



Division of Appellate Defense  
1330 Lady Street, Suite 401  
Columbia, South Carolina 29201-3332  
Post Office Box 11589  
Columbia, South Carolina 29211-1589  
Telephone: (803) 734-1330  
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender  
Wanda H. Carter, Deputy Chief Appellate Defender

January 11, 2012

RECEIVED

JAN 11 2012

S.C. Supreme Court

Ms. Crystal Holmes  
Circuit Court Reporter  
P O Box 611  
Columbia, SC 29202

Dear Ms. Holmes:

Please provide us with the following transcript:

Gary A. White, Jr. v. State of South Carolina      Case #:      09-CP-40-05549

County: Richland      Date of Trial: October 18, 2010

Presiding Judge: L. Casey Manning

To ensure prompt payment, please sign and complete the enclosed CID FORM 3500 and include the original criminal case number (Indictment number) where the space is provided.

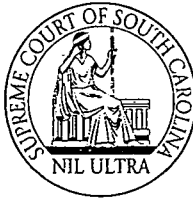
Please number the lines on the paper from 1-25, and include any and all recorded motions, pre and post-trial. Additionally, please transcribe the jury selection, and the State and defense counsel's opening and closing arguments.

If you are aware of any co-defendants or if the Attorney General's Office has already requested a transcript, please let us know.

Sincerely,

Sharon A. Graham  
Administrative Coordinator

cc: S.C. Supreme Court  
Attorney General's Office



# The Supreme Court of South Carolina

DANIEL E. SHEAROUSE  
CLERK OF COURT

BRENDA F. SHEALY  
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330  
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

January 9, 2012

Mark E. Schnee, Esquire  
1720 Main St  
Ste 202  
Columbia, SC 29201-2850

Re: White, Gary A. Jr. v. The State

Dear Mr. Schnee:

The Division of Appellate Defense has advised this office that it has not been provided with sufficient information to make a determination if the petitioner is indigent in this matter, and that it has closed its file in this matter. Accordingly, we are marking our records to indicate that you will remain as his counsel in this matter. Rule 71.1(g), SCRCP; Rule 264(a), SCACR.

If you have not already done so, any transcripts should be ordered within ten (10) days of the date of this letter. Please remember to provide this office and Court Administration with a copy of all correspondence with the court reporter. Rule 207, SCACR.

Very truly yours,

CLERK

DES/jj

cc: Appellate Defense  
Gary A. White, Jr. #309726  
Assistant Attorney General Brian T. Petrano





# THE SCHNEE

L A W F I R M

1720 Main Street, Suite 202  
Columbia, SC 29201  
(803)771-0075  
Fax - (803)799-5888  
SchneeLawFirm@gmail.com

RECEIVED

NOV 21 2011

S.C. SUPREME COURT

The Honorable Daniel E. Shearouse  
Clerk, S.C. Supreme Court  
P.O. Box 11330  
Columbia, SC 29211

Re: Gary A. White, Jr. v. State

November 17, 2011

Dear Mr. Shearouse:

I recently received notice that the Office of Appellate Defense has not received proof that Mr. White is indigent and, therefore, has closed the file in their office. I am re-sending proof to the Office of Appellate Defense.

Please allow this letter to serve as a request for a thirty (30) day extension to request the transcript and allow me to provide the Office of Appellate Defense with the required documents.

Respectfully,

Mark Schnee  
Attorney at Law

Nov. 7, 2011

To: Hon. Supreme Court Clerk,

I'm writing because I'm striving to get  
(copies (clock stamped) of my "NOTICE of Appeal, Appeal (Case No: 2009 CP4005549  
Request to be held in Abeyance" DATED 10-10-2011.  
if possible. THANK you for your TIME in THIS MATTER

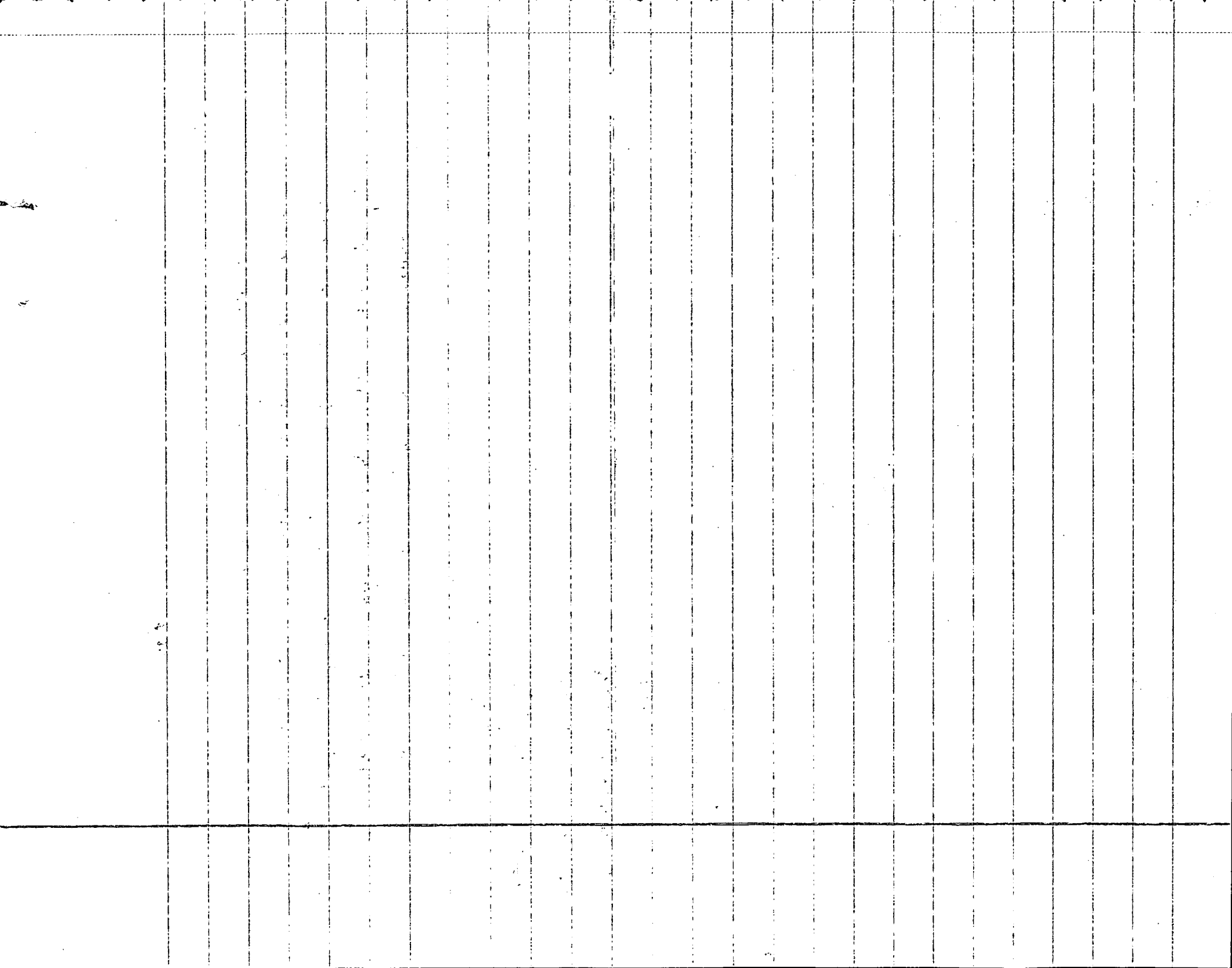
Respectfully,

Amy White # 305724  
McCormick C.E. F4 B229  
386 Redemption way  
McCormick, S.C. 29899

RECEIVED

NOV 07 2011

S.C. SUPREME COURT

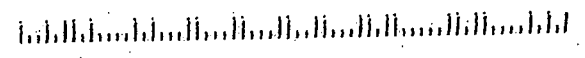


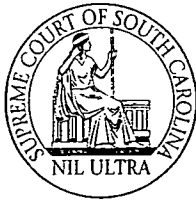
GARY WHITE 304726  
MCCORMICK C.I. #4 B 229  
286 REDEMPTION WAY  
MCCORMICK, S.C. 29844



SOUTH CAROLINA SUPREME CT.  
THE HON. SUPREME COURT CLERK  
P.O. BOX 11330  
COLUMBIA S.C. 29211

29211&1330





# The Supreme Court of South Carolina

DANIEL E. SHEAROUSE  
CLERK OF COURT

BRENDA F. SHEALY  
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330  
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

November 8, 2011

Mark E. Schnee, Esquire  
1720 Main St  
Ste 202  
Columbia, SC 29201-2850


Re: White, Gary A. Jr. v. The State

Dear Mr. Schnee:

The Division of Appellate Defense has advised this office that it will not be providing representation in this matter. Therefore, we are marking our records to indicate that you remain his counsel of record in this matter.

The transcript of the evidentiary hearing must be ordered within ten (10) days of the date of this letter.

Very truly yours,



CLERK

DES/jj

cc: Appellate Defense  
Assistant Attorney General Brian T. Petrano  
Gary A, White Jr. #309726



# SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense  
1330 Lady Street, Suite 401  
Columbia, South Carolina 29201-3332  
Post Office Box 11589  
Columbia, South Carolina 29211-1589  
Telephone: (803) 734-1330  
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender  
Wanda H. Carter, Deputy Chief Appellate Defender

November 3, 2011

RECEIVED

NOV 4 2011

S.C. Supreme Court

Mark Schnee, Esquire  
1720 Main Street, Ste. 202  
Columbia, SC 29201

Re: Gary A. White, Jr. v. State of South Carolina

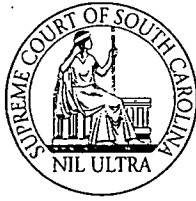
Dear Mr. Schnee:

Since we have received no response from you to our letter of September 28, 2011, we must assume you will be handling the appeal for Mr. White. Therefore, we are closing our file in this matter and by copy of this letter advising the Supreme Court and the Attorney General's Office that all future correspondence should be directed to you. Please do not hesitate to contact me if you have any questions.

Sincerely,

Sharon A. Graham  
Administrative Coordinator

cc: S.C. Supreme Court  
Attorney General's Office



# The Supreme Court of South Carolina

DANIEL E. SHEAROUSE  
CLERK OF COURT

BRENDA F. SHEALY  
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330  
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

November 7, 2011

Mark E. Schnee, Esquire  
1720 Main St, Ste 202  
Columbia, SC 29201-2850

Re: *White, Gary A. Jr. v. The State*, 2009-CP-40-05549

Dear Mr. Schnee:

Enclosed is a *pro se* document filed by your client. Since you represent him in this matter, no action will be taken on this *pro se* filing. *Miller v. State*, 388 S.C. 347, 697 S.E.2d 527 (2010); *Jones v. State*, 348 S.C. 13, 558 S.E.2d 517 (2002); *State v. Stuckey*, 333 S.C. 56, 508 S.E.2d 564 (1998); *Foster v. State*, 298 S.C. 306, 379 S.E.2d 907 (1989). If it is appropriate to dismiss this appeal without prejudice under *Hudson v. Hudson*, 90 S.C. 215, 349 S.E.2d 341 (1986), that request will have to be made you as his counsel.

Very truly yours,



CLERK

Enclosure

cc: Appellate Defense  
Assistant Attorney General Brian T. Petrano  
Mr. Gary White, Jr., #309726

DATE 10-10-2011

RE: P.C.R. # CASE NO: 2009 CP 400 5549

**RECEIVED**

OCT 12 2011

S.C. SUPREME COURT

NOTICE OF APPEAL  
REQUEST TO BE HELD  
IN ABEYANCE

DEAR HON. SUPREME COURT CLERK:

PLEASE BE ADVISED THAT MY P.C.R. ATTY: MARK SCHNEE, JUST INFORMED ME ON 10-7-2011 THAT HE HAS FILED HIS NOTICE OF APPEAL IN THE ABOVE CASE. I BELIEVE THAT THIS NOTICE OF APPEAL IS PREMATURE. WHERE THERE IS A TIMELY 59(e) MOTION STILL PENDING BEFORE THE LOWER COURT, WHICH THE P.C.R. JUDGE STILL HAS JURISDICTION OVER THIS MATTER. SEE OTTEN V. OTTEN 337 SE2d 207; HUDSON V. HUDSON 349 SE2d 341. THEREFORE, I AM RESPECTFULLY REQUESTING FOR MY APPEAL TO BE HELD IN ABEYANCE UNTIL THE LOWER COURT MAKES THEIR RULING UPON THE 59(e) MOTION.

THANK YOU...

SINCERELY,

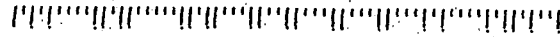
cc ATTY: MARK SCHNEE

cc PERSONAL FILE:

cc APPELLATE DEFENSE

Jung White Jr 309726  
McCoemick C.I. F4B 229  
386 REDEMPTION WAY  
McCoemick S.C. 29899





25211330

South Carolina Supreme Ct.  
The Hon. Supreme Court Clerk  
P.O. Box 11330  
Columbia, S.C. 29211



AUGUSTA GA 309  
11 OCT 2011 PM 11

GARY WHITE 309726  
McCormick, C. I. #48229  
386 Redemption Way  
McCormick S.C. 29899

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

RECEIVED

SEP 15 2011

S.C. Supreme Court

APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

JEANETTE W. McBRIDE  
C.C.P. & G.S.

2011 SEP 15 PM 12:59

FILED

Case No. 2009-CP-40-05549

Gary A. White, Jr., #309726, .....Petitioner,

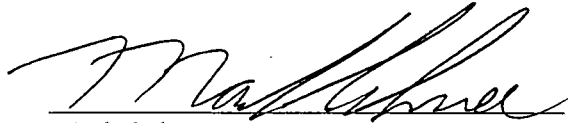
v.

State of South Carolina, ..... Respondent.

NOTICE OF APPEAL

Gary A. White, Jr. appeals the Order of Dismissal to his Application for Post-Conviction Relief. The Application for Post-Conviction Relief by the Petitioner was filed on August 5, 2009. The Order of Dismissal was imposed by the Honorable L. Casey Manning on August 30, 2011. Counsel for the Petitioner received notice of the Order of Dismissal on September 4, 2011.

September 15, 2011



Mark Schnee  
The Schnee Law Firm  
1720 Main Street, Suite 202  
Columbia, South Carolina 29201  
(803) 771-0075  
Attorney for Petitioner

Other Counsel of Record:

Assistant Attorney General Brian Petrano  
Office of the Attorney General  
P.O. Box 11549  
Columbia, SC 29211

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

RECEIVED

SEP 15 2011

APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

S.C. Supreme Court

L. Casey Manning, Circuit Court Judge

JEANETTE W. McBRIDE  
C.C.P. & G.S.

2011 SEP 15 PM 12:59

FILED

Case No. 2009-CP-40-05549

Gary A. White, Jr., #309726, .....Petitioner,

v.

State of South Carolina, ..... Respondent.

PROOF OF SERVICE

I hereby certify that a true copy of the Notice of Intent to Appeal in the above-referenced case has been served upon opposing counsel by delivering same this date to his office at the Office of the Attorney General, P.O. Box 11549, Columbia, South Carolina, 29211.

September 15, 2011



Mark Schnee  
The Schnee Law Firm  
1720 Main Street, Suite 202  
Columbia, South Carolina 29201  
(803) 771-0075  
Attorney for Petitioner

Other Counsel of Record:

Assistant Attorney General Brian Petrano  
Office of the Attorney General  
P.O. Box 11549  
Columbia, SC 29211

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF RICHLAND )  
 )  
 )  
 )  
 White, Gary, #00309726, )  
 )  
 Applicant, )  
 )  
 v. )  
 )  
 State of South Carolina, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS

2009CP4005549

ORDER OF DISMISSAL

JEANNETTE W. McBRIDE  
 C.C.P. & G.S.

2011 AUG 31 AM 11:04

RICHLAND COUNTY  
 FILED

**PROCEDURAL HISTORY**

This matter comes before the Court by way of an Application for Post-Conviction Relief filed August 5, 2009. The Respondent made its Return on or about May 24, 2010. An evidentiary hearing into the matter was convened on October 18, 2010 at the Richland County Courthouse. The Applicant was present at the hearing and was represented by Mark E. Schnee, Esquire. Brian T. Petrano of the South Carolina Attorney General's Office represented the Respondent.

At the hearing, the Applicant testified on his own behalf. The Applicant's trial counsel, who was at the time of the trial an Assistant Public Defender, Stacy Owings also testified. This Court had before it the records of the Richland County Clerk of Court, the transcript of the proceedings against the Applicant, the Applicant's records from the South Carolina Department of Corrections, and finally the records from the Applicant's direct appeal.

**SCANNED**

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Richland County. The Applicant was represented by Stacy Owings, Assistant Public Defender.<sup>1</sup> On June 16, 2005, after a jury trial with the Honorable James R. Barber, III, the Applicant was convicted and sentenced to the following:

| Grand Jury Term | Indictment Number | CDR, S.C. Code, s.           | Charged Offense / Potential Sentence       | Offense Description | Sentence Received | Sentenced to Lesser Offense? |
|-----------------|-------------------|------------------------------|--|---------------------|-------------------|------------------------------|
| 7-04            | 2004GS4003018     | 0139 16-11-0330(A) * 10-30 * | Robbery / Armed Robbery (victim: Circle K) |                     | LWOP              | No                           |
| 7-04            | 2004GS4003017     | 0095 16-03-0910 * 30 *       | Kidnapping / Kidnapping (J. Gwen Anthony)  |                     | LWOP              | No                           |
| 7-04            | 2004GS4003016     | 0139 16-11-0330(A) * 10-30 * | Robbery / Armed Robbery (J. Gwen Anthony)  |                     | LWOP              | No                           |

NOTES: LWOP was pursuant to S.C. Code § 17-25-45. There was a weapons charge but that was not pursued at trial/b/c of indictment issues, p. 12.

TOTAL LWOP: POSSIBLE

A timely Notice of Appeal was filed on Applicant's behalf. The Court of Appeals affirmed the conviction. State v. White, 382 S.C. 265, 267, 676 S.E.2d 684, 685 (2009), reh'g denied (May 28, 2009). The South Carolina Supreme Court also confirmed the conviction. State v. White, 372 S.C. 364, 370, 642 S.E.2d 607, 609 (S.C. Ct. App. 2007) aff'd but criticized, 382 S.C. 265, 676 S.E.2d 684 (2009).<sup>2</sup> The facts of the case from the Supreme Court opinion are as follows:

This case arises from an armed robbery of a convenience store in Columbia, South Carolina. After midnight on April 19, 2004, Gary White and Anthony Morris were riding in a car driven by Roy Wiggins. As Wiggins drove past a convenience store, White told Wiggins to turn around and go back to the store. Wiggins complied. Wiggins drove to the store and parked behind it. White and Morris exited the car, with Wiggins staying behind in the driver's seat. White was carrying a gun.

<sup>1</sup> Ms. Owings is now in private practice.

<sup>2</sup> This case was our Supreme Court's "Case of the Month." A video of the oral argument is available online at: <http://www.sccourts.org/caseOfMonth/Feb2009/index.cfm>

White and Morris entered the convenience store. Gwen Anthony, the store manager, was restocking the grill area when White and Morris entered suddenly. Anthony described the robbers' entry as a "flash."

White, armed with the gun, grabbed Anthony, put his arm around her, and pointed the gun to her neck. Morris moved through the store stealing cash, lottery tickets and an 18-pack of beer while White continued to hold Anthony at gunpoint. While Morris was at the beer cooler, White, while standing up, apparently lost consciousness.

Anthony testified that White's head fell to her shoulder, and the gun dropped from her neck. Although he was unconscious for only a few seconds, Anthony observed that White's breath smelled like alcohol, his gun was black with a silver top, and his jeans were baggy and dark in color. With the 18-pack of beer in hand, Morris ran up the aisle toward the door and screamed at White, waking him. White, still holding Anthony, returned the gun to her neck and began to move toward the door, forcing her to accompany him. As they exited the store, White pushed Anthony away and ran in the opposite direction. At that very moment, Officer Rouppasong of the Columbia Police Department pulled into the store parking lot on a routine break.

Upon his arrival on the scene, Officer Rouppasong saw two people: Anthony, waving and flagging him down and another person running away from the store. Rouppasong described the man he saw running as a black male, wearing a white t-shirt and dark colored pants, holding or carrying something in one of his hands. Rouppasong remained in his vehicle and followed White. As he followed him around the corner of the store, Rouppasong saw a car parked on the street. Rouppasong saw a black male (later identified as White) exit the car on the passenger side and flee. Rouppasong did not give chase; instead, he stayed with the vehicle and Wiggins. Officer Gunter, with the K9 unit, was called to the scene to search for the suspect. Officer Gunter arrived on the scene approximately thirty minutes after the robbery. Once there, Rouppasong relayed the necessary information that allowed Gunter to know where to initiate the track. Gunter and his tracking dog, Aurie, began tracking

and soon found White nearby sleeping next to some bushes, gun in hand. Rouppasong testified that the man he saw lying by the bushes, asleep, was the same man he saw exiting the store and fleeing the crime scene. There were two other in-court eyewitness identifications of White. Wiggins testified that White left his car with a gun, returned to his car a short time later, and then fled when police arrived. The second identification came from Morris.

White was convicted of two counts of armed robbery and kidnapping; he was sentenced to life without parole.

State v. White, 382 S.C. 265, 267-68, 676 S.E.2d 684, 685-86 (2009).

In the PCR application the Applicant made the following allegations:

9. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

- (a) NEW DISCOVERED EVIDENCE
- (b) INEFFECTIVE ASSISTENCE OF TRIAL COUNSEL
- (c) INEFFECTIVE ASSISTENCE OF TRIAL COUNSEL

13. 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? YES

14. If you answered "yes" to (13), identify:

- (a) which grounds have been presented:
  - i. NEWLY DISCOVERED EVIDENCE
  - ii. \_\_\_\_\_
  - iii. \_\_\_\_\_
- (b) the proceedings in which each ground was raised:
  - i. BY MOTION TO REMAND FOR NEW TRIAL OR IN THE ALTERNATIVE FOR A HEARING INTO NEW EVIDENCE.
  - ii. \_\_\_\_\_
  - iii. \_\_\_\_\_

15. 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:

- (a) CERTAIN ISSUES WERE NOT PERSEIVED AT TRIAL AND COULD NOT BE RAISED ON DIRECT APPEAL.
- (b) \_\_\_\_\_
- (c) \_\_\_\_\_

18. State clearly the relief you seek in filing this application.

TO HAVE SENTENCE VACATED OR IN THE ALTERNATIVE, TO HAVE A NEW TRIAL.

7. If you answered "yes" to (6), list

(A) THE NAME OF EACH COURT TO WHICH YOU APPEALED:

IV. WRIT OF HABEAS CORPUS TO SUPREME COURT (S.C.)

V. PETITION FOR REHEARING TO SUPREME COURT (S.C.)

(B) THE RESULT IN EACH SUCH COURT TO WHICH YOU APPEALED:

IV. GRANTED NOV. 19, 2007 AFFIRMED APRIL 27, 2009

V. DENIED MAY 28, 2009

(C) THE DATE OF SUCH RESULT:

IV. APRIL 27, 2009

V. MAY 28, 2009

10. STATE CONCISELY AND IN THE SAME ORDER THE FACTS WHICH SUPPORT EACH OF THE GROUNDS SET OUT IN (9)

(A) CO-DEFENDANT ANTHONY MORRIS RETRACTED HIS TRIAL TESTIMONY BY WAY OF A SWORN STATEMENT. THE STATEMENT ITSELF WEAKENS THE STATES CASE AGAINST MR. WHITE.

(B) TRIAL COUNSEL WAS INEFFECTIVE BY ALLOWING THE STATE TO PRESENT EVIDENCE IN CASE ON A ~~CHARGE~~ CHARGE THAT WAS DISMISSED AT THE START OF TRIAL.

(C) TRIAL COUNSEL WAS INEFFECTIVE BY FAILING TO PURSUE OBJECTION OF JURY CHARGE HAND OF ONE HAND OF ALL. BY FAIL TO PURSUE OBJECTION, COUNSEL ALLOWED THE JUDGE TO GIVE THE CHARGE WITHOUT MAKING A RULING ON OBJECTED CHARGE.

CONTINUED ON BACK SIDE →

12. IF YOU ANSWERED "YES" TO ANY PART OF (11), LIST WITH RESPECT TO EACH PETITION, MOTION OR APPLICATION:

(A) THE SPECIFIC NATURE THEREOF:

IV. PETITION FOR REHEARING TO SUPREME COURT (S.C.)

(B) THE NAME AND LOCATION OF THE COURT IN WHICH EACH WAS FILED:

IV RICHLAND COUNTY, COLUMBIA S.C.

As shown below, at the evidentiary hearing the Applicant proceeded, for the most part, on the allegations as stated in the application for post-conviction relief.

## 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 at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. § 17-27-80 (1985).

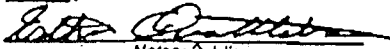
The Applicant testified that Anthony Morris issued a statement following his (Morris') testimony at the trial recanting any involvement in the robbery. The Applicant argued that Morris' retraction affected the testimony of Higgins because Higgins testified that Morris was also at the scene, whereas Morris' recant disclaims any involvement or presence at the scene whatsoever. Morris' "recant" is inserted below:<sup>3</sup>

---

<sup>3</sup> The "recant" was filed as page five (5) of the Applicant's "Motion to Remand For a New Trial, Or, In the Alternative, For a Hearing into New Evidence" filed with the Court of Appeals on October 19, 2005. The State filed their "Return to Motion to Remand for a New Trial" on November 16, 2005. The South Carolina Court of Appeals denied the Applicant's request by written order dated December 9, 2005.

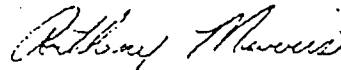
My Name is Anthony Russell Morris, and I'm claiming this to be a true statement that I'm about to write, On June 15, 2005 I gave a statement to the Court house, which was a lie, but the reason why was because I was told that if I testify on my Co-defendant, I would plea to a lesser charge than what they wanted me to plea to. So being that I had custody of my mother, and saw the video tape, I put parts together, and come up with a story, I also was able to see Ray's statements, To be truthful I wasn't on the scene of the crime, My lawyer just told me that I was now in the middle of all this, and either way it went I was gonna face something. But if I wanted the minimum I would have to testify on a person, and a crime that I didn't <sup>know</sup> anything about. This is my first time ever being in trouble with the law, so what ever my lawyer told me, I believed him. On the day it was time for me to plea, he came to the County and told me that, they were not gonna drop my charges, so I told him that I didn't want to testify, and I wasn't ready to plea. In Return he told me that I would have to testify, and I would either have to plea, or either go to trial with my Co-defendant, and would get 90 years. So being that I didn't know what was going on, I did what I was told, and in Return, I received 13 years for something I didn't do, and also got my Co-defendant's time, and really don't know him, or if he was on the crime scene either.

SWORN or affirmed to and subscribed  
before me this 15<sup>th</sup> day of July,  
2005.

  
Notary Public

My Commission Expires May 18, 2014

7/15/05

  
Anthony Morris

The Applicant further alleged that the indictments failed to put him on proper notice that there would be any alleged co-defendants and that precluded him from properly preparing a defense. The Applicant testified that he did see Morris after Morris testified at the trial but that he (Applicant) did not say anything to Morris. The Applicant testified that he never asked Morris to issue the statement/recant.

Trial counsel testified that Morris' testimony during the trial was not unimportant. Trial counsel explained that the retraction would have provided something to cross examine the other co-defendant (the driver - Roy Wiggins). Trial counsel explained that Wiggins and Morris put the Applicant at the scene, and the recant would have given them a better chance.

In a post-conviction relief action, the Applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the 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, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts

presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813 (1985). The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 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. As discussed above, the Applicant has failed to carry his burden in this action. Therefore, this Court finds that the application must be denied and dismissed.

Beyond his review of the undisputed procedural history, this Court finds Applicant's testimony is not credible. Trial counsel's testimony was credible.

Regarding Morris' supposed recant. This Court notes that Morris [Morris, Anthony Terrell #309858] was never produced at the PCR hearing as a witness to authenticate and/or be cross examined about his recant. According to the Richland County Clerk of Court's Online Judicial Index, Morris pled guilty on June 9, 2005 (a week prior to the Applicant's trial) about a month prior to his supposed recant

(2004GS4005082).<sup>4</sup> Yet Morris, despite the supposed recant, waited until August 2006 to file an untimely PCR application (2006CP4004860).<sup>5</sup> This Court notes that it is odd and somewhat inconsistent for Morris to supposedly issue this recant claiming his innocence yet never timely pursue any challenge to his conviction/sentence regarding the crime that he claims (according to the recant) he was not involved with.<sup>6</sup>

The Respondent argued that the recant issue was dealt with by the Court of Appeals and the issue is therefore not properly before this Court, i.e. the issues 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 Respondent argued specifically that issue (Morris recant) was presented to the Court of Appeals. The “recant” was filed as page five (5) of the Applicant’s “**Motion to Remand For a New Trial, Or, In the Alternative, For a Hearing into New Evidence**” filed with the Court of Appeals on October 19, 2005. The State filed their

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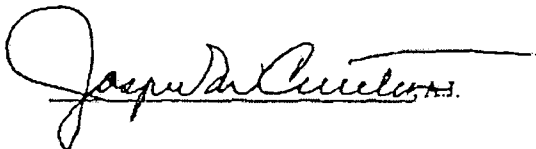
<sup>4</sup>See <http://www4.rcgov.us/publicindex/PICaseDetails.aspx?County=40+&Casenum=2004GS4005082&CourtType=G&CaseType=Criminal&CourtAgency=40001&LastName=Morris&FirstName=Anthony>

<sup>5</sup> Anthony Morris’ PCR was denied/dismissed on June 25, 2007 (2006CP4004860).

<http://www4.rcgov.us/publicindex/PICaseDetails.aspx?County=40+&Casenum=2006CP4004860&CourtType=G&CaseType=Civil&CourtAgency=40002&LastName=Morris&FirstName=Anthony>

<sup>6</sup> Mr. Morris’ testimony begins on page 369 of the Applicant’s trial.

“Return to Motion to Remand for a New Trial” on November 16, 2005. The South Carolina Court of Appeals denied the Applicant’s request by written order dated December 9, 2005:<sup>7</sup>

|   |             |
|---|-------------|
| <b>The South Carolina Court of Appeals</b>  |             |
| The State,  | Respondent, |
| v.  |             |
| Gary A. White,  | Appellant:  |
| The Honorable James R. Barber<br>Richland County<br>Trial Court Case No. 2004-GS-40-03015<br>2004-GS-40-03016<br>2004-GS-40-03017<br>2004-GS-40-03018   |             |
| ORDER   |             |
| <p>The appellant moves for a remand for either a new trial or a hearing on whether a new trial should be ordered. The ground for this motion is the recently created recantation statement of a trial witness.</p> <p>Based on the authority of <u>State v. Porter</u>, 296 S.C.618, 239 S.E.2d 641(1977), and <u>Hayden v. State</u>, 278 S.C. 610, 299 S.E.2d 854(1983) as applied to facts of this case, the motion is denied.</p> <p>IT IS SO ORDERED.</p> <p style="text-align: center;"></p> <p>Columbia, South Carolina<br/>December 9, 2005</p> <p>cc: Assistant Appellate Defender Aileen P. Clare<br/>Assistant Deputy Attorney General Salley W. Elliott</p> |             |

<sup>7</sup> The Applicant’s October 19, 2005 “Motion to Remand For a New Trial, Or, In the Alternative, For a Hearing into New Evidence” (including the Morris statement itself) and the December 9, 2005 Order by the Court of Appeals was part of the Supplemental Appendix submitted on certiorari to the South Carolina Supreme Court.

The Respondent argues that the Court of Appeals Order and the specific citation to Hayden v. State makes it clear that this issue of Morris' recant as supposed newly discovered evidence was flatly rejected by the Court of Appeals.

A party requesting a new trial based on after-discovered evidence must show that the evidence:

- (1) Is such as would probably change the result if a new trial was had;
- (2) Has been discovered since the trial;
- (3) Could not by the exercise of due diligence have been discovered before the trial;
- (4) Is material to the issue of guilt or innocence; and,
- (5) Is not merely cumulative or impeaching.

Hayden v. State, 278 S.C. 610, 611, 299 S.E.2d 854, 855 (1983)

The Respondent argued that the Court of Appeals was correct in denying the Applicant's newly discovered evidence motion because the Morris statement fails to satisfy the Hayden test. The Morris statement is self serving and it does not materially affect the outcome of the trial because Morris is not the only evidence putting the Applicant at the scene of the crime.<sup>8</sup> Morris' statement is not exculpatory (but for Morris himself) because it denies any knowledge of whether the Applicant was involved in the crime.

The Applicant on the other hand relies on the published opinion by the Supreme Court that footnotes the newly discovered evidence issue:

White also asked the court of appeals to grant him a new trial based on newly discovered evidence. It appears the new trial motion was not presented to the trial court. Moreover, White did not ask the court of appeals to remand the new trial motion to the trial court. *See State v. Mercer*, 381 S.C. 149, 165-66, 672 S.E.2d 556, 564-65 (2009) (recognizing that a motion for a new trial based upon after discovered evidence must be presented to the trial court in the first instance). The court of

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<sup>8</sup> As the appellate opinion explained, Officer Rouppasong, Aurie (the German Shepherd), and substantial circumstantial evidence placed the Applicant at the scene of the crime.

appeals declined to address the issue “because it ha[d] not been raised to and ruled on by the trial court and [wa]s not properly before th[e] court.” *White*, 372 S.C. at 387, 642 S.E.2d at 619. We affirm the court of appeals on this issue. Rule 220(b)(1), SCACR. The disposition of this issue is without prejudice to White seeking such relief in the trial court.

State v. White, 382 S.C. 265, 275, 676 S.E.2d 684, 689 n.2 (2009), reh'g denied (May 28, 2009).

This Court respectfully notes that the Supreme Court footnote appears to be inconsistent with the appellate records before this Court. The footnote includes the following: “White did not ask the court of appeals to remand the new trial motion to the trial court.” The Applicant’s October 19, 2005 “*Motion to Remand for a New Trial, Or, In the Alternative, For a Hearing into New Evidence*” (including the Morris statement itself) clearly requested the Court of Appeals to remand the case to the trial court. To be clear, according to the appellate records, the Applicant’s October 19, 2005 “*Motion to Remand for a New Trial, Or, In the Alternative, For a Hearing into New Evidence*” (including the Morris statement itself) and the December 9, 2005 Order by the Court of Appeals was part of the Supplemental Appendix submitted on certiorari to the South Carolina Supreme Court. In fact, the first sentences of the Applicant’s October 19, 2005 “*Motion to Remand for a New Trial, Or, In the Alternative, For a Hearing into New Evidence*” request that the Court of Appeals remand the case for a hearing into the new evidence.

Accordingly, there is no good faith claim that counsel did not move the appellate court to remand the case to the trial court to determine if the Morris statement was sufficient newly discovered evidence. It is obvious that the Court of Appeals rejected the Applicant’s argument regarding the Morris statement and found that it did not satisfy the Hayden factors for newly discovered evidence – the Order specifically cites Hayden. The Applicant has failed to satisfy his

burden of proof and demonstrate that the Morris statement satisfies the Hayden factors and/or that the Court of Appeals decision was incorrect when his motion to remand was denied. The Court recognizes the Applicant's argument that the final sentence of the Supreme Court opinion implies that the newly discovered evidence issue is still available: "[t]he disposition of this issue is without prejudice to White seeking such relief in the trial court." White at n.2. Once again, the Applicant simply failed to satisfy his burden of proof at the PCR hearing and demonstrate that the Morris statement satisfied the Hayden factors, i.e. that it was/is material to his guilt or innocence and would have changed the result of the trial.<sup>9</sup> Accordingly, there is has been no demonstration of prejudice no matter which court was presented with the recant issue, i.e. the Supreme Court, the Court of Appeals, or the trial court.

The Applicant's remaining issue(s) are without merit. The Applicant had notice that the State's case included the co-defendants. The defense was well aware that the co-defendant(s) were part of the State's case. In fact, trial counsel, in pretrial matters, knew (from the discovery) that one of co-defendants might mention that that the Applicant indicated he needed to do the robbery to pay his parole fees. (Transcript, p. 6 L. 20 – p. 11 L. 25).

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<sup>9</sup> Further, this Court did not find the Applicant credible that he did not confront Morris when the two crossed paths after Morris testified against the Applicant at trial.

## CONCLUSION

Based on all 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. Counsel was not deficient in any manner, nor was Applicant prejudiced by counsel's representation. Therefore, this application for post conviction relief must be denied and dismissed with prejudice.

Except as discussed above, this Court finds that the Applicant failed to raise the remaining allegations set forth in his application at the hearing and has, thereby, waived them. As to any and all allegations that were or could have been raised in the application or at the hearing in this matter, but were not specifically addressed in this Order, this Court finds Applicant failed to present any probative evidence regarding such allegations. Accordingly, this Court finds that Applicant waived such allegations and failed to meet his burden of proof regarding them. Accordingly, they are dismissed with prejudice. A waiver is a voluntary and intentional abandonment or relinquishment of a known right. Janasik v. Fairway Oaks Villas Horizontal Property Regime, 307 S.C. 339, 415 S.E.2d 384 (1992). A waiver may be express or implied. "An implied waiver results from acts and conduct of the party against whom the doctrine is invoked from which an intentional relinquishment of a right is reasonably inferable." Lyles v. BMI, Inc., 292 S.C. 153, 158-59, 355 S.E.2d 282 (Ct. App. 1987). The Applicant's failure to address these issue at the hearing indicates a voluntary and intentional

relinquishment of his right to do so. Therefore, any and all remaining allegations are denied and dismissed.

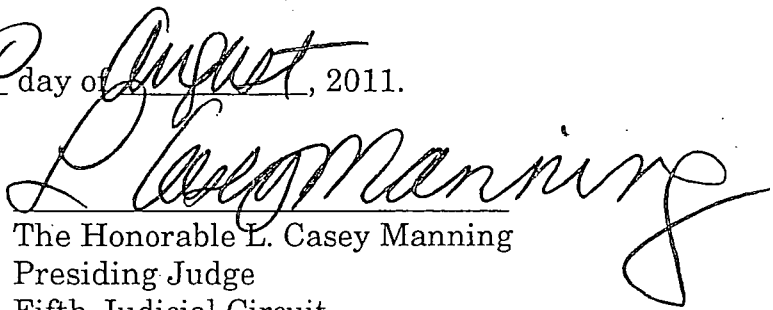
This Court cautions the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an 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 the Applicant's behalf. Applicant and counsel are 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 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 30 day of August, 2011.

Colo, South Carolina.

  
The Honorable L. Casey Manning  
Presiding Judge  
Fifth Judicial Circuit