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FEB 21 2018  
S.C. SUPREME COURT

ALAN WILSON  
ATTORNEY GENERAL

February 21, 2018

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

**Re: Michael C. Kennedy, Respondent v. State of South Carolina, Petitioner**  
**Case No. 2016-CP-06-0223**

Dear Mr. Shearouse:

Enclosed for filing is a notice of appeal in the above case. Also enclosed are the following:

1. A copy of the order which is to be challenged on appeal.
2. Proof of service of notice of appeal on the Respondent.
3. A letter ordering the PCR transcript from the court reporter.

Sincerely,

Julie A. Coleman  
Assistant Attorney General

JAC/ces  
Enclosures

cc: Tricia A. Blanchette, Esquire  
South Carolina Department of Corrections  
Barnwell County Clerk of Court  
Solicitor J. Strom Thurmond, Jr.  
Office of Appellate Defense  
Trisha Allen, Victim Advocacy

STATE OF SOUTH CAROLINA  
In The Supreme Court

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**RECEIVED**

FEB 21 2018

APPEAL FROM BARNWELL COUNTY  
Court of Common Pleas

S.C. SUPREME COURT

The Honorable J. Mark Hayes, II, Circuit Court Judge

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Case No. 2016-CP-06-00223

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MICHAEL C. KENNEDY,

Respondent,

v.

STATE OF SOUTH CAROLINA,

Petitioner.

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**NOTICE OF APPEAL**

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The State of South Carolina appeals the order of the Honorable J. Mark Hayes, II, dated October 25, 2017 and filed November 23, 2017, granting post-conviction relief to Respondent. The State filed a timely motion to reconsider, which was denied in an order dated January 22, 2018, filed February 5, 2018, and received by the State on February 16, 2018. A copy of the order on appeal is attached to this notice.

*[signature page to follow]*

Respectfully submitted,

ALAN WILSON  
Attorney General

JULIE A. COLEMAN  
Assistant Attorney General  
S.C. Bar #102214

Office of the Attorney General  
Post Office Box 11549  
Columbia, SC 29211  
(803) 734-3737

By:

  
**Attorneys for the Petitioner**

Columbia, South Carolina

February 21, 2018

*Other counsel of record:*

**Tricia A. Blanchette, Esquire**  
**P.O. Box 2147**  
**Leesville, SC 29070**

STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM BARNWELL COUNTY  
Court of Common Pleas

The Honorable J. Mark Hayes, II, Circuit Court Judge

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Case No. 2016-CP-06-00223

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MICHAEL C. KENNEDY,

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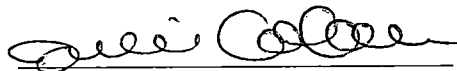
**PROOF OF SERVICE**

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I, Julie A. Coleman, Counsel for the Petitioner, certify that I have today served the within notice of appeal upon Respondent by depositing a copy of it in the United States Mail, postage prepaid, addressed to his attorney of record:

**Tricia A. Blanchette, Esquire**  
**P.O. Box 2147**  
**Leesville, SC 29070**

I further certify that all parties required by Rule to be served have been served this 21<sup>st</sup> day of February, 2018.



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JULIE A. COLEMAN  
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Post Office Box 11549  
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(803) 734-3737  
**Attorney for the Petitioner**

**RECEIVED**

FEB 21 2018

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA )  
COUNTY OF BARNWELL )  
Michael Kennedy, #321820, )  
Applicant, )  
v. )  
State of South Carolina, )  
Respondent. )

IN THE COURT OF COMMON PLEAS  
SECOND JUDICIAL CIRCUIT  
2016-CP-06-00223  
ORDER GRANTING APPLICATION  
FOR POST CONVICTION RELIEF

This matter comes before this Court by way of an Application for Post Conviction Relief filed on May 16, 2016. On June 8, 2017, Applicant, through counsel, submitted an Amendment to Application for Post Conviction Relief, which was made to clarify his Application, and alleged as follows:

1. Applicant was denied the relief granted by the South Carolina Supreme Court, "a new sentencing hearing," when prior plea counsel represented Applicant and the Honorable Thomas A. Russo resided over Applicant's mere resentencing, which failed to cure the bias that tainted the prior sentencing hearing.
2. Ineffective assistance of resentencing hearing counsel (Franchot Brown, Esquire) for failing to address the conflict that resulted from Applicant successfully getting PCR relief from his prior representation, failing to prepare with Applicant prior to his resentencing hearing, and failing to make any meaningful argument on Applicant's behalf.

The State filed a Return and Partial Motion to Dismiss on August 31, 2007.<sup>1</sup> In response, Applicant filed an additional Amendment to Application for Post Conviction Relief on September 8, 2017, which stated:

In general, Applicant would allege that his rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, as well as pursuant to Article I, Section 14 of the South Carolina Constitution, were violated. Applicant would further amend his Application for Post-Conviction Relief to contain the following specific allegations:

1. Applicant was denied effective assistance of counsel and a new sentencing hearing as ordered by the South Carolina Supreme Court when prior plea

<sup>1</sup> This Court finds that Respondent's argument that Applicant has failed to raise a claim cognizable on post conviction relief was rendered moot by Applicant's responsive pleading filed on September 8, 2017.



counsel represented Applicant and the Honorable Thomas A. Russo resided over Applicant's mere resentencing, which failed to cure the issue raised on appeal that resulted in the order for a new sentencing hearing.<sup>2</sup>

2. Ineffective assistance of resentencing hearing counsel (Franchot Brown, Esquire) for failing to address the conflict that resulted from Applicant successfully getting PCR relief from his prior representation, failing to prepare with Applicant prior to his resentencing hearing, failing to make meaningful argument on Applicant's behalf, and failure to file an appeal.

An evidentiary hearing was conducted on September 22, 2017 in front of the Honorable J. Mark Hayes at the Aiken County Courthouse. Applicant was present and represented by Tricia A. Blanchette, Esquire. Respondent was represented by Julie A. Coleman, Esquire. Applicant testified, and his counsel also called Franchot A. Brown, Esquire to the stand. This Court had before him a copy of the filings from the instant Application, Applicant's SCDC records, the transcript from the May 14, 2015 hearing (hereinafter "2015 hearing"), and the following records from Appellate Case No. 2013-002334: the Petition for Writ of Certiorari, Return, Appendix, Supplemental Appendix and Order of the South Carolina Supreme Court dated January 22, 2015. After hearing argument from both sides, this Court took the matter under advisement, from which this Order follows.

### PROCEDURAL HISTORY

#### I. General Sessions

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Barnwell County Clerk of Court. Applicant

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<sup>2</sup> Issue raised on PCR appeal: Trial counsel erred in failing to object to the personal opinions of a former circuit court judge who appeared at all three of petitioner's court proceedings and acted in the role of a solicitor by opposing petitioner's bond reduction and resentencing requests and asking for harsh sentencing as punishment for the criminal acts perpetrated upon a beloved local icon in order to gain community redemption and send a community message of zero tolerance for crime because such participation by the former judge was improper and the majority of the information submitted by the former judge was irrelevant to sentencing.

was indicted during the May 2007 term of the Barnwell County Grand Jury for Armed Robbery Degree (2007-GS-06-0144) and Assault and Battery with Intent to Kill (ABWIK) (2007-GS-06-0145). On May 7, 2007, Applicant appeared in front of the Honorable Thomas A. Russo for a bond reduction hearing. Applicant was represented by Franchot A. Brown, Esquire. Judge Russo denied Applicant's request for bond reduction.

Later the same day, Applicant appeared in front of the Honorable Thomas A. Russo and entered a plea as indicted. Applicant was sentenced to a term of thirty years for armed robbery and a consecutive term of twenty years, suspended to a probation term of three years following the service of ninety days, for ABWIK.

Applicant, through counsel, timely filed for reconsideration, and a reconsideration hearing was held on January 26, 2007. At the conclusion of the hearing, Judge Russo denied Applicant's request for reconsideration.

Thereafter, a timely Notice of Appeal was filed, and the appeal was perfected by M. Celia Robinson, Esquire, of the South Carolina Office of Appellate Defense. After the filing of an Anders brief, the South Carolina Court of Appeals dismissed the appeal by Order dated January 25, 2011. The Remittitur was issued on February 10, 2011.

## II. 2011 Post Conviction Relief Application

On February 22, 2011, Applicant filed an Application for Post Conviction Relief in Barnwell County (2011-CP-06-0088). The State filed a Return on August 4, 2011. On July 8, 2013, Applicant appeared in front of the Honorable R. Ferrell Cothran, Jr. for an evidentiary hearing. Applicant was represented by Melissa J. Armstrong, Esquire. Applicant testified, along with Franchot A. Brown, Esquire. By written order filed August 23, 2013, Judge Cothran denied and dismissed the Application.

A timely Notice of Appeal was filed. The appeal was perfected by Wanda H. Carter, Esquire, of the South Carolina Office of Appellate Defense, by filing a Petition for Writ of Certiorari on September 10, 2014. The State filed a Return on November 26, 2014. By Order dated January 22, 2015, the South Carolina Supreme Court held: "We grant the petition, dispense with further briefing, reverse the order denying the PCR Application, and grant petitioner a new sentencing hearing."

On May 14, 2015, a hearing was held in front of the Honorable Thomas A. Russo.<sup>3</sup> Applicant was present and represented by Franchot A. Brown, Esquire. At the conclusion of the hearing, Judge Russo ordered that Applicant's sentences were to be run concurrently, removing the term of probation and suspended sentence.

#### FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Sixth and Fourteenth Amendments to the United States Constitution guarantee criminal defendants the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984). Where an application for post conviction relief alleges ineffective assistance of counsel 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." Id. 466 U.S. at 686; see Butler v. State, 286 S.C. 441 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 691. The

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<sup>3</sup> It must be noted that Respondent's Return and Partial Motion to Dismiss refers to this hearing as a re-sentencing hearing. Return p. 2.

applicant must overcome this presumption in order to receive relief. Bell v. State, 321 S.C. 238 (1996); see also Cherry v. State, 300 S.C. 238 (1989); Rule 71.1(e), SCRCP.

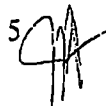
The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117 (citing Strickland, 466 U.S. at 688). 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.

At the evidentiary hearing, Applicant and Franchot A. Brown, Esquire testified. This Court finds the testimony of Applicant credible and the testimony of Franchot A. Brown, Esquire, credible on the matters he could recall.

Turning to the detailed allegations filed by Applicant, this Court finds the primary issue before this Court is whether Applicant was afforded effective representation at the hearing conducted on May 14, 2015. After careful review of the record and consideration of the evidentiary hearing testimony, this Court finds that Applicant was ordered "a new sentencing hearing" by the South Carolina Supreme Court on January 22, 2015 and he was not provided effective assistance at the mere resentencing hearing conducted on May 14, 2015.<sup>4</sup> This Court further finds, as will be addressed in detail below, that Applicant was severely prejudiced as a result of counsel's ineffective assistance.

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<sup>4</sup> As Applicant argued and Respondent conceded, this Court finds Applicant was entitled to effective assistance of counsel at the new sentencing hearing ordered by the South Carolina Supreme Court as collateral relief stemming from post conviction relief.

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As a threshold matter, this Court has considered that the South Carolina Supreme Court summarily granted the writ of certiorari from the denial of the 2011 PCR Application and granted a "new" sentencing hearing without further briefing or arguments.<sup>5</sup> As a result, the assertions made in the Petition for Writ of Certiorari (hereinafter "Petition") are material to this Court's decision. By way of the Petition, the following issue was raised:

Trial counsel erred in failing to object to the personal opinions of a former circuit court judge who appeared at all three of petitioner's court proceedings and acted in the role of a solicitor by opposing petitioner's bond reduction and resentencing requests and asking for harsh sentencing as punishment for the criminal acts perpetrated upon a beloved local icon in order to gain community redemption and send a community message of zero tolerance for crime because such participation by the former judge was improper and the majority of the information submitted by the former judge was irrelevant to sentencing.

As is detailed in the Petition and evidenced in the Appendices, former Circuit Court Judge Rodney Peeples (hereinafter "Judge Peeples") was present and actively involved at Applicant's bond reduction hearing, plea proceeding and resentencing hearing in front of the Honorable Thomas A. Russo. At the bond reduction hearing, Judge Peeples strongly voiced his objection to the request for a lower bond. App. p. 12, ln. 6 – p. 13, ln. 5, p. 13, lns. 14-25. The hearing ended with the reduction being denied and Judge Peeples' suggestion that the case be called to trial that week. App. p. 19.

Later the same day, Applicant appeared in front of Judge Russo to enter a plea to all charges. As was addressed in the Petition, Judge Peeples "argued solicitor style to the effect that petitioner should receive a stiff sentence for the crimes perpetrated upon

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<sup>5</sup> The Order reads as follows: "We grant the petition, dispense with further briefing, reverse the ordering denying the PCR Application, and grant petitioner a new sentencing hearing."

Richardson, who was their community icon, as proper retribution and as a way to send a message to the community that such conduct would not be tolerated." Petition p. 4; See App. p. 47, lns. 6-24, p. 48, lns. 7-13, p. 49, ln. 21 – p. 50, ln. 3, p. 50, ln. 23, p. 51, lns. 5-12. At the conclusion of the hearing, Applicant was sentenced to a term of thirty years for armed robbery and a consecutive term of twenty years, suspended to a probation term of three years following the service of ninety days, for ABWIK.

At the 2011 PCR hearing, Attorney Brown explained his belief that Applicant's sentence should have been between ten to fifteen years and his reasoning for filing the motion to reconsider. App. p. 96, lns. 10-15, p. 99, ln. 17 p. 100, ln. 9. Attorney Brown also made it clear that he was greatly concerned with Judge Peeples' involvement and comments, and he should have objected. App. p. 101, ln. 14 – p. 102, ln. 5.

By way of the Petition, Applicant argued:

Had trial counsel objected to Judge Peeples' personal request for severe sentencing for petitioner as redemption for Richardson and his rally cry per the conscious of the community goal at petitioner's sentencing, then a reasonable probability exists that the sentence petitioner received would have been different. Counsel was aware that his inaction resulted in petitioner's receipt of an unfair sentence, which is why he filed a sentencing reconsideration motion, after which time a sentencing reconsideration hearing was held in the case.

Petition p. 9. The Petition further addressed how Judge Peeples "sales pitch became flat-out inflammatory and laced with character attacks" at the reconsideration hearing. Pet. p. 9.

Again, the Supreme Court granted a "new" sentencing hearing without further briefing or arguments. Therefore, the assertion made in the Petition for Writ of Certiorari are material to this Court's decision. In reviewing the transcript of the May 14, 2015 hearing, Judge Russo made several references, without objection from counsel, that he

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reviewed the transcript from the earlier proceeding. The earlier proceeding which the Supreme Court had summarily set aside due to the assertion made in the Writ that the prior hearings were unconstitutional because plea counsel had failed to object to the retired circuit judge's presence and comments. As a result of Attorney Brown's admitted deficient performance and Judge Russo's reliance upon the prior unconstitutional proceedings, this Court is convinced Applicant was not afforded the relief ordered by the South Carolina Supreme Court due to ineffective assistance of counsel.

At the evidentiary hearing, Attorney Brown was very candid and did not contest that his performance was deficient. To the best of his recollection, Attorney Brown did not recall being given much advance notice of the hearing or meeting with Applicant prior to the date of May 14, 2015. He did not recall receiving a copy of the Supreme Court's Order or being aware that the Order resulted from an appellate argument that he was ineffective in his prior representation of Applicant. He also testified that he was unaware that the Supreme Court had ordered a "new" sentencing hearing.

When asked why he did not inform the court that it was a conflict for him to represent Applicant on the hearing resulting from a finding of his own ineffectiveness, he simply responded that he was unaware of what transpired after he testified at the first evidentiary hearing. When asked why he did not raise concerns that Applicant was being afforded a mere resentencing hearing instead of a "new" sentencing hearing as ordered by the Supreme Court, he responded that he was under the belief that the hearing was merely for resentencing and what occurred was not a "new" sentencing hearing. Due to this belief, he did not consult with Applicant about filing an appeal nor did he preserve any

matters for appellate review. In sum, Attorney Brown candidly admitted his deficiency and concern that Applicant was not provided the relief ordered by the Supreme Court.

When called to the stand, Applicant testified that he was confused by Mr. Brown representing him at the 2015 hearing when he had just received relief due to Mr. Brown's ineffective assistance of counsel. He recalled a brief meeting with Mr. Brown prior to the start of the hearing. He acknowledged that he only voiced an apology during the hearing, and he explained that he did not know how to voice his concerns that he was being denied the relief granted by the Supreme Court. He did not recall Judge Russo nor Attorney Brown discussing his right to file an appeal. He did not see Attorney Brown again, so he filed a PCR Application pro-se attempting to address the failure of his counsel to ensure that he was afforded a new sentencing hearing.

Turning to the record of the 2015 hearing, Judge Russo confirmed that everyone understood that they were all present "for another sentencing hearing." Hearing Transcript p. 5. Thereafter, the State argued: "The Supreme Court, I realize, gave it back to you for you to reconsider, but I don't believe anything's changed that you should reconsider." Hearing p. 11, lns. 12-15. During the hearing, Judge Russo made several references that he had reviewed the transcripts of the prior proceedings before he decided to run the sentences concurrent citing restitution as his reasoning.<sup>6</sup> Hearing Transcript pp.

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<sup>6</sup> Specifically, Judge Russo stated:

I have the transcript from the plea. And I have reviewed it, not once but twice. And I realize that maybe this is just semantics but I guess that from what I read from the Supreme Court's order, this isn't a reconsideration of the sentence. It is a remanding it back for a re-sentencing hearing.

And the only reason I point that out is, is, Mr. Brown, you mentioned that the Court - what other reason would the Court possibly have to send it back for me to reconsider but to reduce it since it was the maximum sentence to begin with.

4, 10, 13-14. At no time did counsel object to Judge Russo's reliance on the record, which the Supreme Court reviewed and was the basis for ordering a "new" sentencing hearing.

Based upon the record before this Court and the testimony offered at the evidentiary hearing, this Court finds that counsel rendered ineffective assistance, which allowed the sentencing court to once again deny Applicant a fair sentencing hearing. The 2015 hearing transcript and the evidentiary hearing establishes that counsel was not aware nor advocating for the relief ordered by the South Carolina Supreme Court. Counsel's representation was not reasonable under professional norms.

Additionally, it is apparent that counsel was not educated to the fact that Applicant had been granted a new sentencing hearing based upon an argument that he had provided ineffective assistance. He made it clear to this Court that if he had been aware, he would not have proceeded with representing Applicant. Counsel failed to address this conflict with Judge Russo simply because he was not aware of it.

Based upon the argument that Attorney Brown was ineffective for failing to object to the improper involvement of Judge Peebles in Applicant prior General Sessions proceedings, Applicant was granted a new sentencing hearing. Ironically, Applicant was not afforded a new sentencing hearing due to the ineffective assistance again rendered by Attorney Brown.

Here, the resulting prejudice is evident from the record of the mere resentencing hearing conducted in May 2015. The South Carolina Supreme Court ordered that Applicant receive a "new" sentencing hearing, yet Judge Russo, without objection from

counsel, simply reviewed Applicant's sentence in conjunction with the prior tainted record, not only once but twice. Hearing Transcript p. 13, lns. 12-14. Therefore, the prejudice suffered by Applicant in the May 2015 hearing was even greater than the prejudice present when the South Carolina Supreme Court granted a "new" not more prejudicial sentencing hearing.

This Court finds that counsel's deficient performance 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. It is true that Judge Russo elected to run Applicant's sentences concurrently, but the reason cited was due to restitution no longer being a factor in the case. This Court finds that the minor alteration made by Judge Russo does not negate the prejudice suffered by Applicant when he was represented by counsel found to be ineffective in front of a Judge who relied upon a record that the Supreme Court found to require a new sentencing hearing. Therefore, this Court is compelled to find that Applicant be granted a new sentencing hearing in front of a circuit court judge that has not reviewed or relied upon the prior unconstitutional proceedings. See Locklear v. Harvey, 273 S.C. 58, 254 S.E.2d 293 (1979).

The secondary issue before this Court is whether counsel was ineffective for failing to file an appeal in a timely manner after the May 2015 hearing.<sup>7</sup> See White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974). At the evidentiary hearing, Applicant and Mr. Brown were in agreement that Attorney Brown did not consult with Applicant about

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<sup>7</sup> At the evidentiary hearing, Respondent conceded Applicant's right to an appeal and did not oppose the granting of a belated appeal.

filing an appeal. Attorney Brown explained that he was under the belief that the proceeding was a mere resentencing, so an appeal would not be warranted. Additionally, the record reflects that Judge Russo did not advise Applicant of his appellate rights.

Based upon the record and testimony offered at the evidentiary hearing, this Court finds that a belated appeal should be granted, but this Court is concerned that the appeal would be taken from a proceeding with constitutionally deficient counsel advocating for Applicant. Therefore, this Court finds that the granting of belated appeal from the 2015 hearing is superseded by the granting of a new sentencing hearing. Nevertheless, this Court finds that if Respondent chooses to appeal this Order, Applicant may pursue a belated appeal through the filing of a notice of cross-appeal or by following the proper procedure with the South Carolina Supreme Court.

#### CONCLUSION

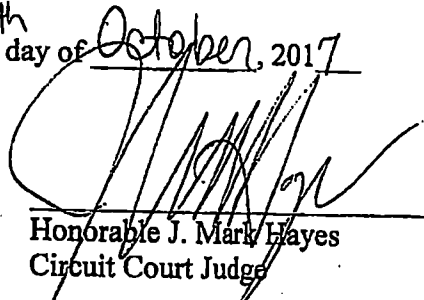
Based upon the foregoing, this Court orders that the Application for Post Conviction Relief is hereby granted. This Court further finds that no other allegations were raised at the PCR hearing. Therefore, any additional allegations are deemed waived because no evidence was presented.



**IT IS THEREFORE ORDERED:**

1. That Applicant has met his burden of proof as to his specific allegation of ineffective assistance of counsel as detailed above;
2. That Applicant is granted a new sentencing hearing in front of a circuit court judge that has not reviewed or relied upon the prior proceedings;
3. That Applicant is alternatively granted a belated appeal pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974);
4. That Applicant be transferred from the custody of South Carolina Department of Corrections to the custody of Barnwell County pending the disposition of his new sentencing hearing.

AND IT IS SO ORDRED this 25<sup>th</sup> day of October, 2017



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Honorable J. Mark Hayes  
Circuit Court Judge

Barnwell, South Carolina