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SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

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FEB 28 2019

S.C. SUPREME COURT

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Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

February 28, 2019

ORIGINAL

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

Re: Jonta Green v. State of South Carolina, Case No. 2013-CP-10-6337

Dear Mr. Shearouse:

Please find enclosed one (1) original and one (1) copy of Petitioner's Notice of Appeal and Certificate of Service in the above referenced case. I am enclosing a copy of the Amended Order of Dismissal.

Please do not hesitate to contact me if you have any questions or concerns.

Sincerely,

Kathrine H. Hudgins
Appellate Defender

cc: Benjamin H. Limbaugh
Assistant Attorney General
P.O. Box 11549
Columbia, South Carolina 29211
Attorney for Respondent
803-734-3970

The Honorable Julie J. Armstrong
Clerk of Court, Charleston County
100 Broad Street, Suite 106
Charleston, South Carolina 29401

Jonta Green, #340485

Enclosures

STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Eugene C. Griffith, Circuit Court Judge

Case No. 2013-CP-10-6337

Jonta Green, SCDC #340485

Petitioner

v.

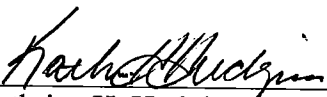
State of South Carolina,

Respondent

NOTICE OF APPEAL

Jonta Green appeals the amended order of dismissal by the Honorable Eugene C. Griffith, Jr. denying post-conviction relief after review pursuant to Austin v. State (attached). Counsel for Petitioner received written notice of the order on February 18, 2019.

February 28, 2019


Kathrine H. Hudgins
Appellate Defender
Attorney for Petitioner

Other Counsel of Record:

Benjamin H. Limbaugh
Assistant Attorney General
P.O. Box 11549
Columbia, South Carolina 29211
Attorney for Respondent
803-734-3970

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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Eugene C. Griffith, Circuit Court Judge

Jonta Green, SCDC #340485,

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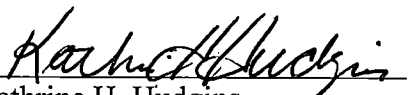
State of South Carolina,

Respondent

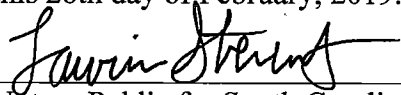
RECEIVED
FEB 28 2019
S.C. SUPREME COURT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Petitioner's Notice of Appeal in the above referenced case has been served upon Benjamin H. Limbaugh, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; The Honorable Julie J. Armstrong, at the Clerk of Court, Charleston County, 100 Broad Street, Suite 106, Charleston, SC 29401; and Jonta Green, #340485, at Allendale Correctional Institution, PO Box 1151, Hwy. 47, Fairfax, SC 29827, this 28th day of February, 2019.


Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 28th day of February, 2019.

 (L.S)
Notary Public for South Carolina
My Commission Expires: July 5, 2027.



State of South Carolina
The Circuit Court of the Eighth Judicial Circuit

Eugene C. Griffith, Jr.
Judge

Post Office Drawer 10
1226 College Street
Newberry, SC 29108
Phone: (803) 321-1430
egriffithj@sccourts.org

February 18, 2019

The Honorable Julie J. Armstrong
Clerk of Court, Charleston County
10 Broad Street, Suite 106
Charleston, SC 29401-2210

Re: Jonta Green v. State of SC.
C/A 2013-CP10-6337

Dear Mrs. Armstrong:

Please find enclosed the amended order for the above styled case for filing in your office. It is my understanding that the attorneys of record will be able to retrieve a stamped clocked copy of the order from the public index. By electronic copy of this letter and enclosures, I am transmitting an unlocked-scanned copy of the order to the attorneys of record.

Thanking you for your kind assistance, I remain,

Sincerely yours,

A handwritten signature in black ink, appearing to read "Eugene C. Griffith, Jr.", written over a horizontal line.

Eugene C. Griffith, Jr.

Cc:

The Honorable Dan Shearhouse
Clerk of Supreme Court for SC

Via email:

Katherine H. Hudgins, Esquire
khudgins@sccid.sc.gov
Benjamin H. Limbaugh, Esquire
blimbaugh@scag.gov

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
FOR THE TENTH JUDICIAL CIRCUIT

2013-CP-10-6337

Jonta Green, #340485,)
)
)
Applicant,)
)
v.)
)
State of South Carolina,)
)
Respondent.)
_____)

**AMENDED
ORDER OF DISMISSAL**

Presiding Judge: The Honorable Eugene C. Griffith, Jr.
Applicant's Attorney: James Falk, Esquire
Respondent's Attorney: Ashleigh R. Wilson, Esquire
Trial Counsel: Demal Mattson, Esquire
Date of Hearing: 2/18/2015
Court Reporter: Karen V. Anderson

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed October 28, 2013. The Respondent made its return on December 22, 2014. An evidentiary hearing on the matter was convened on February 18, 2015 at the Charleston County Courthouse. The Applicant was present at the hearing and represented by James Falk, Esquire. Ashleigh R. Wilson, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

Also testifying was Demal Mattson, Esquire. The Court had before it the trial transcript, the Charleston County Clerk of Court records, and the Applicant's records from the South Carolina

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Department of Corrections, the Applicant's application, the Respondent's return, the appellate records, and the exhibits submitted by the Applicant during the evidentiary hearing¹.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Charleston County Clerk of Court. The Applicant was indicted at the January 2009 term of the Charleston County Grand Jury for murder (2009-GS-10-0113). The Applicant was represented by Demal Mattson, Esquire.

On April 22, 2011, the Applicant proceeded to trial and was found guilty of the lesser included offense of voluntary manslaughter. The Applicant was sentenced by the Honorable Deadra L. Jefferson to confinement for the period of twenty-three years. The Applicant's sentence was amended on May 11, 2011 to twenty years.

The Applicant filed a timely Notice of Appeal. His appeal was perfected by Susan Hackett, Esquire, of the South Carolina Office of Appellate Defense. The Applicant's appeal was dismissed by the Court on January 30, 2013 after review pursuant to Anders v. California. The Remittitur was issued on February 21, 2013.

ALLEGATIONS

In his application for PCR, the Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel
 - a. Failure to object to improper and insufficient foundation where the medical examiner, Dr. Amy Shield, was unavailable to attest to the medical examination report.
 - b. Failure to object to Dr. Schandl's hearsay testimony of Dr. Shield's medical examination report.

¹ Applicant's exhibit 1- a letter to the Applicant from Shonda Gennings; Applicant's exhibit 2- the stipulation of the parties regarding the gun turned in to police.

- c. Failure to object where the question of the cause of death would call for speculation.
- d. Failure to advise that stipulation waived his right to prove every element of the alleged crimes.
- e. Failure to advise that the stipulation would create a burden shifting affect and cause the Petitioner to prove self-defense.
- f. Failure to advise the Petitioner of serious medical issues from brain surgery.

At the hearing, Applicant proceeded solely on the allegations of ineffective assistance of counsel for the following reasons:

1. Ineffective assistance of counsel
 - a. Failure to investigate witnesses.
 - b. Failure to call Shonda Gennings.
 - c. Stipulating about the gun turned in by the Applicant at trial.
 - d. Failure to object to Dr. Schandl's hearsay testimony of Dr. Shield's medical examination report.
 - e. Failure to advise the Petitioner of serious medical issues from brain surgery.

All allegations raised in the application and not addressed in this order are deemed abandoned as the Applicant failed to present any evidence, argument, or testimony regarding such claims.

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 and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly.

Set forth below are the relevant findings of fact and conclusion of law as required by S.C. Code Ann. § 17-27-80 (2014).

Summary of the Testimony

The Applicant, Jonta Green, was present and testified he retained Demal Mattson to represent him at trial. He testified he met with counsel four times within seventeen months. He testified counsel mentioned having a tumor removed before he went to trial. The Applicant also

testified he told counsel to investigate witnesses, but trial counsel already had prepared the witnesses to call as character witnesses. The Applicant testified he showed counsel a letter from his child's mother and told him he wanted to call her as a witness at his trial. The Applicant testified trial counsel said he would look into it, but he never put the letter into evidence. He testified further he also wanted counsel to call his fiancé's father as a character witness.

The Applicant testified he reviewed his discovery materials with counsel shortly before trial. He testified trial counsel told him to set aside funds for a private investigator. He testified he did not discuss stipulating to testimony with counsel prior to trial. The Applicant testified counsel stipulated that the gun turned in by the Applicant was used to shoot the victim. He testified trial counsel helped him turn himself in. The Applicant testified counsel told him the solicitor wanted the weapon, so he turned the weapon in.

Also present and testifying was Demal Mattson, Jr., Esquire. Mr. Mattson testified he was retained to represent the Applicant. Counsel testified he has been a trial lawyer since 1967. He testified he was always available to speak to and meet with the Applicant and his family. He testified he also met with the Applicant several times at the jail about his bond.

Counsel testified the first thing he did was get the discovery materials and try to develop a defense theory for the case. He testified the difficulty with the case was that several people at the party personally knew the Applicant and had identified the Applicant as the shooter. Counsel testified "who done it" was not an issue and they could not go forward on factual innocence. Counsel also testified he discussed his trial strategy with the Applicant. Counsel testified he discussed the strengths and weakness of self-defense with the Applicant. Counsel testified that Applicant was missing an arm lost from an earlier yet unrelated injury from an accident. Counsel testified they ultimately decided to go forward on self-defense. He testified the defense was a

distant shot, but at least it would decrease the Applicant's exposure to something other than murder. Counsel testified they presented testimony about self-defense with the hopes that the Applicant would get voluntary or involuntary manslaughter.

Counsel testified during his investigation, he looked for anything to challenge the credibility of the State's witnesses. He testified he made a list of questions for each State witness. Counsel testified they hired a private investigator. He testified the investigator did not get much because the community was hostile. Counsel testified he took all witness statements and reports and made notes and looked for inconsistencies and discrepancies.

Counsel testified he stipulated to certain facts at trial. He testified he believed that stipulating the weapon belonged to the Applicant was because nearly every witness present at the altercation saw the Applicant and the victim fighting and that they had seen the Applicant with a gun in his possession. He further testified he discussed with the Applicant why they should turn over the gun to the police. He also testified that the strategy of presenting self-defense required them to agree and not challenge that the Applicant shot the victim. Counsel testified his strategy was to argue people saw the Applicant and the victim fighting over the gun and the victim was shot. Counsel testified stipulating the weapon being in the possession of the Applicant immediately prior to the altercation was part of his trial strategy. He testified the only question about the gun was who pulled the trigger. Counsel testified he did not believe in challenging the State about a factual issue that many witnesses' statements consistently said that Applicant introduced the gun to the altercation. Counsel testified it was obvious and common sense that the gun was involved, and he did not want the jury to think that they was misleading them.

Counsel testified the State called Dr. Schandl at trial. He testified there was no question that the victim died from a head wound and that the gun was close to his head. He testified the

angle of the shot was not relevant because the Applicant and the victim were seen wrestling over the gun. He testified he recalled the victim's wound being classified as an exit wound.

Counsel testified there was no use excluding the autopsy report when witnesses testified the victim was shot in the head by the Applicant. He testified he did not consider having the report excluded because so many witnesses had already said what took place. Counsel testified no matter how close the gun was to the victim's head during the struggle, he did not want to try to convince the jury that something was false when it was obviously true.

Counsel testified he is aware that the Applicant has a Sixth Amendment right to confront his accusers. He testified he was aware that the autopsy report contained hearsay, but he did not think that the report had any real significance with all the eye witnesses to the shooting. He testified without the autopsy report the outcome would have been the same and he would have stuck with the same strategy. Counsel testified it was his trial strategy not to alienate the jury by having something excluded that did not matter. He testified he also wanted to elicit helpful testimony from the pathology expert. Counsel testified the stippling noted in the autopsy report showed that the Applicant could not have been standing over the victim when he was shot as one witnesses testified.

Counsel testified he discussed the stipulation about the gun with the Applicant before he signed it. He testified he always discusses stipulations with clients because it is the client's case not his. Counsel testified he was aware of George Thomas as a potential character witness. He testified he spoke to all the witnesses before they testified. He testified he went to the Applicant's church to meet the pastor and an elderly lady who the Applicant drove to church to verify issues. Counsel testified he was surprised that Thomas had a prior criminal record, but he did not need to object to something that was explained by the witness. He testified that a witness with criminal

conviction fourteen years prior does not mean the witness will lie and cannot be an effective witness. He testified with all of the Applicant's other character witnesses, Thompson's testimony and prior conviction were not damaging to the defense's case.

Counsel testified he had seen the letter from Gennings to the Applicant prior to trial. He testified he tried contacting Gennings prior to trial, but was unable to make contact with her. Counsel testified Gennings was the reason for the hostility between the victim and Applicant which led to the murder. Counsel testified Gennings had a child with the victim before the victim was incarcerated on drug charges. Counsel further testified that Applicant had been out at a local club and saw Gennings, bought her a cocktail, and danced with her at the local club. Counsel testified Gennings called the victim and told him about her interaction with the Applicant and the victim got upset. Counsel testified he tried to talk to Gennings at trial, but all she said was that the victim was reformed after his incarceration. Counsel testified he found Gennings to be very hostile and thus he did not want to call her as a defense witness.

Lastly, Counsel testified that he had surgery to remove a benign tumor that was attached to his skull fifteen years ago. He testified he did not practice law for four and a half months after the surgery to allow his brain to recover. Counsel testified the tumor did not affect his ability to effectively represent the Applicant.

Ineffective Assistance of Counsel

The Applicant alleges he received ineffective assistance of counsel. In a PCR action, "the burden of proof is on the applicant to prove his allegation by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002).

For the Applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under

prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. See Strickland v. Washington, 466 U.S. 668 (1984), Porter v. State, 368 S.C. 378, 383,629 S.E.2d 353, 356 (2006).

Stipulation to the gun as evidence

Applicant alleges Counsel was ineffective for stipulating to the gun as evidence as part of the State's case. This Court finds this issue meritless. While Applicant alleges Counsel did not consult with him before stipulating to the gun as evidence, Counsel testified to the contrary. Counsel also testified that many eye-witnesses stated they saw Applicant in possession of the gun just before the altercation and shoot the victim. Counsel further testified it was fruitless to argue about the gun to the jury as he did not want to alienate the jury over a non-issue.

Where trial counsel articulates a valid reason for employing certain trial strategy, such conduct should not be deemed ineffective assistance of counsel. Caprood v. State, 338 S.C. 103, 525 S.E.2d 514 (2000). "Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel." Whitehead v. State, 308 S.C. 119, 417 S.E.2d, 529 (1992).

This Court finds Counsel articulated valid reasons for stipulating to the gun as evidence based on the facts of the case and his professional assessment of the case. This Court agrees with Counsel that it would have discredited his defense of self-defense to argue over who possessed the gun during the incident when many witnesses stated it was the Applicant's. This could have alienated the jury and detracted from his valid defense strategy. This Court also notes that Counsel's strategy of self-defense or voluntary manslaughter was highly effective as Applicant was convicted of the lesser included offense of voluntary manslaughter instead of murder.

Therefore, this Court finds Applicant failed to meet his burden of proof as to this argument, thus, this allegation is denied.

Failure to Call Witnesses

Applicant also alleges Counsel was ineffective for failure to call certain witnesses on his behalf at trial. Applicant specifically wanted Ms. Gennings and Mr. Thomas to testify on his behalf.

Prejudice from trial counsel's failure to interview or call witnesses cannot be shown where the witnesses do not testify at post-conviction relief. Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Bassette v. Thompson, 915 F.2d 932 (4th Cir. 1990), cert. denied, 499 U.S. 982 (1991). An Applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial. Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998).

This Court finds Applicant can prove no prejudice for Counsel's failure to call these witnesses on his behalf at trial as these witnesses did not testify at the PCR hearing. Further, Counsel testified he investigated these witnesses and found Ms. Gennings to be hostile. This Court finds Applicant has failed to meet his burden of proof as to this allegation. Thus, this allegation is denied.

Failure to Investigate Witnesses

Applicant alleged in his application that Counsel was ineffective in not investigating witnesses. Regarding his strategy of calling several character witnesses as to the Applicant's peaceful demeanor, Applicant testified that he did not know that the father of his fiancé had a fourteen year old conviction for burglary. Applicant testified that he believed this impacted the character testimony which was sought to be elicited from this witness. Counsel testified at the

hearing that he did not ask the witness about any prior convictions but may have handled the witness differently if he had known of this conviction. Counsel further stated that he did not think that it made a big impact considering all of the character witnesses that were presented. Therefore, this Court finds Applicant to meet his burden of proof as to this argument. Thus, this allegation is denied.

Failure to Object to Hearsay Testimony of Dr. Shield's Medical Examination Report

Applicant alleges in his application that Counsel's failure to object to hearsay testimony of the physician who performed the autopsy and prepared a written report. At the jury trial, the State called Dr. Cynthia Anne Schandl, who was employed by the Medical University of South Carolina as a forensics pathologist. Dr. Schandl testified that Dr. Shield had participated in a fellowship for one year at the Medical University in the autopsy department under the supervision of Dr. Schandl and three other pathologists. Dr. Schandl testified from review of the report from autopsy of Dr. Shield. Thus, the testimony provided by Dr. Schandl was hearsay.

Counsel testified that he did not object to this hearsay testimony for two reasons: first, challenging the report and testimony as hearsay would appear that the defense was hiding "unfavorable-to-their-theory" findings in the report and second, the findings in the report were consistent with and helpful to the defense theory. Counsel testified that the findings in the autopsy were very consistent with a contact gunshot to the head. Every fact witness described a close physical altercation between the victim and Applicant. All of the witnesses testified that the gun was in possession of the Applicant at the onset of the altercation. The defense's theory of self-defense was consistent with the victim being shot at close range in the head. The findings in the report indicated that the gun shot was made while the mussel was touching the head of the

victim. Counsel for the Applicant needed this opinion to further the defense theory and to offset the testimony of one the eyewitness who stated that Applicant struck the victim with his fist and gun. Therefore, this Court finds Applicant failed to meet his burden of proof as to this argument, and thus, this allegation is denied.

Failure to Advise Applicant of Prior Serious Medical Issues

Applicant alleges in his application that Counsel did not advise him of a prior serious medical issue which arose from having a tumor removed. Counsel testified that he had surgery to remove a benign tumor that was attached to his skull fifteen years before the representation of applicant began. He testified he did not practice law for four and a half months after the surgery to allow his brain to recover. Counsel testified the tumor did not affect his ability to effectively represent the Applicant. Applicant presented absolutely no testimony at the PCR hearing that Counsel was not able to effectively, reasonably, and functionally ambulate, communicate, see, hear, react, organize, or participate as his attorney during the trial. Therefore, this Court finds Applicant to meet his burden of proof as to this argument. This allegation is denied.

In order to prove prejudice, an applicant must show “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989). “A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial.” Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668).

It is all too tempting for a defendant to second-guess counsel's assistance after conviction or 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. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent

in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.

Strickland at 689, 104 S. Ct. at 2065

This Court finds the Applicant's testimony is not credible, while also finding trial counsel's testimony is credible. Regarding the Applicant's claims of ineffective assistance of counsel, this Court finds the Applicant has failed to meet his burden of proof. This Court finds that Applicant's attorney demonstrated the normal degree of skill, knowledge, professional judgment, and representation that are expected of an attorney who practices criminal law in South Carolina. State v. Pendergrass, 270 S.C. 1, 239 S.E.2d 750 (1977); Strickland, 466 U.S. at 668; Butler, 286 S.C. 441, 334 S.E.2d 813. This Court further finds counsel adequately conferred with the Applicant, conducted a proper investigation, and provided thorough representation. This Court finds that counsel's representation did not fall below an objective standard of reasonableness. Accordingly, this Court finds the Applicant failed to prove the first prong of the Strickland test- that trial counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that trial counsel committed either errors or omissions in their representation of the Applicant. This Court also finds the Applicant has failed to prove the second prong of Strickland- that he was prejudiced by trial counsel's performance. This Court concludes the Applicant has not met his burden of proving counsel failed to render reasonably effective assistance. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

CONCLUSION

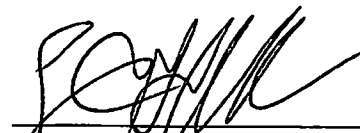
Based on all the forgoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations before or during his trial and sentencing proceedings. Counsel was not deficient and the Applicant was not prejudiced by counsel's representation. Therefore, this PCR application must be denied and dismissed with prejudice.

This Court advises the Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order if he wants to secure appropriate appellate review. His attention is directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely filed.

IT IS THEREFORE ORDERED:

1. That the application for post-conviction relief be denied and dismissed with prejudice; and
2. That the Applicant be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 17th day of February 2019



Eugene C. Griffith, Jr.
Presiding Judge
9th Judicial Circuit

Newberry, South Carolina.