

ROSS AND ENDERLIN, PA  
ATTORNEYS AT LAW

July 19, 2018

Mr. Daniel E. Shearouse  
Clerk, The S.C. Supreme Court  
Post Office Box 11330  
Columbia, South Carolina 29211

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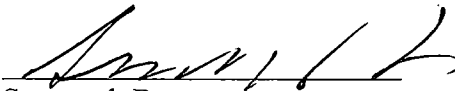
S.C. SUPREME COURT

Re: Jamie A. Makupson v. State  
2017-CP-42-1808

Dear Mr. Shearouse:

Enclosed you will find the original Notice of Appeal in the above matter along with Proof of Service upon the Respondent and the Order of Dismissal. These matters are being referred to the Office of Appellate Defense.

Sincerely,



Susannah Ross  
Attorney at Law

enclosure

cc: Office of the Attorney General  
Office of Appellate Defense  
Spartanburg County Clerk of Court

330 E. COFFEE ST. • GREENVILLE/SC • 29601  
PHONE: (864) 242-0029  
E-MAIL: SUSANNAH@ROSSENDERLIN.COM

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

APPEAL FROM SPARTANBURG COUNTY  
Court of Common Pleas

Michael G. Nettles, Circuit Court Judge

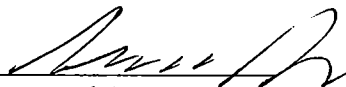
2017-CP-42-1808

Jaime Makupson, ..... Appellant,  
v.  
The State, ..... Respondent.

NOTICE OF APPEAL

Jamie A. Makupson appeals the Honorable Michael G. Nettles' Order of Dismissal filed March 26, 2018, and his Order Denying Applicant's Motion to Alter or Amend Judgment filed July 12, 2018..

This 19 day of July, 2018.

  
Susannah Ross, Attorney at Law  
330 E. Coffee St.  
Greenville, SC 29601  
(864) 242-0029  
Attorney for Appellant

Other Counsel of Record:  
Valerie Giovanoli, Assistant Attorney General  
P.O. Box 11549  
Columbia, SC 29211  
(803) 734-3970  
Attorney for Respondent

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S.C. SUPREME COURT



STATE OF SOUTH CAROLINA  
COUNTY OF SPARTANBURG

Jamie A. Makupson, #281398,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS  
SEVENTH JUDICIAL CIRCUIT

2017-CP-42-1808

**ORDER OF DISMISSAL  
WITH PREJUDICE**

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This matter comes before this Court by way of an application for post-conviction relief (PCR) filed by Jamie A. Makupson (Applicant) on May 22, 2017. The State (Respondent) made its return requesting an evidentiary hearing be held. An evidentiary hearing into the matter was convened on February 22, 2018 at the Spartanburg County Courthouse. Applicant was present and represented by Susannah Ross, Esquire. Valerie Garcia Giovanoli, Esquire, of the Office of the Attorney General represented Respondent.

At the hearing, Applicant testified on his own behalf. Probation Agent Hanna Price ("Agent") (Counsel) also testified. This Court had before it the records of the Spartanburg County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the probation revocation transcript, Applicant's probation records, the PCR application, Respondent's return and motion to dismiss, the signed conditional order of dismissal, and Applicant's reply to the conditional order of dismissal.

#### **PROCEDURAL HISTORY**

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. In May 2013, the Spartanburg County Grand Jury indicted Applicant for assault and battery, first degree (2013-GS-42-2321).

Applicant was subsequently indicted in June 2013 for assault and battery, second degree (2013-GS-42-2919) and threatening life, person, or family of public official, teacher, or principal (2013-GS-42-2920).

Robert B. Hall, Esquire, represented Applicant. Alexandria Denise Lyles, Esquire, prosecuted the case. On June 28, 2013, Applicant pleaded guilty as indicted to all charges before the Honorable J. Mark Hayes, II. Pursuant to a negotiated sentence, Judge Hayes sentenced Applicant to imprisonment for concurrent terms of ten years for assault and battery, first degree, provided that upon the service of five years, the balance was suspended with probation for five years, three years for assault and battery, second degree, and five years for threatening the life, person or family of public official, teacher, or principal. Applicant did not appeal his conviction or sentence.

On April 13, 2016 a probation citation was issued for Applicant for violations of probation.

The affidavit stated that Applicant was to be arrested for the following reasons:

1. Failure to report as instructed having missed an office visit;
2. Failure to refrain from changing residence without prior consent of the Agent;
3. Failure to refrain from the use of controlled substances having tested positive for THC, cocaine, and opiates on 3/8/16 and 3/15/16;
4. Failure to work diligently at a lawful occupation, having never provided the Agent with proof of employment, or proof of any effort to obtain employment;
5. Failure to pay supervision fee being \$600 in arrears and having never made a payment on this account since beginning probation;
6. Failure to pay court fine being \$180 in arrears and having never made a payment on this account since beginning probation;
7. Failure to pay one time \$20 drug test fee;
8. Failure to follow the advice and instructions of the supervising Agent;
9. Failure to comply with special condition of anger management counseling.

On June 17, 2016, the Applicant appeared before the Honorable R. Keith Kelly for a probation revocation hearing. Judge Kelly revoked Applicant's probation and required him to serve his remaining five year sentence. Applicant did not appeal his probation revocation or sentence.

## ALLEGATIONS

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

1. "Did the Court of General Sessions have subject matter jurisdiction to revoke Applicant's probation?"
  - a. "According to the revocation order it states that a citation dated 4-4-16 was issued. It also state that, 'after hearing the evidence and being duly advised, in the presence of the defendant (now Applicant), I find the above named defendant has violated the following conditions of probation. ... This statement would have us believe that citation with an affidavit was issued in this case, when in fact, there was no citation or affidavit issued before hearing or served nor presented to the Applicant in this case. Applicant has never seen a citation nor warrant up to this date. Without the citation or probation warrant rendered this court is without subject matter jurisdiction and the revocation is void."
2. "Did Applicant waive his right to counsel at the probation revocation hearing?"
  - a. "In this case, Applicant had to proceed *pro se* as no counsel was appointed to represent nor were the required procedures or steps taken by the court to assure that Applicant was making a free and voluntary waiver of his right to counsel and that he understood the dangers of self-representation."

## SUMMARY OF PCR HEARING

At the start of the hearing, Respondent requested a ruling on its motion to dismiss. With regard to Applicant's first issue, Respondent argued that the circuit court obviously had subject matter jurisdiction to revoke Applicant's probation and citing to State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005). Respondent also argued because it is clear from the record the circuit court had jurisdiction, there is no genuine issue of material fact requiring a hearing and therefore, Respondent is entitled to summary judgment. S.C. Code Ann. § 17-27-70(c) (Court may "grant a motion by either party for summary disposition of [an] application when it appears from the pleadings ... that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.") As to Applicant's second issue, Respondent argued that based on State v. Bryant, 383 S.C. 410, 680 S.E.2d 11 (2009), there was no genuine issue of material fact to necessitate a hearing and

Respondent was entitled to judgment as a matter of law based solely on the record before the Court. Respondent also admitted Applicant's certified convictions from Spartanburg County and a "Notice of Probation Violation Hearing and Acknowledgment of Rights" and "Notice of Rights" (referred to herein collectively as "the Notices"), as Court's Exhibit 1 and State's exhibit 1, respectively, in support of her argument.

Respondent countered and distinguished Bryant from the instant matter, because in Bryant, the defendant was informed on the record of his right to an attorney, whereas in this case, Applicant was not advised of neither his right to an attorney nor the dangers of proceeding *pro se*. Applicant also cited State v. Brannon, 407 S.C. 293, 755 S.E.2d 117 (2014), and State v. Moore, 399 S.C. 641, 732 S.E.2d 871 (2012).

This Court denied Respondent's motion to dismiss and allowed Applicant to proceed with a hearing to prove his allegations.

I. Applicant testified to the following:

Applicant testified went to report to his probation agent and change his address, however when he arrived, Agent was revoking his probation. Agent accused him of failing two drug tests, but Applicant denied ever having two drug tests. Applicant admitted he failed the March 15 drug test. Applicant denied he ever missed a reporting visit.

Applicant testified that during his revocation hearing, the judge asked him if he had a lawyer, but Agent jumped in and answered the question without allowing Applicant to respond. Applicant also testified he had made numerous attempts to gain lawful employment, but rather Agent did not help him seek employment. Applicant also testified he gave Agent copies of job applications he had filled out and submitted. Applicant testified he completed anger management while in the

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Department of Corrections and gave Agent the proof of completion. Applicant completed the 6<sup>th</sup> grade, has received a GED, and has attended college.

II. Agent testified to the following:

Agent has been working as a probation agent since August of 2013. Agent explained the reasons for each violation:

Agent testified she had a reporting visit with Applicant on October 6, 2015 at which time she advised him his next reporting date would be December 1, 2015. However, Applicant failed to report that day. Agent does not generally violate for missing a reporting appointment, unless it is compounded by other violations or it becomes a recurring problem.

On April 30, 2014, Agent made contact with Applicant's grandmother and aunt who lived at the residence Applicant had provided to probation as being his residence. His grandmother and aunt informed Agent that their residence was Applicant's mailing address, but that he did not live there and was not welcomed there. When Agent confronted Applicant about this issue, Applicant repeatedly told her he lived there. Later, Applicant gave Agent another address. At this time, as well as other office visits, Applicant became aggressive and disrespectful and had to be escorted out of the office.

Agent testified Applicant failed his initial drug test taken on March 8, 2016. Applicant informed her he would pass a second drug test if given a week. Agent drug tested him a week later on March 15, 2016, and Applicant failed again. Applicant did not pay for either drug test.

Agent testified that despite her giving Applicant resources to help find lawful employment, Applicant never obtained lawful employment nor provide her with proof of any attempts to seek lawful employment. Agent also testified Applicant informed her that he turned down job offers from Lear and Excel because of transportation concerns.

Agent testified Applicant never paid any of his probation fees, court fees, or drug test fee. Agent does not violate offenders solely on monetary obligations. However, Applicant had violated in many ways and therefore, Agent was required, by her office's policy, to include all violations.

Agent also testified Applicant never completed his court ordered anger management counseling. Agent was aware Applicant had completed an anger management course required in the Department of Corrections, but informed him that he was also required to take the anger management course outside of the Department of Corrections.

Agent testified that Applicant's demeanor was angry, disrespectful, loud, and aggressive on multiple occasions requiring both a meeting with her supervisor as well as being escorted out of the building. Agent also testified that Applicant had been on probation five prior times to this instant probation term and had violated probation every time. Counsel testified she made a mistake on the probation records in the section for "Agent's recommendations." Her recommendation was never a "partial revocation of 2 years, toll time form [sic] date of Warrant. Continue Probation. time satisfies supervision fee arrearages" as indicated on the probation revocation.

Agent testified she served Applicant with State's Exhibit 1, the Notices, on April 19, 2016. Agent testified she witnessed Applicant sign both documents. Agent also testified Applicant also showed up to her office a few days before the violation hearing thinking he was scheduled for court. Agent had to inform him the hearing was the following day at the courthouse. Agent also asked Applicant if he had gotten an attorney, to which Applicant told her no. Agent asked him why and Applicant shrugged his shoulders. Agent asked him if he didn't because he didn't feel like it, to which Applicant responded "yes." Agent asked Applicant if he was going to represent himself, to which Applicant stated "yes." Agent had her case notes with her and was using them to assist her in testifying.

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**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has had the opportunity to observe the witnesses presented at the hearing, and has weighed their testimony and credibility accordingly. Below are the findings of fact and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (2017). Applicant has failed to prove by a preponderance of the evidence that the circuit court lacked subject matter jurisdiction to revoke his probation or that he did not knowingly and voluntarily waive his right to probation revocation counsel.

*Subject matter jurisdiction*

This Court finds Applicant has failed to prove the circuit court lacked subject matter jurisdiction to revoke his probation. An Applicant may challenge the subject matter jurisdiction of the trial court and such a claim is one that may be raised at any time. See Brown v. State, 343 S.C. 342, 540 S.E.2d 846 (2001), overruled in part by Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005). However, “[c]ircuit courts obviously have subject matter jurisdiction to try criminal matters.” Gentry, 363 S.C. 93; See also S.C. Const. Art. V, § 7. Since Applicant was sentenced to probation after his guilty plea in the circuit court, the circuit court had subject matter jurisdiction to hear his subsequent probation violation matter. Applicant must present evidence that his case is of some class over which the circuit court does not have the authority to preside. Applicant claims that there was no citation or affidavit issued regarding his arrest for probation violations. The probation records include the probation citation issued on April 13, 2016 with an affidavit signed by Agent, on April 4, 2016 and served on April 13, 2016. Additionally, Agent testified Applicant became aggressive so she gave him a copy of the citation and had him escorted out of the office (See also, notation in probation records). Therefore, Applicant has failed to present any evidence to refute the record that

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he was served with the probation citation and affidavit in addition to failing to show that the probation revocation court did not have the authority to preside. Therefore, this Court denies and dismisses this allegation.

*Waiver of probation revocation counsel*

This Court finds Applicant knowingly and voluntarily waived his right to counsel at his probation revocation hearing. In criminal cases, defendants have the right to waive counsel; however, the trial court has discretion to determine if that waiver was a knowing and intelligent waiver. State v. Bryant, 383 S.C. 410, 414, 680 S.E.2d 11, 13 (2009) (citing State v. Thompson, 355 S.C. 261-62, 584 S.E.2d at 134-35 (2003)). Specifically, in addition to reviewing the entire record, the court also looks to ten factors in order to determine if the defendant has sufficient background to understand the dangers of self-representation. Bryant, 383 S.C. 410, 415, 680 S.E.2d 11, 13 (2009). Such factors include, but not limited to, whether the defendant was previously involved in criminal trials, whether he knew the nature of the charge and of the possible penalties, and whether he knew he would be required to comply with trial rules of procedure. Id. This analysis aids the court in determining whether the defendant had sufficient background to waive counsel or was apprised of his rights by another source. Id.

In regard to waiving counsel in a probation revocation hearing, the court first looks to the exchange between the court and the probation agent during the hearing. Id. at 416, 680 S.E.2d at 14. If the court does not explicitly address the specific dangers and disadvantages of proceeding *pro se* as required by Ferretta<sup>1</sup>, the Court notes that the next inquiry is whether the defendant signed a probation notice by his probation officer, acknowledging in part that he may have an attorney represent him and if he could not afford one, one would be appointed on his behalf. Bryant, 383 S.C.

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<sup>1</sup> Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525 (1975)

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at 410, 416-17, 680 S.E.2d 11, 14. The probation notice typically states that it is the defendant's responsibility to ensure that his or her witnesses and attorney appear at the hearing. Id. In Bryant, the Supreme Court held that though the court did not explicitly warn the defendant of the dangers and disadvantages of self-representation, Bryant knowingly and voluntarily waived her right to an attorney by signing a probation notice prior to the hearing informing her of her rights. The Court also found that because of her extensive experience in the criminal justice system, specifically in probation court, as well as previous representation for the underlying charges, she had a sufficient background to waive counsel and was apprised of her rights by some other source. Id. at 417, 680 S.E.2d at 14.

This case is identical to Bryant. On April 13, 2016, Applicant signed a "Notice of Probation Violation Hearing and Acknowledgement of Rights" and a "Notice of Rights," informing him of his rights. This was over two months before the revocation hearing on June 17, 2016. This notice expressly stated that he may have an attorney represent him, and that if he could not afford one, would be appointed for him. In fact, the notice contained the exact verbiage as that in the Bryant case. The responsibility fell on Applicant to make arrangements to hire an attorney to appear at the probation revocation hearing, if desired, as acknowledged in the signed probation notice.

In addition to the Notices signed by Applicant, the record demonstrates Applicant's extensive familiarity with the criminal justice system, including extensive experience with probation. Further, Agent testified credibly that they had a discussion about Applicant getting an attorney to which Applicant nonchalantly indicated he did not feel like getting an attorney and was going to represent himself. Applicant also testified he had a (or some) college education.

Applicant's reliance on Brannon and Moore is misplaced. In Brannon, Brannon violated probation for a number of unsatisfied monetary obligations and failing to "follow his probation

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agent's advice." Brannon, 407 S.C. at 295, 755 S.E.2d at 118. Brannon signed a waiver form which indicated his decision to proceed without counsel and waived his right to a probation revocation hearing. Without a hearing, the circuit court revoked Brannon's probation and sentenced him to five months' imprisonment. Id. The Court of Appeals stated "the absence of any finding whatsoever" that Brannon knowingly and voluntarily waived his right to a hearing and an attorney was troubling and remanded the matter for a determination of whether Brannon had knowingly and voluntarily waived his right to a probation revocation hearing and an attorney. Id. 407 S.C. at 296, 755 S.E.2d at 118.

As a threshold matter, this Court notes Bryant is not only more analogous to the case at bar, but also carries more authoritative weight from the Supreme Court, whereas Brannon is very distinguishable and was decided by the Court of Appeals. Additionally, Brannon signed a form waiving his right to an attorney and a hearing, essentially relinquishing all rights to even challenge the violations with which he had been accused. Brannon did not have a hearing or an opportunity to appear before the circuit court regarding the revocation of his probation. It is also worth noting that all of Brannon's violations were of a monetary nature. In this case, Applicant did appear for probation revocation hearing in which he admitted some of his violations and denied others. Also Applicant's violations were much more extensive than Brannon's and involved more than judge monetary violations.

Secondly, there was *nothing* in the record to support Brannon waived his rights other than a signed pre-printed waiver. Here, the record shows Applicant was apprised of his right to an attorney and the dangers of proceeding *pro se* by his probation agent through the signed Notices, that Applicant has an extensive criminal history and experience with probation, that Applicant possessed sufficient education to waive his right to counsel, and Applicant even told Agent he did not get an

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attorney because he did not feel like it.

In Moore, the issue was whether trial counsel was ineffective for strategically deciding to waive Moore's right to a jury trial and instead opt for a bench trial. Moore testified in his PCR that he did not know he was going to have a bench trial and wanted a jury trial. The Court found the defendant's waiver of his constitutional right to a jury trial was unsupported by the record, in that there was no colloquy with the trial court or trial counsel and that trial counsel did not recall if he definitely explained the differences between a jury and bench trial or whether Applicant understood the distinction. Additionally, Moore had only completed the seventh grade and could not read or write.

Moore is not controlling in this case as it is distinguishable from the case at bar for many reasons. The first being the issue was whether Moore's attorney was ineffective in advising Moore about his constitutional right to a jury trial and the distinction between a jury and bench trial. The issue in this case was Applicant's knowing and voluntary waiver of probation counsel. Secondly, there was nothing in the record that indicated Moore made a knowing or voluntary waiver of his right to a jury trial. Here, as discussed more fully above, there is ample evidence of a knowing and voluntary waiver of his right to probation counsel in the record. Lastly, Moore was significantly less educated than Applicant.

Because the record shows Applicant was apprised of his right to an attorney and the dangers of proceeding *pro se* by his probation agent through the signed Notices, Applicant's extensive criminal history and experience with probation, and Applicant possessed sufficient education to waive his right to counsel, this Court finds Applicant made a knowing and voluntary waiver of his right to probation counsel.

Lastly, this Court notes that Agent's testimony, based on her extensive case notes, was more

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credible than that of Applicant regarding the specific facts surrounding the probation violations. Applicant even admitted to failing a drug test. Based on the evidence presented, this Court finds Applicant was in fact in violation of the terms of his probation for each one of the nine enumerated violations and the revocation was proper. As such, this Court fails to see how an attorney could have assisted Applicant in receiving a different outcome from the probation revocation hearing. Therefore, this court finds that the allegation of denial of probation revocation counsel is without merit and it is denied and dismissed.

### CONCLUSION

Based on all the foregoing, this Court finds and concludes Applicant has not established any violations that would require this Court to grant his application. Therefore, as Applicant has failed to meet his burden of proof in this post-conviction relief action, his application is denied and dismissed with prejudice.

This Court notifies Applicant he must file and serve a notice of appeal within thirty (30) days from receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. An applicant has a right to an appellate counsel's assistance when they are seeking review of the denial of PCR. Austin v. State, 305 S.C. 453 (1991). If an applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. See Rule 71.1 (g), SCRPC. You must look at Rule 243 of the South Carolina Appellate Court Rules for appropriate procedures for appeal.

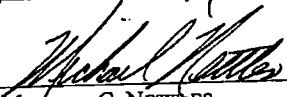
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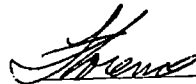
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**IT IS THEREFORE ORDERED THAT:**

1. The application for Post-Conviction Relief is denied and dismissed with prejudice;
2. Applicant shall remain in the custody of the South Carolina Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 20 day of March, 2018.

  
MICHAEL G. NETTLES  
Presiding Judge  
Seventh Judicial Circuit

, South Carolina

CLERK OF COURT  
SPARTANBURG COUNTY  
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M. HOPE BLACKLEY

# Spartanburg County

Spartanburg County Court House  
180 Magnolia Street  
P. O. Box 3483  
Spartanburg, SC 29304-3483

Phone (864) 596-2591  
Fax (864) 596-2239



**M. Hope Blackley**  
Clerk of Court

*March 26, 2018*

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF SPARTANBURG

7<sup>TH</sup> JUDICIAL CIRCUIT

*Janice D. Mackerson*  
Applicant # *251398*

CASE # *2017CP42-1808*

*State*  
Respondent

CERTIFICATE OF SERVICE

I certify that, on this date, I served a copy of the *Ord. Dismissed w/ prejudice*  
In this action dated *3-20* 2018 on *3-26-18*

By mailing to him/her, at his/her last known address, by depositing it in the U.S. Mail, in an envelope with sufficient postage affixed, addressed as follows:

*Valerie Coriandri*  
*Wendy McCay*  
*Susan Ross*

CLERK OF COURT  
SPARTANBURG COUNTY  
2018 MAR 26 AM 10:33  
M. HOPE BLACKLEY

*3-26-18*  
(Date)

*Carrie Selby*  
(Signature)

STATE OF SOUTH CAROLINA )  
COUNTY OF SPARTANBURG )

IN THE COURT OF COMMON PLEAS )  
FOR THE SEVENTH JUDICIAL CIRCUIT )

Jamie Makupson, SCDC # 281398, )  
Applicant, )

Case No. 2017-CP-42-1808

v. )

**RETURN TO APPLICANT'S MOTION  
TO ALTER OR AMEND JUDGMENT**

State of South Carolina, )  
Respondent. )

Respondent, by and through undersigned counsel, making its Return to Applicant's  
"Motion to Alter or Amend the Judgment" filed on April 4, 2018, would respectfully show unto  
this Court:

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M. HOPE BRADLEY  
CLERK OF COURT  
SPARTANBURG COUNTY

**I. Procedural History**

Jamie Makupson (Applicant) is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. In May 2013, the Spartanburg County Grand Jury indicted Applicant for assault and battery, first degree (2013-GS-42-2321). Applicant was subsequently indicted in June 2013 for assault and battery, second degree (2013-GS-42-2919) and threatening life, person, or family of public official, teacher, or principal (2013-GS-42-2920).

Robert B. Hall, Esquire, represented Applicant. Alexandria Denise Lyles, Esquire, prosecuted the case. On June 28, 2013, Applicant pleaded guilty as indicted to all charges before the Honorable J. Mark Hayes, II. Pursuant to a negotiated sentence, Judge Hayes sentenced Applicant to imprisonment for concurrent terms of ten years for assault and battery, first degree, provided that upon the service of five years, the balance was suspended with probation for five years, three years for assault and battery, second degree, and five years for threatening the life,

person or family of public official, teacher, or principal. Applicant did not appeal his conviction or sentence.

On April 13, 2016, a probation citation was issued for Applicant for violations of probation. The affidavit stated that Applicant was to be arrested for the following reasons:

1. Failure to report as instructed having missed an office visit;
2. Failure to refrain from changing residence without prior consent of the Agent;
3. Failure to refrain from the use of controlled substances having tested positive for THC, cocaine, and opiates on 3/8/16 and 3/15/16;
4. Failure to work diligently at a lawful occupation, having never provided the Agent with proof of employment, or proof of any effort to obtain employment;
5. Failure to pay supervision fee being \$600 in arrears and having never made a payment on this account since beginning probation;
6. Failure to pay court fine being \$180 in arrears and having never made a payment on this account since beginning probation;
7. Failure to pay one time \$20 drug test fee;
8. Failure to follow the advice and instructions of the supervising Agent;
9. Failure to comply with special condition of anger management counseling.

On June 17, 2016, Applicant appeared before the Honorable R. Keith Kelly for a probation revocation hearing. Judge Kelly revoked Applicant's probation and required him to serve his remaining five year sentence. Applicant did not appeal his probation revocation or sentence.

## **II. Current Post-Conviction Relief Action**

On May 22, 2017, Applicant filed an application for post-conviction relief. An evidentiary hearing into the matter was convened on February 22, 2018, at the Spartanburg County Courthouse before the Honorable Michael G. Nettles. Applicant was present at the hearing and represented by Susannah Ross, Esquire. Assistant Attorney General Valerie Giovanoli of the South Carolina Attorney General's Office, represented Respondent. Applicant testified on his own behalf at the evidentiary hearing and the State presented testimony from Probation Agent Hanna Price.

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By written order signed March 20, 2018 and filed March 26, 2018, Judge Nettles denied and dismissed the application with prejudice. On April 4, 2018, Applicant filed a "Motion to Alter or Amend the Judgment." This Return follows.

**III. Applicant's Motion to Alter or Amend**

In his motion to alter or amend, Applicant argues this Court should reverse its prior rulings and grant post-conviction relief. Specifically, Applicant argues he was not properly advised of his right to counsel and urges this court to reverse its prior ruling to the contrary. In sum, Applicant requests the Court reverse its prior rulings and grant him post-conviction relief based on arguments that were already properly presented and denied by the Court in its order of dismissal.

In response, Respondent submits this Court's Order of Dismissal contains the required findings of fact and conclusions of law necessary to dispense with Applicant's allegations as required by S.C. Code Ann. § 17-27-80 and Rule 52(a), SCRPC; see also McCray v. State, 305 S.C. 329, 408 S.E.2d 241 (1991). Applicant is not requesting either an alteration or amendment to the Court's order, but rather, Applicant is asking the Court to reverse its decision. Such a request is more properly addressed through the appellate process. See Wilder Corp. v. Wilke, 330 S.C. 71, 77, 497 S.E.2d 731, 734 (1998) (noting the proper use of a Rule 59(e) motion is to preserve issues raised to, but not ruled upon by, the trial court).

Respondent submits this Court's ruling are legally correct and supported by the record, and that this Court should deny Applicant's request to reconsider, alter or amend its ruling.

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**IV. Relief Requested**

WHEREFORE, having made its Return to the motion, Respondent requests the relief requested in the motion be denied and that said motion be dismissed.


Respectfully submitted,

ALAN WILSON  
Attorney General

W. JEFFREY YOUNG  
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON  
Senior Assistant Deputy Attorney General

BY:

  
ATTORNEYS FOR RESPONDENT  
Office of the Attorney General  
Post Office Box 11549  
Columbia, South Carolina 29211  
(803) 734-3737

May 16, 2018

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STATE OF SOUTH CAROLINA )  
COUNTY OF SPARTANBURG )

IN THE COURT OF COMMON PLEAS

JAMIE MAKUPSON,  
S.C.D.C. No. 281398,

2017-CP-42-1808

Applicant,

vs

AFFIDAVIT OF SERVICE BY MAIL

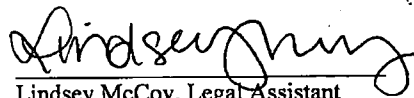
STATE OF SOUTH CAROLINA,

Respondent.

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Return to Applicant's Motion to Alter or Amend Judgment** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Susannah C. Ross, Esquire  
Ross & Enderlin, PA  
330 East Coffee Street  
Greenville, South Carolina 29601

DATED this the 16<sup>th</sup> day of May, 2018.



Lindsey McCoy, Legal Assistant  
For Respondent

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SPARTANBURG COUNTY  
N. HOPE BLACKLEY

STATE OF SOUTH CAROLINA  
COUNTY OF SPARTANBURG

) IN THE COURT OF COMMON PLEAS  
) IN THE SEVENTH JUDICIAL CIRCUIT

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PAUL B. ...  
GREENVILLE CO. SC

JAMIE A. MAKUPSON  
APPLICANT,

VS.

THE STATE OF SOUTH CAROLINA  
RESPONDENT.

) MOTION TO ALTER OR AMEND  
) THE JUDGEMENT

) CASE NO: 2017-CP-42-1808

COMES NOW the Applicant and hereby moves pursuant to Rule 59(e), SCRC, to alter or amend the judgment of this Court filed on March 26, 2018. The Applicant takes issue with the findings of fact and conclusions of law set fourth resulting in the denial of post-conviction relief in his case.

The PCR action proceeded to a full hearing February 22, 2018, solely on the issue of whether the Applicant's right to assistance of counsel guaranteed by the Sixth and Fourteenth Amendments of the US Constitution was violated. The transcript of the probation violation hearing clearly shows Mr. Makupson was not advised by the judge of his right to counsel and there was no inquiry by the judge into whether there was a knowing and intelligent waiver of that right. Mr. Makupson informed the court that he had not seen the violation report and did not know the allegations against him. The probation agent then states that Mr. Makupson told her he didn't feel like getting an attorney and would represent himself. (Revocation p.3) There is no further mention of the right to counsel and no inquiry to determine whether Mr. Makupson was adequately informed of his right to counsel or warned of the dangers of self-representation. Further,

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Mr. Makupson was not advised by the hearing judge that he could invoke his Sixth Amendment right and request the court appoint an attorney to represent him.

"The Sixth and Fourteenth Amendments of our Constitution guarantee that a person brought to trial in any state or federal court must be afforded the right to the assistance of counsel before [s]he can be validly convicted and punished by imprisonment." *State v. Thompson*, 355 S.C. 255, 261, 584 S.E.2d 131, 134 (Ct.App.2003) (citing *Faretta v. California*, 422 U.S. 806, 807, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975)). Our courts have found that, "The right to counsel attaches in probation revocation hearings." *Salley v. State*, 306 S.C. 213, 215, 410 S.E.2d 921, 922 (1991). Further, "Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice." *McKnight v. State*, 320 S.C. 356, 358, 596 S.E.2d 352, 353 (1995) (quoting *Strickland v. Washington*, 466 U.S. 668, 692, 80 L.Ed.2d 674, 696 (1984)).

While one can waive their right to counsel, "[t]he courts indulge every reasonable presumption against waiver of fundamental constitutional rights, and do not presume acquiescence in the loss of fundamental rights." *Thompson*, 355 S.C. at 262, 584 S.E.2d 131, 134 citing *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461, 1466 (1938); *Pitts v. North Carolina*, 395 F.2d 182, 188 (4th Cir.1968). The trial judge must determine whether there is a knowing and intelligent waiver by the defendant. *State v. Dixon*, 269 S.C. 107, 236 S.E.2d 419 (1977) (citing *Johnson v. Zerbst*, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938)). To assure a knowing and intelligent waiver of the right to counsel, the record must demonstrate that the court advised the accused of his right to counsel and adequately warned of the dangers of self representation. *Faretta*

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v. *California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). The record in this case does not comply with *Faretta*.

The signed forms titled Notice of Probation Violation Hearing and Acknowledgement of Notice (Court Exhibit 1) and Notice of Rights (State's Exhibit 1) do not fulfill the court's obligations under the first prong of *Faretta*. The Applicant's signature on the South Carolina Probation, Pardon, and Parole's Notice of Rights form does not amount to a valid waiver of his right to counsel, especially as in this case where Mr. Makupson signed the Notice of Rights but did not sign the Waiver of Right to have appointed counsel at the bottom of that form. (State's Exhibit 1). As in *State v. Brannon*, this record gives no assurance that Mr. Makupson's waiver of counsel is knowing and intelligently made and contains no findings on the matter. *State v. Brannon*, 407 S.C. 293, 755 S.E.2d 117 (2014).

Mr. Makupson's case is distinguishable from *State v. Bryant* because in that case the record showed the court informed the probationer of his right to a lawyer and there was an affirmative verbal waiver of the right to counsel followed with the further instruction that the right to counsel could be invoked at any time. *State v. Bryant*, 383 S.C. 410, 680 S.E.2d 11 (S.C. App. 2009) The issue there was whether after satisfying the first prong, the failure to specifically address the dangers and disadvantages of appearing pro se as required by *Faretta's* second prong could support a knowing and voluntary waiver. To assist in this inquiry into the second prong, the court looked into ten factors to determine whether the accused fully understood the dangers of self-representation based on her background or being appraised of her rights by some other

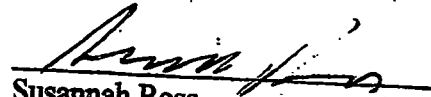
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SPARTANBURG COUNTY

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MS HOPE BLECKLEY

source. *Id.* at 14. Here, Mr. Makupson was not given notice of his right to counsel as required by the first prong of *Faretta*.

For the foregoing reasons, the Applicant requests this Court to alter or amend its Order of Dismissal.

Respectfully submitted,



Susannah Ross  
Attorney for the Applicant  
333 E. Coffee Street,  
Greenville, SC 29601  
(864) 242-0029

Greenville, South Carolina  
This 29 day of March, 2018.

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SPARTANBURG COUNTY  
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# Spartanburg County

Spartanburg County Court House  
180 Magnolia Street  
P. O. Box 3483  
Spartanburg, SC 29304-3483



Phone (864) 596-2591  
Fax (864) 596-2239

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M. Hope Blackley  
Clerk of Court

July 17, 2018

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF SPARTANBURG

7<sup>TH</sup> JUDICIAL CIRCUIT

*Jaime Makupson #281398*

CASE # *2017CP42-1808*

Applicant

CERTIFICATE OF SERVICE

*State*  
Respondent

I certify that, on this date, I served a copy of the  
In this action dated 7-3 2018 on 7-12-18

*Beckie Deming Applicant's motion to  
Alter former judge.*

By mailing to him/her, at his/her last known address, by depositing it in the U.S. Mail, in an envelope with sufficient postage affixed, addressed as follows:

*Megan Jamerson*  
*Susannah Ross*

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7-12-18  
(Date)

*Corie Stey*  
(Signature)

STATE OF SOUTH CAROLINA )  
COUNTY OF SPARTANBURG )  
 )  
Jamie Makupson, SCDC # 281398, )  
Applicant, )  
 )  
v. )  
 )  
State of South Carolina, )  
Respondent. )  
\_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS  
FOR THE SEVENTH JUDICIAL CIRCUIT

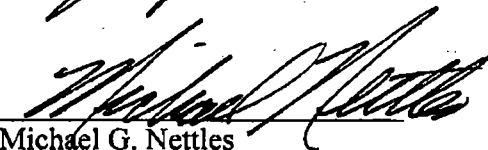
Case No. 2017-CP-42-1808

**ORDER DENYING APPLICANT'S  
MOTION TO ALTER OR AMEND  
JUDGMENT**

This matter comes before the Court by way of Applicant's "Motion to Alter or Amend the Judgement." Respondent made its Return to this motion requesting it be denied and dismissed.

This Court's Order of Dismissal denying and dismissing Applicant's post-conviction relief application was filed on March 26, 2018. Based upon careful reconsideration of all the evidence in this case and upon full consideration of Applicant's motion and Respondent's return, this Court is not persuaded to alter or amend the judgment. This Court further finds that oral argument would not aid in the reconsideration of the original judgment. Therefore, this Court finds that the original Order of Dismissal shall stand as it was written.

AND IT IS SO ORDERED this 3 day of July, 2018.

  
Michael G. Nettles  
Presiding Judge  
Seventh Judicial Circuit

 South Carolina

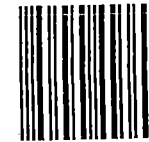
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SPARTANBURG COUNTY  
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SUSANNAH ROSS

130 EAST COFFEE ST.  
GREENVILLE SC 29601



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Mr. Daniel E. Shearouse  
Clerk, The S.C. Supreme Court  
Post Office Box 11330  
Columbia, South Carolina 29211