STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Charleston County

Honorable Deadra L. Jefferson, Circuit Court Judge

Opinion No. 2016-UP-382 (S.C. Ct. App. Filed July 27, 2016)

10-CP-10-03782

DARRELL L. GOSS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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INDEX

CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on September 26, 2016.

QUESTION PRESENTED

Whether the Court of Appeals erred in affirming the PCR court's denial of petitioner's PCR application because petitioner's Sixth Amendment right to the effective assistance of counsel was violated by trial counsel's failure to investigate and present an alibi defense?

STATEMENT OF THE CASE

On September 10, 2007, petitioner Darrell L. Goss ("Goss") was indicted in Charleston County for Kidnapping, Armed Robbery, and Assault and Battery with Intent to Kill. App. 703-08. Along with his co-defendant, Joy Mack ("Mack"), Goss was tried before the Honorable J.C. Nicholson on February 23 – 26, 2009. Goss was represented by James Smiley. Mack was represented by Alex Apostolou. Trip Lawton and Kevin Hales represented the State. The jury convicted Goss and Mack. App. 1. Judge Nicholson sentenced Goss to twenty years' imprisonment on each conviction, to run concurrently. App. 561, l. 18 – 562, l. 7. Goss's convictions were affirmed by the Court of Appeals. State v. Goss, No. 2011-UP-214 (May 17, 2011); App. 589.

On May 27, 2011, Goss filed his PCR application. App. 591. The State filed a Return and Charles Brooks was appointed to represent Goss. On September 16, 2011, a hearing was held before the Honorable Deadra L. Jefferson. App. 621. The State was represented by Matthew S. Friedman. On December 1, 2011, Judge Jefferson issued an Order of Dismissal denying Goss's application. App. 689.

Goss filed a petition for certiorari which the Court of Appeals granted on November 21, 2014. App. from Ct. App. 1. After additional briefing, the court heard oral argument on March 7, 2016. App. from Ct. App. 3. Judges Short, Thomas, and Geathers sat on the panel. App. from Ct. App. 3. On July 27, 2016, the Court of Appeals affirmed the PCR court in a *per curiam* unpublished opinion. App. from Ct. App. 3. On September 26, 2016, the court denied the petition for rehearing. App. from Ct. App. 11. This petition for certiorari follows.

ARGUMENT

The Court of Appeals erred in affirming the PCR court's denial of petitioner's PCR application because petitioner's Sixth Amendment right to the effective assistance of counsel was violated by trial counsel's failure to investigate and present an alibi defense.

Despite trial counsel's admission that he had no knowledge of petitioner's alibi defense and four witnesses who would have testified that petitioner was at a baby shower during the crime, the trial court found trial counsel was not ineffective. The PCR court only reached this conclusion by speculating about potential trial strategies. Such speculation is not permitted. Before an attorney can be credited with a reasonable trial strategy, he must have first performed an adequate investigation. Wiggins v. Smith, 539 U.S. 510, 521-22 (2003). See also Walker v. State, 407 S.C. 400, 405, 756 S.E.2d 144, 147 (2014). Trial counsel performed no investigation and therefore could have no strategic reason for not calling alibi witnesses to defend petitioner against the State's wholly circumstantial case. The Court of Appeals erred in affirming the PCR court's denial of relief.

Factual Background

Petitioner's co-defendant, Joy Mack ("Mack"), was identified by the proprietor of the Urban Gear clothing store in North Charleston as the armed robber. App. 170, ll. 6 – 16. Mack was one of five people who robbed the store. App. 169, ll. 2 – 8. None of the men's faces were covered or masked. App. 96, l. 25 – 97, l. 2. The proprietor, Aytekin Ayazgok, known as "Andy," did not identify Goss as one of the robbers. App. 176, ll. 3 – 8. When Andy was shown a lineup, he identified Goss as a customer, but not one of his assailants. App. 204, l. 20 – 205, l. 8.

Andy testified that at approximately 7:30 PM, as he was closing the store, he saw five young black males enter the store. App. 169, ll. 2 – 12. Andy testified that Mack took an AK-47 out of his pants, pointed it at him and told him to get down. App. 171, ll. 14 – 22. The assailants dragged Andy and another worker who did not testify ("David") to the back office and bound them. App. 174, ll. 1 – 6. Andy and David were both beaten in the back of the head with the butt of the gun. App. 172, ll. 15 – 24. Andy and David eventually got loose and called 911. App. 175, ll. 17 – 20. The robbers took their wallets. They also took clothing and shoes from the store, although Andy never made a list of the items that were stolen. App. 198, ll. 18 – 24.

Andy was shown a photo lineup that included Goss. Andy recognized Goss as a customer who had shopped in his store before the robbery. App. 204, ll. 6 – 15. Andy did not identify Goss as being in the store during the robbery. App. 205, ll. 6 – 8. At trial, Andy identified Mack as the assailant with the AK-47.[1] Andy never saw Mack and Goss together. App. 206, ll. 3 – 5. In their investigation after the robbery, the police lifted a latent fingerprint from the exterior of the store's glass door. App. 315, ll. 1 – 8. The police testified that the print was still wet, probably from sweat. App. 315, ll. 1 – 8. However, they made no attempt to collect any DNA samples from the print. Instead, they fanned the print with a card until it was dry, destroying any possible DNA evidence that could have been gathered from the print. App. 315, ll. 9 – 19. The police did not take a photo of the print on the door. App. 304, ll. 1 – 12.

Based on a tip from an informant who evaded a subpoena and did not testify at trial, the police compared the print from the door with Goss's fingerprints. The State's fingerprint identification expert testified that the print matched Goss's prints. The State's fingerprint expert admitted there is no way to tell the age of a fingerprint. App. 331, ll. 12 – 14.

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[1] The sole basis for Mack's conviction was Andy's identification. No physical evidence tied Mack to the crime, to Goss, or to any member of Goss's family.

Based on the fingerprint identification, the police executed a search warrant at the Goss residence the day after the robbery. App. 363, ll. 15 – 17. Ten people lived at the Goss residence. App. 462, l. 8 – 464, l. 3. The police found some clothes and tags that resembled items that came from Andy's store. App. 323, ll. 2 – 12. However, Andy admitted that some of the items and tags found did not come from his store, such as hats and sunglasses. App. 207, l. 19 – 208, l. 10.

In a car registered to Sharon Goss, petitioner's brother, the police found other clothing in the trunk and a revolver under the front seat. App. 322, ll. 6 – 21. The gun was sent to SLED for processing because blood appeared to be inside the barrel. The SLED DNA analyst testified that the blood found in the barrel of the gun came from Andy. It was the mixture of DNA of two people. SLED did not have enough DNA information on the second person to develop a profile. App. 403, ll. 16 – 25. Andy testified that he was only struck with the butt of a rifle and not with a handgun. App. 203, ll. 8 – 13.

From processing the scene and the evidence collected at the Goss residence, the police found latent prints at the cash register area, the metal display rods, the door frames, the shoeboxes, the grand opening banner, the gun, and a pair of sunglasses found inside the Goss residence. Out of all these latent prints found, the only one that was identified as belonging to Goss was the one from the exterior door. App. 331, l. 15 – 334, l. 15.

The only defense witness who testified was Thomasina Goss ("Thomasina"), petitioner's mother. She testified that she bought the clothes from men who were selling clothing on her street the same afternoon the search warrant was executed. App. 468, ll. 1 – 21. She bought a lot of pants, some shirts, hats, and gloves for her children. She realized that these clothes were probably stolen. App. 469, ll. 11 – 22. Thomasina was impeached with two convictions of

giving false information to the police and a shoplifting conviction. App. 464, ll. 15 – 24.

The PCR Hearing

At Goss's PCR hearing, Goss testified that trial counsel represented him for two years prior to trial and only met with him one time to discuss a plea agreement. App. 631, l. 24 – 632, l. 24. Trial counsel never interviewed him about the case and never discussed witnesses or the evidence against him. App. 632, ll. 6 – 24. Trial counsel told Goss "Don't tell me anything. . . . don't tell me anything about the case because whatever you tell me, I'm stuck with." App. 633, ll. 2 – 4. Goss and trial counsel both agreed that Goss became very upset with Mr. Smiley during this meeting and words were exchanged.

Goss presented the visitor's log from the jail that showed Mr. Smiley visited him and another person on January 4, 2009, from 8:05 to 8:40. App. 612-14. The log showed no other meetings. Goss also entered two letters he wrote trial counsel into evidence at the PCR hearing. The first was dated June 15, 2008, and stated that Goss had yet to meet with him. App. 611. The second was dated January 5, 2009, and apologized for the prior night's confrontation, but expressed his concern that Mr. Smiley had not given him copies of his discovery material to review. App. 615. Goss eventually filed a complaint with Chief Justice Toal regarding trial counsel's refusal to provide him with his discovery material. App. 598-99. Goss testified that was the last time he saw Smiley until the trial. App. 633, ll. 8 – 12.

Goss wanted trial counsel to present an alibi defense. Goss was at his son's baby shower the night of the robbery. App. 634, ll. 18 – 23. Goss stated that had trial counsel visited him and interviewed him, "I would have told Mr. Smiley that I was at my son's baby shower on the date this crime happened. I would have told Mr. Smiley that, but I was never afforded an opportunity to do so." App. 634, ll. 18 – 23.

Goss testified at the PCR hearing that he gave trial counsel a list of his alibi witnesses at jury selection. App. 633, l. 13 – 14, l. 7. App. 638, l. 18 – 641, l. 19. Goss's testimony at the PCR hearing is corroborated by the trial transcript. App. 17, l. 1 – 19, l. 9. During voir dire, the trial judge asked the venire whether they knew two of petitioner's witnesses: Angelique Gadsden and Clifford Hartwell. App. 17, ll. 1 – 25. Smiley even corrected the trial judge's pronunciation of Ms. Gadsden's first name. App. 17, l. 18.

To substantiate his alibi defense at the PCR hearing, Goss was ready to present the testimony of Gadsden, Lucretia Douglas, Bernard Godfrey, and Felicia Henderson. App. 642, ll. 8 – 14. Goss first stated he wanted to offer the affidavit of his brother and was interrupted by the PCR judge who told him, "We only take live testimony because the state can't cross-examine affidavits." App. 642, ll. 2 – 5. Goss then told the court that Gadsden, Godfrey, Henderson, and Douglas were present and ready to testify. App. 642, ll. 8 – 14. The PCR court again interrupted and asked if these witnesses at the baby shower were related to Goss. App. 642, l. 19 – 643, l. 9. The PCR judge then stated:

> THE COURT: The Court takes judicial notice that those individuals, if they had been called to testify, would have testified that he was, in fact, at this event, which he has call—which—the baby shower. Is that acceptable to the state?
>
> MR. FRIEDMAN: Yes, Your Honor.
>
> MR. BROOKS: Is Your Honor taking notice in lieu of me calling them to the stand?
>
> THE COURT: Yeah, because I assume they're going to say there was a baby shower at this location and he was there from 7:00 to 9:00.
>
> MR. BROOKS: I have affidavits here.
>
> THE COURT: I will enter it as a stipulation as to what their testimony would be.

MR. BROOKS: There won't be any need to call them to the stand.

THE COURT: No, I assume—I have no reason to doubt what he's saying, that they would all testify that they were there with him at the baby shower.

MR. BROOKS: Yes, ma'am.

THE COURT: From 7:00 to 9:00.

App. 643, l. 13 – 644, l. 8.

The court then took judicial notice that Sharon Goss, petitioner's brother, would testify that he bought the clothes and the gun from "some guys that were down the street." App. 644, l. 16 – 645, l. 16. The court also took judicial notice that Hartwell would testify that he witnessed this transaction. App. 644, l. 16 – 645, l. 16. The State did not object to the court taking judicial notice of Sharon Goss or Hartwell's testimony. App. 645, ll. 12 – 15. Sharon Goss was at trial and was ready to testify but was not called as a witness by trial counsel. App. 639, l. 23 – 645, l. 14.

Trial counsel was the only other witness at the PCR Hearing. He admitted to communication problems with Goss. He admitted that a long period of time passed where he did not meet with Goss. App. 655, ll. 3 – 6. He said, "And, yes, Darrell and I could have communicated better, and I will take responsibility for my part of that...." App. 662, ll. 18 – 20. He had no clear recollection or specific memory of going over the discovery in this case with Goss. 658, ll. 22 – 25. He said he did not discuss the facts of the case in any detail with Goss. App. 665, ll. 1 – 4. He said he was focused on defeating the State's circumstantial case. App. 665, ll. 1 – 4.

Trial counsel's investigation in this case was limited to receiving the discovery from the State. He did not interview any witnesses nor did he hire an investigator. App. 665, ll. 18 – 25. Trial counsel did not know about Sharon Goss purchasing the pistol from the people who sold

the clothes and putting it in his car. App. 656, ll. 22 – 25. But he admitted that he knew about some of the witnesses who would testify regarding the individuals selling clothes on the street. App. 656, ll. 20 – 23.

Trial counsel's testimony regarding the alibi defense was as follows:

- "I didn't know about an alibi. I'm not saying there wasn't one, I didn't know about one, and if I should have known about that, I'm wrong. First time I've heard about alibi, it was after the case was tried. If that's my fault, it's my fault." App. 656, ll. 12 – 16.

- "If there was an alibi I didn't know about it, all right, and it's my fault for not knowing about it." App. 660, ll. 18 – 20.

- "I wasn't prepared for an alibi defense because I didn't know about it, and, again, that's my fault. I'm wrong. I'll make it clear." App. 665, ll. 13 – 16.

Even though Goss was incarcerated from the time of his arrest until trial, Mr. Smiley stated that even if he had known potential alibi witnesses existed, he would have put the burden on Goss to go find the witnesses and have them come to his office. Regarding this strategy, he said, "It didn't happen, and if it was my fault, I was wrong." App. 672, ll. 12 - 17.

The PCR Court's Order

Despite taking judicial notice that petitioner had four witnesses who would give him an alibi defense, the PCR court denied relief. The court stated that it "had the opportunity to observe each witness at the hearing, and to closely pass upon his or her credibility." App. 690-91. It also re-stated its decision to take judicial notice of petitioner's witnesses' testimony. App. 691-92. It made a favorable finding as to trial counsel's credibility and an adverse finding as to petitioner's credibility. App. 696.

The court then held that counsel "adequately conferred with Applicant, conducted a proper investigation, reviewed the discovery with Applicant, and was thoroughly competent in

his representation." App. 696. The court also held that "counsel made a valid strategic decision to only call Applicant's mother as a witness at trial." App. 696. The court found that applicant did not give counsel his alibi witnesses until after the trial and that even if Smiley had known about them, it would have made no difference because the witnesses "were family or had a prior criminal record." App. 698.

The Court of Appeals' Opinion

The Court of Appeals affirmed in an unpublished *per curiam* opinion. App. from Ct. App. 3. The court appears to credit trial counsel with a reasonable strategic decision and that his investigation was sufficient. App. from Ct. App. 4.

Discussion

The Court of Appeals erred in affirming the PCR court's holding that trial counsel was not ineffective. In a post-conviction relief proceeding, a petitioner may be granted relief based on ineffective assistance of counsel if he shows: (1) that trial counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by counsel's ineffective performance. See Strickland v. Washington, 466, U.S. 668 (1984). To prove prejudice petitioner must show that there was a reasonable probability that but for counsel's errors, the result of the proceeding would be different. See Cherry v. State, 300 S.C. 386 S.E.2d 624 (1989). A "reasonable probability" is simply a probability sufficient to undermine confidence in the outcome of the trial. See Johnson v. State 325 S.C. 182, 480 S.E.2d 733 (1997).

Trial counsel admitted that he should have discovered the existence of his client's alibi. He admitted that he failed to discuss the facts of the case with Goss and that he conducted no investigation. Without conducting any investigation or without any knowledge of the alibi, trial counsel could not have made a reasonable strategic decision to abandon an alibi defense. Strategic

choices of trial counsel are entitled to deference, but such decisions must be made after thorough investigation of the facts of the case. Wiggins v. Smith, 539 U.S. 510, 521-22 (2003). As trial counsel admitted, he did not conduct an investigation to determine the validity of an alibi defense, so no reasonable strategic decision could be made.

This case is similar to Walker. In Walker, the attorney failed to interview or contact the defendant's alibi witness. Walker at 403-04, 756 S.E.2d at 146. The witness would have testified that the defendant spent every weekend with her during the time period when the rape occurred. Id. The Court held that one component of an attorney's duty is "to investigate alibi witnesses identified by a defendant, and the failure to make some effort to contact them to ascertain whether their testimony would aid the defense is unreasonable." Id. at 405, 756 S.E.2d at 147. Here, trial counsel failed to discuss the case or prepare the case for trial with petitioner. Petitioner tried in vain to get trial counsel to call his witnesses as is corroborated by the voir dire at jury selection, but trial counsel ignored him and his witnesses. This failure to investigate is unreasonable and cannot form the basis for any reasonable strategic decision.

The Court of Appeals erred in upholding this finding because trial counsel failed to conduct any investigation that would have allowed him to make a reasonable strategic decision about an alibi. Wiggins, 539 U.S. at 521-22 Trial counsel's testimony regarding the alibi defense was as follows:

- "I didn't know about an alibi. I'm not saying there wasn't one, I didn't know about one, and if I should have known about that, I'm wrong. First time I've heard about alibi, it was after the case was tried. If that's my fault, it's my fault." App. 656, ll. 12 – 16.

- "If there was an alibi I didn't know about it, all right, and it's my fault for not knowing about it." App. 660, ll. 18 – 20.

- "I wasn't prepared for an alibi defense because I didn't know about it, and, again, that's my fault. I'm wrong. I'll make it clear." App. 665, ll. 13 – 16.

It is also clear that petitioner gave trial counsel a list of his alibi witnesses at jury selection because the names of these witnesses were called during voir dire. App. 633, l. 13 – 14, l. 7. App. 638, l. 18 – 641, l. 19. App. 17, l. 1 – 19, l. 9. Trial counsel's investigation in this case was limited to receiving the discovery from the State. He did not interview any witnesses nor did he hire an investigator. App. 665, ll. 18 – 25. This investigation was not constitutionally adequate. Von Dohlen v. State, 360 S.C. 598, 602 S.E.2d 738 (2004).

Furthermore, the PCR court improperly speculated that trial counsel would not have presented an alibi defense even if he knew about it. **This conclusion is apparently based on a *de facto* credibility finding regarding the alibi witnesses.** The PCR Court took judicial notice of the witnesses who were prepared to testify that Goss was at a baby shower during the robbery. Despite dispensing with their live testimony, the PCR judge essentially made a finding that their testimony would not have been credible because they were friends and relatives of Goss. Appellate counsel respectfully submits that because of the nature of Goss's alibi (his son's baby shower), the only witnesses who would have been in attendance would have been Goss's friends and family. The PCR court's conclusion is illogical. Without observing these witnesses or hearing them speak, the PCR court inexplicably concluded that a jury would have disregarded their testimony. A PCR court should not be allowed to make a credibility finding without hearing a witness's testimony.

The PCR court also improperly speculated that even if trial counsel had known about the evidence of Sharon Goss purchasing a gun and clothing, he would not have called Sharon Goss. The PCR judge speculated that trial counsel would have elicited this testimony from Thomasina. Such speculation also does not create a reasonable trial strategy because trial counsel discredited Thomasina himself. During his closing argument, trial counsel made the following comments about Thomasina:

> We got Ms. Goss, **who has lied before**, and I'm not going to sit here and tell you she's Mother Theresa, but she came in and told you things that she knew. Take it for what you believe it's worth, but she told you she bought all that and she bought all stolen goods, **and, of course, she would say what she needs to protect her son.** App. 484, ll. 9 – 15 (emphasis added).

These statements about his only witness destroyed his own defense.

The solicitor seized on these remarks during his closing argument, saying that trial counsel "admitted it's a mom looking out for her son, and they needed to somehow explain why in the world you have all these tags. Otherwise, that is one heck of a random shopping spree today after a clothing store got robbed." App. 500, ll. 5 – 9. Thomasina's prior convictions made her a poor choice as the only defense witness. Even if the other alibi witnesses had prior records, it does not help to choose a single witness with prior convictions for lying over multiple helpful witnesses who may or may not also have prior convictions. Presenting testimony of the other witnesses through Thomasina instead of putting them on the stand only makes sense if Thomasina had no prior record. The PCR court erred in manufacturing an illogical strategy for trial counsel.

Goss can also demonstrate prejudice. First, the PCR court took judicial notice that Goss's alibi witnesses would all say he was at his son's baby shower during the commission of the robbery. This meets the legal definition of an alibi. Second, the court had no ability to assess the witnesses' credibility. The PCR court therefore erred in making a *de facto* credibility analysis solely on the basis that these witnesses were Goss's friends and family. Finally, even though the PCR court took judicial notice of the existence of an alibi, it failed to view this evidence in a light favorable to Goss.

The error on the prejudice prong is also similar to Walker. In Walker, the Court of Appeals found that the alibi was insufficient because the witness could not place the defendant with her on the specific date of the crime. Walker at 404, 756 S.E.2d at 146. The Supreme Court reversed,

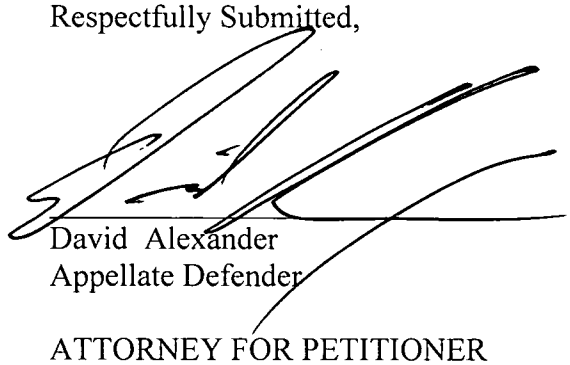
finding that the court's definition of alibi was too narrow. Id. at 405, 756 S.E.2d at 147. Similarly, the PCR court here disregarded petitioner's alibi witnesses because it surmised (without actually taking their testimony) that they were related to him or had criminal records. This was error because as a result of taking judicial notice of their testimony, the only record before the court was that petitioner had an alibi that satisfied the legal definition.

Had trial counsel prepared and presented an alibi defense, there is a reasonable probability that the outcome of the trial would have been different. The victim recognized Goss from his earlier purchases in his store and still did not identify Goss as one of the robbers, even though he could identify his co-defendant. Goss's presence in the store as a customer was a potential explanation for the fingerprints on the door. No other physical evidence directly tied Goss to the robbery. See State v. Bennett, 408 S.C. 302, 758 S.E.2d 743 (Ct. App. 2014) (holding that fingerprint and DNA evidence were insufficient to withstand directed verdict motion in a burglary case). His brother's testimony, that he purchased the gun and clothes, would have explained another key piece of the State's evidence against Goss. In this wholly circumstantial case, an alibi defense would have been critical. The PCR court therefore erred in finding that Goss could not demonstrate prejudice. This Court should grant certiorari and reverse the Court of Appeals' affirmance.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari with the ultimate result of reversing petitioner's convictions and granting him a new trial.

Respectfully Submitted,



David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

This 14th day of November, 2016.

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S.C. SUPREME COURT

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DARRELL L. GOSS,

PETITIONER,

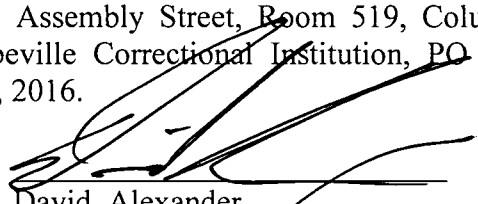
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

I certify that a copy of the Petition for Writ of Certiorari to the Court of Appeals and a copy of the Appendix to the Court of Appeals in this case has been served on Ruston W. Neely, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Darrell L. Goss, #305517, at Turbeville Correctional Institution, PO Box 252, Turbeville, SC 29162, this 14th day of November, 2016.



David Alexander
Appellate Defender
ATTORNEY FOR PETITIONER

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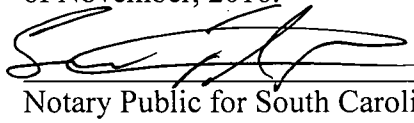
of November, 2016.



(L.S)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.