

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas
Roger M. Young, Sr., Presiding Judge

RECEIVED

JUL - 9 2015

Appellate Case No. 2015-001318

S.C. Supreme Court

STEPHEN J. GREEN, #259765,

Petitioner,

v.

THE STATE OF SOUTH CAROLINA,

Respondent.

**EXPLANATION OF JUSTIFICATION OF APPEAL
PURSUANT TO RULE 243 (c) (SCACR)**

NOW COMES, the Petitioner in the above captioned appeal, seeking to perfect an appeal from the findings of the lower court that his Application for Post-Conviction Relief, docketed at **2011-CP-08-1840, was procedurally barred as both untimely and successive.** This matter came before the lower court by way of Petitioner's current Application for Post-Conviction Relief filed on July 1, 2011, and an Amended Application for Post-Conviction Relief filed on November 13, 2012. The State (Respondent) did not file its Return and Motion to Dismiss in this matter until December 18, 2014. A Conditional Order of Dismissal was subsequently filed on this application on January 5, 2015. Petitioner filed a Response to that Conditional Order on January 30, 2015.

While the Conditional Order of Dismissal entered in this case, sets forth the allegations found in the Application for Post-Conviction Relief filed on July 1, 2011 and the subsequent

Amended Application filed on November 13, 2012, at Question 10(a) and (b), it contains no analysis or discussion concerning the facts in support of these allegations as set forth in the Application at Question 11 (a) and (b). The Conditional Order of Dismissal therefore concluded, without adequate finds of fact and rulings of law, that this Application should be summarily dismissed as both untimely and successive without addressing the factual and legal arguments put forth by Petitioner in support of his position that he should be granted hearing on these issues pursuant to S.C. Code Ann. Section 17-27-45(B).

A Final Order of Dismissal in this matter was filed February 19, 2015, and received by Counsel for the Petitioner on April 7, 2015. Petitioner served and mailed his Motion to Alter or Amend said Order pursuant to Rule 59(e), SCRPC, for filing on April 17, 2015. That motion was filed by the Clerk of Court on April 20, 2015. Said motion was denied by Order of the lower court filed on May 20, 2015. Petitioner served and filed his Notice of Appeal from both the Final Order of Dismissal filed on February 19, 2015 and the Order filed May 20, 2015 denying Petitioner's Motion to Alter or Amend pursuant to Rule 59(e), SCRPC.

PROCEDURAL HISTORY

Petitioner respectfully submits that the Order of Dismissal fails to make specific findings of fact and rulings of law with regard to Petitioner's asserting reasons *why* he did not have a full and fair opportunity to raise his issue regarding his improper sentencing to Life without Parole in his previous Post-Conviction Relief actions. All the crimes involved in this case occurred on March 9, 1998. *The predicate* First Degree Burglary charge for which Petitioner received life without parole on July 14, 1999, pursuant to S. C. Code Ann. § 17-25-45, also took place on March 9, 1998.

The Conditional Order of Dismissal previously issued in this matter concluded, without adequate finds of fact and rulings of law, that this Application should be summarily dismissed as both untimely and successive without addressing the factual and legal arguments put forth by Petitioner in support of his position that he should be granted hearing on these issues pursuant to S.C. Code Ann. Section 17-27-45(B). Petitioner subsequently filed his Reply to the Conditional Order of Dismissal bringing the Court's attention to why circumstances exist in this PCR action which justify review of an application which would otherwise, ordinarily, be deemed successive and untimely. Petitioner submitted that the Final Order of Dismissal entered in this matter, like the Conditional Order before it, fails to include adequate findings of fact and rulings of law with regard to the assertions of Petitioner concerning why review is necessary and appropriate on the unique facts of this case.

In his applications, Petitioner raised the following in support of his allegations;

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

(a) On **July 14, 1999** the Applicant was sentenced following trial by jury on the following indictments:

1998-GS-08-1854- Assault and Battery of a High and Aggravated Nature

1998-GS-08-1855- Armed Robbery

1998-GS-08-1857- Kidnapping

1998-GS-08-1861- Burglary First Degree

1999-GS-08-391 - Criminal Sexual Conduct, First Degree

The Applicant received a life sentence for the First Degree Burglary count and an aggregate sentence of thirty (30) years concurrent for the remaining offenses which were each for crimes committed on **March 9, 1998**.

The First Degree Burglary count addressed **in this application** for which the Applicant was subsequently sentenced to life pursuant to S.C. Code Ann § 17-25-45 (F) 1995 was also committed on **March 9, 1998**.

In *State v. Benjamin*, 353 S.C. 441, 579 S.E.2d 289 (April 2003) our Supreme Court initially ruled that S.C. Code Ann. § 17-25-50 did not apply to the calculation of strikes for

sentencing under the authority of § 17-25-45. That ruling was overturned shortly thereafter in *State v. Gordon*, 356 S.C. 143, 588 S.E.2d 105 (November 2003), wherein our high court concluded that § 17-25-45 and § 17-25-50 “ must be construed together.” Id at 588 S.E. 2d 109. More recently in *Bryant v. State*, 384 S.C. 525, 683 S.E. 2d 280 (2009) the court adhered to the position taken in *Gordon, supra*, that sections 17-25-45 (F) and 17-25-50 must be construed together toward a determination concerning whether the circumstances of a particular case preclude the imposition of a life without parole case.

The Applicant’s initial Application for Post-Conviction Relief on these judgments and sentences was filed on November 14, 2000 and was decided by Order filed October 15, 2002. The sole issue addressed in that action was whether the Applicant was entitled to a belated direct appeal pursuant to *White v. State*, 263 S.C. 100, 208 S.E. 2d 35 (1974). After his judgments and sentences were affirmed on his belated direct appeal, the Applicant filed a second Post-Conviction Relief Application (2004-CP-08-2262) which was dismissed as successive and barred as untimely by § 17-27-45 (A). Thus, the Applicant was denied the opportunity to go forward on an application in which he clearly could have asserted that his second PCR action was proper pursuant to § 17-27-45 (B) inasmuch as it raised this new legal standard. Although the Applicant did not raise this precise issue in his 2004 application, the issue clearly would have been supported by the record. The Applicant did have an appeal perfected on his behalf from this dismissal. He was represented in that PCR appeal by Robert M. Pachak of the Appellate Division of the South Carolina Commission on Indigent Defense. Assistant Appellate Defender Pachak filed a *Johnson* Petition¹ on behalf of the Applicant. That petition dated April 11, 2006 raised the question of “*Whether there was any evidence to support the Post-Conviction Relief judge’s findings that Petitioner’s current application was successive and that it was barred by the statute of limitations?*” Therefore, similar to the procedure followed by the reviewing appellate court when a brief is filed on direct appeal pursuant to *Anders v. California*² the burden shifted to the Supreme Court of South Carolina to review the entire record below to determine whether they concurred with Attorney Pachak’s position that this Post-Conviction Relief appeal was meritless. Once again, Attorney Pachak, like the Post-Conviction Relief lawyer in the circuit court, did not raise the question of whether the Applicant should be allowed to go forward under § 17-27-45(B) which addresses filing a Post-Conviction Relief action following the pronouncement of a new standard of law. As previously noted, *Gordon, supra*, was not decided until November, 2003. The Applicant’s 2004 Post-Conviction Relief Application was filed on October 20, 2004. Thus, he filed his application docketed at 2004-CP-08-2262 within one year of the new standard of law announced in *Gordon* as is required by S.C. Code Ann. § 17-27-45(B). The Appendix submitted along with the *Johnson* Petition filed by Attorney Pachak did include the indictments for the offenses used as predicate convictions for purposes of sentencing the Applicant to life without parole pursuant to S.C. Code Ann. § 17-25-45. These indictments reflect that each of these offenses occurred **on or about March 9, 1998**. See, Indictments No. 98-GS-08-1855, 98-GS-08-1861, 98-GS-08-1857. Although the Order of Dismissal on 2004-CP-08-2262 indicates that the Records of the Clerk of Court were before the Court, the arrest warrants for these crimes **were not** included in the Appendix submitted

¹ 294 S. C. 310, 364 S.E.2d 201 (1998).

² 386 U. S. 738, 87 S. Ct. 1396 (1967).

with the *Johnson* Petition filed following that Order of Dismissal dated November 25, 2005 and filed November 29, 2005. While the indictments for the predicate offenses, which were included in the Appendix at pages 101-102, 105-106, and 109-110, each reference crimes committed *on or about March 9, 1998*, the arrest warrants for each of these offenses clearly establish that the underlying acts each occurred on *March 9, 1998*. See, Attachments obtained from the Berkeley County Clerk of Court's records. As such, these offenses clearly occurred on the same date as the crime for which the Applicant received life without parole pursuant to § 17-25-45. The trial record from the Applicant's November 15-16, 1999 trial for the crimes of First Degree Burglary and Assault and Battery with Intent to Kill clearly establishes that the life without parole sentence for First Degree Burglary was predicated upon his conviction earlier the previous summer for armed robbery, first degree burglary and kidnapping. See, Trial Transcript dated November 15-16, 1999, pages 191-193. Testimony from this trial clearly establishes that the first degree burglary for which the Applicant received a sentence of life without parole in fact occurred on *March 9, 1998*.

In light of all the above, the Applicant asserts that the Supreme Court of South Carolina in conducting its review of that case pursuant to *Johnson* would have been able to determine that the Applicant was entitled to a second Post-Conviction Relief action pursuant to § 17-27-45(B) had the arrest warrants from the Clerk of Court's records been included in the Appendix submitted with the *Johnson* Petition. Accordingly, he now seeks a *de novo* Post-Conviction Relief action on the question of whether § 17-25-50 should have been applied to all his crimes making him ineligible for receipt of a life without parole sentence pursuant to § 17-25-45. The Applicant in *Bryant*, supra, had in fact had a previous Post-Conviction Relief and was allowed to go forward with a second collateral action in 2004 after the favorable change in the law concerning the proper application of § 17-25-50 to 17-25-45. *Bryant* was granted relief in the circuit court, however that ruling was reversed by the Supreme Court on appeal. The ruling of the Post-Conviction Relief judge was reversed, however based on a finding that Bryant's three armed robberies which took place *over the course of three days* did not qualify for application of § 17-27-50 for purposed of counting strikes. In the Applicant's case the crimes that were used as his first strike occurred *on the same date* as the crime for which he was sentenced to life without the possibility of parole pursuant to § 17-27-45. The Applicant's trial lawyer was ineffective in that he did nothing to challenge the use of these prior convictions for enhancement purposes, and in fact, virtually conceded the point during sentencing. See, Trial Transcript p. 192 ll. 18-24.

DISCUSSION

PCR Counsel would ask this Honorable Court to note that at the time of Petitioner's Original PCR action (on these charges which were prosecuted at Petitioner's second jury trial), docketed at 2000-CP-08-2302, the only relief sought was Petitioner's right to a belated direct

appeal. The transcript of the evidentiary hearing on that PCR Application, held on August 16, 2002, confirms that assertion. It is apparent from the transcript of that proceeding that counsel of record was not well familiar with PCR law and procedures. He presented no amendments to the simple *pro se* application filed by Petitioner and only sought the limited review of the question as to whether Petitioner was entitled to a belated appeal. App. pp. 204 – 220.³ See, ATTACHMENT A. Petitioner asks this Honorable Court to recognize that during that time period, it was not uncommon for lawyers representing PCR Petitioners to focus their attention on getting an Petitioner a belated direct appeal. It was common practice at that time for PCR lawyers to do so, on the assumption that, as would be the normal progression in an appellate matter, the Petitioner would have his belated direct appeal and then, *if he lost that appeal*, have the opportunity to raise any collateral claims he might have in a subsequent PCR action. While there was discussion at the PCR hearing referenced above concerning the fact that the only issue before the Court was Petitioner's claim to a belated direct appeal, *there is no indication on this record that Petitioner was advised by anyone that he had to raise any collateral claims he might have in this Application or lose his right to do so.* This issue was subsequently laid to rest by this Honorable Court in *Garner v. State*, 371 S.C. 1, 636 S.E.2d 860 (2006). Undersigned Counsel would respectfully ask this Honorable Court to acknowledge that until that decision, many PCR Petitioners had their belated direct appeals pursuant to *White, supra*, heard before they went forward with a second PCR action on their Sixth Amendment claims after losing their bid for a new trial in their belated direct appeal.

As a practical matter, Petitioner could not have raised this issue in his first application on these charges because the *Gordon, supra*, decision had not been entered at the time of that PCR action. As noted in all Petitioner's pleading thus far, he never got the chance to raise this issue in

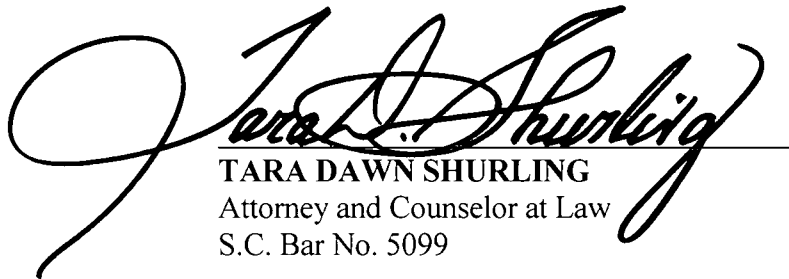
³ Reference to Appendix are from subsequently filed PCR Appeal which put Petitioner's *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974) appeal before this Court in Petitioner's belated direct appeal. Petitioner asks that this Court take judicial notice of the content of that Appendix which is on file with this Honorable Court.

his second PCR action because it was dismissed as successive and time barred. On appeal of that ruling, Petitioner stood no chance for the reviewing court to catch this issue in their review of his PCR appeal pursuant *Johnson, supra*, where the arrest warrants from both the November and July judgments, which provided the exact date of the incidents involved, were not put before this Honorable Court in the Appendix to that PCR Appeal. The rule announced in *Gordon, supra*, should have applied to Petitioner's case inasmuch as his judgments and sentences were subject to direct review after that opinion was filed.

CONCLUSION

For these reasons, Petitioner now most respectfully submits that his case, although procedurally complex, presents viable arguments concerning why he should have been permitted to pursue his most recent PCR application on the judgments and sentences entered at the conclusion of his jury trial held on November 15-16, 1999. He respectfully asks that he be permitted to perfect his appeal from the orders of the lower court dismissing this PCR action.

Respectfully submitted,


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This 6th day of July 2015.

ATTORNEY FOR PETITIONER

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas
Roger M. Young, Sr., Presiding Judge

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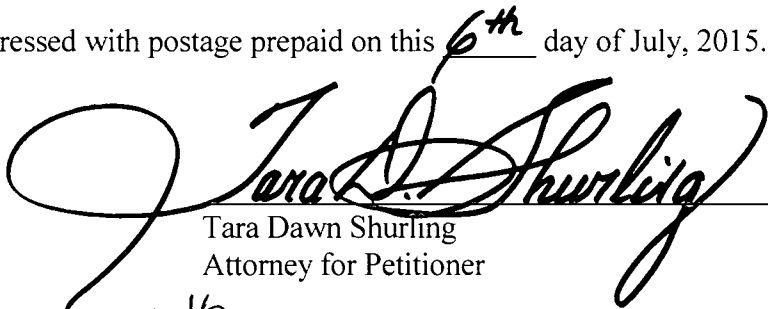
v.

THE STATE OF SOUTH CAROLINA,

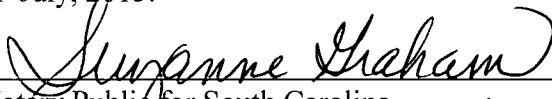
Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of the Petitioner's Explanation of Justification of Appeal Pursuant to Rule 243 (c) SCACR in the above-entitled cause has been served upon opposing counsel, J. Rutledge Johnson, Assistant Attorney General, by mailing in an envelope properly addressed with postage prepaid on this 6th day of July, 2015.


Tara Dawn Shurling
Attorney for Petitioner

SWORN TO BEFORE me this 6th day
of July, 2015.

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

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E X H I B I T S

NO.	DESCRIPTION	ID.	EV.
PLAINTIFF'S EXHIBIT NO. 1, LETTER DATED MARCH 6, 2000, TO STEPHEN J. GREEN FROM J. MITCHELL LANIER.....			9

1 THE COURT: THE NEXT CASE IS THE CASE OF
2 STEPHEN J. GREEN V. THE STATE OF SOUTH CAROLINA,
3 00-CP-08-2302.

4 MR. E. BROWN: YOUR HONOR, MAY I HAVE A
5 MINUTE WITH MR. GREEN, PLEASE?

6 THE COURT: YES.

7 (WHEREUPON, THERE WAS A PAUSE IN THE
8 PROCEEDINGS.)

9 MR. E. BROWN: WE'RE READY, YOUR HONOR.

10 THE COURT: ALL RIGHT. WOULD YOU EACH
11 IDENTIFY YOURSELVES FOR THE RECORD AND WHO YOU
12 REPRESENT?

13 MR. E. BROWN: MY NAME IS EDWARD BROWN. I
14 REPRESENT THE APPLICANT, MR. STEPHEN GREEN.

15 MR. ZELENKA: AND I'M DON ZELENKA WITH THE
16 ATTORNEY GENERAL'S OFFICE REPRESENTING THE
17 RESPONDENT, YOUR HONOR.

18 THE COURT: ALL RIGHT. WHAT MY POLICY IS,
19 IF YOU WILL TELL ME THE GROUNDS YOU ARE PROCEEDING
20 UNDER, BECAUSE OFTENTIMES APPLICANTS WILL CHANGE
21 THEIR GROUNDS OR DROP SOME OR ADD NEW ONES. SO IF
22 YOU WOULD PLEASE TELL ME EXACTLY WHAT YOU ARE
23 PROCEEDING UNDER.

24 MR. E. BROWN: YOUR HONOR, BASICALLY UNDER --
25 IN THIS APPEAL -- I MEAN IN THIS PCR HEARING, THE

1 APPLICANT IS PROCEEDING UNDER THE -- WHAT OCCURRED
2 WAS, THERE WAS TWO TRIALS. THE SECOND TRIAL -- THE
3 FIRST TRIAL HE WAS CONVICTED. THERE WAS A SECOND
4 TRIAL, AND MR. LANIER REPRESENTED HIM IN BOTH
5 TRIALS. THE SECOND TRIAL IS WHAT WE WERE HERE ABOUT
6 TODAY. THAT WAS TRIED BEFORE JUDGE DENNIS.

7 HE -- MR. LANIER DID NOT FILE A NOTICE OF
8 INTENT TO APPEAL IN REGARDS TO THIS APPLICANT.
9 MR. LANIER APPEARED TO TESTIFY THAT HE DID NOT AND
10 THAT HE SHOULD HAVE. THE APPLICANT HAS INDICATED
11 THAT HE WANTED AN APPEAL. NO APPEAL HAS EVER BEEN
12 ACCORDED HIM. I DON'T KNOW THAT THE ATTORNEY
13 GENERAL'S OFFICE IS GOING TO ---

14 (OFF-THE-RECORD DISCUSSION.)

15 MR. E. BROWN: I DON'T KNOW THAT THE -- I
16 DON'T THINK THE ATTORNEY GENERAL'S OFFICE IS GOING TO
17 OPPOSE, ON A FACTUAL BASIS AT LEAST, THAT MR. GREEN
18 HAS NEVER BEEN ACCORDED HIS RIGHT TO AN APPEAL. AND
19 MR. LANIER ADMITTED IN A LETTER TO MR. GREEN THAT,
20 YOU KNOW, HE DIDN'T TIMELY FILE A ---

21 THE COURT: IS THAT CORRECT, FROM THE
22 STATE?

23 MR. ZELENKA: IF THE DEFENDANT -- BECAUSE
24 OF THE FACTUAL CIRCUMSTANCES, JUDGE, HE HAD A FIRST
25 TRIAL, HE DID TAKE AN APPEAL FROM THAT TRIAL, THEN

1 HAD THE SECOND TRIAL.

2 WHAT I INDICATED TO MR. BROWN WAS THERE IS
3 A LETTER FROM MR. GREEN THAT WAS PART OF THE
4 APPLICATION, THAT IF MR. GREEN TESTIFIES, BUT, IN
5 FACT, AFTER HIS CONVICTION HE DESIRED A RIGHT TO
6 APPEAL FROM THAT SECOND CONVICTION, AND WOULD HAVE
7 ASKED MR. LANIER TO DO IT, AND HE HADN'T MADE THAT
8 REQUEST DURING THAT TIME PERIOD, THAT MR. LANIER
9 WOULD HAVE SAID HE WOULD HAVE DONE IT.

10 HE WASN'T CONTACTED. WHEN HE WAS
11 CONTACTED, THE TIME PERIOD, I BELIEVE, HAD ALREADY
12 RUN, AND HE HAD INDICATED THAT HE HAD NOT FILED AN
13 APPEAL ON HIS BEHALF. SO THAT -- MR. LANIER'S
14 TESTIMONY, I THINK, WILL PRETTY MUCH FOLLOW ALONG
15 THOSE LINES. IT'S A MATTER AS TO WHAT MR. GREEN WILL
16 TESTIFY ABOUT THAT MAY BE AT ISSUE.

17 THE COURT: WHAT WOULD HIS TESTIMONY BE
18 THAT WOULD BE CONFLICTING WITH THAT?

19 MR. E. BROWN: YOUR HONOR, MAY I INTERRUPT,
20 PLEASE?

21 THE COURT: ALL RIGHT.

22 MR. E. BROWN: THE LETTER WE HAD FROM
23 MR. LANIER CLEARLY STATES -- AND THE FIRST SENTENCE
24 OF THE LETTER, I THINK, IS THE CRUX OF THE LETTER --
25 I DID LET THE TEN-DAY PERIOD OF TIME ELAPSE WITHOUT

1 FILING THE INTENT TO APPEAL FROM HIS SECOND
2 CONVICTION.

3 AND I THINK THAT'S THE HEART OF THE MATTER
4 RIGHT THERE.

5 THE COURT: WELL, MAYBE YOU SHOULD CALL
6 MR. LANIER FIRST, AND THEN ESTABLISH THAT, AND THEN --
7 THAT'S THE ONLY ISSUE IN THIS CASE?

8 MR. E. BROWN: THAT'S PRETTY MUCH THE
9 ISSUE.

10 THE COURT: ALL RIGHT. WELL, I MEAN -- GO
11 AHEAD.

12 (WHEREUPON, THE WITNESS WAS SWORN BY
13 THE CLERK AND ASKED BY THE CLERK TO STATE
14 THE WITNESS'S FULL NAME FOR THE RECORD.)

15 THE WITNESS: INITIAL J., MITCHELL LANIER.

16 J. MITCHELL LANIER, BEING FIRST DULY SWORN,
17 TESTIFIED AS FOLLOWS:

18 DIRECT EXAMINATION BY MR. BROWN:

19 Q. MR. LANIER, YOU REPRESENTED MR. STEPHEN GREEN IN
20 A MATTER STYLED THE STATE OF SOUTH CAROLINA V.

21 STEPHEN GREEN; IS THAT CORRECT?

22 A. I REPRESENTED HIM ON TWO SEPARATE CRIMINAL
23 CASES.

24 Q. ALL RIGHT. AND THE ONE THAT WE ARE CONCERNED
25 WITH TODAY CONCERNED -- THE INDICTMENT NUMBER, I

1 THINK, ON THOSE WERE 99-GS-08-1859 AND '1860. IS
2 THAT CORRECT? LET ME HAND YOU A COPY OF THE
3 TRANSCRIPT AND THEN I THINK WE CAN EXPEDITE THAT.

4 A. ALL RIGHT. I AGREE WITH THAT.

5 Q. OKAY. AND MR. GREEN WAS, IN FACT, CONVICTED
6 UNDER BOTH OF THESE INDICTMENTS; IS THAT CORRECT?

7 A. THAT'S CORRECT.

8 Q. ALL RIGHT. AND SUBSEQUENT THERETO, MR. GREEN
9 WANTED TO APPEAL -- WANTED AN APPEAL.

10 A. WELL, LET ME EXPLAIN A LITTLE BIT NOW. AT THE
11 SECOND TRIAL MR. GREEN WAIVED HIS RIGHT TO BE PRESENT
12 AT THE TRIAL, SO AFTER THE CONVICTION, I DON'T
13 RECOLLECT EVER TALKING TO HIM, GOING BACK TO THE
14 JAIL. HE KNEW WHAT WAS GOING TO HAPPEN IF HE GOT
15 CONVICTED, HE WAS GOING TO GET LIFE WITHOUT PAROLE
16 BECAUSE HE HAD ALREADY BEEN CONVICTED OF A MOST
17 SERIOUS OFFENSE, AND BOTH OF THESE WERE MOST SERIOUS
18 OFFENSES. SO I DON'T THINK I WENT TO THE JAIL AND
19 ACTUALLY TALKED TO HIM AFTER THE TRIAL WAS OVER.

20 I KNOW HE -- HE KNEW HE HAD A RIGHT TO
21 APPEAL, AND HE -- YOU KNOW, I DON'T KNOW IF ANYBODY
22 CONTACTED ME ABOUT IT OR NOT. I DON'T REMEMBER
23 ANYBODY CONTACTING ME ABOUT IT. BUT I SHOULD HAVE
24 KNOWN HE WANTED TO APPEAL.

25 Q. OKAY. MR. LANIER, LET ME ...

1 MR. E. BROWN: MARK THIS, IF YOU WOULD,
2 MA'AM, PLEASE.

3 MR. ZELENKA: NO OBJECTION.

4 THE COURT: IS THAT THE LETTER?

5 MR. E. BROWN: YES, SIR.

6 THE COURT: ALL RIGHT. IF YOU WOULD HAND
7 IT TO THE COURT REPORTER.

8 BY MR. E. BROWN:

9 Q. LET ME SHOW YOU WHAT HAS BEEN MARKED PLAINTIFF'S
10 EXHIBIT NUMBER 1. AND THAT'S A LETTER YOU WROTE TO
11 MR. GREEN ---

12 A. THAT'S CORRECT.

13 Q. --- REGARDING HIS RIGHT TO APPEAL; IS THAT
14 CORRECT?

15 A. MY FAILURE TO REQUEST OR FILE AN INTENT TO
16 APPEAL WITHIN THE TEN-DAY PERIOD.

17 Q. ALL RIGHT. AND YOU WOULD AGREE THAT THERE'S
18 BEEN NO MOTION OR ANYTHING --- YOU FILED NO MOTION OR
19 ANYTHING OR NO NOTICE IN REGARDS TO AN APPEAL FROM
20 MR. GREEN FROM THIS CONVICTION -- FOR THESE
21 CONVICTIONS?

22 A. NO, I DID NOT.

23 MR. E. BROWN: ALL RIGHT. I HAVE NOTHING
24 FURTHER, YOUR HONOR. I'D MOVE FOR INTRODUCTION OF
25 THE LETTER.

1 THE COURT: NO OBJECTION?

2 MR. ZELENKA: NO OBJECTION.

3 (MARKED FOR IDENTIFICATION WAS PLAINTIFF'S
4 EXHIBIT NO. 1, LETTER DATED MARCH 6, 2000, TO STEPHEN
5 J. GREEN FROM J. MITCHELL LANIER.)

6 CROSS-EXAMINATION MR. ZELENKA:

7 Q. MR. LANIER, I JUST HAVE A FEW QUESTIONS. THE
8 TRIAL IN THIS CASE OCCURRED IN NOVEMBER OF 1999; IS
9 THAT CORRECT?

10 A. THAT SOUNDS CORRECT.

11 Q. AND THE EARLIER TRIAL HAD OCCURRED, AND, IN
12 FACT, THAT WAS BEFORE JUDGE PIEPER IN JULY 1999, AND
13 YOU DID FILE AN APPEAL FROM THAT MATTER AROUND JULY
14 20TH, 1999, BEFORE THIS CASE WAS EVEN TRIED; ISN'T
15 THAT CORRECT?

16 A. CORRECT.

17 Q. AFTER THE NOVEMBER 1999 TRIAL, AS I UNDERSTAND
18 YOUR TESTIMONY, MR. GREEN DID NOT SPECIFICALLY
19 CONTACT YOU ABOUT HAVING AN APPEAL UNTIL SOMETIME IN
20 MARCH 2000 WHEN YOU RESPONDED WITH A LETTER, IS THAT
21 YOUR BEST RECOLLECTION?

22 A. THAT IS MY BEST RECOLLECTION.

23 Q. OKAY. WHEN YOU INDICATED IN THAT LETTER THAT
24 YOU LET THE TEN-DAY TIME PERIOD LAPSE FOLLOWING AN
25 ATTEMPT TO APPEAL FROM THE SECOND CONVICTION, HAD

1 YOUR CLIENT EVER SPECIFICALLY DIRECTED YOU TO FILE
2 THAT NOTICE OF APPEAL AT ANY TIME ---

3 A. NO.

4 Q. --- AFTER THAT CONVICTION?

5 A. NO.

6 Q. OKAY. SO ---

7 A. AND I DON'T KNOW IF SOMEBODY -- HIS FAMILY -- I
8 KNOW HIS MOTHER AND I HAD A LOT OF CONTACT, AND I
9 DON'T KNOW IF SHE HAD CONTACTED ME OR NOT, I JUST
10 DON'T REMEMBER. I DON'T RECOLLECT ANYBODY CONTACTING
11 ME, THOUGH.

12 Q. OKAY. SO YOUR TESTIMONY IS BASICALLY THAT,
13 BECAUSE HE HAD RECEIVED A LIFE-WITHOUT-PAROLE
14 SENTENCE, YOUR BELIEF WOULD HAVE BEEN THAT HIS
15 EXPECTATION WOULD HAVE BEEN FOR AN APPEAL TO BE DONE
16 IN THIS CASE; IS THAT CORRECT?

17 A. I WOULD THINK SO.

18 Q. OKAY.

19 MR. ZELENKA: NO FURTHER QUESTIONS.

20 MR. E. BROWN: NO FURTHER QUESTIONS.

21 (WHEREUPON, THE WITNESS WAS EXCUSED.)

22 MR. E. BROWN: I CALL STEPHEN GREEN TO THE
23 STAND.

24 (WHEREUPON, THE WITNESS WAS SWORN BY
25 THE CLERK AND ASKED BY THE CLERK TO STATE

1 THE WITNESS'S FULL NAME FOR THE RECORD.)

2 THE WITNESS: STEPHEN J. GREEN.

3 STEPHEN J. GREEN, BEING FIRST DULY SWORN,

4 TESTIFIED AS FOLLOWS:

5 DIRECT EXAMINATION BY MR. BROWN:

6 Q. MR. GREEN, YOU ARE PRESENTLY INCARCERATED
7 BECAUSE OF A CONVICTION, IN PART, UNDER INDICTMENT
8 NUMBERS 99-GS-08-1859 AND '1860; IS THAT CORRECT?

9 A. YES, SIR.

10 Q. ALL RIGHT. AND MR. LANIER REPRESENTED YOU IN
11 THAT PROCEEDING?

12 A. YES, SIR.

13 Q. OKAY. AFTER THE TRIAL, DID YOU MAKE AN ATTEMPT
14 TO GET IN TOUCH WITH MR. LANIER IN REGARDS TO
15 APPEALING THE CONVICTION THAT WAS RENDERED AGAINST
16 YOU?

17 A. I DID GET IN CONTACT WITH MR. LANIER.

18 Q. ALL RIGHT. DID ANYONE ELSE ON YOUR BEHALF,
19 PRIOR TO YOUR CONTACTING MR. LANIER, MAKE AN ATTEMPT
20 TO GET -- OR GOT IN TOUCH WITH MR. LANIER REGARDING
21 THE APPEAL?

22 A. YES, SIR.

23 Q. AND WHO WAS THAT?

24 A. MY MOTHER.

25 Q. AND HOW DO YOU KNOW SHE DID THAT?

- 1 A. BECAUSE I SPOKE WITH HER ON SEVERAL OCCASIONS
2 WHERE SHE TOLD ME SHE SPOKE TO MR. LANIER.
- 3 Q. AND DID MR. LANIER, IN FACT, PERFECT AN APPEAL
4 FOR YOU BY WAY OF FILING A NOTICE OF INTENT TO
5 APPEAL?
- 6 A. NO, HE DID NOT.
- 7 Q. ALL RIGHT. DID YOU WANT AN APPEAL?
- 8 A. YES, I DID.
- 9 Q. ALL RIGHT. DID MR. LANIER VISIT YOU AT THE
10 JAILHOUSE OR AT THE DETENTION CENTER AFTER YOU WERE
11 CONVICTED AT THE SECOND TRIAL?
- 12 A. NO, HE DID NOT.
- 13 Q. OKAY. DID YOU REQUEST THAT HE VISIT YOU?
- 14 A. YES, I DID.
- 15 Q. AND HOW DID YOU REQUEST THAT?
- 16 A. I SPOKE TO HIM PRIOR TO THE TRIAL, AND UPON MY
17 CONVICTION, I TOLD HIM THAT, IF CONVICTED, I WANTED
18 AN APPEAL, AND HE TOLD ME THAT HE WAS GOING TO MAKE
19 SURE THAT MY APPEAL WAS FILED, AND HE PUT ME UNDER
20 THE IMPRESSION THAT THE APPEAL WAS TO BE FILED.
- 21 Q. ALL RIGHT. NOW, YOU WERE CONVICTED ON A
22 PREVIOUS OCCASION. DID MR. LANIER FILE A NOTICE OF
23 INTENT TO APPEAL ON THAT -- IN THAT CONVICTION?
- 24 A. YES, HE DID.
- 25 Q. ALL RIGHT. AND THAT APPEAL WAS HEARD; IS THAT

1 CORRECT?

2 A. YES, IT WAS.

3 Q. ALL RIGHT. BUT THERE WAS NOTHING HE DID IN
4 REGARDS TO FILING A NOTICE OF APPEAL IN THIS TRIAL,
5 THAT IS, 99-GS-08-1859 AND '1860?

6 A. THAT'S RIGHT.

7 Q. AND YOU DID WANT AN APPEAL?

8 A. YES, SIR.

9 MR. E. BROWN: I HAVE NOTHING FURTHER.

10 ANSWER ANY QUESTIONS THE COURT OR THE STATE MAY HAVE
11 FOR YOU.

12 CROSS-EXAMINATION BY MR. ZELENKA:

13 Q. MR. GREEN, YOU STATED THAT YOU CONTACTED -- OR
14 MAYBE I MISUNDERSTOOD -- THAT YOU CONTACTED
15 MR. LANIER AFTER THE CONVICTION ASKING FOR AN APPEAL;
16 IS THAT CORRECT?

17 A. NO. BEFOREHAND.

18 Q. BEFOREHAND? OKAY. BUT WHAT CAUSED THE MARCH
19 2000 LETTER? DID YOU WRITE MR. LANIER AND GET THIS
20 RESPONSE FROM HIM ON THIS LETTER?

21 A. YES, I DID.

22 Q. OKAY. AND DID YOU WRITE HIM SHORTLY BEFORE
23 MARCH OR DID YOU WRITE HIM EARLIER IN NOVEMBER?

24 A. I WROTE MR. LANIER SEVERAL TIMES. THAT'S JUST A
25 LETTER THAT I HAD TO BRING FORWARD THAT HE WROTE ME

1 AND GAVE ME A DIRECT RESPONSE ON. I ALSO WROTE A
2 LETTER TO HIM PRIOR TO THAT LETTER REQUESTING SOME
3 INFORMATION ABOUT MY APPEAL AND ABOUT MY TRIAL
4 TRANSCRIPT, AND I ALSO HAD IN MY NOTES WHERE HE TOLD
5 ME, YOU KNOW, HE WASN'T -- HE WASN'T -- HE DIDN'T
6 HAVE TO GIVE THEM TO ME UNTIL I ACTUALLY FILED FOR AN
7 APPEAL OR PCR STAGE.

8 MR. ZELENKA: I HAVE NO FURTHER QUESTIONS.

9 MR. E. BROWN: I HAVE NOTHING FURTHER.

10 THE COURT: YOU MAY STEP DOWN.

11 (WHEREUPON, THE WITNESS WAS EXCUSED.)

12 MR. E. BROWN: I'M GOING TO CALL

13 MR. GREEN'S MOTHER, CLAREN MCNEIL (PHONETIC).

14 THE COURT: IS THE STATE DISPUTING THE
15 POSITION THAT THEY'RE TAKING?

16 MR. ZELENKA: THE STATE IS NOT DISPUTING
17 THAT HE'S ENTITLED, BASED UPON EITHER VERSION OF THE
18 TESTIMONY, THE TESTIMONY OF MR. GREEN COMBINED WITH
19 THE TESTIMONY OF MR. LANIER, THAT HE WOULD BE
20 ENTITLED TO HAVE THIS COURT MAKE A FINDING OF FACT
21 THAT HE DID NOT FREELY AND VOLUNTARILY WAIVE HIS
22 RIGHT TO APPEAL, AND UPON APPEAL FROM THIS
23 POST-CONVICTION RELIEF PROCEEDING, WHICH WOULD
24 OTHERWISE BE DENIED, HE WOULD HAVE THE RIGHT TO HAVE
25 THOSE MATTERS REVIEWED BY THE SOUTH CAROLINA SUPREME

1 COURT AS IF THE APPEAL WAS TIMELY PERFECTED.

2 MR. E. BROWN: I THINK THAT RESOLVES IT, IF
3 WE GET AN ORDER TO THAT EFFECT.

4 THE COURT: ALL RIGHT. SO ORDERED.

5 THE COURT: WHO IS GOING IT PREPARE THE
6 ORDER?

7 MR. ZELENKA: JUDGE, I WOULD BE HAPPY TO.

8 MR. E. BROWN: I APPRECIATE THAT.

9 MR. ZELENKA: AND PROVIDE IT TO COUNSEL
10 CONTEMPORANEOUSLY WITH ME PROVIDING IT TO YOU.

11 BUT JUST FOR THE RECORD, MR. BROWN WOULD
12 STILL HAVE TO FILE THE NOTICE OF APPEAL FROM THE
13 POST-CONVICTION RELIEF APPLICATION TO MAKE THOSE
14 MATTERS GO ON UP, AND THEN IT WOULD BE HANDLED BY THE
15 OFFICE OF APPELLATE DEFENSE.

16 THE COURT: DO YOU UNDERSTAND THAT?

17 MR. E. BROWN: WELL, I'M TRYING TO
18 UNDERSTAND. AS I UNDERSTAND IT, THE POST-CONVICTION
19 RELIEF IS NOT GOING TO BE DENIED, I MEAN, HE'S GOING
20 TO BE GRANTED -- JUDGE, THAT'S GOING TO BE DENIED,
21 BUT HE'S GOING TO BE GRANTED A BELATED RIGHT TO
22 APPEAL THE CONVICTION SEPARATE AND APART AS IF NO
23 POST-CONVICTION RELIEF APPLICATION HAS EVER BEEN
24 FILED.

25 THE COURT: THERE ARE NO OTHER GROUNDS FOR

1 PCR RELIEF.

2 MR. E. BROWN: YES, SIR, THAT'S CORRECT.

3 THE COURT: THERE'S NO OTHER INEFFECTIVE
4 ASSISTANCE ARGUMENTS THAT ARE BEING MADE.

5 MR. E. BROWN: THAT IS CORRECT.

6 THE COURT: SO THERE IS NO BASIS UPON WHICH
7 TO GRANT POST-CONVICTION RELIEF, I.E., SET ASIDE THE
8 CONVICTION. THERE IS A BASIS TO GRANT THE RIGHT TO A
9 BELATED APPEAL, SO YOU CAN RAISE WHATEVER TRIAL
10 ISSUES NEED TO BE RAISED BEFORE THE APPELLATE COURT.

11 MR. E. BROWN: VERY WELL.

12 THE COURT: AND HE'S JUST LETTING YOU KNOW
13 THAT TO GET UP THERE, THEY REVIEW IT IN THE POSTURE
14 OF THIS CASE.

15 MR. ZELENSKA: BUT IT DOESN'T AUTOMATICALLY
16 GET THERE. YOU HAVE TO FILE THE NOTICE OF APPEAL AND
17 JURISDICTION ---

18 MR. E. BROWN: THAT DOESN'T MEAN I'M GOING
19 TO HANDLE THE APPEAL.

20 MR. ZELENSKA: NO. APPELLATE DEFENSE WOULD
21 NORMALLY HANDLE THOSE.

22 THE COURT: IF YOU HAVE A QUESTION, GET
23 WITH ME ABOUT IT, PLEASE.

24 MR. E. BROWN: YES, SIR.

25 (WHEREUPON, THE POST-CONVICTION RELIEF

1 HEARING WAS CONCLUDED AT 10:35 A.M.)

2 STATE OF SOUTH CAROLINA

3 CERTIFICATE OF COURT REPORTER

4

5 COUNTY OF BERKELEY

6

7

8 I, THE UNDERSIGNED, ROBIN SUE HILD, RPR,
 9 FCRR, OFFICIAL COURT REPORTER FOR THE 9TH JUDICIAL
 10 CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO HEREBY
 11 CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE AND
 12 COMPLETE TRANSCRIPT OF RECORD OF ALL THE PROCEEDINGS
 13 HAD AND EVIDENCE INTRODUCED IN THE POST-CONVICTION
 14 RELIEF HEARING OF THE CAPTIONED CASE, RELATIVE TO
 15 APPEAL, IN THE CIRCUIT COURT FOR BERKELEY COUNTY,
 16 SOUTH CAROLINA, ON THE 16TH DAY OF AUGUST, 2002.

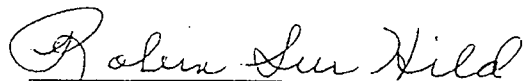
17 I DO FURTHER CERTIFY THAT I AM NEITHER OF
 18 KIN, COUNSEL NOR INTEREST TO ANY PARTY HERETO.

19

20

NOVEMBER 18, 2002

21



22

COURT REPORTER

23

24

25

LAW OFFICE OF



TARA DAWN SHURLING, PA

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July 6, 2015

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JUL - 9 2015

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

S.C. Supreme Court

Re: Stephen J. Green, #259765 v. State of South Carolina
Appellate Case No. 2015-001318

Dear Mr. Shearouse:

Enclosed please find for filing an original and six (6) copies of the Explanation of Justification of Appeal Pursuant to Rule 243 (c) SCACR along with proof of service on opposing counsel. I would appreciate having the two (2) additional copies of this document enclosed with this correspondence clocked and returned to me in the self-addressed, stamped envelope provided. With my thanks for your kind assistance always, I am,

Sincerely yours,

A large, stylized handwritten signature in black ink that reads "Tara Dawn Shurling".

Tara Dawn Shurling
Attorney and Counselor at Law

TDS/sg

Enclosure

cc: J. Rutledge Johnson, Assistant Attorney General
Stephen J. Green, #259765
Ms. Clareon S. McNeill