in this case

If a potential conflict of interest is alleged, the “trial court may not reject a defendant’s chosen counsel absent a showing that both the likelihood and the dimensions of the feared conflict are substantial ” Wheat, 486 U S at 166 Where the South Carolina Supreme Court readily cast doubt on the conclusions of the trial court, it cannot be said that the petitioner’s desire for continued representation by Murphy was outweighed by the alleged conflict of interest

Furthermore, the South Carolina Supreme Court's decision is void of any discussion of the petitioner's waiver of conflict of interest "A voluntary waiver of this constitutional right, knowingly and intelligently made, must be honored by the court in the absence of compelling circumstances" United States v Reese, 699 F 2d at 804, Wheat, 486 U S at 158, Holloway v Arkansas, 435 U S 475 (1978)

In Rodriguez v District Court for the City and County of Denver, et al, 719 P 2d 699 (Colo *en banc*) the Supreme Court of Colorado held that the petitioner Rodriguez was entitled to waive conflict-free representation where another member of the public defender's office had represented a potential witness adverse to the petitioner, Margie Marquez, who cooperated with the prosecution against petitioner prior to his murder trial behind her Public Defender's back. The Supreme Court of Colorado agreed with Rodriguez that his waiver of that clear conflict of interest in his capital case should prevent disqualification of his Public Defender, even though the Court had to assume that Marquez's public defender acquired confidential information about her that could be used against her as a state's witness during Rodriguez's trial. The Court held that Rodriguez's desire for continued representation by his Public defender was entitled to "great weight," and that confidences gained by the Public Defender's Office about Marquez would have to be handled by the trial judge to ensure her rights were also protected. Rodriguez v District Court for the City and County of Denver, et al, 719 P 2d 699, 705-707 (Colo *en banc*) Since the trial court had incorrectly reasoned Rodriguez could not waive the conflict, the case was remanded so that Rodriguez could waive the conflict of interest on the record.

Likewise, Stevenson's testified at the pretrial hearing that his participation included interviewing one witness without taking notes and taking a few photographs. He also admitted

that most of his efforts were subsumed by the actions of SLED investigators. It is clear petitioner's capital case would have been decided differently by the Colorado Supreme Court, given the much different Sixth Amendment constitutional approach of that Court.

Regarding these different approaches, the Rodriguez Court wrote

*Most courts have developed a balancing test to determine under what circumstances concerns for public confidence in the integrity of the judicial process may be found to outweigh the interest of a defendant in being represented by a particular attorney whose effectiveness may be impaired by the presence of conflicts of interest involving rights of a former client-witness. See, e.g., United States v. James, 708 F.2d 40 (2d Cir. 1983), United States v. Agosto, 675 F.2d 965 (C.A. Minn. 1982), cert. denied after remand and affirmance *sub nom.* Gustafson v. United States, 459 U.S. 834 (1982), United States v. Cunningham, 672 F.2d 1064 (2d Cir. 1982), United States v. Arnedo-Sarmiento, 524 F.2d 591 (2d Cir. 1975), United States v. Garcia, 517 F.2d 272 (5th Cir. 1975), see also Gary T. Lowenthal, Successive Representation by Criminal Lawyers, 93 Yale L.J. 1 (1983). Under this approach, the trial court must evaluate the defendant's preference for particular counsel, the witness' right to confidentiality of communications, and the public's interest in maintaining the integrity of the judicial process as well as the nature of the particular conflict of interest involved.*

Other courts, while implicitly engaging in a balancing process, have expressly emphasized the nature of the conflict of interest itself in determining whether a knowing waiver of conflict-free representation by a defendant will permit continued representation by an attorney who must labor under the impediment of this type of conflict of interest. See United States v. Provenzano, 620 F.2d 985 (3rd Cir. 1980), cert. denied, 449 U.S. 899 (1980), United States v. Tocco, 575 F.Supp. 100 (N.D. Ill. 1983), United States v. Seigner, 498 F.Supp. 282 (E.D. Pa. 1980), Commonwealth v. Connor, 381 Mass. 500, 410 N.E.2d 709 (Mass. 1980). See generally E. Margolin & S. Coliver, Pretrial Disqualification of Criminal Defense Counsel, 20 Am. Crim. L. Rev. 227 (1981). In recognition of the great variety of circumstances in which conflicts of interest may arise during litigation, we adopt the balancing approach as best designed to ensure careful scrutiny of the important competing interests inevitably present.

Rodriguez v District Court for the City and County of Denver, et al, 719 P 2d 699, 706, 707

(Colo *en banc*)³ (emphasis added)

In People v Harlan, 54 P 3d 871 (*En banc* Colo 2002), the Supreme Court of Colorado held that disqualification of the petitioner’s long-time counsel of choice during post-conviction relief proceedings was an abuse of discretion even after defense counsel filed a motion for the appointment of an alternate defense counsel to investigate any potential ineffective assistance of council claims The court relied on the balancing test laid out in Rodriguez, 719 P 2d 699 and found that the nature of the conflict was too remote to require disqualification *Id* at 875

The court noted that counsel of choice should only be disqualified “to remedy situations in which continued representation would in some way tarnish the judicial process” *Id* at 876 Where there is no substantial conflict, waiver is acceptable and disqualification is inappropriate *Id* at 877 The court found that there was not a substantial conflict in Harlan because the petitioner merely asked for appointment of counsel to investigate whether there was a basis for asserting ineffective assistance of counsel He did not assert it *Id* at 880

The conflict here was tenuous at best The trial court at one point stated it looked like the only way Stevenson would be a witness was for him to be a defense witness about poor evidence preservation Even if Stevenson was a state’s witness it was clear from the time the trial judge ruled that Murphy had to be disqualified as petitioner’s counsel of choice that he had precious little to add In the final analysis, of course, he not surprisingly had nothing to add and he did not even testify Any conflict here was a potential conflict, at best, and should have been ruled cured by petitioner’s and Murphy’s waiver

³ For ease of reference full internal citations have been included for all case cited in the quote where the Rodriguez court in several citations gave only the first name of the defendant and the citation

As seen above, there is a split in how different jurisdictions analyze this important Sixth Amendment right to appointed counsel of choice issue when faced with the prosecutions allegation that a conflict of interest exists and where it seeks to disqualify counsel over objection

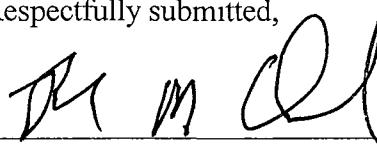
For example, in United States v Lanoue, 137 F 3d 656 (1st Cir 1998), the Circuit Court held that defense counsel was properly disqualified over the objection of Lanoue and his counsel where counsel represented co-defendant Cole during the first trial and Cole was acquitted on all charges The government argued it may call Cole on the issue of whether Lanoue possessed a firearm on the day in question because a conflict of interest could arise if the attorney had to cross-examine Cole The Court reasoned if that happened it could be problematic and the Court held that Lanoue's counsel, who had procured an acquittal for his co-defendant, was properly disqualified from representing Lanoue

Lanoue and Rodriguez cannot be reconciled as Sixth Amendment jurisprudence because of different approaches to analyzing alleged conflicts of interests when both the defendant and his counsel wish for counsel to remain as counsel over the state's objection that a conflict of interest exists or may come to exist Petitioner submits this case presents an excellent vehicle for this Court to resolve such disparate holdings on this issue

CONCLUSION

Based on the foregoing, a writ of certiorari should be granted to allow full briefing on this
issue

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'R M Dudek', written over a horizontal line.

ROBERT M DUDEK

Counsel of Record

South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

October 6, 2011

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2011

No 11-

KENNETH HARRY JUSTUS,

Petitioner,

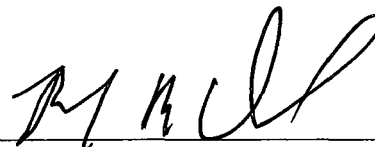
v

STATE OF SOUTH CAROLINA,

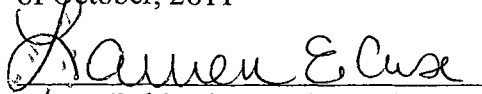
Respondent

CERTIFICATE OF SERVICE

I certify that copies of the petition for writ of certiorari and appendix in this case have been served upon opposing counsel by mailing copies in envelopes properly addressed with postage prepaid on this 6th day of October, 2011


ROBERT M DUDEK
Counsel of Record

SWORN TO BEFORE me this 6th day
of October, 2011

 (L S)
Notary Public for South Carolina
My Commission Expires August 23, 2014

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2011

No 11-

KENNETH HARRY JUSTUS,

Petitioner,

v

STATE OF SOUTH CAROLINA,

Respondent

A P P E N D I X

ROBERT M DUDEK
Attorney at Law

South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State,

Respondent,

v

Kenneth Harry Justus,

Appellant

Appeal from Dorchester County
Diane Schafer Goodstein, Circuit Court Judge
,

Opinion No 26971
Heard March 3, 2011 – Filed May 9, 2011

AFFIRMED

Chief Appellate Defender Robert M Dudek and Senior Appellate
Defender Joseph L Savitz, III, both of South Carolina Commission
on Indigent Defense, of Columbia, for Appellant

Attorney General Alan Wilson, Chief Deputy Attorney General John
W McIntosh, Assistant Deputy Attorney General Donald J
Zelenka, and Assistant Attorney General J Anthony Mabry, all of
Columbia, and Solicitor David Michael Pascoe, Jr , of Orangeburg,
for Respondent

Interest " The solicitor's concern stemmed from Murphy's representation of the solicitor's lead investigator, Tim Stevenson, in his divorce action. Stevenson was purported to be a potential witness in the prosecution against Appellant.

The trial court conducted an evidentiary hearing on the matter in February 2006. At the hearing, Stevenson testified that he had hired Murphy to represent him in his divorce in June 2005, only a few months prior to Murphy's appointment as Appellant's lawyer. He testified that he hired her for the entire divorce and that he still considered her his lawyer. Further, he testified that she had not withdrawn as his lawyer or notified him that she no longer represented him. Murphy, on the other hand, testified that she had agreed to represent Stevenson only to complete his separation agreement, which had been completed. She acknowledged that she had not sent a formal notice of withdrawal. There was no written agreement between Murphy and Stevenson. Both sides presented expert testimony on the conflict of interest issue.

Ultimately, the trial court removed Murphy from the case, noting that it could "not risk the possibility of Mr. Stevenson being called in this case and needing [sic] to be cross examined," and appointed new second-chair counsel.

More than two and one-half years later, on December 11, 2008, Appellant pled guilty to murder. During the sentencing phase, the trial court sentenced Appellant to death for Bregenzer's murder, citing Appellant's prior murder convictions as the aggravating circumstance. See S.C. Code Ann. § 16-3-20(C)(a)(2) (2003) ("The murder was committed by a person with a prior conviction for murder.")

II

A

Appellant raises one issue on appeal: did the trial court abuse its discretion by disqualifying Appellant's originally appointed second-chair counsel? We hold that it did not.

An accused has the right to the assistance of counsel U S Const amend VI, Gideon v Wainwright, 372 U S 335 (1963) "[A] motion to relieve counsel is addressed to the discretion of the trial judge and will not be disturbed absent an abuse of discretion " State v Gregory, 364 S C 150, 152, 612 S E 2d 449, 450 (2005) (quoting State v Graddick, 345 S C 383, 385, 548 S E 2d 210, 211 (2001))

We acknowledge that it is a close question whether Murphy's representation of Stevenson was ongoing or had concluded Moreover, it is fairly debatable whether Stevenson's potential testimony presented an actual conflict of interest However, given the conflicting evidence before the trial court, and giving deference to its findings of fact, we find no abuse of discretion in the disqualification of Murphy

We recognize the State's motion came on the heels of our decision in State v Gregory ⁶ Gregory presents a far more compelling case for relieving counsel than the case before us today At Gregory's insistence, defense counsel moved to be relieved after informing Gregory of counsel's representation of an assistant solicitor in a divorce action Gregory believed his counsel and the solicitor's office were "in cahoots " Finding no prejudice to counsel's continued representation of Gregory, the trial court denied the motion to relieve counsel We reversed, finding "Gregory's attorney had an actual conflict because he placed himself in a 'situation inherently conducive to divided loyalties' by simultaneously representing Gregory and the assistant solicitor who was handling his criminal case " Id at 154, 612 S E 2d at 451 Notwithstanding the distinguishing features in Gregory, we cannot say the decision to relieve Murphy amounted to an abuse of discretion ⁷

B

⁶ Gregory was filed in April 2005, only months before Appellant was indicted

⁷ In light of the fundamental nature of the Sixth Amendment right to counsel and the prosecutor's duty to seek justice, the State must exercise caution in this area It is the threat of an actual conflict that justifies the State's effort to deprive an accused of his counsel, hypothetical or speculative conflicts are insufficient Different considerations are at play when an accused seeks to relieve his or her counsel, as Gregory illustrates

We note Appellant was ultimately represented by attorneys with substantial death penalty experience, Walter Bailey and Norbert Cummings. Appellant had long expressed a desire to plead guilty and to receive the death penalty. The trial court conducted an extensive guilty plea *voir dire*,⁸ including numerous questions which revealed Appellant's complete satisfaction with Bailey and Cummings.⁹

III

Proportionality Review

We review the proportionality of Appellant's sentence in accordance with South Carolina law. S.C. Code Ann. § 16-3-25 (2003). The aggravating circumstance in this case is a prior conviction for murder, for which section 16-3-20(C)(a)(2) permits the imposition of the death penalty. We find the record establishes that the death sentence was not the result of passion, prejudice, or any other arbitrary factor. Furthermore, a review of other decisions in which a defendant was sentenced to death when he had a prior conviction for murder demonstrates that Appellant's death sentence is neither excessive nor disproportionate. See State v. Motts, Op. No. 26947 (S.C. Sup. Ct. filed March 21, 2011) (Shearouse Adv. Sh. No. 10 at 45), State v. Atkins, 303 S.C. 214, 399 S.E.2d 760 (1990).

⁸ Prior to Appellant's guilty plea, the trial court held a State v. Blair, 275 S.C. 529, 273 S.E.2d 536 (1981), hearing to determine whether Appellant was competent to plead guilty and to assist his attorneys in his defense. The trial court found that Appellant was competent, and there is no suggestion to the contrary.

⁹ Prior to the guilty plea hearing, Appellant had instructed his attorneys not to present any mitigating evidence. Nonetheless, Bailey and Cummings investigated possible mitigating circumstances and prepared to introduce evidence in that regard. They even sought ethical advice on the potential presentation of mitigating evidence notwithstanding Appellant's instructions. In the sentencing phase, Appellant wrote a note to the trial court, which stated, "[I] ask that you punish me to the fullest extent of the law, this being the death sentence. I truly believe this punishment is the only just punishment for the crime I've committed."

))

AFFIRMED

TOAL, C J , PLEICONES, BEATTY and HEARN, JJ , concur

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K Suter
Clerk of the Court
(202) 479 3011

August 2, 2011

Mr Robert M Dudek
SC Commission on Indigent Defense
Division of Appellate Defense
1330 Lady St , Suite 401
Columbia, SC 29201

Re Kenneth Harry Justus
v South Carolina
Application No 11A139

Dear Mr Dudek

The application for an extension of time within which to file a petition for a writ of certiorari in the above entitled case has been presented to The Chief Justice, who on August 2, 2011 extended the time to and including October 6, 2011

This letter has been sent to those designated on the attached notification list

Sincerely,

William K Suter, Clerk

by

Gail Johnson
Case Analyst

—

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479 3011

NOTIFICATION LIST

Mr. Robert M. Dudek
SC Commission on Indigent Defense
Division of Appellate Defense
1330 Lady St., Suite 401
Columbia, SC 29201

Clerk
Supreme Court of South Carolina
Post Office Box 11330
Columbia, SC 29211

SOUTH CAROLINA CODE OF LAWS ANNOTATED

TITLE 16 CRIMES AND OFFENSES
CHAPTER 3 OFFENSES AGAINST THE PERSON
ARTICLE 1 HOMICIDE

S C Code Ann § 16-3-20 (2009)

§ 16-3-20 Punishment for murder separate sentencing proceeding to determine whether sentence should be death or life imprisonment

(A) A person who is convicted of or pleads guilty to murder must be punished by death by imprisonment for life or by a mandatory minimum term of imprisonment for thirty years. If the State seeks the death penalty and a statutory aggravating circumstance is found beyond a reasonable doubt pursuant to subsections (B) and (C) and a recommendation of death is not made, the trial judge must impose a sentence of life imprisonment. For purposes of this section, life imprisonment means until death of the offender without the possibility of parole and when requested by the State or the defendant, the judge must charge the jury in his instructions that life imprisonment means until the death of the defendant without the possibility of parole. In cases where the defendant is eligible for parole, the judge must charge the applicable parole eligibility statute. No person sentenced to life imprisonment pursuant to this section is eligible for parole, community supervision, or any early release program, nor is the person eligible to receive any work credits, education credits, good conduct credits, or any other credits that would reduce the mandatory life imprisonment required by this section. No person sentenced to a mandatory minimum term of imprisonment for thirty years pursuant to this section is eligible for parole or any early release program, nor is the person eligible to receive any work credits, education credits, good conduct credits, or any other credits that would reduce the mandatory minimum term of imprisonment for thirty years required by this section. Under no circumstances may a female who is pregnant be executed so long as she is pregnant or for a period of at least nine months after she is no longer pregnant. When the Governor commutes a sentence of death to life imprisonment under the provisions of Section 14 of Article IV of the Constitution of South Carolina, 1895, the commuttee is not eligible for parole, community supervision, or any early release program, nor is the person eligible to receive any work credits, good conduct credits, education credits, or any other credits that would reduce the mandatory imprisonment required by this subsection.

(B) When the State seeks the death penalty, upon conviction or adjudication of guilt of a defendant of murder, the court shall conduct a separate sentencing proceeding. In the proceeding, if a statutory aggravating circumstance is found, the defendant must be sentenced to either death or life imprisonment. If no statutory aggravating circumstance is found, the defendant must be sentenced to either life imprisonment or a mandatory minimum term of imprisonment for thirty years. The proceeding must be conducted by the trial judge before the trial jury as soon as practicable after the lapse of twenty-four hours unless waived by the defendant. If trial by jury has been waived by the defendant and the State, or if the defendant pleaded guilty, the sentencing proceeding must be conducted before the judge. In the sentencing proceeding, the jury or judge shall hear additional evidence in extenuation, mitigation, or aggravation of the punishment. Only such evidence in aggravation as the State has informed the defendant in writing before the trial is admissible. This section must not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the State of South Carolina or the applicable laws of either. The State, the defendant, and his counsel are permitted to present arguments for or against the sentence to be imposed. The defendant and his counsel shall have the closing argument regarding the sentence to be imposed.

(C) The judge shall consider, or he shall include in his instructions to the jury for it to consider, mitigating circumstances otherwise authorized or allowed by law and the following statutory aggravating and mitigating circumstances which may be supported by the evidence:

(a) Statutory aggravating circumstances

(1) The murder was committed while in the commission of the following crimes or acts:

(a) criminal sexual conduct in any degree

(b) kidnapping

(c) burglary in any degree

(d) robbery while armed with a deadly weapon

(e) larceny with use of a deadly weapon

(f) killing by poison

(g) drug trafficking as defined in Section 44-53-370(e), 44-53-375(B), 44-53-440, or 44-53-445

(h) physical torture

- (i) dismemberment of a person or
- (j) arson in the first degree as defined in Section 16 11 110(A)
- (2) The murder was committed by a person with a prior conviction for murder
- (3) The offender by his act of murder knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which normally would be hazardous to the lives of more than one person
- (4) The offender committed the murder for himself or another for the purpose of receiving money or a thing of monetary value
- (5) The murder of a judicial officer former judicial officer solicitor former solicitor or other officer of the court during or because of the exercise of his official duty
- (6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person
- (7) The murder of a federal, state, or local law enforcement officer or former federal state or local law enforcement officer peace officer or former peace officer corrections officer or former corrections officer including a county or municipal corrections officer or a former county or municipal corrections officer a county or municipal detention facility employee or former county or municipal detention facility employee or fireman or former fireman during or because of the performance of his official duties
- (8) The murder of a family member of an official listed in subitems (5) and (7) above with the intent to impede or retaliate against the official Family member means a spouse parent brother sister child or person to whom the official stands in the place of a parent or a person living in the official's household and related to him by blood or marriage
- (9) Two or more persons were murdered by the defendant by one act or pursuant to one scheme or course of conduct
- (10) The murder of a child eleven years of age or under
- (11) The murder of a witness or potential witness committed at any time during the criminal process for the purpose of impeding or deterring prosecution of any crime
- (12) The murder was committed by a person deemed a sexually violent predator pursuant to the provisions of Chapter 48 Title 44 or a person deemed a sexually violent predator who is released pursuant to Section 44 48 120

(b) Mitigating circumstances

- (1) The defendant has no significant history of prior criminal conviction involving the use of violence against another person
- (2) The murder was committed while the defendant was under the influence of mental or emotional disturbance
- (3) The victim was a participant in the defendant's conduct or consented to the act
- (4) The defendant was an accomplice in the murder committed by another person and his participation was relatively minor
- (5) The defendant acted under duress or under the domination of another person
- (6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired
- (7) The age or mentality of the defendant at the time of the crime
- (8) The defendant was provoked by the victim into committing the murder
- (9) The defendant was below the age of eighteen at the time of the crime
- (10) The defendant had mental retardation at the time of the crime Mental retardation means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period

The statutory instructions as to statutory aggravating and mitigating circumstances must be given in charge and in writing to the jury for its deliberation The jury if its verdict is a recommendation of death shall designate in writing and signed by all members of the jury the statutory aggravating circumstance or circumstances which it

found beyond a reasonable doubt. The jury, if it does not recommend death after finding a statutory aggravating circumstance or circumstances beyond a reasonable doubt, shall designate in writing, and signed by all members of the jury, the statutory aggravating circumstance or circumstances it found beyond a reasonable doubt. In nonjury cases the judge shall make the designation of the statutory aggravating circumstance or circumstances. Unless at least one of the statutory aggravating circumstances enumerated in this section is found, the death penalty must not be imposed.

Where a statutory aggravating circumstance is found and a recommendation of death is made, the trial judge shall sentence the defendant to death. The trial judge, before imposing the death penalty, shall find as an affirmative fact that the death penalty was warranted under the evidence of the case and was not a result of prejudice, passion, or any other arbitrary factor. Where a statutory aggravating circumstance is found and a sentence of death is not recommended by the jury, the trial judge shall sentence the defendant to life imprisonment as provided in subsection (A). Before dismissing the jury, the trial judge shall question the jury as to whether or not it found a statutory aggravating circumstance or circumstances beyond a reasonable doubt. If the jury does not unanimously find any statutory aggravating circumstances or circumstances beyond a reasonable doubt, it shall not make a sentencing recommendation. Where a statutory aggravating circumstance is not found, the trial judge shall sentence the defendant to either life imprisonment or a mandatory minimum term of imprisonment for thirty years. No person sentenced to life imprisonment or a mandatory minimum term of imprisonment for thirty years under this section is eligible for parole or to receive any work credits, good conduct credits, education credits, or any other credits that would reduce the sentence required by this section. If the jury has found a statutory aggravating circumstance or circumstances beyond a reasonable doubt, the jury shall designate this finding, in writing, signed by all the members of the jury. The jury shall not recommend the death penalty if the vote for such penalty is not unanimous as provided. If members of the jury after a reasonable deliberation cannot agree on a recommendation as to whether or not the death sentence should be imposed on a defendant found guilty of murder, the trial judge shall dismiss such jury and shall sentence the defendant to life imprisonment as provided in subsection (A).

(D) Notwithstanding the provisions of Section 14-7-1020, in cases involving capital punishment a person called as a juror must be examined by the attorney for the defense.

(E) In a criminal action in which a defendant is charged with a crime which may be punishable by death, a person may not be disqualified, excused, or excluded from service as a juror by reason of his beliefs or attitudes against capital punishment unless such beliefs or attitudes would render him unable to return a verdict according to law.

IN THE SUPREME COURT OF THE UNITED STATES

- October Term, 2011

No 11-

KENNETH HARRY JUSTUS,

Petitioner,

v

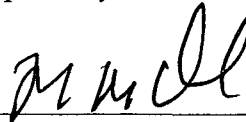
STATE OF SOUTH CAROLINA,

Respondent

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Kenneth Harry Justus requests leave to proceed in forma pauperis, in accordance with the provisions of Title 28 U S C §1915. The affidavit of Petitioner in support of this motion is attached, along with the petition for writ of certiorari.

Respectfully submitted,



Robert M. Dudek
Attorney at Law
South Carolina Commission
on Indigent Defense,
Division of Appellate Defense
1330 Lady Street, Fourth Floor
Columbia, SC 29201
(803) 734-1330

October 6, 2011

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 2010

No A-

KENNETH HARRY JUSTUS,

Petitioner,

v

STATE OF SOUTH CAROLINA,

Respondent

AFFIDAVIT OF KENNETH HARRY JUSTUS
IN SUPPORT OF MOTION TO
PROCEED IN FORMA PAUPERIS

I, Kenneth Harry Justus, being duly sworn, state that I am the petitioner in this case, that because of my poverty I am unable to pay the costs of or give security for this proceeding, that I believe I am entitled to redress

The responses to the questions and instructions below relating to my ability to pay costs or give security are true

1 Are you presently employed?

a If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer

No

b If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received

1996 - wages \$ 10.00 / hour

- 2 Have you received within the past twelve months any income from a business, progression or other form of self-employment, or in the form of rent payments, interest, dividends, or other sources?

No

- a If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months

- 3 Do you own any cash or checking or savings account?

No

- a If the answer is yes, state the total value of the items owned

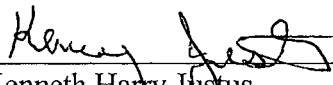
- 4 Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? No

- a If the answer is yes, describe the property and state its approximate value

5 List the persons who are dependent upon you for support and state your relationship to those persons

None

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury


Kenneth Harry Justus

SWORN to and subscribed before me
this 9th day of September, 2011

 (L.S.)
Notary Public for South Carolina

My Commission Expires Sept 22 2018.

**Supreme Court of the United States
'Office of the Clerk
Washington, DC 20543-0001**

William K Suter
Clerk of the Court
(202) 479 3011

August 2, 2011

Clerk
Supreme Court of South Carolina
Post Office Box 11330
Columbia, SC 29211

Re Kenneth Harry Justus
v South Carolina
Application No 11A139
(Your No 269171)

Dear Clerk

The application for an extension of time within which to file a petition for a writ of certiorari in the above entitled case has been presented to The Chief Justice, who on August 2, 2011 extended the time to and including October 6, 2011

This letter has been sent to those designated on the attached notification list

Sincerely,

William K Suter, Clerk

by

Gail Johnson
Case Analyst

**Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001**

William K. Suter
Clerk of the Court
(202) 479 3011

NOTIFICATION LIST

Mr. Robert M. Dudek
SC Commission on Indigent Defense
Division of Appellate Defense
1330 Lady St., Suite 401
Columbia, SC 29201

Clerk
Supreme Court of South Carolina
Post Office Box 11330
Columbia, SC 29211



Division of Appellate Defense
1330 Lady Street Suite 401
Columbia South Carolina 29201 3332
Post Office Box 11589
Columbia South Carolina 29211 1589
Telephone (803) 734 1330
Facsimile (803) 734 1397

Robert M. Dudek Acting Chief Appellate Defender
Wanda H. Carter Deputy Chief Appellate Defender
Joseph L. Savitz III Senior Appellate Defender

RECEIVED

July 21, 2011

JUL 21 2011

S C Supreme Court

Honorable William K. Suter
Clerk, Supreme Court of the United States
1111 First Street, NE
Washington, DC 20543

Re Kenneth Harry Justus v. State of South Carolina

Dear Mr. Suter:

Enclosed please find for filing, with proof of service, the original and two (2) copies of the Motion for Extension of Time in which to File Petition for Writ of Certiorari in the above-referenced capital case that is directed to Chief Justice John G. Roberts.

Yours truly,

Robert M. Dudek
Chief Appellate Defender

Enclosure

cc Daniel Shearouse, Clerk, South Carolina Supreme Court
Donald J. Zelenka, Assistant Deputy Attorney General
J. Anthony Mabry, Assistant Attorney General

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 2010

No. A-

RECEIVED

JUL 21 2011

KENNETH HARRY JUSTUS,

Petitioner, **S C. Supreme Court**

v

STATE OF SOUTH CAROLINA,

Respondent

APPLICATION FOR EXTENSION OF TIME IN WHICH
TO FILE PETITION FOR WRIT OF CERTIORARI

To the Honorable John G. Roberts, Jr., Chief Justice of the United States and Circuit Justice for the Fourth Circuit

The petitioner Kenneth Harry Justus prays that an order be entered extending the time for filing a petition for a writ of certiorari for a period of sixty (60) days to and including October 7, 2011. This application is submitted more than ten days prior to the scheduled filing date for the petition. The pertinent dates are

May 9, 2011 The South Carolina Supreme Court affirmed the judgment of conviction and sentence of death State v. Justus, 392 S.C. 416, 709 S.E. 2d 668 (2011).

August 8, 2011 Expiration of time for the filing of a petition for a writ of certiorari, unless extended

October 7, 2011 Expiration of requested sixty day extension of time for filing of a petition for writ of certiorari

The petition will present a federal constitutional issue for review

Whether the court denied Petitioner his Sixth Amendment right to counsel in this capital case by granting the State's motion to disqualify appointed counsel, with whom Petitioner had developed a trusting legal relationship, and who he wanted to continue as his attorney, simply because she had represented an investigator employed by the Solicitor's Office in an unrelated domestic matter?

Petitioner will invoke this Court's jurisdiction under 28 U S C § 1257(a) This extension of time is requested because

(a) This is a capital case and as such requires especially complete research and careful drafting so as to properly present the petitioner's federal constitutional claim to this Court

Petitioner's lead counsel, Robert Dudek, is the Chief Appellate Defender for the Appellate Division of the South Carolina Office of Indigent Defense Counsel's division normally handles between eight-hundred-and-fifty to one thousand criminal appeals a year before the South Carolina Court of Appeals and the South Carolina Supreme Court Counsel supervises eight other Appellate Defenders and a support staff and maintains his own heavy caseload of mostly murder and death penalty cases In the last sixty days counsel filed the following briefs and petitions for a writ of certiorari Counsel filed the brief of petitioner in the murder case of State v Chris Anthony Liverman and a brief of petitioner in the burglary in the first degree case of State v Kevin Odems with the state Supreme Court, both on July 15, 2011 Counsel is working on the death penalty case of State v Steven Stanko with the brief to be filed in the state Supreme Court next month August 2011 The transcript in that case is 3439 pages

long Counsel and co-counsel just filed the petition for writ of certiorari in death penalty case Bayan Alksey v State with the state Supreme Court on June 22, 2011, which was 90 pages long, included 9 issues, and had an accompanying appendix in excess of 6 000 pages Counsel filed the petition for rehearing in the murder case of State v Aurelio Vincent Ottey with the state Court of Appeals on June 29, 2011 Counsel tried a remand motion for a new trial based on after-discovered evidence in State v Gerald Pitts before Judge J Derham Cole on Tuesday, June 28, 2011 in the Spartanburg County Court of General Sessions Counsel filed the initial brief and designation of matter in the murder case of State v Norman Stoudenmire with the Court of Appeals on June 24, 2011 Counsel also filed the brief of respondent in the murder case of State v Charles Q Jackson with the state Supreme Court on June 24, 2011 Counsel filed the initial brief and designation of matter in the murder case of State v Richard Deas with the state Court of Appeals on June 15, 2011 Counsel on June 8, 2011 argued the murder case of State v Ottey before the state Court of Appeals On Thursday, June 2, 2011, while on death row with Jerry Buck Inman, counsel's client in death penalty case of State v Jerry Buck Inman, Inman informed counsel he wished to resume his appeal and no longer wished to waive his appeals and be executed Counsel had to file a motion to resume mandatory appeal with the state Supreme Court the next morning, Friday, June 3, 2011 That motion was granted by the state Supreme Court on Friday afternoon, June 3, 2011, and counsel arranged for the cancellation of the competency to waive appeals and be executed evaluation with forensic psychiatrist Dr Richard Frierson and his team at the Department of Mental Health on Monday, June 6 2011 Counsel also has assisted co-counsel Charles Grose in preparing for the oral argument in State v Roy Otis Tennant before the state Supreme Court on June 8, 2011 Counsel argued the death penalty case of State v William

Dickerson before the state Supreme Court on Tuesday, May 24, 2011. In addition to the above, counsel has very extensive administrative duties as the Chief Appellate Defender.

(b) Counsel, within the next twenty-one days will have to file a brief in opposition with this Court in the case of State v. Jack Edward Earl Parker, which will be filed on Wednesday, August 10, 2011. Counsel will also file a brief in the state Supreme Court in the death penalty case of State v. Steven Stanko in August, 2010. Again, the transcript in that case is 3439 pages long, and counsel is raising five meritorious issues. Counsel will also file a petition for writ of certiorari from the state Court of Appeals to the state Supreme Court tomorrow, July 22, 2011 in State v. Juan Orozco, 392 S.C. 212, 708 S.E.2d 227 (2011) since appellate counsel in that case left to return to private practice. In addition, counsel also must file a brief in the state Court of Appeals in the case of State v. Robert Johnson on Monday, July 25, 2011. Counsel also has oversight duty of the vast majority of all statewide capital and non-capital appeals as the Chief Appellate Defender. Counsel also serves on the Commission on Indigent Defense's Performance Standards Committee for Public and Appellate Defenders that will meet again on July 26, 2011.

Counsel for the respondent State of South Carolina, Donald J. Zelenka and J. Anthony Mabry of the South Carolina Attorney General's Office have both advised the undersigned that the state does not have any opposition to this request.

WHEREFORE, petitioner requests an order extending the time for filing his petition for a writ of certiorari to and including October 7, 2011

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'R M Dudek', written over a horizontal line.

ROBERT M DUDEK
Chief Appellate Defender

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332

ATTORNEY FOR PETITIONER

July 21, 2011

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2010

No. A -

KENNETH HARRY JUSTUS,

Petitioner,

v

STATE OF SOUTH CAROLINA,

Respondent

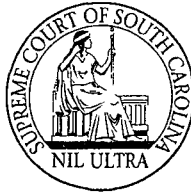
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Motion for Extension in Which to File Petition for Writ of Certiorari has been served upon opposing counsel, Donald J. Zelenka and J. Anthony Mabry by mailing one (1) copy to each in an envelope properly addressed with postage prepaid this 21st day of July, 2011, to

Donald J. Zelenka, Esquire
J. Anthony Mabry, Esquire
Assistant Deputy Attorney General
Office of the Attorney General
PO Box 11549
Columbia, SC 29211



ROBERT M. DUDEK
Chief Appellate Defender
ATTORNEY FOR PETITIONER



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734 1080

FAX (803) 734 1499

June 22, 2011

Chief Appellate Defender Robert M. Dudek
South Carolina Commission on Indigent Defense
P O Box 11589
Columbia, SC 29211

Re The State v. Justus, Kenneth Harry

Dear Counsel

Enclosed is the order issued in the above entitled matter

Very truly yours,

CLERK

DES/dmh

Enclosure

cc Assistant Deputy Attorney General Donald J. Zelenka
Assistant Attorney General J. Anthony Mabry
Solicitor David Michael Pascoe, Jr.

The Supreme Court of South Carolina

The State,

Respondent,

v

Kenneth Harry Justus,

Appellant

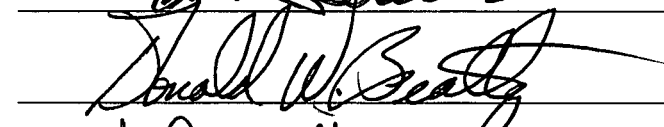
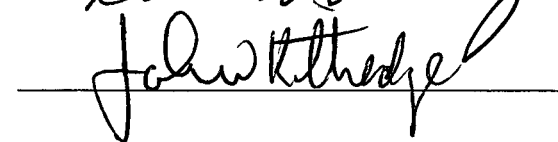
ORDER

This Court recently affirmed appellant's conviction and death sentence in State v Justus, Op No 26971 (S C Sup Ct filed May 9, 2011). The remittitur was sent to the lower court on May 25, 2011. Appellant has now filed a petition for stay of execution to allow him to file a petition for a writ of certiorari in the United States Supreme Court. The State has filed a return stating it does not oppose a stay of execution while appellant seeks a writ of certiorari in the United States Supreme Court.

Because appellant intends to raise to the United States Supreme Court a federal question that is preserved for review, we grant the petition for a stay of execution pursuant to In re Stays of Execution in Capital Cases, 321 S C 544, 471 S E 2d 140 (1996), and the stay shall remain in effect to the extent provided by this Court therein.

IT IS SO ORDERED


C J

J

J

J

Justice Kaye G Hearn , not participating

Columbia, South Carolina

June 22, 2011

**STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

Appeal from Dorchester County
Diane S. Goodstein, Circuit Court Judge

RECEIVED

JUN 2 2011

S C. Supreme Court

STATE OF SOUTH CAROLINA,

Respondent,

v

KENNETH HARRY JUSTUS,

Appellant

RETURN TO PETITION FOR STAY OF EXECUTION

Appellant, Kenneth Harry Justus, a death row inmate, has filed a Petition for Stay of Execution with this Court to seek certiorari from the United States Supreme Court from this Court's decision in State v. Justus, __ S C __, __ S E 2d __, 2011 WL 1758827 (2011), affirming his conviction and death sentence from Dorchester County. Respondent does not oppose the request for a stay of execution to attempt to seek certiorari from the United States Supreme Court. Respondent does not consent to stay of execution for any other reason.

Respectfully Submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J ZELENKA
Assistant Deputy Attorney General

J ANTHONY MABRY
Assistant Attorney General
P O Box 11549
Columbia, SC 29211
(803) 734-6305

By 

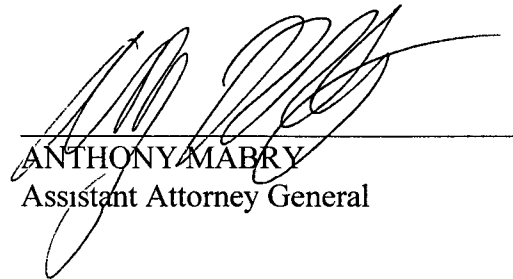
ANTHONY MABRY
Assistant Attorney General
ATTORNEYS FOR RESPONDENT

P O Box 11549
Columbia, SC 29211

June 2, 2011

CERTIFICATE OF SERVICE

I, **Anthony Mabry**, hereby certify that I have served the ***Return to Petition for Stay of Execution*** in the foregoing action by depositing copies in the InterAgency Mail to Robert M Dudek, Chief Attorney for Capital Appeals, Division of Appellate Defense, 1330 Lady Street, Suite 401, Columbia, SC 29201 this 2nd day of June, 2011



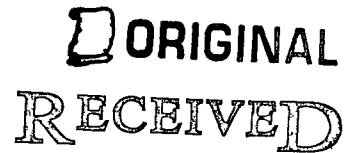
ANTHONY MABRY
Assistant Attorney General

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Dorchester County

Diane S. Goodstein, Circuit Court Judge

 ORIGINAL
RECEIVED

MAY 20 2011

S C Supreme Court

THE STATE,

RESPONDENT,

V

KENNETH HARRY JUSTUS,

APPELLANT

PETITION FOR STAY OF EXECUTION

Counsel for Kenneth Harry Justus, petitions this Court for a stay of execution to allow him to file a petition for writ of certiorari with the United States Supreme Court

I

This Court affirmed petitioner's convictions and death sentence in State v. Kenneth Harry Justus, Op. No. 26971, Shearouse's Adv. Sh. #16, at pp. 32-37 (filed May 9, 2011), 2011 WL 1758827 (S.C.).

II

A petition for writ of certiorari to the United States Supreme Court is now petitioner's proper avenue for relief from the judgment of this Court affirming his murder conviction, and

sentence of death Supreme Court Rule 13.1 Pursuant to *In re STAYS OF EXECUTION IN CAPITAL CASES*, 321 S.C. 544, 471 S.E.2d 544 (1996), this Court is the proper Court to issue the stay pending the disposition of petitioner's case in the United States Supreme Court

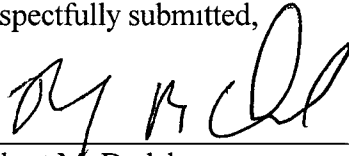
III

Petitioner will raise the following federal issue, preliminarily framed, in the United States Supreme Court

Whether petitioner was denied his right to counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, where the court relieved petitioner's counsel upon the prosecution's motion because counsel had represented a peripheral solicitor's investigator in an unrelated domestic matter where counsel and petitioner both insisted that prior family court representation did not impinge on this capital case in any manner?

WHEREFORE, counsel for Kenneth Harry Justus, requests a ninety day stay of execution from May 9, 2011 in which to file a petition for writ of certiorari in the United States Supreme Court

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'R. M. Dudek', written over a horizontal line.

Robert M. Dudek
Chief Appellate Defender

May 20, 2011

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Dorchester County

Diane S Goodstein, Circuit Court Judge

THE STATE,

RESPONDENT,

V

KENNETH HARRY JUSTUS,

APPELLANT

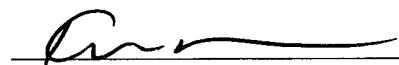
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Stay of Execution in the above-referenced case has been served upon opposing counsel, J Anthony Mabry, Esquire, this 20th day of May, 2011



Robert M Dudek
Chief Attorney for Capital Appeals

SUBSCRIBED AND SWORN TO before me
this 20th of May, 2011

 (L S)
Notary Public for South Carolina
My Commission Expires October 2, 2013



ALAN WILSON
ATTORNEY GENERAL

RECEIVED

JUN 2 2011

June 2, 2011

SC Supreme Court

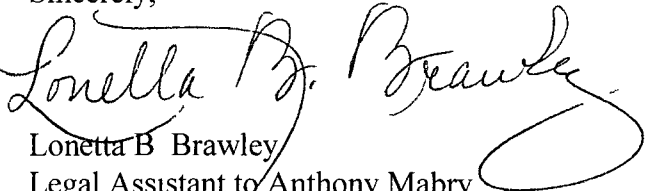
Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
P O Box 11330
Columbia, SC 29211

Re The State v. Kenneth Harry Justus

Dear Ms. Shearouse:

Enclosed please find the original and six (6) copies of Respondent's ***Return to Petition for Stay of Execution*** in the above-referenced matter for filing. By copy of this letter, I am serving opposing counsel with same.

Sincerely,


Lonetta B. Brawley
Legal Assistant to Anthony Mabry
Assistant Attorney General

/lbb
Enclosure

cc Robert M. Dudek, Esquire



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street Suite 401
Columbia South Carolina 29201 3332

Post Office Box 11589
Columbia South Carolina 29211 1589
Telephone (803) 734 1330
Facsimile (803) 734 1397

Robert M Dudek Chief Appellate Defender
Wanda H Carter Deputy Chief Appellate Defender

May 20, 2011

RECEIVED

MAY 20 2011

S C Supreme Court

Honorable Daniel E Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, SC 29211

Re The State v Kenneth Harry Justus (Capital Case)

Dear Mr Shearouse

Enclosed please find an original and six copies of the petition for stay of execution along with a certificate of service

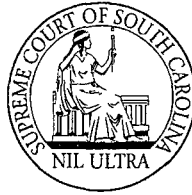
Sincerely,

Robert M Dudek
Deputy Chief Attorney for Capital Appeals

RMD/lc

Enclosure

cc J Anthony Mabry, Esquire



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734 1080

FAX (803) 734 1499

May 25, 2011

REMITTITUR

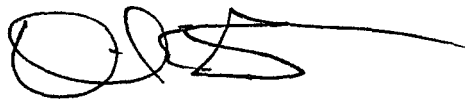
The Honorable Cheryl L. Graham
Clerk of Court, Dorchester County
5200 East Jim Bilton Boulevard
St. George, SC 29477

Re The State v. Justus, Kenneth Harry
2005-GS-18-01265

Dear Ms. Graham

The above referenced matter is hereby remitted to the lower court. A copy of the judgment of this Court is attached.

Very truly yours,



CLERK

DES/dmh

Enclosure

cc Chief Appellate Defender Robert M. Dudek
Assistant Deputy Attorney General Donald J. Zelenka
Assistant Attorney General J. Anthony Mabry
The Honorable David Michael Pascoe, Jr.

**THE STATE OF SOUTH CAROLINA
In The Supreme Court**

The State,

Respondent,

v

Kenneth Harry Justus,

Appellant

Appeal from Dorchester County
Diane Schafer Goodstein, Circuit Court Judge

Opinion No 26971
Heard March 3, 2011 – Filed May 9, 2011

AFFIRMED

Chief Appellate Defender Robert M Dudek and Senior Appellate
Defender Joseph L Savitz, III, both of South Carolina Commission
on Indigent Defense, of Columbia, for Appellant

Attorney General Alan Wilson, Chief Deputy Attorney General John
W McIntosh, Assistant Deputy Attorney General Donald J
Zelenka, and Assistant Attorney General J Anthony Mabry, all of
Columbia, and Solicitor David Michael Pascoe, Jr , of Orangeburg,
for Respondent

JUSTICE KITTREDGE This is a direct appeal in a death penalty case. Appellant raises one issue, asserting the trial court abused its discretion in disqualifying one of his two appointed counsel two years prior to his guilty plea to murder. We find no abuse of discretion and affirm.

I

On the evening of July 26, 2005, Appellant Kenneth Harry Justus murdered Justin Bregenzer.¹ At the time, Appellant was serving two consecutive life sentences at Lieber Correctional Institute, a maximum security prison, for murdering two convenience store workers in separate armed robberies in Oconee County.² Bregenzer had been stabbed eleven times and died from a stab wound to the heart.³ Appellant was arrested and indicted for Bregenzer's murder, and the State sought the death penalty.⁴

The trial court originally appointed Maite Murphy as second-chair defense counsel in October 2005.⁵ Shortly thereafter, in November 2005, and in response to our then recent decision in State v. Gregory, 364 S. C. 150, 612 S. E. 2d 449 (2005), the solicitor filed a motion entitled "Motion to Have the Court Determine Whether Defense Counsel has an Actual Conflict of

¹ Bregenzer's name is also spelled Breganzer in the record on appeal.

² Appellant murdered Randal Eades and Kitty Smith in separate armed robberies in 1997 and 1998, respectively. He was convicted of both murders and accompanying armed robbery charges and sentenced to two consecutive life sentences and two thirty-year sentences for armed robbery. He pled guilty to all charges.

³ Bregenzer was serving time under the Youthful Offender Act for car breaking and grand larceny and had been moved to Lieber for walking away from litter detail. He was scheduled to be released two months after his murder took place.

⁴ A trail of blood and several bloody footprints—which matched Appellant's boots—led from Bregenzer's cell to Appellant's cell. Investigators found Bregenzer's blood on Appellant's clothing and his thumbprint, in Bregenzer's blood, on Bregenzer's sink. They also found the shank used to stab Bregenzer in the bottom of his toilet and the matching wooden handle in the sewer system.

⁵ Appellant's original first-chair counsel, Marva Hardee-Thomas, was excused without objection for personal health reasons and replaced by a former solicitor, Walter Bailey.

Interest " The solicitor's concern stemmed from Murphy's representation of the solicitor's lead investigator, Tim Stevenson, in his divorce action. Stevenson was purported to be a potential witness in the prosecution against Appellant.

The trial court conducted an evidentiary hearing on the matter in February 2006. At the hearing, Stevenson testified that he had hired Murphy to represent him in his divorce in June 2005, only a few months prior to Murphy's appointment as Appellant's lawyer. He testified that he hired her for the entire divorce and that he still considered her his lawyer. Further, he testified that she had not withdrawn as his lawyer or notified him that she no longer represented him. Murphy, on the other hand, testified that she had agreed to represent Stevenson only to complete his separation agreement, which had been completed. She acknowledged that she had not sent a formal notice of withdrawal. There was no written agreement between Murphy and Stevenson. Both sides presented expert testimony on the conflict of interest issue.

Ultimately, the trial court removed Murphy from the case, noting that it could "not risk the possibility of Mr. Stevenson being called in this case and needing [sic] to be cross examined," and appointed new second-chair counsel.

More than two and one-half years later, on December 11, 2008, Appellant pled guilty to murder. During the sentencing phase, the trial court sentenced Appellant to death for Bregenzer's murder, citing Appellant's prior murder convictions as the aggravating circumstance. See S.C. Code Ann. § 16-3-20(C)(a)(2) (2003) ("The murder was committed by a person with a prior conviction for murder.")

II

A

Appellant raises one issue on appeal: did the trial court abuse its discretion by disqualifying Appellant's originally appointed second-chair counsel? We hold that it did not.

An accused has the right to the assistance of counsel U S Const amend VI, Gideon v Wainwright, 372 U S 335 (1963) "[A] motion to relieve counsel is addressed to the discretion of the trial judge and will not be disturbed absent an abuse of discretion " State v Gregory, 364 S C 150, 152, 612 S E 2d 449, 450 (2005) (quoting State v Graddick, 345 S C 383, 385, 548 S E 2d 210, 211 (2001))

We acknowledge that it is a close question whether Murphy's representation of Stevenson was ongoing or had concluded Moreover, it is fairly debatable whether Stevenson's potential testimony presented an actual conflict of interest However, given the conflicting evidence before the trial court, and giving deference to its findings of fact, we find no abuse of discretion in the disqualification of Murphy

We recognize the State's motion came on the heels of our decision in State v Gregory ⁶ Gregory presents a far more compelling case for relieving counsel than the case before us today At Gregory's insistence, defense counsel moved to be relieved after informing Gregory of counsel's representation of an assistant solicitor in a divorce action Gregory believed his counsel and the solicitor's office were "in cahoots " Finding no prejudice to counsel's continued representation of Gregory, the trial court denied the motion to relieve counsel We reversed, finding "Gregory's attorney had an actual conflict because he placed himself in a 'situation inherently conducive to divided loyalties' by simultaneously representing Gregory and the assistant solicitor who was handling his criminal case " Id at 154, 612 S E 2d at 451 Notwithstanding the distinguishing features in Gregory, we cannot say the decision to relieve Murphy amounted to an abuse of discretion ⁷

B

⁶ Gregory was filed in April 2005, only months before Appellant was indicted

⁷ In light of the fundamental nature of the Sixth Amendment right to counsel and the prosecutor's duty to seek justice, the State must exercise caution in this area It is the threat of an actual conflict that justifies the State's effort to deprive an accused of his counsel, hypothetical or speculative conflicts are insufficient Different considerations are at play when an accused seeks to relieve his or her counsel, as Gregory illustrates

We note Appellant was ultimately represented by attorneys with substantial death penalty experience, Walter Bailey and Norbert Cummings. Appellant had long expressed a desire to plead guilty and to receive the death penalty. The trial court conducted an extensive guilty plea *voir dire*,⁸ including numerous questions which revealed Appellant's complete satisfaction with Bailey and Cummings.⁹

III

Proportionality Review

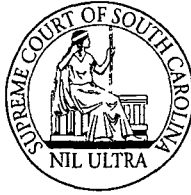
We review the proportionality of Appellant's sentence in accordance with South Carolina law S C Code Ann § 16-3-25 (2003). The aggravating circumstance in this case is a prior conviction for murder, for which section 16-3-20(C)(a)(2) permits the imposition of the death penalty. We find the record establishes that the death sentence was not the result of passion, prejudice, or any other arbitrary factor. Furthermore, a review of other decisions in which a defendant was sentenced to death when he had a prior conviction for murder demonstrates that Appellant's death sentence is neither excessive nor disproportionate. See State v Motts, Op No 26947 (S C Sup Ct filed March 21, 2011) (Shearouse Adv Sh No 10 at 45), State v Atkins, 303 S C 214, 399 S E 2d 760 (1990).

⁸ Prior to Appellant's guilty plea, the trial court held a State v Blair, 275 S C 529, 273 S E 2d 536 (1981), hearing to determine whether Appellant was competent to plead guilty and to assist his attorneys in his defense. The trial court found that Appellant was competent, and there is no suggestion to the contrary.

⁹ Prior to the guilty plea hearing, Appellant had instructed his attorneys not to present any mitigating evidence. Nonetheless, Bailey and Cummings investigated possible mitigating circumstances and prepared to introduce evidence in that regard. They even sought ethical advice on the potential presentation of mitigating evidence notwithstanding Appellant's instructions. In the sentencing phase, Appellant wrote a note to the trial court, which stated, "[I] ask that you punish me to the fullest extent of the law, this being the death sentence. I truly believe this punishment is the only just punishment for the crime I've committed."

AFFIRMED

TOAL, C J , PLEICONES, BEATTY and HEARN, JJ , concur



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734 1080
FAX (803) 734 1499

February 23, 2011

Chief Appellate Defender Robert M. Dudek
South Carolina Commission on Indigent Defense
P O Box 11589
Columbia, SC 29211

Assistant Deputy Attorney General Donald J. Zelenka
Assistant Attorney General J. Anthony Mabry
Office of the Attorney General
P O Box 11549
Columbia, SC 29211

Re The State v. Justus, Kenneth Harry

Dear Counsel

The record in the above case has been reviewed and the time allotment for oral argument for this case is as follows

Appellant	10 minutes
Respondent	10 minutes
Appellant in Reply	5 minutes

This case is scheduled for hearing on Thursday, March 3, 2011 at 9:30 a.m.

Very truly yours,

Daniel E Shearouse, Clerk

By Debbie A Hopkins
Administrative Assistant

DES/dmh



The South Carolina Supreme Court

DANIEL E. SHEAROUSE
CLERK OF COURT
BRENDA F. SHEALY
DEPUTY CLERK

PO BOX 11330
COLUMBIA, S.C. 29211
PHONE NO. 734 1080

To Chief Appellate Defender Robert M. Dudek
From Daniel E. Shearouse
Date January 12, 2011
RE March Preliminary List

Pursuant to the provisions of Rule 216 of the South Carolina Appellate Court Rules, this is to advise that the following case(s) will probably be reached for hearing at the March 2011 term of the South Carolina Supreme Court. Our records indicate that you are counsel of record in one or more of these case(s).

Court will meet the days of March 1, 2, 3, 15, and 16. Please notify this office in writing prior to January 19, 2011, as to any scheduling conflicts for the March term and any changes or additions of counsel that should be made to the record for the purpose of argument. If you do have a scheduling conflict, please advise as to the specific nature of the conflict.

The State v. Justus, Kenneth Harry



The South Carolina Supreme Court

DANIEL E. SHEAROUSE
CLERK OF COURT
BRENDA F. SHEALY
DEPUTY CLERK

PO BOX 11330
COLUMBIA, S.C. 29211
PHONE NO. 734 1080

To David Michael Pascoe, Jr., Esquire
From Daniel E. Shearouse
Date January 12, 2011
RE March Preliminary List

Pursuant to the provisions of Rule 216 of the South Carolina Appellate Court Rules, this is to advise that the following case(s) will probably be reached for hearing at the March 2011 term of the South Carolina Supreme Court. Our records indicate that you are counsel of record in one or more of these case(s).

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The State v. Justus, Kenneth Harry



The South Carolina Supreme Court

DANIEL E. SHEAROUSE
CLERK OF COURT
BRENDA F. SHEALY
DEPUTY CLERK

PO BOX 11330
COLUMBIA SC 29211
PHONE NO 734 1080

To Attorney General Henry Dargan McMaster
Chief Deputy Attorney General John W. McIntosh
Assistant Deputy Attorney General Donald J. Zelenka
Assistant Attorney General J. Anthony Mabry

From Daniel E. Shearouse

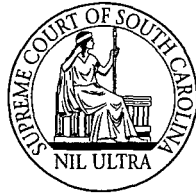
Date January 12, 2011

RE March Preliminary List

Pursuant to the provisions of Rule 216 of the South Carolina Appellate Court Rules, this is to advise that the following case(s) will probably be reached for hearing at the March 2011 term of the South Carolina Supreme Court. Our records indicate that you are counsel of record in one or more of these case(s).

Court will meet the days of March 1, 2, 3, 15, and 16. Please notify this office in writing prior to January 19, 2011, as to any scheduling conflicts for the March term and any changes or additions of counsel that should be made to the record for the purpose of argument. If you do have a scheduling conflict, please advise as to the specific nature of the conflict.

The State v. Justus, Kenneth Harry



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734 1080

FAX (803) 734 1499

December 14, 2010

Assistant Deputy Attorney General Donald J. Zelenka
Assistant Attorney General J. Anthony Mabry
Office of the Attorney General
P O Box 11549
Columbia, SC 29211

Re The State v. Justus, Kenneth Harry

Dear Counsel,

The following Order has been endorsed on your Motion to File Final Brief
Out of Time in the above entitled case on appeal.

“Granted

Jean H. Toal C.J.
For the Court

By s/ Daniel E. Shearouse
Clerk

December 14, 2010 ”

Please be advised the respondent's brief received in this office on
December 9, 2010 is being filed as of the date of this order.

The State v Kenneth Larry Justus
Page Two
December 14, 2010

Very truly yours,

A handwritten signature in black ink, consisting of the letters 'DES' followed by a long, horizontal, slightly wavy line extending to the right.

CLERK

DES/dmh

cc Senior Appellate Defender Joseph L Savitz, III



HENRY McMASTER
ATTORNEY GENERAL

December 9, 2010

RECEIVED

DEC - 9 2010

Honorable Daniel E Shearouse
Clerk, South Carolina Supreme Court
P O Box 11330
Columbia, SC 29211

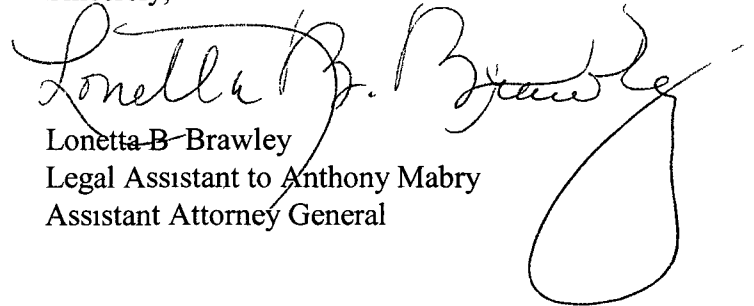
SC Supreme Court

Re The State v Kenneth Harry Justus

Dear Mr Shearouse

Enclosed please find a ***Motion to File Final Brief Out of Time*** with the attached ***Final Brief of Respondent*** in the above-referenced case for filing By copy of this letter, I am serving opposing counsel with same

Sincerely,



Lonetta B Brawley
Legal Assistant to Anthony Mabry
Assistant Attorney General

AM/lbb
Enclosures

cc Joseph L Savitz, III, Esquire
David M Pascoe, Jr , Solicitor
Sandi Wofford, Victims Assistance

**STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

Appeal from Dorchester County
Diane S. Goodstein, Circuit Court Judge

RECEIVED

DEC - 9 2010

STATE OF SOUTH CAROLINA,

Respondent,

S C Supreme Court

v

KENNETH HARRY JUSTUS,

Appellant

MOTION TO FILE FINAL BRIEF OUT OF TIME

Respondent, above-named, hereby makes a motion to this Court allowing Respondent to file the Final Brief of Respondent out of time. The Final Brief was due to be served and filed on December 6, 2010. However, the deadline for filing was miscalendared for December 29, 2010 and therefore missed.

Respondent requests that this Court allow the filing of the attached Final Brief

HENRY D. McMASTER
Attorney General

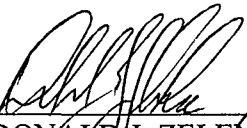
JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

6
#1

J ANTHONY MABRY
Assistant Attorney General
P O Box 11549
Columbia, SC 29211
(803) 734-3665

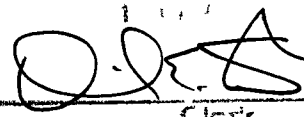
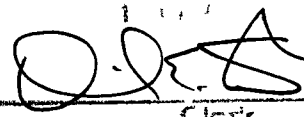
DAVID M PASCOE, JR
Solicitor, First Judicial Circuit
P O Box 1525
Orangeburg, SC 29116-1525
(803) 533-6252

By  *DJ Z* *AM*
DONALD J ZELENKA for
ANTHONY MABRY
Assistant Attorney General
ATTORNEYS FOR RESPONDENT

P O Box 11549
Columbia, SC 29211

December 9, 2010

GRANTED


By  Clerk

December 14, 2010

**STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

Appeal from Dorchester County
Diane S Goodstein, Circuit Court Judge

STATE OF SOUTH CAROLINA,

Respondent,

v

KENNETH HARRY JUSTUS,

Appellant

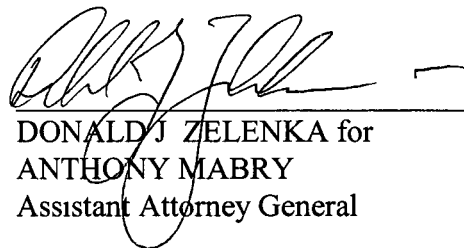
RECEIVED

DEC - 9 2010

S C Supreme Court

CERTIFICATE OF SERVICE

I, **Donald J Zelenka**, hereby certify that I have served Respondent's ***Motion to File Final Brief out of Time*** in the foregoing action by depositing copies in the InterAgency Mail to Joseph L Savitz, III, Senior Appellate Defender, Division of Appellate Defense, 1330 Lady Street, Suite 401, Columbia, SC 29201 this 9th day of December, 2010



DONALD J ZELENA for
ANTHONY MABRY
Assistant Attorney General

Hopkins, Debbie

From Lauren E. Cruse <LCruse@sccid.sc.gov>
Sent Friday, December 10, 2010 3:03 PM
To Hopkins, Debbie
Cc amabry@ag.state.sc.us; Joseph L. Savitz III
Subject Kenneth H. Justus

Clerk's Office
South Carolina Supreme Court

Re: The State v. Kenneth Justus

This office does not oppose the state's motion to file the final brief of respondent out of time.

Sincerely,

Joseph L. Savitz, III
Senior Appellate Defender

JLS III:lec

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DEC 10 2010

S.C. Supreme Court

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

NOV 16 2010

Appeal from Dorchester County

S C Supreme Court

Diane Schafer Goodstein, Circuit Court Judge

THE STATE,

RESPONDENT,

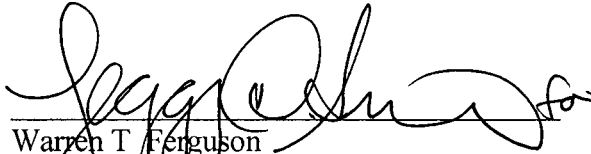
V

KENNETH HARRY JUSTUS,

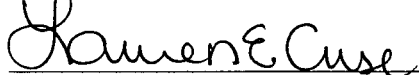
APPELLANT

CERTIFICATE OF SERVICE

I certify that a true copy of the Record on Appeal in the above referenced case has been served upon J Anthony Mabry, Esquire, at Rembert Dennis Building, Room 519, 1000 Assembly Street, Columbia, South Carolina 29201 this 15th day of November, 2010


Warren T. Ferguson
Administrative Assistant

SUBSCRIBED AND SWORN TO before me
this 15th day of November, 2010

 (L S)

Notary Public for South Carolina

My Commission Expires August 23, 2014

The Supreme Court of South Carolina

The State,

Respondent,

v

Kenneth Harry Justus,

Appellant

The Honorable Diane Schafer Goodstein
Dorchester County
Trial Court Case No 2005-GS-18-01265

ORDER

The request for an extension to serve and file the Record on Appeal is granted and extended until November 15, 2010 Pursuant to this Court's order dated March 18, 2009, any further extension request must be based on a showing of good cause

IT IS SO ORDERED

JEAN H TOAL, CHIEF JUSTICE

BY



CLERK

Columbia, South Carolina

November 9, 2010

cc Senior Appellate Defender Joseph L Savitz, III
Assistant Attorney General J Anthony Mabry

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Dorchester County

Diane Schafer Goodstein, Circuit Court Judge

 ORIGINAL
RECEIVED

NOV - 8 2010

S C Supreme Court

THE STATE,

RESPONDENT,

V

KENNETH HARRY JUSTUS,

APPELLANT

MOTION FOR AN EXTENSION OF TIME
IN WHICH TO FILE THE RECORD ON APPEAL

Counsel for Kenneth Harry Justus respectfully requests an additional extension of seven days, in which to file the Record on Appeal in this case. This motion is made pursuant to the Order of the South Carolina Supreme Court dated March 18, 2009. This is a first request for an extension. In support of this request, counsel shows

In support of this request, counsel shows

- (1) The record on appeal is due to be served and filed today, November 8, 2010
- (2) Counsel for Mr. Justus respectfully submits that extraordinary circumstances exist which warrant the granting of an additional extension of time
- (3) The record on appeal was in the process of being prepared last Thursday, however, technical difficulties in our copy room made it impossible to get the record numbered and copied by the date that the record on appeal was due
- (3) On October 4, 2010, counsel filed the petition for rehearing in the case of *State v Larry Horton*. On October 6, 2010, counsel had an oral argument in the Supreme Court in the case

of *State v Reginald Lattimore* On October 7, 2010, counsel filed the petition for rehearing in the case of *State v Theodore Wills* and the initial brief of appellant and designation of matter in the case of *State v Brian Sturgeon* On October 11, 2010, counsel filed the initial brief of appellant and designation of matter in the case of *State v Jonathan Campbell* On October 18, 2010, counsel filed the petition for writ of certiorari and appendix in the case of *Stanley Eppenger v State* On October 20, 2010, counsel filed the initial brief of appellant and designation of matter in the cases of *State v Patrick Rick* and *State v Leon Jones* On October 25, 2010, counsel filed the petition for writ of certiorari and appendix to the Court of Appeals in the case of *State v Zachary Fowler* and the petition for writ of certiorari and appendix in the case of *Gregory Mouzon v State* On October 27, 2010, counsel filed the petition for writ of certiorari and appendix in the case of *William Grimes v State* On November 3, 2010, counsel filed the initial brief of appellant and designation of matter in the case of *State v Curtis Nealey* On November 5, 2010, counsel filed the petition for writ of certiorari and appendix in the capital PCR case of *John Woods v State* On November 4, 2010, counsel attended and testified in the post-conviction relief hearing in the case of *Charles Shuler v State* in Richland County

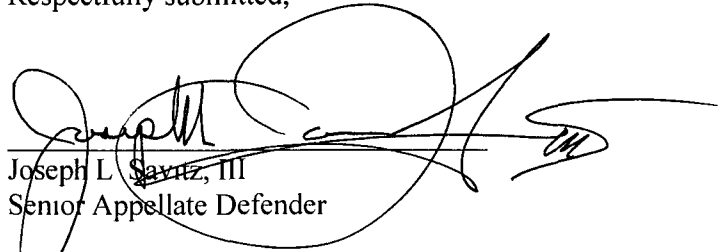
(4) Counsel has been unable to complete the record on appeal As a result, counsel respectfully asks this Court for an additional seven day extension of time to file the record on appeal

(5) Counsel makes this request in good faith and not for purpose of delay

(6) Counsel for the Attorney General's office consents to this request shown by signature below

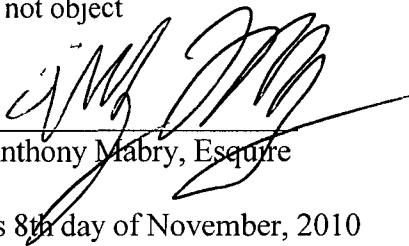
WHEREFORE, the undersigned counsel would respectfully request a seven day extension until November 15, 2010, in which to file the record on appeal in this case based upon the above exigent circumstances Counsel requests that time limits for filing the record be held in abeyance pending a ruling on this motion

Respectfully submitted,



Joseph L. Savitz, III
Senior Appellate Defender
Attorney for Appellant

I do not object



J. Anthony Mabry, Esquire

This 8th day of November, 2010



HENRY McMASTER
ATTORNEY GENERAL

October 8, 2010

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CCT - 8 2010

S.C. SUPREME COURT

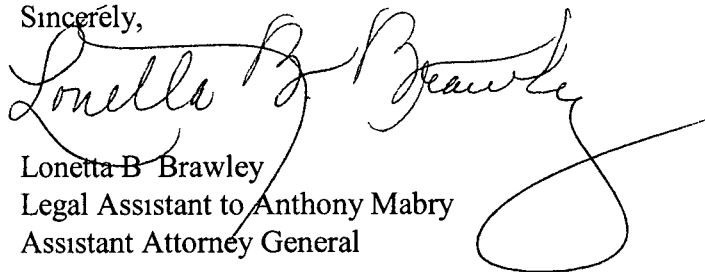
Honorable Daniel E Shearouse
Clerk, South Carolina Supreme Court
P O Box 11330
Columbia, SC 29211

Re The State v Kenneth Harry Justus

Dear Mr Shearouse

Enclosed please find the *Initial Brief of Respondent* and *Designation of Matter* in the above-referenced case for filing By copy of this letter, I am serving opposing counsel with same

Sincerely,



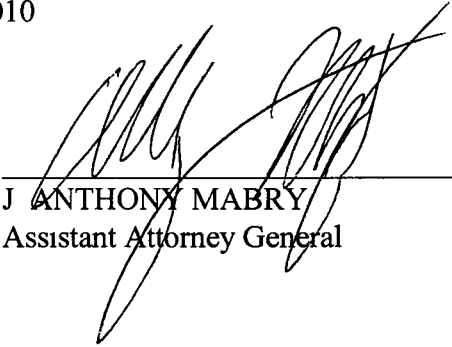
Lonetta B Brawley
Legal Assistant to Anthony Mabry
Assistant Attorney General

/lbb
Enclosure

cc Joseph L Savitz, III, Esquire
David M Pascoe, Jr , Solicitor
Sandi Wofford, Victims Assistance

CERTIFICATE OF SERVICE

I, **Anthony Mabry**, hereby certify that I have served the ***Initial Brief of Respondent and Designation of Matter*** in the foregoing action by depositing copies in the Interagency Mail to Joseph L. Savitz, III, Senior Appellate Defender, Division of Appellate Defense, 1330 Lady Street, Suite 401, Columbia, SC 29201 this 8th day of October, 2010



J. ANTHONY MABRY
Assistant Attorney General

The Supreme Court of South Carolina

The State,

Respondent,

v

Kenneth Harry Justus,

Appellant

The Honorable Diane Schafer Goodstein
Dorchester County
Trial Court Case No 2005-GS-18-01265

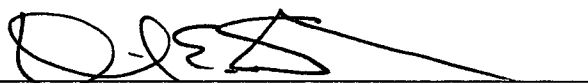
ORDER

Respondent seeks a third extension of time to serve and file the Initial Brief of Respondent and Designation of Matter in the above entitled matter. The request for an extension is granted and extended until October 8, 2010. Pursuant to this Court's order dated March 18, 2009, any further extension request must show the existence of extraordinary circumstances, state what actions are being taken to insure that no further extension will be required, and be signed by the appropriate attorneys.

IT IS SO ORDERED

JEAN H. TOAL, CHIEF JUSTICE

BY


CLERK

Columbia, South Carolina

September 9, 2010

cc Senior Appellate Defender Joseph L. Savitz, III
Assistant Attorney General J. Anthony Mabry



HENRY McMASTER
ATTORNEY GENERAL

September 8, 2010

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SC SUPREME COURT

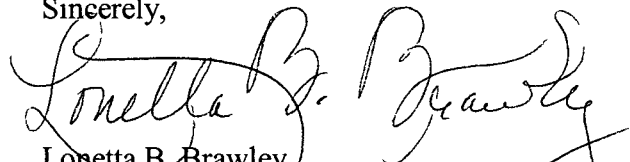
Honorable Daniel E Shearouse
Clerk, South Carolina Supreme Court
P O Box 11330
Columbia, SC 29211

Re The State v Kenneth Harry Justus

Dear Mr Shearouse

Enclosed please find the *Motion for Extension to File Initial Brief of Respondent* in the above-referenced case for filing By copy of this letter, I am serving opposing counsel with same

Sincerely,


Lonetta B Brawley
Legal Assistant to Anthony Mabry
Assistant Attorney General

/lbb
Enclosure

cc Joseph L Savitz, III, Esquire

**STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

Appeal from Dorchester County
Diane S Goodstein, Circuit Court Judge

RECEIVED

SEP - 8 2010

SC SUPREME COURT

STATE OF SOUTH CAROLINA,

Respondent,

v

KENNETH HARRY JUSTUS,

Appellant

**MOTION FOR EXTENSION TO FILE
INITIAL BRIEF OF RESPONDENT
AND DESIGNATION OF MATTER**

The undersigned counsel would respectfully request a thirty (30) day extension in which to file the Initial Brief of Respondent in the above-referenced case. In support of this motion, counsel would respectfully show the Court the following:

Respondent's Initial Brief is due today, September 8, 2010, upon this Court's grant of Respondent's 2nd request for an extension filed on August 9, 2010.

A majority of the Initial Brief has been completed, however, the undersigned attorney for the Respondent has had a number of state and federal matters to attend to since August 9, 2010. Specifically, counsel has prepared a Return and Memorandum of Law in Support of Motion for Summary Judgment in Furman Thompson v. Cartledge, 3:10-cv-01610-HFF-JRM (federal habeas corpus), a Return and Memorandum of Law in Clarence Rice v. State of South Carolina (federal

habeas corpus), a Return and Memorandum of Law in Maurice Smith v State of South Carolina (federal habeas corpus), is preparing a Brief of Respondent in State v Jeffrey Brian Motts, (Capital Waiver of Appeals before this Court) which is close to completion, has prepared a Return to Amended PCR Application, Mahdi v State (filed August 30th)(Capital PCR), a Return and Memorandum of Law in Support of Motion for Summary Judgment in Michael Branch v State, (federal habeas corpus), a Return to Petition for Rehearing State v Zachary Fowler (Ct of Appeals),

Due to these and counsel's involvement in other matters pending in state and federal court, counsel was unable to timely complete his research and properly complete the Initial Brief of Respondent and Designation of Matter in this case. This request is made in good faith, and not for the purposes of delay. Counsel has spoken with opposing counsel, and he has no objection to this extension request.

WHEREFORE, premises considered, counsel hereby respectfully requests a thirty (30) day extension of time to serve and file the Initial Brief of Respondent and Designation of Matter.

Respectfully submitted,

HENRY D. MCMASTER
Attorney General

JOHN W. MCINTOSH
Deputy Attorney General

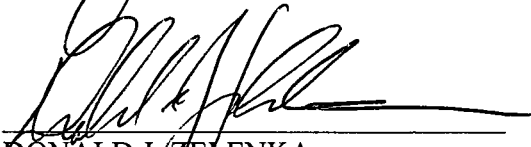
DONALD J. ZELENKA
Assistant Deputy Attorney General

J. ANTHONY MABRY,
Assistant Attorney General
Post Office Box 11549

Columbia, SC 29211
(803) 734-6305

BY



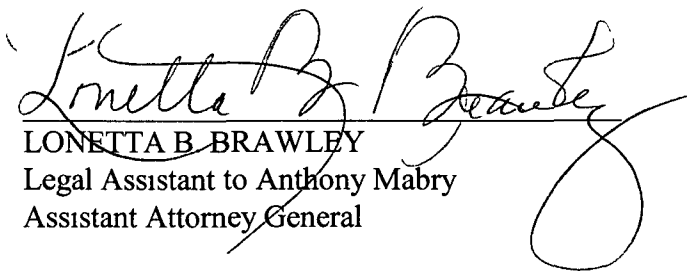
J ANTHONY MABRY
ATTORNEY FOR RESPONDENT

DONALD J. ZELENKA
Supervisor

September 8, 2010

CERTIFICATE OF SERVICE

I, **Lonetta B Brawley**, hereby certify that I have served the ***Motion for Extension to File Initial Brief of Respondent and Designation of Matter*** in the foregoing action by depositing copy in the InterAgency Mail to Joseph L Savitz, III, Senior Appellate Defender, Division of Appellate Defense, P O Box 11589, Columbia, SC 29211 this 8th day of September, 2010,


LONETTA B. BRAWLEY
Legal Assistant to Anthony Mabry
Assistant Attorney General

The Supreme Court of South Carolina

The State,

Respondent,

v

Kenneth Harry Justus,

Appellant

The Honorable Diane Schafer Goodstein
Dorchester County
Trial Court Case No 2005-GS-18-01265

ORDER

Respondent seeks a second extension of time to serve and file the Initial Brief of Respondent and Designation of Matter in the above entitled matter. The request for an extension is granted and extended until September 8, 2010. Pursuant to this Court's order dated March 18, 2009, any further extension request must be based on a showing of good cause and must be signed by the appropriate attorneys.

IT IS SO ORDERED

JEAN H. TOAL, CHIEF JUSTICE

BY Drenda J. Shealy
CHIEF DEPUTY CLERK

Columbia, South Carolina

August 10, 2010

cc Senior Appellate Defender Joseph L. Savitz, III
Assistant Attorney General Anthony Mabry



HENRY McMASTER
ATTORNEY GENERAL

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AUG - 9 2010

SC SUPREME COURT

August 9, 2010

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

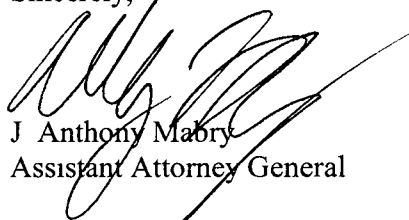
Re *The State v Kenneth Harry Justus*

Dear Mr Shearouse

Enclosed please find an original and six (6) copies of a Motion for Extension to File Initial Brief of Respondent and Designation of Matter, together with Proof of Service which I would appreciate your filing in the above-referenced matter

By copy of this letter I am serving opposing counsel with this request

Sincerely,



J Anthony Mabry
Assistant Attorney General

AM dmd

Enclosures

cc Joseph L Savitz, III, Esquire (w/two (2) copies of encls)

**STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

Appeal from Dorchester County
Diane S. Goodstein, Circuit Court Judge

RECEIVED

AUG - 9 2010

SC SUPREME COURT

STATE OF SOUTH CAROLINA,

Respondent,

v

KENNETH HARRY JUSTUS,

Appellant

**MOTION FOR EXTENSION TO FILE
INITIAL BRIEF OF RESPONDENT
AND DESIGNATION OF MATTER**

The undersigned counsel would respectfully request a thirty (30) day extension in which to file the Initial Brief of Respondent in the above-referenced case. In support of this motion, counsel would respectfully show the Court the following:

Respondent's Initial Brief is due today, August 9, 2010, upon this Court's grant of Respondent's first request for an extension filed on July 9, 2010.

The undersigned attorney for the Respondent has had a number of state and federal matters to attend to since June 21, 2010. Specifically, counsel has prepared a Return and Memorandum of Law in Support of Motion for Summary Judgment in Robert Taft Morris, Jr., #232012 vs. Warden, Ridgeland Correctional Institution, C/A No. 0 10-922-RBH-PJG, counsel attended the capital PCR trial in Greenville, South Carolina in the matter of Freddie Eugene Owens, #5065 vs. State of South Carolina, C/A No. 09-CP-23-0741, and counsel prepared an

Initial Brief of Respondent in the matter of The State vs Jose Herrera, a Beaufort County murder case

Due to these and counsel's involvement in other matters pending in state and federal court, counsel was unable to timely complete his research and properly prepare the Initial Brief of Respondent and Designation of Matter in this case. This request is made in good faith, and not for the purposes of delay.

WHEREFORE, premises considered, counsel hereby respectfully requests a thirty (30) day extension of time to serve and file the Initial Brief of Respondent and Designation of Matter

Respectfully submitted,

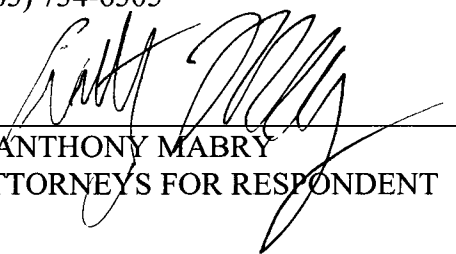
HENRY D MCMASTER
Attorney General

JOHN W MCINTOSH
Deputy Attorney General

DONALD J ZELENKA
Assistant Deputy Attorney General

J ANTHONY MABRY,
Assistant Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-6305

BY



J ANTHONY MABRY
ATTORNEYS FOR RESPONDENT

August 9, 2010

**STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

Appeal from Dorchester County
Diane S Goodstein, Circuit Court Judge

STATE OF SOUTH CAROLINA,

Respondent,

v

KENNETH HARRY JUSTUS,

Appellant

PROOF OF SERVICE

I, J Anthony Mabry, Counsel for the Respondent, certify that I have served the within Motion for Extension to File Initial Brief of Respondent and Designation of Matter via United States mail, first class, postage pre-paid to Appellant's attorney of record, Joseph L Savitz, III, Esq , SCCID, Division of Appellate Defense, 1330 Lady Street, Ste #401, Columbia, SC 29201

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

This 9th day of August, 2010



J ANTHONY MABRY
Office of Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305

The Supreme Court of South Carolina

The State,

Respondent,

v

Kenneth Harry Justus,

Appellant

The Honorable Diane Schafer Goodstein
Dorchester County
Trial Court Case No 2005-GS-18-01265

ORDER

The request for an extension to serve and file the Initial Brief of Respondent and Designation of Matter is granted and extended until August 9, 2010 Pursuant to this Court's order dated March 18, 2009, any further extension request must be based on a showing of good cause

IT IS SO ORDERED

JEAN H TOAL, CHIEF JUSTICE

BY 
CHIEF DEPUTY CLERK

Columbia, South Carolina

July 9, 2010

cc Senior Appellate Defender Joseph L Savitz, III
Assistant Attorney General Anthony Mabry



HENRY McMASTER
ATTORNEY GENERAL

July 8, 2010

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

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SC SUPREME COURT

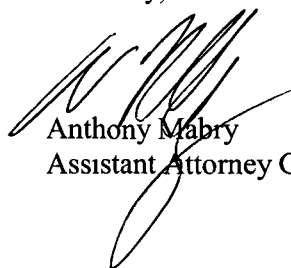
Re State v. Kenneth Harry Justus

Dear Mr. Shearouse:

The Initial Brief of Respondent in the above-referenced case is due to be filed on the above date. I am requesting an extension of thirty (30) days to file and serve Respondent's Brief. Due to counsel's heavy caseload and other court commitments, counsel has been unable to prepare the brief.

By copy of this letter I am serving opposing counsel with this request.

Sincerely,



Anthony Mabry
Assistant Attorney General

AM/lbb
cc Joseph L. Savitz, III, Esquire

The Supreme Court of South Carolina

The State,

Respondent,

v

Kenneth Harry Justus,

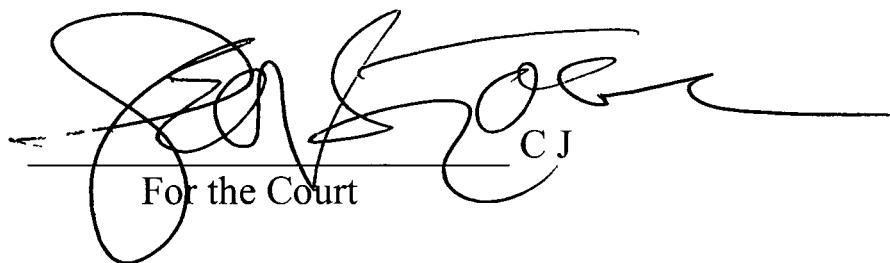
Appellant

The Honorable Diane Schafer Goodstein
Dorchester County
Trial Court Case No 2005-GS-18-01265

ORDER

Appellant seeks a sixth and final extension to serve and file the Initial Brief of Appellant and Designation of Matter in the above entitled matter. The opposing party consents to the extension. The request for an extension is granted and extended until May 24, 2010.

IT IS SO ORDERED



For the Court CJ

Columbia, South Carolina

May 26, 2010

cc Senior Appellate Defender Joseph L. Savitz, III
Assistant Deputy Attorney General Donald J. Zelenka

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Dorchester County

Diane S Goodstem, Circuit Court Judge

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SC SUPREME COURT

THE STATE,

RESPONDENT,

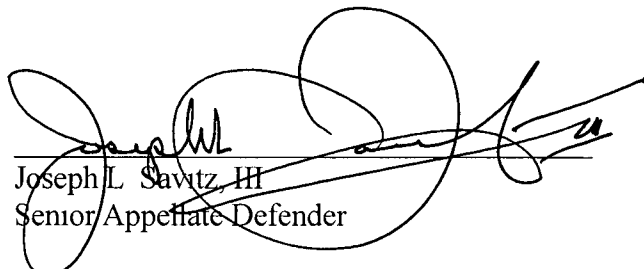
V

KENNETH HARRY JUSTUS,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Donald J Zelenka, Esquire, this 24th day of May, 2010


Joseph L. Savitz, III
Senior Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 24th day of May, 2010


(T.S.)
Notary Public for South Carolina
My Commission Expires October 30, 2018

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

 ORIGINAL

Appeal from Dorchester County
Diane Schafer Goodstein, Circuit Court Judge

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MAY 21 2

STATE OF SOUTH CAROLINA,

RESPONDENT

SC SUPREME COURT

V

KENNETH HARRY JUSTUS,

APPELLANT,

MOTION FOR FINAL EXTENSION
OF TIME DUE TO UNFORESEEN CIRCUMSTANCES
IN WHICH TO FILE THE INITIAL BRIEF OF APPELLANT
AND DESIGNATION OF MATTER

Counsel for Kenneth Harry Justus respectfully requests **a final one day, until Monday, May 24, 2010**, in which to file the initial brief of appellant and designation of matter in this case which is due today. Counsel will request no additional extensions in connection with any step in this appeal. In support of this request, counsel shows

(1) The initial brief of appellant and designation of matter in this case are due to be served and filed today, having been extended by prior orders of this Court. Counsel has read the transcript and completed his research and was this morning in the process of completing the brief in this case. The tape which he had dictated the majority of the argument – representing approximately four hours of concentrated work – without warning unspooled inside the Dictaphone and was ruined despite counsel's efforts to obtain an expert to restore it. The argument will have to be rewritten from scratch.

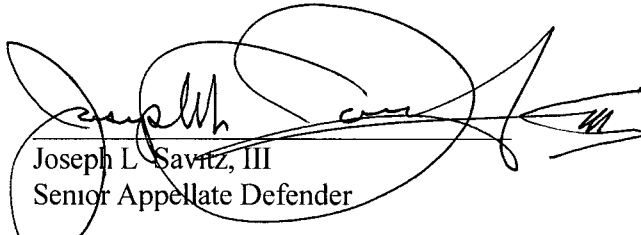
(2) Counsel believes that extraordinary circumstances support this petition for extension as required by the Supreme Court's order of March 18, 2009.

(3) Counsel makes this request in the utmost good faith and not for purposes of delay
Under no conceivable circumstances would he elect to do the same work twice

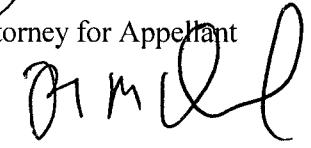
(7) As indicated by signature below, Donald J Zelenka, of the Attorney General's Office,
has no objection to this request

For these reasons, counsel for Mr Justus respectfully requests **a final one day extension,**
until Monday, May 24, 2010 in which to file the initial brief and designation of matter in this case

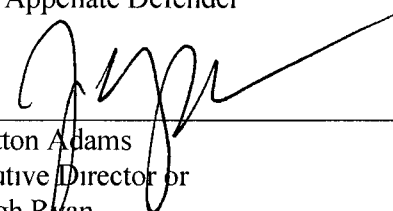
Respectfully submitted,



Joseph L. Savitz, III
Senior Appellate Defender
Attorney for Appellant



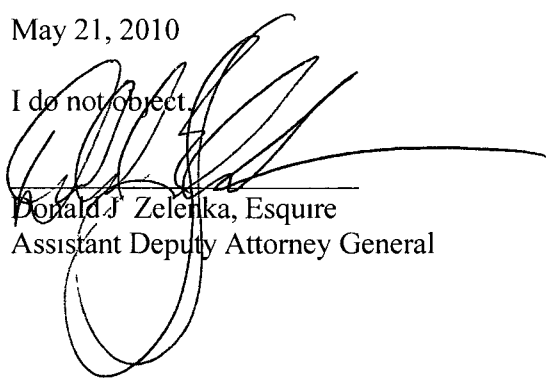
Robert M. Dudek
Chief Appellate Defender



T. Patton Adams
Executive Director or
J. Hugh Ryan
General Counsel

May 21, 2010

I do not object.



Donald J. Zelenka, Esquire
Assistant Deputy Attorney General

The Supreme Court of South Carolina

The State,

Respondent,

v

Kenneth Harry Justus,

Appellant

The Honorable Diane Schafer Goodstein
Dorchester County
Trial Court Case No 2005-GS-18-01265

ORDER

Appellant seeks a fifth and final extension of two (2) days to serve and file the Initial Brief of Appellant and Designation of Matter, and asserts that extraordinary circumstances justify this extension. The opposing party consents to the extension. The request for an extension is granted until May 21, 2010.

IT IS SO ORDERED


C J
For the Court

Columbia, South Carolina

May 21, 2010

cc Senior Appellate Defender Joseph L. Savitz, III
Assistant Deputy Attorney General Donald J. Zelenka

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

 ORIGINAL

Appeal from Dorchester County
Diane Schafer Goodstein, Circuit Court Judge

RECEIVED

STATE OF SOUTH CAROLINA,

MAY 19 2010

RESPONDENT S C SUPREME COURT

V

KENNETH HARRY JUSTUS,

APPELLANT,

MOTION FOR AN ABSOLUTELY FINAL
EXTENSION OF TIME
IN WHICH TO FILE THE INITIAL BRIEF OF APPELLANT
AND DESIGNATION OF MATTER

Counsel for Kenneth Harry Justus respectfully requests **a final 2 days until Friday, May 21, 2010**, in which to file the initial brief of appellant and designation of matter in this case which is due today. Counsel will request no additional extensions in connection with any step in this appeal. In support of this request, counsel shows

(1) The initial brief of appellant and designation of matter in this case are due to be served and filed today, having been extended by prior orders of this Court. Counsel has read the transcript and completed his research and is in the process of writing the brief in this case.

(2) Counsel is also working on the following death penalty cases

The State v. Jerry Buck Inman (975 transcript pages)
Roger Dale Johnson v. The State (3000 plus pages)

(3) In the past month, counsel has filed briefs or certiorari in the following cases

State v. Bobby Alexander Gilbert (557 pages)
Chris Anthony Liverman v. The State (1586 pages)
State v. Stephen Corey Bryant (1395 pages)
State v. Jimmy Lee Sessions (1040 pages)

State v Amber Portwood (407 pages)
State v William Andrew Lee (327 pages)
State v James W Bodensedt (30 pages)
State v Terrell Antonio Addison (1246 pages)
State v Joshua Lee Phillips (848 pages)

- (4) During that time period, counsel has also orally argued the following cases

State v Norman Starnes (death penalty)
State v Angle Vasquez (death penalty)
State v Jason Black
State v David Rocquemore
State v Jason Buncum

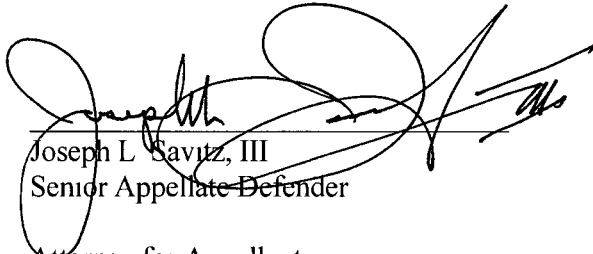
- (5) Counsel believes that extraordinary circumstances support this petition for extension as required by the Supreme Court's order of March 18, 2009

- (6) Counsel makes this request in the utmost good faith and not for purposes of delay

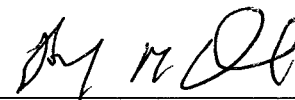
- (7) As indicated by signature below, Donald J Zelenka, of the Attorney General's Office, has no objection to this request

For these reasons, counsel for Mr Justus respectfully requests **a two day extension until Friday, May 21, 2010** in which to file the initial brief and designation of matter in this case

Respectfully submitted,



Joseph L. Savitz, III
Senior Appellate Defender
Attorney for Appellant



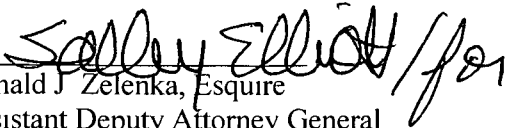
Robert M. Dudek
Chief Appellate Defender



Patton T. Adams
Executive Director or
J. Hugh Ryan
General Counsel

May 19, 2010

I do not object


Donald J. Zelenka, Esquire
Assistant Deputy Attorney General

The Supreme Court of South Carolina

The State,

Respondent,

v

Kenneth Harry Justus,

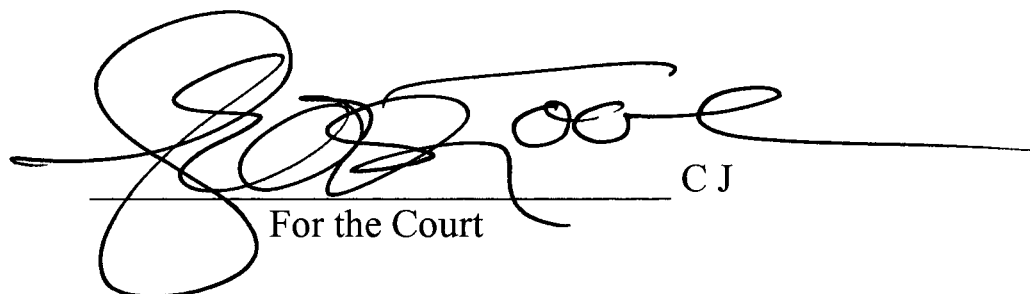
Appellant

The Honorable Diane Schafer Goodstein
Dorchester County
Trial Court Case No 2005-GS-18-01265

ORDER

Appellant seeks a fourth extension of time to serve and file the Initial Brief of Appellant and Designation of Matter and asserts that extraordinary circumstances justify this extension. The opposing party consents to the extension. The request for an extension is granted and extended until May 19, 2010. Pursuant to this Court's order dated March 18, 2009, any further extension request must show the existence of extraordinary circumstances, state what actions are being taken to insure that no further extension will be required, and be signed by the appropriate attorneys.

IT IS SO ORDERED



C J
For the Court

Columbia, South Carolina

April 21, 2010

cc Senior Appellate Defender Joseph L. Savitz, III
 Assistant Deputy Attorney General Donald J. Zelenka

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Dorchester County
Diane Schafer Goodstein, Circuit Court Judge

STATE OF SOUTH CAROLINA,

RESPONDENT

V

KENNETH HARRY JUSTUS,

APPELLANT,

MOTION FOR AN EXTENSION OF TIME
IN WHICH TO FILE THE INITIAL BRIEF OF APPELLANT
AND DESIGNATION OF MATTER

Counsel for Kenneth Harry Justus respectfully requests an extension of thirty days in which to file the initial brief of appellant and designation of matter in this case which is due today. Counsel will request no additional extensions in connection with any step in this appeal unless absolutely unavoidable. In support of this request, counsel shows

(1) The initial brief of appellant and designation of matter in this case are due to be served and filed today, having been extended by prior orders of this Court

(2) In the past two months, counsel has filed briefs or certiorari petitions in the following cases

The State v Bentley Collins (660 transcript pages)
The State v Joshua Lamar Forrest (266 transcript pages)
The State v Richard Simmons (452 transcript pages)
The State v Mokeia Hammond (762 transcript pages)
The State v Devodus Rouse (675 transcript pages)
The State v Jake Antonio Wilson (1111 transcript pages)
The State v Joel Antawan Robinson (866 transcript pages)
The State v Billy Jo Shirar (1146 transcript pages)
The State v Stephen Cory Bryant (1395 transcript pages)
The State v Amber Portwood (407 transcript pages)

ORIGINAL

RECEIVED

APR 19 2013

SC SUPREME COURT

Counsel also had an oral argument in the Court of Appeals in the case of State v Jason Black on Tuesday, April 13, 2010, and an oral argument in the Court of Appeals in the case State v David Rocquemore on Thursday, April 15, 2010 Counsel has an oral argument before this Court in the case of State v Jason Buncom on Tuesday, April 20, 2010

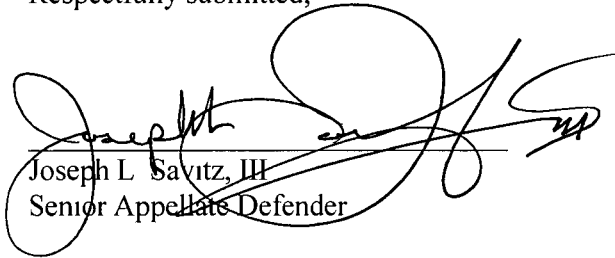
(3) Counsel believes that extraordinary circumstances support this petition for extension as required by the Supreme Court's order of March 18, 2009

(4) Counsel makes this request in the utmost good faith and not for purposes of delay

(5) As indicated by signature below, Donald J Zelenka, of the Attorney General's Office, has no objection to this request

For these reasons, counsel for Mr Justus respectfully requests an additional extension of thirty days in which to file the initial brief and designation of matter in this case

Respectfully submitted,



Joseph L. Savitz, III
Senior Appellate Defender

Attorney for Appellant



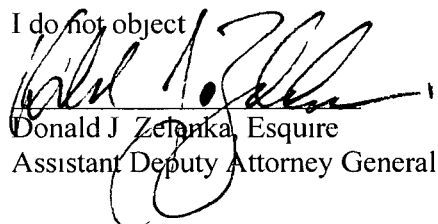
Robert M. Dudek
Chief Appellate Defender



Patton T. Adams
Executive Director or
J. Hugh Ryan
General Counsel

April 19, 2010

I do not object



Donald J. Zelenka, Esquire
Assistant Deputy Attorney General

The Supreme Court of South Carolina

The State,

Respondent,

v

Kenneth Harry Justus,

Appellant

The Honorable Diane Schafer Goodstein
Dorchester County
Trial Court Case No 2005-GS-18-01265

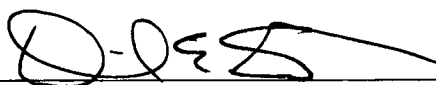
ORDER

Appellant seeks a third extension of time to serve and file the Initial Brief of Appellant and Designation of Matter in the above entitled matter. The request for an extension is granted and extended until April 19, 2010. Pursuant to this Court's order dated March 18, 2009, any further extension request must show the existence of extraordinary circumstances, state what actions are being taken to insure that no further extension will be required, and be signed by the appropriate attorneys.

IT IS SO ORDERED

JEAN H. TOAL, CHIEF JUSTICE

BY



CLERK

Columbia, South Carolina

March 19, 2010

cc Senior Appellate Defender Joseph L. Savitz, III
 Assistant Deputy Attorney General Donald J. Zelenka

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Dorchester County
Diane Schafer Goodstein, Circuit Court Judge

STATE OF SOUTH CAROLINA,

RESPONDENT

V

KENNETH HARRY JUSTUS,

APPELLANT,

MOTION FOR AN EXTENSION OF TIME
IN WHICH TO FILE THE INITIAL BRIEF OF APPELLANT
AND DESIGNATION OF MATTER

RECEIVED

MAR 18 2010

SC SUPREME COURT

Counsel for Kenneth Harry Justus respectfully requests an extension of thirty days in which to file the initial brief of appellant and designation of matter in this case which is due today. Counsel will request no additional extensions in connection with any step in this appeal unless absolutely unavoidable. In support of this request, counsel shows

(1) The initial brief of appellant and designation of matter in this case are due to be served and filed today, having been extended by prior orders of this Court

(2) In the past two months, counsel has filed briefs or certiorari petitions in the following cases

The State v Mokeia Hammond (762 transcript pages)
The State v Devodus Rouse (675 transcript pages)
The State v Jake Antonio Wilson (1111 transcript pages)
The State v Joel Antawan Robinson (866 transcript pages)
The State v Billy Jo Shirar (1146 transcript pages)
The State v Bobby Alexander Gilbert (557 transcript pages)
The State v Chris Liverman (1583 transcript pages)

Counsel also had an oral argument in the death penalty case of State v Norman Starnes Thursday, March 4, 2010, and an oral argument in the death penalty case State v Angle Vasquez within this time in addition to a normal caseload

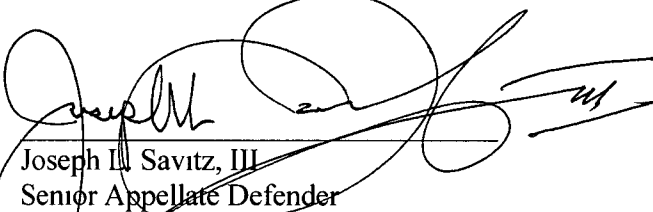
(3) Counsel believes that extraordinary circumstances support this petition for extension as required by the Supreme Court's order of March 18, 2009

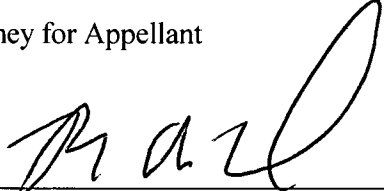
(4) Counsel makes this request in the utmost good faith and not for purposes of delay

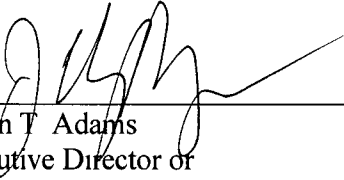
(5) As indicated by signature below, Donald J Zelenka, of the Attorney General's Office, has no objection to this request

For these reasons, counsel for Mr Justus respectfully requests an additional extension of thirty days in which to file the initial brief and designation of matter in this case

Respectfully submitted,

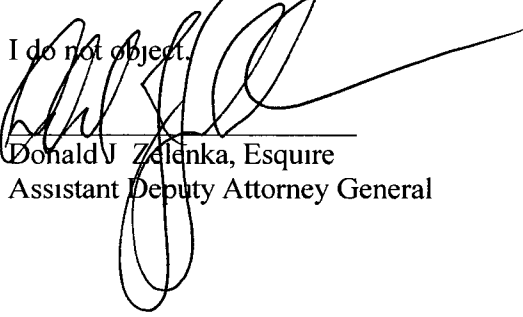

Joseph M. Savitz, III
Senior Appellate Defender
Attorney for Appellant


Robert M. Dudek
Acting Chief Appellate Defender


Patton T. Adams
Executive Director of
J. Hugh Ryan
General Counsel

This 18th day of March, 2009

I do not object.


Donald J. Zelenka, Esquire
Assistant Deputy Attorney General

The Supreme Court of South Carolina

The State,

Respondent,

v

Kenneth Harry Justus,

Appellant

The Honorable Diane Schafer Goodstein
Dorchester County
Trial Court Case No 2005-GS-18-01265

ORDER

Appellant seeks a second extension of time to serve and file the Initial Brief of Appellant and Designation of Matter in the above entitled matter. The request for an extension is granted and extended until March 18, 2010. Pursuant to this Court's order dated March 18, 2009, any further extension request must be based on a showing of good cause and must be signed by the appropriate attorneys.

IT IS SO ORDERED

JEAN H. TOAL, CHIEF JUSTICE

BY



CLERK

Columbia, South Carolina

February 17, 2010

cc Senior Appellate Defender Joseph L. Savitz, III
 Assistant Deputy Attorney General Donald J. Zelenka

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Dorchester County
Diane Schafer Goodstein, Circuit Court Judge

STATE OF SOUTH CAROLINA,

RESPONDENT FEB 16 2010

v

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SC SUPREME COURT

KENNETH HARRY JUSTUS,

APPELLANT,

MOTION FOR AN EXTENSION OF TIME
IN WHICH TO FILE THE INITIAL BRIEF OF APPELLANT
AND THE DESIGNATION OF MATTER

Counsel for Kenneth Harry Justus respectfully requests an additional extension of thirty days in which to file the initial brief of appellant and the designation of matter in this case. In support of this request, counsel shows

(1) Counsel argued in the Supreme Court Thursday, January 21, 2010 in *State v David Dwight Smith*. Counsel has an argument the Supreme Court in the death penalty case *State v Ron Finklea* Thursday, February 4, 2010. He is presently working on the death penalty case of *State v Stephen Bryant*.

(2) In the past month, counsel has filed briefs or certiorari petitions in the following cases

The State v Bentley Collins (660 transcript pages)
The State v Joshua Lamar Forrest (266 transcript pages)
The State v Richard Simmons (452 transcript pages)
The State v Mokeia Hammond (762 transcript pages)
The State v Devodus Rouse (675 transcript pages)

The State v Jake Antonio Wilson (1111 transcript pages)
The State v Joel Antawan Robinson (866 transcript pages)

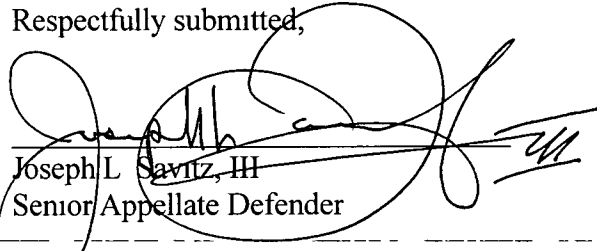
Counsel also argued the *State v Keith Sims* in the Supreme Court January 6, 2010

(3) Counsel believes that good cause supports this petition for extension as required by the Supreme Court's order of March 18, 2009

(4) Counsel makes this request in the utmost good faith and not for purposes of delay

For these reasons, counsel for Mr Justus respectfully requests an additional extension of thirty days in which to file the initial brief of appellant and the designation of matter for this case

Respectfully submitted,



Joseph L. Savitz, III
Senior Appellate Defender

Attorney for Appellant

This 16th day of February, 2010

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Dorchester County
Diane Schafer Goodstein, Circuit Court Judge

STATE OF SOUTH CAROLINA,

RESPONDENT

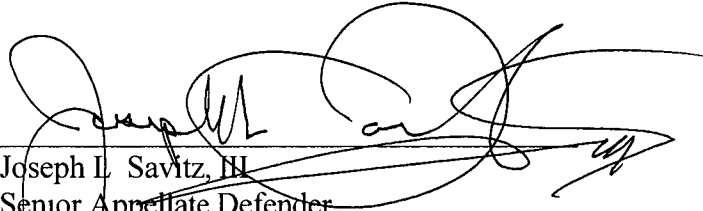
V

KENNETH HARRY JUSTUS,

APPELLANT,

CERTIFICATE OF SERVICE

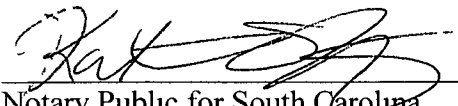
The undersigned attorney hereby certifies that a true copy of the motion for extension of time in the above referenced case has been served upon Donald J Zelenka, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 this 16th day of February, 2010



Joseph L. Savitz, III
Senior Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 16th day of February, 2010



(L S)
Notary Public for South Carolina

My Commission Expires July 1, 2019

The Supreme Court of South Carolina

The State,

Respondent,

v

Kenneth Harry Justus,

Appellant

The Honorable Diane Schafer Goodstein
Dorchester County
Trial Court Case No 2005-GS-18-01265

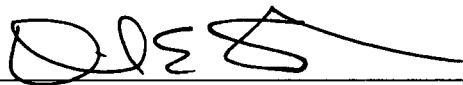
ORDER

For good cause having been shown, the time for serving and filing Initial
Brief of Appellant and Designation of Matter in the above entitled matter is
hereby extended until February 15, 2010

IT IS SO ORDERED

JEAN H TOAL, CHIEF JUSTICE

BY



CLERK

Columbia, South Carolina

January 19, 2010

cc Senior Appellate Defender Joseph L Savitz, III
Assistant Deputy Attorney General Donald J Zelenka



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street Suite 401
Columbia South Carolina 29201 3332
Post Office Box 11589
Columbia South Carolina 29211 1589
Telephone (803) 734 1330
Facsimile (803) 734 1397

Robert M Dudek Acting Chief Appellate Defender
Wanda H Carter Deputy Chief Appellate Defender
Joseph L Savitz III Senior Appellate Defender

January 15 2010

The Honorable Daniel E Shearouse
Clerk, S C Supreme Court
Post Office Box 11330
Columbia, SC 29211

RECEIVED
JAN 15 2010
S.C SUPREME COURT

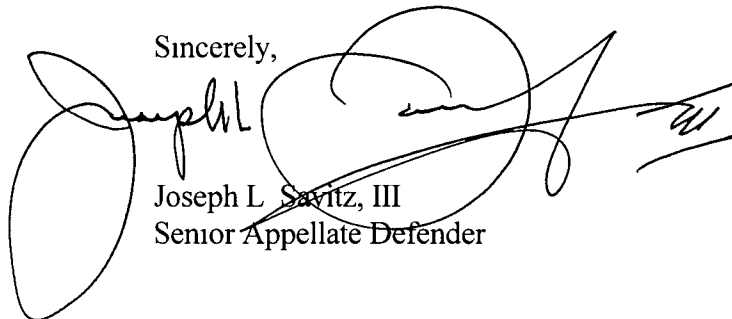
Re The State v Kenneth Harry Justus

Dear Mr Shearouse

The initial brief of appellant and designation of matter in this capital case are due to be served and filed with the Court today However, because of my heavy workload at this time, I am requesting a thirty day extension in which to serve and file the initial brief and designation of matter

By copy of this letter, I am informing Donald J Zelenka, of the Attorney General's Office, of my request

Sincerely,



Joseph L Savitz, III
Senior Appellate Defender

JLS,III/kms

cc Donald J Zelenka

Division of Appellate Defense
1330 Lady Street Suite 401
Columbia South Carolina 29201 3332
Post Office Box 11589
Columbia South Carolina 29211 1589
Telephone (803) 734 1330
Facsimile (803) 734 1397

Robert M Dudek Acting Chief Appellate Defender
Wanda H Carter Deputy Chief Appellate Defender
Joseph L Savitz III Senior Appellate Defender

RECEIVED

DEC - 7 2009

R E C E I P T

SC SUPREME COURT

I, Debbie M Hopkins, of the South Carolina Supreme Court, have received the following original trial transcript(s) in the death penalty case of The State v Kenneth Harry Justus

- 1 February 16 and 17, 2006 (Harriett P Bennett)
- 2 March 2, 2006 (Harriett P Bennett)
- 3 ~~February 2, 2007 (Harriett P Bennett)~~
- 4 July 12, 2007 (Harriett P Bennett)
- 5 October 1, 2008 (Harry A Walker)
- 6 December 11, 2008 (Hilda M Jordan)
- 7 December 15, 2008 (Hilda M Jordan)
- 8 December 16, 2008 (Hilda M Jordan)
- 9 December 23, 2008 (Hilda M Jordan)
- 10 April 27, 2009 (Brenda W Sigwald)

Date December 7, 2009

Debbie M Hopkins
(Name)

ORIGINAL



Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia South Carolina 29201 3332

Post Office Box 11589
Columbia South Carolina 29211 1589
Telephone (803) 734 1343
Facsimile (803) 734 1397

Robert M Dudek Acting Chief Appellate Defender
Wanda H Carter Deputy Chief Appellate Defender
Joseph L Savitz III Senior Appellate Defender

November 23, 2009

RECEIVED

NOV 23 2009

S.C. SUPREME COURT

The Honorable Daniel E Shearouse
Clerk, S C Supreme Court
Post Office Box 11330
Columbia, SC 29211

Dear Mr Shearouse

The following case falls under the 60 day rule for appeals, and the date we received the transcript is listed to the side

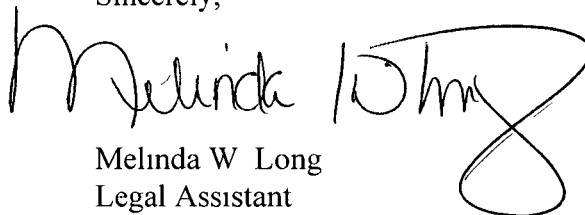
The State v Kenneth Harry Justus

11/16/2009

I would appreciate you beginning our time limits from the above date, and if you need additional information, or have any questions please contact me

Thank you for your assistance in this matter

Sincerely,



Melinda W Long
Legal Assistant



Division of Appellate Defense
1330 Lady Street Suite 401
Columbia South Carolina 29201 3332
Defender
Post Office Box 11589
Columbia South Carolina 29211 1589
Telephone (803) 734 1330
Facsimile (803) 734 1397

Robert M Dudek Acting Chief Appellate Defender
Wanda H Carter Deputy Chief Appellate Defender
Joseph L Savitz III Senior Appellate

November 18, 2009

RECEIVED

NOV 18 2009

C SUPREME COURT

The Honorable Daniel E Shearouse
Clerk of Court
The South Carolina Supreme Court
P O Box 11330
Columbia, SC 29211

Re The State v Kenneth H Justus (Capital Case)

Dear Mr Shearouse

This is just to inform your office that we received the July 12, 2007 hearing on Monday, November 16, 2009

Please contact me if you have any questions or need any other information

Sincerely,

Melinda W Long
Legal Assistant

/mwl

cc Donald J Zelenka, Esquire



SCCID

SOUTH CAROLINA COMMISSION ON INDECENT DEFENSE

ORIGINAL

Division of Appellate Defense
1330 Lady Street Suite 401
Columbia South Carolina 29201 3332

Joseph L. Savitz III Chief Appellate Defender
Wanda H. Carter Deputy Chief Appellate Defender

Post Office Box 11589
Columbia South Carolina 29211 1589
Telephone (803) 734 1330
Facsimile (803) 734 1397

October 28, 2009

RECEIVED

OCT 23 2009

SC SUPREME COURT

The Honorable Daniel E. Shearouse
Clerk of Court
The South Carolina Supreme Court
P O Box 11330
Columbia, SC 29211

Re The State v. Kenneth Harry Justus (Capital Case)

Dear Mr. Shearouse:

The above-referenced capital case is on appeal with this office. I was notified by court reporter Elizabeth Harris that there was no hearing on April 20, 2006. After contacting the trial attorney, Mr. Cummings informed our office that the April 20, 2006 hearing was actually an informal meeting with Judge Goodstein regarding fees and ex parte motions. Also, Desiree Allen with Court Administration has notified us that there were no records found for the February 7, 2007 hearing.

The only transcript that we are waiting on is the July 12, 2007 hearing which was requested from Harriett Bennett on September 30, 2009. I will inform the Court when this transcript has been delivered to our office. Please do not hesitate to contact me if you have any questions.

Sincerely,

Melinda W. Long
Legal Assistant

/mwl

cc Donald J. Zelenka, Esquire
Desiree Allen



South Carolina Court Administration
South Carolina Supreme Court
Columbia, South Carolina

ROSALYN FRIERSON
DIRECTOR

1015 SUMTER STREET SUITE
200
COLUMBIA SOUTH
CAROLINA 29201
PHONE (803) 734 1800
FAX (803) 734 0269

October 16 2009

Ms Melinda Long
Division of Appellate Defense
1330 Lady Street Suite 401
Columbia SC 29201-3332

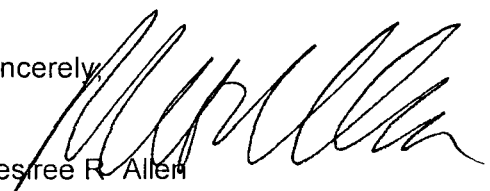
In re State v. Kenneth Harry Justus

Dear Ms Long

This is in follow-up to the letter I sent to you on September 11 2009 concerning the status of the transcripts in the above-named case. All transcripts requested have been delivered or information regarding them has been provided to your office.

The only transcript that cannot be produced is one for proceedings you indicated were heard on February 7 2007. If you will recall, there were no records found among the records delivered to Court Administration in order to produce this transcript. At your convenience, I would appreciate a letter from your office confirming that there are no more outstanding transcripts in this case.

Sincerely,


Desiree R. Allen
Program Manager

CC S C Supreme Court ✓

RECEIVED

OCT 16 2009

SC SUPREME COURT



 ORIGINAL

Division of Appellate Defense
1330 Lady Street Suite 401
Columbia South Carolina 29201 3332

Joseph L. Savitz III Chief Appellate Defender
Wanda H. Carter Deputy Chief Appellate Defender

Post Office Box 11589
Columbia South Carolina 29211 1589
Telephone (803) 734 1330
Facsimile (803) 734 1397

October 9, 2009

RECEIVED

OCT - 8 2009

SC SUPREME COURT

The Honorable Daniel E. Shearouse
Clerk of Court
The South Carolina Supreme Court
P O Box 11330
Columbia, SC 29211

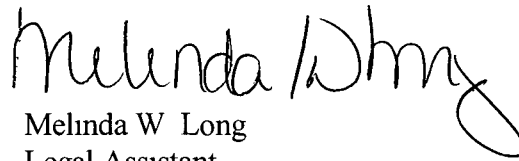
Re The State v. Kenneth H. Justus (Capital Case)

Dear Mr. Shearouse

This is just to inform your office that we received the April 27, 2006 hearing on Friday, October 2, 2009.

I will let you know when I receive the other transcripts that were requested. Please contact me if you have any questions or need any other information.

Sincerely,


Melinda W. Long
Legal Assistant

/mwl

cc Donald J. Zelenka, Esquire



SOUTH CAROLINA COMMISSION ON INDICENT DEFENSE

ORIGINAL

Division of Appellate Defense
1330 Lady Street Suite 401
Columbia South Carolina 29201 3332

Joseph L. Savitz III Chief Appellate Defender
Wanda H. Carter Deputy Chief Appellate Defender

Post Office Box 11589
Columbia South Carolina 29211 1589
Telephone (803) 734 1330
Facsimile (803) 734 1397

RECEIVED

September 30, 2009

SEP 30 2009

SC SUPREME COURT

The Honorable Daniel E. Shearouse
Clerk of Court
The South Carolina Supreme Court
P O Box 11330
Columbia, SC 29211

Re The State v. Kenneth Harry Justus (Capital Case)

Dear Mr. Shearouse:

The above-referenced capital case is on appeal with this office. I have received notification from Desiree Allen at Court Administration regarding some of the transcripts in the above-referenced case. I am reordering the April 20, 2006 hearing, the July 12, 2007 hearing, and the April 27, 2006 hearing from the correct court reporters today. We received the February 2, 2007 hearing on March 10, 2009. Desiree Allen also stated in her letter that there were no records/tapes found for the February 7, 2007.

I will inform the Court when these transcripts have been delivered to our office. Please do not hesitate to contact me if you have any questions.

Sincerely,

Melinda W. Long
Legal Assistant

/mwl

cc Donald J. Zelenka, Esquire



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia South Carolina 29201 3332

Post Office Box 11589
Columbia South Carolina 29211 1589
Telephone (803) 734 1343
Facsimile (803) 734 1397

Joseph L. Savitz III Chief Attorney
Wanda H. Carter Deputy Chief Attorney

September 30, 2009

RECEIVED

SEP 30 2009

SC SUPREME COURT

Ms. Harriett Bennett
Circuit Court Reporter
PO Box 86
Ladson, SC 29465

Dear Ms. Bennett

Our office has been requested to perfect the appeal arising out of

The State v. Kenneth Harry Justus

Indictment #

05 GS-18-1265

County Dorchester

Date of Trial July 12, 2007

Presiding Judge Diane Schafer Goodstein

It is my understanding that you were the court reporter at this time. That being the case, I request that you send this office the original trial transcript along with your bill. If you send a copy to this office, please bill us accordingly. To ensure prompt payment of this bill, please prepare it on the enclosed CID FORM 3500 (Substitution for SCCA DI-4) and include the original criminal case number (Indictment number) where the space is provided.

We request that the lines on the paper be numbered from 1-25, and that you include in the transcript any and all recorded motions, pre and post-trial. Additionally, please transcribe the jury selection, and the State and defense counsel's opening and closing arguments. We have found that even if there are no objections, we need to review both opening and closing arguments for appeal.

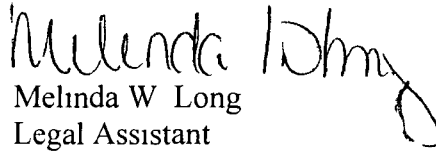
If you are aware of the existence of co-defendants not listed in the prior captioned case, please contact us prior to transcribing the transcript. In this manner, we can consult our records to ensure that in ordering a transcript, a duplication has not occurred. In addition, if the Attorney General's Office has already requested an original transcript, please notify us.

Ms Harriett Bennett
September 30, 2009
Page Two

I am sorry for any inconvenience this may cause, but I appreciate your assistance in this matter. If you have any questions, or problems, please contact me.

Thank you for your kind cooperation in this matter.

Sincerely,


Melinda W Long
Legal Assistant

xc S C Supreme Court
Attorney General's Office



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia South Carolina 29201 3332

Post Office Box 11589
Columbia South Carolina 29211 1589
Telephone (803) 734 1343
Facsimile (803) 734 1397

Joseph L. Savitz III Chief Attorney
Wanda H. Carter Deputy Chief Attorney

September 30, 2009

RECEIVED

SEP 30 2009

SC SUPREME COURT

Ms Brenda Sigwald
Circuit Court Reporter
P O Box 206
Jackson, SC 29831

Dear Ms Sigwald

Our office has been requested to perfect the appeal arising out of

The State v Kenneth Harry Justus Indictment # 05-GS-18-1265

County Dorchester Date of Trial April 27, 2006

Presiding Judge Diane Schafer Goodstein

It is my understanding that you were the court reporter at this time. That being the case, I request that you send this office the original trial transcript along with your bill. If you send a copy to this office, please bill us accordingly. To ensure prompt payment of this bill, please prepare it on the enclosed CID FORM 3500 (Substitution for SCCA DI-4) and include the original criminal case number (Indictment number) where the space is provided.

We request that the lines on the paper be numbered from 1-25, and that you include in the transcript any and all recorded motions, pre and post-trial. Additionally, please transcribe the jury selection, and the State and defense counsel's opening and closing arguments. We have found that even if there are no objections, we need to review both opening and closing arguments for appeal.

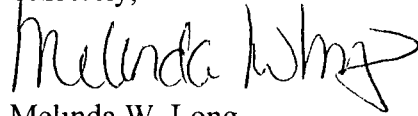
If you are aware of the existence of co-defendants not listed in the prior captioned case, please contact us prior to transcribing the transcript. In this manner, we can consult our records to ensure that in ordering a transcript, a duplication has not occurred. In addition, if the Attorney General's Office has already requested an original transcript, please notify us.

✓
Ms Brenda Sigwald
September 30, 2009
Page Two

I am sorry for any inconvenience this may cause, but I appreciate your assistance in this matter. If you have any questions, or problems, please contact me.

Thank you for your kind cooperation in this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Melinda W Long". The signature is fluid and cursive, with a large, sweeping flourish at the end.

Melinda W Long
Legal Assistant

xc S C Supreme Court
Attorney General's Office



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia South Carolina 29201 3332

Post Office Box 11589
Columbia South Carolina 29211 1589
Telephone (803) 734 1343
Facsimile (803) 734 1397

Joseph L. Savitz III Chief Attorney
Wanda H. Carter Deputy Chief Attorney

September 30, 2009

RECEIVED

SEP 30 2009

SC SUPREME COURT

Ms. Elizabeth Harris
Circuit Court Reporter
3008 Barnes Springs Road
Columbia, SC 29204

Dear Ms. Harris

Our office has been requested to perfect the appeal arising out of

The State v. Kenneth Harry Justus Indictment # 05-GS 18-1265

County Dorchester Date of Trial April 20, 2006

Presiding Judge Diane Schafer Goodstein

It is my understanding that you were the court reporter at this time. That being the case, I request that you send this office the original trial transcript along with your bill. If you send a copy to this office, please bill us accordingly. To ensure prompt payment of this bill, please prepare it on the enclosed CID FORM 3500 (Substitution for SCCA DI-4) and include the original criminal case number (Indictment number) where the space is provided.

We request that the lines on the paper be numbered from 1-25, and that you include in the transcript any and all recorded motions, pre and post-trial. Additionally, please transcribe the jury selection, and the State and defense counsel's opening and closing arguments. We have found that even if there are no objections, we need to review both opening and closing arguments for appeal.

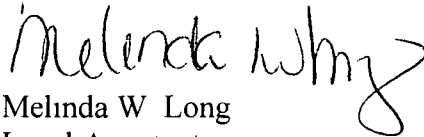
If you are aware of the existence of co-defendants not listed in the prior captioned case, please contact us prior to transcribing the transcript. In this manner, we can consult our records to ensure that in ordering a transcript, a duplication has not occurred. In addition, if the Attorney General's Office has already requested an original transcript, please notify us.

Ms Elizabeth Harris
September 30, 2009
Page Two

I am sorry for any inconvenience this may cause, but I appreciate your assistance in this matter. If you have any questions, or problems, please contact me.

Thank you for your kind cooperation in this matter.

Sincerely,

A handwritten signature in black ink that reads "Melinda W Long". The signature is written in a cursive, flowing style. The first name "Melinda" is written in a larger, more prominent script, and the last name "Long" is written in a slightly smaller, more compact script. The initials "W" and "L" are clearly visible.

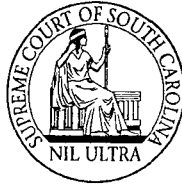
Melinda W Long
Legal Assistant

xc S C Supreme Court
Attorney General's Office

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SEP 14 2009

SC SUPREME COURT



South Carolina Court Administration

South Carolina Supreme Court
Columbia, South Carolina

ROSALYN FRIERSON
DIRECTOR

1015 SUMTER STREET SUITE
200
COLUMBIA SOUTH
CAROLINA 29201
PHONE (803) 734 1800
FAX (803) 734 0269

September 11 2009

Ms Melinda Long
Division of Appellate Defense
1330 Lady Street Suite 401
Columbia SC 29201-3332

In re State v Kenneth Harry Justus

Dear Ms Long

This is in response to your letters requesting that I confirm in writing the status of the transcripts listed below

April 20, 2006 – motion hearing – Elizabeth Harris was assigned to Judge Goodstein that day. There was no motion heard in this case on that date. Ms Harris has provided this information to your office in a Case Status Form.

April 27, 2006 – motion hearing – WAV files forwarded to this office in July 2009 by Ms Herrera have been sent to former CR, Brenda Sigwald to prepare this transcript. It will be completed within two weeks.

February 2, 2007 – motion hearing – Harriett Bennett is checking the tapes to determine if a motion hearing in this case can be found. I will advise when I hear from her.

February 7, 2007 – motion hearing – No records/tapes found for this date.

July 12, 2007 – motion hearing – Harriett Bennett is preparing this transcript.

Unfortunately, since we do not have the tapes or records from February 7, 2007, a transcript cannot be produced. I am sorry for any further inconvenience this may cause.

Sincerely,

Desiree R. Allen
Program Manager

CC S C Supreme Court



SOUTH CAROLINA COMMISSION ON INDICENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia South Carolina 29201 3332

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Joseph L. Savitz III Chief Attorney
Wanda H. Carter Deputy Chief Attorney

September 9, 2009

RECEIVED

SEP - 9 2009

SC SUPREME COURT

Ms. Desiree Allen
S C Court Administration
1015 Sumter Street, 2nd Floor
Columbia, South Carolina 29201-3739

Dear Ms. Allen

Below is a list of transcript(s) that were requested by this office Pursuant to Supreme Court Rule 206(e), the allotted time of sixty (60) days has lapsed to either receive the transcript or an extension to deliver same

<u>Court Reporter</u>	<u>Due Date</u>	<u>Case Name</u>
Ms. Robin L. Davis	3/16/09	Kenneth Harry Justus

Trial Date February 7, 2007 (Motions Hearing)

I would appreciate your confirming in writing as to the status of the above-referenced transcript(s). If you should have any questions, please do not hesitate to contact me.

Sincerely,


Melinda W. Long
Legal Assistant

xc S C Supreme Court
Attorney General's Office



Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia South Carolina 29201 3332

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Joseph L. Savitz III Chief Attorney
Wanda H. Carter Deputy Chief Attorney

September 9, 2009

RECEIVED

SEP - 9 2009

Ms. Desiree Allen
S C Court Administration
1015 Sumter Street, 2nd Floor
Columbia, South Carolina 29201-3739

S C SUPREME COURT

Dear Ms. Allen

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<u>Court Reporter</u>	<u>Due Date</u>	<u>Case Name</u>
Ms. Robin L. Davis	3/16/09	Kenneth Harry Justus

Trial Date April 27, 2006 (Motions Hearing)

I would appreciate your confirming in writing as to the status of the above-referenced transcript(s). If you should have any questions, please do not hesitate to contact me.

Sincerely,

Melinda W. Long
Legal Assistant

xc S C Supreme Court
Attorney General's Office



Division of Appellate Defense
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Columbia South Carolina 29201 3332

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Joseph L. Savitz III Chief Attorney
Wanda H. Carter Deputy Chief Attorney

September 9, 2009

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SEP - 9 2009

S C SUPREME COURT

Ms. Desiree Allen
S C Court Administration
1015 Sumter Street, 2nd Floor
Columbia, South Carolina 29201-3739

Dear Ms. Allen

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<u>Court Reporter</u>	<u>Due Date</u>	<u>Case Name</u>
Ms. Robin L. Davis	3/16/09	Kenneth Harry Justus

Trial Date: April 20, 2006 (Ex Parte Motion Hear)

I would appreciate your confirming in writing as to the status of the above-referenced transcript(s). If you should have any questions, please do not hesitate to contact me.

Sincerely,

Melinda W. Long
Legal Assistant

xc S C Supreme Court
Attorney General's Office



Division of Appellate Defense
1330 Lady Street, Suite 401
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Joseph L. Savitz III Chief Attorney
Wanda H. Carter Deputy Chief Attorney

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August 27, 2009

Ms. Desiree Allen
S C Court Administration
1015 Sumter Street, 2nd Floor
Columbia, South Carolina 29201-3739

RECEIVED

AUG 27 2009

S C SUPREME COURT

Dear Ms. Allen

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<u>Court Reporter</u>	<u>Due Date</u>	<u>Case Name</u>
Ms. Robin L. Davis	3/16/09	Kenneth Harry Justus

Trial Date July 12, 2007

I would appreciate your confirming in writing as to the status of the above-referenced transcript(s). If you should have any questions, please do not hesitate to contact me.

Sincerely,

Melinda W. Long
Legal Assistant

xc S C Supreme Court
Attorney General's Office



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Joseph L. Savitz III Chief Attorney
Wanda H. Carter Deputy Chief Attorney

August 27, 2009

Ms. Desiree Allen
S C Court Administration
1015 Sumter Street, 2nd Floor
Columbia, South Carolina 29201-3739

RECEIVED

AUG 27 2009

SC SUPREME COURT

Dear Ms. Allen

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<u>Court Reporter</u>	<u>Due Date</u>	<u>Case Name</u>
Ms. Robin L. Davis	3/16/09	Kenneth Harry Justus

Trial Date February 7, 2007 (Motions Hearing)

I would appreciate your confirming in writing as to the status of the above-referenced transcript(s). If you should have any questions, please do not hesitate to contact me.

Sincerely,

Melinda W. Long
Legal Assistant

xc S C Supreme Court
Attorney General's Office



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Joseph L. Savitz III Chief Attorney
Wanda H. Carter Deputy Chief Attorney

August 27, 2009

IR
AUG 27 2009

SC SUPREME COURT

Ms. Desiree Allen
S C Court Administration
1015 Sumter Street, 2nd Floor
Columbia, South Carolina 29201-3739

Dear Ms. Allen

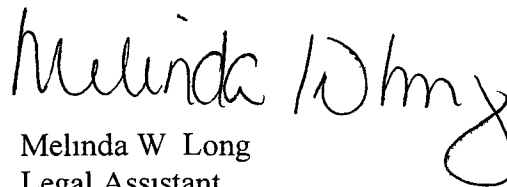
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<u>Court Reporter</u>	<u>Due Date</u>	<u>Case Name</u>
Ms. Robin L. Davis	3/16/09	Kenneth Harry Justus

Trial Date April 27, 2006 (Motions Hearing)

I would appreciate your confirming in writing as to the status of the above-referenced transcript(s). If you should have any questions, please do not hesitate to contact me.

Sincerely,


Melinda W. Long
Legal Assistant

xc S C Supreme Court
Attorney General's Office



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Wanda H. Carter Deputy Chief Attorney

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August 27, 2009

RECEIVED

AUG 27 2009

Ms. Desiree Allen
S C Court Administration
1015 Sumter Street, 2nd Floor
Columbia, South Carolina 29201-3739

SC SUPREME COURT

Dear Ms. Allen

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<u>Court Reporter</u>	<u>Due Date</u>	<u>Case Name</u>
Ms. Robin L. Davis	3/16/09	Kenneth Harry Justus

Trial Date: April 20, 2006 (Ex Parte Motion Hear)

I would appreciate your confirming in writing as to the status of the above-referenced transcript(s). If you should have any questions, please do not hesitate to contact me.

Sincerely,

Melinda W. Long
Legal Assistant

cc: S C Supreme Court
Attorney General's Office



ORIGINAL

Division of Appellate Defense
1330 Lady Street Suite 401
Columbia South Carolina 29201 3332

Joseph L. Savitz III Chief Attorney
Wanda H. Carter Deputy Chief Attorney

Post Office Box 11589
Columbia South Carolina 29211 1589
Telephone (803) 734 1343
Facsimile (803) 734 1397

August 27, 2009

RECEIVED

AUG 27 2009

SC SUPREME COURT

The Honorable Daniel E. Shearouse
Clerk of Court
The South Carolina Supreme Court
P O Box 11330
Columbia, SC 29211

Re The State v. Kenneth Harry Justus (Capital Case)

Dear Mr. Shearouse:

This is just to inform your office that we have received the October 1, 2008 transcript in the above-captioned case on Wednesday, August 26, 2009.

I will let you know when I receive the other transcripts that were requested. Please contact me if you have any questions or need any other information.

Sincerely,

Melinda W. Long
Legal Assistant

/mwl

cc Donald J. Zelenka, Esquire



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

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Columbia South Carolina 29201 3332

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Telephone (803) 734 1343
Facsimile (803) 734 1397

Joseph L. Savitz III Chief Attorney
Wanda H. Carter Deputy Chief Attorney

June 30, 2009

RECEIVED

JUN 30 2009

SC SUPREME COURT

Ms. Harry A. Walker
Circuit Court Reporter
P O Box 127
Rowesville, SC 29133-9133

Dear Ms. Walker

Our office has been requested to perfect the appeal arising out of

The State v. Kenneth Harry Justus

Indictment #

05-GS-18-1265

County Dorchester

Date of Trial October 1, 2008

Presiding Judge Diane Schafer Goodstein

It is my understanding that you were the court reporter at this time. That being the case, I request that you send this office the original trial transcript along with your bill. If you send a copy to this office, please bill us accordingly. To ensure prompt payment of this bill, please prepare it on the enclosed CID FORM 3500 (Substitution for SCCA DI-4) and include the original criminal case number (Indictment number) where the space is provided.

We request that the lines on the paper be numbered from 1-25, and that you include in the transcript any and all recorded motions, pre and post-trial. Additionally, please transcribe the jury selection, and the State and defense counsel's opening and closing arguments. We have found that even if there are no objections, we need to review both opening and closing arguments for appeal.

If you are aware of the existence of co-defendants not listed in the prior captioned case, please contact us prior to transcribing the transcript. In this manner, we can consult our records to ensure that in ordering a transcript, a duplication has not occurred. In addition, if the Attorney General's Office has already requested an original transcript, please notify us.

Ms Harry A Walker
June 30, 2009
Page Two

I am sorry for any inconvenience this may cause, but I appreciate your assistance in this matter. If you have any questions, or problems, please contact me.

Thank you for your kind cooperation in this matter.

Sincerely,

A handwritten signature in black ink that reads "Melinda W Long". The signature is written in a cursive, flowing style.

Melinda W Long
Legal Assistant

xc S C Supreme Court
Attorney General's Office

ORIGINAL



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street Suite 401
Columbia South Carolina 29201 3332

Joseph L. Savitz III Chief Appellate Defender
Wanda H. Carter Deputy Chief Appellate Defender

Post Office Box 11589
Columbia South Carolina 29211 1589
Telephone (803) 734 1330
Facsimile (803) 734 1397

June 30, 2009

The Honorable Daniel E. Shearouse
Clerk of Court
The South Carolina Supreme Court
P O Box 11330
Columbia, SC 29211

RECEIVED
JUN 30 2009
SC SUPREME COURT

Re The State v. Kenneth H. Justus (Capital Case)

Dear Mr. Shearouse:

This is just to inform your office that Court Reporter Hilda Jordan contacted our office on Monday, June 29, 2009 and informed us that she was not the court reporter for the October 1, 2008 hearing. I have attached a copy of this email for your records. I am ordering the October 1, 2008 hearing today from Court Reporter Harry Dot Walker.

I will let you know when I receive this transcript and the other transcripts that were requested. Please contact me if you have any questions or need any other information.

Sincerely,

Melinda W. Long
Legal Assistant

/mwl

cc Donald J. Zelenka, Esquire

Melinda W Long

From HMJORDAN3@aol.com
Sent Monday, June 29, 2009, 1:40 PM
To Melinda W Long
Subject re: State v. Justus

Ms. Long, I have checked the calendar for the judicial department and Harry Dot Walker was scheduled with Judge Diane Goodstein on October 1, 2, and 3, 2008.

— I hope this helps —

Thank you for your time
Hilda M. Jordan, CVR

Make your summer sizzle with [fast and easy recipes](#) for the grill



SOUTH CAROLINA COMMISSION ON INDICENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia South Carolina 29201 3332

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Facsimile (803) 734 1397

Joseph L. Savitz III Chief Attorney
Wanda H. Carter Deputy Chief Attorney

RECEIVED

JUN 24 2009

SC SUPREME COURT

June 23, 2009

Ms. Desiree Allen
S C Court Administration
1015 Sumter Street, 2nd Floor
Columbia, South Carolina 29201-3739

Dear Ms. Allen

Below is a list of transcript(s) that were requested by this office. Pursuant to Supreme Court Rule 206(e), the allotted time of sixty (60) days has lapsed to either receive the transcript or an extension to deliver same.

<u>Court Reporter</u>	<u>Due Date</u>	<u>Case Name</u>
Ms. Robin L. Davis	3/16/09	Kenneth Harry Justus

Trial Date: April 20, 2006 (Ex Parte Motion Hear)

I would appreciate your confirming in writing as to the status of the above-referenced transcript(s). If you should have any questions, please do not hesitate to contact me.

Sincerely,

Melinda W. Long
Legal Assistant

xc S C Supreme Court
Attorney General's Office



Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia South Carolina 29201 3332

Post Office Box 11589
Columbia South Carolina 29211 1589
Telephone (803) 734 1343
Facsimile (803) 734 1397

Joseph L. Savitz III Chief Attorney
Wanda H. Carter Deputy Chief Attorney

RECEIVED

JUN 24 2009

S C SUPREME COURT

June 23, 2009

Ms. Desiree Allen
S C Court Administration
1015 Sumter Street, 2nd Floor
Columbia, South Carolina 29201-3739

Dear Ms. Allen

Below is a list of transcript(s) that were requested by this office Pursuant to Supreme Court Rule 206(e), the allotted time of sixty (60) days has lapsed to either receive the transcript or an extension to deliver same

<u>Court Reporter</u>	<u>Due Date</u>	<u>Case Name</u>
Ms. Robin L. Davis	3/16/09	Kenneth Harry Justus

Trial Date April 27, 2006 (Motions Hearing)

I would appreciate your confirming in writing as to the status of the above-referenced transcript(s). If you should have any questions, please do not hesitate to contact me.

Sincerely,

Melinda W. Long
Legal Assistant

cc S C Supreme Court
Attorney General's Office



SOUTH CAROLINA COMMISSION ON INDEPENDENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia South Carolina 29201 3332

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Columbia South Carolina 29211 1589
Telephone (803) 734 1343
Facsimile (803) 734 1397

Joseph L. Savitz III Chief Attorney
Wanda H. Carter Deputy Chief Attorney

RECEIVED

JUN 24 2009

S C SUPREME COURT

June 23, 2009

Ms. Desiree Allen
S C Court Administration
1015 Sumter Street, 2nd Floor
Columbia, South Carolina 29201-3739

Dear Ms. Allen

Below is a list of transcript(s) that were requested by this office. Pursuant to Supreme Court Rule 206(e), the allotted time of sixty (60) days has lapsed to either receive the transcript or an extension to deliver same.

<u>Court Reporter</u>	<u>Due Date</u>	<u>Case Name</u>
Ms. Robin L. Davis	3/16/09	Kenneth Harry Justus

Trial Date February 7, 2007 (Motions Hearing)

I would appreciate your confirming in writing as to the status of the above-referenced transcript(s). If you should have any questions, please do not hesitate to contact me.

Sincerely,

Melinda W. Long
Legal Assistant

xc S C Supreme Court
Attorney General's Office



Division of Appellate Defense
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Joseph L. Savitz III Chief Attorney
Wanda H. Carter Deputy Chief Attorney

June 23, 2009

Ms. Desiree Allen
S C Court Administration
1015 Sumter Street, 2nd Floor
Columbia, South Carolina 29201-3739

Dear Ms. Allen

Below is a list of transcript(s) that were requested by this office Pursuant to Supreme Court Rule 206(e), the allotted time of sixty (60) days has lapsed to either receive the transcript or an extension to deliver same

Court Reporter
Ms. Robin L. Davis

Due Date
3/16/09

Case Name
Kenneth Harry Justus

Trial Date July 12, 2007

I would appreciate your confirming in writing as to the status of the above-referenced transcript(s). If you should have any questions, please do not hesitate to contact me.

Sincerely,

Melinda W. Long
Legal Assistant

xc S C Supreme Court
Attorney General's Office

RECEIVED
JUN 24 2009
SC SUPREME COURT



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Joseph L. Savitz III Chief Attorney
Wanda H. Carter Deputy Chief Attorney

RECEIVED

JUN 24 2009

June 23, 2009

S C SUPREME COURT

Ms. Desiree Allen
S C Court Administration
1015 Sumter Street, 2nd Floor
Columbia, South Carolina 29201-3739

Dear Ms. Allen

Below is a list of transcript(s) that were requested by this office. Pursuant to Supreme Court Rule 206(e), the allotted time of sixty (60) days has lapsed to either receive the transcript or an extension to deliver same.

<u>Court Reporter</u>	<u>Due Date</u>	<u>Case Name</u>
Ms. Hilda M. Jordan	6/17/09	Kenneth Harry Justus

Trial Date: October 1, 2008

I would appreciate your confirming in writing as to the status of the above-referenced transcript(s). If you should have any questions, please do not hesitate to contact me.

Sincerely,

Melinda W. Long
Legal Assistant

xc S C Supreme Court
Attorney General's Office



SCCID

SOUTH CAROLINA COMMISSION ON INDICENT DEFENSE

ORIGINAL

Division of Appellate Defense
1330 Lady Street Suite 401
Columbia South Carolina 29201 3332

Joseph L. Savitz III Chief Appellate Defender
Wanda H. Carter Deputy Chief Appellate Defender

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June 12, 2009

The Honorable Daniel E. Shearouse
Clerk of Court
The South Carolina Supreme Court
P O Box 11330
Columbia, SC 29211

RECEIVED

JUN 12 2009

SC SUPREME COURT

Re The State v. Kenneth H. Justus (Capital Case)

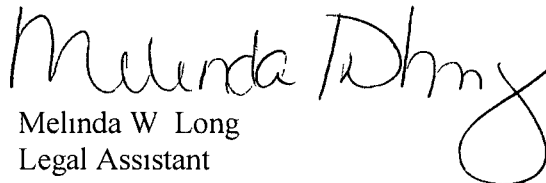
Dear Mr. Shearouse:

This is just to inform your office that we received the following hearings on Monday, June 8, 2009:

December 11, 2008
December 15, 2008
December 16, 2008
December 23, 2008

I will let you know when I receive the other transcripts that were requested. Please contact me if you have any questions or need any other information.

Sincerely,


Melinda W. Long
Legal Assistant

/mwl

cc Donald J. Zelenka, Esquire



Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia South Carolina 29201 3332

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Joseph L. Savitz III Chief Attorney
Wanda H. Carter Deputy Chief Attorney

May 27, 2009

RECEIVED

MAY 27 2009

S C SUPREME COURT

Ms Desiree Allen
S C Court Administration
1015 Sumter Street, 2nd Floor
Columbia, South Carolina 29201-3739

Dear Ms Allen

Below is a list of transcript(s) that were requested by this office Pursuant to Supreme Court Rule 206(e), the allotted time of sixty (60) days has lapsed to either receive the transcript or an extension to deliver same

<u>Court Reporter</u>	<u>Due Date</u>	<u>Case Name</u>
Ms Robin L Davis	3/16/09	Kenneth Harry Justus

Trial Date July 12, 2007

I would appreciate your confirming in writing as to the status of the above-referenced transcript(s) If you should have any questions, please do not hesitate to contact me

Sincerely,

Melinda W Long
Legal Assistant

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Attorney General's Office



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May 27, 2009

RECEIVED

MAY 27 2009

Ms. Desiree Allen
S C Court Administration
1015 Sumter Street, 2nd Floor
Columbia, South Carolina 29201-3739

S C SUPREME COURT

Dear Ms. Allen

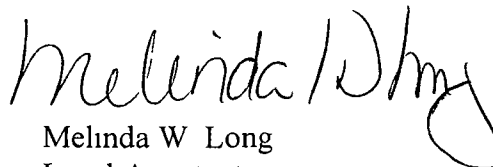
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Ms. Robin L. Davis	3/16/09	Kenneth Harry Justus

Trial Date February 7, 2007 (Motions Hearing)

I would appreciate your confirming in writing as to the status of the above-referenced transcript(s). If you should have any questions, please do not hesitate to contact me.

Sincerely,



Melinda W. Long
Legal Assistant

xc S C Supreme Court
Attorney General's Office



Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia South Carolina 29201 3332

Joseph L. Savitz III Chief Attorney
Wanda H. Carter Deputy Chief Attorney

Post Office Box 11589
Columbia South Carolina 29211 1589
Telephone (803) 734 1343
Facsimile (803) 734 1397

RECEIVED

May 27, 2009

MAY 27 2009

Ms. Desiree Allen
S C Court Administration
1015 Sumter Street, 2nd Floor
Columbia, South Carolina 29201-3739

S C SUPREME COURT

Dear Ms. Allen

Below is a list of transcript(s) that were requested by this office. Pursuant to Supreme Court Rule 206(e), the allotted time of sixty (60) days has lapsed to either receive the transcript or an extension to deliver same.

<u>Court Reporter</u>	<u>Due Date</u>	<u>Case Name</u>
Ms. Robin L. Davis	3/16/09	Kenneth Harry Justus

Trial Date: April 20, 2006 (Ex Parte Motion Hear)

I would appreciate your confirming in writing as to the status of the above-referenced transcript(s). If you should have any questions, please do not hesitate to contact me.

Sincerely,

Melinda W. Long
Legal Assistant

xc S C Supreme Court
Attorney General's Office



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S C Court Administration
1015 Sumter Street, 2nd Floor
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<u>Court Reporter</u>	<u>Due Date</u>	<u>Case Name</u>
Ms Robin L Davis	3/16/09	Kenneth Harry Justus

Trial Date April 27, 2006 (Motions Hearing)

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Sincerely,

Melinda W Long
Legal Assistant

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Attorney General's Office



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SC SUPREME COURT

Ms Desiree Allen
S C Court Administration
1015 Sumter Street, 2nd Floor
Columbia, South Carolina 29201-3739

Dear Ms Allen

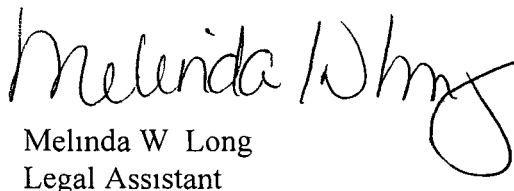
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<u>Court Reporter</u>	<u>Due Date</u>	<u>Case Name</u>
Ms Hilda M Jordan	5/17/09	Kenneth Harry Justus

Trial Date December 11, 2008 (Plea Hearing)

I would appreciate your confirming in writing as to the status of the above-referenced transcript(s) If you should have any questions, please do not hesitate to contact me

Sincerely,


Melinda W Long
Legal Assistant

cc S C Supreme Court
Attorney General's Office



Division of Appellate Defense
1330 Lady Street, Suite 401
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May 27, 2009

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MAY 27 2009

SC SUPREME COURT

Ms. Desiree Allen
S C Court Administration
1015 Sumter Street, 2nd Floor
Columbia, South Carolina 29201-3739

Dear Ms. Allen

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<u>Court Reporter</u>	<u>Due Date</u>	<u>Case Name</u>
Ms. Hilda M. Jordan	5/17/09	Kenneth Harry Justus

Trial Date: December 15, 2008 (Sentencing Hearing)

I would appreciate your confirming in writing as to the status of the above-referenced transcript(s). If you should have any questions, please do not hesitate to contact me.

Sincerely,

Melinda W. Long
Legal Assistant

xc S C Supreme Court
Attorney General's Office



Division of Appellate Defense
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Columbia South Carolina 29201 3332

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Joseph L. Savitz III Chief Attorney
Wanda H. Carter Deputy Chief Attorney

May 27, 2009

RECEIVED

MAY 27 2009

SC SUPREME COURT

Ms. Desiree Allen
S C Court Administration
1015 Sumter Street, 2nd Floor
Columbia, South Carolina 29201-3739

Dear Ms. Allen

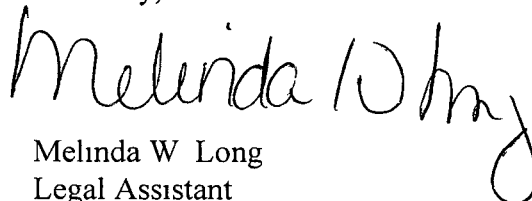
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<u>Court Reporter</u>	<u>Due Date</u>	<u>Case Name</u>
Ms. Hilda M. Jordan	5/17/09	Kenneth Harry Justus

Trial Date: December 16, 2008 (Sentencing Hearing)

I would appreciate your confirming in writing as to the status of the above-referenced transcript(s). If you should have any questions, please do not hesitate to contact me.

Sincerely,


Melinda W. Long
Legal Assistant

xc S C Supreme Court
Attorney General's Office



SOUTH CAROLINA COMMISSION ON INDICENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
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Wanda H. Carter Deputy Chief Attorney

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May 27, 2009

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Columbia, South Carolina 29201-3739

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SC SUPREME COURT

Dear Ms. Allen

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<u>Court Reporter</u>	<u>Due Date</u>	<u>Case Name</u>
Ms. Hilda M. Jordan	5/17/09	Kenneth Harry Justus

Trial Date: December 23, 2008 (Sentencing Hearing)

I would appreciate your confirming in writing as to the status of the above-referenced transcript(s). If you should have any questions, please do not hesitate to contact me.

Sincerely,

Melinda W. Long
Legal Assistant

xc S C Supreme Court
Attorney General's Office



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Joseph L. Savitz III Chief Attorney
Wanda H. Carter Deputy Chief Attorney

May 27, 2009

Ms. Desiree Allen
S C Court Administration
1015 Sumter Street, 2nd Floor
Columbia, South Carolina 29201-3739

Dear Ms. Allen

Below is a list of transcript(s) that were requested by this office. Pursuant to Supreme Court Rule 206(e), the allotted time of sixty (60) days has lapsed to either receive the transcript or an extension to deliver same.

<u>Court Reporter</u>	<u>Due Date</u>	<u>Case Name</u>
Ms. Hilda M. Jordan	3/16/09	Kenneth Harry Justus

Trial Date: October 1, 2008

I would appreciate your confirming in writing as to the status of the above-referenced transcript(s). If you should have any questions, please do not hesitate to contact me.

Sincerely,


Melinda W. Long
Legal Assistant

xc S C Supreme Court
Attorney General's Office

RECEIVED
MAY 27 2009
S C SUPREME COURT



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

ORIGINAL

Division of Appellate Defense
1330 Lady Street Suite 401
Columbia South Carolina 29201 3332

Joseph L. Savitz III Chief Appellate Defender
Wanda H. Carter Deputy Chief Appellate Defender

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Facsimile (803) 734 1397

March 17 2009

RECEIVED

MAR 17 2009

SC SUPREME COURT

The Honorable Daniel E. Shearouse
Clerk of Court
The South Carolina Supreme Court
P O Box 11330
Columbia, SC 29211

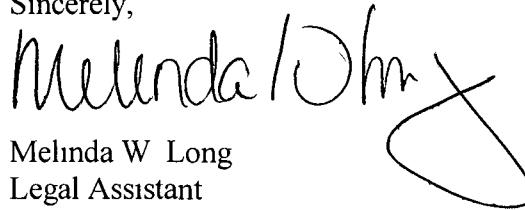
Re The State v. Kenneth H. Justus (Capital Case)

Dear Mr. Shearouse:

This is just to inform your office that we received the February 2, 2007 hearing on Tuesday, March 10, 2009.

I will let you know when I receive the other transcripts that were requested. Please contact me if you have any questions or need any other information.

Sincerely,



Melinda W. Long
Legal Assistant

/mwl

cc Donald J. Zelenka, Esquire

ORIGINAL



SCCID

SOUTH CAROLINA COMMISSION ON INDICENT DEFENSE

Division of Appellate Defense
1330 Lady Street Suite 401
Columbia South Carolina 29201 3332

Joseph L. Savitz III Chief Appellate Defender
Wanda H. Carter Deputy Chief Appellate Defender

Post Office Box 11589
Columbia South Carolina 29211 1589
Telephone (803) 734 1330
Facsimile (803) 734 1397

March 3, 2009

RECEIVED

MAR - 4 2009

SC SUPREME COURT

The Honorable Daniel E. Shearouse
Clerk of Court
The South Carolina Supreme Court
P O Box 11330
Columbia, SC 29211

Re The State v. Kenneth H. Justus (Capital Case)

Dear Mr. Shearouse:

This is just to inform your office that we have received the following transcripts in the above-captioned case:

February 16 and 17, 2006
March 2, 2006

Received March 3, 2009
Received March 3, 2009

I will let you know when I receive the other transcripts that were requested. Please contact me if you have any questions or need any other information.

Sincerely,

Melinda W. Long
Legal Assistant

/mwl

cc Donald J. Zelenka, Esquire



State of South Carolina
The Circuit Court of the First Judicial Circuit

DIANE SCHAFER
GOODSTEIN
JUDGE

POST OFFICE BOX 234
ST GEORGE SOUTH CAROLINA 29477
TELEPHONE (843) 832 0332
FAX (843) 832 0389
E MAIL dgoodstein@cscourts.org

January 16 2009

The Honorable Daniel Shearouse
South Carolina Supreme Court
P O Box 11330
Columbia, SC 29211

RE State of South Carolina v Kenneth Harry Justus
Indictment No 2005-GS-18-1265

Mr Shearouse

Please find enclosed the original Death Penalty Order in regards to the above-referenced matter(s)

Thank you for your assistance in this matter Please do not hesitate to give me a call should you have any questions

Sincerely

A handwritten signature in black ink that reads "Melanie H. Byrd". The signature is fluid and cursive, with the first name "Melanie" being the most prominent part.

Melanie H Byrd
Administrative Assistant to
Judge Diane S Goodstein

Enclosure(s)

RECEIVED
JAN 21 2009
SC SUPREME COURT

STATE OF SOUTH CAROLINA	)	IN THE COURT OF
	)	GENERAL SESSIONS
County of Dorchester	)	FIRST JUDICIAL CIRCUIT
	)	
STATE OF SOUTH CAROLINA	)	Death Penalty Order
	)	
v	)	
	)	
KENNETH HARRY JUSTUS	)	Indictment 2005-GS-18-1265
Defendant	)	
_____	)	

A Name of Trial Judge Diane Schafer Goodstein

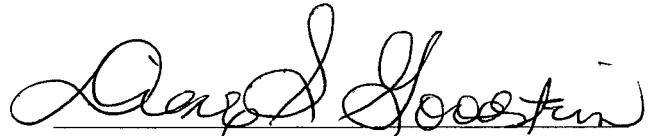
B Name of Defendant Kenneth Harry Justus

C Name of Defense Attorneys 1 Walter Bailey

2 Norbert Cummings

D Date Sentenced December 23 2008

F Aggravating Circumstance(s) found on a copy of the verdict form is attached Prior
conviction of murder, 16-3-20


 Judge Court of General Sessions

 2008
 South Carolina



Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia South Carolina 29201 3332

Post Office Box 11589
Columbia South Carolina 29211 1589
Telephone (803) 734 1343
Facsimile (803) 734 1397

Joseph L. Savitz III Chief Attorney
Wanda H. Carter Deputy Chief Attorney

January 15, 2009

RECEIVED

JAN 15 2009

SC SUPREME COURT

Ms. Robin L. Davis
Circuit Court Reporter
1927 Lake Hills Drive
Kingwood, TX 77339

Dear Ms. Davis:

Our office has been requested to perfect the appeal arising out of

The State v. Kenneth Harry Justus

Indictment # 05-GS-18-1265

County Dorchester

Date of Trial February 16, 2006 (Motions Hearing)

Presiding Judge Diane Schafer Goodstein

It is my understanding that you were the court reporter at this time. That being the case, I request that you send this office the original trial transcript along with your bill. If you send a copy to this office, please bill us accordingly. To ensure prompt payment of this bill, please prepare it on the enclosed CID FORM 3500 (Substitution for SCCA DI-4) and include the original criminal case number (Indictment number) where the space is provided.

We request that the lines on the paper be numbered from 1-25, and that you include in the transcript any and all recorded motions, pre and post-trial. Additionally, please transcribe the jury selection, and the State and defense counsel's opening and closing arguments. We have found that even if there are no objections, we need to review both opening and closing arguments for appeal.

If you are aware of the existence of co-defendants not listed in the prior captioned case, please contact us prior to transcribing the transcript. In this manner, we can consult our records to ensure that in ordering a transcript, a duplication has not occurred. In addition, if the Attorney General's Office has already requested an original transcript, please notify us.

Ms Robin L Davis
January 15, 2009
Page Two

I am sorry for any inconvenience this may cause, but I appreciate your assistance in this matter. If you have any questions, or problems, please contact me.

Thank you for your kind cooperation in this matter.

Sincerely, .

A handwritten signature in black ink, appearing to read "Melinda W Long". The signature is fluid and cursive, with a large loop at the end.

Melinda W Long
Legal Assistant

xc S C Supreme Court
Attorney General's Office



Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia South Carolina 29201 3332

Post Office Box 11589
Columbia South Carolina 29211 1589
Telephone (803) 734 1343
Facsimile (803) 734 1397

Joseph L. Savitz III Chief Attorney
Wanda H. Carter Deputy Chief Attorney

January 15, 2009

RECEIVED

JAN 15 2009

SC SUPREME COURT

Ms Robin L. Davis
Circuit Court Reporter
1927 Lake Hills Drive
Kingwood, TX 77339

Dear Ms. Davis

Our office has been requested to perfect the appeal arising out of

The State v. Kenneth Harry Justus

Indictment # 05-GS-18-1265

County Dorchester

Date of Trial February 17, 2006 (Motions Hearings)

Presiding Judge Diane Schafer Goodstein

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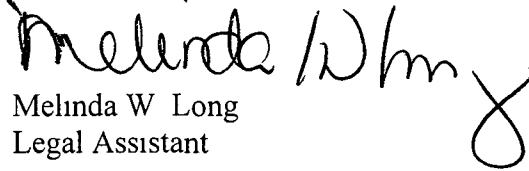
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Ms Robin L Davis
January 15, 2009
Page Two

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Thank you for your kind cooperation in this matter.

Sincerely,


Melinda W Long
Legal Assistant

xc S C Supreme Court
Attorney General's Office



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
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Joseph L. Savitz III Chief Attorney
Wanda H. Carter Deputy Chief Attorney

RECEIVED

JAN 15 2009

SC SUPREME COURT

January 15, 2009

Ms Robin L Davis
Circuit Court Reporter
1927 Lake Hills Drive
Kingwood, TX 77339

Dear Ms Davis

Our office has been requested to perfect the appeal arising out of

The State v Kenneth Harry Justus

Indictment # 05 GS-18-1265

County Orangeburg

Date of Trial March 2, 2006 (Motions Hearings)

Presiding Judge Diane Schafer Goodstein

It is my understanding that you were the court reporter at this time. That being the case, I request that you send this office the original trial transcript along with your bill. If you send a copy to this office, please bill us accordingly. To ensure prompt payment of this bill, please prepare it on the enclosed CID FORM 3500 (Substitution for SCCA DI-4) and include the original criminal case number (Indictment number) where the space is provided.

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Ms Robin L Davis
January 15, 2009
Page Two

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Thank you for your kind cooperation in this matter.

Sincerely,

A handwritten signature in black ink that reads "Melinda W Long". The signature is written in a cursive, flowing style. The first name "Melinda" is written in a larger, more prominent script, followed by "W" and "Long". The signature ends with a long, sweeping horizontal stroke that extends to the right.

Melinda W Long
Legal Assistant

xc S C Supreme Court
Attorney General's Office



Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia South Carolina 29201 3332

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Columbia South Carolina 29211 1589
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Joseph L. Savitz III Chief Attorney
Wanda H. Carter Deputy Chief Attorney

January 15, 2009

RECEIVED

JAN 15 2009

SC SUPREME COURT

Ms Robin L Davis
Circuit Court Reporter
1927 Lake Hills Drive
Kingwood, TX 77339

Dear Ms Davis

Our office has been requested to perfect the appeal arising out of

The State v Kenneth Harry Justus

Indictment # 05-GS-18-1265

County Dorchester

Date of Trial April 20, 2006 (Ex Parte Motion Hearing)

Presiding Judge Diane Schafer Goodstein

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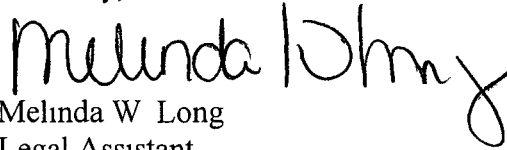
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✓
Ms Robin L Davis
January 15, 2009
Page Two

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Thank you for your kind cooperation in this matter.

Sincerely,


Melinda W Long
Legal Assistant

xc S C Supreme Court
Attorney General's Office



SCCID

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Joseph L. Savitz III Chief Attorney
Wanda H. Carter Deputy Chief Attorney

January 15, 2009

RECEIVED

JAN 15 2009

SC SUPREME COURT

Ms Robin L Davis
Circuit Court Reporter
1927 Lake Hills Drive
Kingwood, TX 77339

Dear Ms Davis

Our office has been requested to perfect the appeal arising out of

The State v Kenneth Harry Justus

Indictment # 05-GS-18-1265

County Dorchester

Date of Trial April 27, 2006 (Motions Hearing)

Presiding Judge Diane Schafer Goodstein

It is my understanding that you were the court reporter at this time. That being the case, I request that you send this office the original trial transcript along with your bill. If you send a copy to this office, please bill us accordingly. To ensure prompt payment of this bill, please prepare it on the enclosed CID FORM 3500 (Substitution for SCCA DI-4) and include the original criminal case number (Indictment number) where the space is provided.

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Ms Robin L Davis
January 15, 2009
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Sincerely,


Melinda W Long
Legal Assistant

xc S C Supreme Court
Attorney General's Office



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JAN 15 2009

SC SUPREME COURT

Ms. Robin L. Davis
Circuit Court Reporter
1927 Lake Hills Drive
Kingwood, TX 77339

Dear Ms. Davis

Our office has been requested to perfect the appeal arising out of

The State v. Kenneth Harry Justus

Indictment # 05-GS 18-1265

County Dorchester

Date of Trial February 2, 2007 (Motions Hearing)

Presiding Judge Diane Schafer Goodstein

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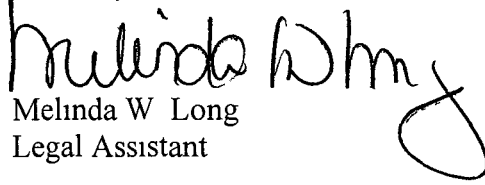
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Ms Robin L Davis
January 15, 2009
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Sincerely,


Melinda W Long
Legal Assistant

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Attorney General's Office



SCCID

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Joseph L. Savitz III Chief Attorney
Wanda H. Carter Deputy Chief Attorney

January 15, 2009

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SC SUPREME COURT

Ms Robin L. Davis
Circuit Court Reporter
1927 Lake Hills Drive
Kingwood, TX 77339

Dear Ms. Davis

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The State v. Kenneth Harry Justus

Indictment #

05-GS-18-1265

County Dorchester

Date of Trial February 7, 2007 (Motions Hearing)

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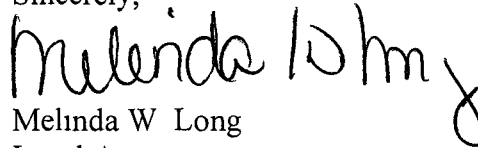
If you are aware of the existence of co-defendants not listed in the prior captioned case, please contact us prior to transcribing the transcript. In this manner, we can consult our records to ensure that in ordering a transcript, a duplication has not occurred. In addition, if the Attorney General's Office has already requested an original transcript, please notify us.

Ms Robin L Davis
January 15, 2009
Page Two

I am sorry for any inconvenience this may cause, but I appreciate your assistance in this matter. If you have any questions, or problems, please contact me.

Thank you for your kind cooperation in this matter.

Sincerely,

A handwritten signature in black ink that reads "Melinda W Long". The signature is written in a cursive, flowing style. The first name "Melinda" is written in a larger, more prominent script, followed by "W" and "Long". The signature ends with a long, sweeping horizontal stroke.

Melinda W Long
Legal Assistant

xc S C Supreme Court
Attorney General's Office



Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia South Carolina 29201 3332

Post Office Box 11589
Columbia South Carolina 29211 1589
Telephone (803) 734 1343
Facsimile (803) 734 1397

Joseph L. Savitz III Chief Attorney
Wanda H. Carter Deputy Chief Attorney

January 15, 2009

RECEIVED

JAN 15 2009

SC SUPREME COURT

Ms. Robin L. Davis
Circuit Court Reporter
1927 Lake Hills Drive
Kingwood, TX 77339

Dear Ms. Davis:

Our office has been requested to perfect the appeal arising out of

The State v. Kenneth Harry Justus

Indictment # 05-GS-18 1265

County Dorchester

Date of Trial July 12, 2007

Presiding Judge Diane Schafer Goodstein

It is my understanding that you were the court reporter at this time. That being the case, I request that you send this office the original trial transcript along with your bill. If you send a copy to this office, please bill us accordingly. To ensure prompt payment of this bill, please prepare it on the enclosed CID FORM 3500 (Substitution for SCCA DI-4) and include the original criminal case number (Indictment number) where the space is provided.

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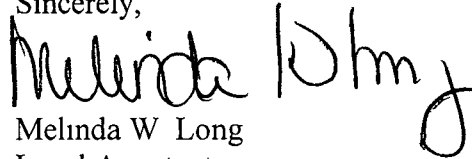
If you are aware of the existence of co-defendants not listed in the prior captioned case, please contact us prior to transcribing the transcript. In this manner, we can consult our records to ensure that in ordering a transcript, a duplication has not occurred. In addition, if the Attorney General's Office has already requested an original transcript, please notify us.

Ms Robin L Davis
January 15, 2009
Page Two

I am sorry for any inconvenience this may cause, but I appreciate your assistance in this matter. If you have any questions, or problems, please contact me.

Thank you for your kind cooperation in this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Melinda W Long". The signature is fluid and cursive, with the first name "Melinda" being more prominent and the last name "Long" following in a similar style.

Melinda W Long
Legal Assistant

xc S C Supreme Court
Attorney General's Office



Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia South Carolina 29201 3332

Post Office Box 11589
Columbia South Carolina 29211 1589
Telephone (803) 734 1343
Facsimile (803) 734 1397

Joseph L. Savitz III Chief Attorney
Wanda H. Carter Deputy Chief Attorney

January 15, 2009

RECEIVED

JAN 15 2009

SC SUPREME COURT

Ms. Hilda M. Jordan
Circuit Court Reporter
PO Box 435
Lexington, SC 29071

Dear Ms. Jordan

Our office has been requested to perfect the appeal arising out of

The State v. Kenneth Harry Justus Indictment # 05 GS-18-1265

County Dorchester Date of Trial October 1, 2008

Presiding Judge Diane Schafer Goodstein

It is my understanding that you were the court reporter at this time. That being the case, I request that you send this office the original trial transcript along with your bill. If you send a copy to this office, please bill us accordingly. To ensure prompt payment of this bill, please prepare it on the enclosed CID FORM 3500 (Substitution for SCCA DI-4) and include the original criminal case number (Indictment number) where the space is provided.

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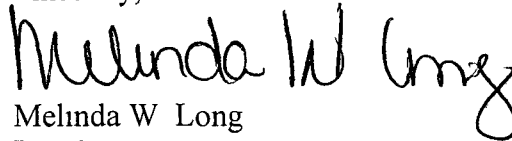
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Ms Hilda M Jordan
January 15, 2009
Page Two

I am sorry for any inconvenience this may cause, but I appreciate your assistance in this matter. If you have any questions, or problems, please contact me.

Thank you for your kind cooperation in this matter.

Sincerely,

A handwritten signature in black ink that reads "Melinda W Long". The signature is written in a cursive, flowing style. The first name "Melinda" is written in a larger, more prominent script, followed by "W" and "Long". The signature is positioned to the right of the typed name and title.

Melinda W Long
Legal Assistant

xc S C Supreme Court
Attorney General's Office



Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia South Carolina 29201 3332

Post Office Box 11589
Columbia South Carolina 29211 1589
Telephone (803) 734 1343
Facsimile (803) 734 1397

Joseph L. Savitz III Chief Attorney
Wanda H. Carter Deputy Chief Attorney

January 15, 2009

RECEIVED

JAN 15 2009

SC SUPREME COURT

Ms. Hilda M. Jordan
Circuit Court Reporter
PO Box 435
Lexington, SC 29071

Dear Ms. Jordan

Our office has been requested to perfect the appeal arising out of

The State v. Kenneth Harry Justus

Indictment # 05-GS-18-1265

County Dorchester

Date of Trial December 11, 2008 (Plea Hearing)

Presiding Judge Diane Schafer Goodstein

It is my understanding that you were the court reporter at this time. That being the case, I request that you send this office the original trial transcript along with your bill. If you send a copy to this office, please bill us accordingly. To ensure prompt payment of this bill, please prepare it on the enclosed CID FORM 3500 (Substitution for SCCA DI-4) and include the original criminal case number (Indictment number) where the space is provided.

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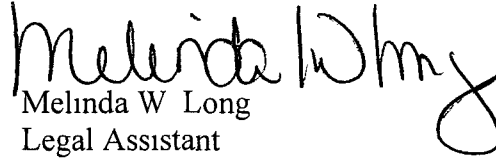
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Ms Hilda M Jordan
January 15, 2009
Page Two

I am sorry for any inconvenience this may cause, but I appreciate your assistance in this matter. If you have any questions, or problems, please contact me.

Thank you for your kind cooperation in this matter.

Sincerely,


Melinda W Long
Legal Assistant

xc S C Supreme Court
Attorney General's Office



Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia South Carolina 29201 3332

Post Office Box 11589
Columbia South Carolina 29211 1589
Telephone (803) 734 1343
Facsimile (803) 734 1397

Joseph L. Savitz III Chief Attorney
Wanda H. Carter Deputy Chief Attorney

RECEIVED

JAN 15 2009

January 15, 2009

SC SUPREME COURT

Ms. Hilda M. Jordan
Circuit Court Reporter
PO Box 435
Lexington, SC 29071

Dear Ms. Jordan

Our office has been requested to perfect the appeal arising out of

The State v. Kenneth Harry Justus

Indictment # 05-GS-18 1265

County Dorchester

Date of Trial December 15, 2008 (Sentencing Hearing)

Presiding Judge Diane Schafer Goodstein

It is my understanding that you were the court reporter at this time. That being the case, I request that you send this office the original trial transcript along with your bill. If you send a copy to this office, please bill us accordingly. To ensure prompt payment of this bill, please prepare it on the enclosed CID FORM 3500 (Substitution for SCCA DI-4) and include the original criminal case number (Indictment number) where the space is provided.

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Ms Hilda M Jordan
January 15, 2009
Page Two

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Thank you for your kind cooperation in this matter.

Sincerely,


Melinda W Long
Legal Assistant

xc S C Supreme Court
Attorney General's Office



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia South Carolina 29201 3332

Joseph L. Savitz III Chief Attorney
Wanda H. Carter Deputy Chief Attorney

Post Office Box 11589
Columbia South Carolina 29211 1589
Telephone (803) 734 1343
Facsimile (803) 734 1397

January 15, 2009

RECEIVED

JAN 15 2009

SC SUPREME COURT

Ms. Hilda M. Jordan
Circuit Court Reporter
PO Box 435
Lexington, SC 29071

Dear Ms. Jordan

Our office has been requested to perfect the appeal arising out of

The State v. Kenneth Harry Justus

Indictment # 05-GS-18-1265

County Dorchester

Date of Trial December 16, 2008 (Sentencing Hearing)

Presiding Judge Diane Schafer Goodstein

It is my understanding that you were the court reporter at this time. That being the case, I request that you send this office the original trial transcript along with your bill. If you send a copy to this office, please bill us accordingly. To ensure prompt payment of this bill, please prepare it on the enclosed CID FORM 3500 (Substitution for SCCA DI-4) and include the original criminal case number (Indictment number) where the space is provided.

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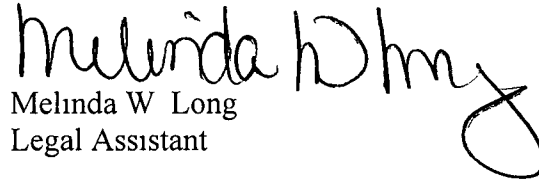
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Ms Hilda M Jordan
January 15, 2009
Page Two

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Thank you for your kind cooperation in this matter.

Sincerely,


Melinda W Long
Legal Assistant

xc S C Supreme Court
Attorney General's Office



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia South Carolina 29201 3332

Post Office Box 11589
Columbia South Carolina 29211 1589
Telephone (803) 734 1343
Facsimile (803) 734 1397

Joseph L. Savitz III Chief Attorney
Wanda H. Carter Deputy Chief Attorney

January 15, 2009

RECEIVED

JAN 15 2009

Ms. Hilda M. Jordan
Circuit Court Reporter
PO Box 435
Lexington, SC 29071

SC SUPREME COURT

Dear Ms. Jordan

Our office has been requested to perfect the appeal arising out of

The State v. Kenneth Harry Justus

Indictment # 05 GS-18-1265

County Dorchester

Date of Trial December 23, 2008 (Sentencing Hearing)

Presiding Judge Diane Schafer Goodstein

It is my understanding that you were the court reporter at this time. That being the case, I request that you send this office the original trial transcript along with your bill. If you send a copy to this office, please bill us accordingly. To ensure prompt payment of this bill, please prepare it on the enclosed CID FORM 3500 (Substitution for SCCA DI-4) and include the original criminal case number (Indictment number) where the space is provided.

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Ms Hilda M Jordan
January 15, 2009
Page Two

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Thank you for your kind cooperation in this matter.

Sincerely,


Melinda W Long
Legal Assistant

xc S C Supreme Court
Attorney General's Office

THE CUMMINGS LAW FIRM, LLC

Attorneys at Law
100 South Main Street, Suite B
Post Office Box 1318
Summerville, South Carolina 29484 1318
E mail cummingslaw@bellsouth.net

Norbert E. Cummings Jr
Henry R. Schlein, Associate

Telephone (843) 821 9999

Donald P. K. Gamache, Associate
Jeanette L. Hyatt, Associate

Fax (843) 851 0062

January 13, 2009

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

RECEIVED

JAN 16 2009

**RE State vs Kenneth Harry Justus
Case Number 2005-GS-18-1265
NOTICE OF INTENT TO APPEAL**

S.C. SUPREME COURT

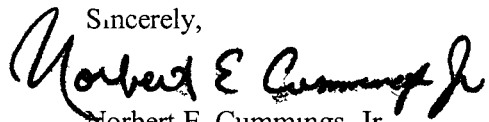
Dear Mr. Shearouse,

Thank you for your kind courtesy and consideration. We are in receipt of your letter dated January 12, 2009. I have enclosed a copy of the letter and Certificates of Service that were mailed on December 29, 2008 to the Office of Attorney General and South Carolina Office of Appellate Defense for your records. The Notice of Intent to Appeal was initially sent to only their offices by mistake.

The Notice of Intent to Appeal was filed as our client was issued a sentence of death on December 23, 2008 by the Honorable Diane S. Goodstein. Our client plead guilty to the capital offense of Murder and was sentenced to death after the requisite 24 hour waiting period. Please feel free to contact my office if you have any questions or if I may be of any assistance.

With warm and kind regards I am,

Sincerely,


Norbert E. Cummings, Jr.

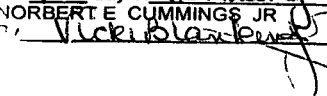
NEC/vlb
Enclosures

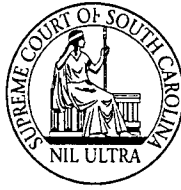
cc South Carolina Office
Of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

The Honorable David M. Pascoe
Dorchester County Solicitor
140 North Main Street Suite 102
Summerville SC 29483

The Honorable Diane S. Goodstein
Walter Bailey

CERTIFICATE OF SERVICES BY MAIL

I hereby certify that I have mailed a true and correct copy of the within Motion/Pleading/Document to all counsel of record by mailing a copy properly addressed with sufficient postage affixed thereto this 13 day of January, 2009
NORBERT E. CUMMINGS, JR.
 Secretary



The Supreme Court of South Carolina

DANIEL E SHEAROUSE
CLERK OF COURT

BRENDA F SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA SOUTH CAROLINA 29211
TELEPHONE (803) 734 1080
FAX (803) 734 1499

January 12, 2009

Norbert E Cummings, Jr , Esquire
Cummings Law Firm
100 S Main St , Ste B
Summerville, SC 29483

RE State v Kenneth Harry Justus, 2005-GS-18-1265

Dear Mr Cummings

This Court has received your notice of appeal in the above matter First, it is not clear why this appeal is being filed with this Court If this is a case in which a sentence of death was imposed, you need to advise this Court of that fact Rule 203(d)(1)(A)(i), SCACR

Second, the notice of appeal is not accompanied by a proof of service showing that a copy of the notice of appeal has been served on counsel for the State The proof of service that has been provided shows that a copy has been served on this Court ¹

I ask that you please advise this Court if this is a case in which a sentence of death has been imposed and provide a proof of service on the counsel for the State within ten (10) days of the date of this letter

Sincerely,



Daniel E Shearouse

cc The Honorable David M Pascoe
Office of the Attorney General

¹ The proof of service should be substantially in the form shown in Form 7 to Appendix C of Part II of the SCACR

RECEIVED
JAN 16 2009
S C SUPREME COURT

THE CUMMINGS LAW FIRM, LLC

Attorneys at Law
100 South Main Street, Suite B
Post Office Box 1318
Summerville, South Carolina 29484 1318
E mail cummingslaw@bellsouth.net

Norbert E. Cummings Jr
Henry R. Schlein, Associate

Donald P. K. Gamache Associate
Jeanette L. Hyatt Associate

Telephone (843) 821 9999

Fax (843) 851 0062

December 29 2008

Office of the Attorney General
State of South Carolina
Post Office Box 11549
Columbia SC 29211

South Carolina Office
Of Appellate Defense
Post Office Box 11589
Columbia, SC 29211 •

The Honorable David M. Pascoe
Dorchester County Solicitor
140 North Main Street, Suite 102
Summerville SC 29483

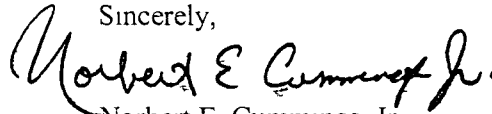
RE — State vs. Kenneth Harry Justus
Case Number 2005-GS-18-1265
NOTICE OF INTENT TO APPEAL

Dear Ladies and Gentlemen

Thank you for your kind courtesy and consideration. Enclosed please find the above Defendant's Notice of Intent to Appeal as filed with the Dorchester County Clerk of Court, along with a Certificate of Service to the Supreme Court of Appeals, the Office of the Attorney General, and the South Carolina Office of Appellate Defense. Thank you again for your consideration. Please feel free to contact me if you have any questions.

With warm and kind regards I am

Sincerely,


Norbert E. Cummings Jr.

NEC/vlb
Enclosures

cc The Honorable Diane S. Goodstein
Walter Bailey
Client

IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM DORCHESTER COUNTY
Court of General Sessions

Diane S Goodstein Circuit Court Judge

Case Number 2005-GS-18-1265

The State of South Carolina

Respondent

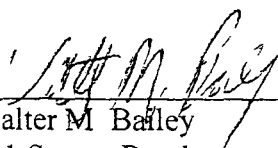
v

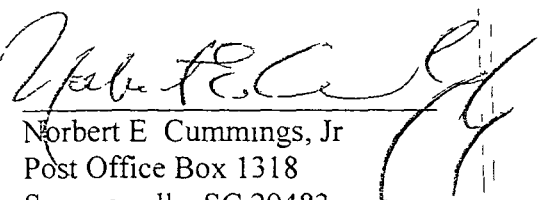
Kenneth Harry Justus

Appellant

NOTICE OF INTENT TO APPEAL

Kenneth Harry Justus, appeals his conviction for Murder and sentence therefore in this case. The sentence was imposed by the Honorable Diane S Goodstein on December 23, 2008, at the conclusion of the sentencing phase of the trial.


Walter M Bailey
101 Spring Road
Summerville, SC 29483
(843) 873-8497
Attorneys for Defendant
Kenneth Harry Justus

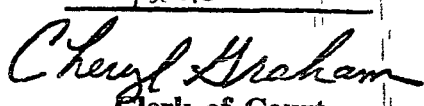

Norbert E Cummings, Jr
Post Office Box 1318
Summerville, SC 29483
(843) 821-9999

Other Counsel of Record
David M Pascoe
First Circuit Solicitor
140 North Main Street, Suite 102
Summerville, SC 29483
(843)871-2640

Summerville South Carolina
This ____ day of December, 2008

CERTIFIED COPY

23 08


Cheryl Graham
Clerk of Court
Dorchester County

THE STATE OF SOUTH CAROLINA
SUPREME COURT

APPEAL FROM DORCHESTER COUNTY
Court of General Sessions
Diane S Goodstein, Circuit Court Judge

Case No 2005-GS-18-1265

The State of South Carolina

Respondent,

v

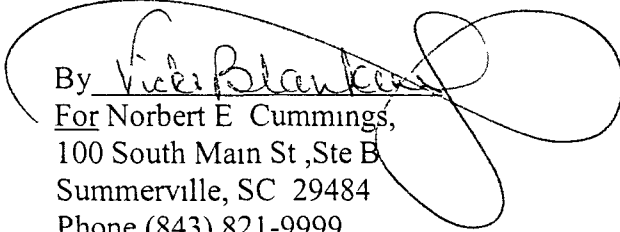
Kenneth Harry Justus

Appellant

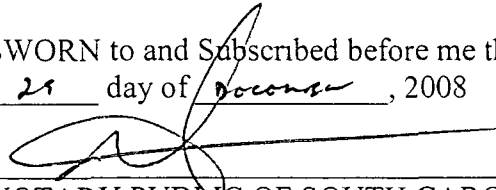
CERTIFICATE OF SERVICE

I, Norbert E Cummings, Jr, Counsel for Defendant above-named, hereby certify that I have today, December 29, 2008, served the within Notice of Intent to Appeal upon the State of South Carolina by causing a copy of it to be deposited in the United States mail, postage paid, addressed to South Carolina Office of Appellate Defense, Post Office Box 11589, Columbia, South Carolina 29211

December 29, 2008

By 
For Norbert E Cummings,
100 South Main St, Ste B
Summerville, SC 29484
Phone (843) 821-9999
Fax (843) 851-0062
Attorney for Defendant

SWORN to and Subscribed before me this
29 day of December, 2008


NOTARY PUBLIC OF SOUTH CAROLINA
My Commission Expires 6/14/2017

THE STATE OF SOUTH CAROLINA
SUPREME COURT

APPEAL FROM DORCHESTER COUNTY
Court of General Sessions
Diane S Goodstein, Circuit Court Judge

Case No 2005-GS-18-1265

The State of South Carolina

Respondent,

v

Kenneth Harry Justus

Appellant

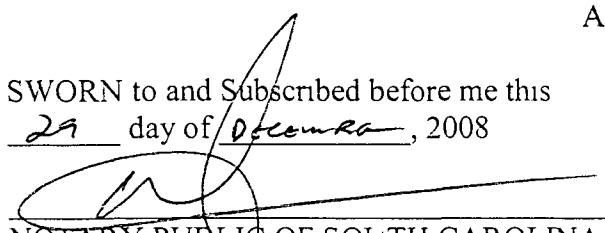
CERTIFICATE OF SERVICE

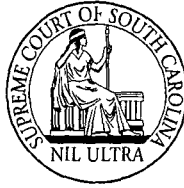
I, Norbert E Cummings, Jr Counsel for Defendant above-named, hereby certify that I have today, December 29, 2008, served the within Notice of Intent to Appeal upon the State of South Carolina by causing a copy of it to be deposited in the United States mail, postage paid, addressed to The Office of the Attorney General, State of South Carolina, Post Office Box 11549, Columbia, South Carolina 29211

December 29, 2008

By Vicki Blaylock
For Norbert E Cummings,
100 South Main St ,Ste B
Summerville, SC 29484
Phone (843) 821-9999
Fax (843) 851-0062
Attorney for Defendant

SWORN to and Subscribed before me this
29 day of December, 2008


NOTARY PUBLIC OF SOUTH CAROLINA
My Commission Expires 6/14/2017



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211
TELEPHONE (803) 734 1080
FAX (803) 734 1499

January 12, 2009

Norbert E. Cummings, Jr., Esquire
Cummings Law Firm
100 S. Main St., Ste. B
Summerville, SC 29483

RE: State v. Kenneth Harry Justus, 2005-GS-18-1265

Dear Mr. Cummings:

This Court has received your notice of appeal in the above matter. First, it is not clear why this appeal is being filed with this Court. If this is a case in which a sentence of death was imposed, you need to advise this Court of that fact. Rule 203(d)(1)(A)(i), SCACR.

Second, the notice of appeal is not accompanied by a proof of service showing that a copy of the notice of appeal has been served on counsel for the State. The proof of service that has been provided shows that a copy has been served on this Court.¹

I ask that you please advise this Court if this is a case in which a sentence of death has been imposed and provide a proof of service on the counsel for the State within ten (10) days of the date of this letter.

Sincerely,



Daniel E. Shearouse

cc: The Honorable David M. Pascoe
Office of the Attorney General

¹ The proof of service should be substantially in the form shown in Form 7 to Appendix C of Part II of the SCACR.

IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED

JAN 12 2009

APPEAL FROM DORCHESTER COUNTY
Court of General Sessions

SC SUPREME COURT

Diane S Goodstein, Circuit Court Judge

Case Number 2005-GS-18-1265

The State of South Carolina

Respondent,

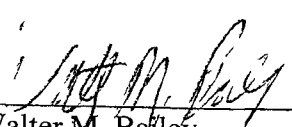
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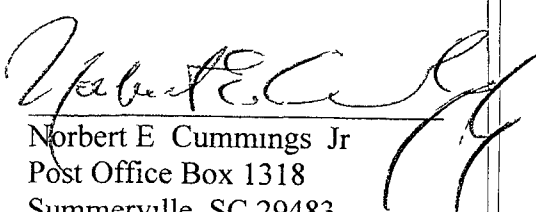
Kenneth Harry Justus

Appellant

NOTICE OF INTENT TO APPEAL

Kenneth Harry Justus, appeals his conviction for Murder and sentence therefore in this case. The sentence was imposed by the Honorable Diane S Goodstein on December 2nd, 2008, at the conclusion of the sentencing phase of the trial


Walter M Bailey
101 Spring Road
Summerville, SC 29483
(843) 873-8497
Attorneys for Defendant
Kenneth Harry Justus


Norbert E Cummings Jr
Post Office Box 1318
Summerville, SC 29483
(843) 821-9999

Other Counsel of Record
David M Pascoe
First Circuit Solicitor
140 North Main Street, Suite 102
Summerville, SC 29483
(843)871-2640

Summerville, South Carolina
This ____ day of December, 2008

CERTIFIED COPY

12 23 08


Cheryl Graham
Clerk of Court
Dorchester County

THE STATE OF SOUTH CAROLINA
SUPREME COURT

APPEAL FROM DORCHESTER COUNTY
Court of General Sessions
Diane S Goodstein, Circuit Court Judge

Case No 2005-GS-18-1265

The State of South Carolina

Respondent,

v

Kenneth Harry Justus

Appellant

CERTIFICATE OF SERVICE

I, Norbert E Cummings, Jr , Counsel for Defendant above-named, hereby certify that I have today, December 29, 2008, served the within Notice of Intent to Appeal upon the State of South Carolina by causing a copy of it to be deposited in the United States mail, postage paid, addressed to South Carolina Supreme Court, The Honorable Daniel E Shearouse, Clerk of Court, Post Office Box 11330, Columbia, South Carolina 29211

January 8, 2009

By Vicki Blanton
For Norbert E Cummings,
100 South Main St ,Ste B
Summerville, SC 29484
Phone (843) 821-9999
Fax (843) 851-0062
Attorney for Defendant

SWORN to and Subscribed before me this
8th day of January, 2009

Sylvia C Foude
NOTARY PUBLIC OF SOUTH CAROLINA
My Commission Expires 9.13.2011

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IAN 10 2009

SC SUPREME COURT

THE CUMMINGS LAW FIRM, LLC

Attorneys at Law
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Post Office Box 1318
Summerville, South Carolina 29484 1318
E mail cummingslaw@bellsouth.net

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Henry R Schlein, Associate
-
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Donald P K Gamache, Associate
Jeanette L Hyatt, Associate

Fax (843) 851 0062

January 8, 2009

South Carolina Supreme Court
The Honorable Daniel E Shearouse
Clerk of Court
Post Office Box 11330
Columbia, SC 29211

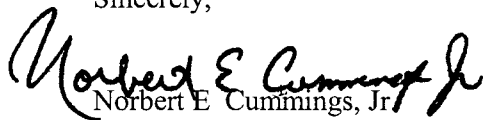
RE State vs Kenneth Harry Justus
Case Number 2005-GS-18-1265
NOTICE OF INTENT TO APPEAL

Dear Mr Shearouse,

Thank you for your kind courtesy and consideration Enclosed please find the above Defendant's Notice of Intent to Appeal as filed with the Dorchester County Clerk of Court on December 23, 2008, along with a Certificate of Service to the South Carolina Supreme Court Thank you again for your consideration Please feel free to contact me if you have any questions

With warm and kind regards I am,

Sincerely,


Norbert E Cummings, Jr.

NEC/vlb
Enclosures

cc South Carolina Office
Of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

The Honorable David M Pascoe
Dorchester County Solicitor
140 North Main Street, Suite 102
Summerville SC 29483

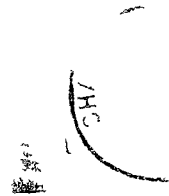
The Honorable Diane S Goodstein
Walter Bailey

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JAN 12 2009

S C SUPREME COURT

The Cummings Law Firm LLC
100 South Main Street Suite B
Post Office Box 1318
Summerville SC 29484-1318



South Carolina Supreme Court
The Honorable Daniel Shearouse
Post Office Box 11330
Columbia SC 29211

10/10/11 10:10 AM

