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December 24, 2019

The Supreme Court of South Carolina  
ATTN: Daniel Shearouse, Clerk of Court  
PO Box 11330  
Columbia, SC 29211

RECEIVED  
DEC 27 2019  
S.C. SUPREME COURT

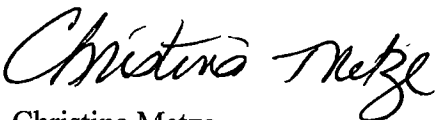
RE : Yusuf Karim Aquil v. State of SC  
2016CP4001661

Dear Mr. Shearouse:

Enclosed please find a Notice of Appeal along with a Certificate of Service and a copy of the Orders being appealed. Also enclosed is a copy which I request you stamp as "filed" and return to me in the enclosed stamped envelope.

Thank you for your assistance in this matter.

Yours very truly,



Christina Metze  
Paralegal

cc: Lindsey Ann McCallister, Office of The Attorney General  
Jeanette McBride, Lexington County Clerk of Court  
Yusuf Karim Aquil

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

Kristi F. Curtis, Circuit Court Judge

Case No.: 2016CP4001661

State of South Carolina,

Respondent,

v.

Yusuf Karim Aquil,

Appellant.

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DEC 27 2019

S.C. SUPREME COURT

NOTICE OF APPEAL

Yusuf Karim Aquil, #226843, appeals the Order of Dismissal denying his Application for Post-Conviction Relief filed May 22, 2019, and the Order Denying Rule 59(E) Motion filed December 6, 2019 issued by the Honorable Kristi F. Curtis, presiding Judge.

December 23, 2019



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Attorney for Appellant

Other Counsel of Record:  
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Counsel for Respondent

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

Kristi F. Curtis, Circuit Court Judge

Case No.: 2016CP4001661

State of South Carolina,

Respondent,

v.

Yusuf Karim Aquil,

Appellant.


RECEIVED  
DEC 27 2019  
S.C. SUPREME COURT

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on Lindsey Ann McCallister by depositing a copy of it in the United States Mail, postage prepaid, on December 23, 2019, addressed to her office at:

PO Box 11549  
Columbia, SC 29211

December 23, 2019

  
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Attorney for Appellant

IN THE STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND

Yusuf Karim Aquil, #226843,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS  
IN THE FIFTH JUDICIAL CIRCUIT

CASE NO. 2016-CP-40-1661

ORDER DENYING APPLICANT'S  
MOTION TO RECONSIDER

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DEC 27 2019

S.C. SUPREME COURT

2019 DEC -5 AM 11:31  
RICHLAND COUNTY  
FILED

On June 3, 2019, Applicant submitted a Motion to Reconsider the Court's Order of Dismissal dated May 22, 2019. Applicant's Motion sought relief on the following allegations which were previously raised in Applicant's memoranda:

1. Applicant alleges that Counsel failed to adequately prepare Applicant for trial;
2. Applicant alleges that Counsel failed to properly investigate and prepare for trial and claims that this failure contributed to Applicant's guilty plea;
3. Applicant alleges that Counsel failed to properly explain lesser-included offenses;
4. Applicant alleges that Counsel failed to include Applicant in plea negotiations with the state and provide Applicant with discovery; and
5. Applicant alleges that Counsel failed to provide Applicant with all of the necessary information which resulted in an involuntary plea.

Upon reviewing the arguments raised within Applicant's Motion, the Court's Order of Dismissal, and the submissions of both parties in this matter, this Court does not find that there is proper cause to reconsider the Court's original order.

**IT IS THEREFORE ORDERED THAT:**

Applicant's Motion to Reconsider the Court's Order of Dismissal is denied.

AND IT IS SO ORDERED this 26<sup>th</sup> day of November, 2019.

*Kristi Curtis*

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KRISTI F. CURTIS  
Presiding Judge  
Fifth Judicial Circuit

STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND

Yusuf Karim Aquil, #226843,

Applicant,

v.

State of South Carolina,

Respondent.

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

) C.A. No. 2016-CP-40-1661

) **ORDER OF DISMISSAL**

REC'D AND FILED  
2019 MAY 22 PM 3:44  
JAMETIA W. McBRIDE  
CLERK, S.C.

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed by Yusuf Karim Aquil (Applicant), through counsel, on March 15, 2016. Respondent made its Return on July 11, 2017. An evidentiary hearing into the matter was convened on February 20, 2019, at the Richland County Courthouse before the undersigned. Aimee J. Zmroczek, Esquire, represented Applicant. Assistant Attorney General Lindsey A. McCallister represented Respondent.

At the hearing, Applicant testified on his own behalf. Neal Michael Lourie, Esquire, Applicant's plea counsel, was also called to testify. This Court also had before it a copy of the records of the Richland County Clerk of Court, records from the South Carolina Department of Corrections, the application, Respondent's Return, and the plea transcript. After a review of the record and all evidence presented, this Court finds Applicant has failed to meet his requisite burden of proof and denies this application.

## PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Richland County.<sup>1</sup> Applicant was indicted at the January 2013 term of the Grand Jury for Richland County for one count each of murder (2013-GS-40-0591), kidnapping (2013-GS-40-0587), armed robbery (2013-GS-40-0588), conspiracy, and possession of a firearm by a convicted violent felon (2015-GS-40-1643), and unlawful carrying a pistol (2015-GS-40-1641). Applicant was represented by Neal Michael Lourie (Counsel), Esquire. Assistant Solicitor Richard C.R. Cathcart prosecuted the case. On March 16, 2015, Applicant pleaded guilty as indicted to murder, kidnapping, and armed robbery before the Honorable DeAndrea G. Benjamin. The remaining charges were dismissed pursuant to the plea agreement. Judge Benjamin sentenced Applicant to a negotiated sentence of thirty years' imprisonment for each charge, to be served concurrently. He did not appeal his convictions or sentences.

## ALLEGATIONS

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

1. Ineffective Assistance of Counsel
  - a. "Failure to properly prepare Applicant for trial."
  - b. "Failure to properly investigate and prepare for trial leading to plea."
  - c. "Failure to properly advise Applicant on lesser-included offenses."

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<sup>1</sup> The header on Applicant's post-conviction relief application denotes "Barnwell County," but this appears to be a scrivener's error as the application has been properly filed in Richland County.

- d. "Failure to include Applicant in negotiations and provide discovery."
- e. "Failure to advise Applicant of all information leading to an involuntary plea."

At the evidentiary hearing, counsel explained Applicant's last allegation is a claim Applicant's guilty plea was involuntarily entered because Counsel failed to properly advise Applicant regarding his outstanding pre-trial motions. Applicant proceeded with all five allegations as set forth in his application.

#### SUMMARY OF TESTIMONY

Applicant testified he was arrested in 2012, and he had a previous criminal record of five strong-armed robberies. Applicant testified he remained in jail for approximately three years before entering his guilty plea. Applicant further testified Counsel was appointed to his case, and they met four to five times during the course of Counsel's representation. Applicant averred Counsel asked for Applicant's version of the facts, and Applicant gave Counsel a list of issues Applicant wanted to investigate. Applicant testified he wanted Counsel to investigate the house where Applicant's co-defendant stayed because Applicant believed the neighbors were potential witnesses. Applicant also wanted Counsel to challenge the search warrant for Applicant's house, through which law enforcement recovered Applicant's cell phone. Applicant testified his defense was mere presence, and he was simply in the wrong place at the wrong time but did not commit the murder.

Applicant further testified he and Counsel prepared for trial for three years, but a few days before the trial was scheduled to start, Applicant was brought to the courthouse to speak with Counsel. According to Applicant, Counsel told him his male codefendant was implicating him

and he should plead guilty, but Applicant thought that had been the situation throughout the life of the case. Applicant testified he did not have evidence to review like a gun or DNA, but Counsel or co-counsel told Applicant "there wasn't much on [him]." Applicant testified he asked Counsel why he should plead guilty if the State did not have sufficient evidence for a conviction, but he had a relationship with Counsel and trusted Counsel's assessment when Counsel told Applicant he was not likely to succeed at trial. Applicant further stated he answered affirmatively to the plea judge's questions during the plea hearing because Counsel instructed him to say yes.

Applicant testified he did not believe Counsel was prepared for trial. Applicant stated he gave Counsel the name of at least one witness, the person who dropped Applicant off at the codefendant's home, but Applicant did not know if that person had been subpoenaed for trial. Applicant also testified he asked Counsel if Counsel had interviewed the neighbors, but Counsel told him he had not had time to do that. Applicant further explained he never denied being present during the murder, but he always told Counsel he did not participate in the crime. Applicant also testified he wanted Counsel to challenge the admission of the cell phone data showing he was in the vicinity of the crime because he felt the cell phone was obtained through an illegal search, but Applicant could not recall what Counsel told him when he asked Counsel about it a few weeks before trial.

Applicant also testified he was served with the State's notice of intent to seek life without parole (LWOP), and he agreed to plead guilty because the State withdrew the LWOP notice as part of the plea. Applicant testified he and Counsel discussed lesser-included offenses when they discussed the plea agreement, and Applicant asked about a reduction in his charge to accessory

after the fact. However, Applicant agreed the State never offered to let him plead to that charge. Applicant testified the State agreed to withdraw its LWOP notice because Applicant admitted his involvement in the crime and his presence at the crime scene. Applicant did not recall being asked whether he agreed with the State's version of the facts as presented at the plea hearing, but agreed he told the plea judge he was satisfied with his attorneys and wished to plead guilty. Applicant testified he signed a plea agreement affidavit but stated he did not read it.

Counsel testified he was appointed on this case, but he requested the appointment because he knew Applicant and Applicant's family, and they requested his help. Counsel testified he was appointed in January 2013 and represented Applicant until he entered the guilty plea in March 2015. Counsel testified he visited Applicant multiple times – approximately once a month for two years – and prepared a discovery notebook for Applicant. Counsel also testified he had two investigators working on the case.

Counsel explained he talked to Applicant about his version of the facts. According to Counsel, he initially felt there were some worrisome issues raised by the State's evidence but Applicant had a reasonable chance of success at trial. Specifically, Counsel testified, the victim's last phone call was to the female codefendant's phone, and the female codefendant implicated Applicant and the male codefendant from the beginning of the investigation. Counsel further testified, in the beginning, he and Applicant discussed that the State's main evidence against Applicant was the female codefendant, as the cell phone records put him within the vicinity of the crime scenes but were not definitive. Counsel testified he and Applicant discussed the fact that the male codefendant could "flip" on Applicant and decide to start cooperating with the State.

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According to Counsel, Applicant and the codefendant both agreed not to cooperate initially, but Counsel began to suspect the codefendant had changed his mind when his attorney stopped returning Counsel's calls a few days before the trial was scheduled to begin.

Counsel testified the female codefendant's statement was the only evidence the State had against Applicant for a long time because the State was having trouble getting evidence and test results back from SLED. Counsel filed a motion to dismiss and a motion for a speedy trial based on this delay, but Judge Hood held a hearing on the motion and was satisfied with SLED's explanation for the delay. Counsel testified he never expected a judge to grant the motion to dismiss, but he was trying to move the case along. Counsel further testified he did not believe a hearing was ever held or a ruling received on a third pre-trial bond motion.

Counsel testified he and Applicant discussed whether, at trial, the defense should present its own case or simply attack the State's evidence; Counsel stated, however, Applicant did not have an alibi and later admitted he had been present at the crime scene but claimed he did not participate in the murder. Counsel testified the posture of the case changed drastically on March 15, 2015, when the State informed him the male codefendant had given a statement confessing his involvement and implicating Applicant. Counsel also testified the State had found witnesses who would have testified they saw the female codefendant cleaning up blood outside the house and heard the male codefendant referring to an African-American man with an Arabic name. Counsel also testified shoes recovered from Applicant's house were eventually matched to shoe prints found at the scene.

Counsel testified he met with Applicant to explain all these issues, and they discussed the "hand of one, hand of all" theory of accomplice liability. Counsel further testified he advised Applicant they would have to succeed on all the major charges at trial because, due to Applicant's previous criminal history, the State only needed one conviction to trigger LWOP. Counsel stated he reviewed the LWOP notice and investigated Applicant's criminal history, including the propriety of using a juvenile conviction as a strike, and Counsel concluded the notice was valid. According to Counsel, he advised Applicant of all of these issues, and Applicant chose to confess and plead guilty freely and voluntarily in exchange for the State withdrawing the LWOP notice. Counsel testified he reviewed the plea agreement and affidavit with Applicant, with Counsel reading each item and Applicant initialing next to each.<sup>2</sup> Counsel testified he always instructs his clients to tell the truth during the plea colloquy with the judge. Finally, Counsel stated he was prepared for trial, had Applicant elected that option.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

This Court has reviewed the record and heard the testimony at the PCR hearing. This Court has observed the witnesses presented at the evidentiary hearing, judged their credibility, and weighed their testimony accordingly in its discussion below. Set forth below are findings of facts and conclusions of law as required by section 17-27-80 of the South Carolina Code.

Applicant alleges he received ineffective assistance of counsel. In a post-conviction relief action, the applicant bears the burden of proving the allegations in his application. Butler v. State,

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<sup>2</sup> The plea agreement affidavit was entered as an exhibit during the evidentiary hearing, and this Court has reviewed it and taken it into consideration in making its decision in this matter.

286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, 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. at 443, 334 S.E.2d at 814. The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 689. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove counsel's performance was deficient. Id. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Id. (quoting Strickland, 466 U.S. at 688 (1984)). 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." Id. at 117-18, 386 S.E.2d at 625. When there has been a guilty plea, the applicant must prove counsel's representation was below the standard of reasonableness and that, but for counsel's unprofessional errors, there is a reasonable probability he would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 58-59 (1985); Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001).

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. 668.

This Court finds Applicant has failed to prove Counsel's performance was deficient in any way, nor was Applicant prejudiced by Counsel's performance. Counsel met with Applicant and reviewed with him the elements of the crimes charged, possible penalties, the evidence and discovery in the case, and Applicant's version of the facts and potential defenses. This Court finds Applicant ultimately chose to cooperate with the State in order to avoid a likely sentence of life without parole, and this decision was made freely and voluntarily. Therefore, for the reasons stated below, the Court denies relief and dismisses the allegations with prejudice.

1. Failure to adequately prepare Applicant for trial, failure to investigate and prepare for trial

Applicant alleges Counsel was ineffective for failing to review discovery with him and prepare him for trial, and that Counsel did not properly investigate the case and prepare for trial. This Court disagrees and finds Counsel provided effective assistance in this case.

"[C]riminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case." Walker v. State, 397 S.C. 226, 235, 723 S.E.2d 610, 615 (Ct. App. 2012) (reversed on other grounds by Walker v. State, 407 S.C. 400, 756 S.E.2d 144

(2014)). Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to result. Porter v. State, 368 S.C. 378, 385-86, 629 S.E.2d 353, 357 (2006), abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018) (citing Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998)). In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." Wiggins v. Smith, 539 U.S. 510, 521-22 (2003).

In addition, the South Carolina Supreme Court has repeatedly held a PCR 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. See, e.g., Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998). To establish counsel failed to adequately prepare for trial, Petitioner must present evidence of what counsel could have discovered or what other defenses could have been pursued had counsel more fully prepared. See Palacio v. State, 333 S.C. 506, 513, 511 S.E.2d 62, 66 (1999) (finding trial counsel not ineffective for failing to timely request discovery because the contents of the documents were not presented at the PCR hearing); Moorehead, 329 S.C. at 334, 496 S.E.2d at 417 (holding trial counsel's failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result); Davis v. State, 326 S.C. 283, 288, 486 S.E.2d 747, 749 (1997) (denying relief where applicant failed to present witnesses or specific testimony establishing applicant would have had a defense with additional time to prepare for trial); Skeen v. State, 325 S.C. 210, 217, 481 S.E.2d 129, 133 (1997) (finding applicant was not

entitled to relief where no evidence was presented at the PCR hearing to show how additional preparation would have had any possible effect on the result at trial).

This Court finds credible Counsel's testimony he met with Applicant nearly every month for over two years, provided discovery, and discussed the posture of the case with Applicant as new developments arose. Counsel's file contains extensive and detailed notes supporting his testimony, which Counsel read into the record during the evidentiary hearing. Counsel also testified he had multiple investigators on this case and pushed for SLED to process and test evidence. This Court finds credible Counsel's assertion the case changed dramatically once the male codefendant began cooperating with the State shortly before trial was set to begin, and this changed the degree of risk Applicant faced in proceeding to trial. The Court also finds credible Counsel's testimony he was prepared for trial had Applicant decided not to cooperate with the State and confess.

Applicant admitted he knew there were potential witnesses and defenses he could raise at trial and at least one outstanding pre-trial motion when he decided to plead guilty. Additionally, although Applicant alleges Counsel did not adequately prepare for trial, Applicant presented no evidence of any issue Counsel missed in his preparation of the case or any meritorious defense Applicant was unable to raise due to Counsel's allegedly deficient preparation.

Therefore, applying the above-recited case law to the facts of Applicant's case, for the reasons recited above, this Court finds Counsel not deficient in his investigation of the case and preparation for trial. Additionally, this Court finds Applicant failed to prove he was prejudiced by Counsel's allegedly deficient conduct. Accordingly, these allegations are denied and dismissed with prejudice.

2. Failure to properly explain lesser-included offenses, failure to include Applicant in negotiations, failure to provide Applicant all necessary information prior to guilty plea

Applicant alleges Counsel failed to properly explain lesser-included offense, failed to include Applicant in plea negotiations with the State, and failed to provide Applicant all necessary information prior to Applicant's guilty plea. This Court disagrees. This Court finds credible Counsel's testimony he reviewed the State's evidence, the potential strengths and weaknesses of each side's case, and the possible penalties with Applicant prior to the plea. Further, this Court finds the plea affidavit and plea colloquy are dispositive as to these issues, and the record clearly establishes Applicant pleaded guilty freely and voluntarily.

To find a guilty plea is voluntarily and knowingly entered into, the record must establish Applicant had a full understanding of the consequences of his plea and the charges against him. Boykin v. Alabama, 395 U.S. 238 (1969); Dover v. State, 304 S.C. 433, 405 S.E.2d 391 (1991). In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence presented at the PCR hearing. Harris v. Leeke, 282 S.C. 131, 318 S.E.2d 360 (1984). Because a guilty plea is a solemn, judicial admission of the truth of the charges against an individual, an applicant's right to contest the validity of such a plea is usually, but not invariably, foreclosed. Blackledge v. Allison, 431 U.S. 63 (1977). Statements made during a guilty plea should be considered conclusive, unless an applicant presents valid reasons why he should be allowed to depart from the truth of his statements. Crawford v. U.S., 519 F.2d 347 (4<sup>th</sup> Cir. 1975) overruled on other grounds by U.S. v. Whitley, 759 F.2d 327 (4<sup>th</sup> Cir. 1985).

The plea transcript reflects the plea judge clearly explained the terms of the negotiated agreement to Applicant, including the thirty-year sentence and withdrawal of the State's LWOP

notice, and Applicant indicated his understanding of the agreement. Tr. pp. 3-4, 6. The plea judge also explained to Applicant his right to a jury trial, the State's burden of proof, and Applicant's right to challenge the admission of any statements and other evidence; Applicant informed the plea court he understood these rights and wished to waive them to plead guilty. Tr. pp. 13-14. Importantly, Applicant also affirmed he had enough time to talk with Counsel to prepare his case and he felt Counsel had done everything he asked or felt Counsel should have done. Tr. pp. 14-15. Finally, the plea court specifically inquired whether Applicant understood the court's questions and had given his own answers, and Applicant stated he did and his answers were his own. Tr. p. 16. Accordingly, this Court finds Counsel's representation of Applicant was not deficient, nor was Applicant prejudiced by Counsel's representation. Counsel met with Applicant on multiple occasions to review discovery, discuss the facts of the case, and explain Applicant's constitutional rights and options for resolving the case. Further, the plea transcript reflects Applicant entered into the guilty plea freely and voluntarily. Therefore, this Court denies relief and dismisses these allegations with prejudice.

### 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 relief. Counsel was not deficient in any manner, nor was Applicant prejudiced by Counsel's representation. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.


Applicant must file and serve a notice of appeal within thirty days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR (providing the appropriate procedure to perfect an appeal). Pursuant to Austin v.

State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Further, Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to Rule 243, SCACR, for the appropriate procedures for appealing a judgment in a PCR action.

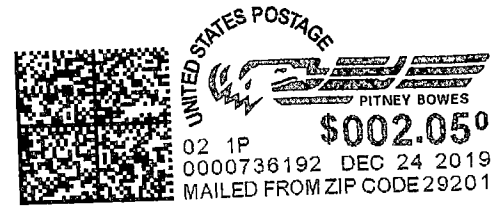
**IT IS THEREFORE ORDERED:**

1. the Application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. Applicant shall be remanded to the custody of the Respondent.

**AND IT IS SO ORDERED.**

  
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KRISTI F. CURTIS  
Presiding Circuit Court Judge  
Fifth Judicial Circuit

May 17, 2019



# First Class Mail

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The Supreme Court of South Carolina  
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