LAW OFFICE OF
TRICIA A. BLANCHETTE

RECEIVED
NOV 07 2017
S.C. SUPREME COURT

November 7, 2017
VIA HAND DELIVERY

The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211

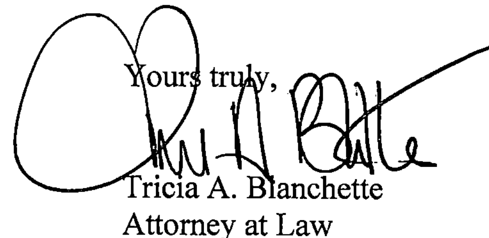
RE: Miguel Alejandro Urena v. State

Dear Sir:

For filing, attached please find a Notice of Appeal, Certificate of Service and copy of the Orders from the underlying PCR Application.

Thank you for your assistance with this matter. Please contact me if any additional information is needed.

Yours truly,



Tricia A. Blanchette
Attorney at Law

cc: Dorchester County Clerk of Court (without Orders)
Ruston Neely, Office of the Attorney General
Miguel Urena

PO Box 2147 • Leesville, SC 29070
803.908.3266 • blanchettelaw@gmail.com

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
NOV 07 2017
S.C. SUPREME COURT

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas
Post Conviction Relief

Honorable Robert E. Hood, Circuit Court Judge

Case No.: 2015-CP-18-994

Miguel Alejandro Urena, 354385, Petitioner,

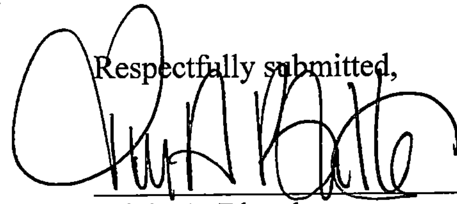
vs.

State of South Carolina Respondent.

NOTICE OF APPEAL

Miguel Alejandro Urena, Petitioner, appeals the Order of Dismissal issued by the Honorable Robert E. Hood on August 22, 2017, which was filed on August 30, 2017. Petitioner also appeals the Order issued by the Honorable Robert E. Hood on September 27,, 2017, which was filed on October 4, 2017. Petitioner, through counsel, received notice of the entry of the Order on October 10, 2017.

Respectfully submitted,



Tricia A. Blanchette
S.C. Bar No. 74904
PO Box 2147
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November 7, 2017

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THE STATE OF SOUTH CAROLINA
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APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas
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Case No.: 2015-CP-18-994

Miguel Alejandro Urena, 354385, Petitioner,

vs.

State of South Carolina Respondent.

CERTIFICATE OF SERVICE

I, Tricia A. Blanchette, Attorney at Law, hereby certify that a copy of the Notice of Appeal, and accompanying Orders, were hand delivered to Julie A. Coleman, Assistant Attorney General, this 4th day of October 2017 at the following address:

Office of the Attorney General
ATT: Ruston Neely, Ast. AG
1000 Assembly Street, 5th Floor
Columbia, SC 29201

Tricia A. Blanchette
S.C. Bar No. 74904
PO Box 2147
Leesville, SC 29070
(803) 908-3266

November 7, 2017

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF DORCHESTER
IN THE COURT OF COMMON PLEAS

CERTIFIED COPY

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2015CP1800994

Miguel Alejandro Urena	2017 AUG 30 AM 11:09	South Carolina State of	RECEIVED
PLAINTIFF(S)		DEFENDANT(S)	
Submitted by:	CLERK OF COURT DORCHESTER COUNTY	Attorney for: ☐ Plaintiff ☐ Defendant ☐ Self-Represented Litigant	NOV 07 2017 S.C. SUPREME COURT

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED (*CHECK REASON*):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Non-suit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: ____________

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: ____________

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**

☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: ____________

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk: ____________

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.
Note: Title abstractors and researchers should refer to the official court order for judgment details.
E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

Robert E. Hood	2164	8/30/2017
Circuit Court Judge	**Judge Code**	**Date**

SCANNED
SEP 12 2017

FORM4Cm
CA SCRCP Form 4C (Revised 2/17)

For Clerk of Court Office Use Only

This judgment was entered on **8/30/2017**, and a copy mailed first class or placed in the appropriate attorney's box on **8/30/2017**, to attorneys of record or to parties (when appearing pro se) as follows:

Tricia A. Blanchette PO Box 2147 Leesville, SC 29070
Miguel Alejandro Urena #354385, Lee Correctional Institution 990 Wisacky Highway Bishopville, SC 29010

Ruston Wesley Neely PO Box 11549 Columbia, SC 29211

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Cheryl Graham

Court Reporter

Cheryl Graham - Clerk of Court

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA)
COUNTY OF DORCHESTER)

IN THE COURT OF COMMON PLEAS
FOR THE FIRST JUDICIAL CIRCUIT

Miguel Alejandro Urena, #354385,
Applicant,

v.

State of South Carolina,

Respondent.

Case No. 2015-CP-18-0994

ORDER OF DISMISSAL

2017 AUG 30 AM 11:09
CLERK OF COURT
DORCHESTER COUNTY
CERTIFIED COPY

This Court convened an evidentiary hearing into this matter on February 27, 2017 at the Dorchester County Courthouse. Applicant was present at the hearing and represented by Tricia Blanchette, Esquire. Ruston W. Neely, Esquire, of the South Carolina Attorney General's Office, represented Respondent. Applicant's trial counsel was James Bell, Esquire, (Counsel), who was present and testified. This Court had the opportunity to listen to the testimony of Applicant and Counsel. This Court had before it the records of the Dorchester County Clerk of Court regarding the subject conviction, Applicant's records from the South Carolina Department of Corrections, the pleadings in this matter, and the exhibits introduced by the State and Applicant at the evidentiary hearing. This Court finds as follows:

I. PROCEDURAL HISTORY

On November 9, 2004, the Dorchester County Sheriff's Department sought and obtained an arrest warrant against Applicant for the crime of trafficking heroin (H-657485). The Honorable James C. Williams Jr. imposed special conditions of release by Order dated December 13, 2004 and Applicant achieved release through bondsman on or about December 15, 2004, under the condition "That he or she does not leave the state of South Carolina," among other terms. At an indeterminate time thereafter, Applicant left South Carolina.

Applicant was indicted by the Dorchester County Grand Jury in February 2005 for trafficking in heroin in excess of 28 grams (2005-GS-18-198). Counsel represented Applicant on the charges. On March 16, 2006, Applicant was tried in absentia before the Honorable Lee S. Alford and was found guilty as indicted. Judge Alford sentenced Applicant to a term of twenty-five years' imprisonment and sealed the sentence. Applicant was thereafter arrested in the state of New York and extradited to South Carolina in January 2013. Applicant appeared before the court, represented by Bentley Price, Esquire. The Honorable Edgar W. Dickson unsealed and pronounced Judge Alford's sentence on February 21, 2013.

Applicant filed a *pro se* notice of appeal on May 5, 2014. On May 21, 2014, the South Carolina Court of Appeals issued an order dismissing Applicant's appeal as untimely. App. Case No. 2014-001000. The Remittitur was issued on June 6, 2014.

On May 22, 2015, Applicant filed an application for post-conviction relief (PCR). On September 8, 2015, Applicant filed a motion for discovery seeking permission to subpoena records from Applicant's previous attorneys and the Dorchester County Solicitor's Office. The parties proceeded to a motion hearing on February 23, 2016 before the Honorable Maite Murphy, and Applicant's motion was granted by order dated March 21, 2016. Due to the length of time since Applicant's trial, Applicant was unable to acquire complete files from the attorneys involved in Applicant's case.

On May, 19, 2016, Applicant made a motion to authorize further discovery. In an order dated May 25, 2016, Judge Culbertson granted Applicant's request and extended the discovery order to include the files of the Dorchester County Sheriff's Office and SLED. Applicant received a letter from the court reporter stating there was no transcript, nor could one be produced due to the amount of time since the trial. Applicant received a letter from the

Solicitor's office stating they no longer had the file. Applicant received a letter from James Bell stating that his file had been destroyed. Applicant received a letter from SLED stating they had no file.

Respondent made its return and motion to dismiss on or about July 5, 2016, requesting the application be dismissed as untimely, barred by the equitable doctrine of laches, and barred by the doctrine of fugitive disentitlement. On September 7, 2016, Respondent filed an Amended Return and Motion to Dismiss and submitted a Conditional Order of Dismissal.

The State's motion to dismiss was heard by the Honorable Diane S. Goodstein on October 25, 2016. On November 12, 2016, Judge Goodstein signed an order denying summary judgment and found questions of fact were raised that required an evidentiary hearing. An evidentiary hearing was scheduled and heard on February 27, 2017.

II. ALLEGATIONS

In his post-conviction relief (PCR) application, Applicant alleged he is being held unlawfully for the following reasons:

1. "Ineffective assistance of trial counsel."
   a. "Failure to properly prepare Applicant prior to trial."
   b. "Failure to call witnesses and utilize evidence."
2. "Ineffective assistance of appellate counsel."
   a. "Failure to raise all meritorious issues on appeal."

By amendment filed February 10, 2016, through retained counsel, Tricia Blanchette, Esquire, Applicant added the following claims and request for relief:

3. "Ineffective assistance of James A. Bell, Esquire, Bentley Prices, Esquire and Adam Young, Esquire, for failure to timely file a Notice of Intent to Appeal and properly perfect a direct appeal, which resulted in the dismissal of Applicant's pro-se Notice as untimely. As a result, Applicant is requesting a belated direct appeal pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974)."

By amendment dated September 1, 2016, Applicant added the following claims:

4. Ineffective assistance of James A. Bell, Esquire (trial counsel) to preserve issues on the record and preserve the record / transcript of the trial for a direct appeal.
5. Ineffective Assistance of post-trial counsel, Bently Price, Esquire and Adam Young, Esquire for failure to obtain transcripts of the court proceedings as requested by Applicant, have all motions ruled upon, timely file an appeal (as previously addressed) and/or a PCR application.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court reviewed the record in its entirety, listened to the testimony given, and heard the arguments presented at the evidentiary 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. This Court finds counsel's testimony was credible and persuasive and Applicant's testimony lacked credibility. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

Therefore, this Court dismisses Applicant's application for the reasons set out below:

A. Respondent's Motion to Dismiss

At the evidentiary hearing, the State made a motion to dismiss based on the statute of limitations, laches, and the fugitive disentitlement doctrine.

1. Statute of Limitations

The State argued Applicant's case should be dismissed because his PCR application was filed more than one year after Applicant's sentence was read to him. On February 21, 2013, Applicant's sentence was read to him by Judge Dickson. Applicant filed his PCR application on May 22, 2015. Applicant filed his PCR application more than a year after the statutory limit. S.C. Code Ann. §17-27-45(a).

Applicant argued the statute of limitations should have started after Applicant's *pro se* notice of appeal, which was dismissed as untimely by the Court of Appeals on May 21, 2014. This argument is without merit. If the statute of limitations was renewed by an untimely notice of

appeal, then the statute of limitations would be worthless. Any prospective PCR applicant could file an untimely appeal and reset his statute of limitations. Therefore, this Court finds this argument unpersuasive.

In the alternative, Applicant argued his PCR application could not be filed while his direct appeal was pending. Applicant's notice of appeal was filed March 31, 2014 and dismissed by the Court of Appeals on May 21, 2014. This argument is without merit. A party wishing to appeal an order of the circuit court must serve a notice of appeal on all respondents "within ten days after the sentence is imposed." Rule 203(b)(2), SCACR. A timely Rule 59(e), SCRCP, motion to alter or amend the judgment stays the time for appeal until the appellate receives "written notice of entry of the order granting or denying such motion." Rule 59(f), SCRCP; Rule 203(b)(1), SCACR. Here, Applicant's motion to reconsider the sentence was granted May 13, 2013. Applicant had until May 23, 2013 to file a notice of appeal. Applicant testified his sentencing judge told him he only had 10 days to file a notice of appeal. Applicant's notice of appeal was 312 days late. "An application for post-conviction relief cannot be made while an appeal from the conviction or sentence is pending or during the time in which an appeal may be perfected." SCRCP 71.1(b). However, Applicant did not attempt to file a PCR application during the 51 days while his notice of appeal was pending. This argument would be persuasive if Applicant had attempted to file a PCR application during those 51 days. Applicant did not do so. Therefore, this Court finds Applicant's argument unpersuasive.

Applicant also argued this Court should equitably toll the statute of limitations based on Applicant's unique circumstances and because he was diligent in pursuing his appellate rights without the assistance and advice of counsel. This Court finds this argument persuasive. Applicant's circumstances were unique. Applicant testified he filed a PCR application on

December 17, 2013[1], within the one year statute of limitations. Applicant testified he then filed a notice of appeal on May 5, 2014, because he thought a direct appeal had to be filed before a PCR application could be filed. Applicant's notice of appeal would have been timely for his PCR claim. Based on the court's ruling to grant Applicant's motion to reconsider the sentence, Applicant had until May 13, 2014 to file his PCR application. Rule 59(f), SCRCP; Rule 203(b)(1), SCACR.

This Court finds the unusual circumstances surrounding Applicant's filings and sentencing compelling. This Court considers Applicant's attempt to file an appellate claim within the statute of limitations an extraordinary circumstance that requires equitable tolling of the statute. Therefore, this Court declines to grant the State's motion to dismiss on the basis of the statute of limitations.

2. Laches

The State argued Applicant's case should be dismissed based on the doctrine of laches. Laches is an equitable doctrine defined as "neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done." Bray v. State, 366 S.C. 137, 140, 620 S.E.2d 743, 745 (2005). "Whether a claim is barred by laches is to be determined in light of the facts of each case, taking into consideration whether the delay has worked injury, prejudice, or disadvantage to the other party; delay alone in assertion of right does not constitute laches." Id. The State was able to call both attorneys who represented the Applicant and who were able to produce documents concerning their representation. The trial transcript had been destroyed due to the time between Applicant's trial and the reading of his sentence.

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[1] The only evidence presented of this December 2013 PCR application is Applicant's testimony and affidavit.

This Court finds, in this case, the State was not prejudiced or disadvantaged by the delay such as to constitute laches. Therefore, this Court declines to grant the State's motion to dismiss on the basis of laches.

3. Fugitive Disentitlement Doctrine

The State argued Applicant's application should be dismissed based on the doctrine of fugitive disentitlement. Two requirements must be met for fugitive disentitlement to apply: (1) the appellant must be or have been a fugitive; and (2) there must be a connection between appellant's fugitive status and the appellate or post-conviction process the appellant seeks to utilize. Posner v. Posner, 383 S.C. 26, 34, 677 S.E.2d 616, 620 (Ct. App. 2009). Where a long escape may make meaningful appeal impossible or otherwise prejudice the State in the event a new trial is ordered, dismissal of the appeal or post-conviction action may be an appropriate response. State v. Serrette, 375 S.C. 650, 652, 654 S.E.2d 554, 555 (Ct. App. 2007).

This Court finds Applicant was a fugitive and there was a connection between his fugitive status and his PCR appeal. However, this Court also finds the State's case was not sufficiently prejudiced by the time Applicant spent in New York with a pending sentence in South Carolina. Therefore, this Court declines to grant the State's motion to dismiss on the basis of fugitive entitlement.

B. Ineffective Assistance of Trial Counsel

This Court finds Applicant failed to satisfy his burden to prove that Counsel was deficient. Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant must prove "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 (1984). The proper measure of performance is whether trial counsel provided representation within the range of competence required in criminal cases. Id.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland v. Washington, 466 U.S. 668. First, Applicant must prove that counsel's performance was deficient. Id. Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). 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. 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.

1. Failure of Counsel to Notify Applicant of Trial Date

Applicant's bond paperwork included provisions stating Applicant must not leave the state of South Carolina. The bond paperwork also informed him a bench warrant would be obtained if he failed to appear for a court appearance. The bond paperwork also gave him notice that he would be tried in his absence if he failed to appear for his trial date. Applicant resided in New York at the time of the trial on March 16, 2006, where he was tried in his absence.

Applicant was informed by Counsel of the trial and its result by a letter dated March 21, 2006. Applicant admitted he received the letter informing him he had been found guilty in South Carolina. Applicant remained in New York until he was arrested and found guilty of drug charges in New York. After his sentence in New York was completed, Applicant was extradited to South Carolina to have his sentence unsealed and read in December of 2012.

Counsel did not advise Applicant he could leave the state. However, Counsel was aware Applicant had moved to New York and Counsel had been able to contact him on several occasions, while Applicant resided in New York. On July 28, 2005, Counsel wrote a letter to Applicant outlining Counsel's belief there was potential for a plea deal, as well as Counsel's belief that the evidence would not be suppressed at trial. Applicant Ex. 10. That same letter also requested further instruction on how Applicant wished to move forward with his case. Applicant Ex. 10. Counsel testified that, without Applicant's consent, he could not properly negotiate a firm plea offer with the State.

As the trial date approached, Counsel testified he was unable to reach Applicant. On February 28, 2006, Counsel wrote a letter requesting Applicant contact him immediately because Counsel had been unable to reach him by telephone. State's Ex. 3. Counsel testified he tried all the telephone numbers he had for Applicant and was unable to reach him. Applicant testified that even if Counsel had been able to reach him, he would not have been able to come to the trial. Applicant testified he did not have the financial ability to make the trip from New York to South Carolina for his trial. Counsel's March 21, 2006, letter recorded Counsel's past conversation with Applicant that the minimum statutory sentence at trial was twenty-five years' incarceration.

This Court finds Counsel's conduct and multiple attempts to contact Applicant concerning his trial were reasonable. Counsel made numerous phone calls and mailed letters to

the address Applicant provided to Counsel. This Court also finds Applicant's bond paperwork placed him on continuous notice that his trial could take place during any term of General Sessions court in Dorchester County. This Court finds the bond paperwork places the responsibility on Applicant to stay in touch with his attorney and apprise his attorney of any change in contact information, which he failed to do. Applicant was on notice his trial could take place during any term of court in Dorchester County. Applicant was in violation of his bond when he left South Carolina and had notice that his trial could proceed without him if he failed to appear. Counsel made attempts to contact Applicant and Applicant made no reciprocating effort to stay in contact or keep apprised of his case. Applicant was not apprised of or present for his trial due to his own complacency, not due to an ineffectiveness of Counsel.

Applicant testified he would have been unable to return to South Carolina for his trial based on financial reasons. Applicant could not be prejudiced by Counsel's failure to contact him, because there was no reasonable probability that the result of the proceeding would be different. "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. At Applicant's trial, Counsel made a motion for a continuance based on Applicant's absence. That motion was denied. Even if Applicant had known about his trial, he would still be unable to make the trip to South Carolina due to financial difficulties. In both situations, Applicant brought the problem on himself by leaving South Carolina while on bond. Since Applicant could not be at the trial in either circumstance, there is no reasonable probability that the motion or the trial would have been different. Applicant's failure to keep Counsel apprised of his whereabouts is no justification for his failure to appear at trial. Likewise, Applicant's willful violation of the terms of his bond

does not excuse his financial inability to reach South Carolina in time for his trial. Applicant was not there and Counsel tried the case to the best of his ability.

This Court finds Counsel was not ineffective and made reasonable efforts to contact Applicant concerning his case and trial. Furthermore, based on Applicant's testimony that he would have been unable to travel to South Carolina for his trial, this Court finds Applicant was not prejudiced by his failure to communicate with Counsel. Therefore, this Court denies and dismisses the allegation that Counsel was ineffective by failing to properly notify Applicant of his trial.

2. Failure of Counsel to properly prepare Applicant for trial

Applicant cannot be prejudiced by Counsel's failure to prepare him for trial when he did not appear for his trial. Further, Applicant testified he could not come to his trial because he did not have the funds to do so. "Applicant bears the burden of proving the allegations in his application." Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814. "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." Strickland v. Washington, 466 U.S. 668, 670, 104 S. Ct. 2052, 2056, 80 L. Ed. 2d 674 (1984).). "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.

This Court also finds Counsel was not deficient. Counsel testified he met with Applicant when Applicant was in South Carolina and was unable to reach him as the trial date approached. This Court finds Counsel prepared Applicant within the professional norms required considering

Applicant's failure to communicate with Counsel.

This Court finds Applicant has failed to prove he was prejudiced by Counsel's failure to prepare him for trial. This Court finds Applicant has also failed to prove Counsel was deficient. Therefore, this Court denies and dismisses this allegation.

3. Failure to properly call witnesses and present evidence

Applicant cannot prove Counsel was deficient nor can he prove he was prejudiced. Applicant presented no evidence that Counsel made any errors at trial. Applicant also failed to show Counsel was deficient for failing to call important witnesses. Counsel testified he prepared for trial and had a suppression hearing to attempt to exclude the evidence. Applicant has not shown how he was prejudiced by any of Counsel's actions. "Applicant bears the burden of proving the allegations in his application." Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814. "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." Strickland v. Washington, 466 U.S. 668, 670, 104 S. Ct. 2052, 2056, 80 L. Ed. 2d 674 (1984). "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.

This Court finds Applicant has failed to prove he was prejudiced by any actions or inactions of Counsel at trial or that Counsel was deficient. Therefore, this Court denies and dismisses this allegation.

4. Failure of Counsel to preserve trial transcript

After the trial, Counsel did not purchase the trial transcript from the court reporter or seek

to have the transcript preserved. There is no duty for trial counsel to purchase or preserve a trial transcript. The court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625. This Court finds purchasing or preserving a trial transcript for an absentee client is not a prevailing professional norm or practice for trial counsel and it is unreasonable to expect Counsel to do so.

Therefore, Counsel was not deficient for failing to purchase or preserve a trial transcript for his fugitive client because he had no duty or expectation to do so. Therefore, this Court denies and dismisses the allegation that Counsel was ineffective for failing to purchase or preserve the trial transcript.

5. Failure of Sentencing Counsel to Perfect Appeal and Obtain Transcript

Bentley Price and Adam Young, Esquires, (Sentencing Counsel) jointly represented Applicant. Sentencing Counsel were hired to obtain Applicant credit for the time Applicant served in New York for unrelated drug charges. The limits of their representation are laid out in a letter from Sentencing Counsel to Applicant. State's Ex. 2. Sentencing Counsel negotiated with the State and sentencing judge to obtain a consent order, which credited Applicant with the time served credit. This order was signed on May 21, 2014. In a letter from Sentencing Counsel to Applicant dated December 4, 2013, Sentencing Counsel informed Applicant they could handle the representation for his PCR application, but the retainer would be $20,000.00. State's Ex. 2. The letter also stated that Applicant could file the PCR application *pro se*, but he needed to do so within 1 year of the sentencing.

Applicant did not hire Sentencing Counsel to handle his PCR application. Sentencing Counsel was under no duty to obtain a trial transcript for Applicant. Sentencing Counsel completed their representation of Applicant successfully and when Applicant chose not to hire

them for other matters their representation came to a close. "The court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625. Sentencing Counsel reasonably outlined the bounds of their representation to Applicant and professional norms do not require counsel to attempt to obtain a transcript for an appellate case that is beyond the bounds of their representation. Therefore, this Court finds Sentencing Counsel had no duty to attempt to obtain Applicant's trial transcript or advise him on appellate matters because those were outside the scope of Sentencing Counsel's representation. Accordingly, this Court finds Sentencing Counsel did not err by failing to attempt to obtain a transcript.

Applicant argued he should be granted a new trial due to the inability of the record to be reconstructed. A court reporter's tapes are customarily destroyed or reused if a transcript is not requested within 5 years of the time of the hearing. S.C. Court Rule 607(i). At the time of Sentencing Counsel's representation in May 2014, the tapes of the trial were 8 years old. Presumably, the tapes had been destroyed and were unobtainable. Without a reconstruction of the record, Applicant lacked any meritorious issues to argue on direct appeal. "It is simply unrealistic and unreasonable to think that a trial judge and counsel can-under these circumstances [the passage of fourteen months]-reconstruct a proper record that will permit meaningful appellate review, especially in light of our issue preservation rules. Furthermore, (defendant's) own actions are the reason a transcript of the proceedings below is not available." Serrette, 375 S.C. at 652, 654 S.E.2d at 555. Applicant was in New York from 2005 to 2012. This Court finds the lapse of time between Applicant's trial date and his return makes a reconstruction of the record in Applicant's case unreasonable and Applicant's actions are the reason the transcript is unavailable.

Therefore, this Court finds Sentencing Counsel was not deficient for failing to perfect an appeal where the limits of their representation were clearly delineated. This Court also finds Sentencing Counsel was not deficient for failing to attempt to purchase or preserve a trial transcript because it is not within the professional norms to do so. Therefore, this Court denies and dismisses this allegation.

6. Belated White Appeal

Applicant argued he is entitled to a belated appeal pursuant to White. In White v. State, 263 S.C. 110, 108 S.E.2d 35 (1974), the South Carolina Supreme Court held that even if the post-conviction relief court finds that Applicant never voluntarily and intelligently abandoned his appeal, the court has no jurisdiction to grant a belated appeal. Therefore, where an accused establishes in a post-conviction relief hearing that he was unconstitutionally deprived of his statutory right to a direct appeal, the South Carolina Supreme Court, upon an appeal of the post-conviction relief decision, will review the trial record and pass upon all issues properly raised and argued as if the direct appeal has been perfected.

Here, it is uncontroverted Applicant was notified of the requirement to file a notice of appeal after his sentencing hearing. Trial counsel advised Applicant he would have the right to appeal after his sentence was read. Plaintiff's Ex. 10. Applicant and Counsel testified the sentencing court notified Applicant he had to file a notice of appeal within 10 days. Sentencing Counsel testified they were only hired to handle Applicant's motion to reconsider the sentence. Applicant testified Sentencing Counsel told him that he had 10 days to file an appeal and Sentencing Counsel told Applicant they were retained only to obtain credit for the time he had served in New York. Sentencing Counsel testified Applicant never retained or paid them to handle his direct appeal or his PCR claim.

In White, "Although there was a reasonable basis for trial counsel's conclusion or assumption that the defendant was fully aware of his appeal rights, counsel should not have rested upon that assumption. He should have made certain that the defendant was fully aware of his rights. White v. State, 263 S.C. 110, 118, 208 S.E.2d 35, 39 (1974). In this case, this Court finds Applicant was fully aware, from multiple sources, of his appellate rights and knew he needed to file his notice of appeal within 10 days of his case's adjudication. Further, there was no reason to believe a trial transcript would be available 8 years after the trial. A court reporter's tapes are customarily destroyed or reused if a transcript is not requested within 5 years of the time of the hearing. S.C. Court Rule 607(i). At the time of Sentencing Counsel's representation in May 2014, the tapes of the trial were 8 years old. Presumably, the tapes had been destroyed and were unobtainable. Without a reconstruction of the record, Applicant lacked any meritorious issues to argue on direct appeal. "It is simply unrealistic and unreasonable to think that a trial judge and counsel can-under these circumstances [the passage of fourteen months]-reconstruct a proper record that will permit meaningful appellate review, especially in light of our issue preservation rules. Furthermore, (defendant's) own actions are the reason a transcript of the proceedings below is not available." Serrette, 375 S.C. at 652, 654 S.E.2d at 555. Applicant was in New York from 2005 to 2012. Thus, any grounds for a potential direct appeal would be moot and frivolous without a proper record.

Therefore, this Court finds Applicant was fully aware of his right to appeal and was not unconstitutionally deprived thereof. This Court also finds Sentencing Counsel was under no duty to perfect an appeal for Applicant after concluding their negotiation of time served for Applicant. Therefore, this allegation is denied and dismissed.

C. Ineffective Assistance of Appellate Counsel

Applicant did not have appellate counsel. No evidence was presented regarding this allegation at the PCR hearing. Therefore, this Court denies and dismisses this allegation.

IV. CONCLUSION

Based on the foregoing, this Court finds and concludes 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 notes Applicant must file and serve a notice of appeal within thirty (30) days from receipt 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, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, his post-conviction relief attorney must serve and file a notice of appeal on Applicant's behalf. Applicant and his attorney are directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

1. The Application for Post-Conviction Relief is denied and dismissed with prejudice; and

2. Applicant must be remanded to the custody of the Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 22 day of Aug, 2017.

ROBERT E. HOOD
Presiding Judge
1st Judicial Circuit

Columbia, South Carolina

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF DORCHESTER
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2015- CP-18-994

Miguel Alejandro Urena — PLAINTIFF(S)

State of South Carolina — DEFENDANT(S)

Submitted by: Tricia A. Blanchette	**Attorney for :** ☒ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT**. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT**. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.
Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		$
		$
		$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**
E-Filing Note: In E-Filing Counties, the Court will electronically sign this form using a separate electronic signature page.

Circuit Court Judge

2164 — Judge Code

9/27/2017 — Date

2017 OCT -4 AM 9:21

SCRCP Form 4C (02/2017)

STATE OF SOUTH CAROLINA
COUNTY OF DORCHESTER

IN THE COURT OF COMMON PLEAS
CA. NO.: 2015-CP-18-994

Miguel Alejandro Urena,

Applicant,

vs.

State of South Carolina,

Respondent.

2017 OCT -4 AM 9:21

ORDER

After careful consideration of the submitted briefs, the applicable law and all other arguments, this Court denies Respondent's Motion to Reconsider.

Under SCRCP Rule 59(f), a Rule 59(e) motion "may in the discretion of the court be determined on the briefs filed by the parties without oral argument." Hence, the grant or denial of a Motion to Reconsider is within the discretion of the circuit court. Motions to Reconsider are limited in scope and are not to be used to repeat the same arguments previously presented. *Dockins v. Benchmark Commc'n*, 180 F.R.D. 294, 295 (D.S.C. 1998). A Motion to Reconsider cannot be granted where the moving party simply seeks to have the Court rethink its decision. *Id.*

Accordingly, Respondent's Motion to Reconsider is DENIED.

REHood

The Honorable Robert E. Hood
5th Judicial Circuit Judge

Columbia, South Carolina

This 27 day of September, 2017