

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

APPEAL FROM RICHLAND COUNTY
COURT OF COMMON PLEAS

FEB 28 2020

The Honorable Brian M. Gibbons, Circuit Court Judge S.C. SUPREME COURT

Case No. 2017-CP-40-01784

Gerald Bernard
Haltiwanger, #314454,

Petitioner,

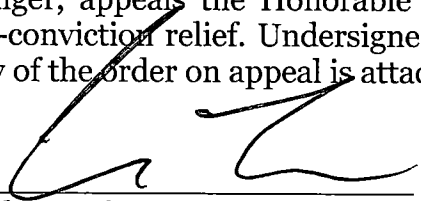
v.

State of South Carolina,

Respondent.

NOTICE OF APPEAL

The Petitioner, Gerald Bernard Haltiwanger, appeals the Honorable Brian M. Gibbons' January 29, 2020, order denying post-conviction relief. Undersigned counsel received notice of entry January 31, 2020. A copy of the order on appeal is attached.



Christopher S. Leonard
KENDRICK & LEONARD, PC
P.O. Box 886
Columbia, SC 29202
(803) 667-3186
Attorney for the Petitioner

Other Counsel of Record:
Samuel L. Key
Office of SC Attorney General
PO Box 11549
Columbia, SC 29211-1549

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM RICHLAND COUNTY
COURT OF COMMON PLEAS

The Honorable Brian M. Gibbons, Circuit Court Judge

Case No. 2017-CP-40-01784

RECEIVED

FEB 28 2020

S.C. SUPREME COURT

Gerald Bernard
Haltiwanger, #314454,

Petitioner,

v.

State of South Carolina,

Respondent.

CERTIFICATE OF SERVICE

I, Christopher S. Leonard, certify that I have today served the within notice of appeal upon the Respondent by depositing a copy of it in the US Mail, postage prepaid, addressed to its attorney of record, Samuel Key, Esq., Office of SC Attorney General, PO Box 11549, Columbia, SC 29211-1549 and the Richland County Clerk of Court. I further certify that all parties required by Rule to be served have been served this 26 of February 2020.



Christopher S. Leonard
KENDRICK & LEONARD, PC
P.O. Box 886
Columbia, SC 29202
(803) 667-3186
Attorney for the Petitioner

Other Counsel of Record:
Samuel L. Key
Office of SC Attorney General
PO Box 11549
Columbia, SC 29211-1549

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2017CP4001784

Gerald Bernard Haltiwanger

State Of South Carolina

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: _____

Attorney for : Plaintiff Defendant or Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit);
 Rule 43(k), SCRPC (Settled); Other _____
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; Bankruptcy;
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by _____ Court:

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order: _____

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge _____

Judge Code _____

Date _____

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this 29 January 2020 to attorneys of record or to parties (when appearing pro se) as follows:

Christopher Shannon Leonard

Lindsey Ann McCallister

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court _____

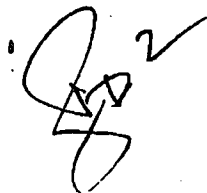


At the close of argument on the issues presented to the Court, Applicant provided the Court *State v. McDonald*, 343 S.C. 319, 540 S.E.2d 464 (2000), and *State v. Terry*, 339 S.C. 352, 529 S.E.2d 274 (2000), in support of his position on the Rule 804(b)(3) issue. The State requested leave to research and respond to the Rule 804(b)(3) issue because the issue was not specified until the evidentiary hearing. This Court granted the State and Applicant ten days to provide the Court with any additional information supporting each parties' respective position. After reviewing Applicant's proposed order granting relief, the State's memorandum in support of denying relief, the entire record, and the testimony presented, this Court finds Applicant has failed to establish any constitutional deprivations that would entitle Applicant to relief.

I. Procedural History

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Richland County Clerk of Court. In his original PCR application, Applicant presented two different sets of charges and sentences for consideration.

First, in December 2009, Applicant waived presentment to the grand jury for the charge of assault and battery of a high and aggravated nature (2009-GS-40-8567). Applicant further waived presentment to the grand jury on criminal domestic violence of a high and aggravated nature (2009-GS-40-2678) and criminal domestic violence, first offense (2009-GS-40-11882). Laura Kris Hines, Esquire, represented Applicant. Assistant Solicitor Sasquisha Octavia Tobin prosecuted the case. On January 7, 2010, Applicant pleaded guilty as indicted to assault and battery of a high and aggravated nature and criminal domestic violence, first offense and to the lesser included charge of criminal domestic violence, first offense before the Honorable J. Michelle Childs. Judge Childs sentenced Applicant to imprisonment for time served for both criminal domestic violence counts and six years for assault and battery of a high and aggravated nature provided that upon the service



of one year, the balance is suspended with probation for two years. Applicant did not appeal his conviction or sentence.

Additionally, in October 2012, the Richland County Grand Jury indicted Applicant for murder (2012-GS-40-05298). Mark Sawyer, Alicia Dyer Goode, and Patrick Sharpe, Esquires, represented Applicant. Luck Campbell, Megan Walker, and Sandra Vriesinga prosecuted the case. On November 12-18, 2013, Applicant proceeded to trial before the Honorable Diane Schafer Goodstein. The jury found Applicant guilty as indicted. Judge Goodstein sentenced Applicant to life imprisonment. Applicant appealed.

Chief Appellate Defender Robert Michael Dudek and Heather Vry Scalzo, Esquire, perfected the appeal. The Court of Appeals affirmed Applicant's conviction on April 13, 2016. *State v. Haliwanger*, Op. No. 2016-UP-175 (S.C. Ct. App. filed April 13, 2016). The remittitur was returned to the circuit court on May 11, 2016.

Applicant untimely challenged his January 2010 guilty plea but timely challenged his November 2013 jury trial by commencing this PCR action on March 24, 2017.

II. Issues Presented at the Evidentiary Hearing

1. Whether trial counsel was ineffective for failing to introduce Jonathan Sterling's statement made to law enforcement regarding the incident as a statement against interest pursuant to Rule 804(b)(3), SCRE; and
2. Whether trial counsel was ineffective for failing to seek pretrial immunity pursuant to the Protections of Parsons and Property Act, when trial counsel sought a jury instruction on immunity under the Act during the charge conference.

The State moved to dismiss all allegations not supported by evidence and testimony introduced at the evidentiary hearing. Specifically, the State argued Applicant's allegations regarding his 2010 guilty plea are additionally barred by the statute of limitations for PCR actions. Because the allegations regarding Applicant's guilty plea are untimely, and because no evidence



was presented in support of those claims at the evidentiary hearing, the Court grants the State's motion and dismisses those allegations with prejudice.

III. Discussion¹

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

Applicant alleges (1) trial counsel was ineffective for failing to introduce Jonathan Sterling's statement made to law enforcement regarding the incident as a statement against interest pursuant to Rule 804(b)(3), SCRE; and (2) trial counsel was ineffective for failing to seek pretrial immunity pursuant to the Protections of Persons and Property Act, where trial counsel sought a jury instruction on immunity under the Act during the charge conference.

To establish ineffective assistance of counsel, the PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness, and (2) the applicant sustained prejudice as a result of counsel's deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *Cherry v. State*, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989). To establish prejudice, the applicant must prove "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 (quoting *Strickland*, 466 U.S. at 694).

Strickland requires trial counsel must be given leeway to make reasonable strategic decisions. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant.¹ *Strickland*, 466 U.S. at 688-689.



“Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another.” *Id.* at 691. Therefore, judicial scrutiny of counsel’s performance must be highly deferential. *Id.* at 689. Where counsel articulates a valid strategic reason for his action or inaction, counsel’s performance should not be found ineffective. *Roseboro v. State*, 317 S.C. 292, 454 S.E.2d 312 (1996); *Underwood v. State*, 309 S.C. 560, 425 S.E.2d 20 (1992); *Stokes v. State*, 308 S.C. 546, 419 S.E.2d 778 (1992). 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). In making a fair assessment of attorney performance, a court must make every effort 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.” *Strickland*, 466 U.S. at 689.

As discussed below, Applicant’s allegations of ineffective assistance of trial counsel regarding his November 2013 jury trial are without merit. Therefore, these allegations are denied and dismissed with prejudice because Applicant failed to meet his burden under *Strickland*.

1. Statement against interest

Applicant alleges trial counsel was ineffective for failing to introduce Jonathan Sterling’s statement made to law enforcement regarding the incident as a statement against interest pursuant to Rule 804(b)(3), SCRE. The Court disagrees.

Rule 804, SCRE, provides exceptions to the rule against hearsay when the declarant is unavailable as a witness. It is undisputed Sterling was unavailable because he invoked his Fifth Amendment right to silence. *See State v. McDonald*, 343 S.C. 319, 323, 540 S.E.2d 464, 460 (2000) (“A witness who invokes his Fifth Amendment right to silence is unavailable for hearsay



purposes.”). Therefore, the issue here is whether Sterling’s out of court statement falls within an exception under Rule 804.

When the declarant is unavailable as a witness, the declarant’s prior statement may be admissible as a statement against the declarant’s interest. Rule 804(b)(3), SCRE. A statement against interest is:

A statement which was at the time of its making so far contrary to the declarant’s pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant’s position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

Rule 804(b)(3), SCRE. However, “[S]uch statements must meet the strict requirements of Rule 804(b)(3).” *State v. Fuller*, 337 S.C. 236, 245, 523 S.E.2d 168, 172 (1999).

In *State v. Fuller*, our Supreme Court was asked, among other things, to determine “whether a non-self-inculpatory statement, which is collateral to a self-inculpatory statement, may nonetheless come in under Rule 804(b)(3), SCRE, as a statement made by an unavailable declarant against his penal interest.” 337 S.C. at 243–44, 523 S.E.2d at 172. The *Fuller* court held such statements are inadmissible. *Id.* at 244, 523 S.E.2d at 172. Similarly, in *State v. Holmes*, our Supreme Court reaffirmed *Fuller* and stressed the Rule 804(b)(3) is to be applied “very narrowly *to only those portions of a hearsay statement which are plainly self-inculpatory.*” 342 S.C. 113, 117, 536 S.E.2d 671, 673 (2000) (emphasis added).

Here, trial counsel was not constitutionally ineffective for failing to introduce Sterling’s out of court statement because, as a matter of law, Sterling’s entire statement was not admissible as a statement against interest. The portions of the statement Applicant relies on as exculpatory



evidence corroborating his self-defense claim are hearsay and hearsay within hearsay, and those portions do not qualify as an exception to hearsay under Rule 804(b)(3). The Court further finds the potentially admissible portions of Sterling's statement add little, if anything, to corroborate Applicant's version of events and advance his defense.

Applicant asserts trial counsel should have entered Sterling's entire statement through the investigator who testified that Sterling implicated Applicant as the shooter to put the investigator's statement into context. Applicant contends Sterling's entire statement was admissible as a statement against interest under Rule 804(b)(3), and trial counsel should have attempted such strategy rather than moving for a mistrial. However, Applicant's reliance on Rule 804(b)(3) in asserting Sterling's entire statement was admissible as a statement against interest is misplaced. As a matter of law, only the plainly self-inculpatory portions within Sterling's statement were admissible. *See Holmes*, 342 S.C. at 117, 536 S.E.2d at 673 (stating Rule 804(b)(3) is applied "very narrowly to only those portions of a hearsay statement which are plainly self-inculpatory").

Sterling's plainly self-inculpatory statements are summarized as follows:

- a) He hit the security guard one time;
- b) He hit the security guard with his fist; and
- c) He followed Tyrobe, who was driving Applicant's car to Bluff Road to "put the car up because that car was involved in the shooting at El Toro's on [August 25, 2012]."

The remaining portions of Sterling's statement are collateral to his self-inculpatory statements; therefore, the remaining statements are inadmissible hearsay. *See Fuller*, 337 S.C. at 244, 523 S.E.2d at 172 (finding non-self-inculpatory statements which are made collateral to self-inculpatory statements are inadmissible).

First, Sterling's statement he hit Moti, the security guard, in the face because Moti was macing Applicant is not plainly self-inculpatory because the statement offers a defense of others defense for himself. As such, the statement is not plainly self-inculpatory and is inadmissible

8

hearsay. *See State v. Young*, 420 S.C. 608, 619–20, 803 S.E.2d 888, 894 (2017) (stating blame-spreading remarks should not be presented to the jury because attempts to absolve blame and other self-serving statements do not qualify as statements against penal interest).

Further, Sterling's statements regarding Moti's exclamations, "I SHOULD SHO[O]T YOUR MOTHERFUCKIN ASS!" and "I WILL SHOOT YOUR ASS IF YOU COME BACK ON THIS PROPERTY!" are also inadmissible non-self-inculpatory statements. Had Sterling been available to testify, these statements were potentially admissible as excited utterances. However, Sterling was unavailable, making Moti's exclamations hearsay within hearsay. Rule 804(b) does not provide an exception for this situation; therefore, the statements constitute inadmissible hearsay within hearsay. *See* Rule 805, SCRE ("Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules."). Sterling's own statements to law enforcement were not excited utterances but merely statements relaying Moti's excited utterances. Therefore, trial counsel was not deficient for seeking to introduce Sterling's entire statement because the entire statement contained inadmissible hearsay and only Sterling's self-inculpatory statements within the entire statement were potentially admissible.

The potentially admissible portions of Sterling's statement do little, if anything, to aid Applicant's theory of self-defense. Arguably, an attempt to introduce the admissible portions of Sterling's statement would have been deficient as Sterling admitted he helped hide Applicant's car because the car was involved in the shooting. Therefore, trial counsel was not deficient for failing to introduce even the potentially admissible portions of Sterling's statement.

Applicant's assertion he was prejudiced by trial counsel's alleged failure to introduce Sterling's statement because the jury only had Applicant's testimony to consider in deciding



whether Applicant acted in self-defense is without merit. The transcript shows Applicant attempted to corroborate his testimony by explaining what the gas station video portrayed. (Tr. 760–67). Marquita Mobley and Kristina Nuttry both testified “the guy with the dreads” (Sterling) punched Moti. (Tr. 303; 581–82). Nuttry testified Moti pulled his gun out after being punched. (Tr. 582). Mobley and Nuttry also both saw Applicant and Moti arguing. (Tr. 294; 590). Another witness, Lamar Ray, testified as follows: Moti maced Applicant; Sterling punched Moti; Moti pulled his gun and then Sterling fell; Moti was telling Applicant to “go on, leave;” and Moti was standing outside El Toro’s door when he was shot. (Tr. 320; 323–25; 354; 325). The above-referenced testimony by Mobley, Nuttry, and Ray corroborate most of Applicant’s testimony. As such, Applicant’s testimony was not the only evidence presented for the jury to consider in deciding Applicant’s self-defense claim—the majority of his version of events were corroborated by other witnesses and the gas station video. Therefore, Applicant was not prejudiced by trial counsel’s alleged failure to introduce the admissible portions of Sterling’s statement, as those portions were cumulative to other evidence.

Further, trial counsel was not deficient for failing to seek to introduce Sterling’s statement to put Investigator Lindler’s testimony that Sterling implicated Applicant as the shooter, because trial counsel objected to and moved for a mistrial in response to the statement. (Tr. 676–77). As explained above, only the self-inculpatory portions within Sterling’s statements were potentially admissible as statements against interest. Sterling stated he and his brother Tyrobe talked about the shooting, and Tyrobe said “BRUH MUST HAVE SHOT THAT MAN!” This statement by Sterling is not a statement against his interest, and, therefore, is inadmissible under Rule 804(b)(3). The introduction of the entire statement to give context to Lindler’s statement goes beyond the reasoning for Rule 804(b)(3), as our courts have repeatedly held the rule is to be applied “very

narrowly to only those portions of a hearsay statement which are plainly self-inculpatory.” *Young*, 420 S.C. at 619, 803 S.E.2d at 894. As with Moti’s exclamation, this statement is hearsay within hearsay, and Tyrobe’s words could be an excited utterance or present sense impression to which Sterling could testify to. However, Sterling’s remarks implicating Applicant as the shooter were inadmissible because they do not constitute a statement against interest.

Further, trial counsel objected to Lindler’s statement and moved for a mistrial. Trial counsel’s decision to move for a mistrial rather than seek to introduce inadmissible hearsay was reasonable. *See Whitehead*, 308 S.C. at , 417 S.E.2d at (“Courts must be wary of second guessing counsel’s trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct will not be deemed ineffective assistance of counsel.”). As such, trial counsel was not ineffective for failing to introduce the portion of Sterling’s statement implicating Applicant as the shooter to put Lindler’s statement into context. Finally, Applicant admitted to being the shooter; therefore, there is no prejudice from Lindler’s statement because who was the shooter was not a disputed fact.

Based on the foregoing, trial counsel was not deficient nor was Applicant prejudiced by Sterling’s statement not being introduced into evidence. As such this allegation is denied and dismissed with prejudice.

2. Immunity

Applicant asserts trial counsel was ineffective for failing to seek immunity pursuant to the Protections of Persons and Property Act¹ (the Act) pretrial, when trial counsel sought a jury instruction on immunity under the Act during the charge conference. The Court disagrees.

Subsection 16-11-440(C) of the South Carolina Code provides in pertinent part:

¹ S.C. Code Ann. §§ 16-11-410 to -450 (2015 & Supp. 2018).



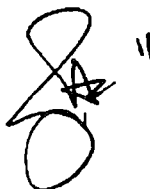
A person who is not engaged in an unlawful activity and *who is attacked in another place where he has a right to be* . . . has no duty to retreat and has the right to stand his ground and meet force with force, including deadly force, if he reasonably believes it is necessary to prevent death or great bodily injury to himself or another person

(emphasis added). “A claim of immunity under the Act requires a pretrial determination using a preponderance of the evidence standard” *State v. Curry*, 406 S.C. 364, 370, 752 S.E.2d 263, 266 (2013).

Trial counsel was not deficient for failing to seek immunity pursuant to the Act because Applicant informed trial counsel of his version of the facts, and Applicant’s own version of the facts show he did not have a right to be on El Toro’s premises. Sawyer testified from Applicant’s version of events, Moti, a licensed security guard, ejected him from the premises, and Applicant almost immediately reentered the premises to get into his car. Therefore, from Applicant’s own version of events, he did not have a right to be on the premises. As such, trial counsel was not deficient for failing to seek immunity under the Act pretrial.

Applicant was not prejudiced by trial counsels’ alleged deficiency because even Applicant’s own version of events, which he eventually testified to at trial, did not support immunity under the Act because Applicant was not in a place where he had a right to be. However, Applicant’s version of events supported the theory of self-defense, and the jury received a self-defense jury charge.

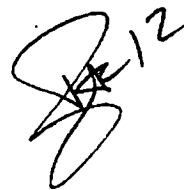
Because Applicant’s version of events did not amount to immunity under the Act, trial counsel was not deficient nor was Applicant prejudiced by trial counsels’ alleged failure to seek pretrial immunity under the Act. As such, this allegation is denied and dismissed with prejudice.

Handwritten signature or initials, possibly "SA" or "AA", with a vertical line to the right.

IV. Conclusion

Based on all the foregoing, this Court finds and concludes that Applicant has not established any violations that would require this Court to grant his application. Trial counsel was not deficient for failing to introduce Sterling's entire statement as a statement against interest because only the self-inculpatory portions of the statement were potentially admissible at trial. Trial counsel was not deficient for failing to seek pretrial immunity under the Act because Applicant's version of the facts showed he did not have a right to be on the premises after he was ejected from the premises by Moti. Applicant was not prejudiced by trial counsel's alleged failure to enter Sterling's statement because most of Applicant's testimony was corroborated by the gas station video of the incident, Marquita Mobley's testimony, and Lamar Ray's testimony. Therefore, this PCR action must be denied and dismissed with prejudice.

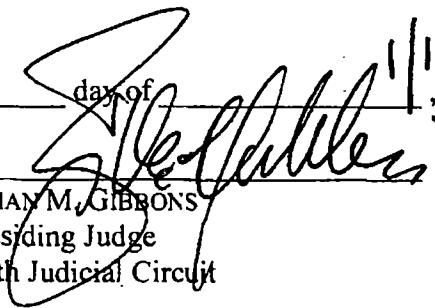
This Court notes Applicant must file and serve a notice of appeal within thirty (30) days from receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. *See* Rule 203, SCACR. An applicant has a right to an appellate counsel's assistance when they are seeking 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), SCRCP. Refer to Rule 243 of the South Carolina Appellate Court Rules for appropriate procedures for appeal.



IT IS THEREFORE ORDERED THAT:

1. The PCR action 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 _____ day of _____, 2020.


BRIAN M. GIBBONS
Presiding Judge
Fifth Judicial Circuit


_____, South Carolina