(6)

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

William H. Seals, Circuit Court Judge

Case No.: 2016-CP-26-01258

State of South Carolina, ... Respondent,

V.

Richard B. Niles, Jr. #333708, ... Appellant.

NOTICE OF APPEAL

Richard B. Niles, Jr. appeals the order of dismissal of the Honorable William H. Seals dated February 5, 2018. Appellant received written notice of entry of the order on February 23, 2018.

February 28, 2018

/s/

Richard B. Niles, Jr. #333708
McCI F-4 A-side
386 Redemption Way
McCormick, SC 29899
Appellant, pro-se

Other Counsel of Record:

Johnny Ellis James, Jr.
Assistant Attorney General
PO Box 11549
Columbia, SC 29211-1549

Attorney for Respondent

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

William H. Seals, Circuit Court Judge

Case No.: 2016-CP-26-01258

State of South Carolina, ... Respondent,

V.

Richard B. Niles, Jr. #333708, ... Appellant.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on the Respondent by depositing a copy of it in the United States Mail at the Mail Room at the McCormick Correctional Institution, with postage prepaid, on February _____, 2018, addressed to the attorney of record, Johnny Ellis James, Jr., Assistant Attorney General, PO Box 11549, Columbia, South Carolina 29211-1549.

February 28, 2018

/s/

Richard B, Niles,Jr. 333708
McCI F-4 A-side
386 Redemption Way
McCormick, SC 29899

Appellant, pro-se

February 28, 2018

The Honorable Jenny Abbott Kitchings
Clerk, S.C. Court of Appeals
P.O. Box 11629
Columbia, SC 29211

RE: State of South Carolina, Respondent v. Richard B. Niles, Jr. #333708, Appellant, Case No.: 2016-CP-26-01258

Dear Ms. Kitchings:

Enclosed for filing is a notice of appeal in the above case. Also enclosed are the following:
(1) Proof of service of the notice of appeal on the Respondent.
(2) A copy of the order which is being challenged on appeal.

Please return to me a clock-stamped copy of the notice of appeal and the proof of service at your earliest convenience. Thank you.

Sincerely,

/s/

Richard B. Niles, Jr.
#333708
McCI F-4 A-side
386 Redemption Way
McCormick, SC 29899

Appellant, pro-se

cc: Johnny Ellis James, Jr.
Assistant Attorney General
Post Office Box 11549
Columbia, SC 29211-1549

Attorney for Respondent

STATE OF SOUTH CAROLINA COUNTY OF HORRY	)	IN THE COURT OF COMMON PLEAS FOR THE FIFTEENTH JUDICIAL CIRCUIT
Richard B. Niles, Jr., S.C.D.C. No. 333708, Applicant, v. State of South Carolina, Respondent.	)	Case No.: 2016-CP-26-01258 **ORDER OF DISMISSAL**

This matter comes before the Court by way of an application for post-conviction relief filed by Richard B. Niles, Jr. ("Applicant") on February 24, 2016. Respondent made its return on or about February 16, 2017. The Court convened an evidentiary hearing into the matter on Monday, November 27, 2017, at the Horry County Courthouse in Conway, South Carolina. Applicant was present at the hearing and represented by James K. Falk, Esquire. Johnny Ellis James Jr., of the South Carolina Attorney General's Office, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant's appellate counsel, Robert M. Dudek, Esquire ("Counsel") also testified by telephone with the consent of the parties and this Court.[1] The Court had before it Applicant's records from the South Carolina Department of Corrections, a copy of the original trial transcript, the records of the Horry County Clerk of Court regarding the subject convictions, Applicant's direct appeal records, and the pleadings. The Court finds as follows:

I. PROCEDURAL HISTORY

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. Applicant was indicted at the August 2007

[1] Applicant's trial counsel, Verdell Barr, Esquire, was deceased at the time of the evidentiary hearing.

term of the Horry County Grand Jury for murder (2007-GS-26-03363). Applicant was further indicted at the October 2008 term for possession of a weapon during the commission of a violent crime (2008-GS-26-4116), and armed robbery (2008-GS-26-4117). Verdell Bar, Esquire represented Applicant. Donna Elder and Bradley C. Richardson, each of the Fifteenth Circuit Solicitor's Office, prosecuted the case. On March 9, 2009, Applicant proceeded to trial before the Honorable Benjamin H. Culbertson and a jury. The jury found Applicant guilty as indicted on March 13, 2009. Judge Culbertson sentenced Applicant to imprisonment for concurrent terms of 30 years for murder, 30 years for armed robbery, and 5 years for possession of a weapon during the commission of a violent crime.

Applicant filed a timely notice of appeal and a direct appeal was perfected by Robert M. Dudek, Esquire, who raised the following issue:

> Whether the court erred by refusing to charge voluntary manslaughter based on evidence appellant was shot at and returned fire where the court incorrectly reasoned that Appellant was either acting in self-defense or shot the decedent during the commission of an armed robbery since voluntary manslaughter and self-defense are not mutually exclusive?

The parties proceeded to oral arguments on February 14, 2012. Mr. Dudek and Reid T. Sherard, Esquire, represented Applicant. Brendan J. McDonald, of the South Carolina Attorney General's Office, appeared for the State. By opinion decided September 12, 2012, and substituted November 14, 2012, the South Carolina Court of Appeals reversed Applicant's convictions, finding the circuit court erred in refusing to charge the jury on voluntary manslaughter. State v. Niles, 400 S.C. 527, 735 S.E.2d 240 (Ct. App. 2012). The State petitioned the Supreme Court of South Carolina for a writ of certiorari, which was granted by order dated February 6, 2014. The parties proceeded to oral arguments in the Supreme Court on June 25, 2014, with the same attorneys appearing. By opinion decided March 25, 2015, and substituted June 10, 2015, the

Supreme Court reversed the Court of Appeals, finding the evidence did not warrant a voluntary manslaughter charge. State v. Niles, 412 S.C. 515, 772 S.E.2d 877 (2015). The Remittitur was issued on June 10, 2015.

Present Application

In his post-conviction relief application, Applicant alleges he is being held unlawfully for the following reasons:

1. Ineffective Assistance of Trial Counsel, in that:
    a. "Trial counsel ineffective for failing to object to the solicitor's improper closing."
    b. "Trial counsel ineffective for failing to object to the prosecution's improper bolstering that resulted in impermissible vouching for a State's witness."
    c. "Trial counsel ineffective for failing to object to the prosecution introducing void indictments to the trial court."
    d. "Trial counsel ineffective for not objecting to the trial court's inadequate response to the jury's question."
2. Ineffective Assistance of Appellate Counsel, in that:
    a. "Appellate counsel ineffective for failing to argue that 'trial court erred in charging the jury that it may infer malice from the use of a deadly weapon.'"
    b. "Appellate counsel was ineffective failing to raise the issue that 'trial court erred in not properly answering the jury's questions.'"

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court has reviewed the records submitted to it by the parties and the legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80, this Court makes the following findings based upon all of the probative evidence presented.

A. Ineffective Assistance of Trial Counsel

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she must prove "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." Butler at 442, 334 S.E.2d 441 (quoting Strickland v. Washington, 466 U.S. 668, 686 (1984)). The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Id.

"[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Butler at 442, 334 S.E.2d 441 (quoting Strickland at 690). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989). "Judicial scrutiny of counsel's performance must be highly deferential, as it is all too tempting for a defendant to second-guess counsel's assistance after conviction or an adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Strickland, 466 U.S. at 689; Edwards v. State, 392 S.C. 449, 456-57, 710 S.E.2d 60, 64 (2011). "[W]hen counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)).

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 at 117, 386 S.E.2d at 625 (citing Strickland 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 at 117-18, 386 S.E.2d at 625 (citing Strickland at 694).

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. Strickland at 696. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies; if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. at 696-97.

1. Failure to Object to Golden Rule Argument

Applicant argues Counsel was ineffective for failing to object to alleged "golden rule" arguments made by the State in its closing argument. On review, the solicitor's argument must be reviewed in the context of the entire record. State v. Reese, 370 S.C. 31, 38, 633 S.E.2d 898, 901 (2006) (citing State v. Copeland, 378 S.C. 572, 300 S.E.2d 63 (1982)). "A solicitor's argument must be carefully tailored not to appeal to the personal biases of the jury." Id. (citing Von Dohlen v. State, 360 S.C. 598, 602 S.E.2d 738 (2004)). "The argument must not be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences that may be drawn therefrom." Id.; see also State v. White, 246 S.C. 502, 144 S.E.2d 481 (1965) (granting a new trial where the solicitor explicitly called upon jurors to imagine their wives or daughters as the victim); State v. McDaniel, 320 S.C. 33, 462 S.E.2d 882 (Ct. App. 1995) (reversing where the solicitor used 'you' some 45 times in

addressing the jury, placing them in the position of the victim). Improper comments in closing, including a "golden rule" argument, do not automatically require reversal if they are not prejudicial to the defendant, and Applicant has the burden of proving he did not receive a fair trial because of the alleged improper comment. Brown v. State, 383 S.C. 506, 516, 680 S.E.2d 909, 915 (2009) (citing Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002)). "The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." Id.

At trial, Applicant argued that he fired at the victim, James Salter, in self-defense after a drug deal turned sour between the victim and Ervin Moore, a co-conspirator who testified against Applicant at trial, and the victim opened fire. Tr. 636-43. During the State's closing argument at trial, the solicitor on occasion utilized a degree of second-person tense while retelling the story of the crime:

> What do they see? They see a heavyset black male running, jumping from that Mustang over to the Ford Fusion, not a tiny little fellow like Ervin Moore. You saw him. He's a tiny thing but a heavyset black male. Mr. Niles is a good bit bigger than Mr. Moore. What else does Mr. Watts see? He sees a black female driving. That's Mokeia Hammond. Once again by everybody's testimony she's driving. When that car hops the curb, curb over in Logan's Roadhouse Mr. Watts is close. What does he get a view of? He sees two individuals in that car. Like Ervin Moore told you he's down in the floorboard covering that eye saying, "What did you do?" He sees a heavyset black male in the back. It's happening fast. All you can tell is it's a heavyset black male. Once again, not a tiny guy like Ervine Moore but a big old fellow with black female driver.

Tr. 674-75. The State later argued to the jury the supposed reasoning of the deceased victim:

> . . . folks, I submit to you when *you* get shot, uh, it takes a second to recover even with adrenaline. *You* pull your weapon and *you* see the Defendant Niles jumping in that backseat. Where are *you* going to shoot first? Back towards *your* attacker, the man who's killed you, given *you* the mortal wound; and so, James reaches back, bam, first shot strikes the upper doorpost and fragments, bam, he blows out the window, glass is going everywhere, cuts Ervin Moore, cuts Richard Niles,

> cuts Mokeia Hammond, they start to take off. Those two shell casings are down. Bam, bam, bam, he's shooting the car as it's pulling out. He's trying to get some manner of defense. He's working on adrenaline. He's trying to fight back. Folks, we know that's about how it happened because where the shell casings are. The last shot I believe he even shoots off his rearview mirror. He's going into shock already and he drives out.

Tr. 678-79 (emphasis added).

The Court finds no deficiency or prejudice from Counsel's lack of objection. At first blush, the second excerpt of the State's closing would appear to fall into the same error as that addressed in McDaniel, insofar as the State repeatedly referred to the jury in the second-person. However, read in the scope of the closing argument as a whole, it appears to this Court that the State's argument was not intended to place the jury into the position of the defendant, but rather to explain the reasoning of the deceased that would be consistent with the ballistics evidence introduced at trial. Furthermore, to the extent that Counsel could have or should have objected, this Court finds that the State's fleeting, arguably inarticulate use of "you" in five instances, italicized above, does not come close to the 45 instances in McDaniel and does not otherwise rise to the level of unfairness so as to make the trial a denial of due process.

Finally, any conceivable error would have been harmless. To quote the Supreme Court's consideration of the case:

> We note further that it was undisputed that Niles, Hammond, and Moore met the victim in the parking lot to rob the victim during the drug transaction. Niles further admitted that Moore and Hammond were unarmed, and that he fired the fatal shots, killing the victim. Thus, the scheme to rob the victim, coupled with Niles's [sic] decision to arrive at the scene armed with a deadly weapon, discounts any claim that Niles in any way act in a sudden heat of passion. Rather, Niles clearly planned for the possibility that he might have to discharge his weapon to accomplish the robbery, and did in fact kill the victim. These salient facts cannot be ignored.

Niles, 412 S.C. at 523, 772 S.E.2d at 881. This Court agrees. Accordingly, Applicant's request for relief by way of this allegation is **DENIED**.

2. – Failure to Object to Improper Bolstering

Applicant argues Counsel was ineffective for failing to object to the State's alleged bolstering of co-conspirator witness Ervin Moore. "A prosecutor cannot vouch for the credibility of a witness by expressing or implying his personal opinion concerning a witness' truthfulness." State v. Shuler, 344 S.C. 604, 630, 545 S.E.2d 805, 818 (2001) (citing Elmer v. Maryland, 353 Md. 1, 724 A.2d 625 (1999)). "Improper vouching occurs when the prosecution places the government's prestige behind a witness by making explicit personal assurances of a witness' veracity, or where a prosecutor implicitly vouches for a witness' veracity by indicating information not presented to the jury supports the testimony." Id. (citing State v. Kelly, 343 S.C. 350, 540 S.E.2d 851 (2001)). "Vouching occurs when a prosecutor implies he has facts that are not before the jury for their consideration." Id. (citing Missouri v. Wolfe, 13 S.W.3d 248 (Mo. 2000)). "A witness' testimony concerning a plea agreement with the prosecution does not necessarily constitute improper vouching." Id.

At trial, on redirect, the State questioned Moore on his written agreement to testify:

Q: Okay, you just know we came out there to talk to you Sunday?

A: Yes, ma'am, and I was happy.

Q: Okay, and the statements that we went over before and your testimony ---

A: Yes, ma'am.

Q: --- you signed a written agreement with us about your deal here today; right?

A: Yes, ma'am.

Q: Part of that written agreement it deals with what happens if you get on the stand and lie; doesn't it?

A: Yes, ma'am.

Q: And if you get up on the stand and you lie what happens to that agreement?

A: It ain't no good.

Q: It goes out the window?

A: Yes, ma'am.

Q: And what you facing?

A: Thirty.

Q: Facing murder, aren't you?

A: Yes ma'am.

Tr. 450-51.

Shuler is dispositive as to this allegation—the above quoted testimony is simply not objectionable. The State was well within its rights to question Moore regarding the terms of his plea agreement, including its provision regarding the need for truthfulness, so long as the solicitor did not personally state or otherwise imply her personal opinion or outside knowledge to the jury. Since she did not, Counsel was not deficient in failing to object, and Applicant's request for relief by way of this allegation is **DENIED**.

3. – Failure to Object to Void Indictments

Applicant argues Counsel was ineffective for failing to object to and challenge the indictments against him. "The indictment is a notice document." State v. Gentry, 363 S.C. 93, 102, 610 S.E.2d 494, 500 (2005). "A challenge to the indictment on the ground of insufficiency must be made before the jury is sworn[.]" Id. Where a timely objection is made, the court must judge an indictment by determining whether "(1) the offense is stated with sufficient certainty and particularity to enable the court to know what judgment to pronounce, and the defendant to

know what he is called upon to answer and whether he may plead an acquittal or conviction thereon; and (2) whether it apprises the defendant of the elements of the offense that is to be charged." Id.; see also S.C. Code Ann. § 17-29-20, -30.

No testimony was taken on this allegation. Applicant clearly had notice of the charges, determined how to plead, and was apprised of the elements of the offenses contained therein. The Court finds no deficiency on the part of counsel, nor can it conceive of any possible prejudice that would amount therefrom. Accordingly, Applicant's request for relief by way of this allegation is **DENIED**.

4. – Failure to Object to Court's Response to Jury Questions

Applicant argues Counsel was ineffective for failing to demand the Court provide greater clarification to the jury in response to the questions sent out during deliberations.

At trial, the jury sent out, among others, a note inquiring: "Can the Defendant be found guilty of murder and not guilty of armed robbery?" Tr. 717, ll. 8-9. Discussing how to answer the question, Counsel argued that Applicant could not be found guilty of murder if he was found not guilty of armed robbery. Tr. 718-19. Judge Culbertson determined the appropriate response was to refer the jury to the written copy of his jury instructions—specifically those sections regarding murder and the jury's verdict. Tr. 719, ll. 18-21. Counsel again voiced that though there was certainly no issue of law to suggest both murder and armed robbery had to be proven together, the particular facts of the case required such a finding. Tr. 720-21. Judge Culbertson declined to respond in detail but conservatively directed the jury's attention to sections of the written copy of jury instructions regarding murder and the jury verdict. Tr. 721, ll. 14-17. Counsel preserved his objection. Tr. 721-222.

The record reflects that Counsel asked for a more specific answer from the Court and the Court declined the request. As such, Applicant's allegation that he failed to do so is factually without merit. Accordingly, Applicant's request for relief by way of this allegation is **DENIED**.

B. Ineffective Assistance of Appellate Counsel

A defendant is also constitutionally entitled to effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387 (1985). "However, appellate counsel is not required to raise every non-frivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523 (1990). Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745 (1983). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Tisdale v. State, 357 S.C. 474, 476. 594 S.E.2d 166, 167 (2004) (quoting Jones v. Barnes, 463 U.S. 745, 754 (1983) ("For judges to second-guess reasonable professional judgments and impose on . . . counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy . . . .")).

Applicant must show that appellate counsel's performance was deficient and that he was prejudiced by the deficiency. Thrift, at 537; Gilchrist v. State, 364 S.C. 173, 612 S.E.2d 702 (2005); Anderson v. State, 354 S.C. 431, 581 S.E.2d 834 (2003). When a claim of ineffective assistance of counsel is based upon failure to raise viable issues, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. Smith v. Robbins, 528 U.S. 259, 288 (2000) (citing Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986)).

1. Failure to Argue Against Instruction on Inference from Use of Deadly Weapon

Applicant argues Appellate Counsel was ineffective for failing to argue that the Court erred by instructing the jury that it could infer malice from the use of a deadly weapon, despite Applicant's argument for self-defense. Under today's law, where evidence is presented that would reduce, mitigate, excuse, or justify a homicide or attempted homicide caused by the use of a deadly weapon, juries shall not be charged that malice may be inferred from the use of a deadly weapon. State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009). However, the Court recognized the case was a "clear break from our modern precedent," and held the new holding was effective only prospectively and in pending appeals where the issue was preserved. Id., 385 S.C. at 612, 685 S.E.2d at 810. Prior to the October 2009 ruling, the charge that malice may be inferred from the use of a deadly weapon was proper even where evidence was presented that would reduce, mitigate, excuse or justify the killing. Id., 385 S.C. at 608, 685 S.E.2d at 807.

At the March 2009 trial, as already noted, Applicant proceeded with a strategy of arguing self-defense. During the charge conference, counsel for co-defendant Hammond, in a moment of notable foresight, initially argued that the instruction regarding inferring malice from the use of a deadly weapon amounted to impermissible burden shifting under Sandstrom v. Montana, 442 U.S. 510 (1979). Tr. 624-25; see also Belcher, 385 S.C. at 608, 685 S.E.2d at 807-08 (touching on Sandstrom in its review of jurisprudential history on the matter). Counsel did not join in the co-defendant's motion. After an overnight break, counsel for the co-defendant withdrew his objection, finding that he was thinking of Lowry v. State, 376 S.C. 499, 657 S.E.2d 760 (2008), which cited to Sandstrom and only prohibited a presumption, whereas the instruction merely permitted the jury to draw an inference. Tr. 632, ll. 2-17. Judge Culbertson charged the jury that

"[i]nferred malice may also arise when the deed is done with a deadly weapon." Tr. 694, ll. 7-8. Appellate Counsel did not raise the issue on appeal.

Appellate Counsel testified the case was pending when Belcher came down, noted that Counsel did not take exception at trial, and that he would have argued Belcher had the issue been preserved for appeal.

Applicant argues Appellate Counsel should have argued against the instruction permitting an inference of malice from the use of a deadly weapon, if only because co-defendant's counsel initially made something similar to that argument at the charging conference. This allegation is without merit as a matter of law—Belcher is explicitly prospective, not retrospective, and the issue was not preserved for appeal. Nor could counsel be said to have been ineffective for failing to object and preserve the issue, as doing so would have been contrary to long-standing law and demanded substantial clairvoyance on his part. The Court finds no deficiency on the part of Appellate Counsel, nor prejudice therefrom, and accordingly Applicant's request for relief by way of this allegation is **DENIED**.

2. Failure to Argue Error in the Court's Responses to Jury Questions

Applicant alleges in his application that Appellate Counsel should have raised the issue of the Court's response to the jury questions (addressed in II.A.4, above) on appeal. Applicant did not argue this allegation at the hearing. In any event, appellate counsel is not required to raise every non-frivolous issue. Based upon its own review of the record, as well as evidenced by the initial vacation of the conviction by the Court of Appeals, this Court finds Appellate Counsel raised a substantially stronger issue on appeal—the Court was well within its discretion to simply direct the jury's attention back to portions of its written instructions. Accordingly, Applicant's request for relief by way of this allegation is **DENIED**.

III. CONCLUSION

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

This Court notifies 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. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

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 South Carolina Department of Corrections.

AND IT IS SO ORDERED this 5 **day of** Feb. **, 2018.**

WILLIAM H. SEALS, JR.
Presiding Judge
Fifteenth Judicial Circuit

Marion, South Carolina