

DEC. 0.5 2012

Noel E. Gray Jr. #307590  
B.R.C.I. Murray #212B  
4460 Broad River Rd.  
Columbia, S.C. 29210

EXHIBIT

DECEMBER 4, 2012

Attention: Honorable Clerk

RE: NOTICE OF INTENT TO APPEAL  
NOEL E. GRAY, JR #307590  
2004-65-02-1333-1334

RECEIVED

DEC 27 2012

SC Court of Appeals

Dear Honorable Clerk:

Please find enclosed copies of Notice of Intent to Appeal, Petitioners  
Rule 29(b) Motion for New Trial based on Newly /After Discovered Evidence  
that was within the one year Statute of Limitations as pursuant to  
Rule 29(b) of the South Carolina Rules of General Sessions "Criminal Procedures"

November 30, 2012 Honorable D.A. Early, III Circuit Court Judge denied  
Appellant's Motion for New Trial and denied Motion for Appr. of Counsel.  
Please Send a Clock Stamp copy back to the Appellant Thank you!

Sincerely  
Noel E. Gray Jr. #307590  
Noel E. Gray Jr.  
Pro-se Appellant.

RECEIVED

DEC 07 2012

SC Court of Appeals

NOTICE OF INTENT TO APPEAL  
THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS  
FROM AIKEN COUNTY  
THE HONORABLE D.A. EARLY, III

EXHIBIT

DEC. 05 2012

RECORDED

DEC 27 2012

SC COURT OF APPEALS

DECEMBER 4, 2012  
INDICTMENT # 2004-GS-02-1333-1334

THE STATE OF SOUTH CAROLINA -- Respondent

VS.

Noel E. Gray, Jr. # 307590 -- Appellant

INDEXED

DEC 27 2012

SC COURT OF APPEALS

NOTICE OF INTENT TO APPEAL

The Appellant filed a Rule 29(b) Motion For New Trial Based on Newly / After Discovered Evidence according to the Rule 25(b) Rules of Criminal Procedures of South Carolina, on September 17, 2012.

The Newly Discovered Evidence was within the One(1) year Statute of Limitations and met all the elements to support a New Trial based on Ineffective Assistance of Trial Counsel.

November 30, 2012 the Honorable D.A. Early, III denied both Motion's for New Trial and Appointment of Counsel.

The Appellant Appeals his Unconstitutional Denial of Due Process, and Request Appointment of Appellate Counsel.

Noel E. Gray Jr. #307590  
Noel E. Gray Jr.  
Pro-Se Appellant

Notice of Intent To Appeal  
State of South Carolina  
vs.

EXHIBIT

Noel E. Gray Jr. #307590  
2004-GS-02-1333-1334.

### CERTIFICATE OF SERVICE

I Noel Gray do hereby certify that I have this day served the Original of Appellant's Notice of Appeal upon the South Carolina Court of Appeals and copies of Appellant's Notice of Intent to Appeal to the Clerk of Court of Aiken County, and to Mr. Strom Thurmond Jr. Solicitor, Second Judicial Circuit, by placing same in the United States Mail properly addressed and with correct postage affixed thereto:

- 1) South Carolina Court of Appeals  
P.O. Box 11629  
Columbia, S.C. 29211
- 2) South Carolina Commission of Appellate Defense  
Suite 306  
1205 Pendleton St.  
Columbia, S.C. 29202
- 3) Clerk of Court  
Aiken County Judicial Circuit  
P.O. Box 583  
Aiken, S.C. 29802
- 4) Mr. Strom Thurmond Jr. Solicitor  
Second Judicial Circuit  
PO Box 3368  
Aiken, S.C. 29802

Dated this 5th day of February, 2012

Noel E. Gray Jr. #307590  
Noel E. Gray Jr.  
Pro-Se Appellant  
BRCI. Murray 212-13  
4460 Broad River Rd.  
Columbia, S.C. 29210

RECEIVED  
FEB 7 2012  
COURT OF APPEALS



EXHIBIT

## The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS  
CLERK

V. CLAIRE ALLEN  
DEPUTY CLERK

POST OFFICE BOX 11629  
COLUMBIA, SOUTH CAROLINA 29211  
1015 SUMTER STREET  
COLUMBIA, SOUTH CAROLINA 29201  
TELEPHONE: (803) 734-1890  
FAX: (803) 734-1839  
[www.sccourts.org](http://www.sccourts.org)

December 18, 2012

Noel E. Gray, Jr., #307590  
4460 Broad River Road  
Columbia SC 29210

Re: The State v. Gray, Noel  
Appellate Case No. 2012-213607

Dear Mr. Gray:

This Court has received your notice of appeal, and the case has been assigned the appellate case number that appears above. Please use this number on all future correspondence relating to this matter.

All parties to this matter are advised that all filings must comply with the requirements of Rule 267 of the South Carolina Appellate Court Rules (SCACR). The SCACR are available online at [www.sccourts.org/courtreg](http://www.sccourts.org/courtreg). Additionally, any filings submitted by counsel admitted in South Carolina must include counsel's bar number.

The attention of the parties is directed to the order relating to the inclusion of personal data identifiers and other sensitive information in documents filed with the Supreme Court of South Carolina and the South Carolina Court of Appeals. The order can be found at [www.sccourts.org/courtOrders/HTMLFiles/2007-08-13-02.htm](http://www.sccourts.org/courtOrders/HTMLFiles/2007-08-13-02.htm). Please note that the responsibility for insuring that information is redacted or sealed as required by this order rests with counsel and the parties. This office will *not* review filings for redaction or to determine if materials should be sealed.

Very truly yours,

*V. Claus Allen, Deputy*

CLERK

cc: Robert Michael Dudek  
James Strom Thurmond, Jr.  
Salley W. Elliott



EXHIBIT A

## The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS  
CLERK

V. CLAIRE ALLEN  
DEPUTY CLERK

POST OFFICE BOX 11629  
COLUMBIA, SOUTH CAROLINA 29211  
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[www.sccourts.org](http://www.sccourts.org)

December 18, 2012

Noel E. Gray, Jr., #307590  
4460 Broad River Road  
Columbia, SC 29210

Re: The State v. Gray, Noel  
Appellate Case No. 2012-213607

Dear Mr. Gray:

It is the understanding of this court that there was no hearing held by The Honorable Judge Doyet A. Early, III on November 30, 2012, therefore there will be no transcript to request. The appellant's initial brief must be filed with this court within thirty (30) days from the date of this letter.

Very truly yours,

*V. Claire Allen, Deputy*

CLERK

cc: Robert Michael Dudek  
James Strom Thurmond, Jr.  
Salley W. Elliott

EVIDENCE



# 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

January 11, 2013

Mr. Noel Gray, #307590  
Broad River Correctional Institution  
4460 Broad River Road  
Columbia, SC 29210

Re: Your case **4265**

Dear Mr. Gray:

I am the lawyer who will be handling your case in the appellate court. I will be reviewing the record of the proceedings at the trial court to see what legal errors to present to the court on your behalf. I will submit these arguments in the form of a written "brief."

I will send you copies of the brief when I file it with the appellate court. Please be patient while the court considers your case. This process is very slow, but there is nothing I can do to speed up the process. It will probably be at least six months before I submit a brief to the appellate court and at least a year after that before the court decides your case. Some cases take even longer. You will be notified when the court makes a decision and letters asking the status of your case do not speed up the process.

Please keep these points in mind. In a direct appeal, the appellate court can only consider the information that was in front of the trial court. Any new information cannot be brought to their attention at this point. The appellate court does not decide guilt or innocence. In general, it only looks to see if the trial judge made errors of law. A reversible error only occurs when your lawyer makes an objection or motion and the judge rules against you when legally he should not have. In addition, usually the error must not have been harmless. That is, the error must be something that could have changed the result of the trial.

Mr. Noel Gray, #307590  
Page 2  
January 10, 2013

In addition, the court decides the case based on the written briefs submitted by the attorney general's office and me. It occasionally sets oral arguments, which are an opportunity for me to focus its attention on the information in the brief. If you are in prison, you cannot attend.

I receive a tremendous amount of mail and I may not be able to respond to all letters. However, you are free to telephone me collect. An SCDC Telephone Privilege Request has already been submitted for the following number: (803) 734-1330. This is the preferred method of us communicating. Regardless, rest assured if you write me a letter about your case, I will read it and carefully consider it as I decide which issue or issues to submit to the appellate court. Please note that the decision about which issues to submit is mine. Only if I submit a "no merits" or Anders brief, stating I could not find any good issues, will the court let you submit your own legal arguments to the court.

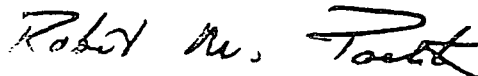
In addition, we are not able to visit our clients personally but feel free to call collect.

Be assured that I will try my best to find reversible error. I will submit the best brief I possibly can to the appellate court.

Finally, if you are transferred to another facility or released, you must write and let me know where you are. The Department of Corrections will not notify us of your new address.

I hope this letter answers some of the questions you may have at this time. Again, please do not hesitate to contact me by letter if you have any questions or I may be of further assistance.

Sincerely,



Robert M. Pachak  
Appellate Defender

RMP/pcm

STATE OF SOUTH CAROLINA ) IN THE SECOND JUDICIAL CIRCUIT

COUNTY OF AIKEN ) THE COURT OF COMMON PLEAS

RECEIVED

NOEL E. GRAY, JR. # 307590 ) DOCKET NO. 2013-CP-02-00478 MAR 11 2013

Petitioner, )

VS. )

STATE OF SOUTH CAROLINA )

Respondent, )

MOTION FOR THE HONORABLE JUDGE

DOYET A. EARLY, III TO RECUSE

HIMSELF PURSUANT TO SCACR

RULE 501 (E) (A) CODE OF JUDICIAL

CONDUCT FLOYD V. STATE. 303 S.C.

298, 400 S.C. 2d 145 (1991)

BRCI MALROOM

FILED 13 March 2013

Angel Williams  
Deputy Clerk

COMES NOW INTO THIS HONORABLE COURT, The petitioner: Noel E. Gray Jr. # 307590 praise respectfully moves this Honorable Court to Order the Honorable Judge Doyet A. Early III, to recuse him self from this Post Conciliation Relief Case 2013-CP-02-00478.

The petitioner contends that the Honorable has resided on the bench on the petitioners first PER hearing, dated February 2, 2009 and the petitioner has sent correspondence to the Honorable Judges office on December 29, 2009 before the petitioners Trial concerning Ineffective Assistance of Trial Counsel and also the petitioner has written up the Honorable for Abuse of Discretion and showing prejudice towards the petitioner with the office of Disciplinary office 09-DE-J-0199 August 4, 2009. It is clear that there is a Conflict of Interest and he is showing Biasness towards the petitioner. In clear violation of the Sixth and 14th Amend.

EXHIBIT #



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

April 12, 2013

Mr. Noel Gray, #307590  
Broad River Correctional Institution  
4460 Broad River Road  
Columbia, SC 29210

Re: Your appeal

Dear Mr. Gray:

Enclosed is a copy of the Initial Brief of Appellant in your case, which I have filed with the South Carolina Court of Appeals.

Please contact me if you have any questions.

Sincerely,

Robert M. Pachak  
Appellate Defender

RMP/pcm

Enclosure

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

---

Appeal from Aiken County

Doyet A. Early, III, Circuit Court Judge

---

THE STATE,

RESPONDENT,

V.

NOEL GRAY,

APPELLANT

APPELLATE CASE NO. 2012-213607

---

INITIAL BRIEF OF APPELLANT

---

ROBERT M. PACHAK  
Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589  
(803) 734-1343

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CONTENTS ..... 1

TABLE OF AUTHORITIES ..... 2

STATEMENT OF ISSUES ON APPEAL ..... 3

STATEMENT OF THE CASE ..... 4

ARGUMENT ..... 5

CONCLUSION ..... 8

TABLE OF AUTHORITIES

**Cases**

Clark v. State, 365 S.C. 385, 434 S.E.2d 266 (1993)..... 6

Davie v. State, 381 S.C. 601, 675 S.E.2d 416 (2009) ..... 6

Leamon v. State, 363 S.C. 432, 611 S.E.2d 494 (2005)..... 7

State v. Gray, Op. No. 2008-UP-040..... 4

**Rules**

Rule 243 (c), SCACR ..... 4

Rule 29(b), SCRCrimP ..... 5, 6, 7

STATEMENT OF ISSUES ON APPEAL

Whether appellant's case should be remanded for a hearing and the appointment of counsel on his after discovered evidence claim that trial counsel failed to convey two plea agreement offers to him?

## STATEMENT OF THE CASE

Appellant was convicted of two (2) counts of criminal sexual conduct with a minor in the second degree after a jury trial held before the Honorable Jackson V. Gregory on February 2, 2005. Appellant was sentenced to life imprisonment without the possibility of parole. He was represented by Kelly P. Brown, Esquire.

Appellant appealed his convictions and the appeal was dismissed after a review pursuant to Anders v. California by the Court of Appeals on January 11, 2008. State v. Gray, Op. No. 2008-UP-040.

Appellant filed his first application for post-conviction relief on April 18, 2008. An evidentiary hearing was held on February 2, 2009, before the Honorable Doyet A. Early, III. Appellant was present and was represented by counsel. Both appellant and trial counsel testified at the hearing. On April 2, 2009, Judge Early issued an order denying and dismissing the application for post-conviction relief. A Johnson Petition for Writ of Certiorari was filed with the South Carolina Supreme Court and it was denied on December 2, 2010.

Appellant filed another application for post-conviction relief on December 9, 2011. Appellant alleged newly discovered evidence and ineffective assistance of PCR counsel. Respondent filed a return and motion to dismiss alleging the application to be successive and for failing to meet the filing requirements of the statute of limitations. After a conditional order of dismissal and appellant's response, the application was dismissed by Judge Early on June 26, 2012. Appellant appealed the order of dismissal, but the appeal was dismissed on August 30, 2012, by the South Carolina Supreme Court pursuant to Rule 243 (c), SCACR.

On September 24, 2012, appellant filed a motion for a new trial pursuant to Rule 29(b), SCRCrimP. Appellant also filed a motion for appointment of counsel. On December 4, 2012, Judge Early filed a form order denying the motion for new trial and the motion for appointment of counsel. (ROA. p. 49 – 50). The motions were denied without a hearing and without an explanation.

This appeal follows.

## ARGUMENT

Appellant's case should be remanded for a hearing and the appointment of counsel on his after discovered evidence claim that trial counsel failed to convey two plea agreement offers to him.

Appellant's motion for a new trial pursuant to Rule 29(b), SCPCrimP was filed on September 24, 2012. (ROA. p. 1). In the motion, he wrote that on October 12, 2011, he received a Rule 5 discovery package from trial counsel that contained two plea agreements that counsel failed to disclose to him. Appellant cited Davie v. State, 381 S.C. 601, 675 S.E.2d 416 (2009) which held that the failure to communicate a plea offer to a client constitutes deficient performance. (ROA. p. 2). Any plea offer was better than the life imprisonment without parole sentence that he received. (ROA. p. 3).

In Clark v. State, 365 S.C. 385, 434 S.E.2d 266 (1993), the court wrote that to obtain a new trial based on after discovered evidence, a party must show that the evidence:

- (1) Would probably change the result if a new trial is had;
- (2) Has been discovered since the trial;
- (3) Could not have been discovered before the trial;
- (4) Is material to the issue of guilt or innocence; and
- (5) Is not merely cumulative or impeaching.

Here the plea agreement would have changed the result because appellant would have pled guilty and avoided a life sentence without parole. Appellant has shown that he discovered the existence of the plea agreement since the trial. He could not have discovered the plea agreements

before trial because they were not disclosed to him. The plea agreements would have been material to guilt or innocence. And, the plea agreements were not merely cumulative or impeaching.<sup>1</sup>

Appellant has alleged facts that have not been refuted. He should be allowed a hearing on his allegations. In Leamon v. State, 363 S.C. 432, 611 S.E.2d 494 (2005), the Court held that when considering the State's motion for summary dismissal, where no evidentiary hearing has been held, a PCR judge must assume facts presented by the applicant are true and view those facts in the light most favorable to the applicant. Surely, the same rules would apply to a motion for after discovered evidence under Rule 29(b).

---

<sup>1</sup> In McCoy v. State, 401 S.C. 363, 737 S.E.2d 623 (2013), the Court adopted a different after-discovered evidence test as it relates to juror misconduct. The Court may want to look at current after-discovered test as it relates to the failure to disclose plea agreements.

CONCLUSION

Appellant's case should be remanded for a hearing on the merits of his claim and he should have counsel appointed at the local level to assist him.

Respectfully submitted,

Robert M. Pachak

Robert M. Pachak  
Appellate Defender

ATTORNEY FOR APPELLANT

This 12th day of April, 2013.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

---

Appeal from Aiken County

Doyet A. Early, III, Circuit Court Judge

---

THE STATE,

RESPONDENT,

V.

NOEL GRAY,

APPELLANT

---

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

---

Appellant proposes the following be included in the Record on Appeal:

- (1) Rule 29(b) Motion;
- (2) Form Order Denying Rule 29(b) Motion
- (3) Miscellaneous Exhibits
- (4) Prior PCR Application and Supporting Documents
- (5) Return and Motion to Dismiss
- (6) Conditional Order of Dismissal
- (7) Applicant's Response to Conditional Order of Dismissal
- (8) Post-Conviction Relief (Successive Application Amendment)
- (9) Final Order of Dismissal

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

April 12th, 2013

*Robert M. Pachak*

Robert M. Pachak  
Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589  
(803) 734-1343

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

Appeal from Aiken County  
Doyet A. Early, III, Circuit Court Judge

THE STATE,

RESPONDENT,

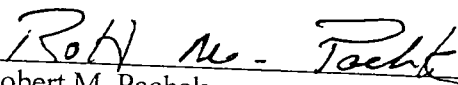
V.

NOEL GRAY,

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 Salley W. Elliott, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 12th day of April, 2013.

  
Robert M. Pachak  
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me  
this 12th day of April, 2013.

  
Notary Public for South Carolina (L.S.)  
My Commission Expires: July 24, 2022.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF AIKEN	)	FOR THE SECOND JUDICIAL CIRCUIT
	)	
NOEL E. GRAY JR #307590	)	2013-CP-02-00478
Petitioner,	)	2004-GS-02-1333-1335
	)	
vs.	)	MOTION TO DISMISS PENDING
	)	PCR ACTION UNTIL PENDING
STATE OF SOUTH CAROLINA	)	APPEAL IS RENDERED COMPLETE.
Respondent,	)	

COMES NOW INTO THIS HONORABLE COURT NOEL E. GRAY JR. #307590, by and through Pro-Se Representation, here by respectfully asking this Honorable Court to Dismiss PCR ACTION 2013-CP-02-00478 due to a pending Appeal in the S.C. Court of Appeals, and the petitioner can have two(2) actions in Civil Court therefore, he respectfully submits that this Current PCR Action should be dismissed until the pending Appeal is complete.

Respectfully Submitted  
 Noel E Gray Jr #307590  
 Noel E Gray Jr.  
 Pro-Se Petitioner

sworn and subscribed before me  
 this 8th day of July, 2013  
Susan N. Faye %  
 Notary Public for South Carolina  
 My Commission Expires  
 My Commission Expires: \_\_\_\_\_  
 My Commission Expires  
 March 5, 2018

7.12.13  
[Signature]  
 Clerk P.S.  
[Signature] 30  
 Deputy Clerk

THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE  
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING  
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.

---

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

The State, Respondent,

v.

Noel Gray, Appellant.

Appellate Case No. 2012-213607

---

Appeal From Aiken County  
Doyet A. Early, III, Circuit Court Judge

**RECEIVED**

FEB 28 2014

---

Unpublished Opinion No. 2014-UP-036  
Submitted December 1, 2013 – Filed January 29, 2014

**SC Court of Appeals**

---

**AFFIRMED**

---

Appellate Defender Robert M. Pachak, of Columbia, for  
Appellant.

Attorney General Alan McCrory Wilson and Senior  
Assistant Deputy Attorney General Salley W. Elliott,  
both of Columbia, for Respondent.

---

**PER CURIAM:** Affirmed pursuant to Rule 220(b), SCACR, and the following  
authorities: *State v. Harris*, 391 S.C. 539, 545, 706 S.E.2d 526, 529 (Ct. App.  
2011) ("The granting of a new trial because of after-discovered evidence is not

avored, and this court will affirm the trial court's denial of such a motion unless the trial court abused its discretion." (internal quotation marks omitted)); *id.* ("In order to warrant the granting of a new trial on the ground of after-discovered evidence, the movant must show the evidence (1) is such as will probably change the result if a new trial is granted; (2) has been discovered since the trial; (3) could not have been discovered before the trial by the exercise of due diligence; (4) is material to the issue; and (5) is not merely cumulative or impeaching."); Rule 29(b), SCRCrimP (providing "[a] motion for a new trial based on after-discovered evidence must be made within one (1) year after the date of the actual discovery of the evidence by the defendant or after the date when the evidence could have been ascertained by the exercise of reasonable diligence").

**AFFIRMED.<sup>1</sup>**

**SHORT, WILLIAMS, and THOMAS, JJ., concur.**

---

<sup>1</sup> We decide this case without oral argument pursuant to Rule 215, SCACR.



EXHIBIT #

# The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS  
CLERK

V. CLAIRE ALLEN  
DEPUTY CLERK

POST OFFICE BOX 11629  
COLUMBIA, SOUTH CAROLINA 29211  
1015 SUMTER STREET  
COLUMBIA, SOUTH CAROLINA 29201  
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FAX: (803) 734-1839  
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February 24, 2014

The Honorable Liz Godard  
PO Box 583  
Aiken SC 29802-0583

## REMITTITUR

Re: The State v. Noel Gray  
Lower Court Case No. 2004GS0201333, 2004GS0201334  
Appellate Case No. 2012-213607

Dear Clerk of Court:

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

Very truly yours,

*V. Claire Allen, Deputy*

CLERK

Enclosure

cc: Noel E. Gray, Jr., #307590  
Salley W. Elliott, Esquire  
Robert M. Pachak, Esquire  
Alan McCrory Wilson, Esquire

EXHIBIT #1

NOEL E. GRAY, JR #307590  
BROAD RIVER CORR INST  
WATERGATE # 274  
4460 BROAD RIVER RD  
COLUMBIA, SC. 29210

APRIL 23, 2014

HONORABLE CLERK'S OFFICE  
TO THE COURT OF COMMON PLEAS  
PO BOX 583  
Aiken, SC. 29802 - 0583

Re: Motion to Replace PCR Application and Motion to Transfer Motion pursuant to  
SC Code Ann. §17-27-60(2003) to 2013-CP-02-00478 filing date of April 16,  
2014. Re: 08-CP-02-00734

Dear Honorable Clerk,

Please find enclosed the Original and a true copy of said motions  
to file into your court. Also please send the applicant a clock stamped copy  
of said motions in the self-addressed and stamped envelope for your  
convenience. Your time and help is greatly appreciated.

May God Bless You.

Respectfully Submitted

Noel E. Gray Jr. #307590

Noel E. Gray Jr.

Pro Se Applicant

EXHIBIT # 1

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF AIKEN	)	
		2004-65-02-1333-1335
NOEL E. GRAY, JR #307590	)	2013-CP-02-00478
Pro-Se Applicant,	)	
	)	MOTION TO REPLACE PCR APPLICATION
VS.	)	DATED FEBRUARY 27, 2013 WITH PCR
	)	APPLICATION DATED APRIL 16, 2014 WITH
STATE OF SOUTH CAROLINA	)	SUBJECT MATTER AND SUPPLEMENTAL
Respondent,	)	JURISDICTION AMENDMENT DATED
		JANUARY 23, 2014 WITH EXHIBITS

COMES NOW INTO COURT, Noel E. Gray Jr. #307590 by and through Pro-se Representation respectfully moving this Honorable Court to drop the PCR Application dated February 27, 2013 and replace it with the Application filed on April 16, 2014 with the Subject Matter and Supplemental Jurisdictional Issues with Material Facts to Support this action.

The applicant contends that two Applications aren't necessary and the April 16, 2014 and the January 23, 2014 issues are more efficient to support this action pursuant to S.C. Code Ann. § 17-27-20(A); § 17-27-90 and every issue raised is supported with Material Facts pursuant to S.C. Code Ann. § 17-27-90(2003).

Also pursuant to S.C. Code Ann. § 17-27-20(A)(4) this Application is not successive, defaulted or barred by Judicial Doctrine of Rejudication that South Carolina per act § 17-27-20(A)(4) (1976)

COPY  
ORIGINAL FILED

APR 24 2014

AIKEN COUNTY  
CLERK OF COURT

code of laws provides for New facts and Evidence that was not available at the time of alleged PCR 08-CP-02-00734 and PCR 2013-CP-02-00478 that if true would vacate or void the conviction or sentence.

To deny this application would provide the Erroneous "abuse of discretion Standard see e.g. State v. Edens, 520 S.E. 2d 116, 118 (S.C. 1978); State v. Pierce, 207 S.E. 2d 414, 417 (S.C. 1974), and will deprive an indigent his Procedural legal due process under the Sixth and Fourteenth Amendments of the United States Constitution and Article 1 § 3 of the South Carolina State Constitution.

Respectfully Submitted,

Noel E. Gray Jr. #207570

Noel E Gray Jr.

Water # 274

Broad River Corr. Inst.

4460 Broad River Rd.

Columbia, SC. 29210

SUBSCRIBED AND SWORN BEFORE ME

this 2<sup>nd</sup> day of April, 2014

Susan N. Frye ys

Notary Public for South Carolina

My Commission Expires: \_\_\_\_\_

APR 15 2014

EXHIBIT #

STATE OF SOUTH CAROLINA )

IN THE COURT OF COMMON PLEAS

COUNTY OF AIKEN )

2004-GS-02-1333-1335

Noel E. Gray Jr. #307590 )

2013-CP-02-00478

Pro Se Applicant. )

CERTIFICATE OF SERVICE

VS. )

STATE OF SOUTH CAROLINA )

Respondent. )

Comes now into Court Noel E. Gray Jr. #307590 by and through, & pro se Representation respectfully Submitting that a Original and a True Copy has been mailed postage pre-paid and mailed to the Honorable Clerk of Courts Office for the Court of Common Pleas, P.O. Box 583 Aiken, SC, 29802-0583.

Respectfully Submitted

Noel E. Gray Jr. #307590

Noel E. Gray Jr.

Pro Se Applicant.

SUBSCRIBED AND SWORN TO before me

This 3rd day of April 2014

X Austen H. Dykes

Notary Public for South Carolina, My Commission Expires

My Commission Expires 12/31/2013

COPY ORIGINAL FILED

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AIKEN COUNTY CLERK OF COURT



# 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

February 4, 2014

Noel Gray, #307590  
Broad River Correctional Institution  
4460 Broad River Road  
Columbia, SC 29210

Re: Your case

Dear Mr. Gray:

Enclosed is a copy of the opinion of the Court of Appeals affirming your conviction. Please be advised that our office will be closing your case along with this letter.

Please be aware that there is a **one year statute of limitations for filing an application for post-conviction (PCR) relief**. This is one year from the date of the enclosed opinion. This statute of limitations is **very strictly enforced**, so please be sure that **you** comply with it. Please understand *it is your responsibility alone to be sure this PCR application is timely filed*. **This application must be filed with the clerk of court in the county of your conviction**. There is also now a **one year statute of limitations for filing for federal habeas**. However, you must **exhaust your PCR claims** in state court, before raising them in federal court.

Please be aware that the time between your direct appeal becoming final, and the date your PCR application is filed **will count against your federal habeas statute of limitations in the future**. I do wish you the best. Feel free to contact me if you have any questions.

Sincerely,

Robert M. Pachak  
Appellate Defender

RMP/pcm

Enclosure: Post-Conviction Relief Application

FORM 5

RULE 71.1 (c) S.C.R.C.P.  
NEW PCR APPLICATION  
IN THE COURT OF COMMON PLEAS

STATE OF SOUTH CAROLINA )

COUNTY OF AIKEN )

NOEL E. GRAY JR #307590 )  
Full name and prison number (if any) of Applicant. )

v. )

State of South Carolina )

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 it 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 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 BROAD RIVER CORR. INST.
2. Name and location of Court which imposed sentence SECOND JUDICIAL CIRCUIT AIKEN, SC.
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) 2004-GS-02-1333
  - (b) 2004-GS-02-1334
  - (c) 2004 GS-02-1335
5. The date upon which sentence was imposed and the terms of the sentence:
  - (a) FEBRUARY 2, 2005
  - (b) SAME

- (c) SAME
- 6. Check whether a finding of guilty was made:
  - (a) after a plea of guilty \_\_\_\_\_
  - (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:
    - i. SOUTH CAROLINA COURT OF APPEALS
    - ii. \_\_\_\_\_
    - iii. \_\_\_\_\_
  - (b) the result in each such Court to which you appealed:
    - i. AFFIRMED
    - ii. \_\_\_\_\_
    - iii. \_\_\_\_\_
  - (c) the date of each such result:
    - i. JANUARY 29, 2014
    - ii. \_\_\_\_\_
    - iii. \_\_\_\_\_
  - (d) if known, citations of any written opinion or orders entered pursuant to such results:
    - i. N/A
    - ii. N/A
    - iii. N/A

9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) N/A
  - (b) N/A
  - (c) N/A

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

- (a) INEFFECTIVE ASSISTANCE OF COUNSEL 'Failure to Convey Plea Offer'
- (b) ~~PROSECUTORIAL MISCONDUCT (Dropped)~~
- (c) JURISDICTIONAL and SUBJECT MATTER JURISDICTION

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

- (a) SEE RULE 29(b) MOTION WITH MATERIAL FACTS
- (b) ~~SAME AS AD(1) Dropped~~
- (c) SEE JURISDICTION/SUPPLEMENTAL JURISDICTION MOTION WITH MATERIAL F

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

- (a) any petition in a State Court under South Carolina Law?  YES
- (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. RULE 29(b) SC R Crim P. GENERAL SESSIONS
  - ii. DIRECT APPEALS COURT
  - iii. \_\_\_\_\_
  - iv. \_\_\_\_\_
- (b) the name and location of the Court in which each was filed:
  - i. 2nd Judicial Circuit Court Aiken South Carolina
  - ii. SOUTH CAROLINA COURT OF APPEALS
  - iii. \_\_\_\_\_
  - iv. \_\_\_\_\_
- (c) the disposition thereof:
  - i. Denied
  - ii. Denied
  - iii. \_\_\_\_\_

- iv. \_\_\_\_\_
- (d) the date of each such disposition:
  - i. December 4, 2012
  - ii. February 29, 2014

- iii. \_\_\_\_\_
- iv. \_\_\_\_\_

- (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?  
YES

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

- (a) which grounds have been presented:
  - i. INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL
  - ii. SUBJECT MATTER JURISDICTION
  - iii. JURISDICTION
- (b) the proceedings in which each ground was raised:
  - i. POST CONVICTION RELIEF dated February 2, 2009.
  - 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) ~~NA~~ Jurisdiction can be raised at any time
- (b) ~~NA~~ Plea Agreements After-discovered.
- (c) NA

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

- (a) your arraignment and plea? NO
- (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. KELLY P. BROWN ESQ., 410 Barnwell Ave. N.W. P.O. Box 2247 Aiken, SC. 29802
  - ii. ROBERT M. PAUJAK ESQ. P.O. Box 11589 Columbia, SC. 29211-1589
  - iii. \_\_\_\_\_
- (b) the proceedings at which each such attorney represented you:
  - i. TRIAL
  - ii. Direct Appeal
  - iii. \_\_\_\_\_

19. State clearly the relief you seek in filing this application:

All INDICTMENTS, INFORMATIONS and Complaints Dismissed with PREJUDICE.

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

NO

Also for #19 the Applicant would move the Honorable Court to grant re-offer of the Non-violent plea deal offered by the State, and the trial counsel refused to convey.

STATE OF SOUTH CAROLINA )  
County of )

VERIFICATION

I, \_\_\_\_\_, 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.

Paul E. Gray, Jr. #307510

SWORN to and subscribed before me this 20th  
day of March, 2014.

Susan H. Frye (L.S.)  
Notary Public

My Commission Expires: \_\_\_\_\_

EXHIBIT # 9

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

I, \_\_\_\_\_, 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 thereof.

Noel E. May Jr. # 307530  
Applicant

SWORN or affirmed to and subscribed before me this  
29th day of March, 2014.

Susan H. Frye  
Notary Public

My Commission Expires  
March 31, 2015

My Commission Expires: \_\_\_\_\_

State of South Carolina

County of Aiken

) Court of Common Pleas  
) 08-CP-02-00734

Noel Gray, Jr.

Plaintiff  
vs.

State of South Carolina  
Defendant

)  
)  
) Transcript of Record

February 2, 2009  
Aiken, South Carolina

B E F O R E:

The Honorable Doyet A. Early, III, Judge.

A P P E A R A N C E S:

Bradley L. Boni, Esq.  
Attorney for the Plaintiff

Mary S. Williams, Esq.  
Attorney for the Defendant

Lisa H. Davenport  
Official Court Reporter

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INDEX OF WITNESSES

Noel Gray, Jr.,  
 Direct examination by Mr. Boni..... 4

Kelley P. Brown,  
 Direct examination by Ms. Williams... 12  
 Cross examination by Mr. Boni..... 16

EXHIBITS

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EV</u>
S-1	Order for continuance	15	15

1 (Whereupon, on February 2, 2009 the following  
2 proceedings were held:)

3 THE COURT: This is the State versus Noel Gray?

4 MS. WILLIAMS: Yes, Your Honor. May it please the  
5 Court. He was represented at trial by Kelley Brown. He  
6 is represented today by Brad Boni. His PCR was filed on  
7 April 18 of 2008. This case arises from two charges -- a  
8 criminal sexual conduct in the second degree with the  
9 minor. He has raised several PCR allegations in his  
10 application.

11 In general terms there were -- he raised issues of  
12 violation of the federal Interstate Agreement on Detainers  
13 Act, an enhanced sentence under the recidivist statute, an  
14 officer committing perjury, failing to discover witnesses,  
15 that life without parole is an illegal sentence, failure  
16 to inform him that he cannot -- that excuse me, failure to  
17 ~~inform him of his right to make a closing argument,~~  
18 failing to suppress the testimony of a witness named L. [REDACTED]  
19 B. [REDACTED], the use of the words rape trauma, and that he  
20 should've had a lesser included ABHAN and that there was  
21 no evidence to support a DSS finding putting his name on a  
22 registry. We would ask to clarify any allegation at this  
23 time so that the court is aware of what we're looking at.

24 THE COURT: All right. He had an appeal?

25 MS. WILLIAMS: He did have a direct appeal and the

1 issue raised in that appeal was the legitimacy of a prior  
2 Georgia conviction being used for the recidivist statute.  
3 His appeal was dismissed. The Court found that the  
4 Georgia charge was fine to be used as a prior offense to  
5 activate South Carolina's recidivist statute. The  
6 remittitur was sent on January 30 of 2008.

7 THE COURT: Thank you.

8 All right, sir: Mr. Boni?

9 MR. BONI: Your Honor, my client's allegations boil  
10 down to ineffective assistance of counsel regarding the  
11 violation of the Interstate Agreement and Detainers Act  
12 and then the second issue being that she did not raise any  
13 issue on the most serious offense on the recidivist  
14 statute giving my client life without parole. Those are  
15 really the main two arguments that he has put in his brief  
16 that we feel need to be addressed.

17 ~~THE COURT: All right. You may call any witnesses~~  
18 ~~you deem appropriate.~~

19 MR. BONI: We'd like to call Mr. Gray.

20 NOEL E. GRAY, JR., after being duly sworn,  
21 testified as follows:

22 THE CLERK: Please have a seat in the witness box and  
23 state your full name for the Court.

24 THE WITNESS: My name is Noel Eugene Gray, Jr.

25 THE COURT: Your witness.

DIRECT EXAMINATION

1  
2 BY MR. BONI:

3 Q Mr. Gray, when did you file your request for final  
4 disposition of your charges here in South Carolina?

5 A I didn't hear you, sir.

6 Q I'm sorry. When did you file your request for final  
7 disposition of your charges?

8 A May 5, 2004.

9 Q May 5, 2004?

10 A (Witness nods head.)

11 Q Okay. And when were you actually transported to  
12 South Carolina?

13 A September 1, 2004 by the Aiken County Sheriff's  
14 Office.

15 Q Okay. And your trial began on January 31 of 2005,  
16 ended on February 2, 2005; is that correct?

17 A Yes, sir.

18 Q Which, if my math is correct, I believe that's more  
19 than 180 days since may 2004 -- May 5, 2004?

20 A (Witness nods head.)

21 Q Did you ever consent to a continuance of your trial?

22 A No, sir.

23 Q Did you ever appear in open court for a continuance  
24 of your trial?

25 A No, sir.

1 Q Were you aware that a continuance had ever been filed  
2 on your behalf?

3 A No, sir.

4 Q Okay. Let me ask that one more time. So, you never  
5 appeared in open court for a continuance on this trial?

6 A No, sir.

7 Q All right.

8 A Never have.

9 Q Is there anything else that you'd like to state for  
10 the court for Judge Early?

11 A Well, yes, sir --

12 THE COURT: Wait a minute. What's the point you're  
13 trying to make?

14 MR. BONI: The point I am trying to make, Your Honor,  
15 is that more than 180 days had passed since he filed for  
16 disposition of his charges that were pending in South  
17 ~~Carolina to the date of trial which under Interstate~~  
18 Agreement detainers Act --

19 THE COURT: Give me a code section.

20 MR. BONI: Code section 17-11-10, article 3.

21 THE COURT: Hold on. 17-11-10, article 3.

22 MR. BONI: Article 3, paragraph A, Your Honor.

23 THE COURT: A.

24 MR. BONI: It states that he should be brought to  
25 trial within 180 days.

1 THE COURT: Shall be; right?

2 MR. BONI: Shall be brought to trial --

3 THE COURT: Provided that the good cause shown in  
4 open court the prison or his counsel being present the  
5 Court having jurisdiction may grant any necessary or  
6 reasonable continuances. All right, sir. Do you have a  
7 copy of the request for final disposition?

8 MR. BONI: Yes, I believe I do, Your Honor.

9 THE COURT: What happens when it's not done within  
10 180 days?

11 MR. BONI: Well, under the case State v Holbrook I  
12 believe...

13 THE COURT: You got a copy of the case?

14 MR. BONI: No, sir. Unfortunately, I do not. I  
15 apologize.

16 THE COURT: Is it a difficult case to find or?

17 MR. BONI: I apologize. State v Holbrook was the  
18 violation of 120 days which is further down in that act.  
19 Once the person is brought to South Carolina or to the  
20 receiving state, once he's been transported they have 120  
21 days from that period to bring to trial which that would  
22 have been violated as well without a continuance. That is  
23 what was under State v Holbrook.

24 THE COURT: Do you have any caselaw that shows I'm  
25 supposed to dismiss it?

1 MS. WILLIAMS: I am not sure this is the perfect time  
2 to mention, but I believe Mrs. Brown has a copy of a  
3 continuance order in her file.

4 THE COURT: Has a copy of what, ma'am?

5 MS. WILLIAMS: She may have -- I believe that she has  
6 a continuance order and may testify to that.

7 THE COURT: I am just asking what --

8 MR. BONI: No, Your Honor. I don't believe I have a  
9 copy of the case.

10 THE COURT: Okay. Move along. So, your position is  
11 they should have tried it within 180 days and the failure  
12 to do so would result in a dismissal of the charges and  
13 your counsel was ineffective because they did not bring  
14 that to the Court's attention?

15 THE WITNESS: Yes, sir.

16 MR. BONI: Our second issue on the most serious  
17 ~~offense, I don't know that it necessarily requires any~~  
18 testimony. I think it's more of a legal argument.

19 THE COURT: All right. Now, Mr. Gray, I've taken the  
20 testimony on the Interstate Agreement on Detainers Act.  
21 The other one is the recidivism statute which, I assume,  
22 would be based on the record and legal argument; is that  
23 correct?

24 THE WITNESS: I believe so, Your Honor.

25 THE COURT: All right. Is there anything else you

1 want to tell me in connection with those two issues?

2 THE WITNESS: Yes, sir, with the IADA at the time  
3 that it was violated I also sent correspondence to your  
4 office as well as --

5 THE COURT: My office?

6 THE WITNESS: -- Miss Wallis. Yes, sir.

7 THE COURT: Why would you send it to me?

8 THE WITNESS: I was trying to report that my IADA was  
9 violated and I was trying to seek some legal help because  
10 I tried talking to my counsel, but she wouldn't discuss it  
11 with me and I filed grievances on behalf of that as well.

12 THE COURT: All right. Anything else?

13 THE WITNESS: No, sir.

14 THE COURT: Any cross examination on the testimony  
15 he's given so far?

16 MS. WILLIAMS: No, sir.

17 THE COURT: ~~You may step down.~~

18 All right, sir. Why don't you let me hear from you  
19 on the legal argument on the recidivism statute?

20 MR. BONI: Yes, Your Honor. That statute under South  
21 Carolina law requires prior convictions from other state  
22 may be used to trigger this statute and convictions  
23 offense will be classified as a most serious offense.  
24 Prior conviction under State v Lindsey must contain all of  
25 the elements of the most serious offense.

1 His prior conviction from Georgia was for aggravated  
 2 child molestation. Under the Georgia statute aggravated  
 3 child molestation occurs when such person commits an  
 4 offense of child molestation which act physically injures  
 5 a child or involves an act of sodomy. The Georgia  
 6 indictment against my client stated -- alleged that he  
 7 unlawfully performed a sexual act; to wit, sodomy, an  
 8 immoral and indecent act involving the mouth of the  
 9 accused and the vagina of the minor victim.

10 In Georgia sodomy does not require actual  
 11 skin-to-skin contact. You can be found guilty of sodomy  
 12 even if clothing is on and nowhere in his indictment or  
 13 any of the allegations state that all the clothing was off  
 14 and there was any actual contact.

15 THE COURT: In his Georgia indictment. In the  
 16 indictment from Georgia?

17 MR. BONI: Yes, Your Honor, in the Georgia  
 18 indictment. Which, obviously, under his offense here and  
 19 the criminal sexual conduct act it does require sexual  
 20 battery which among many things means cunnilingus. An act  
 21 of cunnilingus requires the male tongue to reach the  
 22 female vagina that was stated in State v Morgan.

23 So, it is our belief that the same elements are not  
 24 there -- that the elements from his Georgia conviction do  
 25 not have the same or similar elements that are here in his

1 criminal sexual conduct act, and, therefore, would not  
2 trigger the recidivist statute and create a life without  
3 parole sentence.

4 THE COURT: He was convicted of criminal sexual  
5 conduct in the second degree?

6 MR. BONI: Second degree.

7 THE COURT: Without the enhancement it would have  
8 carried what sentence?

9 MR. BONI: I think a maximum of 20 years, I believe.

10 THE APPLICANT: It was 30; 15 apiece.

11 MR. BONI: Okay. It was 15 apiece. So, it would've  
12 been a maximum of 30.

13 THE COURT: On the consecutive type sentence?

14 MR. BONI: Yes, Your Honor.

15 THE COURT: All right. Anything else?

16 MR. BONI: That's it, Your Honor.

17 MS. WILLIAMS: Just with regard to the recidivist  
18 statute, Your Honor, I would just note for the record that  
19 the Court of Appeals ruled on this issue and found that --

20 THE COURT: Did they issue a written opinion or was  
21 it just a --

22 MS. WILLIAMS: They issued a short per curiam opinion  
23 following the submission of an Andrews brief and did  
24 actually address that the Trial Judge erred by allowing  
25 the prior out of state charge for aggravated child

1 molestation to be classified as a most serious offense in  
2 South Carolina. After a thorough review of the record the  
3 Court of Appeals dismissed that appeal on that exact  
4 allegation.

5 MR. BONI: And, Your Honor, I think possibly it might  
6 be because it was not really an appealable issue. I think  
7 it was more of an issue that went to the PCR relief  
8 because it was ineffective assistance of counsel for not  
9 raising this issue at sentencing.

10 THE COURT: All right, ma'am. How about detainer?

11 MS. WILLIAMS: I would like to call Kelley Brown to  
12 give testimony. If we could get Mrs. Brown.

13 KELLEY P. BROWN, after being duly sworn,  
14 testified as follows:

15 THE CLERK: Please have a seat in the witness box and  
16 state your full name for the Court.

17 ~~THE WITNESS: My name is Kelley Perkins Brown.~~

DIRECT EXAMINATION

18 BY MS. WILLIAMS:

19 Q Mrs. Brown, when were you appointed to represent  
20 Mr. Gray in this matter?

21 A My file indicates that our office was appointed and I  
22 was assigned to represent him on February 17 of 2004  
23 pursuant to his writing from out of state and requesting  
24 an attorney on the charges. I did not actually have  
25

1 opportunity to confer with with Mr. Gray until he was  
2 transported from I believe it was Lexington, Kentucky to  
3 the the Aiken County Detention Center sometime after  
4 September -- beginning of September of 2004.

5 Q And are you aware -- did he ever send you a request  
6 for information on this International Detainer -- I'm  
7 sorry; the Detainer Act question?

8 A Well, he had questions about that. I believe the  
9 correspondence that I had from him regarding that issue  
10 started around December of 2004.

11 Q And was there ever a continuance granted in the case?

12 A Yes, there was. An order was signed by Judge  
13 Reginald Lloyd who was the Chief Administrative Judge for  
14 the Second Judicial Circuit at that time and that was  
15 signed on October 29 of 2004 and was filed on November 8  
16 of 2004. I had spoken with Mr. Gray on October 13, I  
17 ~~believe it was, about the fact that the State was prepared~~  
18 to try his case during the October term of court and that  
19 because I had not had the opportunity to speak with him  
20 about his charges until he was transported here it was a  
21 very short period of time between that and the October  
22 term of court and that I felt it was in his best interest  
23 to have an attorney who was prepared to go forward for  
24 trial given the serious nature of these charges and at the  
25 time he agreed for me to seek a continuance on his behalf.

1 Q Does that continuance -- was there a date given  
2 through which the continuance would last?

3 A Yes. The order stated that if the indictments had  
4 not been dealt with -- been disposed of by February 28 of  
5 2005, then they would be dismissed with prejudice pursuant  
6 to the Interstate Agreement on Detainers.

7 Q All right. And if we could -- if I could get a copy  
8 of that order, I would like to submit that order into  
9 evidence in this case or at least let the Judge have an  
10 opportunity to review that.

11 THE COURT: Let me see it, please.

12 Q I would like to ask you a little bit about your  
13 research regarding the recidivist statute. Did you have  
14 an opportunity to review the records of his Georgia  
15 conviction?

16 A Yes, I did.

17 Q And did you do research on this point to determine if  
18 you felt that that conviction could be used?

19 A I did. I looked at the statute itself and also the  
20 -- I had a copy of the indictment, and by my research and  
21 understanding the allegation was even though the term of  
22 art of sodomy isn't a term of art that we would have used  
23 here in South Carolina pursuant to that statute the  
24 allegations under which he plead guilty involved an  
25 indecent act involving the mouth of the accused and the

1 vagina of the victim being a child under the age of 14 and  
2 based on my research of South Carolina law of how the  
3 South Carolina courts had interpreted other out-of-state  
4 statutes it seemed on its face and based on my research  
5 that the allegations would have met the factual  
6 allegations necessary to sustain an indictment and  
7 conviction for criminal sexual conduct with a minor in the  
8 second degree in the state of South Carolina, and,  
9 therefore, was appropriate to be used for enhancement  
10 purposes under our recidivist statute.

11 THE COURT: Isn't that exactly what the appellate  
12 brief was written on to the Court of Appeals by whoever  
13 did it?

14 MS. WILLIAMS: Yes, sir.

15 THE COURT: Mr. Clarty. I mean, I just read the  
16 brief. It seems like it is the same argument that you  
17 ~~just made and the same thing you're testifying about.~~

18 THE WITNESS: Yes, sir.

19 MS. WILLIAMS: We would have no further testimony on  
20 these issues.

21 THE COURT: All right. Let's mark this order for  
22 continuance no. 1 for the State in this PCR. Hold on one  
23 second, please. Let the Court Reporter mark it.

24 (Whereupon, State's Exhibit No. 1 was marked for  
25 identification and received into evidence.)

1 THE COURT: Are you aware of the order of continuance  
2 by Judge Lloyd?

3 THE APPLICANT: No, sir, I was not. It was never  
4 brought to my attention, sir.

5 THE COURT: Well, okay. Were you aware of it, sir?  
6 Your lawyer?

7 MR. BONI: I was not aware of it.

8 THE COURT: Take a look at it. All right: You've  
9 had a chance to look at it?

10 MR. BONI: Yes, Your Honor.

11 THE COURT: Anything from this witness, ma'am?  
12 Anything further by the State?

13 MS. WILLIAMS: Nothing further.

14 THE COURT: Sir, anything?

15 MR. BONI: Yes, Your Honor.

16 CROSS-EXAMINATION

17 BY MR. BONI:

18 Q You stated October 13, 2004 was when an agreement was  
19 made on the continuance; is that correct?

20 A That's when I consulted with Mr. Gray about the  
21 continuance and he agreed that it was in his best interest  
22 to have the matter continued. I also informed him of the  
23 order after it was signed. He and I had communication  
24 about that matter.

25 Q Okay. Did you get anything in writing from him

1 regarding that?

2 A No, I did not.

3 Q Okay. And regarding the allegations in the Georgia  
4 indictment in your research, did you ever see where it  
5 mentioned anything about skin-to-skin contact?

6 A I don't recall.

7 Q Okay. Do you recall if it ever mentioned anything  
8 regarding whether clothing was on or off in those  
9 allegations?

10 A If whatever involved --

11 Q If clothing between Mr. Gray and the victim -- if  
12 they were wearing clothes or if the victim was not wearing  
13 clothes. Do you remember -- recall in your research if  
14 ever that was mentioned in the indictment or --

15 A It was not mentioned in the indictment. I would find  
16 it hard to believe that an allegation could be made of  
17 ~~mouth-to-vaginal contact with clothing being present.~~

18 However, the indictment did not mention anything  
19 specifically about the presence or absence of clothing.

20 MR. BONI: May I have one moment, Your Honor?

21 THE COURT: You may.

22 MR. BONI: No, Your Honor, nothing further.

23 THE COURT: Any cross? Any redirect, ma'am?

24 MS. WILLIAMS: Nothing further from the State.

25 THE COURT: You may step down.

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THE WITNESS: Thank you.

THE COURT: Anything else on behalf of the State?

MS. WILLIAMS: I've provided the statutes and the State versus Lindsey if Your Honor has any desire to look at those, and other than that, we have nothing further.

THE COURT: Thank you. Anything on behalf of the applicant?

MR. BONI: No, Your Honor.

THE COURT: All right. I am going to take it under advisement and please have proposed orders within 30 days. Please explain that to your client.

(End of transcript of record.)

CERTIFICATE OF REPORTER

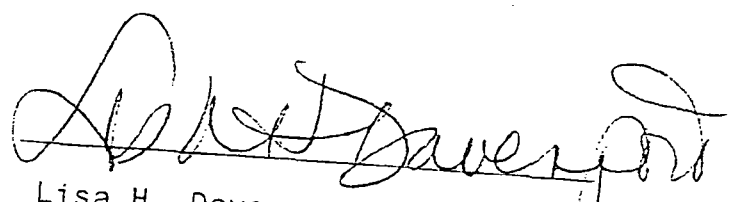
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State of South Carolina )  
County of Aiken )

I, Lisa H. Davenport, Official Court Reporter for the second Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas for Aiken County, South Carolina, on the 2nd day of February, 2009.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

July 28, 2009

  
Lisa H. Davenport, Court Reporter

Noel Gray # 307590  
Water ee # 281  
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4460 Broad River Rd.  
Columbia, SC,

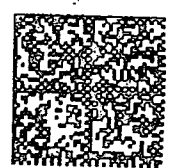
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c/o Wm of Certiorari  
The Supreme Court of South Carolina  
Mr. Daniel E. Sprouse, Clerk of Court  
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