

Volume II of II

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Richland County

J. Ernest Kinard, Jr., Circuit Court Judge

RECEIVED
MAY 23 2016
SC SUPREME COURT

STEPHEN SMALLS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

Appellate Case No. 2012-212553

APPENDIX

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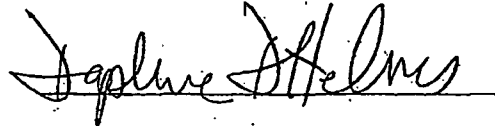
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I, the undersigned Daphne D. Helms, official court reporter for the Fifth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the circuit court for Richland County, South Carolina, on the 7th of June, 2011.

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

August 3, 2012

A handwritten signature in cursive script, reading "Daphne D. Helms", written over a horizontal line.

Daphne D. Helms, court reporter

STATE OF SOUTH CAROLINA)
)
 COUNTY OF RICHLAND)
)
 STEPHEN SMALLS, 283971,)
 Applicant,)
)
 v)
 THE STATE,)
 Respondent.)

IN THE COURT OF COMMON PLEAS

2005-CP-40-2393

CONSENT ORDER FOR HEARING TO RECEIVE ADDITIONAL TESTIMONY

JEANETTE M. MONROE
 C.C.P. CLERK
 2011 OCT 19 PM 2:54
 RICHLAND COUNTY
 FILED

Counsel for the Applicant in the above captioned previously filed a Motion asking that the Applicant's Post-Conviction Relief action be scheduled for a *de novo* hearing on the merits of his allegations as set forth in his Post-Conviction Relief Application. This matter was originally heard by the Honorable James C. Williams, Jr., presiding circuit court judge. At the conclusion of this hearing the record was held open to enable Counsel for the Applicant to review a file from the Fifth Circuit Solicitor's Office. Counsel diligently sought an opportunity to review the file in question over a period of many months. Ultimately, Counsel was advised by email that the Fifth Circuit Solicitor's Office did not have a separate file concerning the witness in question. A copy of that email is attached as *Attachment A*. Judge Williams was subsequently notified that Counsel had exhausted all reasonable efforts to review records from the Solicitor's Office concerning what if any deals had been given to this witness in exchange for his cooperation. This Court is advised that this information was conveyed to Judge Williams either in person, by phone, or in an email. That communication was not documented in Post-Conviction Relief counsel's file. On October 21, 2010 Post-Conviction Relief Counsel advised the Supreme Court of the status of this case following correspondence from the Court prompted by a letter they had received from the client regarding his Post-Conviction Relief action. Counsel's letter to the Supreme Court was courtesy copied to Judge Williams. See *Attachment B*. A copy of the transcript of the Post-Conviction Relief hearing is attached hereto. See, *Attachment C*.

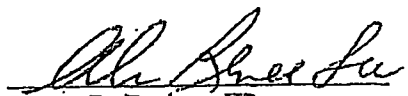
Judge Williams has now retired. He left the bench without having made a ruling in this pending Post-Conviction Relief matter. ~~This case has been transferred to me for my review and decision on the merits of the Applicant's case.~~ By previous motion the Applicant has asked that his pending Post-Conviction Relief Application be scheduled for a *de novo* hearing. At a subsequent hearing counsel *withdrew* the Applicant's request for a *de novo* hearing, and requested instead that this case be reconvened for additional testimony. The Applicant was present for this proceeding. Given the fact that the Solicitor's Office was unable to produce adequate records concerning what if any preferential treatment a witness was given in exchange for his cooperation, the Applicant asserts that the ends of justice would be best served by the Court holding another hearing at which he will have the opportunity to be fully heard on the merits of his case. Since the Solicitor's Office had no file concerning the witness in question, the Applicant submits that he should be permitted to present testimony from individuals involved in the prosecution and defense of that witness in order to fairly resolve the question of whether he was denied access to impeachment evidence clearly discoverable pursuant to *Brady v. Maryland* 373 U.S. 83 (1963) and *Giglio v. United States* 405 U.S. 150 (1972). Counsel for the Respondent has agreed that the record is incomplete, and that the Applicant is entitled to further pursue the issue at hand. Given all the facts in this matter, this Court finds it necessary and appropriate to reconvene for further testimony and evidence

re
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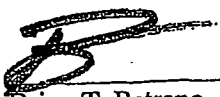
relevant to the Applicant's claims concerning this one issue.

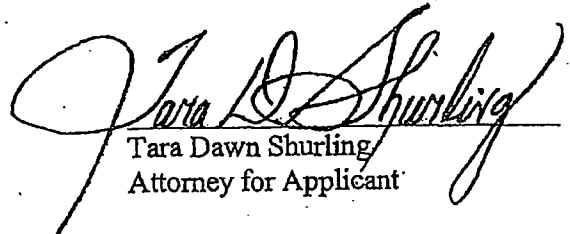
Therefore the Applicant's case is to be scheduled for further hearing ~~before me during the next~~ ^{January} term of Post-Conviction Relief proceedings in Richland County, ~~over which I am scheduled to preside.~~

IT IS SO ORDERED.


~~James R. Barber, III~~
Chief Administrative Judge
Fifth Judicial Circuit

This 18th day of ~~September~~ ^{October}, 2011.
Columbia, SC


Brian T. Petrano
Assistant Attorney General


Tara Dawn Shurling
Attorney for Applicant

State of South Carolina

Court of Common Pleas

County of Richland

2005-CP-40-2393

Stephen Smalls

:

-VS-

:

TRANSCRIPT OF RECORD

:

The State of South Carolina

:

January 13, 2012

Columbia, South Carolina

B E F O R E:

The Honorable J. Ernest Kinard, Jr., Judge.

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

Tara D. Shurling, Esquire
Attorney for the Applicant

Brian T. Petrano, Esquire
Attorney for the State

Daphne D. Helms
Circuit Court Reporter

I N D E X

Witness

Eugene Green

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E X H I B I T S

<u>No.</u>	<u>Description</u>	<u>ID.</u>	<u>EV.</u>
P-1	copy of e-mail		24

1 The Court: Okay.

2 Mr. Petrano: Mr. Stephen Smalls will be the next case,
3 Your Honor.

4 The Court: Okay.

5 Mr. Petrano: Your Honor, my introduction on this case
6 will be rather atypical. Just give me a moment on this.

7 The Court: All right.

8 Mr. Petrano: Your Honor, may it please the Court? This
9 is 2005-CP-40-02393. As you can tell from the common pleas
10 number, it's a 2005 P.C.R. Judge, this case had went before
11 Judge Williams approximately in 2007. The record was held
12 open. This was before my time when I handled Fifth Circuit
13 P.C.R.'s, so I did not handle that 2007 P.C.R.

14 You have that transcript in your packet from that
15 hearing. That has the testimony of the two trial attorneys.
16 Ultimately, there was a motion for a de novo P.C.R. hearing
17 filed by the applicant on April 25, 2011.

18 Judge Lee ultimately assigned it to Judge Barber. Judge
19 Barber then just said put it on the active docket and, well,
20 here we are, Judge. There's a couple of witnesses; none of
21 them are the State's. And I would note that the victim in
22 this case on my victim notification sheet, according to the
23 S.C.D.C. printout, is a Mr. Eugene Green who I believe has
24 been subpoenaed to be a witness here by the applicant. Thank
25 you, Judge.

1 Ms. Shurling: That's correct, Your Honor. For the
2 record, I'm court-appointed counsel for Stephen Smalls. Your
3 Honor, in the first post-conviction relief hearing which was
4 held before Judge Williams on July 31st, 2007, his post --
5 his public defender, pardon me, Sheila Mims, testified that
6 she was aware as this case was approaching trial, she and the
7 co-defendant -- I mean co-defense counsel, LaNelle Durant,
8 were aware that the State's eyewitness in this case, Mr.
9 Eugene Green, had a pending charge for carjacking. However,
10 they were told, according to their testimony as the trial was
11 beginning on the day of trial, that the carjacking charge had
12 already been dismissed.

13 As a result, they did not engage in any standard Giglio
14 impeachment with Mr. Green because they were under the
15 understanding, based on the notification from the solicitor's
16 office, that the charge had, in fact, been dismissed prior to
17 trial. Ms. Mims testified that she subsequently became aware
18 that the charge had, in fact, not been dismissed and was
19 dismissed the day following Mr. Green's testimony against Mr.
20 Stephen Smalls.

21 Your Honor, at that time we presented testimony from
22 both defense attorneys. We've attempted -- off the record we
23 had discussions with Judge Williams and former Assistant
24 Solicitor Hood who had been the assigned prosecutor for
25 Eugene Green to discuss the case with him, and he was

1 potentially going to testify. He had not been able to see
2 the solicitor's file in the case, and I felt that based on
3 the testimony of Ms. Mims I needed to see the file in the
4 case, and so I requested that the record be left open.

5 Mr. Hood and I then attempted to view the file in the
6 solicitor's office, and we were informed and I'm paraphrasing
7 -- but generally Mr. Hood, I believe, was informed that he
8 was no longer employed there and that he would not have
9 access to the file. I went to Judge Williams. We got an
10 order, Your Honor, that directed the Fifth Circuit
11 Solicitor's Office to allow both Mr. Hood and I to review the
12 case history file for Eugene Green.

13 I subsequently received an e-mail from B.A. or Elizabeth
14 Levy, as we all knew her B.A., that she would have been happy
15 to let me see the file and that she had located it and it was
16 in her office. I then went to the solicitor's office, and
17 unfortunately the file that she had was for a different Green
18 or the wrong charges or something. It was not the file for
19 the charges at issue in this case.

20 Subsequently, I requested that she locate the file. She
21 was unable to do so and sent me an e-mail which I will
22 provide the Court with a copy of in a moment. I asked her
23 for something in writing verifying that she had been unable
24 to locate the file for Mr. Eugene Green.

25 I have now served through the department of corrections

1 a subpoena for Mr. Eugene Green. He is present in the
2 courtroom, and I would call him as a witness for the
3 applicant at this time.

4 Mr. Petrano: And at this point as a formality, Your
5 Honor, we do object. Your Honor, I don't have the ability to
6 move to quash the indictment or the subpoena for Mr. Green
7 because I was not the recipient; it was obviously Mr. Green.
8 However, Your Honor, page 415 of the record on appeal -- it
9 was an Anders record on appeal, so it's the entire
10 transcript. Page 415 is the indictment.

11 Your Honor, Mr. Green is the victim in this case, was
12 the victim that has been phrased -- classified as an
13 eyewitness, but that was in his capacity as a victim. He got
14 a shotgun pulled on him. Your Honor, we do object to calling
15 the victim, and I probably should choose a better word, but
16 it's escaping me right now. I don't want to say harassing
17 the victim, but, Your Honor, the victim should not be brought
18 back after a trial to have to testify at a P.C.R. That's all
19 I've got, Judge. He is the victim.

20 Ms. Shurling: Your Honor, two things. First, the State
21 was sent a copy of my subpoena for Eugene Green. They were
22 on notice of it---

23 Mr. Petrano: Absolutely.

24 Ms. Shurling: ---prior to this proceeding. Secondly, I
25 believe that a victim would have the right to object to

1. testifying. I would ask that the Court question Mr. Green.
2. I believe that if he desires to waive any objection that he
3. would have the right to raise with regard to testifying. I
4. also believe that where -- on the unique issues in this case
5. where there is a question about Mr. Green himself having
6. pending criminal charges which would have been the subject of
7. appropriate impeachment under Giglio and its progeny that the
8. due process rights and Sixth Amendment rights of my client
9. would override any consideration raised by the respondent,
10. particularly where Mr. Green is willing and able to waive any
11. objection that he would have to testifying.

12. **The Court:** All right. Green was the victim in the
13. case. I, of course, haven't read the transcript at this
14. point. It wouldn't take me but, you know, three minutes to
15. read it but...

16. **Ms. Shurling:** Well, Your Honor, actually Bojangles' was
17. the victim, and he was an employee of Bojangles'.

18. **The Court:** Well, if the State had the subpoena and they
19. did not move to quash it, you can call him.

20. **Ms. Shurling:** Thank you, Your Honor. At this time---

21. **The Court:** And that he has certain rights that I'll
22. advise him.

23. **Ms. Shurling:** Thank you, Your Honor. I call Mr. Eugene
24. Green to the stand, Your Honor.

25. Eugene Green, having been duly sworn, testified as

1 follows:

2 Examination by the Court

3 Q. Mr. Green, you're not really here voluntarily. You've
4 been what's called subpoenaed. Do you understand that?

5 A. Yes, sir.

6 Q. And then I take it there was an order of transport
7 issued - I haven't seen it - to have S.C.D.C. bring you here,
8 and here you are. This is a post-conviction proceeding that
9 took place a long time ago. Normally we hear these things
10 within a year or two of them having happened, but this
11 happened way back there and I know nothing of what transpired
12 other than Mr. Smalls was found guilty and received a
13 sentence of armed robbery. I take it now that it occurred at
14 Bojangles' or somewhere like that. You apparently were an
15 employee of Bojangles' at the time?

16 A. Yes, sir.

17 Q. And you testified during the trial?

18 A. Yes, sir.

19 Q. The trial has been gone. You don't have to testify if
20 you don't want to is the bottom line. Are you willing to
21 testify?

22 A. Yes, sir.

23 Q. All right.

24 A. I didn't want to then. I didn't want -- I didn't even
25 want to have nothing to do with it.

1 Q. But you don't have to testify if you don't want to is
2 the bottom line.

3 A. No, no. I am.

4 Direct Examination

5 By Mr. Shurling:

6 Q. Mr. Green, the question is whether or not you are
7 willing to testify here today---

8 A. Yeah.

9 Q. ---not whether or not you wanted to testify at trial.

10 A. I said, "Yeah."

11 Q. Here you will testify.

12 A. Yeah.

13 Q. Okay. Thank you.

14 The Court: All right.

15 By Ms. Shurling:

16 Q. Mr. Green, do you recall being asked by the Fifth
17 Circuit Solicitor's Office to be in a witness in the case
18 against Stephen Smalls?

19 A. Yes, ma'am.

20 Q. And at the time did you have a pending charge---

21 A. Yes, ma'am.

22 Q. ---for carjacking?

23 A. Yeah.

24 Q. At some point in time were you brought to this
25 courthouse for meetings with the prosecutor in the Stephen

1 Smalls' case?

2 A. Yes, ma'am. I was brought up here twice.

3 Q. Were you asked to be a cooperating witness and testify
4 against Mr. Smalls?

5 A. Yes, ma'am.

6 Q. And what did you tell the State?

7 A. I didn't want anything to do with it, and it was like I
8 would have to go -- they was going to send me to go take a
9 polygraph test. If I -- if I failed the polygraph test, then
10 the charge still was going to be. So I kept telling them I
11 didn't want anything to do with it. I went and took the
12 polygraph test, and Investigator Pierce told me -- they said
13 I failed the polygraph test for every question. So
14 Investigator Pierce told me that he don't know why the
15 solicitor was still -- why the charge wasn't dismissed
16 because he had already talked to the victim and the victim
17 had already -- had told him what had happened. He said that
18 the charge -- he had already let them know to dismiss the
19 charge against me.

20 So they brought me back up here again the next day, and
21 I talked to that man over there, Pascoe, back there in the
22 back, and he was like if I -- you know what I'm saying? They
23 were going to subpoena me to come to court, so I didn't -- I
24 didn't want anything to do with it. He was like if I didn't
25 come -- you know, if I didn't come, you know, to participate

1 in the trial that my charge wasn't going to go anywhere. I
2 didn't want anything to do with it.

3 The Court: He's not answering your specific question.

4 By Ms. Shurling:

5 Q. When you told Mr. Pascoe, I believe you said---

6 A. Yes, ma'am.

7 Q. ---is who you were talking to, that you did not want to
8 testify in Mr. Stephen Smalls' case, what did he say would be
9 the consequence of not---

10 A. My charge wasn't going to go anywhere.

11 Q. Your charge wasn't going to go anywhere?

12 A. Yeah. Like I still was going to be charged with the
13 charge.

14 Q. So as of the time of your testimony, you thought you
15 still had the pending charge---

16 A. Yes, ma'am.

17 Q. ---of carjacking.

18 A. Yes, ma'am.

19 Q. Now, at your trial nobody -- I mean, pardon me, at
20 Stephen Smalls' trial nobody asked you anything about having
21 a pending charge for carjacking, did they?

22 A. No, ma'am.

23 Q. Nobody asked you if that charge had anything to do with
24 why you were testifying.

25 A. No, ma'am.

Eugene Green - direct exam by Ms. Shurling

1 Q. Now, you were asked about whether you'd been in trouble
2 once before about being in possession of a stolen vehicle.

3 A. Yeah.

4 Q. Do you remember that?

5 A. Yep.

6 Q. That's a different charge, isn't it?

7 A. Yeah.

8 Q. Okay. In fact, your record reflects that you had a
9 charge for unlawful possession of a stolen vehicle back in
10 about 2000, well before this case.

11 A. Yes, ma'am.

12 Q. So the only prior judgment that you were asked about was
13 one that had been disposed of long before this and that no
14 questions were put to you at all concerning that carjacking
15 charge.

16 A. No, ma'am.

17 Q. Okay. After you testified for the State in Stephen
18 Smalls' case, did anything else ever happen on that
19 carjacking charge?

20 A. No, ma'am. They never notified me of nothing, never
21 said nothing else to me.

22 Q. Were you ever notified that the charge was dismissed?

23 A. No, ma'am. I was never called for roll call or nothing.

24 Q. Now, you were in jail for a little while after you were
25 arrested on that carjacking charge, weren't you?

1 A. I stayed in, yeah, for awhile.

2 Q. And you were released on appeal on a P.R. bond? Is that
3 correct?

4 A. A P.R. bond.

5 Q. And how long before the Stephen Smalls' trial were you
6 released on a P.R. bond?

7 A. Like a couple of days before, something like that.

8 Q. Okay.

9 A. It was like right -- like right -- like right before it,
10 something like that. I know it was real close. It was like
11 days.

12 Q. What was your understanding of who had---

13 A. He was telling me how to dress and everything. He was
14 telling me how to dress. Don't come with no jeans on looking
15 like I'm in the streets and this and that. I just want the
16 truth to be known because I didn't want anything to do with
17 it, and that man over there, the way that he had talked to
18 me, he was telling me how to dress, you know, how to look --
19 you know, don't come up in a here looking like I'm from the
20 streets and, you know, dress presentable. Wear a shirt and
21 pants and all this, you know.

22 Q. Mr. Green, I understand that you're a little excited and
23 -- but if you can help me remember -- that nice lady sitting
24 beside you has got to write down every word that's said in
25 the courtroom, and if you and I get to talking over each

1 other, it makes it hard for her to do her job. Okay? When
2 you had the conversation with I believe you said Detective
3 Pierce?

4 A. Yes, ma'am.

5 Q. Was he the officer that arrested you on the carjacking
6 charge?

7 A. He was the one that arrested me; yes, ma'am.

8 Q. And was he the officer that transported you to and from
9 the polygraph test?

10 A. Yeah, he took me there and brought me back.

11 Q. And brought you back.

12 A. Yeah.

13 Q. The conversation that you relayed a moment ago about
14 what he said took place on the way back from the polygraph---

15 A. On the way back -- we was on the interstate, coming down
16 the interstate right there by Decker Boulevard, like coming
17 down the back way.

18 Q. Okay.

19 A. Coming back.

20 Q. Now, I understand what you say Detective Pierce said.
21 And, by the way, you don't know whether his name is spelled
22 P-I-E or P-E-A-R-C-E, do you?

23 A. I think it's spelled with a C. P -- P-E-A -- P-I-E-C-R
24 or something like that.

25 Q. Thank you. When that conversation took place, you say

1 that based on that conversation it was your understanding
2 that the officer had already determined that you shouldn't be
3 charged in that carjacking.

4 A. Yeah. He said he had notified---

5 Mr. Petrano: Object to hearsay.

6 The Court: Yeah, it is, but you've already covered
7 enough with him, haven't you?

8 By Ms. Shurling:

9 Q. Okay. At the time that you testified at the Stephen
10 Smalls' proceeding, who did you understand had the authority
11 to decide -- ultimately decide whether or not those carjack
12 -- that carjacking charge against you went forward or didn't
13 go forward?

14 A. That man over there, David Pascoe.

15 Q. So the fact that the officer had had a conversation with
16 you did not assuage your worry about that carjacking charge.

17 A. No, ma'am.

18 Ms. Shurling: Thank you. No further questions.

19 Cross-Examination

20 By Mr. Petrano:

21 Q. I saw you sitting in the jury box talking to the
22 applicant. Is that true?

23 A. Yeah.

24 Q. What were you guys talking about?

25 A. Nothing.

1 Q. Nothing at all. Just the weather? Baseball?

2 A. We wasn't talking about nothing..

3 Q. You weren't discussing this case?

4 A. No.

5 Q. You weren't discussing the testimony that you gave?

6 A. No.

7 Q. You weren't discussing the testimony you were about to

8 give.

9 A. No.

10 Q. Have you spoken to the applicant's attorney before?

11 Ms. Shurling: That's me.

12 The Witness: Yeah, I talked to her yesterday.

13 By Mr. Petrano:

14 Q. What did she say?

15 A. What you mean what she say?

16 Q. What did she tell you?

17 A. She was talking about -- we was talking about the case.

18 Q. What did she tell you, if you recall, sir? If you don't

19 recall it, you don't recall it.

20 A. I can't really remember.

21 Q. Did she tell you what was going to happen here today?

22 A. No, she didn't tell me what was going to happen today.

23 Q. She did not. Did she mention---

24 A. I mean---

25 Q. I'm sorry.

1 A. I know -- I know I was being subpoenaed to come here.

2 Q. Did she mention Mr. Smalls?

3 A. Her client?

4 Q. Yes.

5 A. Yeah.

6 Q. Okay. What did she tell you about Mr. Smalls?

7 A. She was saying that I was coming back to court, to be
8 subpoenaed to come back. It was going up for a P.C.R.

9 Q. Did she ask you any questions about the carjacking
10 charge?

11 A. Yeah.

12 Q. What did she ask you?

13 A. Everything she just talked about.

14 Q. Okay. Anything else?

15 A. No.

16 Q. Okay.

17 Ms. Shurling: Mr. Green, when I came---

18 The Court: He's not through.

19 Ms. Shurling: Oh, I'm sorry. I thought you said you
20 were through. I apologize.

21 By Mr. Petrano:

22 Q. Do you remember testifying at the trial against Mr.
23 Smalls?

24 A. Yeah.

25 Q. Did he pull a shotgun on you?

1 A. Can I be honest with you?

2 Q. Please do, sir.

3 A. It was dark; you know what I'm saying? It was dark. I
4 just know when the investigator came down there he had a --
5 he had some pictures.

6 Q. I'm sorry. Are you done?

7 A. Nah. Go ahead.

8 Q. Do you remember your testimony at the trial?

9 A. Yeah.

10 Q. Do you remember that you testified at the trial that you
11 recognized Mr. Smalls and that he held a shotgun on you for a
12 moment?

13 A. I pointed him out in a picture.

14 Q. And yet I believe you pointed him out in court; is that
15 correct?

16 A. Yeah.

17 Q. And you said that he pulled a shotgun on you. Excuse
18 me. Nothing further.

19 Redirect Examination

20 By Ms. Shurling:

21 Q. My apologies for interrupting Mr. Petrano. I'll turn my
22 hearing aid up; I misunderstood him. Mr. Green, when I came
23 to see you yesterday did I make it clear to you first thing
24 that I was the lawyer representing Stephen Smalls?

25 A. Yeah.

1 Q. And did I tell you that you had an absolute right not to
2 talk to me if you didn't want to?

3 A. Yeah. That's the first thing you said.

4 Q. Did I also ask you if you were currently represented by
5 a lawyer?

6 A. Yeah, you asked me all that.

7 Q. And what did I tell you I'd have to do if you had a
8 lawyer?

9 A. I can't remember.

10 Q. Do you remember me telling you that if you were
11 represented by counsel I'd have to go through your lawyer to
12 ask for permission---

13 A. Yeah.

14 Q. ---to talk to you?

15 A. Yeah.

16 Q. And you told me you don't currently have a lawyer. Is
17 that correct?

18 A. Yeah.

19 Q. Okay. And I believe that one of the very first
20 questions I asked you was when you became aware that your
21 carjacking charge had been dismissed. Fair?

22 A. Yeah.

23 Q. And you told me you'd never been notified that it was
24 dismissed.

25 A. I never was.

1 Q. Okay. Now, I asked you a lot of questions yesterday.
2 Were the questions I asked you yesterday any different from
3 the questions that I asked you in court today?

4 A. No, ma'am.

5 Q. Did I at any time yesterday tell you what to say in
6 court today?

7 A. No, ma'am.

8 Q. Did I tell you how to answer questions?

9 A. No, ma'am.

10 Q. Did I feed you any information concerning this case and
11 suggest that you work it into your testimony?

12 A. No, ma'am.

13 Q. Did I advise you that based on my reading of the
14 documents on file with the clerk of court's office that the
15 carjacking charge had been dismissed without prejudice?

16 A. Yes, ma'am.

17 Q. And that that meant that there was always the
18 possibility the solicitor's office could try to bring it back
19 up later?

20 A. Yes, ma'am.

21 Q. So I told you all that, didn't I?

22 A. Yes, ma'am.

23 Q. Okay. And I made it very clear to you that despite the
24 fact that I'd subpoenaed you that you didn't have to talk to
25 me and that you didn't have to testify.

1 A. Yes, ma'am.

2 Q. Correct?

3 A. Yes, ma'am.

4 Q. I believe I even told you that the prosecutors both in
5 your case and in Mr. Smalls' case were likely to be here
6 today, didn't I?

7 A. Yes, ma'am.

8 Q. So you knew that when you were giving this testimony
9 that you were likely to be having to give it in the courtroom
10 with those gentlemen here.

11 A. Yes, ma'am.

12 Q. Would you have testified in the case against Stephen
13 Smalls if you had not been told that your carjacking charge
14 would not---

15 A. No.

16 Q. ---be dismissed if you didn't---

17 A. Because I didn't want anything to do with it.

18 Q. And were you afraid of the State prosecuting you for
19 carjacking?

20 A. Yep.

21 Q. Carjacking is a pretty serious charge, isn't it?

22 A. Yeah. They say it carries 25 years.

23 Mr. Petrano: Your Honor, we're going way outside the
24 record.

25 The Court: Yeah, we're way beyond all that. That's---

colloquy

1 Ms. Shurling: Thank you, Your Honor. No further
2 questions.

3 The Court: You can step down.

4 Ms. Shurling: A moment's indulgence, Your Honor. One
5 moment, Your Honor. Your Honor, in light of the testimony
6 that was introduced a moment ago, I believe in the interest
7 of a complete record I would move to introduce a copy of the
8 S.L.E.D. prior record report for Eugene Green for the purpose
9 of demonstrating that the prior offense for being in
10 possession of a stolen vehicle that was the subject of
11 discussion, cross-examination at trial, was an earlier
12 charge, not the charge at issue here today, and I would move
13 to introduce this as Applicant's 1.

14 Mr. Petrano: Your Honor, I object as to relevance. The
15 argue suffices without the S.L.E.D. report which was---

16 The Court: Yeah, I take that as a given. He was
17 questioned about that during the trial, and it was not this
18 case. We understand that.

19 Ms. Shurling: Your Honor, I would object, for the
20 record, to not being allowed to document the fact that they
21 were not the same charges---

22 The Court: It doesn't matter, Ms. Shurling. Once I
23 rule---

24 Ms. Shurling: Thank you.

25 The Court: You've been in front of me enough to know to

colloquy

1 sit down. Move on to something else.

2 Ms. Shurling: Your Honor, we would note for the record
3 I don't believe it came out in the procedural history covered
4 by the State that ultimately there was a consent motion,
5 pardon me, a consent order for this hearing here today which
6 was entered with the State and filed. That's part of the
7 procedural history and will be part of the clerk of court's
8 records.

9 The Court: Okay. You can put that in.

10 Ms. Shurling: I did reference, Your Honor, that I
11 requested something in writing from the Fifth Circuit
12 Solicitor's Office to document that they did not have a file
13 for Eugene Green, and I received back from Elizabeth Levy on
14 February 20th, 2009, the simple e-mail: "We have checked
15 archives and do not have this file."

16 Mr. Petrano: No objection.

17 The Court: Okay.

18 Ms. Shurling: I move to introduce that as Applicant's
19 Number 1.

20 Mr. Petrano: That's number 1?

21 Ms. Shurling: I believe that would be number 1.

22 Mr. Petrano: Okay. Thank you. I'm sorry. I just
23 wanted to make sure.

24 Ms. Shurling: And I'll get you a copy of that, Mr.
25 Petrano.

colloquy

1 Mr. Petrano: Thank you, ma'am.

2 Ms. Shurling: A moment's indulgence, Your Honor.

3 (Plaintiff's Exhibit 1 was received in evidence. An
4 off-the-record discussion takes place between Ms. Shurling
5 and Mr. Smalls.)

6 Ms. Shurling: Your Honor, the applicant would have no
7 further witnesses.

8 Mr. Petrano: Your Honor, may I just have a moment?

9 The Court: All right. Now, of course, I haven't read
10 all these documents which, as you know, won't take me long to
11 read, but Judge Williams continued it for a mere 60 days to
12 keep the record open. You stated that's why it took so long,
13 but we left the record open or he did for the purpose of, as
14 I understood it, letting Mr. Pascoe and Mr. Hood testify, as
15 I read the last couple of pages, which you don't need that
16 testimony is what you're saying.

17 Ms. Shurling: Your Honor, it's my understanding that
18 they were going to be called as witnesses for the State. If
19 they're not, I'll call them.

20 The Court: I'm not asking that they be called. I mean,
21 you just said you---

22 Mr. Petrano: I did not subpoena them, Your Honor, and
23 that was why I wanted a moment to discuss the matter with
24 them before I rested.

25 The Court: Okay. All right. That's fine.

1 Ms. Shurling: Your Honor, if we could have that brief
2 recess to allow him to talk to them. If he's not going to
3 call them, I will.

4 Mr. Petrano: He's not---

5 The Court: I'm not pushing that they be called. I'm
6 only saying---

7 Mr. Petrano: I believe she's rested.

8 The Court: You have rested, so it's up to him to call
9 them or not call them.

10 Mr. Petrano: We have no additional witnesses, Judge.

11 The Court: All right.

12 Ms. Shurling: Thank you, Your Honor.

13 The Court: So what is it y'all want me to do? The best
14 I can?

15 Ms. Shurling: Your Honor, the record before the Court
16 in the form of the previous testimony of the public defenders
17 in this case confirms that they did not engage in appropriate
18 impeachment of Mr. Eugene Green because they were notified by
19 the prosecution that the pending carjacking charge against
20 Mr. Green had been dropped before the trial. They testified
21 that they subsequently found out that the charge had, in
22 fact, not been dropped, and we've presented documentation of
23 the previous proceeding documenting that the charge was, in
24 fact, not dropped until the day after Mr. Green presented
25 testimony on behalf of the State in this case.

1 We have now presented testimony from Mr. Green that he
2 testified in this case because he was told that his pending
3 charge for carjacking wasn't going to go away, wasn't going
4 to go anywhere unless he testified. And it is equally clear,
5 even if you don't take his testimony into account, that
6 defense counsel would have exercised their right on behalf of
7 Mr. Smalls to impeach the credibility of Mr. Eugene Green
8 based on the fact that he had, if not a deal in his pending
9 case, certainly the hope of ingratiating himself to the State
10 and getting some sort of benefit from testifying for the
11 prosecution.

12 That type of standard Giglio cross-examination would
13 have been engaged in in this case had the public defender
14 been aware that the carjacking charge was still pending
15 against Mr. Eugene Green. We've heard the testimony today
16 that he would not have testified, of course.

17 Your Honor, it's important to note that in this case Mr.
18 Eugene Green was the only eyewitness that identified my
19 client in this particular case. There was a manager that was
20 there that day, but I believe that the record will reflect
21 that he did not pick Mr. Smalls out of a line-up and did not
22 positively identify him during the trial proceedings. It's
23 been awhile since I've read them, but I believe that's
24 accurate.

25 The case would have been decidedly different had the

1 State not had the eyewitness testimony of Eugene Green. For
2 that reason, we believe we have clearly demonstrated
3 prejudice that warrants a new trial.

4 Mr. Petrano: Judge, it's a credibility matter. Also,
5 the May 2nd date is the date the document was filed and
6 stamped by the clerk. That's not necessarily the date that
7 something actually happened. You could sign an order and
8 make a decision, and it may not be filed for a couple of
9 days. It doesn't mean the decision wasn't made before it was
10 filed.

11 Second, Judge, there is somewhat of a disagreement on
12 the interpretation of Mr. Green's testimony. He was
13 subpoenaed as a witness at that trial. I don't think he had
14 any choice whether to testify or not. That's all.

15 The Court: All right.

16 Mr. Petrano: And his testimony is in the record.

17 The Court: Yeah, just prepare some orders. I have to
18 read the whole record.

19 Mr. Petrano: Are you talking to one of us or both of
20 us? You said prepare an order.

21 The Court: She gets paid to prepare orders. You get --
22 you have to do them whether you get paid any additional or
23 not, so go ahead.

24 Mr. Petrano: Thank you, Your Honor.

25 Ms. Shurling: Your Honor, I would note a couple of

colloquy

1 things for the record. One is that we would ask that the
2 entire records of the clerk of court concerning the two
3 charges against Eugene Green be incorporated as part of the
4 record in this matter, these two specific charges that were
5 dismissed. I believe that the documents that were introduced
6 previously were not just entered in the data system on that
7 date but that they actually reflect the date that the action
8 was taken by the solicitor's office as being the day after
9 this testimony. The documents, of course, will speak for
10 themselves.

11 And, Your Honor, I did testify -- did subpoena Mr. David
12 Pascoe and -- and Mr. Robert Hood. It was my intent to call
13 them as witnesses. When I reread the original P.C.R.
14 proceeding transcript, it was clear that the State intended
15 to call them as witnesses and I anticipated that they would
16 do so here today. I've presented my case. I've clearly
17 presented Mr. Green's testimony and the documentation that
18 supports what he has had to say and feel that the applicant
19 has met his burden of proof.

20 The Court: All right.

21 Mr. Petrano: Your Honor, I object to adding anything
22 else to the record. This case has been open for seven years,
23 I think. Plaintiff's 1 and Plaintiff's 2---

24 The Court: Well, we aren't adding to the record. We're
25 just putting documents in that exist and are referred to.

colloquy

1 Ms. Shurling: Your Honor, in most post-conviction
2 relief cases, the Court always has before it the records of
3 the clerk of court---

4 The Court: That's right. The clerk's record is part of
5 it.

6 Mr. Petrano: The applicant, not the victim.

7 Ms. Shurling: Your Honor, I am asking, given the nature
8 of this allegation, that the entire records of the clerk of
9 court with regard to the carjacking charge against Eugene
10 Green be referenced by the Court as part of this record.

11 Mr. Petrano: What if they don't exist? Where are they?

12 The Court: If they don't exist, we can't do it.

13 Mr. Petrano: I mean, I don't understand. Are we going
14 to look for them later? I don't--- I'm not trying to be
15 difficult.

16 The Court: Me, either. If I don't get them, I don't
17 get them.

18 Ms. Shurling: Your Honor, if I can be given until the
19 end of next week to present certified copies of everything in
20 that file---

21 The Court: You can.

22 Ms. Shurling: ---I'll be happy to.

23 The Court: You can do that, but, you know, this is me
24 and not Judge Williams.

25 Ms. Shurling: Yes, sir.

colloquy

1 The Court: He gave you 60 days. You got 60 days. I'll
2 give you 'til next week. You've got 'til next week.

3 Ms. Shurling: Yes, sir.

4 The Court: All right.

5 Mr. Petrano: It's been seven years, Judge. Thank you.

6 Ms. Shurling: Well, and I do believe, Your Honor, that
7 the documents that were introduced at the last proceeding
8 will be definitive on that question---

9 The Court: All right.

10 Ms. Shurling: Thank you.

11 (Pause in proceedings.)

12 The Court: Ms. Shurling.

13 Ms. Shurling: Yes, sir, Your Honor.

14 The Court: In today's world -- just step back there.

15 Ms. Shurling: Oh, I'm sorry. I thought you were asking
16 me to approach the bench, Your Honor.

17 The Court: Obviously it has no bearing on how I'm going
18 to rule in the matter of Barry Thomas.

19 Ms. Shurling: Yes, sir, Your Honor.

20 The Court: But -- and you can cover this with him.
21 Having been around forever, when I was sworn in as a judge we
22 did not have the one-year statute of limitations. My ex-
23 partner who was then speaker of the house, Bob Sheheen---

24 Ms. Shurling: I knew him.

25 The Court: ---complained to me about having been called

1 to testify in a post-conviction hearing on some case he and I
2 had 20 years before.

3 Ms. Shurling: Yes, sir.

4 The Court: And that's all. He said that. Well, about
5 two weeks later I go to the judicial college and we talk
6 about post convictions and I say, you know, how do y'all deal
7 with all of this -- things that happened 20, 30 years ago
8 when witnesses are dead and transcripts are gone? And they
9 said, well, you know, we've got the statute of limitations.
10 My first -- I think I said -- it turned out four of the
11 states that were there in my group had them. I got those
12 judges to send me copies of the statute of limitations and
13 gave them to Sheheen and to Mike Baxley who was also from my
14 delegation. Took no part in it other than that.

15 They then, you know, said: Yea, we don't have to go
16 back 20 years. We'll pass this with exception, which they
17 did which has been a boom to the judiciary on the one hand,
18 but it won't impact the technical ruling that I'll have to
19 make on that. I just didn't think about all that. When you
20 ask people to dig in and dig in, that surfaces that I'm the
21 instigator of the one-year thing. Not really but I did
22 participate to that extent.

23 Ms. Shurling: Yes, sir. Well, I certainly didn't know
24 I had Your Honor to thank for 17-27-45(a).

25 The Court: Yeah. Well, that's right.

colloquy

1 Ms. Shurling: That's okay. I believe---

2 The Court: And if Rutherford had been in the House at
3 that time, I would have been given it to him.

4 Ms. Shurling: I believe, Your Honor, that the rule has
5 served a valuable purpose for both sides of the courtroom---

6 The Court: That's right.

7 Ms. Shurling: ---in many ways. The rule also very
8 clearly or the prior holding of the Court very clearly
9 indicated that at the time the 365 days would not begin
10 running until a ruling on a post-trial motion to reconsider
11 sentence.

12 The Court: Right. I understand all that.

13 Ms. Shurling: And obviously it's our position that our
14 motion was appropriately---

15 The Court: I'm not making any -- I haven't read any of
16 those cases on it. There are exceptions to it, of course,
17 and I'm just saying I think if it turned out I ruled against
18 you---

19 Ms. Shurling: Yes, sir, Your Honor.

20 The Court: ---you'd say, well, I guess he did rule
21 against me. He's the one that instigated the rule. Well,
22 not really, but I did have that hand in it.

23 Ms. Shurling: I know Your Honor from your many years on
24 the bench, and I know that you're not rigid about applying
25 rules anyway.

1 The Court: Right. Okay.

2 Ms. Shurling: Thank you.

3 The Court: All right.

4 Ms. Shurling: Got you.

5 (Whereupon, the proceedings were concluded.)

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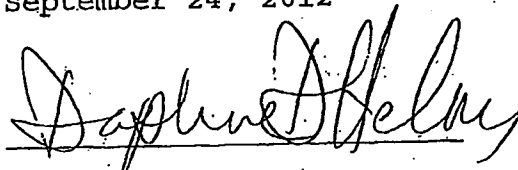
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I, the undersigned Daphne D. Helms, official court reporter for the Fifth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the circuit court for Richland County, South Carolina, on the 13th of January, 2012.

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

September 24, 2012

A handwritten signature in cursive script that reads "Daphne D. Helms". The signature is written in dark ink and is positioned above a horizontal line.

Daphne D. Helms, court reporter

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

) IN THE COURT OF COMMON PLEAS

) 2005CP4002393

) Steven Smalls, #283971,
)
) Applicant,

) v.

) ORDER OF DISMISSAL

) State of South Carolina,
)
) Respondent.

JEANETTE W. McBRIDE
C.C.P. & G.S.

2012 MAR 29 AM 10:36

RICHLAND COUNTY
FILED

PROCEDURAL HISTORY

This matter comes before the Court by way of an Application for Post-Conviction Relief filed May 18, 2005. The Respondent made its Return on January 10, 2006. An evidentiary hearing into the matter was convened on July 31, 2007 at the Richland County Courthouse. The Applicant was present at the hearing and was represented by Tara Dawn Shurling, Esquire. Robert L. Brown of the South Carolina Attorney General's Office represented the Respondent. At the PCR hearing in 2007, the Applicant and his two trial attorneys testified. Following the July, 2007 hearing, The Honorable James C. Williams, Jr. issued an Order dated May 19, 2008 continuing the case so that the Applicant could further investigate the details of the dismissal of a carjacking charge that was pending against the victim. The Solicitor's file is no longer (if it ever was) available regarding the victim's prior charge (Eugene Green). The Applicant submitted records from the Richland County Clerk of Court regarding the victim's dismissed carjacking charge. The Applicant moved, and the Respondent consented, to have a final hearing on this case

to resolve the remaining issue, i.e. the specifics regarding the dismissal of the victim's carjacking charge.

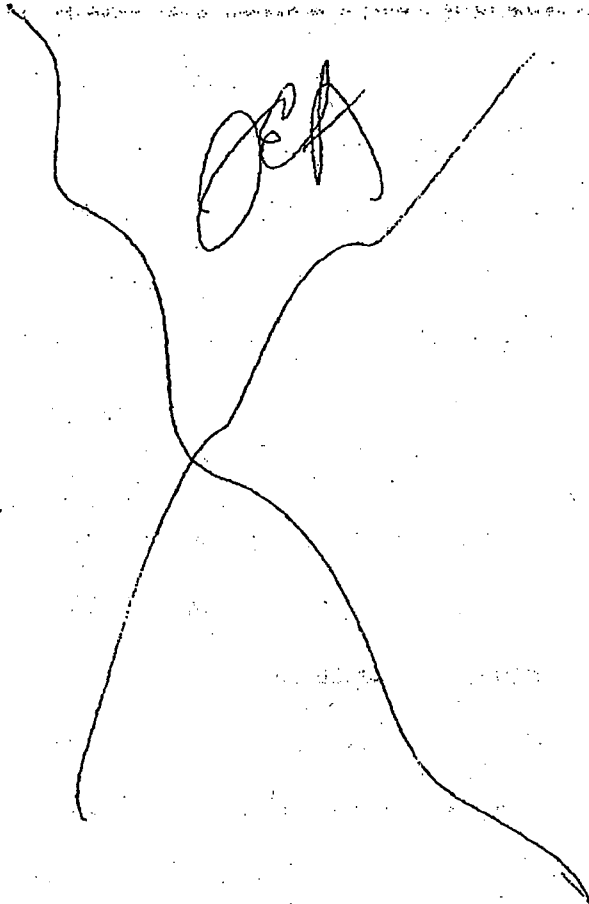
The second PCR hearing was held before this Court on January 13, 2012. The Applicant subpoenaed the victim, Mr. Eugene Green, the Solicitor from the Applicant's trial (David M. Pascoe, Jr.), and the Solicitor originally assigned to the victim's carjacking charge (Robert E. Hood, Esquire). At the PCR hearing before this Court, the Applicant only called Mr. Eugene Green to testify – Mr. Hood and Mr. Pascoe were present but were not called to the stand.

This Court (and the prior PCR court) had before it the records of the Richland County Clerk of Court, the transcript of the proceedings against the Applicant (this Court of course had the transcript from the prior PCR hearing), the files from the Applicant's direct appeal, and the Applicant's records from the South Carolina Department of Corrections.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Richland County. The Applicant was indicted at the July 2000 term of the Court of General Sessions for Richland County for armed robbery (00-GS-40-52623). He was represented by Sheila Mims, Esquire and LaNelle Durant, Esquire. On May 2, 2002, the Applicant proceeded to trial after which he was found guilty of armed robbery. He was sentenced by the Honorable Henry F. Floyd to confinement for a period of twenty-five (25) years for armed robbery.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected. The South Carolina Court of Appeals dismissed Applicant's appeal. State v. Smalls, Op. No. 2004-UP-315 (S.C. Ct. App. filed May 13, 2004). The Remittitur was issued on June 21, 2004.

In the PCR application, the Applicant alleged that he received ineffective assistance of counsel. The Applicant's claim eventually morphed into an additional issue, not ineffective assistance of counsel, that the State was deceptive in that the victim's carjacking charge was not – as it was explained at trial and to trial counsel – dismissed prior to the trial. At the evidentiary hearings, the Applicant proceeded mainly on the issue regarding the victim's carjacking charge and when it was actually dismissed.



FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. § 17-27-80 (1985).

This Court shall first address the matter of the victim and his carjacking charge. Regarding the victim, at the beginning of the trial (May 1, 2002), the State explained:

11	MS. DURANT: He has pending charge, Your
12	Honor, but I don't know if I am allowed to go into
13	that.
14	THE COURT: What's the charge?
15	MS. DURANT: Car jacking.
16	MR. PASCOE: Also it's my understanding, and
17	I talked to the prosecutor this morning and he told me
18	this is was dismissing it, that it was dismissed. So
19	it's not pending anymore.
20	THE COURT: So he doesn't have a charge?
21	MR. PASCOE: Right.

(Trial transcript, p. 33).

The victim testified at the trial, explained the armed robbery, how he helped the police capture his assailant, how he identified his assailant in a photo lineup, and he also identified the Applicant in the courtroom. (Trial transcript, p. 63 - 77). The victim's prior record was explored at trial by both the State and defense counsel. (Trial transcript, p. 78, 96, 98).

At the PCR hearing before this Court, the victim testified as a witness for the Applicant. The victim explained that prior to the hearing he had met with the Applicant's attorney. The victim claimed that he had not discussed anything with the Applicant. The victim was somewhat evasive, because this Court observed the victim and the Applicant talking in the jury box throughout the morning during and prior to this hearing.¹ The victim explained that he did not want to testify at the Applicant's trial, but that he was subpoenaed and that the prosecutor for the Applicant told him he should dress appropriately. The victim explained that it was his understanding that the victim and the investigating officer for his carjacking charge thought that the charge would be dismissed. The victim explained that the Applicant's prosecutor (Mr. Pascoe) told him (the victim) that he had no authority to dispose of the victim's carjacking charge.² At the PCR hearing, the victim agreed that it was the Applicant who pulled the shotgun on him in the dark that night. There was no credible testimony whatsoever, at any time, to suggest that victim's trial testimony was false or was improperly influenced by the carjacking charge that was dismissed prior to the trial.

The Applicant's testimony and the testimony of the trial attorneys took place on July 31, 2007 before Judge Williams. Apart from the Eugene Green victim issue before this Court, the claims put forth by PCR counsel at the prior PCR hearing included the following:

- 1 Failure to object to an opening statement by the State suggesting that an officer saw the Applicant at the scene – and/or – failure to argue during closing that the State never presented such evidence. (PCR transcript, p. 8 – 10, 26 - 27).
 - a. There is no merit to this claim, opening statements are not evidence, and the jury was told several times by the judge and the attorneys to base their verdict on the

¹ The victim is currently incarcerated and was seated in the jury box along with the other PCR applicants and SCDC guards.

² This would have been correct, because Mr. Pascoe was not the Solicitor for the charge against the victim; that charge was assigned to and dismissed by Mr. Hood who the Applicant subpoenaed but did not call to the stand.

evidence only. (Trial transcript, p. 359, 387). There is no prejudice considering the overwhelming evidence in this case, i.e. the identification of the Applicant, his fingerprint on the weapon, his flight, etc.

2 Failure to object to an amendment of the indictment regarding the victims' names. (PCR transcript, p. 11 - 12).

a. There is no deficient performance nor any prejudice concerning this claim. The parties agreed to amend the indictment to reflect the two victims; there is no lack of notice as to the crime itself. (Trial transcript, p. 29, 32).

3 Failure to object to a statement that the gun used in the crime originally came from an otherwise unsolved burglary. (PCR transcript, p. 12 - 13).

a. The witness explained that the gun's street history originated from an unsolved burglary. (Trial transcript, p. 325- 326). The Solicitor's question occurred on p. 339, L. 7:

1	Q	Investigator Mead, first with regards to the
2		shotgun, you were asked where it originally came from?
3	A	Yes, sir.
4	Q	To make it perfectly clear, State's Exhibit
5		Eight wasn't stolen from the defendant's house in 1999?
6	A	No, it was not.
7	Q	He burglarized somebody else's house?
8	A	That's correct.
9	Q	So is there any reason why his fingerprint
10		would be on this weapon --
11	A	None that I know of, sir.
12	Q	-- other than he robbed the Bojangles?
13	A	That's correct.

It is clear, considering the context of the direct and cross examination of that witness, that on redirect the attempt was to explain that the weapon came from a burglary from someone other than the defendant's house. The argument was to simply show that the weapon would only have the Applicant's fingerprint because he used it in the robbery -- that it is not as though it was his lawfully owned weapon. There is no suggestion that the testimony was an attempt to prejudice the Applicant and suggest that he should be convicted of the armed robbery because he had also supposedly committed a burglary. An isolated sectioning of the cold record does suggest an implication that "he" was referring to the defendant and that he had committed an unrelated burglary; however, the flow of the examination of that witness makes it clear that the burglary being referred to was

"unsolved." *See full testimony of investigator Mead*, Trial transcript, p. 301 – 346. Considering the other overwhelming evidence in this case, i.e. victim identification, fingerprint, flight, etc, there is no prejudice relating to this allegation. "The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." *Strickland v. Washington*, 466 U.S. 668, 697, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674 (1984).

In a post-conviction relief action, the Applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCP. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985).

Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); *Butler*, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Butler*, 286 S.C. 441, 334 S.E.2d 813 (1985). The Applicant must overcome this presumption to receive relief. *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989). When there has been a guilty plea, the applicant must prove that counsel's representation was below the standard of reasonableness and that, but for counsel's unprofessional errors, there is a reasonable probability that he would not have pled guilty and would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 58-59 (1985); *Alexander v. State*, 303 S.C. 539, 542, 402 S.E.2d 484, 485 (1991).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625, (citing Strickland). Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. As discussed above, the Applicant has failed to carry his burden in this action. Therefore, this Court finds that the application must be denied and dismissed.

This Court finds Applicant has failed to prove the first prong of the Strickland test – that counsel failed to render reasonably effective assistance under prevailing professional norms. This Court also finds Applicant has failed to prove the second prong of Strickland – that he was prejudiced by counsel's performance.

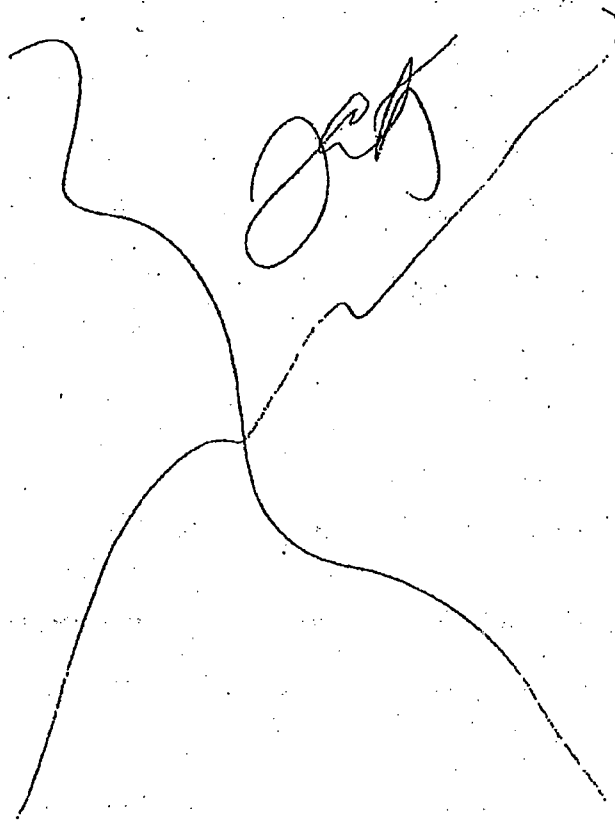
The available records from the Richland County Clerk of Court for the victim show that his carjacking charge was dismissed on May 1, 2002:

CHARGE	VIOL. DATE	DISPOSITION	DISP. DATE
2599 CARJACKING/TAKE VEHICLE, W/O INJURY	12/24/2001	Other - Dismissed Unindicted (C)	5/1/2002

The Clerk records indicate a final action item time/date stamp regarding two comments to the carjacking file at midnight on May 2, 2002:

05/02/2002	12:00 am	recorded the following Case Note: COMMENT: & WILL NOT TESTIFY IF THE CASE GOES TO TRIAL
05/02/2002	12:00 am	recorded the following Case Note: COMMENT: LEAVE TO RESTORE-VICTIM DOES NOT WISH TO PURSUE PROSECUTION

This Court notes that the two comments may have a date of May 2, 2002 – after the day the victim testified – but that the comments are merely supplemental comments and do not indicate anything contrary to the fact that the carjacking charge was actually dismissed on May 1, 2002. After all, it is highly unlikely that anyone made an entry exactly at midnight on May 2, 2002. Accordingly, there is no merit whatsoever to the Applicant's claim that the victim's carjacking charge was not dismissed prior to his testimony at trial; the victim did not dispute the legitimacy of his testimony at the Applicant's trial.

A large, stylized handwritten signature in black ink, consisting of several loops and sweeping lines, positioned in the lower middle of the page.

CONCLUSION

Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Counsel was not deficient in any manner, nor was Applicant prejudiced by counsel's representation. Therefore, this application for post conviction relief must be denied and dismissed with prejudice.

Except as discussed above, this Court finds that the Applicant failed to raise the remaining allegations set forth in his application at the hearing and has, thereby, waived them. As to any and all allegations that were or could have been raised in the application or at the hearing in this matter, but were not specifically addressed in this Order, this Court finds Applicant failed to present any probative evidence regarding such allegations. Accordingly, this Court finds that Applicant waived such allegations and failed to meet his burden of proof regarding them. Accordingly, they are dismissed with prejudice. A waiver is a voluntary and intentional abandonment or relinquishment of a known right. Janasik v. Fairway Oaks Villas Horizontal Property Regime, 307 S.C. 339, 415 S.E.2d 384 (1992). A waiver may be express or implied. "An implied waiver results from acts and conduct of the party against whom the doctrine is invoked from which an intentional relinquishment of a right is reasonably inferable." Lyles v. BMI, Inc., 292 S.C. 153, 158-59, 355 S.E.2d 282 (Ct. App. 1987). The Applicant's failure to address these issue at the hearing indicates a voluntary and intentional relinquishment of his right to do so. Therefore, any and all remaining allegations are denied and dismissed.


This Court cautions the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the

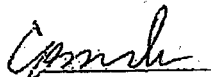
appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCR, provides that if the applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Applicant and counsel are directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely filed.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 2 day of March, 2012.


The Honorable J. Ernest Kirard, Jr.
Presiding Judge
Fifth Judicial Circuit

 South Carolina.

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

2005-CP-40-2393

STEVEN SMALLS, #283971)
) Applicant.)
)
v.)
)
THE STATE OF SOUTH CAROLINA,)
) Respondent.)
_____)

RULE 59(e) SCRPC, MOTION TO
ALTER OR AMEND

JEANETTE W. McBRIDE
C.O.P. & G.S.
2012 APR 13 PM 3:4

RICHLAND COUNTY
FILED

NOW COMES the Applicant in the above-captioned case, acting by and through undersigned counsel, respectfully moving this Court pursuant to Rule 59(e), SCRPC, to alter or amend its Order of Dismissal filed March 29, 2012. The Order of Dismissal filed in this matter was received by counsel for the Applicant on April 3, 2012.

The Application for Post-Conviction Relief in this matter was filed on May 18, 2005. The State filed its Return on January 10, 2006. An initial evidentiary hearing was convened on July 31, 2007, before Judge James C. Williams, Jr., then circuit court judge, during which the Applicant was present and represented by Tara Dawn Shurling, Esquire and the State was represented by Robert L. Brown, of the South Carolina Attorney General's Office. As a result of that hearing, the Court issued an Order continuing the case and permitting further development of the facts surrounding the dismissal of a pending carjacking charge against the victim, (Thomas) Eugene Green. When records concerning this charge could not be obtained from the Solicitor's Office, the Applicant moved, and the Respondent consented, to hold a second hearing on the unresolved issues.

The second hearing was held on January 13, 2012. The Applicant was present at this proceeding and was represented by Tara Dawn Shurling, Esquire. The State was represented by

Assistant Attorney General, Brian Petrano. At this proceeding the presented testimony from Eugene Green

The Applicant, acting by and through his undersigned counsel, respectfully asks that this Court reconsider its denial of relief in this case, or in the alternative, that the Court issue an Amended Order of Dismissal addressing the issues raised herein. In support of this request, the Applicant would ask the Court to note the following:

- This Order of Dismissal references the fact that the Office of the Solicitor has not been able to locate its file for State witness and victim, Eugene Green. Order pg. 1. The Order further notes parenthetically that here may never have been a file available on this individual. Order of Dismissal pg. 1, para. 1. The Applicant would respectfully not that it strains credibility for the State to assert that they may not have ever had a file on the criminal charge against this individual in Richland County. He was, it has been shown, charged with carjacking,; a most serious offense. The records of the Clerk of Court which have been submitted to this Court for review document that the charge existed and was dismissed contemporaneously with the individual's testimony against the Applicant. The Applicant would submit that the very fact that the Office of the Fifth Circuit Solicitor is not able to produce a file documenting the circumstance under which that charge was dismissed is suspicious at the very least.
- The Order of Dismissal entered in this case attributes significance to the fact that he Applicant was seen talking to Eugene Green in the jury box prior to the call of this case for an evidentiary hearing. Order of Dismissal Pg. 5, para. 1. Counsel for the Applicant would urge this Court to reconsider attaching any significance to that observation for two reasons: 1) the Applicant had no control over where the correctional officers handling witnesses in this case seated them while the parties awaited this hearing. To penalize the Applicant for speaking with Eugene Green when he was forced to sit next to him while he awaited his PCR hearing is unfair. 2) Counsel for the Applicant, as an officer of the court, advised the Court that she

had interviewed Eugene Green, at the prison where he is currently housed, the day before the evidentiary hearing. Counsel further proffered that she had not in any way instructed Eugene Green on how to testify nor had she directed the content of his testimony. Counsel further advised the Court that his testimony at the PCR hearing was entirely consistent with the answers Eugene Green had given to her questions during his interview and that his testimony was consistent in every aspect with all the information provided by him in that interview before he had any contact with the Applicant on the day of the PCR hearing. In his PCR testimony, Eugene Green confirmed that Counsel had not told him what to say or in any way influenced his testimony. Therefore, there was no evidence that whatever brief conversation the Applicant may have had with Eugene Green seated in the jury box the day of this hearing in any way influenced his testimony.

- This Order notes that Eugene Green testified that he investigating officer in the carjacking car had informed him that he thought the charge was going to be dismissed. **Order of Dismissal Pg. 5, para.1.** The witness however, went on to explain however, that he did not rely on that assertion by the officer because he knew that it was the solicitor, not the investigator, who had the authority to dismiss this charge. He further noted that although the investigator was telling him that he had told the Solicitor's Office that the charge would have to be dismissed, he had still been asked by the Solicitor's Office to submit to a polygraph test on that charge and was told he had failed it.
- This Order of Dismissal attaching significance to the fact that Eugene Green testified that the solicitor assigned to the Applicant's case had told him that he did not have the authority to dismiss his carjacking charge because it wasn't his case. **Order of Dismissal Pg. 5, para. 1.** This point overlooks two other significant factors: 1) Eugene Green expressly testified, in addition to the testimony referenced in this order, that when he told the solicitor in the Applicant's case that

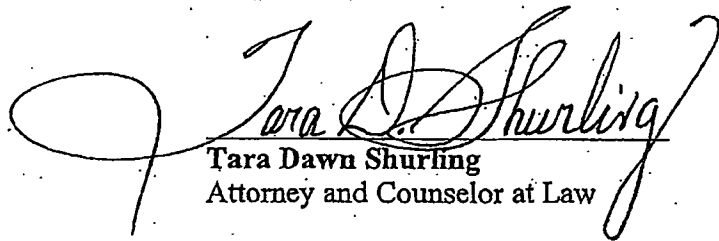
he did not want to testify at the Applicant's trial he was told by that same solicitor that if he didn't testify, his charge "*wasn't going anywhere.*"

- The Order of Dismissal filed in this case, states that ,"*At the PCR hearing, the victim agreed that it was the Applicant who pulled the shotgun on him in the dark that night.*" Order of Dismissal Pg. 5, para. 1. Counsel for the Applicant does not have the benefit of a transcript of that proceeding at the time this motion is being drafted, however, it is Counsel's recollection that when asked to confirm his trial testimony on this critical point, Eugene Green paused for several seconds and then stated only, "*it was dark*". The Applicant would therefore very respectfully submit that the Order of Dismissal incorrectly finds that Eugene Green confirmed the truthfulness of his trial testimony in his PCR testimony.
- In footnote 2, Order of Dismissal Pg. 5, it is noted that Mr. Hood, the prosecutor in the carjacking charge against Eugene Green, was present but had not been called as a witness at the second PCR hearing despite the fact that he was present and had been subpoenaed by Counsel for the Applicant. Counsel for the Applicant would note that, in light of the testimony of Eugene Green, the focus of the Applicant's case had shifted from when the carjacking charge was actually dismissed to when, or if, Eugene Green was ever told the charge had been dismissed. As noted above, Eugene Green testified that he was told that charge wasn't going anywhere if he didn't testify against the Applicant. He further testified that he never was notified that the charge had been dismissed and did not know for certain that it ever had been until he was so advised by counsel for the Applicant. The Applicant would respectfully note that while the burden of proof is on the Applicant in a PCR proceeding, it is not his job to present the Respondent's case. If the State had evidence that Eugene Green was put on notice *before he testified against the Applicant* that this carjacking charge had already been dismissed, they were free to present it in rebuttal to the Applicant's offer of proof. They chose not to do so. It is therefore, uncontested that Eugene

Green was not told his carjacking charge had been dismissed before he testified in the Applicant's trial.

For all the above reasons, the Applicant now prays that this Court might amend its Order pursuant to Rule 59(e), SCRCP, grant relief and remand the Applicant's case to the Richland County Court of General Sessions for a new trial. In the alternative, the Applicant would ask for this Court to issue an Amended Order of Dismissal altering or amending the previous order in light of the factors addressed herein. The Applicant would assert that his request for an Amended Order is necessary in order to fully preserve all of his arguments for appellate review.

Respectfully submitted,



Tara Dawn Shurling
Attorney and Counselor at Law

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

ATTORNEY FOR THE APPLICANT

This 12th day of April, 2012.

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

STEVEN SMALLS, #283971,)
)
Applicant,)

CASE NO.: 2005-CP-40-2393.

v.)

CERTIFICATE OF SERVICE)

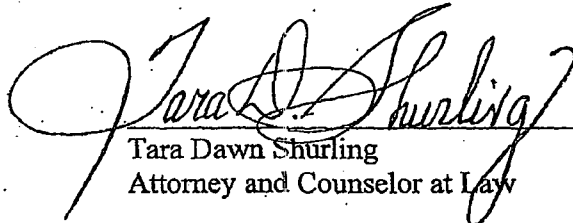
STATE OF SOUTH CAROLINA,)
)
Respondent.)

JEANETTE W. McBRIDE
C.C.P. & G.S.
2012 APR 13 PM 3:44
RICHLAND COUNTY
FILED

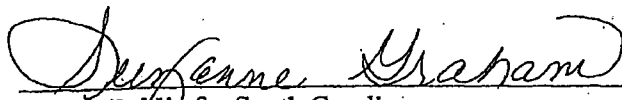
The undersigned hereby certifies that a true copy of the Rule 59(e) Motion to Alter or Amend in the above matter has been served on opposing counsel this the 13th day of April, 2012, by mailing one (1) copy in a stamped envelope properly addressed to:

Robert D. Corney
Assistant Attorney General
Office of the Attorney General
P. O. Box 11549
Columbia, SC 29211

The original having been hand delivered to the Richland County Clerk of Court for filing.


Tara Dawn Shurling
Attorney and Counselor at Law

SWORN TO BEFORE ME this 13th day of
April, 2012.


Notary Public for South Carolina (L.S.)

My Commission Expires: 3/12/2013

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND)	FOR THE FIFTH JUDICIAL CIRCUIT
Steven Smalls, #283971,)	
)	2005-CP-40-02393
Applicant,)	
v.)	RETURN TO RULE 59(e) MOTION
State of South Carolina,)	TO ALTER/AMEND
Respondent.)	

This matter comes before the Court by way of Applicant's Motion pursuant to Rule 59, SCRCPP, dated April 12, 2012, and received by Respondent April 16, 2012, in which he asks the Court to alter or amend its Order dismissing his Application for post-conviction relief (PCR).

The Respondent would submit the following:

I.

The Order of Dismissal of by this Court dated March 2, 2012, and entered by the clerk March 29, 2012, contains all of the required findings of facts and conclusions of law as required by S.C. Code Ann. § 17-27-80 (1976), and Rule 52(a) SCRCPP. See also, McCray v. State, 305 S.C. 329, 408 S.E.2d 241 (1991).

II.

The State, therefore, respectfully requests that the relief requested by the Applicant be denied and that his Motion be dismissed.

WHEREFORE, having made its Return to the motion, the State requests that the relief requested in the Motion be denied and that said Motion be dismissed.

(Signatures on Next Page)

Respectfully submitted,

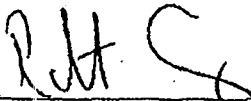
ALAN WILSON
Attorney General

JOHN W. MCINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Senior Assistant Deputy Attorney General

ROBERT D. CORNEY
Assistant Attorney General

BY:



ATTORNEYS FOR RESPONDENT
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
(803) 734-3737

April 19, 2012

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

STEVE SMALLS, 283971)
Applicant,)

v.)

THE STATE OF SOUTH CAROLINA)
Respondent.)

IN THE COURT OF COMMON PLEAS

FIFTH JUDICIAL CIRCUIT


Case No. 2005-CP-40-2393

ORDER DENYING
MOTION TO ALTER OR AMEND

2012 MAY 14 AM 10:22
JEANNETTE W. MCBRIDE
C.C.P. & C.V.
RICHLAND COUNTY
FILED

Subsequent to my issuance of an order on 3/29/12 dismissing applicant's Post Conviction Release Proceeding, Applicant filed a Rule 59(e) SCRCP Motion dated 4/12/12 received by me around 4/16/12.

The Applicant's 59(e) motion raised six issues that he felt should be addressed and I have carefully considered each item and note that some of the matters mentioned could have been amplified in my order of 3/29, which order was eleven pages in length and adequately addressed applicant's issues raised; however, I also lack a transcript of the PCR hearing and if a transcript revealed that the victim only testified that "it was dark" that portion of my order of 3/29/12 should be amended, but such an amendment would not alter the result; accordingly, the 59(e) motion is denied and it is so ordered.


J. Ernest Kinard, Jr.
Judge, Fifth Judicial Circuit

May 8, 2012

Camden, South Carolina.

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2005CP4002393

Steve #283971 Smalls

State Of South Carolina

PLAINTIFF(S)

DEPENDANT(S)

Submitted by: _____	Attorney for: <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant or <input type="checkbox"/> Self-Represented Plaintiff
---------------------	--

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 (Settled); Rule 41(a), SCRPC (Vol. No. 10); Rule 41(b), SCRPC (Settled); Other _____
- ACTION STRICKEN (CHECK REASON): Rule 40(g), 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 17 May 2012 to attorneys of record or to parties (when appearing pro se) as follows:

Joseph Preston Strom Jr.

Tara D Shurling

Robert L Brown

Brian T Petrano

Robert Daniel Corney

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court Jeanette W. McBride