LAW OFFICE OF
LINDA VALLAR WHISENHUNT LLC

213 SOUTH MAIN STREET
ANDERSON, SC 29624

OFFICE (864) 225-3125
FAX (864) 225-3126

WWW.LAWWHIS.COM
LINDA@LAWWHIS.COM

October 12, 2018

South Carolina Supreme Court
Post Office Box 11330
Columbia, SC 29211

RE: Donovan Deshawn Williford v. State of South Carolina,
Case #2017-CP-04-01802

Dear Sir or Madam:

Please find enclosed the original and one (1) copy of the Appellant's Notice of Appeal and Proof of Service on Kelly Oppenheimer of the Office Attorney General in connection with the above-referenced matter. Please file the original and return a clocked copy to my office in the enclosed self-addressed stamped envelope. Also enclosed is a copy of the Order of Dismissal.

Please contact me if you have any questions.

Sincerely,

Linda Vallar Whisenhunt, LLC

Linda Vallar Whisenhunt

LVW/
Enclosure
cc: Donovan Deshawn Williford
Kelly Oppenheimer, South Carolina Office of Attorney General
Adriane Burk, South Carolina Commission on Indigent Defense

NOTICE OF APPEAL IN A CIVIL CASE

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

R. Scott Sprouse, Circuit Court Judge

Case No. 2017-CP-04-01802

Donovan Deshawn Williford,
S.C.D.C. No. 371832 Appellant,

v.

State of South Carolina, Respondent.

NOTICE OF APPEAL

Donovan Deshawn Williford appeals the denial of his Post Conviction Relief by the order of the Honorable R. Scott Sprouse, dated September 24, 2018 and filed October 1, 2018. Appellant received written notice of entry of this order on October 4, 2018.

October 12, 2018

Linda Vallar Whisenhunt
Linda Vallar Whisenhunt, LLC
213 South Main Street
Anderson, South Carolina 29624
(864) 225-3125
Attorney for Appellant

Other Counsel of Record:
Kelly Oppenheimer
South Carolina Office of Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
Attorney for Respondent
(803) 734-3970

PROOF OF SERVICE OF A NOTICE OF APPEAL

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

R. Scott Sprouse, Circuit Court Judge

Case No. 2017-CP-04-01802

Donovan Deshawn Williford,
S.C.D.C. No. 371832 Respondent,

State of South Carolina, Appellant.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on State of South Carolina by depositing a copy of it in the United States Mail, postage prepaid, on October 12, 2018, addressed to its attorney of record, Kelly Oppenheimer, South Carolina Office of Attorney General, Post Office Box 11549, Columbia, South Carolina 29211.

October 12, 2018

Linda Vallar Whisenhunt
Linda Vallar Whisenhunt, LLC
213 South Main Street
Anderson, South Carolina 29624
(864) 225-3125
Attorney for Appellant

STATE OF SOUTH CAROLINA
COUNTY OF ANDERSON

IN THE COURT OF COMMON PLEAS
FOR THE TENTH JUDICIAL CIRCUIT

Donovan Deshawn Williford, #371832,

Applicant,

v.

State of South Carolina,

Respondent.

Case No. 2017-CP-04-01802

ORDER OF DISMISSAL

This matter comes before the Court by way of an application for post-conviction relief filed August 29, 2017, by Donovan Deshawn Williford (Applicant). The State (Respondent) made its Return, Partial Motion to Dismiss, and Motion for a More Definite Statement on June 6, 2018, requesting an evidentiary hearing be held on the allegations of ineffective assistance of counsel stemming from his probation revocation hearing. An evidentiary hearing into the matter was convened on August 30, 2018, at the Anderson County Courthouse before the Honorable R. Scott Sprouse. Applicant was present at the hearing and was represented by Linda V. Whisenhunt, Esquire. Assistant Attorney General Kelly Oppenheimer of the South Carolina Attorney General's Office represented Respondent.

PROCEDURAL HISTORY

On April 15, 2015, Applicant appeared before the Honorable Letitia H. Verdin with counsel, Hervery Young, Esquire. Before Judge Verdin, Applicant waived presentment to the grand jury for one count of first-degree burglary and pled guilty to the lesser-included offense of second-degree burglary, non-violent (2015-GS-04-00544). Pursuant to a recommendation by the State, Judge Verdin sentenced Applicant under the Youthful Offender Act to a term of

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imprisonment not to exceed five years, suspended to three years' probation. Applicant did not appeal his plea or sentence.

Thereafter, on April 7, 2016, an arrest warrant was issued for Applicant for violating the terms of his probation. Specifically, the warrant alleged Applicant had failed to report to probation on April 5, 2016, and there was probable cause to believe Applicant had committed the offense of third-degree assault and battery by mob. Subsequently, during its June 2016 term, the Anderson County Grand Jury indicted Applicant for this offense (2016-GS-04-01129). Tenth Circuit Public Defender, Jennifer L. Johnson, represented Applicant on this charge. Assistant Solicitor Al Andrew Means, of the Tenth Circuit Solicitor's Office, prosecuted the case.

On March 13, 2017, Applicant appeared before the Honorable J. Cordell Maddox, Jr. for a probation revocation hearing with counsel, Johnson. At the hearing, Judge Maddox revoked Applicant's probation, requiring him to serve a term not to exceed five years under the Youthful Offender Act. Judge Maddox also recommended Applicant for the shock incarceration program. Applicant did not appeal his probation revocation.

Subsequently, on March 16, 2017, Applicant again appeared before Judge Maddox. He pled guilty as indicted to third-degree assault and battery by a mob. Pursuant to a recommendation by the State, Judge Maddox sentenced Applicant to a term of imprisonment of 134 days, which amounted to a time served sentence. Applicant did not appeal his plea or sentence.

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

1. "Insufficient or Ineffective Assistance;"
    a. "My lawyer's failure to inform me of shock program limits;" and
        i. "My representation was Hervery Young in April of 2015, but Jennifer L. Johnson represented me on March 15, 2017 and that is

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when I was sentenced to my prison time. I was not informed that the shock incarceration program did not allowed [sic] 2nd degree burglary offenses into the program. I didn't find out until I got to Kirkland that I didn't get accepted."

b. "I was not informed about how plea bargaining works."
    i. "I was not informed of the fact that my charge couldn't be further reduced at the time of my plea."

2. "Insufficiency of Process;" and
3. "Unjust Law Enforcement Discretion."

At the evidentiary hearing, Applicant proceeded forward on an allegation counsel was ineffective for failing to inform him he was ineligible for the shock incarceration program.

TESTIMONY PRESENTED AT THE EVIDENTIARY HEARING

At the evidentiary hearing, Applicant testified on his own behalf and presented the testimony of Circuit Public Defender Johnson (Counsel). This Court also had before it a copy of Applicant's 2017 plea transcript, a copy of Applicant's probation revocation hearing transcript, the records of the Anderson County Clerk of Court, Applicant's probation records, and Applicant's records from the South Carolina Department of Corrections.

During the evidentiary hearing, Applicant testified on his own behalf. Applicant testified he is currently serving a three year sentence under the Youthful Offender Act, and his maxout date is in 2020. He also testified Counsel represented him at his probation revocation hearing. He further testified he met Counsel prior to his hearing, at which point she informed him he could serve three years in full. He also testified he was aware he could get a three year sentence, and he was aware that sentence was a possibility. He elaborated, however, he thought he would be sentenced to a ninety-day shock incarceration program. He further elaborated the court at his probation revocation hearing recommended he get the shock program.

Applicant also testified he asked Counsel about the shock program, but he never got any answers from her. He testified Counsel never told the probation revocation court he was not

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eligible for the shock program based on his prior conviction. He further testified he informed the court at his hearing he understood the shock program. Applicant initially testified he was unaware whether or not a recess was taken during his hearing to discuss the shock program with Counsel. However, after having his memory refreshed, Applicant testified a recess was taken during his hearing, and he and Counsel did discuss the shock program. Applicant further testified he understands he could have received the shock program. He elaborated he wanted the court to recommend the shock program and understood the court merely made a recommendation for the shock program. He further elaborated he understood despite the recommendation, he could still receive three years.

Following Applicant's testimony, Counsel testified. Counsel testified she represented Applicant during his probation revocation. She further testified she met with Applicant a number of times prior to his probation revocation hearing. She elaborated during these meetings, she explained probation revocation, as well as the amount of time Applicant faced. She further elaborated Applicant absconded supervision, and she and Applicant discussed the violation. She testified Applicant never denied the violation. Counsel also testified she explained to Applicant under the Youthful Offender Act he could serve between three and six years imprisonment because these sentences are indeterminate. She further testified Applicant never indicated he did not understand something.

Counsel also testified during the probation revocation hearing, the court recommended the shock program on its own, and she did not broach the subject. She testified she did told neither the court nor Applicant that Applicant was ineligible for the shock program. She explained she did not realize the underlying offense of second-degree burglary would make Applicant ineligible for the shock program and eligible for a mandatory three year sentence.

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Counsel also testified she was hopeful the Department of Corrections would follow the recommendation for the shock program. She explained she never guaranteed Applicant would be accepted into the shock program, and neither did the court. She further explained she told Applicant the shock program is similar to boot camp. Counsel testified she informed Applicant it would take at least ninety days to get into the shock program, so, in reality, it was a six month program. She further testified she told Applicant eligibility in the shock program was based on the Department of Corrections' determination.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

Ineffective Assistance of Counsel

In a post-conviction relief action, an applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCP; *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, the applicant 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." *Strickland v. Washington*, 466 U.S. 668 (1984); *Butler*, 286 S.C. 441, 334 S.E.2d 813.

The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional

judgment. *Butler*, 286 S.C. 441, 334 S.E.2d 813. The applicant must overcome this presumption to receive relief. *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." *Cherry*, 300 S.C. at 117, 385 S.E.2d at 625 (citing *Strickland*). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625.

"[A]ll persons charged with probation violations have a right to counsel and must be informed of this right pursuant to court rules and case law." *Turner v. State*, 384 S.C. 451, 454, 682 S.E.2d 792, 793 (2009) (citing *Barlet v. State*, 288 S.C. 481, 483, 343 S.E.2d 620, 621 (1986); Rule 602(a), SCACR). Although a probationer does not have a Sixth Amendment right to counsel, the same traditional *Strickland* standard applies, requiring an applicant asserting his probation revocation counsel was ineffective to establish both that counsel's performance was deficient and that he was prejudiced by this deficiency. *Id.* at 455, 682 S.E.2d at 794 ("We now hold that because a probationer has a right to counsel, albeit not a Sixth Amendment right, the same analysis for ineffectiveness that applies in other PCR proceedings involving claims against counsel should, by analogy, apply in PCR proceedings involving claims against probation counsel.").

After careful review based on the standard discussed above, this Court finds Applicant has failed to carry her burden in this action. Below are this Court's findings in regards to each of Applicant's allegations of ineffective assistance of counsel.

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Counsel's alleged failure to secure Applicant's acceptance into the shock incarceration program

Applicant alleges Counsel was ineffective for failing to secure Applicant's acceptance into the shock incarceration program. Specifically, Applicant contends Counsel never informed him he would be ineligible for the shock program. As an initial matter, this Court finds Counsel's testimony with respect to this issue very credible, whereas Applicant's testimony is not credible.

This Court finds Applicant has failed to establish Counsel was deficient. Counsel testified she explained the shock program to Applicant. She further testified she never made any guarantees to Applicant he would be accepted into the program. Indeed, Counsel informed Applicant acceptance into the program was up to the Department of Corrections. Additionally, Counsel made Applicant fully aware he could serve between three and six years imprisonment. Moreover, Applicant knowingly and voluntarily entered a guilty plea to second-degree burglary, knowing he could serve a sentence of up to three years. Based on the foregoing, this Court finds Applicant has wholly failed to establish any deficiency on the part of Counsel.

Similarly, this Court finds Applicant has failed to establish any resulting prejudice from this alleged deficiency. "A court may order that an 'eligible inmate' be sentenced to the 'Shock Incarceration Program.' If an 'eligible inmate' is sentenced to the 'Shock Incarceration Program' he must be transferred to the custody of the department for evaluation." S.C. Code Ann. § 24-13-1330(A). Inmates who are eligible must: (1) be under the age of thirty at the time of admission; (2) be eligible for parole in two years or less; (3) have not been convicted of a violent crime or "no parole offense;" (4) have not been previously incarcerated in a state correctional facility or have participated previously in the shock incarceration program; and (5)

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be physically able to participate in the program. S.C. Code Ann. § 24-13-1310(1). The Department of Corrections further regulates selection criteria into the shock incarceration program. S. C. Code Ann. § 24-13-1320(A). Applicant pled guilty to second-degree burglary in 2015, which is defined as a violent crime. *See* S.C. Code Ann. § 16-1-60. Therefore, by definition, Applicant was ineligible for the shock incarceration program. Furthermore, Applicant wholly failed to testify had he known he could serve up to six years imprisonment, he would not have pled guilty. Based on the foregoing, this Court finds Applicant has failed to establish any resulting prejudice from this alleged deficiency. Accordingly, this allegation must be denied and dismissed with prejudice.

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CONCLUSION

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

This Court notes Applicant must file and serve a notice of appeal within thirty 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 post-conviction relief. Rule 71.1(g), SCRCP, provides if an applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on the applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That this application for post-conviction relief must be denied and dismissed with prejudice; and

2. Applicant must be remanded to and remain in the custody of the State.

AND IT IS SO ORDERED this 24 day of September, 2018.

R. SCOTT SPROUSE
Presiding Judge
Tenth Judicial Circuit

Walhalla, South Carolina

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Vallar Whisenhunt
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