THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

The Honorable Brian M. Gibbons, Circuit Court Judge

Case No. 2020–CP–42–02623

Derrick Burnside #382831,

Petitioner,

v.

State of South Carolina, Respondent.

NOTICE OF APPEAL

Petitioner Derrick Burnside appeals the Honorable Brian M. Gibbons' Order Denying his Application for Post-Conviction Relief filed on **January 26, 2023**, and the Court's Order Denying Applicant's Motion to Alter or Amend Judgment (Rule 59(e), SCRCP) filed on **March 2, 2023**.

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ATTORNEY FOR PETITIONER

March 8, 2023

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cc:
Amy W. Cox, Spartanburg County Clerk of Court

STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG	IN THE COURT OF COMMON PLEAS FOR THE SEVENTH JUDICIAL CIRCUIT
Burnside, Derrick, #382831, Applicant, v. State of South Carolina, Respondent.	Case No.: 2020-CP-42-02623 **ORDER OF DISMISSAL**

This matter comes before this Court by way of Applicant's post-conviction relief application filed August 3, 2020. Respondent made its return on November 10, 2020, requesting an evidentiary hearing be convened. An evidentiary hearing was held on October 20,2022, at Spartanburg County Courthouse. Dayne C. Phillips, Esquire, represented Applicant. Assistant Attorney General Chelsey Marto represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Counsels Ryan L. Beasley and Annemarie Haynsworth Odom, Esquires, Solicitor Barry J. Barnette, Esquire, and Applicant's sister Michelle Arene also testified. After reviewing all records and evidence before this Court, this Court finds Applicant cannot meet his requisite burden of proof of establishing he is entitled to post-conviction relief and denies and dismisses this application with prejudice. Findings of fact and conclusions of law are set forth below.

Procedural History

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. In August 2018, the Spartanburg County Grand Jury indicted Applicant for Murder and possession of a weapon during a violent crime (18-GS-42-4777). Ryan L. Beasley, Esquire and Annemarie Haynsworth Odom. Esquire represented Applicant. Barry Joe Barnette, Esquire, prosecuted the case. On

November 20, 2019, Applicant proceeded to plead guilty before the Honorable J. Derham Cole. Judge Cole sentenced Applicant to a life sentence confined to the South Carolina Department of Corrections.

Applicant filed a notice of appeal on December 2, 2019. The South Carolina Court of Appeals dismissed Applicant's appeal by unpublished opinion for failure to provide a sufficient explanation as required by Rule 203, SCACR. The remittitur was issued on May 6, 2020.

Summary of Relevant Facts

On July 22, 2018, the victim, Latonya Richards, went to pick up hers and Applicant's three-year-old son up at Applicant's store, Phresh Threads. (Tr. 18). When she arrived, she and Applicant began arguing and Applicant began hitting her, knocked her to the ground, dragged her through the store by her hair, pulled his weapon out, pointed it at her, and began shooting at her; all within view of their three-year-old. (Tr. 18-19). Richards dragged herself to her car and Applicant shot her in the head and killed her. (Tr. 19).

Applicant then wrecked his car and was arrested for driving under the influence. (Tr. 20). The murder weapon was found in the car, was tested, and matched the bullets used in the murder. (Tr. 20-21). Richards had nothing in her system at the time. (Tr. 21). Applicant and Richards were going through a break-up at the time and told someone in her family to check on her if she did not come back home in time. (Tr. 21).

Current Action Before this Court

In his *pro se* PCR application, Applicant alleges he is detained unlawfully for the following reasons (excerpts verbatim):

1. "Ineffective assistance of counsel, which rendered the guilty plea involuntary, due to counsel's failure to properly advise Applicant regarding the service of a sentence on a murder conviction."
    a. "Counsel failed to advise Applicant prior to the entry of his guilty plea that a sentence on a murder conviction is served day for day."

2. "Ineffective assistance of counsel for failure to make contemporaneous objections and/or motions regarding the court's statements during the guilty plea proceeding."
    a. "Counsel failed to make legal objections and/or motions following the court's statements regarding the victim impact portion of the plea proceeding."

Applicant submitted an amended application on June 3, 2022, alleging:

1. Applicant did not knowingly, intelligently, or voluntarily plead guilty.
2. Applicant detrimentally relied on Plea Counsel's erroneous advice to plead guilty without reviewing all the discovery or sentencing consequences with Applicant.
3. Plea Counsel's failure to adequately advise the Applicant regarding the service of a sentence for a murder conviction. Specifically, Counsel did not inform that the mandatory minimum sentence on a murder conviction must be served day-for-day.
4. Plea Counsel failed to conduct a reasonable investigation and to develop all available, relevant, and admissible or mitigating evidence in preparation of Applicant's defense. Specifically, Applicant was in a head-on collision motor vehicle accident and suffered a head injury. Applicant believes that he may have suffered a traumatic brain injury.
5. Plea Counsel's failure to provide additional, critical mitigation during the plea hearing. Specifically, Counsel failed to provide evidence of Applicant's traumatic experience of being molester when he approximately ten (10) years old as a Boy Scout, claims that the victim's decision to have an abortion combined with his son feeling uncomfortable around a male the victim was dating triggered a mental breakdown, his prior depression and anxiety since childhood, the prescribed medications he was taking at the time of the incident, and his self-medicating via alcohol addiction/abuse.
6. Plea Counsel's failure to present evidence and argue during the plea hearing that Applicant was guilty but mentally ill.
7. Plea Counsel's failure to move for the presiding judge to make a finding on whether Counsel could prove by a preponderance of the evidence that Applicant was guilty but mentally ill during the commission of the crime.
8. Plea Counsel's failure to file a motion to reconsider the sentence, arguing the previously listed issues and disparate sentencing based on similar cases in Spartanburg County and South Carolina.

At the PCR hearing, Applicant proceeded forward on the allegations raised in the amended application. All other allegations raised in his initial application and amendments are deemed waived and abandoned and, accordingly, will not be addressed in this order.

Summary of the Testimony

Applicant Testimony

Applicant testified that Counsels were not interested in the case. He stated he met with Counsel Beasley about four times, and the meetings lasted about five minutes each. He stated

they discussed little about the case. He stated Counsels told him that the case was a slam dunk. He stated he was afraid he would lose at trial. He stated he did not review any discovery with Counsels. He stated he never discussed discovery motions. He stated he decided not to view the video. He stated that Counsels told him that a guilty but mentally ill plea was not pursuable but was not given an explanation as to why. He stated that he never received any plea deals beyond the initial negotiated life imprisonment offer and the subsequent plea straight up to murder. Applicant stated that Counsels failed to bring up a lot in mitigation, including past traumas consisting of molestation, a head injury, and the victim's abortion. He stated that the victim was with another guy whom he thought was messing with his son. He stated he was mentally evaluated several times and Dr. Maddon found he had depression and PTSD, which he was medicated for. He stated he was injured in a car accident, which led to drinking and impulsivity. He stated he informed Counsels of the molestation. He stated he wanted Counsels to move to reconsider the sentence after the plea. He stated he was overwhelmed at the time. He stated he acted because he felt out of control with everything in his childhood and going on at the time of the incident.

Counsel Beasley Testimony

Counsel Beasley testified that he met with Applicant more than four times. He stated that the video was awful, and Applicant elected not to see it. He stated that he showed the Court the video beforehand, so he had time to process what happened before deciding on a sentence. He stated that the shooting was in broad daylight. He stated that he shared all discovery with Applicant, except for the video. He stated he informed Applicant of his rights, the charges, and sentencing ranges. He stated that he discussed Applicant's childhood molestation but did not discuss the head injury. He stated that he thought Applicant would lose at trial. He stated that he

did not think a guilty but mentally ill plea was appropriate and did not remember telling Applicant about the option. He stated that Applicant was always planning on pleading. He stated that the first plea offer was a negotiated life sentence, which was followed by an offer to plead straight up to murder. He stated that Applicant's prior car accident was not a big issue and Applicant did not want to discuss the details with Counsels. He stated he did not hear about an abortion but heard the victim was seeing someone else. He stated he did not think this was a factor. He stated he did not recall a pistol-whipping incident with the boyfriend and his son. He stated he filed a notice of appeal at Applicant's request. He testified that he told Applicant he did not see any appealable issues in the plea. He stated he assumed he discussed a motion to reconsider the sentence.

Counsel Odom Testimony

Counsel Odom testified that Applicant met with her or Counsel Beasley between ten or fifteen times. She stated that they reviewed the discovery with Applicant, in portions. She stated they discussed and filed the notice of appeal. She stated that she did not think the guilty but mentally ill plea was appropriate and did not discuss the option with Applicant as a result. She stated that they knew about the molestation and Applicant's head injury but did not think they were important in mitigation. She stated that she did not recall discussion of the abortion or any fear he had for safety of the child.

Solicitor Testimony

Solicitor testified that there was nothing in either mental health report indicating that a guilty but mentally ill plea was appropriate. Solicitor testified that Applicant pled straight up to murder in exchange for the death penalty being taken off the table.

Michelle Arene Testimony

Arene testified that she emailed Counsel Odom requesting a lesser sentence after the original sentence was imposed.

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. Before this Court are the Spartanburg County Clerk of Court Records, Applicant's South Carolina Department of Corrections Records, the plea transcript, direct appeal records, and this PCR action's records. 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 conclusion of law as required by South Carolina Code Annotated Section 17-27-80 (2003).

Ineffective Assistance of Counsel

In a PCR action, the applicant bears the burden of proving allegations contained in the application. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant asserts ineffective assistance of counsel as a ground for relief, the applicant must show "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. Ineffective assistance of counsel is governed by the Sixth Amendment, as explained by the United States Supreme Court in *Strickland v. Washington*.

Pursuant to the first prong of the *Strickland* analysis, the applicant must prove defense counsel's performance was deficient. *Id.* at 686; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d

624, 625 (1989). To show deficiency, the applicant must prove by a preponderance of the evidence that counsel's actions fell outside of the zone of "reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688. *See also* Rule 71.1(e), SCRCP ("The applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence."). Reasonableness is determined by the "variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how to best represent a criminal defendant," and the scope of the reasonableness inquiry is limited to facts counsel had available at the time of representation. *Id.* at 689. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003) (citing *Strickland*, 466 U.S. at 690). Judicial scrutiny of counsel's performance remains highly deferential towards defense counsel with a strong presumption that counsel acted competently, because competent representation may be executed in virtually "countless" ways. *Strickland*, 466 U.S. at 688-89.

Second, counsel's deficient performance must have prejudiced the applicant so 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. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. The court makes this determination based upon the totality of the evidence. *Id.* at 695. Realistically, this matters "'only in the rarest case'" because "[t]he likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 111-12 (2011) (quoting *Strickland*, 466 U.S. at 697).

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. *Strickland*, 466 U.S.

at 696. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies; if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. *Id.* at 696-97.

Invalid Plea

In the context of a guilty plea, the applicant must show there is a reasonable probability that, but for ineffective assistance of counsel, he or she would not have pled guilty but, instead, would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). Applicant's right to contest the validity of a plea is usually, but not invariably, foreclosed because of the inherent solemnity and truthfulness included in the guilty plea process. *See Blackledge v. Allison*, 431 U.S. 63, 73-74 (1977) ("Solemn declarations in open court carry a strong presumption of verity. The subsequent presentation of conclusory allegations unsupported by specifics is subject to summary dismissal, as are contentions that in the face of the record are wholly incredible."). Absent valid reasons why the applicant is entitled to depart from previous judicial admissions made at the plea hearing, statements made during the original proceeding remain conclusive. *Dalton v. State*, 376 S.C. 130, 137-38, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing *Crawford v. United States*, 519 F.2d 347, 350 (4th Cir. 1975)).

For a plea to be valid, the applicant must have been aware of the nature and crucial elements of the offense the maximum and minimum penalties, and the rights he is waiving by accepting the plea. *Boykin v. Alabama*, 395 U.S. 238 (1969); *Roddy v. State*, 339 S.C. 29 (2000). A plea is not knowing or voluntary if a defendant "lacks knowledge of material evidence in the prosecution's possession." *Gibson v. State*, 334 S.C. 515, 523, 514 S.E.2d 320, 324 (1999).

A defendant's knowing and voluntary waiver of statutory or constitutional rights must be

established by a complete record, and "may be accomplished by colloquy between the court and defendant, between the court and defendant's counsel, or both." *Roddy v. State*, 339 S.C. at 34, 528 S.E.2d at 421 (citing *State v. Ray*, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993)). "'[T]he voluntariness of a guilty plea is not determined by an examination of the specific inquiry made by the sentencing judge alone, but is determined from both the record made at the time of the entry of the guilty plea and the record of the post-conviction hearing.'" *Dalton*, 376 S.C. at 138, 654 S.E.2d at 874 (quoting *Harres v. Leeke*, 282 S.C. 131, 133, 318 S.E.2d 360, 361 (1984)). Further, "guilty pleas, freely and voluntarily entered, act as a waiver of all non-jurisdictional defects and defenses, including claims of a violation of a constitutional right prior to the plea." *Whetsell v. State*, 276 S.C. 295, 297, 277 S.E.2d 891, 892 (1981).

Based upon a review of the plea hearing transcript, the plea was entered freely, knowingly, intelligently, and voluntarily. At the hearing, he stated he understood what he was charged with and the potential sentences that could be imposed. (Tr. 4-5). Applicant stated he was represented by Counsel for about a year, had plenty of time to talk to Counsel about the case, talked with Counsel about the evidence in the case, told Counsel everything he knew about the allegations against him, and talked about whether a defense existed in the case and determined none existed. (Tr. 5-7). Applicant stated he knew he was waiving his right to remain silent, the right to proceed to a jury trial where the burden would be on the State to show he was guilty beyond a reasonable doubt, and the right to call and confront witnesses. (Tr. 7-13). Applicant stated he was not promised or offered anything if he pled, he was not coerced or forced into pleading, and that he was pleading freely and voluntarily. (Tr. 13-14). Applicant stated he was guilty of killing Richards with malice aforethought and that he possessed a gun during the commission of the crime. (Tr. 14). Applicant stated he did not suffer from any mental

or psychological condition affecting his ability to understand what he was doing at the plea hearing and that he had never been treated for substance abuse problems and did not suffer from a substance abuse problem when pleading. (Tr. 15-16). Thus, Applicant pled freely, knowingly, intelligently, and voluntarily, and, thus, cannot withdraw it now.

Failure to Review Discovery

Applicant testified that Counsels did not review the discovery with him. However, both Counsels credibly testified that they reviewed the discovery with Applicant with exception of the video, which Applicant elected not to view. Applicant also testified that he elected not to view the video and that that was his personal decision. Accordingly, relief is denied on this ground.

Failure to Discuss Day-for-Day

Applicant claims his plea is invalid because he did not know a murder conviction required him to serve his sentence day for day. "It is well settled that parole eligibility is a collateral consequence of sentencing, and that trial counsel need not advise a client of his parole eligibility or ineligibility in order to render effective assistance." *Jackson v. State*, 349 S.C. 62, 64, 562 S.E.2d 475, 476-77 (2002) (citations omitted). "When considering an allegation on PCR that a guilty plea was based on inaccurate advice of counsel, the transcript of the guilty plea hearing will be considered to determine whether information conveyed by the plea judge cured any possible error made by counsel." *Burnett v. State*, 352 S.C. 589, 592, 576 S.E.2d 144, 145 (2003) (citing *Moorehead v. State*, 329 S.C. 329, 496 S.E.2d 415 (1998)).

At the plea hearing, Applicant stated he understood that he would receive a sentence between thirty years' and life imprisonment. (Tr. 4-5). Applicant was never told at the plea hearing that part of the sentence could be suspended. Additionally, Applicant himself stated he was not promised or offered anything to plead. (Tr. 13-14). Thus, this Court finds that even if

Counsels did not advise him definitively on whether he had to serve a day-for-day sentence, there is no indication of misadvise, nor any indication that this knowledge would have caused Applicant to proceed to trial instead. Accordingly, relief is denied on this ground.

Failure to Mitigate Sentence

Applicant claims Counsel was ineffective for failing to mitigate the sentence. Counsel may be found deficient for failing to sufficiently investigate and present mitigating evidence. *See Council v. State*, 380 S.C. 159, 172, 670 S.E.2d 356, 363 (2008) (finding it unreasonable for counsel not to further investigate the defendant's background and present even minimal mitigating evidence obtained); *Wiggins v. Smith*, 539 U.S. 510, 521 (2003) (finding it unreasonable when Counsel failed to investigate mitigating evidence beyond a couple retained records, including the presentence investigation report and social service records); *Williams v. Taylor*, 529 U.S. 362, 398 (2000) (finding that Counsel was unreasonable for failing to evaluate the totality of available mitigation evidence). An applicant is prejudiced by this deficiency if there is a reasonable probability that a different sentence would have been imposed but for Counsel's failure to investigate and present mitigating evidence. *Council v. State*, 380 S.C. 159, 171, 670 S.E.2d 356, 362 (2008).

Counsels' mitigation strategy was reasonable. Counsel Beasley told the plea judge that Applicant comes from a great family, that he grew up in the Bronx and hand a tough childhood. (Tr. 22-23). Specifically, he testified that he experienced abuse as a child and witnessed a murder, amongst other crimes. (Tr. 23). He stated that Applicant loved the victim, and that the crime was senseless. (Tr. 23). He stated that Applicant has an excellent work ethic. (Tr. 24). He stated that Applicant struggled with PTSD and has been receiving mental health treatment while incarcerated. (Tr. 24). He stated that Applicant lost control during the killing and has been

devastated since. (Tr. 25). He stated Applicant admitted guilt and did not ask for bond because he did not want to put the victim's family through that. (Tr. 25-26).

Applicant also gave a very compassionate apology letter, which he could not finish reading himself because he became overwhelmed with emotion. (Tr. 26-28). Four of Applicant's cousins spoke on his behalf. (Tr. 28-30, 32-37). Applicant had his business partner's mother speak on his behalf. (Tr. 30-31).

Dr. Maddox also spoke. She stated that Applicant had a prior history of being an inpatient. (Tr. 38). She stated she evaluated him, and he suffers from depression, was a victim of abuse, and used drinking as self-medication. (Tr. 38-39). She stated he tried to kill himself after killing the victim. (Tr. 39). She stated he suffered slight cognitive impairment from drinking. (Tr. 39). She stated he has previously been treated before, but still struggles mentally and with his morality. (Tr. 39-40). She stated he was truly remorseful over what happened. (Tr. 39).

This Court finds this strategy was reasonable and there has been no showing that highlighting the incidences raised in the application would have had an impact on the sentence. In fact, many of the incidences now raised were touched on at the plea hearing, including Applicant's history of abuse, cognitive impairment, mental health issues, and tough childhood. Applicant has failed to meet his burden of proof regarding either prong of the *Strickland* analysis and denies relief accordingly.

Failure to Pursue Guilty but Mentally Ill Plea

Applicant claims Counsels were ineffective for failure to pursue a guilty but mentally ill plea. Applicant was evaluated by Dr. Maddox, who informed the Court at the plea hearing that she could say Applicant knew what he was doing and could conform his behavior during the incident but failed to do so. (Tr. 39). Additionally, both Counsels and Solicitor all testified that

there was no basis for a guilty but mentally ill plea. Thus, this allegation is without merit and relief denied accordingly.

Motion to Reconsider the Sentence

Applicant claims Counsel was ineffective for failure to move to reconsider the sentence. Both Counsels credibly testified that they filed a notice of appeal upon Applicant's request but did not recall discussing a motion to reconsider the sentence. Both Counsels indicated that they did not think the motion would have been successful, if filed. Thus, Applicant has failed to meet his burden of proof regarding either prong of the *Strickland* analysis and denies relief accordingly.

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Conclusion

Based on all the foregoing, this Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this PCR application must be denied and dismissed with prejudice.

This Court notifies the Applicant that he must file and serve a notice of appeal within thirty days of receipt by counsel of the judgment entry's written notice to secure appropriate appellate review. *See* Rule 203, SCACR. Pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991), an Applicant has the right to appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP provides that if the Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate appellate procedures.

IT IS THEREFORE ORDERED:

1. The PCR application be denied and dismissed with prejudice; and
2. Applicant be remanded to the custody of Respondent.

AND IT IS SO ORDERED this _____ day of 1/17/23, 2022.

BRIAN M. GIBBONS
Presiding Judge
Seventh Judicial Circuit

_____, South Carolina.

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CLERK OF COURT
SPARTANBURG COUNTY

STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG	)	IN THE COURT OF COMMON PLEAS IN THE SEVENTH JUDICIAL CIRCUIT
Derrick Burnside, #382831, Applicant,	)	Case No.: 2020-CP-42-02623
v.	)	**ORDER DENYING APPLICANT'S MOTION FOR RECONSIDERATION**
State of South Carolina, Respondent.	)	

The matter before this Court by way of an application for post-conviction relief (hereafter "PCR") filed August 3, 2020. An evidentiary hearing was held on October 20, 2022, at Spartanburg County Courthouse. Dayne C. Phillips, Esquire, represented Applicant. Assistant Attorney General Chelsey Marto represented Respondent. The Court denied relief by written order dated January 26, 2023. On February 6, 2023, Applicant, through Counsel, filed a Motion for Reconsideration.

After careful consideration of the arguments of Counsel and review of the record, this Court is unable to discover any material fact or principle of law that has either been overlooked or disregarded, and further finds no error of law or fact not appropriately considered. The order of dismissal issued by this Court contains the appropriate findings of fact and conclusions of law as required by section 17-27-80 of the South Carolina Code of Laws and Rule 52(a) of the South Carolina Rules of Civil procedure. Accordingly, Applicant's motion for reconsideration is **DENIED.**

IT IS THEREFORE ORDERED that Applicant's motion is hereby **DENIED AND DISMISSED.**

AND IT IS SO ORDERED this _____ day of 2/24, 2023.

Brian M. Gibbons
Circuit Court Judge
Seventh Judicial Circuit

_____, South Carolina