

LAW OFFICE OF



TARA DAWN SHURLING, PA

Attorney and Counselor at Law

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RECEIVED

August 5, 2015

AUG 07 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: Trey Levar Garner, #248321 v. State of South Carolina; 2014-CP-40-5098.

Dear Mr. Shearouse:

Enclosed please find for filing a Notice of Appeal in the above captioned Post-Conviction Relief matter along with proof of service on opposing counsel. This Notice addresses the client's intent to appeal the Order of Dismissal issued by Judge Goldsmith in this matter. I was retained to represent this client in the circuit court only. The client never advised me whether he wished to appeal this Order. In an abundance of caution, I am filing this appeal on his behalf to avoid an *Austin* claim that I failed to preserve his right to appeal. I will advise him that he needs to advise you, and the Attorney General's Office, who will be representing him if he chooses to go forward with this appeal. I am providing the client a copy of this Notice of Appeal, and a Form Affidavit of Indigency. I am instructing him to fill it out and return it to me immediately for submission to Appellate Division of the South Carolina Commission on Indigent Defense, if he wishes to seek representation by them. I will make certain he is aware that time is of the essence, and that he must return his affidavit to me immediately. For now, I would appreciate having the two additional copies of this notice 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: Clay Mitchell, Assistant Attorney General

Lorienne French, Legal Service Coordinate, Appellate Defense

Trey Garner, #248321

Danita Sumter

STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Brooks P. Goldsmith, Presiding Judge

AUG 07 2015

S.C. SUPREME COURT

2014-CP-40-5098

TREY LEVAR GARNER, #248321

Applicant,

v.

THE STATE OF SOUTH CAROLINA,

Respondent.

NOTICE OF APPEAL

NOW COMES the Applicant in the above-captioned Post-Conviction Relief matter, acting by and through his undersigned counsel, giving notice of his appeal from the Order of Dismissal filed on July 8, 2015 denying his Post-Conviction Relief Application.



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

3614 Landmark Drive, Suite A
Columbia, South Carolina 29204
(803)738-8622
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ATTORNEY FOR APPLICANT

This 5th day of August, 2015.

Other Counsel of Record:
Clay Mitchell, Assistant Attorney General
P. O. Box 11549
Columbia, SC 29211
Attorney for Respondent
(803) 734-3737

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Brooks P. Goldsmith, Presiding Judge

RECEIVED

AUG 07 2015

2014-CP-40-5098

S.C. SUPREME COURT

TREY LEVAR GARNER, #248321

Applicant,

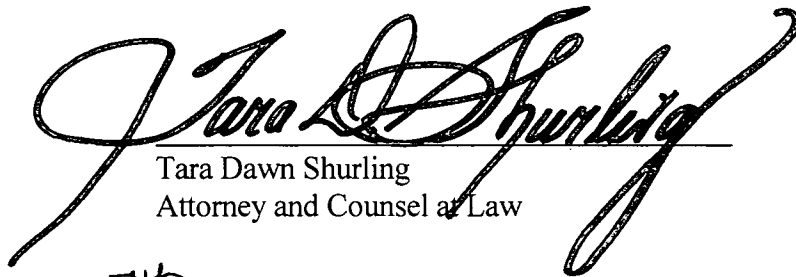
v.

THE STATE OF SOUTH CAROLINA,

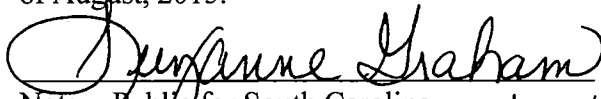
Respondent.

CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that one copy of the Applicant's Notice of Appeal in the above-entitled cause has been served upon opposing counsel, Clay Mitchell, Assistant Attorney General, by mailing in an envelope properly addressed with postage prepaid on this 5th day of August, 2015.


Tara Dawn Shurling
Attorney and Counsel at Law

SWORN TO BEFORE me this 5th day of August, 2015.

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

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2014CP4005098

Trey Levar Garner

State of South Carolina

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: _____	Attorney for : <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant or <input type="checkbox"/> Self-Represented Litigant
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-DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other _____
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; Bankruptcy; Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):** Affirmed; Reversed; Remanded; Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court:

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order: _____

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge _____ Judge Code _____ Date _____

For Clerk of Court Office Use Only

This judgment was entered on the ____ day of _____, 20 ____ and a copy mailed first class or placed in the appropriate attorney's box on this 9 July 2015 to attorneys of record or to parties (when appearing pro se) as follows:

Tara Dawn Shurling

Megan Harrigan Jameson

James Clayton Mitchell III

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court

Jeanette W. McBride

JUL 16 2015

CANNED

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

Trey Levar Garner, #248321,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

2014-CP-40-05098

ORDER OF DISMISSAL

This matter comes before the Court pursuant to a Motion for a New Trial pursuant to Rule 29(b), SCRCrimP, filed on November 22, 2011, in the Richland County Court of General Sessions. In that motion Applicant alleges that a "juror serving at his trial has now been discovered to have a close family tie to the victim in this case." No action was taken on this case until August 18, 2014, where a document captioned "CONSENT ORDER FOR PREVIOUSLY FILED MOTION FOR A NEW TRIAL TO BE REFILED AS A TIMELY APPLICATION FOR A NEW TRIAL PURSUANT TO S.C. CODE ANN. §§17-27-20(a)(4) and 17-27-45(C)," was filed. The consent order states "the State does not in any way concede the merit of the Applicant's prayer for relief, or the timelines of the original motion, the State has consented to the Applicant's request that his previously filed motion be treated as a request for a new trial pursuant to §17-27-20(A)(4) and § 17-27-45(C)."

Applicant then filed this application for post-conviction relief (PCR) on August 20, 2014, where he argues the same allegations. Respondent filed a Return and Motion to Dismiss on December 2, 2014, requesting the action be dismissed as filed outside the statute of limitations. A hearing was held on April 3, 2015, at the Richland County Courthouse. Applicant was present

and represented by Tara D. Shurling, Esquire. J. Clayton Mitchell, Esquire, of the South Carolina Attorney General's Office represented Respondent.

At the hearing, Applicant testified on his own behalf. Also testifying was Jim Truitt of the Richland County Clerk's Office, Wilbert Davis, Michelle Davis, Jermaine Nixon, Tyshawn Watson, Applicant, and Denita Sumter. This Court had before it the Richland County Clerk of Court records, Applicant's South Carolina Department of Corrections records, the PCR application, and the pleadings.

I. PROCEDURAL HISTORY

Applicant is currently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Richland County. Applicant was indicted at the September 1997 term of the Richland County Grand Jury for Murder (1997-GS-40-21496), Attempted Armed Robbery and Robbery (1997-GS-40-21497), and Conspiracy to Armed Robbery (1997-GS-40-21498). On March 9-12, 1998, Applicant proceeded to trial before the Honorable J. Derham Cole. At trial, Applicant was represented by James P. Rogers, Esquire. The State was represented by R. Knox McMahon and Joenathan Chaplin, Assistant Solicitors for the Fifth Judicial Circuit. On March 12, 1998, the jury found Applicant guilty as indicted. Judge Cole sentenced Applicant to imprisonment for thirty (30) years for Murder, five (5) years, consecutive, for Attempted Armed Robbery, and five (5) years, concurrent, for Conspiracy.

A timely notice of appeal was filed and an appeal was perfected by Melody J. Brown, Esquire, then of the South Carolina Office of Appellate Defense. Applicant, by and through counsel, submitted a Final Brief of Appellant, in which he raised the following issues:

1. The trial judge erred in failing to direct a verdict, or alternatively ordering a new trial, on the murder charge and the attempted armed robbery charge when the testimony from the principal and the other witnesses demonstrated that the act resulting in murder was not an attempt to

commit armed robbery, rather the crime acted on was the murder of a storekeeper and not an act of the criminal conspiracy.

2. The trial judge erred in failing to declare a mistrial when the state improperly admitted evidence of a general criminal intent by the inference of gang activity, when gang activity was not an allegation against defendant and only worked to create an inference of guilty from bad character.
3. The trial judge erred in admitting State Exhibit 16, a photograph of the murder site including the victim's blood, when the prejudicial effect of the bloody scene outweighed the possible probative value of the evidence.

The Supreme Court of South Carolina affirmed Applicant's conviction pursuant to Rule 220(b)(1), SCACR, State v. Garner, Mem. Op. No. 107 (filed August 23, 2000).

2001-CP-40-3472

Applicant subsequently filed an application for post-conviction relief on August 20, 2001, where he alleged he was being held unlawfully for the following reasons:

1. Ineffective assistance of counsel
2. Subject matter jurisdiction
3. Ineffective assistance of appellate counsel.

On January 21, 2004, an evidentiary hearing was held before the Honorable J. Ernest Kinard, Jr. Applicant testified on his own behalf. Trial counsel Rogers testified for the State. On March 24, 2004, Judge Kinard issued an Amended Order of Dismissal with Prejudice, denying relief. Applicant served and filed a notice of appeal to the South Carolina Supreme Court.

Applicant was represented by Joseph L. Savitz, III, then Acting Chief Attorney of the S.C. Office of Appellate Defense on the appeal. Counsel Savitz filed a Petition for Writ of Certiorari pursuant to Johnson¹ on Applicant's behalf on November 3, 2004, where he requested to be relieved as counsel. In an Order dated December 2, 2005, the Supreme Court of South

¹ Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988).



Carolina issued an Order denying certiorari and granting counsel's petition to be relieved as counsel. The remittitur was issued on December 20, 2005.

2006-cv-00021-GRA-BM

Applicant then filed a petition for writ of habeas corpus on January 20, 2006, in federal district court. Applicant raised the following issues:

1. Ineffective assistance of trial counsel deprived Appellant of fair trial in violation of due process. Const. Amends 5, 6.
2. Insufficient evidence adduced to support state court convictions. U.S. Const. Amend. 14.
3. U.S. Const. Amend. 6 and 14.
4. U.S. Const. Amend. 6 and 14.

On March 13, 2006, Respondent filed its return and motion for summary judgment requesting that the case be dismissed. The federal district court granted Respondent's motion for summary judgment and dismissed the case with prejudice by Order filed February 2, 2007. Applicant then filed a notice of appeal on April 4, 2007. The United State Court of Appeals for the Fourth Circuit dismissed the appeal by order dated October 24, 2007, and mandated the judgment on November 15, 2007. This action follows.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court has reviewed the Clerk of Court records regarding the subject convictions, the guilty plea transcript, Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, and the legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80 (2003), this Court makes the following findings of fact based upon all of the probative evidence presented.



As a matter of general impression, this Court finds Wilbert and Michelle Davis's testimony to be credible and persuasive on all matters. These credibility findings have been applied to the Court's findings and conclusions set forth below.

State's Motion to Dismiss

At the April 3, 2015, hearing, this Court first heard arguments on the State's Motion to Dismiss. The Court denied this motion at the hearing. The State argued the consent order entered into between the Fifth Circuit Solicitor's Office and Applicant did not bind the Attorney General's Office. The consent order effectively allowed the PCR action to be considered filed on the date the Rule 29(b), SCCrimP, was filed in the court of general sessions. The State argued it was not apprised of or consulted regarding the consent order. The State failed to appeal the consent order, so it is therefore binding. This Court denies Respondent's motion to dismiss.

Newly Discovered Evidence of Juror Misconduct

Applicant alleges that Chandra L. Davis, a juror seated at Applicant's trial was the niece of the victim's daughter, Michelle Davis. Applicant alleges he is entitled to a new trial based upon this newly discovered evidence of juror misconduct. The South Carolina Supreme Court recently addressed the issue of juror misconduct in McCoy v. State, 401 S.C. 363 (2013). McCoy held an issue of fact exists and a hearing is therefore required where an allegation would establish an exception to either the statute of limitations or the prohibition against successive applications when those allegations are not conclusively refuted by the record. The court also held the traditional five part test governing newly discovered evidence in PCR actions is not applicable to allegations of juror misconduct. The court enunciated a test for when the grant of a new trial is warranted on the basis of juror misconduct: "if it is shown that (1) the juror intentionally concealed information; and (2) the information concealed would have supported a



challenge for cause or would have been a material factor in the use of the party's peremptory challenges." Applicant must file an application for post-conviction relief "within one year after the date of actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence." S.C. Code Ann. §17-27-45(C).

Summary of Testimony

Jim Truit

Jim Truitt, Richland County Clerk of Court Administrator, testified juror records are destroyed after three (3) years. He testified juror checks are destroyed after ten (10) years. Mr. Truitt concluded any records pertaining to juror Chandra Davis have been destroyed as Applicant's trial was held in March 1998.

Wilbert Davis

Mr. Davis testified he is married to Michelle Davis whose father was murdered in October 1996. Applicant was convicted of his murder. Mr. Davis testified he and his brother were standout football players for Lower Richland High School. He testified he thereafter coached football at Lower Richland from around 1995 to 2000.

Mr. Davis testified he did not have a niece named Chandra Davis. He explained that he does have two nieces, but the oldest is in the ninth grade and is fourteen or fifteen years old. Mr. Davis testified no one was raised as part of his family by the name of Chandra. No one by the name of Chandra was taken into his or his family's household. He categorically denied being related to a Chandra Davis. He testified he did not know any students at Lower Richland named Chandra Davis, nor did he know of any student claiming to be related to him. Mr. Davis testified he attended at least some of Applicant's trial and did not recognize any members of the jury.

Michelle Davis



Mrs. Davis testified she is married to Wilbert Davis. She explained they met in the tenth grade and have been together for around thirty (30) years. She unequivocally testified she did not know a woman by the name of Chandra Davis. She testified she did not know anyone named Chandra that is related to her husband or anyone claiming to be related to her husband. She testified she was a witness at Applicant's trial and that she did not recognize anyone seated on the jury panel.

Jermaine Nixon

Mr. Nixon testified he attended Lower Richland High School from 1992 to 1996. He testified he knew Chandra Davis and was acquainted with her. He testified he was asked to tell the truth. He admitted that he had no personal knowledge that Chandra Davis was related to Wilbert Davis and the Davis family. Applicant attempted to elicit certain testimony from Mr. Nixon but this testimony was excluded as inadmissible hearsay. He testified he was not a close friend of Applicant and that he has not had contact with Applicant since he was sentenced to prison. He testified Denita Sumter asked him to provide an affidavit to support this action.

Tyshawn Watson

Mr. Watson testified he went to middle and high school with a Chandra Davis. He testified he is not close friends with Applicant or has he visited him while in prison or had any contact with him since his imprisonment. Applicant attempted to elicit certain testimony from Mr. Watson but this testimony was excluded as inadmissible hearsay. He also testified Denita Sumter asked him to provide an affidavit to support this action.

Trey Garner

Applicant testified he has been in prison for around eighteen (18) years and that he was nineteen (19) years old at the time of the incident. He testified he did not have a prior record at



the time. He testified Ricky Anderson is Denita Sumter's brother. He testified he became aware that a juror seated at his trial was possibly related to the victim. He then asked Ms. Sumter to see if she could talk to people that attended high school with them to see if they could recall a Chandra Davis and her possible relationship to the Davises. He testified he attended Lower Richland High School from 1992 to 1993 and then reenrolled for a month in 1995. He admitted that he did not attend classes regularly and did not know a Chandra Davis himself. He testified he did not recognize any jurors and that he would have brought that to the trial court's attention. Applicant also testified he does have a personal relationship with Denita Sumter. He categorized this relationship as romantic in nature.

Denita Sumter

Ms. Sumter testified she is currently involved in a romantic relationship with Applicant. She testified they have been friends for fourteen (14) to fifteen (15) years. She visits him in prison, writes him letters, and talks to him on the telephone. Ms. Sumter explained that Anderson brought this information to her attention, and she then hired Counsel Shurling to look into this possibility that a juror was related to the victim. She testified Counsel Shurling hired a private investigator to thoroughly inspect the claim. She testified she attempted to find people who would know more about a possible relationship and noted that she tried to bring forward neutral witnesses and not people who are close to Applicant. She testified she provided the affidavits to Counsel Shurling in hopes to have them presented to the Court. Ms. Sumter testified she was very sympathetic with the Davis family.

Analysis

First, this Court denies Applicant's motion to hold the record open to allow for testimony regarding witness Ricky Anderson. Applicant has submitted Anderson's affidavit as an



attachment to the application. This Court finds his testimony would be in conformity with his affidavit and would be additional inadmissible hearsay.

Applicant must show that juror Chandra Davis intentionally concealed her relationship to Mr. Davis and that the concealment would have supported a challenge for cause to her serving on the jury. See McCoy. Applicant has failed to meet his burden of proof. There was no evidence presented from the juror in question who is alleged to have withheld the information. Without her testimony this Court must find Applicant failed to show that she intentionally concealed the alleged relationship. The only evidence Applicant presented to support the existence of the relationship was inadmissible hearsay in the form of affidavits. The Court relies on the credible evidence presented from Wilbert and Michelle Davis in finding that Applicant has failed to meet his burden in proving any familiar or casual connection between juror Chandra Davis and the victim in the underlying case. Applicant failed to present any admissible or credible evidence that juror Chandra Davis was related to the victim. This application is denied and dismissed with prejudice.

III. CONCLUSION

Based on the foregoing, the Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Applicant failed to demonstrate counsel's performance was unreasonable under prevailing professional norms. Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625; Stalk v. State, 383 S.C. 559, 563, 681 S.E.2d 592, 594 (2009). Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

The Court notes Applicant must file and serve a notice of appeal within thirty (30) days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate

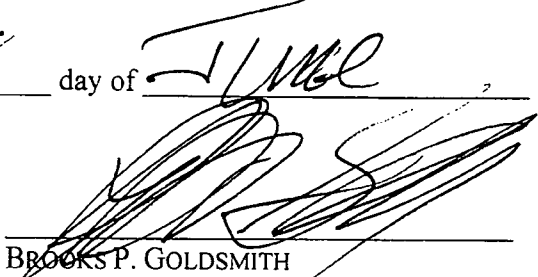


appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCR, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

1. The Application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. Applicant shall remain in the custody of the South Carolina Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 18 day of JUNE, 2015.



BROOKS P. GOLDSMITH
Presiding Judge

_____, South Carolina

LAW OFFICE OF



TARA DAWN SHURLING, PA

Attorney and Counselor at Law

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Suite A

Columbia, South Carolina 29204

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August 5, 2015

Clay Mitchell, Assistant Attorney General
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211-

RE: Trey Levar Garner, #248321 v. State of South Carolina; 2014-CP-40-05098.

Dear Mr. Mitchell:

Enclosed please find for your records a copy of the Notice of Appeal that was filed in the above-captioned matter. The client never advised me whether he wished to appeal this Order. In an abundance of caution, I am filing this appeal on his behalf to avoid an *Austin* claim that I failed to preserve his right to appeal. I was only hired for the circuit court action. I will advise him that he needs to advise you, and the Court, who will be representing him if he chooses to go forward with this appeal. I remain,

Sincerely yours,

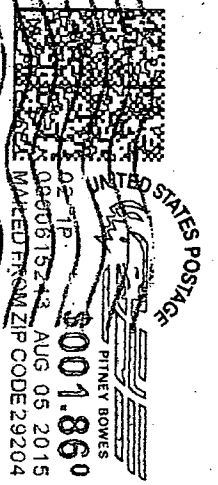
A large, stylized handwritten signature in black ink, reading "Tara Dawn Shurling".

Tara Dawn Shurling
Attorney and Counselor at Law

TDS/sg

Enclosure

cc: The Honorable Daniel E. Shearouse, Clerk, Supreme Court of South Carolina ✓
Trey Garner, #248321
Danita Sumter



COLUMBIA SC 292

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Law Office of

TARA DAWN SHURLING, PA

3614 LANDMARK DRIVE, SUITE A
COLUMBIA, SOUTH CAROLINA 29204



The Honorable Daniel E. Shearouse
South Carolina Supreme Court Clerk
Post Office Box 11330
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