LAW OFFICE OF

Kristy Grafton Goldberg, LLC

ATTORNEY AT LAW

November 4, 2016

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

RE: Gregory Velez, SCDC # 345428, vs. State of South Carolina
Appeal of Case No. 2013-CP-32-0614

Dear Mr. Shearouse,

Enclosed for filing is a Notice of Appeal in the above referenced case. Also enclosed are a certificate of service and a copy of the original court order which is to be challenged on appeal. I would appreciate it if you could file the Notice of Appeal and mail a date-stamped copy back to me in the enclosed pre-stamped envelope.

By copy of this letter I am informing Attorney Tommy Thomas of this Appeal as I believe he has been retained to represent Mr. Velez on the appeal.

Please let me know if you have any questions or concerns regarding this matter.

Respectfully,

Kristy Goldberg

CC: Johanna Valenzuela
Assistant Attorney General
Post Office Box 11549
Columbia, South Carolina 29211-1549

Gregory Velez, SCDC # 345428
Lieber Correctional Institution
136 Wilborn Avenue

1720 MAIN STREET • SUITE 303 • COLUMBIA, SOUTH CAROLINA 29201
PHONE (803) 667-6633 • FACSIMILE (803) 799-4059

P.O. Box 205
Ridgeville, SC 29472

The Honorable Beth Carrigg
Clerk of Court
205 East Main Street
Lexington , South Carolina 29072

Tommy Thomas
Post Office Box 88
Irmo, South Carolina 29063

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Brooks P. Goldsmith, Circuit Court Judge

RECEIVED
NOV -8 2016
S.C. SUPREME COURT

Case No. 2013-CP-32-1230

Gregory Velez, SCDC # 345428, ... Appellant

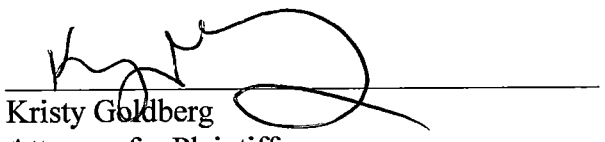
v.

State of South Carolina, ... Respondent.

NOTICE OF APPEAL

Applicant Boyd Evans hereby appeals from the Order of the Honorable Brooks P. Goldsmith presiding Judge for the 11th Judicial Circuit, filed October 28, 2016 and received by counsel for the Applicant on November 2nd, 2016 in the matter of Gregory Velez v. State of South Carolina, Case No. 2013-CP-32-1230.

November 4, 2016



Kristy Goldberg
Attorney for Plaintiff

Law Office of Kristy Goldberg, LLC.
1720 Main Street, Suite 303
Columbia, SC 29201
Phone (803) 667-6633
kristy@kristygoldberglaw.com

Other Counsel of Record:
Assistant Attorney General, Johanna Valenzuela
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Brooks P. Goldmsith, Circuit Court Judge

Case No. 2013-CP-32-1230

Gregory Velez, SCDC # 345428, ... Appellant

v.

State of South Carolina, ... Respondent.

PROOF OF SERVICE

Personally appeared before me, Kristy Goldberg, Esquire, who being duly sworn, deposes and states:

She is the counsel of record for Applicant;
Service by mail is proper in this instance; and
She has served the NOTICE OF APPEAL on the following party on November 4, 2016 by depositing one copy in the U.S. Mail, postage prepaid:

Assistant Attorney General, Johanna Valenzuela
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211

Kristy Goldberg
Attorney for Plaintiff

Law Office of Kristy Goldberg, LLC.

1720 Main Street, Suite 303
Columbia, SC 29201
Phone (803) 667-6633
kristy@kristygoldberglaw.com

Other Counsel of Record:
Assistant Attorney General, Johanna Valenzuela
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF LEXINGTON	)	FOR THE ELEVENTH JUDICIAL CIRCUIT
	)	
Gregory Velez, S.C.D.C. No. 345428,	)	C.A. No. 2013-CP-32-1230
	)	
Applicant,	)	
	)	
v.	)	**ORDER OF DISMISSAL**
	)	
State of South Carolina,	)	
	)	
Respondent.	)	

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed April 9, 2013, and amended May 7, 2015. Respondent made its return on or about December 23, 2013. An evidentiary hearing was held on June 9, 2015, at the Lexington County Courthouse. Applicant was present and represented by Kristy Goldberg, Esq. Assistant Attorney General J. Walt Whitmire represented Respondent.

Applicant; Applicant's co-defendant, Mr. Leaphart, represented by Anna Good, Esquire; and Applicant's trial counsel, Mike Duncan, Esquire, testified at the hearing. The Court had before it Applicant's trial transcript, the Lexington County Clerk of Court records, the South Carolina Department of Corrections records, the PCR application, the Return, the State's exhibit ("Duncan Timesheet") and the following Applicant exhibits: (1) plea agreement/offer, (2) audio statements of conspirators, (3) a letter written from Mr. Leaphart to Applicant, known as the "Leaphart Letter"; (4) a letter written from Applicant to Mr. Leaphart, known as the "Velez Letter"; (5) a statement by one of the victims, Mr. Corley; (6) the CAD Report; (7) the incident report in the underlying case; and (8) the search warrant in the underlying case.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Lexington County Clerk of Court. Applicant was indicted at the November 2008 term of the Lexington County Grand Jury for burglary, first-degree (2008-GS-32-3721), kidnapping (2008-GS-32-3722), criminal conspiracy (2008-GS-32-3724), robbery/armed robbery (2008-GS-32-3725), and possession of a weapon during a violent crime (2008-GS-32-3726). Applicant was represented by W. Michael Duncan, Esq. On March 28, 2011, the State called this case to trial. The jury found Applicant guilty as indicted. The Honorable R. Knox McMahon sentenced Applicant to twenty-five years in prison for kidnapping, five years for criminal conspiracy, twenty-five years for armed robbery, and five years for the firearms provision. The sentences were to be served concurrently.

A notice of appeal was filed and perfected by Katherine Hudgins, Esq., of the Office of Appellate Defense pursuant to Anders. The South Carolina Court of Appeals affirmed Applicant's convictions and sentences by unpublished opinion. State v. George Velez, 2013-UP-045 (S.C. Ct. App. filed January 30, 2013). The Remittitur was issued on February 21, 2013.

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 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

The Applicant alleges he received ineffective assistance of counsel due to his trial counsel's alleged failure to properly cross-examine all co-defendants about their original statements to police; failure to properly cross-examine co-defendant Jeremy Leaphart about the State's alleged threat to force him to testify; use of an alleged ineffective trial strategy regarding introduction of certain exhibits that were not substantially helpful and resulted in losing the opportunity for last closing argument; alleged failure to object to the admission of State's Exhibit 32, which was a letter written by Applicant but was not properly authenticated; alleged failure to properly cross-examine the victims; alleged failure to properly cross-examine Officer McCullum; and alleged failure to move to suppress any evidence obtained as a result of the search warrant for the automobile.

In a PCR action, "[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing SCRCP 71.1(e)). Where the application alleges ineffective assistance of counsel as a 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, 2065, 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 Caprood v. State, the S.C. Supreme Court analyzed a PCR court's holding that trial counsel was ineffective for not seeking a curative instruction after making a hearsay objection and for introducing into evidence a report containing hearsay and references to a separate armed robbery. Caprood, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000). Noting that trial counsel had outlined "a valid trial strategy" for both his reason for not requesting a curative instruction and for introducing the report, the Court held those actions by trial counsel "should not be the basis of a finding of ineffective assistance of counsel." Id.

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

I. Alleged failure to properly cross-examine all co-defendants about their original statements to police

Applicant began his testimony with a summary of his various defense counsel. Originally represented by Mr. Bax, Applicant was dissatisfied with that representation, stating "[h]e was just under the assumption that I was gonna plead, so as a result of that I asked him to please remove himself from my—my case if he has a biased opinion already." (PCR Hearing Tr. p. 9, ll. 22-24). After Mr. Bax, Applicant had another counsel who, due to a conflict of interest, also had to be removed from Applicant's case. A little less than a year before he went to trial, trial counsel took over representation of Applicant. Applicant confirms trial counsel did visit him, review

discovery with him, and prepare the case for trial with him.

Applicant alleges his trial counsel failed to properly challenge his co-defendants during cross-examination at his trial. Applicant argues that it was error to have his co-defendants merely admit to the State on direct that they had lied in their original statements; Applicant instead believes counsel should have used his co-defendants' audio recorded statements in which they claimed they were in no way involved with the robbery to impeach their testimony. Applicant also argued that his co-defendants' statements "should have been exactly the same and [trial counsel] could have punched holes in their statements with that." (PCR Hearing Tr. p. 15, ll. 14-15.)

Trial counsel explained he believed the most effective cross-examination was to focus on showing the co-defendants' bias and their attempt to get as good a deal as they could get. One co-defendant, Mr. Barnes, was testifying prior to pleading and trial counsel believed he could show Mr. Barnes was "looking for a break." (PCR Hearing Tr. p. 56, l. 10.) Additionally, trial counsel believed the best strategy with co-defendant Mr. Thompson was to highlight how bizarre and unbelievable it was to claim Mr. Thompson had only met Applicant for the first time the day of the robbery. Trial counsel felt to focus on the co-defendants' original statements where they denied any involvement, when they were in court willing to admit to a significant role in the robbery, would not have been a successful strategy.

The Court agrees. Trial counsel here had a valid strategic reason for using the methods he used to cross-examine the co-defendants. This Court finds Applicant has failed to meet his burden of establishing plea counsel was ineffective and failed to establish any prejudice from trial counsel's strategy.

II. ***Alleged failure to properly cross-examine co-defendant Jeremy Leaphart on the State's alleged threat to force him to testify, introduction of certain exhibits that were not substantially helpful and resulted in losing the opportunity for last closing argument, and admission of State's Exhibit 32, which was a letter written by Applicant that was not properly authenticated***

Applicant also claims his co-defendant, Mr. Leaphart, only testified due to a threat from the solicitor's office, that trial counsel was aware of that threat, and that trial counsel should have cross-examined Mr. Leaphart about that threat. Mr. Leaphart[1] claimed he entered a plea of guilty for a cap of twenty years prior to Velez's trial, and there were no requirements to testify at trial in exchange for accepting that plea offer. At his plea, Mr. Leaphart was asked to answer several questions about the events of the crime and Applicant's involvement on the record. Mr. Leaphart claimed that prior to testifying in Applicant's trial he asked the State for permission to speak with Applicant. He urged Applicant to plead guilty and not go to trial. Mr. Leaphart alleges that he had the understanding that if he did not testify during Applicant's trial the State would take away his guilty plea and give him an additional five years in prison. Mr. Leaphart claimed he lied on the stand at trial to avoid facing the additional five years that were allegedly threatened, but claimed at the time of the PCR hearing he felt compelled to tell the truth; the "truth" being that Mr. Leaphart was not guilty, that he and Applicant were "never together," and that Mr. Leaphart was only near the scene of the crime to "meet somebody." (PCR Hearing Tr. p. 46, ll. 9-12.) Mr. Leaphart claims he has been feeling guilty and wanting to tell the truth for a long time; however, he never contacted the Court, Applicant, the Solicitor, his attorney, or anyone else about this alleged false testimony.

Trial counsel testified he was present for the meeting between Mr. Leaphart and

Applicant prior to Mr. Leaphart testifying at trial. In reference to the claim that the State had threatened Mr. Leaphart prior to his testifying, trial counsel said he used what he could use in the cross-examination of Mr. Leaphart and stated that he's "been doing this[, practicing law,] twenty-one years, . . . and this is only—this is four years ago. I – I think I would have remembered that if that had been stated as explicitly as that. . . . I remember Mr. Leaphart trying to convince my client to plead guilty and that Mr. Leaphart didn't want to be there, he didn't want to testify . . . ." (PCR Hearing Tr. p. 58, ll. 9-16.) When trial counsel was asked if Mr. Leaphart ever gave any indication that he was being pressured to testify by the state, trial counsel replied that although Mr. Leaphart didn't want to be at the trial and did not want to testify, trial counsel did not remember anyone "saying what they were gonna do to [Leaphart] if he didn't testify." (PCR Hearing Tr. p. 58, l. 25 – p. 59, l. 1.)

Applicant also asserts trial counsel erred in admitting a letter from Mr. Leaphart to Applicant, which opened the door for the State to enter a letter from Applicant to Mr. Leaphart and which closed the door on Applicant getting last closing. Further, Applicant claims trial counsel should have objected to the State's failure to authenticate Applicant's letter to Mr. Leaphart.

Trial counsel explained he admitted the letter Mr. Leaphart sent Applicant, the "Leaphart letter," because he sought to take advantage of Mr. Leaphart's struggle to testify. Trial counsel explained that Mr. Leaphart refused to look at Applicant while he testified and at one point during his testimony he began to cry. Trial counsel believed that confronting him with his letter that said he only saw Applicant for the first time the day of the crime after he—Mr. Leaphart—

[1] Mr. Leaphart was represented by Anna Good, Esquire, at the PCR hearing for the purpose of receiving advice

was already in the police car would result in Mr. Leaphart recanting his testimony and would help discredit Mr. Leaphart in front of the jury. Prior to introducing that letter, counsel was aware of Applicant's letter back to Leaphart and was aware that introduction of the "Leaphart letter" may result in the "Velez letter" being introduced. Trial counsel felt then, and felt now, that those letters, even in conjunction, were more helpful or neutral than they were harmful, to include losing last closing. Trial counsel felt that if he could discredit Mr. Leaphart with the letter and point out the absurdity of Mr. Thompson's testimony, he would be able to knock out two of the three most harmful witnesses testifying against Applicant.

The Court agrees that, like counsel in Caprood, trial counsel's strategy in both situations was reasonable. Additionally, the Court finds, after observing and hearing the testimony presented at the hearing, that Mr. Leaphart's testimony is not credible. Applicant has failed to meet his burden of establishing plea counsel was ineffective as to his chosen strategy or that the ineffectiveness caused him prejudice.

III. Alleged failure to properly cross-examine the victims

As regards the cross-examination of the victim, Mr. Corley, Applicant testified his counsel was ineffective for not using his booking sheet to challenge Mr. Corley on his description of the suspects' physical features.

Trial counsel explained that he disagreed with Applicant's characterization of Mr. Corley's cross-examination. Trial counsel noted he did cross Mr. Corley on his inability to identify Applicant. The trial transcript shows trial counsel did cross-examine Mr. Corley extensively about his claim to be able to identify the suspects and his subsequent inability to

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about testifying at the PCR hearing,

identify anyone. (Record on Appeal, Tr. P. 200-202). Trial counsel felt focusing on Mr. Corley's inability to identify Applicant rather that breaking it down to the way he identified a specific type of person was more effective at the time.

As regards the cross-examination of the victim, Ms. Otts, Applicant testified that he wanted counsel to emphasize the timeline with Ms. Otts more in order to effectively challenge law enforcement on the CAD Report being fifteen minutes off of Ms. Otts' timeline. Applicant claims the CAD report shows him being arrested prior to Ms. Otts calling 9-1-1. In determining the right way to cross-examine Ms. Otts, trial counsel noted at the time he did not know for sure what Applicant's decision was in terms of testifying at trial. The fifteen minute timeline disparity was something trial counsel felt Applicant could do if he testified. Trial counsel felt that harping on the victim about a fifteen minute disparity from a crime committed three years ago during a traumatic event was not going to help Applicant with the jury.

The Court finds trial counsel's strategy was reasonable. This Court finds Applicant has failed to meet his burden of establishing plea counsel was ineffective or that the ineffectiveness caused him prejudice.

IV. Alleged failure to properly cross-examine Officer McCullum

As regards the cross-examination of Office McCullum, Applicant claims trial counsel should have crossed Office McCullum about allegedly changing his statement from observing two suspects, as stated in the incident report, to observing three suspects, as he testified at trial. Trial counsel disagrees with the emphasis Applicant placed on Officer McCullum's testimony and notes Officer McCullum was not a significant witness for the State. The trial transcript shows trial counsel established on cross-examination that Office McCullum only saw the

suspects from a distance (Record on Appeal, Tr. p. 253, ll. 16-20), the only interaction he had with the suspects was to give verbal commands to the first subject he saw (Record on Appeal, Tr. p. 255, ll. 9-17), that he was not close enough to identify any of the suspects (Record on Appeal, Tr. p. 256, ll. 18-19), and that he did not see any activity at the victim's house because he was focused on the vehicle at the time (Record on Appeal, Tr. p. 257, ll. 16-21).

The Court finds Applicant has not met its burden in establishing trial counsel was ineffective or in showing how he was prejudiced by trial counsel's cross-examination of Officer McCullum.

V. Alleged failure to move to suppress any evidence obtained as a result of the search warrant for the automobile

As to the search warrant, Applicant argued the search warrant was dated several days after the evidence inventory shows his car was searched without the authority of a warrant. Trial counsel explained he did not move to suppress evidence found in Applicant's car in a pre-trial hearing because there was no legitimate basis to suppress the evidence that was seized from the vehicle due to the fact that the vehicle could have been searched incident to arrest.

The Court finds Applicant has not met his burden in establishing trial counsel was ineffective or in establishing a different result had trial counsel challenged the search in pretrial.

VI. Overwhelming Evidence of Guilt

This Court further finds Applicant cannot meet his burden to show that he was prejudiced by any alleged deficiencies because there is overwhelming evidence of his guilt. See Franklin v. Catoe, 346 S.C. 563, 570 n. 3, 552 S.E.2d 718, 722 n. 3 (2001), cert. denied, 535 U.S. 1114, 122 S.Ct. 2332, 153 L.Ed.2d 162 (2002) (finding overwhelming evidence of guilt negated any claim

that counsel's deficient performance could have reasonably affected the result of the defendant's trial); Geter v. State, 305 S.C. 365, 367, 409 S.E.2d 344, 346 (1991) (concluding reasonable probability of a different result does not exist when there is overwhelming evidence of guilt); cf. Ford v. State, 314 S.C. 245, 248, 442 S.E.2d 604, 606 (1994) (holding respondent failed to prove prejudice from trial counsel's failure to request an alibi charge where there was overwhelming evidence of guilt).

Two of the three codefendants who took part in the armed robbery scheme testified Applicant hatched the plan to rob the victims.[2] (Record on Appeal Tr. p. 90, l. 23-p. 91, l. 5; p. 93, ll. 9-10; p. 154, ll. 8 - 12). All three of the codefendants detailed the events that took place on August 13, 2008, both in planning and executing the robbery, implicating Applicant. (Trial Tr. p. 89, l. 15 – p. 99; pp. 153 - 159; p. 127 – 134.) The codefendants also identified Applicant as being in possession of the only shotgun used during the robbery. (Record on Appeal Tr. p. 91, ll. 3-4; p. 95, ll. 7-9; p. 163, ll. 11-14; p. 131, ll. 9-10.) The two victims of the robbery also testified and corroborated the codefendants' testimony about the crime, to include the use of a shotgun by one of the armed robbers. (Record on Appeal Tr. p. 182, l. 19 – p. 183 l. 1; p. 208, ll. 22-23.) Applicant was found near the scene of the crime with two shotgun shells in his pocket. (Record on Appeal Tr. p. 314, l. 14 - 315, l. 16.). As a result, Applicant can show no prejudice from any of the allegations raised in his PCR application as no deficiency on behalf of trial counsel could have reasonably changed the outcome of trial.

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. Counsel was not deficient in any manner, and 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 18th day of October, 2016.

Brooks P. Goldsmith
Presiding Judge
Eleventh Judicial Circuit

_____, South Carolina.

[2] When asked whose idea it was to rob the specific victim, the third codefendant said "It been kind of mine's" [sic]. (Record on Appeal Tr. p. 128, ll. 23-24.)

LAW OFFICE OF
Kristy Grafton Goldberg, LLC
ATTORNEY AT LAW
1720 MAIN STREET, SUITE 303
COLUMBIA, SOUTH CAROLINA 29201

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