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SEP 09 2016

Hugh W. Welborn

Attorney at Law
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S.C. SUPREME COURT

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email to:
hughwelborn@bellsouth.net

September 7, 2016

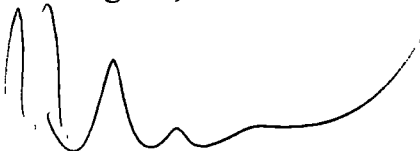
South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

In RE: Garvin Duvall #334729 vs. State of South Carolina
Case #: 2013-CP-04-2174

Dear Sir/Madam:

Please find enclosed herewith the original and one (1) copy of the Appellant's Notice of Appeal in connection with the foregoing matter which I ask that you file for record, returning the clocked copy to my office. I also enclose a copy of the Order of Dismissal and the original Proof of Service on Johanna C. Valenzuela, Office of the Attorney General. Please use the enclosed self-addressed envelope to return the clocked copy to my office.

With kind regards,



Hugh W. Welborn

HWW/sba
Enclosures

cc: Office of the Appellate Defense
Office of the Attorney General
Client

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM ANDERSON COUNTY
COURT OF COMMON PLEAS

HONORABLE R. SCOTT SPROUSE

2013-CP-04-2174

GARVIN DUVALL, #334728

APPELLANT,

VS

STATE OF SOUTH CAROLINA,

RESPONDENT.

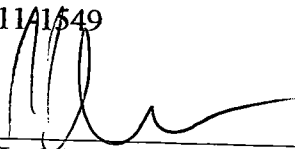
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SEP 09 2016

S.C. SUPREME COURT

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on the State of South Carolina by depositing a copy of it in the United States Mail postage prepaid on September 7, 2016 addressed to its attorney of record Johanna C. Valenzuela, Office of the Attorney General, Post Office Box 11549, Columbia, South Carolina 29211-1549



Hugh W. Welborn
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Anderson, South Carolina 29622
(864) 226-5787
Attorney for Garvin Duvall, #334728

Anderson, South Carolina

September 07 2016

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM ANDERSON COUNTY
COURT OF COMMON PLEAS

RECEIVED

HONORABLE R. SCOTT SPROUSE

SEP 09 2016

2013-CP-04-2174

S.C. SUPREME COURT

GARVIN DUVALL, #334728

APPELLANT,


vs

STATE OF SOUTH CAROLINA,

RESPONDENT.

NOTICE OF APPEAL

Garvin Duvall, #334728 appeals the denial of his Post Conviction Relief. The Post Conviction Relief Action was heard and denied by the Honorable R. Scott Sprouse Circuit Court Judge on June 8, 2016, and Order of Dismissal issued on September 1, 2016 and filed on September 6, 2016. The Appellant received Order of Dismissal on September 7, 2016.



Hugh W. Welborn
Attorney for the Appellant
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Attorney for Garvin Duvall, #334728

Other Counsel of Record:
Johanna C. Valenzuela
Office of Attorney General State of SC
Post Office Box 11549
Columbia, South Carolina 29211

STATE OF SOUTH CAROLINA
COUNTY OF ANDERSON

JUDGMENT IN A CIVIL CASE

FILED-CLERK'S OFFICE

ANDERSON CASE NO. 2013-CP-04-2174



IN THE COURT OF COMMON PLEAS

2016 SEP - 6 AM 9: 28

Garvin Duvall, S.C.D.C No. 334728

PLAINTIFF(S)

State of South Carolina
COMMON PLEAS JUDGE
GENERAL SESSIONS
DEFENDANT(S)

Submitted by: Court

Attorney for : Plaintiff Defendant
or
 Self-Represented Litigant

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. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; Bankruptcy; Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other

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

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Sign and enter judgment by the Court:

A TRUE COPY

SEP - 6 2016

Richard P. White
CLERK OF COURT

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT 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 (List amount(s) below)

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.

Richard P. White
Circuit Court Judge

2752
Judge Code

9-1-16
Date

For Clerk of Court Office Use Only



This judgment was entered on the 6th day of Sept, 2016 and a copy mailed first class or placed in the appropriate attorney's box on this 6th day of Sept, 2016 to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)
Richard D. Jolley
CLERK OF COURT

Court Reporter:

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

Multiple horizontal lines for additional information or notes.

FILED-CLERK'S OFFICE
ANDERSON SC



STATE OF SOUTH CAROLINA)
COUNTY OF ANDERSON)
COMMON PLEAS AND)
GENERAL SESSIONS)
SEP - 6 2016)
AM 10:28)
IN THE COURT OF COMMON PLEAS)
FOR THE TENTH JUDICIAL CIRCUIT)

Garvin Duvall,
S.C.D.C. No. 334728,

Applicant,

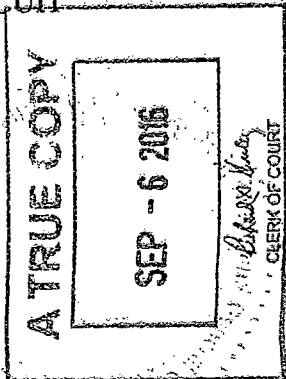
v.

State of South Carolina,

Respondent.

C.A. No. 2013-CP-04-2174

ORDER OF DISMISSAL



This matter comes before the Court by way of an application for post-conviction relief (PCR) filed September 26, 2013. Respondent made its return, and an evidentiary hearing was held on June 8, 2016, at the Anderson County Courthouse. Applicant was present and represented by Hugh W. Welborn, Esquire. Senior Assistant Deputy Attorney General Johanna C. Valenzuela represented Respondent.

Applicant and his trial counsel, Robert Gamble, Esquire, and Matthew Perkins, Esquire, testified at the hearing. The Court had before it Applicant's trial transcript, the Anderson County Clerk of Court records, Applicant's appellate records, the South Carolina Department of Corrections records, the PCR application, and the Return.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Anderson County Clerk of Court. In April 2007, the Anderson County Grand Jury indicted Applicant for Murder and Possession of a Weapon during the

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Commission of a Violent Crime (2007-GS-04-1218) and Criminal Conspiracy (2007-GS-04-1219). Robert Gamble and Matthew Perkins, Esquires, represented Applicant. On May 15, 2009, Applicant proceeded to trial before the Honorable J. Cordell Maddox, Jr., and a jury. The jury found Applicant guilty as indicted. Judge Maddox sentenced Applicant to consecutive sentences of thirty years for Murder and five year sentences for Criminal Conspiracy and Possession of a Weapon during the Commission of a Violent Crime.

Applicant filed a timely notice of appeal. Robert M. Dudek, Esquire, of the Office of Appellate Defense perfected the appeal. The South Carolina Court of Appeals affirmed Applicant's conviction on February 16, 2012. State v. Duvall, Op. No. 2012-UP-132 (S.C. Ct. App. filed February 29, 2012). Petition for a Writ of Certiorari was denied on September 5, 2013.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the case law presented at the hearing, to review the record in its entirety, to hear the testimony and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing and to closely pass upon their credibility. This Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

Ineffective Assistance of Counsel

In a PCR action, "[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence." Frasler v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing SCRPC 71.1(e)). Where the application alleges ineffective assistance of counsel as a

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ground for relief, 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 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814.

First, the applicant must show that counsel's performance "fell below an objective standard of reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). The Applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625.

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; see Strickland v. Washington, 466 U.S. 668, 688, 692, 104 S. Ct. 2052, 2053, 2067 (1984) ("[T]he defendant must show that counsel's representation fell below an objective standard of reasonableness [and] . . . any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution."); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006) ("PCR applicant must prove: (1) that counsel failed to render reasonably effective assistance under prevailing professional norms; and (2) that the deficient performance prejudiced the applicant's case.").

And "where counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." Watson v. State, 370 S.C. 68, 72, 634 S.E.2d 642, 644 (2006 (citing Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992))). "Counsel's performance is accorded a favorable presumption, and a reviewing court proceeds from the rebuttable presumption that counsel 'rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.'" Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (quoting Strickland, 466 U.S. at 690, 104 S.Ct. 2052). "Accordingly, when counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." Id. (citing Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)). "Courts must be wary of second-guessing counsel's trial tactics; and where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992) (citing Goodson v. United States, 564 F.2d 1071 (4th Cir. 1977)).

In his application, Applicant alleged that his trial counsel were ineffective for failing to move to sever his trial from his co-defendant, for failing to object to the Court's curative instruction, and for his failure to receive a fair trial. Prior to the hearing, Applicant's counsel submitted a letter to Respondent amending the application to include a claim of actual innocence and "if the credibility of the witness, Mr. Stansell, is truly exposed." Additionally, when the PCR hearing began, Applicant also alleged his trial counsel were ineffective for not objecting to the burden of proof being shifted through the malice instruction and for failing to request an alibi instruction.

This Court will now address each allegation of ineffective assistance of counsel:

I. Failure to move to sever

Applicant argues his Trial Counsel should have moved to sever his trial so as to not proceed to trial with his co-defendant. Applicant agreed that his co-defendant also had not moved to sever the trial.

Trial Counsel, Robert Gamble, testified that he did not believe there was a basis to sever and, for strategic reasons, he believed keeping the trial together would be beneficial to his client.

Jointly tried criminal defendants are not entitled to separate trials as a matter of right. State v. Dennis, 337 S.C. 275, 281, 523 S.E.2d 173, 176 (1999). In order for an appellate court to reverse a conviction based on a trial court's failure to allow severance, a defendant must show prejudice. Id. "The general rule allowing joint trials applies with equal force when a defendant's severance motion is based upon the likelihood he and a co-defendant will present mutually antagonistic defenses, i.e., accuse one another of committing the crime." Hughes v. State, 346 S.C. 554, 558, 552 S.E.2d 315, 317 (2001) (citing Dennis, 337 S.C. at 281, 523 S.E.2d at 176). "A severance should be granted only when there is a serious risk that a joint trial would compromise a specific trial right of a co-defendant or prevent the jury from making a reliable judgment about a co-defendant's guilt." Id. "A proper cautionary instruction may help protect the individual rights of each defendant and ensure that no prejudice results from a joint trial." Id. (citing State v. Holland, 261 S.C. 488, 494, 201 S.E.2d 118, 121(1973)).

Neither the co-defendant nor Applicant moved to sever the trial. Trial Counsel both testified they believed it was strategically beneficial to Applicant to proceed forward with the co-defendant in this trial and to focus on discrediting the testimony of J.W. Stansell. Had Applicant proceeded forward with a trial separate from his co-defendant, he still would have had to contend

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with the very detailed confession made to J.W. Stansell. (See *infra*, Section II, summarizing J.W. Stansell's testimony.) As such, this Court finds Applicant has failed to establish ineffective assistance of counsel related to this issue or establish that he would have obtained a more favorable verdict in a separate trial.

II. Failure to Object to Curative Instruction

Applicant argues the Court of Appeals' decision from his direct appeal, finding this issue unpreserved, establishes that his counsel were ineffective and caused him prejudice.

A review of the trial transcript shows that the curative instructions made clear to the jury that the statements made as to the victim's fear were introduced only for the case of *State v. Frances Moore*. (Tr. p. 298, ll. 15-22; Tr. p. 303, ll. 12-14; Tr. p. 309, ll. 3-8.) Additionally, the Solicitor's reference to these statements in closing also only directed the jury to Frances Moore. (Tr.p. 660, ll. 13-19.)

Further, the State presented evidence in its case against Applicant that he had attempted to solicit J.W. Stansell in the murder plan. J.W. Stansell presented evidence that Applicant told him prior to the crime that there was a concern that the victim was a "rat" and was about to be arrested and turn on people he was involved with in criminal activity, including Frances Moore and that she along with some other people wanted the victim dead. (Tr. p. 390, l. 6 - p. 393, l. 14.) Applicant went on to say that France Moore was going to pay him \$2,000 to kill the victim. (*Id.*) Applicant also showed Stansell a gun that he was given to use. (Tr.p. 390-393.) Additionally, Stansell stated that the plan included the location and the intent to shoot the victim in the car and then set the car on fire to make it appear like a drug deal gone bad. (*Id.*)

Stansell also testified that he later saw Applicant in a hospital after the murder and asked

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Applicant if he did it and Applicant declared that he had. (Tr.p. 397.) In this conversation, Applicant made an admission that he had lured the victim to the location, that the victim had exited the vehicle, and that Applicant then shot him in the head. (Tr. p. 397.) Applicant confirmed that he next set the car on fire. (Tr.p. 398.) Applicant stated that he disposed of the murder weapon at his work in a furnace. (Tr.p. 398-399.)

The evidence of the victim's fear of having his car burned and being shot was similar to other evidence admitted about the plan expressed by Applicant to the State's witness, Stansell, about Applicant's plan and the carrying out of the plan. The admission of the evidence from the Erwins and Rita Woods would be harmless error as cumulative toward the testimony and admissions of Applicant to Stansell.

Applicant's appellate records, to include the briefs in the direct appeal case, are before this Court. After reviewing those records and the trial transcript, the Court finds Applicant has not met his burden and established that had his counsel objected to the curative instruction, the outcome of his case would have been different.

III. Failure to object to malice instruction

Applicant claims Trial Counsel erred by not objecting to the malice instruction because the instruction impermissibly shifted the burden. To the extent Applicant relies on State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009), the Court notes this trial concluded prior to Belcher being decided. The South Carolina Supreme Court specifically held that Belcher did not apply in the PCR context. Belcher, 385 S.C. at 613, 685 S.E.2d at 810 ("Our ruling, however, will not apply to convictions challenged on post-conviction relief."). Further, the evidence presented in this trial was that the victim was shot in the back of the head and in the back and

RSS

then his car was set on fire to try and cover up the crime. (Trial Tr. p. 398, ll. 22-25; pp. 469-471; 520, ll. 13-17; p. 521.) There was sufficient evidence, aside from the use of a deadly weapon, for the jury to find malice. As such, this Court does not find Trial Counsel were ineffective or that there was any prejudice due to trial counsel's failure to object to the jury charge.

IV. Failure to request alibi instruction

Applicant argues Trial Counsel should have requested an alibi instruction. The trial court did give Applicant's jury an alibi instruction. (Trial Tr. p. 696, l. 21 – p. 697, l. 8.)

This Court finds Applicant has not established Trial Counsel were ineffective and has not established prejudice.

V. Actual Innocence/Stansell Credibility

Aside from Applicant's assertions that Mr. Stansell was lying and that he is innocent, no additional evidence was presented to the Court on this issue. The Court finds Applicant has not established any reason to grant relief on this basis.

All Other Allegations

As to any additional allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this Order, this Court finds Applicant failed to present any testimony, argument, or evidence at the hearing regarding such allegations. Accordingly, this Court finds Applicant has abandoned any such allegations.

CONCLUSION

Based on all the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations before or during his trial or sentencing proceedings. Applicant was not prejudiced by counsel's representation. Therefore, this PCR application must



be denied and dismissed with prejudice.

This Court advises Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order if he wants to secure appropriate appellate review. His attention is also 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 be denied and dismissed with prejudice; and
2. That Applicant be remanded to the custody of Respondent.

AND IT IS SO ORDERED this 1 day of September, 2016.

R. Scott Sprouse
Presiding Judge
Tenth Judicial Circuit

Walden, South Carolina.

COMMON PLEAS AND
GENERAL SESSIONS

2016 SEP -6 AM 9:28

FILED-CLERK'S OFFICE
ANDERSON SC

STATE OF SOUTH CAROLINA
COUNTY OF ANDERSON

Garvin Duvall,
Plaintiff(s),
-vs-

South Carolina State Of,
Defendant(s).

FILED-CLERK'S OFFICE
ANDERSON SC

2013 OCT -8 A 8: 53

IN THE COURT OF COMMON PLEAS
JUDICIAL CIRCUIT
CASE NO.: 2013CP0402174
APPOINTMENT OF COUNSEL OR GAL
(Select one.)

ORDER
 AMENDED ORDER

TYPE OF CASE/PROCEEDING: (Check one.)

- Post-Conviction Relief (PCR)/habeas case
- SVP case
- Minor Name Change
- Adoption
- Custody and/or Visitation
- Other: Post Convict Rel 500

Juvenile Abuse and Neglect

TRUE COPY
OCT - 8 2013
Richard W. Welborn
Clerk of Court

It appears Garvin Duvall, who is a litigant in this case, is entitled to court-appointed counsel or a guardian ad litem.

It further appears that: (Select only one.)

- counsel/guardian ad litem has not yet been appointed by the court; therefore, an appointment for counsel/guardian ad litem is necessary.
- counsel or a guardian ad litem was previously appointed by the court but has indicated either a possible conflict of interest, an entitlement to exemption, or other good cause warranting the appointment of new counsel or guardian ad litem based on:
- counsel was previously appointed by the court but has not indicated that the litigant has retained private counsel and is no longer entitled to appointed counsel.
- court appointed counsel has obtained, Esquire as substitute counsel pursuant to Rule 608(h)(2); provided, however, only the member who originally received the appointment and who sought substitute counsel shall receive credit.
- Other: .

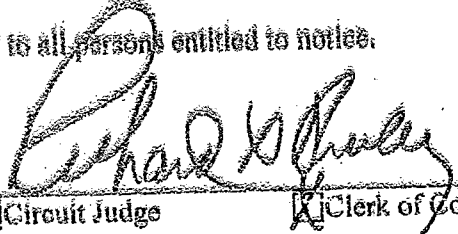
Therefore, it is ordered that Hugh W. Welborn hereby is appointed as (Select one.)

counsel lead counsel (if capital PCR case) guardian ad litem
for the above-named person. Any counsel or GAL previously appointed is/are hereby relieved.

(If Death Penalty PCR Case) It is further ordered that, Esquire, is hereby appointed as second counsel in this capital PCR case.

The clerk of court is directed to forward a copy of this order to all persons entitled to notice.

IT IS SO ORDERED
October 7, 2013


 Circuit Judge Clerk of Court

Plaintiff Attorney:

Defendant Attorney:

NOTICE: SC Supreme Court Order of September 29, 2006, requires appointed counsel entitled to payment from the Office of Indigent Defense (OID) to register the case online with OID within fifteen (15) days of this appointment at www.scid.sc.gov, and further directs that reimbursement vouchers be submitted directly to SCCID and not to the trial judge or clerk of court. See SCCID website for further details.

Hugh W. Welborn

Attorney at Law
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Anderson, South Carolina 29622

Office Telephone:
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September 7, 2016

RECEIVED

SEP 09 2016

South Carolina Office of Appellate Defense
P. O. Box 11589
Columbia, South Carolina 29211-1589


S.C. SUPREME COURT

In RE: Garvin Duvall #334729 vs. State of South Carolina
Case #: 2013-CP-04-2174

Dear Sir or Madam:

In connection with the foregoing matter, please be advised that I was the Court Appointed Attorney and enclose herewith a copy of my appointment. I also enclose copies of all documents you requested for filing a copy of the Appellant's Notice of Appeal in this matter together with a copy of the Order and Proof of Service. I ask that your office assume representation of this indigent Applicant.

Very truly yours,

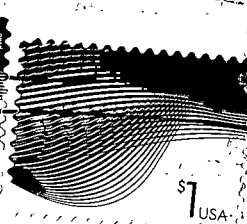
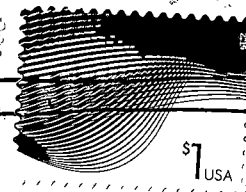


Hugh W. Welborn

HWW/sba
Enclosures

cc: South Carolina Supreme Court
Office of Attorney General
Client

Hugh W. Welborn
Attorney At Law
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