IN THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM LEXINGTON COUNTY

COURT OF COMMON PLEAS

WILLIAM P. KEESLEY, CIRCUIT COURT JUDGE

2013-CP-32-2101

Arthur R. Ladia,.....Petitioner.

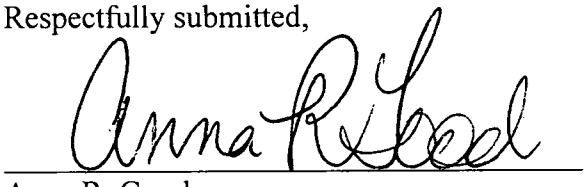
vs

The State of South Carolina,.....Respondent.

NOTICE OF APPEAL

Arthur R. Ladia appeals the Honorable William P. Keesley's June 6, 2014, order denying post-conviction relief to the Petitioner. Undersigned counsel received notice of entry of the order on June 26, 2014. A copy of the order on appeal is attached to this notice.

Respectfully submitted,



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June 27, 2014.

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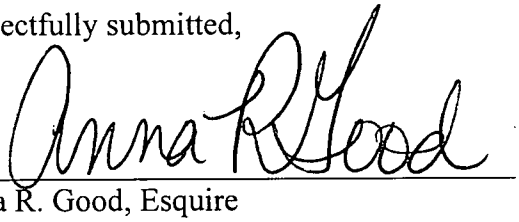
PROOF OF SERVICE

I, Anna Good, certify that I have today served the within Notice of Appeal upon the Respondent by depositing a copy of it in the United States Mail, postage prepaid, addressed to the attorney of record, Walt Whitmire, P.O. Box 11549, Columbia, South Carolina 29211-1549. I further certify that all parties required by Rule to be served have been served this 27th day of June 2014.

Respectfully submitted,



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BETH A. CARRIGG
CLERK OF COURT
LEXINGTON, SC

STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF LEXINGTON	ELEVENTH JUDICIAL CIRCUIT
Arthur R. Ladia, S.C.D.C. No. 351416, Applicant, v. State of South Carolina, Respondent.	C.A. No. 2013-CP-32-2101 **ORDER OF DISMISSAL GRANTING A REVIEW OF DIRECT APPEAL ISSUES PURSUANT TO WHITE V. STATE**[1]

This matter comes before the Court pursuant to an application for post-conviction relief (PCR) filed June 18, 2013. Respondent made its Return. An evidentiary hearing into the matter was convened on April 14, 2014 at the Lexington County Judicial Center. Applicant was present and was represented by Anna R. Good, Esquire. Respondent was represented by Assistant Attorney General Walt Whitmire.

Walt #1

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Lexington County. Applicant was indicted at the February 2012 term of the Court of General Sessions for Lexington County for armed robbery (2012-GS-32-0284), burglary in the first-degree (2012-GS-32-0285), and criminal conspiracy (2012-GS-32-0286). Applicant was represented by John W. Locklier, III, Esquire (counsel). On June 21, 2012, Applicant pleaded guilty to the lesser-included offense of attempted armed robbery, the lesser-included offense of burglary in the second-degree, and to criminal conspiracy as indicted. The Honorable D. Craig Brown sentenced Applicant to a term of fifteen (15) years imprisonment for attempted armed robbery, a term of ten (10) years

[1] White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974).

imprisonment for burglary in the second degree, and a term of five (5) years imprisonment for criminal conspiracy. The sentences were to be served concurrently. Applicant did not appeal his sentences or convictions.

At the PCR hearing, Applicant alleged that he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel:
   a. failing to properly advise Applicant on his potential sentence;
   b. failing to file a post-trial motion for reconsideration of sentence;
   c. failing to file a notice of appeal;
   d. failing to review and discuss discovery materials with Applicant;
   e. failing to negotiate a more favorable plea agreement;
   f. failing to prepare Applicant's case for trial;
   g. failing to pursue a preliminary hearing;
   h. failing to object to the imposition of the sentence.
2. Involuntary Guilty Plea:
   a. Applicant claimed he had no other meaningful choice but to accept to enter the plea.

WPC #2

APPLICABLE LAW

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel 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, (1984); Butler, 286 S.C. at 441, 334 S.E.2d at 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel

rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 668, 104 S.Ct. at 2064. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney' s performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland, *supra*. 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.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

WBL #3

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court reviewed the Clerk of Court records regarding the subject convictions, the application for post-conviction relief, the transcripts and documents from the prior proceedings, and legal arguments of counsel. Pursuant to S.C. Code Ann. §17-27-80 (2003), this Court makes the following findings of fact based upon all of the probative evidence presented.

Evidence was presented in an attempt by the Applicant to prove that counsel provided ineffective assistance in failing to seek reconsideration of the sentence, failing to provide discovery materials in a timely fashion, not providing the Applicant with sufficient information, not exploring plea bargains that would involve the Applicant's cooperation with the State, not

having a preliminary hearing, and not being prepared to try the case. He maintains that his guilty pleas were not made knowingly and voluntarily.

The record reflects that the plea attorney performed well within the range of acceptable representation and that nothing that the attorney did or failed to do resulted in prejudice to the defendant under Strickland. Further, the record establishes that the Applicant's pleas of guilty were made freely, knowingly, voluntarily, and intelligently.

A.

Applicant offered two witnesses at the PCR hearing. He testified, as well as a relative, Ms. Bernetha Richardson. Exhibits were also presented. The State presented Mr. Locklair as a witness for the respondent.

The Applicant testified that he retained Mr. Locklair before being served with warrants. Counsel arranged for the Applicant to turn himself in to law enforcement. Applicant stated that he met with his attorney initially for about 45 minutes. Applicant was incarcerated in the Lexington County Detention Center (LCDC) when another meeting took place around January 2012, which the Applicant stated was about 20 to 30 minutes long. The Applicant was able to be released on bail, and he met with counsel in early June 2012. The guilty pleas took place on June 21, 2012.

Both Applicant and counsel testified that the discussions related to a plea bargain only dealt with pleading guilty to a charge of attempted armed robbery, until they arrived at the courthouse on the day of the plea. On the day of the plea, they learned that the Solicitor's office had submitted additional indictments to the Grand Jury for criminal conspiracy and burglary in the second degree, and the offer became to plead to these three charges with a cap of imprisonment for twenty years.

This Court finds Applicant has failed to meet his burden to prove counsel was ineffective for failing to properly advise Applicant on the terms of the guilty plea offer and the consequences of entering the plea. "In the context of a guilty plea, the deficiency prong inquiry turns on whether the plea was voluntarily, knowingly, and intelligently entered. Anderson v. State, 342 S.C. 54, 57, 535 S.E.2d 649, 651 (2000). "A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of the plea by showing that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty, but would have insisted on going to trial." Rolen v. State, 384 S.C. 409, 413, 683 S.E.2d 471, 474 (2009). "To find a guilty plea is voluntarily and knowingly entered into, the record must establish the defendant had a full understanding of the consequences of his plea and the charges against him." Roddy v. State, 339 S.C. 29, 33, 528 S.E.2d 418, 421 (2000).

Applicant testified that he was pressured into accepting the plea bargain, uninformed, and misinformed by counsel. Basically, he maintains that he was told by counsel that he was going to receive a probationary sentence and that he relied upon this representation. At one point, Applicant testified that counsel told him that he would receive no more than one-half of the 20-year cap. While counsel testified that he felt that the sentence was excessive and that the Applicant should have been given probation, the credible evidence is that Applicant understood from counsel and from the judge that the decision about the length and conditions of his sentence was in the judge's discretion. See Holden v. State, 393 S.C. 565, 573, 713 S.E.2d 611, 615 (2011) ("In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing.").

The record reflects that counsel made an impassioned plea for probation, stating with clarity why, in the attorney's opinion, a lenient sentence was justified, raising all the appropriate mitigating factors, and giving the judge a basis to justify such a sentence. There is no proof that counsel could have done or should have done more in this regard. He could not make the facts and he could not impose the sentence. He could only be an advocate, which he did diligently. The court rejects the contention that Applicant was misled or misinformed because the record does not support that assertion. Therefore, this allegation is denied and dismissed.

B.

Applicant has failed to meet his burden to prove counsel was ineffective for failing to file a motion for reconsideration of sentence. "[A] petitioner claiming ineffective assistance of counsel in a motion for reconsideration must also show prejudice." Dakane v. U.S. Atty. Gen., 399 F.3d 1269, 1274 (11th Cir. 2005). Applicant testified that he told family members to instruct counsel to file a reconsideration motion. Ms. Richardson testified that she spoke to counsel after the sentencing, told him to file a motion for reconsideration, and that counsel said that he would do whatever he could.

WPAC #6

While the court finds Ms. Richardson credible, the Applicant bears the burden of proving that there was a clear instruction to file a motion for reconsideration. The court believes that conversations took place, but that it is unproven that counsel was instructed to file a motion for reconsideration. It is the court's interpretation of the evidence that there were discussions about what to do after the plea. Counsel testified that he does not recall any discussion about a reconsideration motion. He explained why such motions are not normally made, and that there did not appear to be anything that the judge overlooked or misapplied that would warrant filing a motion. Recognizing that counsel feels strongly that the sentence would have been modified and

made more lenient, the court finds it to be pure speculation and unsupported by the facts to conclude that a post-plea motion would achieve any change in sentencing. The court concludes that there is no proof of prejudice under Strickland, even if the failure to file a post-plea motion were deemed to be deficient performance. See State v. Hicks, 377 S.C. 322, 325, 659 S.E.2d 499, 500 (Ct. App. 2008) ("A judge or other sentencing authority is to be accorded very wide discretion in determining an appropriate sentence, and must be permitted to consider any and all information that reasonably might bear on the proper sentence for the particular defendant, given the crime committed."). Therefore, this allegation is denied and dismissed.

C.

Applicant has met his burden to prove he is entitled to relief pursuant to White v. State. "[C]ounsel has a constitutionally imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing." Roe v. Flores-Ortega, 528 U.S. 470, 480, 120 S. Ct. 1029, 1036, 145 L. Ed. 2d 985 (2000). Counsel testified that he was told by Applicant's family that he wanted to pursue a PCR route and that the attorney did not file an appeal because of that conversation. Counsel stated that he should have gotten the decision about an appeal directly from Applicant and that an appeal should be filed to protect the record. Without in any way ruling whether or not any meritorious appellate issues seem to exist, the court finds that the Applicant should be allowed review of his direct appeal issues. See Simuel v. State, 390 S.C. 267, 271, 701 S.E.2d 738, 739 (2010) "[T]here is no probative evidence that Thompson informed Petitioner of his right to a direct appeal, nor is there any evidence that Petitioner waived his right to a direct appeal.").

D.

Applicant failed to meet his burden to prove counsel was ineffective for failing to review and discuss discovery materials with him. "From counsel's function as assistant to the defendant derive the overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution." Strickland , 466 U.S. at 688, 104 S. Ct. 2052. As for allegations that counsel failed to properly discuss the discovery materials with Applicant, the court finds that the credible evidence is that these things were adequately discussed. Even if they were not, the court has not been provided with any specifics as to how any lack of knowledge about discovery materials prejudiced the Applicant.

PCR counsel offered exhibits related to things received after Applicant arrived in prison. Applicant testified that he got some of the discovery after he was released on bail. Counsel testified that he went over all discovery materials with Applicant, including discussions about what the co-defendants told police. Counsel explained why he normally does not give a copy of the materials to his clients, which appears a rational and appropriate practice. He explained why materials were given to Applicant after the plea. The court finds counsel's version to be credible.

Even if all the discovery materials were not reviewed with Applicant in advance of the plea, there is no specific explanation in this record, and nothing apparent on its face, as to how the further knowledge about any discovery information would have been likely to have changed the outcome. So, even if the court were to accept the assertion that this information was given to Applicant for the first time after the plea (which the court finds unproven), there is absolutely no showing of prejudice under Strickland. This allegation is denied and dismissed.

E.

Applicant's allegation that counsel was ineffective for failing to negotiate a more favorable plea agreement is without merit. "Our state constitution provides, [t]he Attorney General shall be the chief prosecuting officer of the State with authority to supervise the prosecution of all criminal cases in courts of record. S.C. Const. art. V, § 24. Thus, the prosecution has wide latitude in selecting what cases to prosecute." Rainey v. Haley, 404 S.C. 320, 332-33, 745 S.E.2d 81, 87 (2013) (internal citations omitted) (Beatty, J., concurring). "Prosecutors have broad powers in the plea bargain process: Under the separation of powers doctrine, which is the basis for our form of government, the Executive Branch is vested with the power to decide when and how to prosecute a case." Reed v. Becka, 333 S.C. 676, 684, 511 S.E.2d 396, 400 (Ct. App. 1999)

As for the assertion that counsel was deficient in failing to seek a better plea bargain based on an offer to cooperate with the prosecution, the court finds no merit to this claim. Again, it is pure speculation. See Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998) ("Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result."). There were co-defendants engaged in a conspiracy to commit this robbery. It was not a spur of the moment event. Applicant was the person who held the gun on the victim. The court accepts counsel's testimony that there was never an indication that Applicant could have provided information that would have benefitted him in his plea negotiations. The Applicant never disclosed the full story to him. The Applicant withheld the name of the person in Atlanta who was contacted in this conspiracy. There is nothing in this record to indicate that the prosecutor had any desire to negotiate a better deal for the gunman than for the other co-

defendants, so the court accepts the testimony of plea counsel that there was no basis for seeking to further cooperate in exchange for leniency. The transcript reflects that a female co-defendant had taken steps to turn herself in to law enforcement and cooperate at an earlier stage. Applicant has failed to prove deficient performance or prejudice under Strickland in this regard. Moreover, there is no proof of any unsupported or substantial difference in the sentence received by the co-defendant. See State v. Charping, 333 S.C. 124, 132, 508 S.E.2d 851, 855 (1998) (citing Brogdon v. Blackburn, 790 F.2d 1164 (5th Cir.1986) (codefendant's life sentence not relevant to defendant's character or offense; fact is relevant only to the task of comparing the proportionality of Brogdon's sentence to the sentences of others similarly situated, a function assigned by statute to State Supreme Court). The claim that Applicant would have benefitted had his attorney somehow brokered a deal involving more cooperation is purely speculative and unproven. Therefore, this allegation is denied and dismissed.

F.

WPH #10

Applicant failed to meet his burden to prove counsel was ineffective for failing to prepare his case for trial. As for the assertion that counsel was unprepared for trial, the court finds that Applicant has failed to prove that claim. Counsel testified credibly that it was not a difficult case to prepare, that he was familiar with it, and that he would have been ready to proceed to trial at the proper time. While this is a very serious case, it does not appear to present unusual legal or factual issues. Applicant basically offered only his assertion that counsel was not ready for trial. That is not enough to carry the burden of proof. See Skeen v. State, 325 S.C. 210, 214–15, 481 S.E.2d 129, 132 (1997) (finding Applicant was not entitled to post-conviction relief where there was no evidence presented at the PCR hearing to show how additional preparation would have

had any possible effect on the result of the trial). Therefore, this allegation is denied and dismissed.

G.

Applicant failed to prove counsel was ineffective for failing to purse a preliminary hearing at the outset of the representation. "[D]efendant's plea negotiations and silence before trial court concerning his desire for a preliminary hearing constituted evidence of waiver." Bonnette v. State, 277 S.C. 17, 282 S.E.2d 597 (1981). There were no specifics other than that a hearing was scheduled and not held. The Grand Jury indicted the defendant. There is no showing as to what would be gained by a preliminary hearing that was not learned in discovery, nor any showing of how the failure to have one was prejudicial under Strickland. This issue fails for lack of proof. Therefore, this allegation is denied and dismissed.

H.

WRC #11

Applicant failed to prove counsel was ineffective for failing to object to the imposition of an alleged excessive sentence. "A great deal of the dispute raised by the Applicant seems to relate to the sentence being excessive. A judge is allowed broad discretion in sentencing within statutory limits." State v. Sidell, 262 S.C. 397, 205 S.E.2d 2 (1974). "A sentence is not excessive if it is within statutory limitations and there are no facts supporting an allegation of prejudice against respondent." Cummings v. State, 274 S.C. 26, 260 S.E.2d 187 (1979). "It is well settled in this State that this Court has no jurisdiction to disturb, because of alleged excessiveness, a sentence which is within the limits prescribed by statute unless: (a) the statute itself violates the constitutional injunction, Article I, Sec. 19, against cruel and unusual punishment, or (b) the sentence is the result of partiality, prejudice or pressure or corrupt motive." Wood v. State, 257 S.C. 179, 184 S.E.2d 702 (1971).

While it is understandable that Applicant and counsel may feel the sentence was excessive, there is no showing that anything related to the sentence was improperly fashioned or that the proceeding was improperly conducted. The court finds that Applicant has failed to prove that he was misled by the advice and instructions of plea counsel. There is no showing of impropriety on the part of the sentencing judge. It is not credible that the attorney told the Applicant anything that approached a guarantee or representation that he would receive probation. Rather, the court finds that the evidence demonstrates that counsel may have felt that probation was appropriate and communicated that to his client, but that Applicant knew that the decision was in the discretion of the judge. The sentence imposed was within the range of the plea bargain. Applicant knew the plea bargain. The record demonstrates that counsel did an admirable job in the plea proceeding. Counsel had no control over what the judge would do with the information in forming a sentence. See Wolfe v. State, 326 S.C. 158, 165, 485 S.E.2d 367, 371 (1997) ("Wishful thinking regarding sentencing does not equal a misapprehension concerning the possible range of sentences, especially where one acknowledges on the record that one knows the range of sentences and that no promises have been made."). Therefore, this allegation is denied and dismissed.

I.

Applicant failed to prove that he entered an involuntary plea. "The United States Supreme Court has held that before a court can accept a guilty plea, a defendant must be advised of the constitutional rights he or she is waiving. Specifically, a defendant must be aware of the privilege against self-incrimination, the right to a jury trial, and the right to confront one's accusers. This Court considered the requirements of a voluntary and knowing guilty plea in State v. Hazel, 275 S.C. 392, 271 S.E.2d 602 (1980). Pittman v. State, 337 S.C. 597, 599, 524 S.E.2d

623, 624 (1999) (citing Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969)). Although the trial court is not required to direct defendant's attention to each right and obtain a separate waiver, the record should indicate the defendant was fully aware of the consequences of his guilty plea. State v. Lambert, 266 S.C. 574, 225 S.E.2d 340 (1976).

The claim that the plea was not freely, knowingly, and voluntarily made is unproven. Much of that claim hinges on the assessment by Applicant that he was pressured to take the plea bargain because of the matters discussed above. The transcript and the testimony at the PCR hearing do not support this being an involuntary and unknowing plea. It establishes the opposite. Applicant claims that counsel never apprised him of his rights, never reviewed the charges with him, and that they did not have an adequate opportunity to discuss these issues. The court finds that not to be credible. Applicant stated that he only received discovery materials about a week before the trial was scheduled to begin. While counsel testified that he felt sandbagged by the Solicitor adding additional charges to the plea bargain, there is no proof that the net effect was in any way significantly different because the driving charge was the attempted armed robbery. There is no proof that adding charges on the day of the plea made it involuntary or unknowing. The credible evidence is that all of those charges were discussed before the plea and a decision made to accept the offer. There is no proof of compulsion, duress, or fear that overcomes the voluntariness of the plea.

WM #13

It is Applicant's contention that he was placed in a situation where he had no choice but to accept the plea bargain, primarily because counsel was telling him that he would get probation and because counsel was not prepared for trial. Those claims are not proven. The court does not find it credible that Applicant only admitted guilt because counsel told him to go along with the

plea. There was a strong case against this Applicant, and there is no proof that his free will was overcome. Therefore, this allegation is denied and dismissed.

J.

Except as discussed above, this Court finds that the Applicant affirmatively abandons the remaining allegations set forth in his application at the hearing. 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). Applicant's failure to address these issues 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.

CONCLUSION

WPC #14

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 for post-conviction relief. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

This Court notes that Applicant must file and serve a notice of intent to appeal within thirty (30) days from receipt of this Order to secure the appropriate appellate review. See Rule 203, SCACR. Rule 71.1(g), SCRCP; Bray v. State, 336 S.C. 137, 620 S.E.2d 743 (2005), for the obligation of Applicant's counsel to file and serve notice of appeal. The Applicant's attention is also directed to South Carolina Appellate Court Rule 243 for appropriate procedures after notice 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. That the Applicant is granted a review of direct appeal issues pursuant to White v. State, 263 S.C. 110, 108 S.E.2d 35 (1974). Within thirty days of service of this Order, PCR counsel for the Applicant must file a Notice of Appeal to secure the appropriate review of the Applicants' convictions. Counsel and the Applicant are directed to Davis v. State, 288 S.C. 290, 342 S.E.2d 60 (1986) and South Carolina Appellate Court Rule 227(g) for the appropriate procedure for securing belated appellate review.

3. Applicant must be remanded to the custody of Respondent

AND IT IS SO ORDERED this 4th day of June, 2014.

William P. Keesley

WILLIAM P. KEESLEY
Presiding Judge
Eleventh Judicial Circuit

#15

Edgefield, South Carolina