

VOLUME II OF II

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas
Post-Conviction Relief
Brooks P. Goldsmith. - Presiding Judge

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JUN 16 2017

S.C. SUPREME COURT

Case No.: 2016-002253

Gregory Velez #345428 Petitioner,

vs.

State of South Carolina Respondent.

APPENDIX

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1 State of South Carolina

Court of Common Pleas

2 County of Lexington

3
4 Gregory Velez,)

Transcript of Record

5 Applicant,)

6 vs.)

2013-CP-32-1230

7 The State of South Carolina,)

8
9 June 9, 2015

Lexington, South Carolina

10
11 B E F O R E:

12 The Honorable Brooks P. Goldsmith, Judge

13
14 A P P E A R A N C E S:

15 John W. "Walt" Whitmire, Assistant Attorney General
Attorney for the State

16 Kristy G. Goldberg, Esquire
17 Attorney for Defendant

18 Anna R. Good, Esquire
19 Attorney for Jeremy Leaphart

20
21 Stacy S. Johnson, RPR
22 Circuit Court Reporter

23
24 COPY
25

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P R O C E E D I N G S

(Plaintiff's Exhibit Numbers 1 through 8 were marked for identification.)

MR. WHITMIRE: Judge, may we approach?

THE COURT: Certainly.

(Proceedings held at the bench; not reported.)

MR. WHITMIRE: May it please the Court, the last matter before Your Honor today is Gregory Velez v. State of South Carolina. Case Number 2013-CP-32-1230.

Mr. Velez was indicted for burglary first degree, kidnapping, and the weapons provision. He proceeded to trial and was represented by Mr. Michael Duncan. He was found guilty as indicted and Judge McMahon sentenced him to an aggregate term of twenty-five years to run concurrent with all the sentences.

He filed -- a notice of appeal was filed on his behalf. Office of Appellate Defense filed an Anders brief and that was ultimately denied, dismissed, and disposed of. He has since filed a timely application for post-conviction relief and an amended application.

To give you a little backstory on this case factually, this isn't a who-done-it case, it isn't an overly complicated case. Mr. Velez had three co-defendants; Mr. Barnes, Mr. Thompson, and Mr. Leaphart. They all consistently testified to the most material and important facts; that they

1 enter -- they decide to rob a particular victim in the middle
2 of the day. Mr. Velez was the driver. In the act, three of
3 them enter the home; one stands guard. All three were armed,
4 all are consistent on who had which gun. Mr. Thompson had the
5 AK-47, Mr. Velez had an assault-type shotgun, Mr. Leaphart had
6 a handgun and the other defendant had a handgun, too. The
7 victims were all consistent on -- on the guns, too, and who
8 did what with the guns. This was a case where they were
9 caught in the act. Suspicious activity was reported in the
10 neighborhood. The police parked their car near the Tahoe,
11 which was running. The inmate who was standing guard takes
12 off on foot when an officer pursues him. The other three go
13 -- take off on foot in the woods and another officer pursues
14 them.

15 They're ultimately -- Mr. Velez and his two other
16 co-defendants were arrested. Mr. Leaphart was alone by
17 himself. They all originally gave dishonest statements to the
18 police, but eventually three pled guilty -- well, two pled
19 guilty, one was going to plead guilty, and Mr. Velez was the
20 holdout who went to trial.

21 The corroborating facts in this case as Judge McMahon
22 concluded at the end were pretty convincing and compelling in
23 the sense that Mr. Velez's driver's license was found in the
24 driver's side of the Tahoe. Mr. Velez, it was absolutely
25 consistent throughout the testimony he had a shotgun, that was

1 his weapon, and when he was apprehended two shotgun shells were
2 found in his pockets.

3 This entire PCR action mostly centers around counsel's
4 investigation, preparation for trial and execution of his trial
5 strategy as relates to the cross-examination of these three
6 co-defendants. The immaterial -- the inconsistencies are
7 erroneous and immaterial at best and the State would -- would
8 possibly intend to show that Mr. Duncan executed a wonderful
9 trial strategy and if there was even the potential deficiency
10 the prejudice bar is almost impossible to overcome in this case
11 because of the facts of it.

12 One thing that makes this case landing procedurally here
13 is that Mr. Velez's co-defendant has been transported and
14 intends to testify, I believe, on his behalf. The extent of
15 that testimony, I have no idea. I think there might be a
16 recantation. Because of that both sides had a motion to have
17 an attorney appointed. An order was entered. Ms. Good is
18 present and represents Mr. Leaphart, who is back there, on his
19 rights and consequences of testifying in this matter. The
20 State has had no contact with Mr. Leaphart in any form or
21 fashion.

22 Everyone's present. Applicant is represented by
23 Ms. Goldberg. At this time, I turn matters over to
24 Ms. Goldberg to announce anything else she may have for the
25 record.

1 **THE COURT:** Ms. Goldberg.

2 **MS. GOLDBERG:** Thank you, Your Honor. May it please the
3 Court? An amended application was filed on the Applicant's
4 behalf on May 7th of this year. For the record, and for
5 clarity, the allegations that are being presented today are
6 all ineffective assistance of trial counsel as to -- the
7 actual trial counsel, none against appellate counsel or
8 anything like that. These allegations are: Failure to
9 properly cross-examine all co-defendants generally. Failure
10 to properly cross-examine Jeremy Leaphart, who is one of the
11 defendants -- or co-defendants. Ineffective trial strategy
12 regarding introduction of certain exhibits that were not
13 substantially helpful and resulted in losing the opportunity
14 for last closing argument. Failure to object to the admission
15 of State's Exhibit 32, which will be presented today, as it
16 was used against the Defendant without being properly
17 authenticated. Failure to properly cross-examine the victims.
18 Failure to properly cross-examine Officer McCullum. And
19 failure to move to suppress any evidence obtained as a result
20 of the search warrant for the automobile. And then, Your
21 Honor, we will argue that the cumulative nature of these
22 errors were such that he was prejudiced and the trial cannot
23 be relied on as having produced a just result.

24 Your Honor, at this time in order to prove these
25 allegations, I'd like to call my client, Mr. Velez, to the

1 stand.

2 **THE COURT:** All right.

3 **MR. WHITMIRE:** May it please the Court? And for the
4 record, Your Honor, counsel has more than timely sent me a
5 notice of her intended exhibits from counsel's file. The
6 State absolutely does not object and by consent agrees to
7 their admission at the proper time.

8 **THE COURT:** Okay.

9 **MR. WHITMIRE:** I believe they've all been pre-marked.

10 **THE CLERK:** Raise your right and place your left hand on
11 the Bible.

12 GREGORY VELEZ,

13 having been duly sworn, testified as follows:

14 **THE CLERK:** If you'll have a seat and state your name for
15 the record.

16 **THE WITNESS:** Gregory Velez.

17 DIRECT EXAMINATION

18 BY MS. GOLDBERG:

19 Q. All right, sir. Where are you currently housed?

20 A. Lieber Correctional Institute.

21 Q. And what sentence are you serving?

22 A. A 25-year sentence.

23 Q. When were you arrested?

24 A. August 13, 2008.

25 Q. Have you been incarcerated consistently since that date?

1 A. Yes, ma'am.

2 Q. You never went out on bond or anything?

3 A. No, ma'am.

4 Q. What were you charged with?

5 A. Burglary first, armed robbery, kidnapping, criminal
6 conspiracy, possession of a firearm during a violent crime,
7 and grand larceny.

8 Q. You ultimately had a jury trial on this case?

9 A. Yes, ma'am.

10 Q. What was your sentence?

11 A. Twenty-five years.

12 Q. Total, correct?

13 A. Total, yeah. I was sentenced to twenty-five years and I
14 think five charges ran together.

15 Q. Do you understand what a PCR or what post-conviction
16 relief is?

17 A. Generally, yes.

18 Q. Do you understand that if we're successful in this hearing
19 that your charges aren't dismissed; that you actually start
20 over and your charges would be pending again?

21 A. Yes, ma'am.

22 Q. You understand that if the charges were to be pending
23 again you would then have the decision of whether to have
24 another jury trial or to plead guilty?

25 A. Yes, ma'am.

1 Q. Do you want to go forward with this PCR understanding
2 that's the possible result?

3 A. Yes, ma'am.

4 Q. When you were arrested -- or after you were arrested in
5 August of 2008, who was your first attorney?

6 A. Arie Bax.

7 Q. How long did he represent you?

8 A. I'm not really sure. About a little over a year.

9 Q. What happened with his representation? Why did it end?

10 A. It took him eight months to get me in court. Because he
11 thought I was gonna plead is the only reason he got me into
12 court and when I got there he cited a couple of case laws and
13 a couple of rules and seeing if they could get me a bond and
14 they ended up giving me a bond.

15 Q. They did give you bond?

16 A. Yeah, they give me a bond eight months later. April 15th.

17 Q. But you were never to afford the bond?

18 A. (Shakes head.)

19 Q. Why did Mr. Bax ultimately stop representing you?

20 A. I constantly was trying to contact him and talk to him
21 about my case and he just wouldn't respond to none of my
22 letters. He was just under the assumption that I was gonna
23 plead, so as a result of that I asked him to please remove
24 himself from my -- my case if he has a biased opinion already.

25 Q. And he did?

1 A. Yes, ma'am.

2 Q. Was another attorney then appointed?

3 A. Yes, ma'am.

4 Q. Who was that?

5 A. I don't remember his name because he was appointed for
6 about three weeks and there was a conflict of interest because
7 he represented the victim on drug -- prior drug charges.

8 Q. Okay. And then after that what happened?

9 A. I was appointed Mr. Mike Duncan six months prior to my
10 trial.

11 Q. Did he come and visit you at the jail?

12 A. Yes, ma'am.

13 Q. Did he go over your discovery with you?

14 A. Yeah. Generally, yeah.

15 Q. And he prepared your case for trial?

16 A. Yes, ma'am.

17 Q. Generally speaking, what defense was he prepared to go
18 forward on at trial?

19 A. He said something about a defense -- I don't know exactly
20 the name, but it was like everyone versus one person or I'm the
21 little old person in the whole state versus me, which generally
22 consisted of -- since my co-defendants all -- since they pled
23 guilty, that he wanted to -- his defense to say that they pled
24 guilty of these charges, but I wasn't with them when they
25 committed this.

1 Q. While your charges were pending, did you receive a plea
2 offer at any point?

3 A. Not that I'm aware of, no. I've not seen -- when I
4 received my discovery -- oh, excuse me. When I received my
5 discovery, they gave me something like just a little
6 scribble-scrabble on the paper talking about thirty years or
7 twenty-two or something. I don't -- I'm not really sure.

8 **MS. GOLDBERG:** Your Honor, at this time I would show the
9 Applicant Plaintiff's Exhibit Number 1 for identification
10 purposes.

11 **MR. WHITMIRE:** Without objection.

12 **THE COURT:** Admitted without objection.

13 (Plaintiff's Exhibit Number 1, a plea agreement, was
14 admitted into evidence.)

15 BY MS. GOLDBERG:

16 Q. Mr. Velez, have you seen this piece of paper before?

17 A. Yeah.

18 Q. What is that?

19 A. That's -- that's the paper that came with my discovery.
20 It says a plea agreement.

21 Q. And what does it say the plea agreement -- or the plea
22 offer was?

23 A. It says the plea offer was a cap of twenty.

24 Q. Were you aware of that while your charges were pending?

25 A. No one ever came and talked to me about it.

1 Q. Would you have accepted that plea agreement if you had
2 known about it?

3 A. No, ma'am.

4 Q. You don't remember any other plea offers that were
5 offered?

6 A. I never had any other plea offers.

7 Q. Mr. Velez, you and I have discussed your amended
8 application, correct?

9 A. Yes, ma'am.

10 Q. And that generally covers several things that you believe
11 your attorney did that were ineffective?

12 A. Yes, ma'am.

13 Q. All right. Now the first one on the amended application
14 is that you believe your attorney failed to properly
15 cross-examine your co-defendants. This is just a general
16 thing, not specific to Mr. Leaphart; is that correct?

17 A. Yes, ma'am.

18 Q. Okay. Can you give me some examples of how he should
19 have better cross-examined those co-defendants?

20 A. I feel like he should have brought up their original
21 statement and not just allow the State to -- to ask my
22 co-defendants about it and they -- they say it's a lie and
23 dismiss the whole original statement. And because it was
24 Mirandized, it was admissible at court. He should have brought
25 it up in order to impeach them.

1 **MR. WHITMIRE:** Objection; relevance.

2 **THE COURT:** Overruled. Go ahead.

3 **MS. GOLDBERG:** Thank you, Your Honor.

4 BY MS. GOLDBERG:

5 Q. All right, Mr. Velez. You reviewed the discovery,
6 correct?

7 A. Yes, ma'am.

8 Q. Is it your understanding that all of the co-defendants,
9 including yourself, spoke with police after you were arrested?

10 A. Yes, ma'am.

11 Q. All right. And generally what is your understanding of
12 what the other defendants said originally? Did they deny it
13 or did they admit it?

14 A. Completely denied all allegations of these charges.

15 Q. During the cross-examination of Mr. Barnes and
16 Mr. Thompson, two of your co-defendants, did your lawyer ask
17 them about that?

18 A. Absolutely not, ma'am.

19 Q. Did he bring up the fact that they had denied it initially
20 at all?

21 A. No, ma'am.

22 Q. Is it your understanding that -- is it your understanding
23 that the co-defendants all -- all of their initial statements
24 were audio-recorded?

25 A. Yes, ma'am.

1 **MS. GOLDBERG:** All right. At this time, Your Honor, I
2 would just offer Plaintiff's Exhibit No. 2. That's just the
3 audio recordings.

4 **MR. WHITMIRE:** Without objection.

5 **THE COURT:** All right.

6 **MS. GOLDBERG:** We'll just make this a part of the record.
7 I'm not gonna play it.

8 **THE COURT:** Certainly. Okay.

9 (Plaintiff's Exhibit Number 2, audio recordings, was
10 admitted into evidence.)

11 BY MS. GOLDBERG:

12 Q. Mr. Velez, as to the audio recordings, do you have a
13 specific allegation of what your lawyer should have done?

14 A. I feel like he should have brought up the audio recording
15 after -- during his cross-examination I thought he should have
16 brought it up and, you know, questioned them about their
17 original statement and allow the jury to hear this original
18 statement so they can make their own decision on whether the --
19 the original statement was a lie or the statement that -- the
20 testimony they recited on trial was a lie or just to discredit
21 their word completely, you know. With audio you can actually
22 listen to people's ability to lie, you know, tone of voices and
23 all that. I'm not a professional, but I'm sure -- I'm sure one
24 of the statements have to have been a lie and I feel like the
25 jury should have been allowed to -- to review and inspect it

1 and make their own decision because they are the truth-testing
2 device of the adversary system.

3 Q. But the way it was presented, the jurors were not even
4 aware that they had given that original statement denying the
5 allegations, correct?

6 A. Yes, ma'am.

7 Q. Aside from that issue, what other examples are there where
8 you think your attorney should have better cross-examined your
9 co-defendants?

10 A. I feel like if -- if every one of my co-defendants
11 committed this, then all of their stories should have been
12 exactly the same, not just generally the same. Like, you
13 know, the chain of events that happened within this dwelling
14 should have been exactly the same and he could have punched
15 holes in their statements with that. Like, for example, you
16 got Mr. Leaphart who said it was his idea when he got on the
17 stand, but Barnes and Thompson stated it was my idea. And
18 you've got -- you've got Mr. -- Mr. Thompson that say he
19 snatched the wire from the speaker and gave it to Barnes and
20 Barnes tied everybody up and you've got Barnes that say he
21 snatched the wire from the speaker and gave it to me and I
22 tied everybody up. You also got -- the way the money was
23 supposedly handed off, you've got one person saying he handed
24 Mr. Leaphart the money and then you've got the other one
25 saying that I handed Mr. Leaphart the money. It's just total

1 confusion. Like I say, instead of just the general story
2 being the same, every single detail should have been the same
3 if they committed this together.

4 Q. And that's all reflected in the transcript of the trial?

5 A. Yes, ma'am.

6 Q. And your lawyer failed to point out these differences in
7 their testimony during the trial?

8 A. Yes, ma'am.

9 Q. Your allegation is that a more proper cross-examination
10 would have made a difference in your case. Is that what you
11 believe?

12 A. Yeah, a more proper cross-examination.

13 **MR. WHITMIRE:** Objection; calls for speculation.

14 **THE COURT:** Okay. Overruled. Go ahead.

15 **MS. GOLDBERG:** Thank you, Your Honor.

16 BY MS. GOLDBERG:

17 Q. In what way would it have made a difference?

18 A. I think it would have questioned the credibility of my
19 co-defendants' word on their ability to tell the truth. You
20 know, a jury only knows what you tell them, so if they don't
21 have all factual evidence of what's going on, then they can't
22 knowingly make an intelligent decision on what the verdict
23 should have been.

24 Q. Now regarding Jeremy Leaphart specifically, what do you
25 think your lawyer should have done in cross-examining him?

1 What should he have brought up?

2 A. All right. Before trial he -- he wanted to talk to me
3 and the Solicitor, Ms. Angela Garrick, allowed me to go to the
4 back room and talk to him in front of my attorney and in front
5 of a court investigator, and the first question I asked him
6 was, you know, why are you doing this to me? You got your time
7 already, why are you coming back, and he said to me, and he
8 will verify this, that they said they're gonna give him five
9 extra years if he doesn't.

10 **MR. WHITMIRE:** Objection to hearsay.

11 **THE COURT:** Sustained.

12 **MS. GOLDBERG:** Thank you, Your Honor.

13 BY MS. GOLDBERG:

14 Q. You stated that your attorney was -- without going back
15 into what was actually said during the meeting, you said that
16 your attorney was present for this conversation?

17 A. Yes, ma'am.

18 Q. Was he able to hear everything that was said?

19 A. Yes, ma'am.

20 Q. Do you believe your attorney should have used that
21 information in cross-examining Mr. Leaphart during the trial?

22 A. Yes, ma'am. I feel like he should have used it because
23 it would have showed like duress. They were forcing him to do
24 that.

25 Q. During Mr. Leaphart's actual cross-examination by

1 Mr. Duncan, two exhibits were introduced into evidence; is
2 that right?

3 A. Yes, ma'am.

4 Q. And based on your recollection of the trial and your
5 reading of the transcript, those were the only two exhibits
6 ever introduced on your behalf; is that right?

7 A. Yes, ma'am.

8 **MS. GOLDBERG:** This is Plaintiff's Exhibit Number 3.

9 **MR. WHITMIRE:** Without objection.

10 **MS. GOLDBERG:** Your Honor, may I approach?

11 **THE COURT:** Admitted without objection.

12 (Plaintiff's Exhibit Number 3, a letter and statement,
13 was admitted into evidence.)

14 **MS. GOLDBERG:** And I'm actually gonna -- if the State
15 doesn't mind, I'm gonna hand the judge a courtesy copy of
16 these.

17 **MR. WHITMIRE:** Without objection.

18 BY MS. GOLDBERG:

19 Q. Mr. Velez, if you could just describe to me what you're
20 looking at?

21 A. This is just a personal letter from Jeremy Leaphart to me.
22 Just a letter to me from Jeremy Leaphart.

23 Q. And that was actually introduced as an exhibit at trial,
24 correct?

25 A. Yeah. He actually wrote it -- he actually wrote it to

1 tell me what happened and it's a brief -- it's a briefing on
2 what happened. Like when they pulled up on me on the street,
3 he was already in handcuffs in the car.

4 Q. Do you believe that the entry of that exhibit in your
5 trial was beneficial to your case?

6 A. Absolutely not.

7 Q. Did you and your attorney ever discuss entering that
8 letter as an exhibit at trial?

9 A. I don't recall.

10 Q. What is the next -- the next pages after that's part of
11 the same Applicant's Exhibit Number 3, what are the following
12 two pages?

13 A. It's a written statement.

14 Q. By who?

15 A. From Mr. Jeremy Leaphart.

16 Q. And was that document admitted in your jury trial?

17 A. Yes, it was.

18 Q. Was that document beneficial to your case?

19 A. Absolutely not.

20 **MR. WHITMIRE:** Objection; calls for speculation. And on
21 relevance, too.

22 **THE COURT:** Overruled. Go ahead.

23 **BY MS. GOLDBERG:**

24 Q. Did you and your lawyer ever discuss the entry of that
25 document in your case?

1 A. I don't recall. I don't think so. I don't recall.

2 Q. Were these documents harmful to your case?

3 A. Absolutely.

4 Q. Explain that to the Court.

5 A. First, the actual letter, we had Mr. Leaphart read it on
6 the stand and somehow it triggered the -- the State to come
7 with a recross and show him a letter that I supposedly wrote
8 him similar to this letter and then they painted a picture of
9 us trying to help each other or something of that nature. On
10 top of that, it was -- my letter wasn't authenticated. Like I
11 -- I didn't -- didn't no one ask me did I write a letter to
12 him, no one -- no court proceedings, nothing of the matter,
13 none of that.

14 MS. GOLDBERG: Your Honor, at this time I'll present
15 Plaintiff's Exhibit No. 4 into evidence.

16 MR. WHITMIRE: No objection.

17 THE COURT: Thank you.

18 (Plaintiff's Exhibit Number 4, a letter, was admitted
19 into evidence.)

20 BY MS. GOLDBERG:

21 Q. Mr. Velez, what is this document, our Exhibit Number 4?

22 A. This is a letter I supposedly wrote him.

23 Q. That was entered at trial as well?

24 A. Yes.

25 Q. Who entered that document at the trial?

1 A. The Solicitor entered that, Ms. Angela Garrick, I believe,
2 or Rhonda Patterson, one of the two.

3 Q. She did not enter that document into evidence during your
4 -- during the direct testimony of Mr. Leaphart, correct?

5 A. No, ma'am. She -- she did it as like a -- the only one
6 reason I did this is because you did that because the only
7 reason -- the only reason she brought this letter up is because
8 my attorney brought this letter up.

9 Q. Your understanding was that he opened the door for her to
10 be able to introduce that letter?

11 A. Now, yeah. Now that's my understanding now. Back then
12 I really didn't know really. I thought -- I thought I wasn't
13 supposed -- they wasn't supposed to bring up my statement or
14 record or anything unless I'm the one that got on the stand
15 and actually read this letter. Other than that, I thought it
16 would be considered hearsay.

17 Q. You didn't testify at all during your trial, correct?

18 A. No, ma'am.

19 Q. Nobody ever asked you whether that was your handwriting
20 or not?

21 A. No, ma'am.

22 Q. Nobody ever got you to look at it and say whether you
23 wrote it or not?

24 A. No, ma'am.

25 Q. Were there any experts offered regarding handwriting

1 samples from you?

2 A. No, ma'am. The letter was never even mentioned until the
3 trial.

4 Q. Did you know anything about these -- both of these letters
5 prior to trial?

6 A. I've known about this one.

7 Q. Which one?

8 A. The one that came from Jeremy Leaphart.

9 Q. You understand that because both of these exhibits, the
10 statement and the letter by Jeremy Leaphart, were introduced
11 at trial that you weren't able to have the last closing
12 argument, correct?

13 A. I understand that now.

14 Q. Did you know that during trial?

15 A. No, I did not.

16 Q. Did your lawyer ever explain to you that if evidence was
17 admitted during trial you could lose closing argument?

18 A. No, ma'am.

19 Q. Did he ever explain to you the benefits or -- the
20 possible benefits that could result from that?

21 A. No, ma'am.

22 Q. If you had known that at the time, would you have wanted
23 these exhibits to be offered into evidence?

24 A. No. The thing is this: He only entered this into
25 evidence. He didn't -- if he was gonna enter something into

1 evidence, you might as well just enter everything that I
2 pointed out to you in evidence at the same time instead of
3 just entering this one little piece of paper -- these three
4 little pieces of paper and losing closing argument because that
5 last -- that last say-so is --

6 **MR. WHITMIRE:** Objection; asked and answered.

7 **THE COURT:** Overruled. Go ahead.

8 A. Because that last -- that last -- to me, now that I have
9 actually sat down and had time to really sit down and study
10 certain aspects of the law, that closing statement is like --
11 is absolutely important and is of utter importance.

12 Q. But you would have been okay losing it if there were
13 exhibits offered that you thought were helpful?

14 A. Yeah, if he would have entered that -- this, if he would
15 have entered the victims' statements, if he would have entered
16 CAD reports, if he would have entered evidence inventories
17 stating that my vehicle was -- they had went in my vehicle five
18 days before they even had a search warrant. If he would have
19 entered all of this, I believe that the cumulative -- you know,
20 all of it together would have at least raised a reasonable
21 doubt.

22 Q. Okay. Now moving on to the examination of -- or the
23 cross-examination of the victims in this case, your allegation
24 is that your lawyer ineffectively cross-examined them. Can
25 you provide the Court with examples of that?

1 A. The victim, John Corley, he basically made a statement
2 and he told what happened in the statement, and his first
3 question was: Can you tell me something about the people in
4 your house? And he stated: The first one was six-one,
5 slender, dark skin. He was wearing a stocking, but you can
6 see through it. I can identify him again with no problem.

7 The issue that I have there with "no problem", when a
8 person says "no problem", that means there's no doubt in their
9 mind if they see this person in a store or they see this person
10 at a gas station --

11 **MR. WHITMIRE:** Objection; relevance. The witness is --

12 **THE COURT:** Overruled.

13 A. -- I believe if they -- they would see them.

14 Q. And that actually -- that particular issue was addressed
15 by your lawyer on cross-examination, right?

16 A. Yeah.

17 Q. So what did your lawyer leave out that he should have
18 addressed?

19 A. I feel like he should have addressed the fact that --
20 okay. He said -- during trial he said he didn't want to get
21 no one in trouble, so that's understandable, but he went so
22 far as to describe every single person that he'd encountered
23 that day, like body structure-wise.

24 Q. Okay.

25 **MS. GOLDBERG:** Your Honor, at this time I'm gonna present

1 the Applicant with Plaintiff's Exhibit Number 5. This is the
2 statement of Mr. Corley and the booking photo -- I mean, the
3 booking report of Mr. Velez. I think that will aid him in his
4 testimony in this regard.

5 **THE COURT:** Without objection?

6 **MR. WHITMIRE:** Your Honor, I certainly don't object to
7 the exhibit itself. At this time I would just object to
8 any further testimony on the matter. He's announced his
9 allegation. This is an issue within the professional realm
10 of his trial attorney. Mr. Velez didn't represent himself,
11 per se. This would be a proper matter for another witness
12 since he's made his allegation very clear.

13 **MS. GOLDBERG:** Your Honor, he's got, as I understand
14 it, very specific -- a very specific line in this victim's
15 statement that I think he believes should have been brought
16 out during trial and I just want him to be able to relay what
17 that is to the Court.

18 **THE COURT:** All right. Overruled. Go ahead.

19 (Plaintiff's Exhibit Number 5, a statement and booking
20 report, was admitted into evidence.)

21 BY MS. GOLDBERG:

22 Q. Mr. Velez, I've handed you Applicant's Exhibit Number 5.
23 That's the statement of the victim, Mr. Corley. Can you read
24 to the Court the line with the physical descriptions that you
25 believe should have been brought out?

1 A. Okay. The first line says the first guy was about
2 six-one, slender, dark skin. That's one person he described.
3 The second person he described was six-three -- was slim and
4 six-three. The next one he described being five-nine or
5 five-ten, about 170 pounds.

6 Q. And why do you think that's important?

7 A. Because I don't fit neither one of these descriptions and
8 neither does any of my co-defendants.

9 Q. The last page of that exhibit that I handed you was taken
10 from your discovery. That's a copy of your booking form from
11 Lexington County Detention Center; is that right?

12 A. Yes, ma'am. It's actually from Batesburg-Leesville.

13 Q. And how -- what does that document reflect that your
14 height and weight was at the time of arrest?

15 A. That I'm six feet, 209 pounds.

16 Q. And as to your coloring, I know it doesn't say it on the
17 document, but what do you think should have been addressed
18 regarding that?

19 A. Well, I'm -- obviously I'm not dark-skinned. I think I'm
20 -- I'm light-skinned.

21 Q. All right. What's -- is that the extent of your argument
22 regarding the cross-examination of Mr. Corley?

23 A. Yes.

24 Q. Okay. As to the other victim, Ms. Otts, what do you
25 believe, if anything, should have been addressed that wasn't

1 at trial?

2 A. I believe her statement should have been entered into
3 evidence as well because it shows a timeline, something that
4 I was trying to explain to my attorney at the time, and it was
5 kind of confusing in a way, in a sense, and she's the only one
6 -- she's the only victim that kept her original statement and
7 got on the stand and said exactly something -- you know,
8 exactly what was said on that original statement.

9 Q. So the transcript reflects the same thing that's in her
10 original statement?

11 A. Yes, ma'am.

12 Q. Okay. So what did your lawyer need to address during her
13 cross-examination?

14 A. Time. Time is an essential element. She stated in her
15 original statement that this occurred around 1:45 and during
16 -- during the trial she -- she testified that -- it's in the
17 transcript. She said that it took these people ten to
18 fifteen minutes to rob her and it took these people ten to
19 fifteen minutes to get out of the house -- I mean, for her to
20 make the phone call, so that's about thirty minutes. There's
21 a CAD report inside my discovery that shows -- that says
22 recorded call from Connie Otts, which is kind of confusing --

23 **MR. WHITMIRE:** Objection; hearsay.

24 **MS. GOLDBERG:** He's just testifying as to a part of his
25 discovery, which is what his understanding of the facts at the

1 trial would be.

2 **THE COURT:** Overruled. Go ahead.

3 A. All right. In this CAD report, it states 2:15 recorded
4 call from Connie Otts.

5 **MS. GOLDBERG:** And actually to make this a little easier,
6 Your Honor, this is actually Plaintiff's Exhibit Number 6, the
7 CAD report.

8 **MR. WHITMIRE:** I withdraw my objection.

9 (Plaintiff's Exhibit Number 6, a CAD report, was admitted
10 into evidence.)

11 BY MS. GOLDBERG:

12 Q. All right. Mr. Velez, what's important about Plaintiff's
13 Exhibit Number 6?

14 A. Right here it states recorded call from Connie Otts.

15 Q. What are you looking -- at the very top of the page you're
16 reading, what does it say?

17 A. Page 45 and search result.

18 Q. All right. I apologize. Go ahead.

19 A. All right. It's a CAD report and it shows here recorded
20 call from Connie Otts. It says 14:15, which is 2:15 military
21 time. According to her statement on the stand, she said it was
22 between 1:30 and 2:00, and that's the same -- it's consistent
23 with her actual original statement, and what I did was I took
24 math -- I used some math. I took fifteen minutes that it took
25 for them to rob her and fifteen minutes that it took for her

1 to find a phone because the place was like messed up and you
2 subtract it from 2:15 and it's 1:45. Just like her original
3 statement stated and just like her statement on the stand
4 stated.

5 Q. Okay. So the CAD report shows that her testimony would
6 have been consistent and correct. What else is important that
7 should have been brought up? Why does that matter in your
8 case?

9 A. Because it shows -- if you go down that same page, it
10 shows that I was being detained at 1:29, which is sixteen
11 minutes before she claims that the situation happened.

12 Q. So that's the part you think should have been brought out
13 during trial?

14 A. Yeah, because -- since time is an essential element, I
15 was arrested three blocks away -- like, no, not really, about
16 two blocks away and being detained sixteen minutes before the
17 victim, the person who felt this, before she said it happened.

18 Q. Okay. You also believe that Officer -- your attorney
19 should have better cross-examined Officer Kendrick McCullum;
20 is that correct?

21 A. Yes, ma'am.

22 Q. And what should he have brought up in that
23 cross-examination?

24 A. Officer McCullum, he -- when he was being -- when he was
25 being direct -- when he was on direct examination, he had

1 stated that he seen three people on the stand, but in his --
2 his original incident report that's in the discovery he stated
3 he only -- he only visually seen two people.

4 **MS. GOLDBERG:** Okay. Your Honor, at this time I've got
5 Plaintiff's Exhibit 7. This is the incident report of Officer
6 McCullum.

7 **MR. WHITMIRE:** Without objection.

8 (Plaintiff's Exhibit Number 7, an incident report, was
9 admitted into evidence.)

10 BY MS. GOLDBERG:

11 Q. Mr. Velez, is that the document that you believe your
12 attorney should have used in cross-examination?

13 A. Yes. Yes, ma'am.

14 Q. And, again, what does that document say regarding the
15 number of people he saw?

16 A. Okay. First he says -- it says approximate time --
17 officer noticed a black male wearing dark in color pants and
18 dark in color shirt running in the direction of the SUV where
19 reporting officer was standing. Subject at this time
20 apparently made visual contact with reporting officer and
21 stopped running in an area at the approximate distance of
22 fifty yards from reporting officer and the SUV. Reporting
23 officer did notice that the subject did have an object in his
24 right hand that was believed to be a weapon. Reporting officer
25 did present sidearm and gave the subject a command to stop and

1 put the weapon down. Subject at this time began to back
2 away, placing the object behind his leg, and ran back in the
3 direction that he began running from. Reporting officer did
4 notice a second subject through the treeline running in the
5 same direction as Subject 1 with the same colored clothes.

6 Q. And I'll stop you right there. Those are the only two
7 subjects he saw as reflected by his incident report, correct?

8 A. Yes, ma'am.

9 Q. And then -- the difference between that and his trial
10 testimony is?

11 A. He said he seen three people. The reason why this is
12 important to me is I feel like it goes better with the
13 Solicitor's theory of -- of events, of the chain of events
14 that happened that day.

15 Q. And for the record, that testimony where the witness
16 mentioned three people is on Page 245. I'll put that on the
17 record.

18 All right. Mr. Velez, finally you have alleged that you
19 have a problem -- your lawyer should have brought up a problem
20 with your search warrant and the evidence in your case; is that
21 correct?

22 A. Yes, ma'am.

23 Q. All right. Mr. Velez, I'm gonna hand you Plaintiff's
24 Exhibit Number 8, and that's actually two documents. Can you
25 -- do you recognize those documents?

1 A. Yes, ma'am.

2 Q. Were they a part of your discovery?

3 A. Yes, ma'am.

4 BY MS. GOLDBERG:

5 Q. What is your concern with the search warrant and the
6 property in this case?

7 A. The search warrant here has a date of the 14th. It was
8 then signed by a judge, I'm not sure which judge that is, on
9 the 15th and it was executed by -- by Officer -- Lieutenant
10 Steven Clare on August 18, 2008. The thing is, this is the
11 evidence inventory from my actual case and it shows here a
12 bunch of bags and stuff that they say they got that matched
13 the returns from the search warrant, but it also shows here
14 that they took two swabs from my steering wheel on the 13th,
15 which is five days before they claim they executed the search
16 warrant within the vehicle.

17 Q. And it actually shows multiple items that were taken from
18 your car on that day when your car was discovered, correct?

19 A. Yes, ma'am.

20 Q. So your concern is that those items were taken before a
21 search warrant was issued and executed for the car?

22 A. Yes, ma'am.

23 Q. And what do you believe your lawyer should have done?

24 A. He should have had a pre-trial motion to suppress this
25 evidence, this harmful evidence. It shows that law enforcement

1 was inside my vehicle five days before they received this --
2 you know, before they supposedly executed the search warrant
3 from being inside my vehicle.

4 Q. Are there any specific items of evidence that you believe
5 were harmful?

6 A. Yeah, there was supposedly a -- a jug of money found
7 within my truck and if he would have suppressed all this, then
8 that -- that was -- that is what was supposedly taken from the
9 victim was the jug of money. If he would have suppressed the
10 jug of money, then --

11 **MR. WHITMIRE:** Objection, Your Honor; relevance. There's
12 no probative value of taking this testimony as a search
13 incident to arrest, plain view and numerous other exceptions
14 during the course of the commission of a crime would make this
15 entire line of testimony completely pointless.

16 **THE COURT:** I understand the argument, but nonetheless
17 I'm overruling that.

18 **MS. GOLDBERG:** Thank you, Judge.

19 (Plaintiff's Exhibit Number 8, a search warrant, was
20 admitted into evidence.)

21 BY MS. GOLDBERG:

22 Q. You can continue if you weren't finished.

23 A. Just I feel like if -- if they would have suppressed that
24 evidence right there, then they really wouldn't have too much
25 of a case because that's the only -- like the only actual

1 thing that really links me to it is my vehicle. That's the
2 only actual evidence. Everything else is like circumstantial.

3 **MS. GOLDBERG:** All right. Thank you. Please answer
4 the questions of the Assistant Attorney General. Thank you.

5 **THE COURT:** Cross-examination.

6 **MR. WHITMIRE:** May it please the Court?

7 CROSS-EXAMINATION

8 BY MR. WHITMIRE:

9 Q. Good afternoon, Mr. Velez. Your first attorney was Arie
10 Bax?

11 A. Arie Bax.

12 Q. Mr. Bax wasn't attentive to your case?

13 A. No, he came to see me one time, got me in court for a
14 bond hearing, represented me in a Schmerber motion and I never
15 heard from him again until he relieved himself off my case.

16 Q. Did y'all talk about this case at all during that time?

17 A. Every time I wrote him he would not write me back.

18 Q. And I believe you testified you had him relieved or had
19 another attorney appointed because he just wasn't doing enough
20 for you, correct?

21 A. Yeah, he wasn't -- I believe he wasn't performing his
22 attorney -- his job as an attorney and due diligence. He just
23 wasn't doing the job at all. He wasn't responding to my
24 letters or nothing.

25 Q. Fair enough. Then Mr. Duncan gets the case six months

1 before trial?

2 A. Yeah, after another attorney got relieved as well, yeah.

3 Q. At that time you were pretty involved and you expected a
4 lot of your attorneys? Correct me if I'm wrong.

5 A. No, I just -- I just expected them to answer -- answer my
6 questions because I don't bother them like often.

7 Q. Did you tell Mr. Duncan your entire version and facts?

8 A. Yes, sir.

9 Q. Why were you at the scene that day?

10 A. I was on my way to see a female. My vehicle ran out of
11 gas and I wasn't apprehended on the scene of the actual
12 incident.

13 **MS. GOLDBERG:** Objection, Your Honor.

14 Q. What did you tell your attorney --

15 **THE COURT:** I'm sorry?

16 **MS. GOLDBERG:** Your Honor, may we approach?

17 (Proceedings held at the bench; not reported.)

18 **MR. WHITMIRE:** I can withdraw this line of questioning.
19 I beg the Court's indulgence.

20 **THE COURT:** All right, sir.

21 BY MR. WHITMIRE:

22 Q. Do you recall when you testified that you don't dispute
23 that was your truck at the scene?

24 A. No, that is my vehicle, but, once again, it wasn't exactly
25 on the scene.

1 Q. With your license -- driver's license in it?

2 A. I never denied not one time that that was not my vehicle.
3 That is absolutely my vehicle.

4 Q. Now prior to trial you testified that the Solicitor
5 brought you in a conference room with Mr. Leaphart?

6 A. Yes, sir.

7 Q. And it's my understanding you testified to pressure you
8 or to pressure him. What was it?

9 A. Actually he talked to me and tried to talk me out of
10 going to trial because of what he said and I let him say what
11 happened to him.

12 Q. But your attorney was present?

13 A. Yeah, my attorney was present and a court reporter was
14 present as well.

15 Q. If I'm understanding this right, I just want to make
16 certain I've got it down right and you get your day in court,
17 you testified that Solicitor Garrick threatened to add five
18 years to his case in front of your attorney?

19 A. He testified to that in front of my attorney.

20 Q. Were you present?

21 A. Yeah, he said -- he said in front of my attorney and
22 myself and the court investigator. I just can't remember her
23 name or I would have called her, too.

24 Q. Were there similar types of occurrences with your other
25 two co-defendants?

1 A. That's what I'm arguing today. You know --

2 Q. Go ahead.

3 A. -- a person doesn't understand what it feels like to be
4 accused of something that places you at life plus a hundred
5 and five years. They will never understand the pressure that
6 they feel from that unless you've actually been in that
7 situation.

8 Q. And you took your case very serious as a result?

9 A. Absolutely. Yes, sir.

10 Q. Now during the course of trial, did your attorney give
11 you a notepad or anything to write -- write down notes?

12 A. No, I just used the back of my -- it was just the back of
13 one of my paperworks here.

14 Q. But you passed him notes?

15 A. Excuse me?

16 Q. You passed your attorney notes during the trial?

17 A. Yeah. I had -- I had -- he would come and talk to me
18 after questioning everybody and ask me if that's it and any
19 time when there was something, if I asked him -- for example,
20 I asked him about this McCullum thing. I asked him when he
21 was cross-examining him, I said he said there was two people
22 in his original incident report, and he tells me it's
23 insignificant. When I asked him about the original statements,
24 he said it was insignificant. I asked him about Ms. Connie
25 Otts and -- and this CAD report and turning it into evidence

1 and he said it was insignificant.

2 Q. But you were able to communicate with him and y'all
3 talked about how he was gonna approach your three co-defendants
4 prior to trial?

5 A. Not really, no.

6 Q. Did you talk about any of the potential witness testimony
7 prior to trial?

8 A. No. He just -- his -- his strategy was everybody versus
9 us, let them say what they want to say and we'll just -- I
10 guess he wanted closing argument with that, but he just felt
11 compelled to enter my co-defendants' statements in evidence.

12 Q. And all your co-defendants testified on direct that they
13 had originally lied?

14 A. Yeah, and stopped right there.

15 Q. And my understanding is what you're upset about is you
16 wish that your attorney brought out what they lied about?

17 A. Yeah, because I feel like -- I feel it's unjust for --
18 for the Solicitor and my co-defendants, co-conspirators, to
19 make any decision for the jury that that original statement
20 was, in fact, a lie. I feel like they should have been
21 inspected. It should have been able to have been viewed by
22 the jury and they should have made their own assumption on
23 their own understanding of which statement was a lie.

24 Q. Co-defendant Thompson pled guilty before your trial?

25 A. Yeah.

1 Q. Did you and your attorney talk about his guilty plea
2 hearing?

3 A. No, we didn't -- we didn't have any record of it. Just
4 that he pled guilty.

5 Q. Co-defendant Leaphart pled guilty before your trial. Did
6 you and your attorney talk about his guilty plea?

7 A. No, we didn't have a record of that either.

8 Q. Nothing?

9 A. Just that he pleaded guilty. That's all.

10 **MR. WHITMIRE:** I beg the Court's indulgence. No further
11 questions, Your Honor.

12 **THE COURT:** Redirect?

13 **MS. GOLDBERG:** No, Your Honor.

14 **THE COURT:** Thank you. You may step down.

15 (Witness excused.)

16 **THE COURT:** Call your next witness.

17 **MS. GOLDBERG:** Your Honor, at this time the Applicant
18 would call Jeremy Leaphart. Prior to this, prior to calling
19 him, I just want to put on the record, as the Assistant
20 Attorney General said, we came before Your Honor in April and
21 asked -- I had a motion that Mr. Leaphart be appointed counsel
22 for the purpose of testifying at this hearing. That was
23 granted. Attorney Anna Good was appointed by the Court to
24 represent him. She's discussed this matter with him. She
25 maybe wants to put something on the record at this time.

1 **THE COURT:** Ms. Good.

2 **MS. GOOD:** Thank you, Your Honor. I was appointed last
3 week to Mr. Leaphart. I have had a discussion with him about
4 his testimony today and we've discussed all potential legal
5 ramifications of him testifying today and I do believe he
6 wants to testify, but I just wanted to make sure that all that
7 was on the record.

8 **THE COURT:** Okay. Thank you.

9 **MS. GOLDBERG:** At this time we'd call Jeremy Leaphart.

10 JEREMY LEAPHART,

11 having been duly sworn, testified as follows:

12 **THE CLERK:** If you'll have a seat and state your name for
13 the record.

14 **THE WITNESS:** My name is Jeremy Leaphart.

15 DIRECT EXAMINATION

16 BY MS. GOLDBERG:

17 Q. Good morning, Mr. Leaphart.

18 A. How you doing?

19 Q. You are currently incarcerated, correct?

20 A. Yes, ma'am.

21 Q. What sentence are you serving?

22 A. I'm serving a 10-year sentence.

23 Q. For what charges?

24 A. Second degree burglary and attempted armed robbery.

25 Q. Is that incident the one that Mr. Velez was convicted at

1 trial for?

2 A. Yes, ma'am.

3 Q. Did you go to trial yourself or did you plead guilty?

4 A. I pled guilty.

5 Q. Who was your attorney?

6 A. Casey Caldwell.

7 Q. If you can, tell me what plea offers you received in this
8 case.

9 A. They came to me with a -- first time they came with like
10 an open plea for eight to twelve, and I was like "nah". Then
11 I go back to court and they tell me they're gonna give me zero
12 to fifteen on the second degree burglary and zero to twenty on
13 the attempted armed robbery.

14 Q. Is that the one you took?

15 A. Yes, ma'am.

16 Q. And, I'm sorry, what did you say that sentence you're
17 serving is?

18 A. A 10-year sentence.

19 Q. So you could have received twenty years at your plea?

20 A. Yes, ma'am.

21 Q. Were there any conditions made as to this plea offer?

22 A. No, the only thing he told me was to just take the deal.

23 **MR. WHITMIRE:** Objection; hearsay. Well, I'll withdraw
24 it.

25 BY MS. GOLDBERG:

1 Q. Go ahead. You can continue.

2 A. The only thing he said is this is the deal that you're
3 getting. You've got a chance to get probation or from zero
4 to twenty due to that you ain't got no criminal record, so I
5 advise you to go ahead and take the plea, so I'm like all
6 right.

7 Q. Were there any requirements that in exchange for accepting
8 that plea offer you would have to testify in a trial of your
9 co-defendant?

10 A. No, 'cause if I knew that I wouldn't have took it.

11 Q. That was never mentioned at all?

12 A. Nah, that was never mentioned.

13 Q. When you pled guilty, did you have to answer any
14 questions?

15 A. Yes, ma'am.

16 Q. What did they ask you on the record?

17 A. She asked me: Was Mr. Velez with you? I looked at my
18 lawyer and I'm like, I've got to answer that question? You
19 know it won't make things right. Just say yeah. He go like
20 just say yeah. Like just -- just tell them yeah. Because if
21 you don't tell them yeah, you ain't gonna get your plea, so I
22 said all right, yeah.

23 Q. Was that the only question you were asked about the
24 incident?

25 A. No. Then she asked me did he have a weapon and I'm like

1 I don't know. He's like just say yeah, so I said yeah. And
2 she asked me something else, but I don't remember what the last
3 question was.

4 Q. At some point you were transported for Mr. Velez's trial;
5 is that right?

6 A. Yes, ma'am.

7 Q. Did you have a lawyer with you that day?

8 A. Not -- when I came back there to talk to him?

9 Q. Uh-huh.

10 A. No, I didn't have no lawyer.

11 Q. Or just that whole day did you have a lawyer to help you?

12 A. No, ma'am.

13 Q. Tell me -- was there a conversation between you and
14 Mr. Velez that morning?

15 A. Yes, ma'am.

16 Q. Tell me about that.

17 A. Okay. I had -- when I first got there, I had asked
18 Ms. Angela Garrick could I speak to Mr. Velez. She was like
19 yeah, I'll let you talk to him. So I talked to him and said
20 take the plea because we really don't want to go to trial, all
21 right, and I talked him. We were in the back and we was
22 talking and I was telling him, I said, man, she told me if I
23 don't come up here and --

24 **MR. WHITMIRE:** Objection; hearsay.

25 Q. Let me ask it this way. Mr. Leaphart, you spoke with the

1 Solicitor that morning of trial, correct?

2 A. Yes, ma'am.

3 Q. Okay. Did you have -- come away from that conversation
4 with the understanding that there would be any consequences if
5 you did not testify?

6 A. Yes, ma'am. She --

7 Q. And what was your understanding?

8 A. She said if you don't to testify, we're gonna take your
9 guilty plea back and give you five more years.

10 Q. Did you relay that to Mr. Velez later?

11 A. Yes, ma'am.

12 Q. Was his attorney present?

13 A. Yes, ma'am.

14 Q. You did ultimately testify in that trial; is that right?

15 A. Yes, ma'am.

16 Q. Why did you testify?

17 A. I was under the impression that I ain't had no choice.
18 If I don't, they were gonna take my time back and at this time
19 I've been locked up like three or four years. So if you take
20 my time back, that means that I go back to the original start,
21 so I'm at nothing.

22 Q. When you were originally arrested, you denied involvement
23 in the crime, right?

24 A. Yes, ma'am.

25 Q. And then at trial you admitted involvement in the crime?

1 A. Yes, ma'am.

2 Q. Did you testify truthfully at trial?

3 A. No. No, I testified what Casey and Ms. Angela told me to
4 say.

5 **MS. GOLDBERG:** No further questions.

6 **MR. WHITMIRE:** May it please the Court?

7 **THE COURT:** Certainly.

8 CROSS-EXAMINATION

9 BY MR. WHITMIRE:

10 Q. Mr. Leaphart, how long have you known Mr. Velez?

11 A. About -- say about eight years.

12 Q. Are you guys close?

13 A. No, not close. I've seen him from time to time, talked
14 to him.

15 Q. Have you been present all day waiting for this hearing?

16 A. Here?

17 Q. Uh-huh.

18 A. Yeah, I came here early. I got here a little early
19 because I thought y'all was gonna start at nine.

20 Q. And you've been sitting back there talking to Mr. Velez
21 waiting for this case?

22 A. Was I talking to him about the case?

23 Q. No, just talking to him in general.

24 A. Yeah, I talked to him.

25 Q. Because you guys are friends?

1 A. Friends? You could say that.

2 Q. So you're here to admit lying under oath at a -- in
3 trial?

4 A. I mean, the man got twenty-five years for what my lawyer
5 told me to say, which wasn't really true.

6 Q. What -- what really wasn't true since you just --

7 A. What really wasn't true?

8 Q. -- since you just testified you lied under oath?

9 A. Me and him was never -- me and him was never together,
10 all right? I was there to meet somebody. So if I was there,
11 the crime or whatever took place, the police -- I see the
12 police, I ran.

13 Q. Because you were by yourself --

14 A. Right.

15 Q. -- outside the house?

16 A. I was by myself at the stop sign.

17 Q. And apparently according to the State, the State's
18 evidence, the other three guys were in the house and took off
19 separately?

20 A. That's what the State would say.

21 Q. And -- I beg the Court's indulgence. So you were just
22 with -- you were just there -- there at the Corley residence
23 just to meet somebody?

24 A. No. Where Corley stays at, the stop sign is right here.
25 His house sits in the middle, it's a dirt road, and this the

1 main road. I was on Howard Street at the stop sign. That's
2 right in front of his house.

3 Q. Were you with Mr. Velez at all that day?

4 A. No.

5 Q. Mr. Thompson?

6 A. No.

7 Q. Mr. Barnes?

8 A. No.

9 Q. The State just made all this up to -- to convict?

10 A. You mean -- that paper that I wrote to the State says that
11 me and Mr. Velez were never together at all that day.

12 Q. Why did you plead guilty?

13 A. Why did I plead guilty?

14 Q. Uh-huh.

15 A. I ain't got time to be just going through all the motions
16 with them people and I'm like man, I'm just ready to get out of
17 the county because I want to get this time over with and come
18 on home.

19 Q. Were you guilty?

20 A. Not at all.

21 Q. So your -- your testimony is that your attorney allows you
22 to plead guilty to something you didn't do?

23 A. I mean, he tell me -- he tell me you got zero to twenty,
24 you've got a chance for probation, take it. I ain't got no
25 criminal record, so who wouldn't take it if you've got a zero

1 to twenty with a chance of probation?

2 Q. No criminal record?

3 A. None at all, but what? Nothing. I got probation for a
4 drug charge and I completed probation, and that's it.

5 Q. And have you filed a PCR against your attorney?

6 A. Yeah, I went back to PCR court, but --

7 Q. What happened there?

8 A. I turned it down because they were making it so that --

9 Q. I'm sorry, I -- could you repeat that?

10 A. I said I turned my PCR down because David Bax said Barnes
11 and Thomas was gonna come back and testify against you.

12 Q. Who said that?

13 A. David Bax.

14 Q. Who's David Bax?

15 A. That was my PCR attorney.

16 Q. When was your PCR?

17 A. About two years ago.

18 Q. So your -- your attorney withdrew State's evidence and
19 talked to you about what would happen at trial?

20 A. When we got into court like right now he told me you don't
21 even -- you don't have to go forward through it because they're
22 gonna come back and testify on you saying yeah, you was there,
23 just that third.

24 Q. The same two other co-defendants that testified against
25 Mr. Velez?

1 A. Right.

2 Q. And you're upset because you think he got a lot of time?

3 A. No, I think he got the worst part of the deal because
4 really he ain't deserved what happened, you know what I mean?
5 Twenty-five years for what?

6 Q. You guys all got, what, ten years or less?

7 A. Yeah.

8 Q. But you guys aren't close friends?

9 A. No.

10 Q. Associates?

11 A. Associates. You could say that.

12 Q. Just -- just sitting back there catching up for an hour
13 or so before this hearing?

14 A. Catching up on -- he know a lot of people I know.

15 Q. And you don't want to see him in jail for twenty-five
16 years?

17 A. We're both in jail.

18 Q. So much so where you're coming back and saying everything
19 you said at trial was a lie?

20 A. I mean, it's the truth. Why not come back and straighten
21 up the record? He got twenty-five years for a lie.

22 Q. When did you decide to tell the truth about this?

23 A. When I decided? I been having that on -- I've been
24 walking around with the guilt for me to tell the truth about
25 it for a long time.

1 Q. Did you ever write any letters?

2 A. No.

3 Q. Contact the Court and say I helped falsely convict
4 somebody?

5 A. No.

6 Q. Why not?

7 A. I was waiting on, I guess, for him to go back to trial to
8 tell it.

9 Q. So you're waiting on him to tell you it's time to help me?

10 A. No. How he gonna tell me to turn the evidence? You can't
11 write institution to institution.

12 Q. You can't do what?

13 A. You can't write to institution to institution. He can't
14 write me from Lieber. He's at Lieber, I'm at Allendale. I
15 can't write inmate to inmate.

16 Q. Did you ever write to the Solicitor or your attorney,
17 anyone, to say I helped falsely convict somebody?

18 A. No, I ain't writing nobody.

19 **MR. WHITMIRE:** No further questions, Your Honor.

20 **MS. GOLDBERG:** No further questions.

21 **THE COURT:** Thank you, sir. You may step down.

22 (Witness excused.)

23 **MS. GOLDBERG:** Your Honor, at this time the Applicant
24 would call Attorney Mike Duncan.

25 Your Honor, Applicant's finished with Mr. Leaphart. Can

1 his lawyer be excused? Do you have any --

2 **THE COURT:** Mr. Leaphart's lawyer?

3 **MS. GOLDBERG:** Yes.

4 **MR. WHITMIRE:** May we approach?

5 **MS. GOLDBERG:** Yes. I just wanted to make sure.

6 (Proceedings held at the bench; not reported.)

7 **THE COURT:** Come around, sir.

8 W. MICHAEL DUNCAN,

9 having been duly sworn, testified as follows:

10 **THE CLERK:** If you'll have a seat and state your name for
11 the record, please, sir.

12 **THE WITNESS:** My name's Mike Duncan.

13 DIRECT EXAMINATION

14 BY MS. GOLDBERG:

15 Q. Good morning, Mr. Duncan.

16 A. Good morning.

17 Q. You represented Gregory Velez?

18 A. I did.

19 Q. Were you appointed or retained?

20 A. I was appointed.

21 Q. Do you know approximately when?

22 A. From my file I note that an order was signed June 23,
23 2010, so I would have received that sometime shortly after
24 that.

25 Q. And when was the trial in this case?

1 A. The end of March, 2011. Like March 28th through the 30th,
2 I believe.

3 Q. What was the history in this case with plea offers?

4 A. There was one plea offer, as I recall, and it was a cap
5 of twenty years and it's -- it happens to be sitting here in
6 front of me, Plaintiff's Exhibit 1. A cap of twenty years
7 pleading guilty to burglary second degree, kidnapping, and
8 armed robbery, and that's -- dismissal of the other -- of the
9 other charges.

10 Q. It sounds like that was the same plea offer that
11 Mr. Leaphart testified to that he received, a cap of
12 twenty years?

13 A. I -- I think so based on -- based on what Mr. Leaphart --
14 what I heard just a minute ago.

15 Q. At any point did you learn or did you become aware that
16 co-defendants were going to proffer testimony during their
17 guilty pleas?

18 A. I was not -- I was not aware of that.

19 Q. You weren't told, you weren't aware?

20 A. I was not aware. I was not told.

21 Q. Did you ever receive a transcript of the pleas with the
22 proffered testimony?

23 A. I did not.

24 Q. Other than the original -- let me back up. When the
25 defendants were arrested, they all provided statements to law

1 enforcement, correct?

2 A. That's my understanding.

3 Q. To the best of your memory?

4 A. (Nods head.)

5 Q. Do you remember having audio recordings of these
6 statements?

7 A. Yes.

8 Q. After -- other than those, did you ever receive any
9 statements from the Solicitor's Office that were subsequent
10 statements?

11 A. From the co-defendants?

12 Q. Yes.

13 A. No. I had the written discovery, which was some 212
14 pages of written discovery, and then there was an audio of the
15 -- the recorded statements taken shortly after the four people
16 were arrested.

17 Q. At what point did you become aware that the co-defendants
18 were gonna testify against Mr. Velez at trial?

19 A. Sometime during the month of March of 2011.

20 Q. How did you find out?

21 A. There was discussions with the Assistant Solicitor,
22 Angela Garrick. I met with her -- I'm looking back at my
23 time records. I met with her on a couple of occasions, maybe
24 three different -- different times, in which she provided
25 discovery and told me, you know, generally what -- you know,

1 the witnesses that the State would present, and they included
2 all three co-defendants, two -- two of whom had entered
3 guilty pleas at that time and been -- and been sentenced.
4 Mr. Thompson, Jaiwaiski Thompson, had received a 10-year
5 sentence and Jeremy Leaphart had received a 10-year sentence,
6 and Lewis Barnes was the third co-defendant, and he was -- his
7 charge was still pending, but I -- I had discussions with his
8 lawyer as well and it was, I guess, as -- as certain as you
9 can be as a lawyer talking to another lawyer about what his
10 client is gonna do, it was pretty clear to me that Mr. Barnes
11 was gonna enter a plea at some point in time and that his
12 testimony would not be helpful to my client.

13 Q. Did the Solicitor or any of the attorneys ever tell you
14 what they were going to testify to at trial?

15 A. Specifically, no. Generally -- generally, yes.
16 Generally that they were going to admit their involvement and
17 would implicate my client in the -- in the incident that had
18 -- that allegedly involved four people, four defendants.

19 Q. Originally when each of the co-defendants were arrested,
20 they gave pretty detailed descriptions denying their
21 involvement, talking about what they did that day; is that
22 fair?

23 A. Yes.

24 Q. Did you bring up what their original statements were
25 during your cross-examination of them in trial?

1 A. No.

2 Q. Did you ask them about their denials at all?

3 A. No, not that I -- not that I recall. Not that I recall,
4 no.

5 Q. If you had and they had denied their original statements,
6 you could have been allowed to play those audio statements to
7 impeach them; is that correct?

8 A. Sure. Yes.

9 Q. Any particular reason why you didn't cross-examine the
10 co-defendants on these original denials?

11 A. Yes, there is, and I'll -- I'll explain.

12 Q. Yeah. Go ahead.

13 A. Two of the three and, I guess, I'd like to leave
14 Mr. Leaphart for later --

15 Q. That's fine.

16 A. -- because he -- his testimony was different, but two --
17 two of the three, Mr. Thompson and Mr. Barnes, had testified
18 that they were involved, they were in this house, participated
19 in a robbery, tied up the -- tied up the occupants of the
20 house. Mr. Barnes, as I recall, hit the -- the man,
21 Mr. Corley, in the face with a -- with a gun, as -- as I
22 recall. I mean, he -- he was -- he did more than the other
23 defendants and his -- his testimony was to that effect. I
24 mean, he testified that he did more and it -- it did not make
25 sense to me to challenge these two guys on their admission of

1 what they did in the house. You know, why would they come to
2 court and sit on this witness stand and testify that they did
3 something that they didn't have anything to do with so that
4 they could go to prison? I mean, that -- it made no sense to
5 me to attack their testimony on the stand. All I believed that
6 I could do in regard to Mr. Thompson and Mr. Barnes was show
7 their bias or their attempting to get as good a deal as they
8 could get in the -- in the case of Mr. Barnes, who hadn't pled
9 guilty at that time and was gonna be coming to court and gonna
10 be looking for a break, and Mr. Thompson -- Mr. Thompson's
11 testimony -- in reviewing the transcript, Mr. Thompson
12 testified that he didn't know Mr. Velez at all, that this was
13 like the first time they had ever met, and I -- I re-read my
14 closing argument and I referred to it as, you know, what kind
15 of meeting would that be if we met on the street and said, you
16 know, hey, how you doing, let's go rob somebody today? I mean,
17 his -- I was better off, I believed, attacking Mr. Thompson's
18 witness testimony than I would have been bringing up some
19 statement where he absolutely denied any involvement three
20 years before and then had come to court and, you know, stood
21 in front of a judge, admitted his guilt, and essentially did
22 the same thing on the stand in the trial of -- of my client.

23 Q. All right. Now as to Mr. Leaphart specifically, let's
24 start with this meeting that may have taken place prior to
25 trial. Were you present for any such meeting?

1 A. Yes, I was.

2 Q. What -- how did that come about?

3 A. As -- as I recall, Mr. Leaphart asked to talk to my
4 client. That's -- that's the way I remember it. I don't --
5 I don't -- I don't recall it being a request by Mr. Velez, and
6 I don't know why the Solicitor would have granted it if my
7 client had said, you know what, let me talk to your witness,
8 Ms. Solicitor.

9 Q. So the Solicitor did -- was aware and was okay with them
10 speaking to each other?

11 A. That's correct. That's correct.

12 Q. And was the meeting before the trial started at all?

13 A. I'm not -- I'm not sure on that. It was -- it was in the
14 -- during the first day of trial. I -- I thought it was in
15 the afternoon. I thought it was like after the lunch break
16 and Mr. Leaphart was gonna be called as a witness. And maybe
17 if I look -- if I look at the transcript, Mr. Thompson was the
18 first witness who was called by the State and I -- I think that
19 -- I think there was a break and Mr. Leaphart came after lunch
20 and we met in one of these, you know, back rooms here in the
21 -- of off the courtroom and Mr. Leaphart -- you know, I was
22 obviously here this morning and heard Mr. Velez testify and I
23 -- I recall it being Mr. Velez, Mr. Leaphart, I was in there
24 and there was, I think, a deputy. I mean, I think it was, you
25 know, a --

1 Q. Courthouse deputy?

2 A. -- courthouse deputy as I recall. That's what I --
3 that's what I think who was in the room.

4 Q. Was anything said during this meeting that you could have
5 or should have used during cross-examination of Mr. Leaphart?

6 A. I -- I thought I used what could be used to cross-examine
7 Mr. Leaphart. I don't -- and this obviously is a very
8 significant point that Mr. Leaphart testified to today about
9 they would take back his plea, give him more time. I've --
10 I've been doing this twenty-one years, so not forever, but a
11 pretty long time, and this is only -- this is four years ago.
12 I -- I think I would have remembered that if that had been
13 stated as explicitly as that. I remember -- what I remember
14 about Mr. Leaphart doing is I remember Mr. Leaphart trying to
15 convince my client to plead guilty and that Mr. Leaphart didn't
16 want to be there, he didn't want to testify and, you know, he
17 attempted to persuade Mr. Velez that a guilty plea would --
18 would be the best way to go, something like that. That's the
19 gist of it.

20 Q. Did he ever give you any indication that he was being
21 pressured into testifying by the State?

22 A. He certainly didn't want to be here. He made that very
23 clear, that he did not want to testify. And, again, I mean,
24 that -- so in the sense of that being pressure, yes. Having
25 -- having -- specifically saying what they were gonna do to

1 him if he didn't testify, I don't remember that.

2 Q. Okay. All right.

3 MS. GOLDBERG: May I approach, Your Honor?

4 Q. I'm going to refer you to Plaintiff's Exhibit 3, which is
5 -- just, for the record, explain what those two documents are.

6 A. The Plaintiff's Exhibit 3 is a letter, a handwritten
7 letter, signed by Jeremy Leaphart. I can -- I can read it.
8 It's probably easier to read it than try to describe it.

9 Q. All right.

10 A. To whom it may concern. That on August 13, 2008,
11 Mr. Gregory Velez wasn't with Jeremy D. Leaphart at all that
12 day. When I was arrested, I was by myself. Mr. Gregory Velez
13 was on another street in somebody's yard when we pulled up in
14 the police car. Thank you. Jeremy D. Leaphart.

15 And then behind the rest of Exhibit -- Plaintiff's
16 Exhibit 3 is a statement that is signed -- signed by Jeremy
17 Leaphart. It does -- looking at the handwriting, it doesn't
18 look to me like Jeremy Leaphart wrote this statement. It
19 appears that this statement was -- was written by law
20 enforcement, Captain Walter Goss, from the Batesburg-Leesville
21 Police Department.

22 Q. The trans -- the transcript reflects that you entered
23 both of those documents into evidence during the jury trial.
24 Do you recall that?

25 A. I -- I recall -- I specifically recall entering the

1 handwritten thing that Jeremy Leaphart signed and I don't
2 doubt that I entered the other one. I don't -- I don't have
3 a specific recollection of that.

4 Q. Do you recall why you entered the letter from Jeremy
5 Leaphart into evidence?

6 A. Yes. Jeremy -- Jeremy Leaphart was struggling to testify.
7 His -- as opposed to the other two co-defendants in this case.
8 Mr. Thompson -- Mr. Thompson had no difficulty testifying.
9 And, again, he claimed not to know Mr. Velez at all, but that
10 -- that Mr. Velez was present and he admitted it. Mr. Thompson
11 certainly didn't have any -- any -- any problem in testifying
12 against my client that day in trial and Mr. -- Mr. Leaphart was
13 the next witness and he was struggling. He -- and, again, as
14 I saw him today, it does come back to me and, you know, I saw
15 it in the -- in the transcript as well. Mr. Leaphart sat, you
16 know, on the stand and Mr. Velez was, you know, essentially
17 where he is right now and, you know, I'm -- I can look at
18 Mr. Velez and testify fine. I mean, I'm making eye contact
19 with you, but Mr. Leaphart could not look at Mr. Velez, he did
20 not look at Mr. Velez, and at least on -- on an occasion
21 Mr. Leaphart began to cry and, you know, he's -- he's a grown
22 man. I mean, what -- he's a young man, but he's a grown man
23 and you don't -- that's not an every day occurrence in -- in
24 a courtroom, in a trial, and I -- I thought and hoped that I
25 could impeach him and get him to say, you know, that he's

1 lying about Mr. Velez when he had previously said, you know,
2 two and a half years before while sitting in the quiet of his
3 jail cell he wrote this letter and -- and I believe that in
4 that -- in that instance the jury would have a difficult time
5 believing Mr. Leaphart's testimony on the stand given the --
6 given the nature of his testimony sitting on this -- on this
7 stand where he couldn't make eye contact with my client, where
8 he was crying, where he was clearly struggling to testify,
9 and so I introduced this statement so that I could say well,
10 Mr. Leaphart, what about this; is this true? And my -- my
11 review of the transcript is that Mr. Leaphart really never
12 explained this letter, why he would write it, so I -- I
13 thought it would be helpful to discredit his testimony against
14 Mr. Velez on -- you know, at the first day of trial.

15 Q. And I'll go ahead and direct your attention to the next
16 exhibit. I guess maybe it's -- does it say Plaintiff's
17 Exhibit Number 4?

18 A. Four.

19 Q. Okay. Explain for the record what that document is.

20 A. It is a letter from Mr. Gregory Velez -- purports to be
21 from Mr. Gregory Velez saying -- and, again, I'll just read
22 it. It's dated December 4, 2008, which is the same date as
23 Plaintiff's Exhibit 3, and it reads: To whom it may concern.
24 I, Gregory Velez, swear that on August 13, 2008, Mr. Jeremy D.
25 Leaphart wasn't at any point with me when I was being detained

1 on Albert Street and an officer pulled up with Jeremy --
2 Mr. Jeremy D. Leaphart in the back of his police vehicle.
3 Thank you. Signed, purportedly, Gregory Velez.

4 Q. You said that those two letters appear to have been
5 written on the same date -- or they state that they're written
6 on the same date?

7 A. They had the same date on the top.

8 Q. Those two letters are almost actually identical. Would
9 you agree with that characterization?

10 A. Yes.

11 Q. In -- in substance and content?

12 A. Yes.

13 Q. Did -- were you aware of that letter purportedly written
14 by Mr. Velez at the time of trial?

15 A. Yes, it was in the discovery and I'm -- and I'm pretty
16 confident that Mr. Velez had shown it to me, given me a copy.

17 Q. Were you aware that introducing the letter written by
18 Mr. Leaphart opened the door for the State to introduce this
19 letter from Mr. Velez?

20 A. Yeah.

21 Q. Those two letters in conjunction, do you think that those
22 would be more helpful or harmful for Mr. Velez's case, the two
23 letters together?

24 A. I think -- still today I think they are more helpful or
25 neutral. I don't think they are harm -- particularly harmful.

1 I mean, they both -- they both say that these two individuals
2 who were supposed to be together -- alleged to be together,
3 were not together. And, again, Mr. Leaphart -- Mr. Leaphart
4 was now -- you know, at the time of the introduction of the
5 letter, Mr. Leaphart was saying something else, was saying
6 that, you know, in fact, Mr. Velez was with me, we were
7 together and we were involved in this situation together, and
8 I believed -- I believed then and I believe now that trying to
9 discredit one of the witnesses who was testifying against my
10 client was -- if I could knock one out and at that point
11 there'd only been one, there would have been Mr. Thompson who
12 said I never knew Mr. Velez, I -- I wasn't -- I was not very
13 impressed with Mr. Thompson's testimony and this is Witness
14 Number 2 and I wasn't -- at that point I was thinking if we
15 could discredit him that it would knock out two -- two of the
16 three people who were gonna be probably the most harmful
17 witnesses testifying against my client.

18 Q. Because the co-defendants weren't able to identify any of
19 the -- I mean, the victims weren't able to identify any of the
20 defendants, right?

21 A. Correct.

22 Q. The only identification of anybody involved came from each
23 of the co-defendants?

24 A. That's right.

25 Q. So you believed at that time that entrance of those

1 documents into evidence were worth losing closing -- last
2 closing argument?

3 A. I -- I do. I did and I do.

4 Q. On direct, Mr. Velez testified as to cross-examining the
5 victims, specifically regarding Mr. Corley. I think his
6 allegation was that Mr. Corley gave various specific physical
7 descriptions of the suspects and that none of those physical
8 descriptions matched Mr. Velez. Any particular reason why you
9 didn't address that during trial?

10 A. I -- I disagree with Mr. Velez's characterization of not
11 addressing it on cross-examination. I asked Mr. Corley --
12 there's questions to Mr. Corley that you can't identify my
13 client. I mean, you don't know that he had a photo lineup, he
14 couldn't identify anybody. He testified that he didn't want
15 to get the wrong person and, you know, Mr. Corley was -- he's
16 the alleged victim in the case, he's certainly not a friendly
17 witness for -- for my side, and I thought that I got about as
18 much as I could get out of Mr. Corley in regard to that rather
19 than break it down specifically to say you identify, you know,
20 this type person. I mean, it -- that was just my feeling at
21 that time.

22 Q. And then regarding the testimony of Connie Otts, the
23 other victim, I think that Mr. Velez's allegation was that her
24 testimony and timeline didn't match with the CAD report and
25 that that should have been addressed during trial. Any

1 particular reason why you didn't address that?

2 A. Mr. -- yes, there is a -- there is a reason, and I'll
3 elaborate, I guess, if it's okay?

4 Q. Yes, please.

5 A. Mr. -- Mr. Velez was focussed on, you know, it can't --
6 it can't possibly be this way because the time is off as -- as
7 I recall. I mean, as I -- as I recall his -- I mean, that that
8 was -- you know, that was gonna -- gonna clear him and -- and
9 I'm -- I'm trying to carefully say this because obviously
10 Mr. Velez has a right to testify at the trial and we hadn't
11 reached that point and, you know, I -- I think at that point
12 in time we had, you know, generally discussed his right to
13 testify, but he hadn't made a decision as to whether he -- he
14 was going to and whether, you know, that -- I think if he had
15 testified, he would have talked about that timeline, you
16 know, but I -- also I -- and he may have, he may have, but
17 fifteen minutes on a -- in the afternoon as this lady remembers
18 three years later a very traumatic event, I did not -- I did
19 not believe harping on that in front of the jury to a lady who
20 really couldn't identify anybody would win points for our side
21 with the -- with the twelve people sitting in the jury box.

22 Q. During direct today Mr. Velez also talked about an
23 allegation of failure to cross -- cross-examine Officer
24 McCullum based on the differences between his incident report
25 and what was testified to at trial. Are you familiar with

1 that?

2 A. Quite frankly, I'm not. I -- I heard Mr. Velez's
3 testimony today, but I don't remember -- I don't have any
4 specific recollection of that being a significant point. I
5 think -- I think Mr. Velez made that -- termed it that way and
6 I don't remember Officer McCullum being a significant witness
7 for the State is how I would phrase it.

8 Q. And, finally, he testified to -- he argued that you
9 should have had a pre-trial hearing regarding the search
10 warrant asking to suppress any evidence obtained out of his
11 car prior to the search warrant being authorized and executed.
12 Any particular reason why you didn't request that pre-trial
13 hearing?

14 A. I don't -- I don't think we had any basis to -- any
15 legitimate basis to suppress the evidence that was seized from
16 that vehicle.

17 Q. Any particular reason why?

18 A. It was, you know, on the -- pretty close to the -- it was
19 a search incident to an arrest and that's -- I don't think that
20 -- I mean, I think it's -- it's an exception to a -- you know,
21 to the need for a search warrant under the Fourth Amendment.

22 Q. So you did think about it and determined it wouldn't be
23 successful?

24 A. That's correct.

25 **MS. GOLDBERG:** No further questions.

1 **MR. WHITMIRE:** I beg the Court's indulgence.

2 **THE COURT:** All right. Let me check with my personnel
3 here and see if we need to take a five or ten minute break.

4 (Discussion off the record.)

5 **THE COURT:** All right. Let's take a five-minute recess.

6 **MS. GOLDBERG:** All right.

7 **THE COURT:** Thank you.

8 (Recess taken at 12:09 PM.)

9 **BAILIFF:** All rise. Court is now in session.

10 **THE COURT:** Please be seated, ladies and gentlemen.

11 (Witness resumes the stand at 12:18 PM.)

12 **THE COURT:** And now cross-examination.

13 **MR. WHITMIRE:** May it please the Court?

14 CROSS-EXAMINATION

15 BY MR. WHITMIRE:

16 Q. Good afternoon, Mr. Duncan.

17 A. Good afternoon.

18 Q. Mr. Duncan, what is your primary area of practice?

19 A. I do a -- I do a general practice of law, but a
20 significant portion of my practice is criminal defense.

21 Q. And generally what area of the state?

22 A. Columbia, Richland County, Lexington County, Fairfield.

23 I had -- my firm had an office in Fairfield County for probably
24 seven or eight years and so I handled cases there, too.

25 Q. You tried general sessions cases in Lexington before?

1 A. Yes.

2 Q. You've won armed robbery cases here, right?

3 A. Yes.

4 Q. What were the circumstances of your substitution on
5 Mr. Velez's case?

6 A. Mr. Velez had had a lawyer. Arie Bax, had been his
7 lawyer, I think, from the outset of his case, you know, from
8 his -- at the time of his arrest in August of 2008 and, again,
9 you know, I don't -- I don't know specifically what went down
10 there, but I've heard Mr. Velez testify today and I remember,
11 you know, when I was appointed that -- that he had -- he and
12 Mr. Bax had reached a parting of the ways and sometime in --
13 in or about the summer of 2010 another lawyer had been
14 appointed and -- and I know it -- from the order from my file
15 it was -- Marion Moses had been appointed very briefly and
16 then it turned out he had represented -- either had represented
17 or was representing John Corley, who's the alleged victim in
18 this case, and so they needed another lawyer and I guess my --
19 it was my turn.

20 Q. Did you have a chance to meet with Mr. Bax?

21 A. I had discussions -- I had a discussion with Mr. Bax. I
22 just -- I really don't remember if I sat down with him. I'm
23 looking at -- you know, I've got my timesheet up here and I
24 note a conference with Attorney Arie Bax in November of 2010,
25 but I don't remember if that was in person or, you know, on the

1 phone. I know -- I know Arie Bax. I know him and I -- I'm
2 sure I saw him at the jail.

3 Q. On the matter of your timesheet, does that timesheet
4 reflect all of your labor and efforts in this case?

5 A. Yes, sir.

6 Q. Mr. Duncan, would you publish that timesheet for us?

7 A. I mean, I can --

8 Q. Can you read it out?

9 A. Do you want me to read it out from beginning to end?

10 **MR. WHITMIRE:** May I approach?

11 **THE COURT:** You can.

12 **THE WITNESS:** I'm glad to. If you need to give a copy to
13 Ms. Goldberg, I don't have -- I don't have three of them.

14 (State's Exhibit Number 1 was marked for identification.)

15 **MR. WHITMIRE:** May I approach the witness, Your Honor?

16 **THE COURT:** Yes, sir.

17 BY MR. WHITMIRE:

18 Q. Mr. Duncan, I'm showing you what's marked as State's
19 Exhibit 1. Do you recognize this document?

20 A. I do.

21 Q. In your general practice, do you keep spreadsheets like
22 that to account for all your time?

23 A. I do.

24 Q. Is this the timesheet for Mr. Velez's case?

25 A. It is.

1 **MR. WHITMIRE:** At this time, Your Honor, the State moves
2 to admit State's Exhibit 1 into evidence.

3 **MS. GOLDBERG:** No objection.

4 **THE COURT:** Admitted without objection.

5 (State's Exhibit Number 1, Duncan Timesheet, was admitted
6 into evidence.)

7 BY MR. WHITMIRE:

8 Q. In just summary of that timesheet, how many times did you
9 meet with Mr. Velez prior to trial?

10 A. I -- according to this timesheet, I met with Mr. Velez
11 eight -- eight times at the county jail. A total of eight.

12 Q. And I recall from your testimony Mr. Leaphart hadn't pled
13 guilty when you got on the case yet?

14 A. I think that -- I think that's right. I think that's
15 right.

16 Q. And the same with Mr. Thompson?

17 A. Yeah, I believe that to be correct. I think all -- I
18 think all four defendants had pending charges.

19 Q. And just backtracking a little bit, did you have a chance
20 when you first got on the case to review all of Mr. Bax's file?

21 A. Yeah. Yeah, I did.

22 Q. Is Mr. Bax an attorney who keeps a detailed file?

23 A. He -- I -- I received -- there was extens -- I mean,
24 there was 200 pages of discovery, 212 pages of discovery, and,
25 again, when I -- I had that -- I had that information and when

1 -- when I met with Mr. Velez and that was -- that was a couple
2 of months later. I mean, I was appointed in -- let's see. The
3 order is dated June 23, 2010. I think I, you know, probably
4 got it within a week or so, so like early July I would have
5 had to have had the case for the first time. I remember
6 writing a letter. At -- at the very moment that I was
7 appointed, you know, came in, I didn't know where Mr. Velez
8 was. You know, at the minute that I got it, I didn't know if
9 Mr. Velez was incarcerated. You know, anybody -- you know,
10 they didn't tell you that, and I learned that at some point in
11 time, sooner rather than later.

12 Q. And, Mr. Duncan --

13 A. I'm sorry.

14 Q. -- please correct me if I'm wrong, if I mischaracterize
15 my notes from your -- your direct, but I recall you testified
16 Mr. Velez wanted to take this case to trial because he thought
17 the timing element of the evidence played in his favor for
18 reasonable doubt?

19 A. From --

20 Q. And, please -- please, if I'm wrong, correct me.

21 A. I'm trying to -- trying to answer your question as best
22 I can. From my first meeting with Mr. Velez, he -- he was
23 not interested in a plea was the way I would characterize our
24 meeting and I -- and what I remember, you know, about our
25 initial meeting, and that was in September, was that that was

1 part of his problem with Mr. Bax, is that Mr. Bax was pushing
2 him to take the plea and he wasn't interested in a plea, and
3 so that -- that kind of set the tone and obviously -- I'm
4 sorry.

5 Q. And that's the matter I really want to get to and get
6 some testimony on. What about the case made him confident in
7 going to trial and not taking a guilty plea?

8 A. I -- I don't know if Mr. Velez was confident about the
9 case, but he said he didn't do it and so he wasn't gonna take
10 the plea. You know, that -- in -- in practicing law for at
11 that time, I guess, what, seventeen years, I guess at the point
12 in time I was appointed to represent him, sixteen, seventeen,
13 years, sometimes that's just the way it is.

14 Q. Certainly.

15 A. And, you know, it's his right and he wanted -- he -- he
16 was not interested in a plea.

17 Q. And based on your initial review of Mr. Bax's files and
18 some of your initial conversations with relevant parties, did
19 you develop an impression about the State's evidence against
20 your client?

21 A. As -- as you went through the case, it was gonna be a
22 hard -- a hard road to hoe, so to speak. You know, there was
23 gonna be -- there was gonna be evidence presented that was
24 gonna be, you know, difficult to overcome.

25 Q. Mr. Velez was ultimately arrested with Mr. Thompson and

1 the other co-defendant, Mr. Barnes, at the scene -- in the
2 neighborhood?

3 A. The -- the arrest of all four defendants in this case
4 took place within about thirty minutes of the incident --
5 alleged incident at the Corley residence.

6 Q. Did Mr. Velez give you any leads, any facts to look into,
7 that explains that very unfortunate coincidence?

8 A. I think his statement from the witness stand today was
9 essentially, you know, what he -- what he said; that he was in
10 Batesburg-Leesville to see a -- to see a lady, to see a female.

11 Q. Did he give you the young lady's name and ask that you go
12 meet her?

13 A. I don't recall that. I don't recall getting a name.

14 Q. So going into trial a few weeks before it becomes apparent
15 to you that his co-defendants are gonna testify against him,
16 all of them. You weren't at their pleas?

17 A. I was not.

18 Q. I recall you testified that Ms. Garrick had communicated
19 some of the substance of what Mr. Barnes and Mr. Thompson and
20 Mr. Leaphart were gonna testify to?

21 A. Yes. More so what the two who had pled guilty,
22 Mr. Thompson and Mr. Leaphart. And, again, my -- I had had
23 discussions with Mr. Barnes's attorney and, again, it was --
24 I was pretty certain that Mr. Barnes would be a hostile
25 witness -- a cooperating witness for the State as well.

1 Q. Did Ms. Garrick communicate this to you through just
2 phone calls or was this face to face or -- or was it through
3 writing?

4 A. It -- it was face to face on -- let me beg your
5 indulgence a moment. Ms. Garrick informed me via e-mail
6 about -- about the trial, a trial date, and that from -- my
7 timesheet says March 1, 2011, e-mails to and from Assistant
8 Solicitor Angela Garrick regarding trial date on week of
9 March 28th. And if it would help you to have this, that's
10 fine.

11 Q. Your testimony on the matter is sufficient.

12 A. And so at that point, you know, I knew trial was coming
13 up and we had -- we, being Ms. Garrick and myself and the
14 other assistant solicitor on the case, Rhonda Patterson, had
15 a meeting on March 22nd in person here at the courthouse.

16 Q. I'm gonna back up a little bit and ask the Court to
17 indulge this line of questioning as it goes to his preparation
18 and ability to testify -- I mean, to prepare his
19 cross-examination.

20 State's evidence that was pretty consistent had your
21 client as the driver -- I mean, all the witness stories lined
22 up that had your client as the driver?

23 A. Yes..

24 Q. All of the witnesses testified that, I believe,
25 Mr. Thompson had the AK?

1 A. Yes.

2 Q. Mr. Leaphart had the shotgun?

3 A. Yes.

4 Q. And that the other two had handguns?

5 A. Yes.

6 Q. Now on most of the material facts of the planning and
7 the execution and the ultimate, I guess, arrest, were you
8 prepared to cross-examine his co-defendants? Were you given --
9 a better statement of the question, were you given sufficient
10 information to be able to attack them and know the substance
11 of what the State's case was gonna be?

12 A. Generally speaking, yes. I mean, the -- you know, the --
13 the problem was there are four -- four people who are at a --
14 alleged to be at a place in Batesburg-Leesville where a robbery
15 takes -- takes place and three of the four individuals testify
16 that, you know, that's -- that's them, that they are three of
17 the people and, you know, there's -- there's a mysterious
18 fourth person who is not -- you know, who is the fourth person?
19 And the victims -- the victims can't identify anybody, the
20 victims can't -- you know, cannot identify this -- this fourth
21 human being.

22 Q. The victims put three guys in the house?

23 A. That's -- that's correct.

24 Q. And one person -- one lookout outside?

25 A. Right, right. I mean, right. There's four -- four

1 people; three inside the home and one -- you know, one outside
2 the home, and if that's what you had, you know, if that's what
3 you had, then the case would have been much more defensible,
4 but we have three -- you know, three co-defendants, who -- two
5 of whom have pled guilty and say -- you know, implicate the
6 fourth guy, and the -- the hard part in, you know, preparing
7 for the -- for the trial is why are these three human beings
8 saying that they did this if they didn't do this? If, in fact,
9 their -- their statements to the Batesburg police were correct,
10 why are they putting themselves there and --

11 Q. What I'm really getting at --

12 A. Sorry.

13 Q. I'm sorry. I appreciate you helping to make a record.
14 During the trial, the co-defendants are the first three
15 witnesses. Did any of their testimony ambush you, any facts
16 that you didn't see coming, come out at trial and affect your
17 ability to cross-examine?

18 A. No.

19 Q. You've worked with the Solicitor's Office before?

20 A. Yes.

21 Q. Just a few more questions. And I guess globally
22 regarding your trial strategy on cross-examining the
23 co-defendants, I believe your strategy was to distance your
24 client from Mr. Thompson and Mr. Barnes based on identity or
25 the fact that they didn't really know him very well?

1 A. That's generally correct. Mr. Thompson -- Mr. Thompson's
2 testimony was he'd never met Mr. Velez.

3 Q. And when you said on direct that Mr. Thompson's testimony
4 wasn't very convincing to you, did you mean that it wasn't
5 convincing in connecting your client inside the home or just
6 not credible in general?

7 A. His -- his story -- his general story of how he came to
8 be present and how he came to be in an agreement with the --
9 with my client specifically, which is obviously what the
10 Solicitor was, you know, seeking in testimony, it just didn't
11 make very much sense that he had never met my client until
12 the afternoon in question and they decided to go down and rob
13 somebody. I mean, that -- I believed that I could do something
14 with that in closing argument that would certainly make members
15 of the jury raise their eyebrows and go wait a minute, that --
16 that story really doesn't make much sense.

17 Q. And you wanted to stay away from all those very
18 descriptive details from the stand by Mr. Thompson and
19 Mr. Barnes about what they did in the house as a result of
20 distancing your client?

21 A. Correct. I mean -- again, I'm not -- I'm not sure, you
22 know, where Mr. Velez -- I think that Mr. Velez's opinion of
23 the situation was that these -- none of these four guys did it
24 and that they were telling the truth when they talked to the
25 police, you know, initially after the alleged incident and,

1 you know, I do understand that if you're facing -- I heard
2 Mr. Velez testify today and in my experience in doing criminal
3 defense work for a number of years, I know that he is correct
4 in saying that nobody knows what it feels like facing life
5 plus a hundred and five years unless you're facing it, you
6 know. I don't -- I've heard that expressed by a lot of people,
7 even though I can't really picture that either, so that perhaps
8 I would come in and confess to doing something that I didn't
9 do to get that heavy load off of me and get a much lighter
10 sentence, but -- but these -- I mean, this is a serious crime
11 and these folks got -- you know, as we came to trial, I had --
12 there were two defendants, two co-defendants, who had gotten
13 10-year sentences and to me to try to get those folks on the
14 witness stand to say nah, I just came in here and told the
15 Solicitor what they wanted to hear and I didn't really have
16 anything to do with it, I didn't think I would get very far
17 with that.

18 Q. But you approached Leaphart differently because he knew
19 your client fairly well?

20 A. I approached Leaphart differently in large part because
21 he walked in that room and said -- stood in my presence and I
22 knew what he -- how he felt about the whole thing. I mean,
23 the other two guys didn't know my client and certainly didn't
24 ask to talk to him. I mean, it was a -- it was a different
25 situation.

1 Q. Just a few more general questions and I promise I'll be
2 done at least. Was Mr. Velez an active client in this case?
3 And I mean that by letter-writing, very concerned, wanting to
4 talk about the facts with you and --

5 A. Yes. Yes. I've -- again, what he -- his testimony -- at
6 some point in his testimony today I think he -- it was very
7 accurate in that he was not a person who would get his family
8 to call you and, you know, say come see -- go see my son or go
9 see my boyfriend or whatever. I mean, that -- that wasn't what
10 he did, but he did write letters and he wrote a very extensive
11 twenty-four pages, twenty-five pages of, you know, sort of his
12 version of -- it was kind of his take on the case. The facts
13 -- the factual portion of it was a little slim. There was a
14 lot of law, there was a lot of, you know -- but, you know, he
15 wrote --

16 Q. You had a chance to review what he wrote?

17 A. Yeah.

18 Q. Did you talk to him about it and go over his concerns?

19 A. As -- as I recall, we did. As I recall, we did, yes. I
20 mean, that -- again, I've looked through my file in preparation
21 for coming over here and I think his letter was sometime in the
22 fall, like November of 2010, and, you know, we -- we talked
23 about it after -- after that.

24 Q. During trial did you provide him a notepad as a means of
25 communication or did he write on something for you?

1 A. He had -- he had some paper. I mean, he had the ability
2 to write something. You know, I don't know that I gave him a
3 notepad.

4 Q. I mean, I didn't mean that specifically, but --

5 A. Right.

6 Q. Do you recall him passing you notes wanting you to direct
7 questioning a certain way or anything to that extent?

8 A. I -- I didn't see -- I don't see anything in my file that
9 reflects, you know, lengthy notes from Mr. Velez and, you know,
10 there are some clients who give you -- who have -- who take
11 notes of everything and give you two or three pages at the end
12 of the day or something like that. I don't recall that, but I
13 think I would characterize Mr. Velez as an active client both
14 before trial and during trial. I mean, he was certainly very
15 attentive and, you know, it was -- it was not a situation where
16 he was just sitting there at the table.

17 Q. And a final question. You tried this case to the best of
18 your ability?

19 A. Yes.

20 **MR. WHITMIRE:** No further questions. Thank you very
21 much, Mr. Duncan.

22 **THE COURT:** Redirect.

23 **MS. GOLDBERG:** I beg the Court's indulgence. No
24 questions.

25 **THE COURT:** Thank you. You may step down.

1 **THE WITNESS:** Thank you.

2 (Witness excused.)

3 **MS. GOLDBERG:** Your Honor, at this time, the Applicant
4 rests.

5 **THE COURT:** Applicant rests.

6 **MR. WHITMIRE:** Your Honor, the State would request the
7 lunch break to determine if we're gonna put up a case or not.

8 **THE COURT:** Did you indicate you have a witness coming
9 this afternoon?

10 **MR. WHITMIRE:** Possibly the Solicitor is coming this
11 afternoon.

12 **THE COURT:** 2:00?

13 **MR. WHITMIRE:** Thank you.

14 **MS. GOLDBERG:** Thank you, Your Honor.

15 **THE COURT:** All right. We'll be in recess until 2:00.

16 **MR. DUNCAN:** Your Honor, may I ask --

17 **THE COURT:** Does Mr. Duncan need to remain?

18 **MR. WHITMIRE:** I ask Mr. Duncan be released unless
19 Ms. Goldberg needs him.

20 **MS. GOLDBERG:** No objection.

21 **THE COURT:** You're released from your subpoena,
22 Mr. Duncan.

23 **MR. DUNCAN:** Thank you.

24 (Recess taken at 12:47 PM.)

25 (Proceedings continue at 2:04 PM.)

1 **BAILIFF:** Court is now in session.

2 **THE COURT:** Good afternoon, ladies and gentlemen. Please
3 be seated.

4 The Applicant's rested. Where does that bring us,
5 Mr. Whitmire?

6 **MR. WHITMIRE:** May it please the Court? The State has
7 conferred with the prosecuting solicitor and at this time we
8 rest, too, and would be happy to give argument if necessary.

9 **THE COURT:** All right. We'll hear argument then.

10 **MR. WHITMIRE:** It's the State's position that most of
11 these issues really have nothing to do with the substantive
12 evidence against Mr. Velez. It was really a difficult case
13 as counsel has stated when his client was picked up with two
14 of the other co-defendants and arrested in the same place.
15 Everyone consistently testified he drove the car. All of the
16 co-defendants consistently testified who had which guns and
17 the fact that the victims were able to match up the body types
18 with who had which gun, including Mr. Thompson, the biggest
19 one, who kicked in the door, had the AK-47. What really -- I
20 mean, the most damaging evidence to this Applicant were the
21 shotgun shells in his pocket upon arrest when everyone and all
22 of his co-defendants say that he was the one with the shotgun
23 and everyone else has other types of weapons.

24 Thus, starting with -- I think what is the most easily
25 dispositive factor in this case in support of denial of

1 the PCR application is just they came no where close to
2 meeting Strickland's prejudice prong which calls into question
3 the outcome of the determinative nature of the proceeding.
4 Specifically addressing deficiency, I believe most of the --
5 most of the allegations ultimately come down to counsel's
6 preparation, counsel's execution of his cross-examination of
7 the co-defendants. Counsel testified and it's un-refuted, that
8 he was not caught off -- caught by ambush. He knew exactly
9 substance-wise of what Mr. Velez's co-defendants were going to
10 testify to at trial. He was prepared and he did the best he
11 could. He executed a strategy in a very sound way within
12 Stokes and all the cases on point where he attacked the
13 relationship between Mr. Velez and Mr. Thompson and Mr. Barnes
14 having very little knowledge of each other because they gave
15 such damaging testimony, specifically factually on what they
16 did.

17 Now Mr. Leaphart, who he was very familiar with, he
18 attacks him directly and he gave a very -- he gave credible
19 reason for doing it. He said Mr. Thompson's testimony was
20 strong and it would -- he just didn't believe getting into
21 tiny little specifics was going to give his client really any
22 -- any credible strength to help the case. That is unrefuted
23 -- irrefuted in the record. That being said, he is well within
24 the ambit of cross-examination. Certainly an applicant has a
25 fundamental right under the Sixth Amendment to confront their

1 accusers and that mostly comes through cross-examination.
2 However, when we look at that in terms of strategy and you look
3 at it at the time of trial, act when required to act, you're
4 making split second decisions, you're looking at preparation
5 coming up at trial, new information coming here and there,
6 versus the microcosm of a PCR where we have a transcript and
7 it's much more of a finite inquiry. That's something that's
8 really always important to mention. It's just so -- such a
9 susceptible type of allegation for hindsight.

10 Counsel testified he tried the case to the best of his
11 ability and he still stood by the decisions he made. Even
12 if there was deficiency, and certainly the State is not
13 suggesting that anything is questionable, if there was it's
14 the most minor and miniscule points when you look at all the
15 overwhelming evidence and the position that Mr. Velez was in
16 just by the mere fact that he was caught at the scene. As
17 counsel testified, Mr. Velez got caught up in the time because
18 of when the victim made her cell phone call to police. By the
19 time she gets out to the truck or the car to get her cell phone
20 and call, the police were there. A neighbor reported to police
21 in the middle of the day that four suspicious individuals were
22 at this residence. That's how they got caught and he was
23 ultimately arrested with them and they all give inconsistent
24 statements at first denying guilt. They all testified at trial
25 I lied to the police at first and that was, I know, a big point

1 of contention from Applicant's case was the failure to bring
2 some of that out and really exploit it, but there's been no
3 showing of specific details within those statements that would
4 be of strong or significant exculpatory value to Mr. Velez
5 other than just the generic I wasn't there, I don't know what
6 they're talking about. I believe counsel utilized the
7 strongest piece of exculpatory evidence Mr. Velez could have
8 had in the statement or letter he had from the co-defendant,
9 Mr. Leaphart, who testified today.

10 In addressing Mr. Leaphart's testimony in particular, the
11 State would say that that is incredible, suspect and should be
12 given no evidentiary weight. He testified he lied under oath.
13 He testified that he, in fact, filed a PCR, but he ended up
14 withdrawing it and not going forward because he was advised
15 that these two -- that Mr. Barnes and Mr. Thompson's testimony
16 was just too strong against him and had he gone back to trial
17 would mean that he believed that he'd given it away. In fact,
18 also the last point, that he had waited this long to come in
19 and -- and tell his side, that he lied under oath and let
20 purportedly an innocent man go free, is pretty telling.
21 Instead, what the record shows is these two are friends. He
22 testified earlier they got caught up waiting on Mr. Velez's
23 case to be heard and they talked for a while. He's just upset
24 that a friend of his got a heavy sentence, a 25-year sentence,
25 when the rest of them took favorable plea bargains and I think

1 his motives are clear in that regard.

2 These are just the overall arching themes of the case.
3 I'll be happy to answer any specific allegations as to matters
4 of law Your Honor may have once, I guess, Ms. Goldberg has
5 presented her case.

6 **THE COURT:** Thank you, Mr. Whitmire. Ms. Goldberg.

7 **MS. GOLDBERG:** Thank you, Your Honor. May it please the
8 Court? I'll just go through the amended application in order.
9 The first one regarding failure to properly cross-examine all
10 co-defendants. Mr. Velez testified that there was information
11 that they had each given very detailed audio descriptions,
12 denials of what had happened that day. Mr. Duncan admitted
13 that he did not cross-examine them in that regard. He
14 testified that the testimony of the first co-defendant,
15 Mr. Thompson, was not credible, not believable in general, and
16 if that was the case, then the argument from the Applicant
17 would be that there's no reason to not damage his credibility
18 even further by continuing to use everything in this arsenal,
19 including prior inconsistent statements. We would argue that
20 there was no reasonable basis that trial counsel offered for
21 him to have not cross-examined them on those prior statements.

22 Regarding Jeremy Leaphart specifically, I -- I think
23 that the information that Mr. Leaphart testified to today in
24 conjunction with Mr. Duncan's testimony actually showed the
25 credibility. Mr. Duncan testified that he went out of his way

1 to talk to Mr. Velez prior to trial, was trying to talk him
2 out of going to trial, was very, very clear that he did not
3 want to be there, did not want to testify. He was tearful
4 on the stand, he wouldn't look Mr. Velez the eye while
5 cross-examining, he was very uncomfortable during his testimony
6 and he was struggling with it, and Mr. Duncan thought he might
7 be able to get him to admit that he was lying, although
8 ultimately he did not admit that. Mr. Leaphart had already
9 pled guilty, he had already been sentenced. There is no other
10 possibility offered. There's no reason to explain why he would
11 so reluctantly be willing to testify unless he was, in fact,
12 threatened with additional time if he did not testify. There's
13 been no evidence offered by the State as to that not happening.
14 Mr. Duncan it appeared remembered the conversation, but not in
15 detail of the specifics that were said, but given the demeanor
16 of Mr. Leaphart during the original jury trial as described in
17 connection with what Mr. Leaphart said today, that the only
18 reason he testified and lied in his testimony was because he
19 was afraid the State would give him additional time or go back
20 on his plea offer. I think that goes to his credibility and
21 it appears that if Mr. Leaphart is credible in all of this,
22 if what he said in that initial meeting were true, then
23 Mr. Duncan should have been able to bring that out more in
24 cross-examination, the duress and the threat of additional
25 time.

1 Next, Your Honor, I did provide the -- I believe it's
2 Applicant's Exhibits 3 and 4, which when presented I handed
3 courtesy copies up to the Court. Those are the letters. We
4 would argue that it is just objectively and patently
5 unreasonable for Mr. Duncan to have admitted that letter from
6 Jeremy Leaphart as evidence in trial. That opened the door
7 for the Solicitor to open the letter allegedly offered by
8 Mr. Velez during their redirect. They would have not -- it
9 appears from the transcript they would have never offered any
10 letters had that not happened by Mr. Duncan. All those two
11 letters do since they're written on the same date and are
12 virtually identical, all they do is infer to the jury that
13 there's some sort of conspiracy between the two or was to get
14 them out of it, that there was some meeting of the minds, some
15 relationship, some desire to cooperate in the defense at some
16 point in time. I think that was more hurtful than helpful to
17 this case and since that was essentially the biggest piece of
18 evidence that was entered by the defense, it was unreasonable
19 to lose closing -- last closing argument just for the purposes
20 of that. Further, it was never authenticated. Mr. Duncan
21 could have objected when the State on redirect offered that
22 letter purportedly written by Mr. Velez, even though
23 content-wise that he himself, Mr. Duncan, had opened the door.
24 When it was offered by the State, it wasn't authenticated.
25 He could have objected on that basis, which he did not do.

1 Failure to properly cross-examine the victims. I think
2 that was sufficiently testified to, so I'll stand on the
3 record. The same with Officer McCullum and, as well, the
4 search warrants. Mr. Velez just believes that there was at
5 least sufficient basis, sufficient reason to at least have a
6 pre-trial hearing on that matter, and that was not requested.

7 Your Honor, we would argue that due to the number of the
8 errors here that as a whole prejudiced his trial. The Attorney
9 General has stated multiple times, he stated in his opening
10 and he stated it again just now, about the very bad evidence
11 against Mr. Velez of the shotgun shells in his pocket. That
12 actually did not come from the witness stand today from any
13 witness and I believe while it might be mentioned in the
14 transcript, it's not mentioned in his discovery, so that's a
15 little bit of an odd issue. Other than that, most of the
16 facts as they've been presented are correct, including that
17 none of the victims were able to identify any defendant in
18 this case. The defendants, none of them were actually caught
19 at the scene as in at the residence where this took place.
20 They were approached in the neighborhood. The only evidence
21 against Mr. Velez specifically was that his car was in the
22 neighborhood and that the co-defendants implicated him. For
23 that reason that's what makes it so important that all of those
24 co-defendants who implicated him should have been thoroughly
25 cross-examined with everything in Mr. Duncan's arsenal,

1 including Jeremy Leaphart. That's all your, Your Honor.

2 **THE COURT:** Thank you.

3 **MR. WHITMIRE:** The State would disagree with some of
4 the factual contentions in opposing counsel's final argument.
5 The first being the notion that -- about the shotgun shells.
6 It's a compelling piece of evidence and that came out through
7 testimony and though evidence through Detective Clark towards
8 the end of trial during a pat-down search when he was arrested.
9 That was, in fact, in the record, but we haven't brought that
10 out today. That's in the trial record before this Court.

11 Addressing the issue about authentication and opening the
12 door, ultimately there's been no showing that this was an
13 inadmissible piece of evidence. The State has full discretion
14 to admit and present admissible evidence any way it chose.
15 Even if there wasn't a full objection about authentication,
16 there's been no showing that Mr. Leaphart wouldn't be able to
17 authenticate the signature from Mr. Velez. I think it's been
18 abundantly obvious today these two knew each other. They've
19 known each other for some time. That seems as if it would
20 certainly have been, but regardless it's a matter of
21 speculation and it just, per se, could not support a finding
22 of prejudice.

23 I beg the Court's indulgence. Again, going back to
24 Mr. Leaphart's testimony today, being threatened with
25 additional time, Applicant suggests that that testimony was

1 not refuted, that was uncontradicted; however, Mr. Duncan's
2 testimony, if you listen to it closely was very specific: I
3 don't remember that. That's something I wouldn't forget if a
4 solicitor threatened somebody to enhance them in some manner
5 where the Applicant -- or the person who is being threatened
6 has already pled guilty and been sentenced. There was no
7 deferred sentencing, there was nothing. He was in SCDC.
8 That's just an incredible notion to begin with and I think
9 it's important that the Solicitor -- or not the Solicitor, but
10 the witness, Mr. Duncan, was very clear: That's not something
11 I would likely -- I wouldn't forget that. I don't have a note
12 stating exactly what Ms. Garrick said, but I know I wouldn't
13 forget something like that if it happened, and that's an
14 incredible assertion to make to begin with that would require
15 a substantial showing because it is so, so inflammatory and
16 just representative of bad conduct.

17 If the Court has no further questions, the State will sit
18 down.

19 **THE COURT:** Okay. The Court agrees with the position of
20 an argument made by the Attorney General in this case and in
21 addition thereto makes a finding that the testimony of the
22 witness Leaphart really did not appear to be credible to the
23 Court. The reasons for him changing his testimony does not
24 make sense to me. His presentation, the same.

25 And, Mr. Whitmire, I'm gonna ask you to prepare an order

1 denying the application if you would.

2 **MR. WHITMIRE:** Thank you, Your Honor. I'll get that to
3 you after giving it to opposing counsel first.

4 **MS. GOLDBERG:** Thank you, Your Honor.

5 (Proceedings were concluded at 2:22 PM.)
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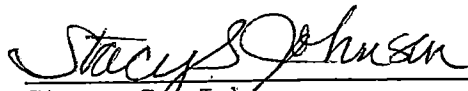
C E R T I F I C A T E

I, Stacy S. Johnson, Official Court Reporter for the
Eight Judicial Circuit of the State of South Carolina, do
hereby certify that the foregoing is a true, accurate and
complete transcript of record of all the proceedings had and
the evidence introduced in the hearing of the captioned case in
Circuit Court on the 9th day of June, 2015.

This transcript may contain quoted material. Such
material is reproduced as read by the speaker.

I do further certify that I am neither of kin, counsel,
nor have an interest to any party hereto.

June 22, 2015


Stacy S. Johnson
Circuit Court Reporter

FORM 5

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

County of Lexington

FILED

Gregory Velez 345428

Full name and prison number (if any) of Applicant

2013 APR - 9 A 8:03

v.

BETH A. GARRIGG
CLERK OF COURT
LEXINGTON SC

APPLICATION

POST-CONVICTION RELIEF

State of South Carolina

2013 CP 3201230

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Lieber Correctional Institute
2. Name and location of Court which imposed sentence Lexington County
Court house, Lexington South Carolina
3. Name(s) of co-defendant(s) (if any) Jeremy D. Leaphart, Lewis B. Barnes,
Jaiwaiki A. Thompson
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2008-GS-32-3721-Burglary 1st/2008-GS-32-3722-Kidnapping
 - (b) 2008-GS-32-3724-Crim. Conspc/2008-GS-32-3725-Armed Robbery

A TRUE COPY

Lex. Co. C.C.C.P., G.S. & F.O.

(c) 2008-GS-32-3726-Poss. of firearm, / 2008-GS-32-3727-Kidnapping

5. The date upon which sentence was imposed and the terms of the sentence:

(a) March 30 2011 25 years at 85%

(b) _____

(c) _____

6. Check whether a finding of guilty was made:

(a) after a plea of guilty _____

(b) ☒ after a plea of not guilty _____

(c) after a plea of nolo contendere _____

7. Did you appeal from the judgment of conviction or the imposition of sentence?

yes

8. If you answered "yes" to (7), list:

(a) the name of each Court to which you appealed:

i. South Carolina Court of Appeal

ii. _____

iii. _____

(b) the result in each such Court to which you appealed:

i. Appeal Dismissed

ii. _____

iii. _____

(c) the date of each such result:

i. January 30th 2013

ii. _____

iii. _____

(d) if known, citations of any written opinion or orders entered pursuant to such results:

i. Unpublished Opinion No. 2013-UP-045

ii. _____

iii. _____

9. If you answered "no" to (7), state your reasons for not so appealing:

(a) N/A

(b) _____

FILED
2013 APR -9 A 8:03
BETH A. CARRIGG
CLERK OF COURT
LEXINGTON SC

- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) United States Constitution 4th, 6th, 14th
- (b) Amendment violations
- (c) _____
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) Ineffective Assistance of Counsel
- (b) Due Process violations
- (c) Illegal Search and Seizure
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? N/A
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? N/A
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? N/A
- (d) any other petitions, motions or applications in this or any other Court? N/A
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
- i. N/A
- ii. _____
- iii. _____
- iv. _____
- (b) the name and location of the Court in which each was filed:
- i. N/A
- ii. _____
- iii. _____
- iv. _____

BETH A. CARRIGG
CLERK OF COURT
LEXINGTON SC

2013 APR - 9 A 8:03

FILED

(c) the disposition thereof:

- i. N/A
- ii. _____
- iii. _____
- iv. _____

(d) the date of each such disposition:

- i. N/A
- ii. _____
- iii. _____
- iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

- i. N/A
- ii. _____
- iii. _____
- iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

NO

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

- i. N/A
- ii. _____
- iii. _____

(b) the proceedings in which each ground was raised:

- i. N/A
- ii. _____
- iii. _____

FILED
 2013 APR -9 A 8:03
 BETH A CARRIGG
 CLERK OF COURT
 LEXINGTON SC

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:
- (a) Ineffective Assistance of Counsel
- (b) _____
- (c) _____
17. Were you represented by an attorney at any time during the course of:
- (a) your arraignment and plea? N/A
- (b) your trial, if any? Yes
- (c) your sentencing? Yes
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed?
N/A
18. If you answered "yes" to one or more parts of (17), list:
- (a) the name and address of each attorney who represented you:
- i. W. Michael Duncan / Jury Trial
508 Hampton Street, Suite 300 Columbia SC 29201
- ii. Kathrine H. Hodgins
1330 Lady Street, Suite 401 Columbia SC, 29201
- iii. _____
- (b) the proceedings at which each such attorney represented you:
- i. W. Michael Duncan
Jury Trial
- ii. Kathrine H. Hodgins
Direct Appeal
- iii. _____

FILED
2013 APR -9 A 8:03
BETH A. CARRIG
CLERK OF COURT
LEXINGTON SC

19. State clearly the relief you seek in filing this application:

vacate Conviction and Sentence and reverse
and remand for a New Trial

20. Are you now under sentence from any other court that you have not challenged?

No

2013CP3201230

STATE OF SOUTH CAROLINA)

VERIFICATION

County of _____)

I, Gregory Velez, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

[Signature]

SWORN to and subscribed before me this 02
 day of April, 2013.

Ludham Bryant (L.S.)
 Notary Public

My Commission Expires: May 26, 2020

2013 APR -9 A 8:03
 BETH A. CARRIGG
 CLERK OF COURT
 LEXINGTON SC.

FILED

APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF

I, Gregory Velez, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

Gregory Velez
Applicant

SWORN or affirmed to and subscribed before me this
02 day of April, 2013.

Ludeman Bryant
Notary Public

My Commission Expires: May 26, 2026

FILED
2013 APR - 8 10:53
BETH A. CARRIGG
CLERK OF COURT
LEXINGTON, SC

2013CP3201230

FILED
2013 APR - 9 A 8:03
BETH A. CARRIGG
CLERK OF COURT
LEXINGTON, SC

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF LEXINGTON	)	
	)	2013-CP-32-01230
GREGORY VELEZ, SCDC # 345428,	)	
Applicant,	)	
	)	<u>AMENDED</u> APPLICATION FOR
v.	)	POST-CONVICTION RELIEF
	)	
STATE OF SOUTH CAROLINA	)	(ACTION FILED APRIL 9, 2013)
Respondent.	)	
	)	

1. Place of Detention: Lieber Correctional Institution.
2. Name and location of Court which imposed sentence: Lexington County Court of General Sessions, Lexington County Courthouse, Lexington, South Carolina.
3. Name(s) of Co-defendants: Jeremy Leaphart, Lewis Barnes, Jaiwaiki Thompson
4. The indictment number or numbers upon which and the offense or offenses for which sentence was imposed:
 - a. 2008-GS-32-3721 Burglary 1st Degree
 - b. 2008-GS-32-3722 Kidnapping
 - c. 2008-GS-32-3724 Criminal Conspiracy
 - d. 2008-GS-32-3725 Armed Robbery
 - e. 2008-GS-32-3726 Possession of a Firearm During the Commission of a Violent Crime
 - f. 2008-GS-32-3727 Kidnapping
5. The date upon which sentence was imposed and the terms of the sentence:
 - a. 2008-GS-32-3721 Burglary 1st Degree – 25 years concurrent
 - b. 2008-GS-32-3722 Kidnapping – 25 years concurrent
 - c. 2008-GS-32-3724 Criminal Conspiracy – 5 years concurrent
 - d. 2008-GS-32-3725 Armed Robbery – 25 years concurrent
 - e. 2008-GS-32-3726 Possession of a Firearm ... – 5 years concurrent
 - f. 2008-GS-32-3727 Kidnapping – 25 years concurrent
6. A finding of guilty was made by a jury after a plea of not guilty.
7. Did you appeal the judgment of conviction or the imposition of sentence? Yes
8. If you answered "yes" to (6), list
 - a. The name of each Court to which you appealed:

- i. South Carolina Court of Appeals
 - b. The result in each such Court to which you appealed:
 - i. Conviction Affirmed
 - c. The date of each such result:
 - i. January 30, 2013
 - d. If known, the citations of any written opinion or orders entered pursuant to such results:
 - i. Unpublished Opinion No. 2013-UP-045. Remittitur issued February 21, 2013.
9. Not applicable.
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- a. Violation of Applicants 6th Amendment Right to representation by effective trial counsel.
 - b. Evidence of material facts not previously presented and heard that requires vacation of the conviction in the interest of justice.
11. State concisely and in the same order the facts which support each of the grounds set out in (9).
- a. Ineffective assistance of trial counsel – failure to properly cross-examine all co-defendants.
 - b. Ineffective assistance of trial counsel – Failure to properly cross-examine Jeremy Leaphart.
 - c. Ineffective assistance of trial counsel – ineffective trial strategy by introduction of exhibits that were not substantially helpful and losing the opportunity for last closing.
 - d. Ineffective assistance of trial counsel – failure to object to the admission of State's Exhibit 32 as it was used against the Defendant without being properly authenticated.
 - e. Ineffective assistance of trial counsel – failure to properly cross-examine the victims regarding their description of the perpetrators and the timeline of the incident.
 - f. Ineffective assistance of trial counsel – failure to properly cross-examine Officer Kendrick McCullum.
 - g. Ineffective assistance of counsel – failure to move to suppress any evidence obtained as a result of the Search Warrant for the automobile and failure to object to the admission of any such evidence when it was offered at trial.
 - h. The cumulative nature of counsel's errors were such that the Defendant was prejudiced and the trial cannot be relied on as having produced a just result.

- i. Evidence of material facts not previously presented and heard that requires vacation of the conviction in the interest of justice.

12. Prior to this application have you filed with respect to this conviction:

- a. Any petition in a State Court under South Carolina Law? No
- b. Any petitions in State or Federal Courts for habeas corpus or post-conviction relief? No
- c. Any petitions in the United States Supreme Court for certiorari other than petitions, if any, already specified in # 7? No
- d. Any other petitions, motions or applications in this or any other Court? No

13. Not applicable.

14. Has any ground set forth in (9) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed? No

15. Not applicable.

16. If any ground set forth in (9) has not previously been presented to any Court, State or Federal, set forth the ground, and state concisely the reasons why such ground has not previously been presented: All issues in Section (9) are being presented for the first time and were not presented because they were not cognizable on direct appeal.

17. Were you previously represented by an attorney at any time during the course of:

- a. Your arraignment and plea? N/A
- b. Your trial, if any? Yes
- c. Your sentencing? Yes
- d. Your appeal, if any, from the judgment of conviction or imposition of sentence? Yes.

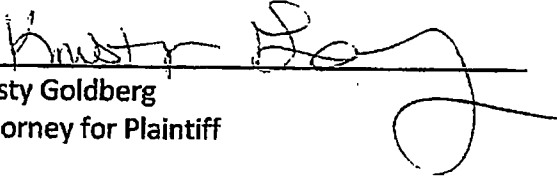
18. If you answered "yes" to one or more parts of (16), list:

- a. The name and address of each attorney who represented you:
 - i. W. Michael Duncan, Esquire, 508 Hampton Street, Suite 300, Columbia, South Carolina 29201
 - ii. Katherine H. Hudgins, Esquire, of the South Carolina Office of Appellate Defense.
- b. The proceedings at which each such attorney represented you:
 - i. Trial
 - ii. Appeal

19. State clearly the relief you seek in filing this application: Conviction reversed with remand for new trial.

20. Are you now under sentence from any other court that you have challenged? No.

Respectfully submitted,



Kristy Goldberg
Attorney for Plaintiff

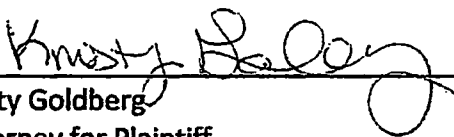
Law Office of Kristy Goldberg, LLC.
1720 Main Street, Suite 303
Columbia, SC 29201
Phone (803) 667-6633
kristy@kristygoldberglaw.com

Columbia, South Carolina

This 5 th day of May, 2015

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF LEXINGTON	)	
	)	2013-CP-32-01230
GREGORY VELEZ, SCDC # 345428,	)	
Applicant,	)	
	)	
v.	)	CERTIFICATE OF SERVICE
	)	
STATE OF SOUTH CAROLINA	)	
Respondent.	)	
	)	

I certify that on this date I served the Notice of Appearance in this case on The State of South Carolina by delivering a copy of this Notice to the State's attorney of record, Walt Whitmire, by delivering a copy of this motion via U.S. Mail said copy to the 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 301
 Columbia, SC 29201
 Phone (803) 252-2299
 kristy@kristygoldberglaw.com

Columbia, South Carolina

This 5th day of May, 2015

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

Respondent, making its Return to the application for post-conviction relief filed April 9, 2013, would respectfully show this Court:

I.

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 its case to trial. The jury found Applicant guilty as indicted. The Honorable R. Knox McMahon sentenced Applicant to twenty-five (25) years imprisonment for burglary, first-degree, twenty-five (25) years imprisonment for kidnapping, five (5) years imprisonment for criminal conspiracy, twenty-five (25) years imprisonment for armed robbery, and (5) years imprisonment 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.¹ The South Carolina Court of Appeals affirmed his 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.

Attached herewith and incorporated herein are the records of the Lexington County Clerk of Court regarding the subject conviction, Applicant's appellate records, Applicant's records from the South Carolina Department of Corrections, and the trial transcript. Respondent reserves the right to amend this Return upon receipt of any relevant materials.

II.

In his current Application, Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. "Ineffective Assistance of Counsel."
2. "Due Process Violation."
3. "Illegal search and seizure"

Any claims not specifically enumerated in the PCR application or amendments **not filed at least 10 days prior** to the evidentiary hearing will be opposed, and the State will seek summary dismissal of vague or general claims at an evidentiary hearing. S.C. Code §17-27-50. All amendments should be made well in advance of an evidentiary hearing by counsel of record. Rule 11, SCRCP.

III.

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

¹ Anders v. California, 380 U.S. 738, 87 S.Ct. 1396 (1967).

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, 334 S.E.2d 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. 668. 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. 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. With respect to guilty plea counsel, the Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52 (1985).

Respondent submits that Applicant cannot satisfy either requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that the record does not conclusively refute. Accordingly, Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

Applicant further alleges that he was denied due process of law. Applicant's allegation claims infringement of his rights under certain amendments to the United States Constitution. However, Applicant fails to set forth with specificity the grounds upon which these constitutional violations are based. The Uniform Post-Conviction Procedure Act requires that the Applicant must "... specifically set forth the grounds upon which the application is based." Section 17-27-50 of the Code of Laws of South Carolina (1976). In an application for post-conviction relief, it is incumbent upon Applicant to make at least a prima facie showing which would entitle him to relief before an evidentiary hearing will be scheduled and held. Welch v. MacDougall, 246 S.C. 258, 143 S.E.2d 455 (1965); Blandshaw v. State, 245 S.C. 385, 140 S.E.2d 784 (1965). Since Applicant has failed to make even a prima facie showing, Respondent would submit that this allegation should be dismissed for failing to meet the requirements of the Uniform Post-Conviction Procedures Act. This allegation is so vague that it is impossible for the State to respond.

V.

The Respondent submits that Applicant's third allegation for Post-Conviction Relief should be summarily dismissed for failure to state a claim cognizable under the Post-Conviction Procedure Act, S.C. Code Ann. § 17-27-10 to -160 (2003). An Applicant may commence a post-conviction relief action on the following grounds:

1. That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;
2. That the court was without jurisdiction to impose sentence;
3. That the sentence exceeds the maximum authorized by law;

4. That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
5. That his sentence has expired, his probation, parole or conditional release [was] unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or
6. That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy.... S.C. Code Ann. § 17-27-20 (1976).

Even if the facts alleged by the Applicant are true, these facts do not support a cognizable claim for post-conviction relief under any of the statutory grounds. The allegations presented by Applicant raises direct appeal issues that are procedurally barred by S.C. Code Ann. § 17-27-20(b) (1985). Post-conviction relief is not a substitute for a direct appeal. Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on direct appeal. Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973). The Applicant could have raised these issues at trial or on appeal. His failure to do so has waived these allegations as grounds for relief. Therefore, the Court should summarily dismiss these allegations.

VI.

Each and every allegation contained within the application not hereinbefore either expressly admitted, qualified or explained is hereby denied.

VII.

WHEREFORE, having made its Return, the State requests that an evidentiary hearing be held.

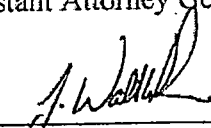
Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

KAREN C. RATIGAN
Senior Assistant Deputy Attorney General

J. WALT WHITMIRE
Assistant Attorney General

By: 

ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
Telephone: (803) 734-3737

Dec 23rd, 2013

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

GREGORY VELEZ, #345428

Applicant,

vs

STATE OF SOUTH CAROLINA,

Respondent

IN THE COURT OF COMMON PLEAS
IN THE ELEVENTH CIRCUIT

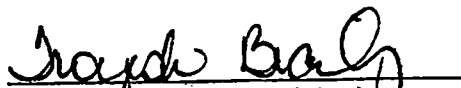
2013-CP-32-1230

AFFIDAVIT OF SERVICE BY MAIL

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Return** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Kristy G. Goldberg, Esq.
1720 Main St. Suite 301
Columbia, SC 29211

DATED this 23rd day of December, 2013


 Troyeshi Brailey, Legal Assistant
 For Respondent

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

Gregory Velez,
S.C.D.C. No. 345428,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS

FOR THE ELEVENTH JUDICIAL CIRCUIT

C.A. No. 2013-CP-321230

ORDER OF DISMISSAL

BEEJA A. CAMPBELL
CLERK OF COURT
LEXINGTON SC

OCT 28 P 1:35

FILED

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. Leaphart¹ 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
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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

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 than 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 Officer McCullum, Applicant claims trial counsel should have crossed Officer 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 Officer 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

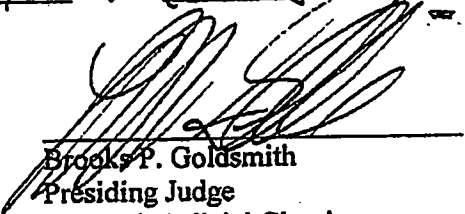
Based on all the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations before or during his trial. Counsel was not deficient in any manner, and Applicant was not prejudiced by counsel's representation. Therefore, this PCR application must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