

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas
W. Jeffrey Young, Presiding Judge

Appellate Case No. 2016-001760

RECEIVED

SEP 12 2016

S.C. SUPREME COURT

STEPHEN J. GREEN, #259765,

Petitioner,

v.

THE STATE OF SOUTH CAROLINA,

Respondent.

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

NOW COMES, the Petitioner in the above captioned appeal, seeking to perfect an appeal from the findings of the lower court that his Application for Post-Conviction Relief, docketed at **2011-CP-08-1841**, was procedurally barred as both untimely and successive.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Berkeley County Clerk of Court. He was indicted during the December 1998 and March 1999 terms of the Berkeley County Grand Jury for assault and battery of a high and aggravated nature (1998-GS-08-1854), armed robbery (1998-GS-08-1855), burglary in the first degree (1998-GS-08-1861), kidnapping (1998-GS-08-1857), and criminal sexual conduct in the first degree (1998-GS-08-0391). Applicant proceeded to trial, and a jury found him guilty as

indicted. J. Mitchell Lanier, Esquire, represented Applicant. On July 14, 1999, the Honorable Daniel F. Pieper sentenced Applicant to life imprisonment. Applicant pursued a direct appeal from his convictions and sentences. Following the submission of an *Anders*¹ brief by appellate counsel, Daniel T. Stacey, then Chief Attorney for the South Carolina Office of Appellate Defense, the South Carolina Court of Appeals dismissed Applicant's direct appeal. *State v. Green*, Op. No. 2000-UP-740 (S.C. Ct. App. filed Dec. 5, 2000). The Remittitur was returned to the Court of General Session on February 28, 2001.

Applicant was also indicted during the December 1998 term of the Berkeley County Grand Jury for burglary in the first degree (1998-GS-08-1859) and assault and battery with intent to kill (1998-GS-08-1860). Applicant proceeded to trial and a jury found him guilty of burglary in the first degree and the lesser-included offense of assault and battery of a high and aggravated nature. On November 16, 1999, the Honorable R. Markley Dennis, Jr. sentenced him to life imprisonment.

This matter came before the lower court by way of Petitioner's current Application for Post-Conviction Relief filed on July 1, 2011, and an Amended Application for Post-Conviction Relief filed on November 13, 2012. The State (Respondent) did not file its Return and Motion to Dismiss in this matter until December 22, 2014. A Conditional Order of Dismissal was subsequently filed on this application on January 6, 2015. Petitioner filed a Response to that Conditional Order on February 3, 2015.

A Final Order of Dismissal in this matter was filed February 6, 2015, and received by Counsel for the Petitioner on February 10, 2015. Petitioner served and mailed his Motion to Alter or Amend said Order pursuant to Rule 59(e), SCRCPP, for filing on February 19, 2015. That motion was filed by the Clerk of Court on February 24, 2015. Said motion was granted by Order of the

¹ *Anders v. California*, 386 U.S. 738 (1967).

lower court filed on March 10, 2015, in which Respondent's Motion for Dismissal was ordered to be scheduled for a hearing. A hearing was convened on Respondent's Motion to Dismiss on April 23, 2015 before the Honorable W. Jeffrey Young, presiding circuit court judge. Respondent was represented at this hearing by Elizabeth H. Neyle, then Assistant Attorney General. Petitioner was represented by undersigned counsel. An Order of Dismissal was issued by Judge Young and filed with the Clerk of Court's Office on December 29, 2015, however undersigned counsel did not receive a clocked copy of said Order until February 24, 2016. Petitioner served and mailed a Motion to Alter or Amend, pursuant to Rule 59(e), SCRCPC, on March 7, 2016. The Rule 59(e) Motion was filed on March 10, 2016. Respondent filed a Return to Petitioner's Motion to Alter or Amend pursuant to Rule 59(e) on April 5, 2016. An Order denying Petitioner's Motion to Alter or Amend, pursuant to Rule 59(e), was entered by the Honorable Jeffrey W. Young and was filed with the Clerk of Court's Office on July 22, 2016. That Order was received by Petitioner's Counsel on July 28, 2016. A Notice of Appeal was served on Respondent and mailed to this Honorable Court on August 25, 2016. The Notice of Appeal was filed on August 29, 2016.²

EXPLANATION OF BASIS FOR APPEAL

Petitioner filed his current Application on July 1, 2011, and Amended Application on November 13, 2012, alleging the following grounds for relief:

1. The Petitioner seeks resentencing on all counts on the ground that the sentences he received on these judgments may have been influenced by the fact that the Petitioner had additional most serious charges pending for trial on which it was widely accepted at the time he

² In preparing this pleading, undersigned counsel discovered that the date Judge Dennis issued an earlier Order of Dismissal was referenced in the Notice of Appeal as was the date of a subsequent Order granting Petitioner's Rule 59(e) Motion on the February 6, 2015 Order of Dismissal. The dates of the Final Order of Dismissal, and the Order denying a 59(e) Motion on that Order, are properly reflected herein. Petitioner apologizes to the Court for this error. The procedural history of this case is extremely complex and resulted in this inadvertent reference to the earlier Order of Dismissal.

would face a mandatory life sentence and further, that the sentencing judge may not have given the Petitioner the sentences he imposed had they not been run concurrent with a life sentence.

2. The Petitioner should be re-sentenced on his judgments and sentences entered on July 14, 1999, where a recent decision by the United States Supreme Court found it unconstitutional to sentence a minor to life without the possibility of parole.
3. The Petitioner filed a Post-Conviction Relief [Application] on the judgments address herein for which sentence was imposed on July 14, 1999. That Application was denied by Order dated July 10, 2002, however the Petitioner's right to appeal from said order was not preserved by his PCR counsel.

Pursuant to the March 13, 2015 Order of Judge Dennis, a hearing was convened an evidentiary hearing on Petitioner's current application on April 23, 2015, at the Charleston County Courthouse. Petitioner was present at this proceeding and was represented by undersigned counsel. Respondent was represented by Elizabeth H. Neyle, then of the South Carolina Attorney General's Office. In addition to the arguments presented at that proceeding, the lower court had before it a copy of the trial transcript, the Berkeley County Clerk of Court's records regarding the subject convictions, and the pleadings in this case. The lower court also had before it relevant portions of the transcript of Petitioner's November, 1999 trial before the Honorable R. Markley Dennis, Jr. and the arrest warrants charging Petitioner with the First Degree Burglary charge and Assault and Battery with Intent to Kill count prosecuted at that trial

ALLEGATION

I

As argued by Petitioner, the first degree burglary charge prosecuted at his July, 1999 trial, as well as the other charges addressed at that trial, occurred on March 9, 1998. *See*, Warrant No.F-774447. The First Degree Burglary charge for which Petitioner subsequently received life without

parole, at his November 1999 trial, pursuant to S. C. Code Ann. § 17-25-45 also took place on March 9, 1998. *See*, Warrant No.F-774448.³ Although Petitioner could have received a life sentence for either count of First Degree Burglary under South Carolina law, it is apparent from the transcript of the second trial that the Life without Parole⁴ sentence imposed in the second trial was imposed as the mandatory penalty for a second most serious offense pursuant to §17-25-45.

As noted in the Procedural History above, Petitioner's first Post-Conviction Relief Application on the judgments addressed in this action was filed on December 3, 2001, and was dismissed on July 10, 2002. *State v. Gordon*, 356 S.C. 143, 588 S.E.2d 105 (S. Ct., 2003) was decided on October 20, 2003, and became final on November 20, 2003, following a Petition for Rehearing. It was the *Gordon* decision which overruled precedent and established that § 17-25-45 (a/k/a the Strike Law) had to be construed together with § 17-25-50. It is Petitioner's position that that post-*Gordon* he *could not* have properly been sentenced to life without parole on the second burglary conviction where all Petitioner's crimes were committed within the same twenty-four hour period.

In his current PCR action, Petitioner argued that, particularly in light of his age and lack of significant prior record, the trial judge in this first trial would not have been as likely to impose a life without parole sentence for First Degree Burglary had it not been for what at the time would have been perceived as the inevitability of him receiving a LWOP sentence in the trial which was to follow. He asserted that it was highly likely that the trial judge would have been aware that Petitioner had another set of charges awaiting trial which also involved most-serious offenses.⁵ This is particularly true where both cases involved Berkeley County charges, the cases were both

³ The Assault and Battery with Intent to Kill charge prosecuted at that same trial arose from the same incident on March 9, 1998. *See*, Warrant No. F-774452. Petitioner was convicted of the lesser included offense of Assault and Battery of a High and Aggravated Nature on that charge.

⁴ Hereafter, LWOP.

⁵ First Degree Burglary (1998-GS-08-1859) and Assault and Battery with Intent to Kill (1998-GS-08-1860).

prosecuted by the same Assistant Solicitor, Brent Alan Gray, and Petitioner was represented by the same Defense Counsel, Mitchell Lanier at both trials. The remarks made by the sentencing judge do not conclusively establish that he would not have sentenced Petitioner to a life sentence for First Degree Burglary had it not been for the fact that Petitioner had other most serious charges pending. Absent some affirmative statement by the Court revealing whether it would have exercised its discretion to impose a life without parole sentence on the First degree Burglary charge involved in the first trial, regardless of whether or not Petitioner had been facing an LWOP sentence on other most serious charges, it is impossible to determine with certainty what impact that knowledge had on Petitioner's receipt of a life sentence in this case. The remarks of the presiding judge at the time of sentencing do make it very clear that he had strong feelings about sentencing someone so young to a term of life without parole. *See, Trial I, Tr. p. 192, l. 4 – p. 193, 10.*

Petitioner was extremely young, just months beyond his eighteenth birthday, when these crimes occurred and he had no prior criminal record. If tried today, under *Gordon, supra*, the presiding judge at the second trial could not have given Petitioner a LWOP sentence based upon his status as a recidivist offender given the fact that all these crimes occurred on the same date; March 9, 1998. Inasmuch as there is no clear indication that Judge Pieper would have sentenced Petitioner to a life sentence for First Degree Burglary at his first trial, absent consideration of the likelihood that Petitioner was going to receive a mandatory LWOP sentence on another pending most-serious charge, Petitioner argues that the lower court should have found him to be entitled to re-sentencing pursuant to S.C. Code Ann. §17-27-45(B).

Re-sentencing is warranted in this case based upon application of a new rule of law not in place at the time of his original sentencing. There is authority in South Carolina for the position that a judge in a PCR proceeding has the authority, on appropriate facts, to remand for a new sentencing

hearing only. *See, Davie v. State*, 381 S.C. 601, 675 S.E.2d 416 (2009). Where the Petitioner in *Davie* had not expressed a desire to proceed to trial, our Supreme Court found that a remand for a new trial was not the appropriate remedy. Here, the sole question before the lower court was whether Petitioner should be entitled to re-sentencing in light of the fact that a rule of law in place at the time of Petitioner's first trial, which has subsequently been overturned by our Supreme Court, likely played a significant role in his receipt of a life sentence for First Degree Burglary.⁶

Respondent argues that re-sentencing should not be granted where Petitioner could, and in their view should, have raised his claim under *Gordon* in his second PCR action filed on October 20, 2004. Petitioner argues, however, that the 2004 application, docketed at 2004-CP-08-2262, referenced *all* Petitioner's judgments and sentences from *both* trials and, therefore, should be considered invalid as it pertains to Petitioner's judgments and sentences from his first trial. A review of the Application for PCR docketed at 2004-CP-08-2262 reveals that it does reference the charges and indictment numbers from *both* of Petitioner's jury trials. That application raised claims regarding subject matter jurisdiction. It was denied and dismissed as successive on November 29, 2005. Petitioner clearly could not be expected to have raised this current claim rooted in *Gordon* in his original Post-Conviction Relief Application action which predated the decision in *Gordon*. This is particularly true where the rule announced in *Gordon* constituted a reversal of a position previously taken by this Honorable Court on the same issue. Petitioner submits that his second Post-Conviction Relief Application was invalid inasmuch as it addressed judgments and sentences arising from two separate judicial proceedings held on separate dates before different judges.

The Uniform Post-Conviction Relief Procedure Act, S.C. Code Ann. §17-27-10, et seq, clearly does not envision one PCR action addressing multiple judicial proceedings held on different

⁶ The indictments and warrants from the other charges heard at the July, 1999 trial, all demonstrate that the offenses were part of the same incident which lead to the First Degree Burglary charge.

dates before different judges, where different charges involving different victims were prosecuted. Petitioner's second PCR action was dismissed as successive and time barred. While it is inexplicable why Respondent did not object to the scope of that application at the time it was filed and heard, it is clear that an application for PCR involving multiple judgments and sentences arising from two separate incidents for which an Petitioner was prosecuted before two different judges at two separate trials, can not be heard in the context of a single collateral review. For that reason, the lower court should have found that the ruling on 2004-CP-08-2262 was invalid.

Petitioner argues that even if the 2004 PCR action was properly entertained and the ruling on it valid, on appeal from that ruling, Petitioner stood no chance for the reviewing court to consider the *Gordon* issue *sua sponte*. The PCR appeal on the 2004 filing was submitted pursuant *Johnson v. State*, 294 S.C. 310, 364 S.E.2d 201 (1998). The arrest warrants on the charges from both the November and July trials were not put before the Court in the Appendix from that appeal. The records of the Supreme Court, Appendix to PCR Appeal on 2004-CP-08-2262, reveal that while the records of the Clerk of Court were listed as being contained in the Appendix, those records *did not* include the arrest warrants which expressly stated that these offenses all occurred on March 9, 1998. The *indictments*, which were included in the Appendix to the 2004 PCR appeal, each indicate that these offenses each occurred “*on or about*” March 9, 1998. App. pp. 101 – 111. As noted above, *the arrest warrants* in the Clerk of Court records on each of the charges from the two trials, clearly state that both of these burglaries occurred on March 9, 2015, during the nighttime. *See*, Warrant No. F-774447; Indictment No.98-GS-08-1861 and Warrant No. F-774448; Indictment No. 98-GS-08-1859.⁷ Petitioner asserts that had all the Clerk of Court records, including the arrest warrants for

⁷ The Supreme Court's decision in *Bryant v. State*, 384 S.C. 525, 683 S.E. 2d 280 (2009), subsequently tackled the thorny question of what exactly is factually required for multiple offenses to be treated as one for purposes of sentencing pursuant to §17-25-45 and §17-25-50. Petitioner is unaware of any case finding that multiple offenses occurring within the same twenty-four (24) hour time period would not qualify for treatment as one strike pursuant

each of the indictments named in that PCR action, been included in the Appendix to the PCR appeal on 2004-CP-08-2262, this issue might have been addressed by the Supreme Court under the umbrella of Petitioner's challenge to the jurisdiction of the circuit court raised in his 2004 PCR filing.

In this case Petitioner could not have raised his *Gordon* claim in his original PCR action. The second PCR was procedurally flawed, but neither Petitioner's PCR lawyer nor the Respondent's Counsel addressed that issue in the circuit court or on appeal. His PCR lawyer in the 2004 filing attempted to amend Petitioner's subject matter jurisdiction claim to a claim of ineffective assistance of counsel, however, the Application was dismissed as successive and untimely. Counsel in that action could have argued the *Gordon* issue currently asserted by Petitioner. It wasn't until Petitioner's family hired his present PCR Counsel in the wake of the U.S. Supreme Court's ruling in *Graham v. Florida*⁸, that the procedural flaws in the 2004 filing were made known to Petitioner and the import of the *Gordon* decision was explained to him.

While Petitioner is aware of the general rule that "ignorance of the law is no excuse", Petitioner respectfully asserts that application of that principal in this case is inappropriate.⁹ Even the justices of this Honorable Court have grappled with the complex issues dealt with in the *Gordon* decision for years. *Gordon* reversed the position taken by this Court just months earlier in *State v. Benjamin*, 353 S.C. 441, 579 S.E.2d 289 (2003)¹⁰. Petitioner would therefore argue that it would not be equitable to foreclose review of this issue because neither Petitioner, nor his original PCR Counsel, recognized the application of the ruling in *Gordon* to the facts in his case.

to §17-25-50. To the extent that *Bryant* might be construed to qualify Petitioner's two sets of charges to be treated as multi-strikes, that ruling would not apply to Petitioner where all these offenses predate *Bryant*.

⁸ 560 U.S. 48, 130 S.Ct. 2011 (2010) (July 16, 2010).

⁹ *State v. Binnarr*, 400 S.C. 156, 733 S.E.2d 890 (2012), *but see*, *State v. Latimore*, 390 S.C. 88, 700 S.E. 2d 456 (2010).

¹⁰ *State v. Gordon* was decided November 20, 2003 after the decision in *State v. Benjamin* was handed down on April 7, 2003.

For all the reasons set forth above, Petitioner most respectfully asserts that this Application should not have been dismissed because this claim was not raised in the 2004 PCR filing. Remaining is the more difficult question of whether Petitioner should be denied relief because his current application was filed more than 365 days after the *Gordon* decision was entered. Petitioner's 2004 filing was dismissed as successive and untimely. There would be no logical reason for Petitioner to believe a *third* application would be reviewed on its merits following dismissal on his *second* application on those grounds. Neither is it reasonable to charge Petitioner with the responsibility to review § 17-27-10, et seq., and come to the conclusion that his 2004 filing was procedurally flawed. The record reveals that Petitioner's family hired his current lawyer after the *Graham* decision was finally decided on July 6, 2010. His current application was filed within 365 days of that ruling. PCR Counsel has advised the Court that the *Gordon* issue presented herein was discovered by her while preparing that application.

Petitioner respectfully argues that the lower court should have found that he was entitled to a ruling on the merits of his current PCR Application and further that he is entitled to a re-sentencing on his judgments and sentences from his July, 1999 trial pursuant to S.C. Code Ann. § 17-27-90. Petitioner has not previously had sufficient opportunity to be heard on this crucial issue. While §17-27-90 prohibits successive PCR Applications, its language clearly supports review of such an application where, "the court finds a ground for relief asserted which for sufficient reason was not asserted, or which was inadequately raised" in a previous application.

Inasmuch as it is impossible to know the degree to which the imposition of a LWOP term on the First Degree Burglary judgment impacted the sentencing on the remaining counts, the lower court should have found it necessary and appropriate to grant resentencing on all the judgments entered at the July, 1999 trial. The records of the Clerk of Court reflect that each of the

other sentences imposed by Judge Peiper at the July, 1999 trial, were *expressly* ordered to run *concurrent* to the sentence imposed for First Degree Burglary on Indictment No. 98-GS-08-1861. Petitioner received the maximum term allowed on each count. It is impossible to know if the sentencing judge would have given Petitioner maximum sentences had those sentences not been consumed by the LWOP sentence imposed for First Degree Burglary, The 2004 PCR Application filed by Petitioner addressing his charges from both of his trials, was invalid as it addressed his charges from two separate trials, held before two different judges, and it attacked judgments and sentences on two sets of charges involving separate incidents with different victims. Where this issue could not have been raised in the *first* PCR action and the *second* PCR was invalid, the issue was appropriately before the lower court in Petitioner's current application. Assuming, *arguendo*, that the 2004 PCR action was valid, Petitioner would still be entitled to relief where the record before the appellate court in Petitioner's PCR appeal from the second PCR filed did not contain the legal documents necessary to insure that the Court reviewed the *Gordon* issue in the context of Petitioner's *Johnson* appeal.

ALLEGATION

III

This issue would ordinarily be controlled by the Supreme Court of South Carolina's decision in *Bray v. State*, 366 S.C. 137, 141, 620 S.E.2d 743, 745 (2005) (stating that "although petitioner did not raise an allegation that he was denied the right to review his first PCR application in his second PCR action, he could have raised this allegation"). However, inasmuch as Petitioner's 2004 PCR application was not valid, *see Allegation I above*, the lower court erred in failing to recognize that Petitioner has advanced a valid claim with regard to his prayer for a belated PCR

appeal from his original PCR action, docketed at 2001-CP-08-2537, pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991).

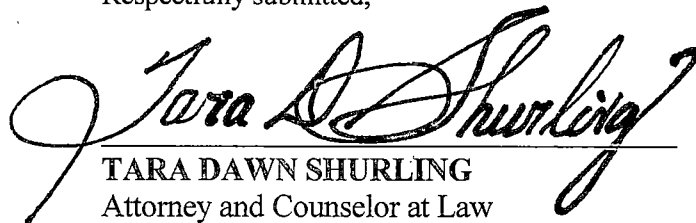
As noted in the procedural history above, the evidentiary hearing held in connection with Petitioner's first PCR action was not held until June 3, 2002. Petitioner has asserted that his PCR Counsel in his original PCR action was ineffective in that Counsel neglected to preserve his right to appeal from the denial of that application. The record before the lower court contained no evidence from which the Court could conclude that Petitioner knowingly and voluntarily waived his right to an appeal from the decision in his first PCR action. PCR Counsel has submitted a transcript of that proceeding as Attachment A, to her memorandum filed following the evidentiary held in this matter. That transcript includes a Certificate of Reporter which verifies that it is a true, accurate and complete transcript of the Post-Conviction Relief hearing held on June 3, 2002, before the Honorable R. Markley Dennis, Jr. and indicates that the record was certified on March 20, 2009.

Petitioner's direct appeal was perfected pursuant to *Anders v. California*, 386 U.S. 738 (1967) and therefore, the entire trial transcript was reproduced in the Record on Appeal. Thus, both transcripts necessary for an appeal from the denial of Petitioner's original PCR are available. In light of this fact, Respondent would not be prejudiced by the grant of a belated PCR appeal. Therefore, Petitioner respectfully argues that the lower court erred in failing to rule that he was entitled to a belated PCR appeal from the Order of Dismissal issued on the PCR action docketed at 2001-CP-08-2537 pursuant to *Austin, supra*.

CONCLUSION

For these reasons, Petitioner now most respectfully submits that his case, although procedurally complex, presents viable arguments concerning why he should have been permitted to pursue his most recent PCR application on the judgments and sentences entered at the conclusion of his jury trial held on July 14, 1999. He respectfully asks that he be permitted to perfect his appeal from the orders of the lower court dismissing this PCR action.

Respectfully submitted,



TARA DAWN SHURLING
Attorney and Counselor at Law
S.C. Bar No. 5099

3614 Landmark Drive, Suite A
Columbia, S.C. 29204
803-738-8622
803-738-1600 Fax
E-mail: tdslaw@shurlinglaw.com

ATTORNEY FOR PETITIONER

This 8th day of September, 2016.

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas
W. Jeffery Young, Presiding Judge

2016-001760

STEPHEN J. GREEN, #259765,

Petitioner,

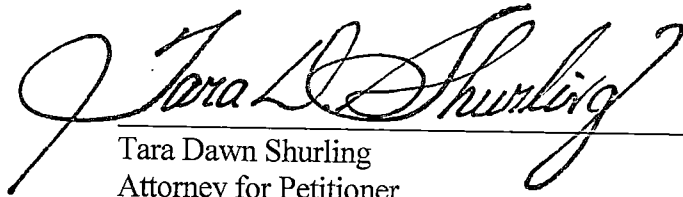
v.

THE STATE OF SOUTH CAROLINA,

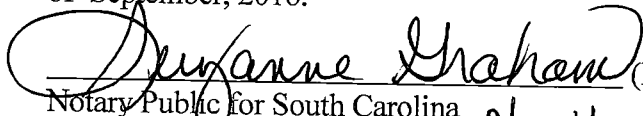
Respondent.

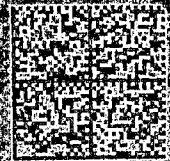
CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of the Petitioner's Explanation of Justification of Appeal Pursuant to Rule 243 (c) SCACR in the above-entitled cause has been served upon opposing counsel, J. Rutledge Johnson, Assistant Attorney General, by mailing in an envelope properly addressed with postage prepaid on this 8th day of September, 2016.


Tara Dawn Shurling
Attorney for Petitioner

SWORN TO BEFORE me this 8th day
of September, 2016.

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



UNITED STATES
02-1P
00006
MAILED

Law Office of
TARA DAWN SHURLING, PA

3614 LANDMARK DRIVE, SUITE A
COLUMBIA, SOUTH CAROLINA 29204



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