Melissa J. Armstrong, Esquire
3213 Amherst Avenue
Columbia, S.C. 29205
(803) 467-4541
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September 13, 2013

Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
1015 Sumter Street
Columbia, S.C. 29211

Re: Michael C. Kennedy v. State of South Carolina
11-CP-06-0088

Dear Ms. Kitchings,

Enclosed please find for filing an Original Notice of Intent to Appeal, Certificate of Service an d Final Order of Dismissal in the above-entitled captioned matter.

Because Mr. Kennedy is indigent, I am asking that the South Carolina Department of Appellate Defense assume responsibility for the handing of Mr. Kennedy's Petition for Writ of Certiorari.

Very truly yours,

Melissa J. Armstrong

MJA/me
Enclosures: as stated

cc: Honorable Ralph F. Cothran, Jr.
David Spencer, Esquire
S.C. Office of Appellate Defense
Mr. Michael C. Kennedy

MICHAEL C. KENNEDY, #321820 Applicant, V. STATE OF SOUTH CAROLINA, Respondent.	))))))))	IN THE COURT OF COMMON PLEAS 11-CP-06-0088 **NOTICE OF INTENT TO APPEAL** COUNTY OF BARNWELL

Applicant, by and through counsel undersigned, hereby serves notice of his intent to appeal the denial of post-conviction relief and Order of Dismissal, dated August 23, 2013 and filed and sent August 27, 2013, by the Honorable Ralph F. Cothran, Jr., attached hereto.

Respectfully submitted,

Melissa J. Armstrong, Esquire
3213 Amherst Avenue
Columbia, S.C. 29205
S.C. Bar #9650

This 13th day of September, 2013.

MICHAEL C. KENNEDY, #321820 Applicant, V. STATE OF SOUTH CAROLINA, Respondent.	)))))))	IN THE COURT OF COMMON PLEAS 11-CP-06-0088 **CERTIFICATE OF SERVICE** COUNTY OF BARNWELL

Applicant, by and through counsel undersigned, hereby serves notice of his intent to appeal the denial of post-conviction relief and Order of Dismissal, dated August 23, 2013 and filed and sent August 27, 2013, by the Honorable Ralph F. Cothran, Jr., attached hereto. By first-class mail, on the following parties:

David Spencer, Esquire
P.O. Box 11549
Columbia, S.C. 29211

Honorable Ralph F. Cothran, Jr.
Presiding Judge
16 N. Brooks. St.
Manning, S.C. 29102

Honorable Rhonda McElveen
Barnwell County Clerk of Court
P.O. Box 723
Barnwell, S.C. 29812

South Carolina Office of Appellate Defense
1330 Lady Street, Suite 401
Columbia., S.C. 29201

Respectfully submitted,

Melissa J. Armstrong, Esquire
3213 Amherst Avenue
Columbia, S.C. 29205
S.C. Bar #9650

This 13 day of September, 2013.

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF BARNWELL)

Michael C. Kennedy, #321820
☐ Plaintiff

v.

State Of South Carolina
☒ Defendant.

CASE NO.
2011-CP-06-0088

MOTION AND ORDER INFORMATION FORM AND COVER SHEET

Plaintiff's Attorney:	Defendant's Attorney:
Melissa J. Armstrong, Bar No. Address: 1830 Marion Street Columbia, SC 29201 phone: fax: e-mail: other:	David Spencer, Bar No. 68571 Address: PO Box 11549 Columbia, SC 29211 phone: (803) 734-3689 fax: (803) 734-4113 e-mail: other:

☐ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☒ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☒ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion:
Estimated Time Needed: Court Reporter Needed: ☐ YES / ☒ NO

SECTION II: Motion/Order Type

☐ Written motion attached
☒ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☐ Plaintiff / ☒ Defendant — August 7, 2013 Date submitted

SECTION III: Motion Fee

☐ PAID – AMOUNT:
☒ EXEMPT: (check reason)
☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☒ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter:
☐ Other:

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.
☐ Other:

_____
JUDGE

CODE: _____ Date: _____

CLERK'S VERIFICATION

Date Filed:

Collected by: _____

☐ MOTION FEE COLLECTED: _____
☐ CONTESTED – AMOUNT DUE: _____

RHONDA D. McELVEEN
CLERK OF COURT
BARNWELL, S.C.
2013 AUG 23 AM 11:24

SCCA/233 (11-03)

STATE OF SOUTH CAROLINA
COUNTY OF BARNWELL

IN THE COURT OF COMMON PLEAS
FOR THE SECOND JUDICIAL CIRCUIT

2011-CP-06-0088

Michael C. Kennedy, #321820,

Applicant,

v.

State of South Carolina,

Respondent.

ORDER OF DISMISSAL

This matter is before this Court by way of an application for post-conviction relief (PCR) filed February 22, 2011. The State made its return on August 4, 2011. A hearing into the matter was convened at the Aiken County Courthouse on July 8, 2013. Applicant was present and represented by Melissa J. Armstrong, Esquire. The State was represented by David Spencer of the Office of the South Carolina Attorney General.

Applicant testified on his own behalf. Also testifying was his plea counsel, Franchot A. Brown, Esquire. This Court also had before it the pleadings of both parties, the Clerk of Court's records regarding the subject convictions, the appellate records, and the transcripts of the bond reduction proceeding, guilty plea proceeding, and the hearing for the motion for reconsideration.

PROCEDURAL HISTORY

Applicant is currently incarcerated with the South Carolina Department of Corrections pursuant to the Barnwell County Clerk of Court's orders of commitment. The Barnwell County Grand Jury indicted the Applicant at the May 2007 term of General Sessions for Armed Robbery (2007-GS-06-0144), Assault and Battery with Intent to Kill (ABWIK) (2007-GS-06-0145), and Conspiracy (2007-GS-06-146). Franchot A. Brown, Esquire represented the Applicant. On May 7, 2007, the Applicant pled guilty to Armed Robbery and ABWIK. Pursuant to agreement, the

Conspiracy charge was dismissed. Applicant was sentenced by the Honorable Thomas A. Russo to thirty years imprisonment for Armed Robbery and a consecutive sentence of twenty years imprisonment, suspended to three years probation upon the service of ninety days imprisonment for ABWIK.

A notice of appeal was filed at the South Carolina Court of Appeals. M. Celia Robinson, Esquire submitted a brief pursuant to Anders v. California, 386 U.S. 738 (1967). The Court of Appeals dismissed the Applicant's appeal by Order dated January 25, 2011. The remittitur was issued on February 10, 2011.

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 (1985).

Ineffective Assistance of Counsel and Involuntary Plea

Applicant alleges ineffective assistance of counsel rendered his plea was involuntary. The burden of proof is on the applicant in a PCR proceeding to prove the allegations in his application. Bell v. State, 321 S.C. 238, 467 S.E.2d 926 (1996); Rule 71.1(e), SCRCP.

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Judge v. State, 321 S.C. 554, 471 S.E.2d 146 (1996). In order to prove prejudice, an applicant must show that but for

counsel's errors, there is a reasonable probability the result at trial would have been different. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Id. Where trial counsel articulates a valid reason for employing certain trial strategy, such conduct should not be deemed ineffective assistance of counsel. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1995); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). 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, 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985); Stalk v. State, 383 S.C. 559, 681 S.E.2d 592 (2009); Roscoe v. State, 345 S.C.16, 546 S.E.2d 417 (2001).

To be knowing and voluntary, a plea must be entered with a full understanding of the charges and the consequences of the plea. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969); Dover v. State, 304 S.C. 433, 405 S.E.2d 391 (1991). In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing. Harris v. Leeke, 282 S.C. 131, 318 S.E.2d 360 (1984).

Applicant alleges plea counsel was unprepared for the sentencing phase of the guilty plea proceeding and failed to present sufficient mitigation testimony during the sentencing proceeding. The victim (Victim) in this case was an eighty-six year-old man who was a well-respected member of the community. The prosecution alleged Applicant and his co-defendant, Lugene Tooks, robbed Victim on Victim's front porch. Tooks had done some yard work for Victim and was aware that he carried significant amounts of cash. Tooks lured Victim out of the house and hit him over the head with a wine bottle. Tooks and Victim wrestled on the porch. The prosecution alleges Applicant then came out of the bushes and picked Victim up from the stairs and slammed him to the ground. Applicant then ripped the back pocket off Victim's pants as he took Victim's wallet. Applicant

agreed with the prosecution's statement of facts at the guilty plea hearing. Guily plea transcript pp. 34-36. Applicant alleged at the PCR hearing that he did not throw Victim down the stairs, instead Victim fell.

However, Applicant confirms the other facts and admitted his involvement in the robbery when he testified at the PCR hearing. He testified he was 6'1" and would have weighed about 190 pounds at the time of the plea. He admitted planning the robbery with Tooks. He admitted that when they committed the robbery, they did not ask Victim for his money first, but resorted to an assault immediately. Applicant admits that he and Tooks ganged up on Victim. Applicant admitted ripping Victim's pants pocket to take the wallet. Applicant alleges that it was Tooks' idea to commit the robbery and that he expressed reservations to Tooks about the robbery, but still ended up participating in the robbery. He admitted he was eighteen years old at the time and was older than Tooks. Applicant admitted it was mean to rob such an elderly man the way he and Tooks did.

Counsel testified he considered whether Judge Russo would be a good judge to hear Applicant's guilty plea. Judge Russo was a relatively new judge at the time of the plea. Counsel did a diligent review, discussing Judge Russo's practice with several other attorneys who indicated that Judge Russo was a fair judge. Judge Russo had experience as a prosecutor, public defender, and private attorney. Counsel's review disclosed that Judge Russo appeared to be a favorable judge for the guilty plea.

Counsel testified that he notified all of the potential mitigation witnesses of the court date and advised them that they should be present. Counsel's recollection was that most came, although some might not have been present. The transcript of the guilty plea indicates Applicant's parents were present on his behalf at the guilty plea hearing and his mother spoke. Tr. p. 39; pp. 45-46. Additionally, Counsel presented several additional witnesses at the motion for reconsideration. See

Motion hearing tr. pp. 4-6 (listing people present on behalf of Applicant including his brother, Keith Kennedy, and Kelvin Isaac, an elected official from Blackville, SC). Applicant did not present any witnesses at the PCR hearing other than himself and Mr. Brown. See Bannister v. State 333 S.C. 298, 509 S.E.2d 807 (1998) (finding that when an applicant alleges ineffective assistance for failure to call a witness, the applicant must present the testimony of the favorable witness or present other acceptable evidence to establish prejudice from the alleged deficiency of counsel).

This Court finds Applicant has not met his burden of proof. Counsel made a well-presented plea for mitigation to Judge Russo, emphasizing Applicant's strong family background, his youth, his remorse, and his lack of a prior record. Counsel, as he testified, then made a motion for reconsideration, free of charge, when he was disappointed with the sentence. Counsel made an impassioned argument for sentence reduction, including reference to proposed sentencing guidelines and a comparison of the sentence in the present case to the sentence in a murder case that occurred in Columbia. Counsel presented several additional witnesses at the sentencing hearing, including an elected official who spoke of Applicant highly.

However, the simple matter is Judge Russo found the very nature of the crime particularly mean and brutal. This Court has to agree on that point. More importantly, counsel's conduct did not fall below professional norms, nor has Applicant demonstrated to this Court additional witnesses or evidence sufficient to prove prejudice from Counsel's alleged deficiency.

Additionally, Applicant alleges Counsel was ineffective for failing to object to comments made by the victim's attorney, retired Judge Rodney A. Peeples, asking Judge Russo to send a message to the community with his sentence. Counsel testified that he did not think objecting to those comments would be productive. First, he wanted to avoid a confrontational tone at the plea hearing, as his strategy was to emphasize Applicant's remorse. Second, given Judge Russo's

extensive experience as a prosecutor and public defender, he considered Judge Russo capable of sorting out any inappropriate considerations in determining a just sentence. This Court finds counsel's strategy reasonable and finds counsel's performance was not deficient. This Court agrees that Judge Russo would be capable of sorting out inappropriate considerations in fashioning an appropriate sentence and does not believe Applicant was prejudiced by the lack of an objection to Judge Peeples' comments. *See generally*, State v. Cain, 2979 S.C. 497, 508-09, 377 S.E.2d 556, 562 (1988) (finding solicitor's argument to the jury to "send a message to surrounding counties" during the sentencing phase of a death penalty trial "did not rise to the level of arousing juror passion or prejudice".). Accordingly, this allegation is denied.

This Court finds Applicant has not met his burden of proof and denies this application with prejudice.

CONCLUSION

Based on the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this Application for Post-Conviction Relief must be denied and dismissed with prejudice.

This Court advises the parties that in order to secure the appropriate appellate review, notice of appeal must be served and filed within thirty (30) days after receipt by counsel of notice of entry of this order. See Rules 203 and 243 of the South Carolina Appellate Court Rules. This Court notes that post-conviction relief counsel must advise an applicant of the right to seek appellate review of a post-conviction relief order. State v. Bray, 366 S.C. 137, 620 S.E.2d 743 (2005). Also, pursuant to Austin v. State, 305 S.C. 453, 409 S.E. 2d 395 (1991), an applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, post-conviction relief counsel must

serve and file a notice of appeal on an applicant's behalf.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and

2. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 19 day of [illegible], 2013.

Ralph F. Cothran, Jr.
Presiding Judge
Second Judicial Circuit

[illegible], South Carolina