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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

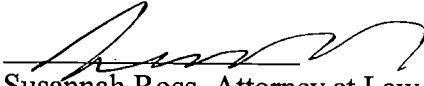
2017-CP-42-4438

Kevin W. McDaniels, Appellant,
v.
The State, Respondent.

NOTICE OF APPEAL

Kevin W. McDaniels appeals the Honorable R. Lawton McIntosh's Order of Dismissal filed April 13, 2020.

This 22 day of April, 2020.


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STATE OF SOUTH CAROLINA)
 COUNTY OF SPARTANBURG)
 Kevin W. McDaniels, #254398,)
 Applicant,)
 v.)
 State of South Carolina,)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 FOR THE SEVENTH JUDICIAL CIRCUIT

Case No.: 2017-CP-42-04438

ORDER OF DISMISSAL

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This matter comes before this Court by way of Applicant Kevin W. McDaniels's post-conviction relief (hereafter "PCR") application, filed December 5, 2017. A motion to dismiss hearing on this matter was held on February 20, 2020, at the Spartanburg County Courthouse. Susannah Ross, Esquire, represented Applicant. Assistant Attorney General Jacob Isenburg represented Respondent, the State of South Carolina. At the hearing, Applicant testified on his own behalf and presented testimony from his ex-wife as a purported alibi witness. Respondent presented testimony from prior PCR counsel. After a thorough review of all records and evidence before this Court, this Court finds Applicant cannot meet his requisite burden of proof of establishing he is entitled to post-conviction relief and denies and dismisses this application with prejudice. Specific findings of fact and conclusions of law are set forth below.

Procedural History

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. During its March 2008 term, the Spartanburg County Grand Jury indicted Applicant for first-degree burglary (2008-GS-42-1743), second-degree burglary (2008-GS-42-1744), and two counts of grand larceny (2008-GS-42-1745 and -1746). Assistant Public Defender Robert Hall of the Spartanburg County Public Defender's Office represented Applicant. Then-Deputy Solicitor Barry Barnette and Assistant

Solicitor Ann Marie Thompson of the Seventh Circuit Solicitor's Office prosecuted the case. On August 26, 2008, Applicant appeared before the Honorable R. Markley Dennis, Jr., circuit court judge, and pled pursuant to *North Carolina v. Alford*,¹ in accordance with negotiations entered into between Applicant and the State. In accordance with these negotiations, Judge Dennis sentenced Applicant to imprisonment for concurrent terms of fifteen years' imprisonment for each burglary charge and five years' imprisonment for each of the grand larceny charges, with sentences running concurrently to each other and concurrent to an unrelated federal sentence for which he was currently incarcerated. Applicant did not pursue a direct appeal.

Initial Post-Conviction Relief Action (2009-CP-42-3350)

Applicant filed his first PCR application on June 16, 2009 (2009-CP-42-3350). An amendment to the application was filed on April 22, 2010. He alleged the following grounds for relief in his application:

1. "Actual Innocent (sic)," in that "Applicant was in the State of Florida when the S.C. crimes were committed;"
2. "Coerced," in that "Law enforcement and attorney coerced Applicant into pleading guilty to crime;" and
3. "Duress," in that "Applicant placed under duress by law enforcement and attorney to admit to a crime Applicant did not commit."

Respondent filed a return on or about October 29, 2009, arguing the first allegation should be summarily dismissed for failure to state a cognizable claim and that the remaining allegations were without merit, arguing instead that the plea entry was voluntarily. An amended return and motion to dismiss without prejudice was filed on October 20, 2010, arguing that because Applicant was out of state custody, the court should dismiss without prejudice and allow

¹ 400 U.S. 25 (1970).

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Applicant to file another application once returning to state custody. On November 5, 2010, the Honorable J. Derham Cole, presiding judge, dismissed the action without prejudice, allowing Applicant to file a new PCR application upon returning to state custody.

Second Post-Conviction Relief Action (2014-CP-42-0506)²

Applicant filed a second PCR application on February 10, 2014 (2014-CP-42-0506) alleging:

1. "I am actually innocent – I was not even in the State."
 - a. "Police Coercion."
 - b. "Involuntary confession."
2. "Ineffective assistance of counsel on behalf of Robert Hall."
 - a. "Counsel failed to pursue a one hour continuance."
3. "Police coerced me into confession of crimes I did not commit."
4. "Miscarriage of justice for not granting a continuance."

Respondent filed a return on or about September 11, 2014, requesting that an evidentiary hearing be held. In the return, Respondent argued that the first allegation should be dismissed for failure to state a cognizable claim and that the claims regarding coercion and duress were without merit because the plea was voluntarily entered. An evidentiary hearing was convened on January 11, 2016, at the Spartanburg County Courthouse before the Honorable R. Ferrell Cothran Jr., presiding judge. Applicant appeared for the hearing by telephone and was represented by J. Brandt Rucker, Esquire. Assistant Attorney General Alicia A. Olive of the

² While this case was pending, Applicant appealed the denial of credit for time served on January 11, 2018, on an unrelated conviction from Richland County. On appeal, Applicant his argued the lower court erred in denying Applicant credit for time served when the plea judge stated on record he would get credit for time served. In response, Respondent argued the plea court did not have jurisdiction over that motion, the presiding judge had no authority to alter the sentencing of another circuit court judge, the sentencing judge complied with all the terms of the negotiated plea regarding the federal sentence, and he was already awarded all credit to which he was entitled under Section 24-13-40 of the South Carolina Code. This case is still pending.

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South Carolina Attorney General's Office represented Respondent. At the hearing, Applicant alleged that Counsel was ineffective because he only met with him once before the scheduled trial, that he was in Florida at the time the crimes were committed, and that he had alibi witnesses, including his father. His mother testified she was prepared to testify the day of the trial in defense of her son. Counsel testified that another attorney on staff met with Applicant several times, the charges and discovery were discussed with Applicant that he planned on trying the case until Applicant decided to enter the plea and they discussed all alibi witnesses available if the case proceeded to trial. Counsel also testified there were problems with using Applicant's father as an alibi witness because he was nervous and approached by the FBI and that Applicant's ex-wife would be the best alibi witness available. He also testified Applicant was served with a notice of a life sentence. On the day of trial, the plea offer was made and Applicant decided to accept it after talking to Counsel and his mother.

Applicant prematurely filed a *pro se* notice of appeal on December 7, 2015, which the court dismissed the notice of appeal, without prejudice, by written order dated January 12, 2016, for failure to show opposing counsel was served and failure to provide the copy of order under appeal as required by Rule 243(b) and 203(1)(B)(i) and (ii), SCACR. The remittitur was issued on January 28, 2016.

Applicant filed a notice of appeal and many other *pro se* motions thereafter, including a motion to relieve counsel.³ The request to relieve counsel was denied by written order, filed on

³ These motions include Notice of Mental and Physical Torture by the State of South Carolina and by Circuit Judge Derham Cole and Prosecutor Barry Barnette, Motion to Relieve Counsel Brandt Rucker and Appoint Competent Counsel Who Has Experience in Factually Innocent Cases, Motion to Appoint Private Investigator for the Purpose of Factually Innocent Investigation in Which Kevin McDaniels Was Not in the State When the Crimes Occurred on 12/27/15/05 & 1/14/06, and Motion for an Evidentiary Hearing on the Factual Innocent Evidence that Kevin McDaniels Has Presented Proving He Was In Florida 12/27/05 & 1/1 1/06. Petitioner

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October 27, 2015, with the Court finding that Counsel advising Applicant to withdraw his PCR application because, if granted, he would be facing life imprisonment if a jury convicted him was an insufficient reason to relieve and replace Counsel. The Court dismissed the appeal, without prejudice, by written order on April 27, 2016. In the order, the Court stated that the notice of appeal was dismissed because a final order had not been issued yet. The Court also sent a letter to Applicant on May 4, 2016, telling him the additional motions and petition he sent were outside the jurisdiction of the Court of Appeals and the Supreme Court. The remittitur was issued on May 13, 2016.

The Court filed its order of dismissal on May 4, 2016, denying Applicant's claims and dismissing the case with prejudice. The Court found Counsel was effective because he adequately conferred with Applicant in preparation of the plea, that he discussed the charges, including the elements, burden of proof, potential penalties, constitutional rights, witnesses available to testify, and possible defenses. The Court also found that Counsel conducted a proper investigation and provided thorough representation. The Court found that the plea judge reviewed questions with Applicant and confirmed Applicant knew the charges against him, and knew what evidence the State had against him. The Court also found that after talking with

has since filed several more motions in this Court, including a Motion for Emergency Release Based Upon Factual Innocence Denied Access to the Courts Ineffective Assistance of Counsel, Motion for an Order Appointing Private Investigator FBI/ATF/U.S. Marshal to Present Evidence that Kevin McDaniels was in Florida 12/27/05 & 1/14/06, and Present These Findings to the Court, Motion to Relieve Counsel Brandt Rucker and Appoint New Competent Counsel to Represent McDaniels on Appeal and Represent Him on the Attached Motion for Evidentiary Hearing and Motion for Immediate Release, Motion for an Evidentiary Hearing on the Factual Innocence Exhibits that Kevin McDaniels and the FBI/ATF/Secret Service/U.S. Marshals Service has Presented Proving Factual Innocence, Proposed Motion for Immediate Release Based Upon Ineffective Assistance of Counsel/Due Process Violation and Factual Innocence Since March 11, 2006, and a Motion to Correct a Clear Error of Law and Prevent Manifest Injustice, as well as a Petition for Writ of Certiorari.

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Counsel about the plea he changed the plea from a guilty plea to an *Alford* plea. Counsel was also effective for negotiating a favorable plea offer after Applicant was facing life imprisonment if it proceeded to trial. Thus, Counsel was not deficient. Additionally, Applicant's claim of ineffective assistance of counsel for failure to request a continuance was rejected. Instead, the Court found that the continuance was not necessary because he decided to plead instead of proceeding to trial and even if it did go to trial, the witnesses were only one hour late and would not have been prevented from testifying. The Court also found that the record supported the finding that the plea was knowingly and voluntarily entered into. Finally, the Court summarily dismissed the "actual innocence" allegation for failure to state a cognizable claim.

Applicant filed a notice of appeal from the denial of post-conviction relief on June 21, 2016. Appellate Defender Kathrine H. Hudgins of the South Carolina Commission on Indigent Defense-Office of Appellate Defense filed a *Johnson*⁴ petition for writ of certiorari and petition to be relieved as counsel. Applicant's motion to relieve counsel was denied by written order, filed on April 26, 2018. By order filed September 5, 2018, the South Carolina Supreme Court dismissed the petition for writ of certiorari and granted appellate counsel's motion to be relieved. The remittitur was returned on September 26, 2018.

1:18-cv-2611-TLW-SVH

Applicant then filed a petition for writ of habeas corpus on September 27, 2018, alleging ineffective assistance of counsel, that he is "factually innocent", miscarriage of justice, civil and criminal conspiracy, and prosecutorial misconduct. Respondent filed a return on January 22, 2019, asking the court to summarily dismiss the case because Applicant is not entitled to relief for the aforementioned reasons and, thus, Respondent is entitled to summary judgment as a

⁴ *Johnson v. State*, 294 S.C. 310, 364 S.E.2d 201 (1988).

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matter of law. On March 14, 2019, the Honorable Shiva V. Hodges, United States Magistrate Judge, issued the report and recommendation that Respondent's motion for summary judgment be granted and Applicant's petition be denied. *McDaniels v. Charles Williams, Warden*, 1:18-cv-02611-TLW. Applicant's objection was received on March 25, 2019. In the objection, Applicant alleged that he gave an involuntary confession, ineffective assistance of counsel, that he is innocent of any wrongdoing, "cause and actual prejudice", miscarriage of justice, civil and criminal conspiracy, prosecutorial misconduct, and "fundamental defects have occurred resulting in a complete 'miscarriage of justice.'" On September 23, 2019, the Court Judge adopted the Magistrate's report and recommendation granting Respondent's motion for summary judgement and dismissed Applicant's petition. *McDaniels v. Charles Williams, Warden*, 1:18-cv-02611-TLW.

Applicant submitted a notice of appeal to the United States Court of Appeals, Fourth Circuit on September 27, 2019, reiterating the same allegations previously stated. This request for appeal was denied by unpublished written order dated February 21, 2020, finding that the Applicant did not make a requisite showing that entitling him to an appeal.

Current Post-Conviction Relief Action (2017-CP-42-4438)

Applicant filed his third PCR application on December 5, 2017 (2017-CP-4438) alleging:

1. Newly Discovered Evidence
 - a. "alibi Shawn C. Hall."
2. Ineffective Assistance of Counsel.
 - a. "Notified all Attorneys of Alias Shawn Hall. They refused to present it."
3. Prosecutorial Misconduct.
 - a. "FBI notified Barry Barnette McDaniels was in Florida under alias Shawn Hall."

A motion to dismiss hearing occurred on February 20, 2020. This order articulates the

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court's findings based upon the hearing and submissions made regarding this matter.

Fourth PCR Application (2019-CP-42-01256)

On April 3, 2019, while the current action was pending, Applicant filed a fourth collateral challenge in circuit court, a petition and writ of habeas corpus requesting immediate release from detention. This matter is still ongoing.

Current Action before this Court

In his current PCR application, Applicant alleges he is being held in custody unlawfully on the following grounds:

4. Newly Discovered Evidence
 - a. "alibi Shawn C. Hall."
5. Ineffective Assistance of Counsel.
 - a. "Notified all Attorneys of Alias Shawn Hall. They refused to press."
6. Prosecutorial Misconduct.
 - a. "FBI notified Barry Barnette McDaniels was in Florida under alias Shawn Hall."

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Summary of Testimony Presented at the Motion to Dismiss Hearing

Applicant's Testimony

At the hearing, Applicant stated that he was working for a construction company under an alias in Florida at the time of the 2008 charges, including the two burglary charges and the two grand larceny charges. He stated that he recently discovered work records existed in Florida that confirmed he was in Florida at this time. He stated that he confessed to the crime while on cocaine after not sleeping for several days. He was picked up for the crime in Columbia, South Carolina. He stated he wanted to go to trial for the crime, alleging he was innocent of any wrongdoing. He stated that his now ex-wife was with him in Florida at this time and would have been an alibi witness for him if the case proceeded to trial. On cross-examination, Applicant stated he knew he had an alibi witness at the time of the trial and that he wanted his ex-wife to

testify at the trial, but ultimately decided to plead out.

Applicant's Ex-Wife's Testimony

Applicant's now ex-wife briefly testified that she was with Applicant in at the time of the crime and that her ex-husband is innocent of any wrongdoing.

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Applicant's PCR Attorney Testimony

Prior PCR counsel also briefly testified, stating that he was aware of the alias defense in the prior action, but chose not to pursue this argument because the defense was imperfect, because he thought if the case went to trial, the jury would disbelieve Applicant and still find him guilty of the burglaries.

Findings of Fact and Conclusions of Law

This Court has reviewed the pleadings, the records submitted to it by the parties, and the applicable law. Before this Court are the Spartanburg County Clerk of Court Records, Applicant's South Carolina Department of Corrections Records, prior PCR and habeas corpus filings, and the records for this PCR action. Pursuant to South Carolina Code Annotated, Sections 17-27-70 and -80, this Court dismisses the application based upon the following findings:

Newly Discovered Evidence - Alibi Defense

This Court finds that Applicant's newly discovered evidence claim concerning work papers allegedly supporting his previously repeatedly asserted alibi defense fails on the merits. The Uniform Post-Conviction Relief Act states that a person may institute a PCR action if "there exists evidence or material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice." S.C. Code Ann. § 17-27-20(A)(4). If the applicant contends there is evidence of material fact not previously presented, the PCR

application must be filed within one year after the date of actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence. S.C. Code Ann. §17-27-45(C).

In South Carolina, a plea is regarded as a waiver of non-jurisdictional defects and claims of violations of constitutional rights. *State v. Rice*, 401 S.C. 330, 331-32, 737 S.E.2d 485, 485-86 (2013) (citing *Hyman v. State*, 397 S.C. 35, 44, 723 S.E.2d 375, 379 (2012)). Therefore, an applicant requesting a new trial based on after-discovered evidence following a plea must show that:

(1) the newly discovered evidence was discovered after the entry of the plea in the exercise of reasonable diligence, could not have been discovered before the entry of the plea; and (2) the newly discovered evidence is of such a nature and quality that, under the facts and circumstances of that particular case, an "interest of justice" requires the applicant's guilty plea to be vacated. In other words, a PCR applicant may successfully disavow his or her guilty plea only where the interests of justice outweigh the waiver and solemn admission of guilt encompassed in a plea of guilty and the compelling interests in maintaining the finality of guilty-plea convictions.

Jamison v. State, 410 S.C. 456, 470, 765 S.E.2d 123, 130 (2014).

Applicant's right to contest the validity of a plea is usually, but not invariably, foreclosed because of the inherent solemnity and truthfulness included in the plea process. *See Blackledge v. Allison*, 431 U.S. 63, 73-74 (1977) ("Solemn declarations in open court carry a strong presumption of verity. The subsequent presentation of conclusory allegations unsupported by specifics is subject to summary dismissal, as are contentions that in the face of the record are wholly incredible."). Absent valid reasons why the applicant is entitled to depart from previous judicial admissions made at the plea hearing, statements made during the original proceeding remain conclusive. *Dalton v. State*, 376 S.C. 130, 137-38, 654 S.E.2d 870, 874 (Cl. App. 2007) (citing *Crawford v. United States*, 519 F.2d 347, 350 (4th Cir. 1975)).

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At the hearing, Applicant did not contest the validity of the plea, but instead alleged newly discovered evidence based upon recent discovery of work papers with his alleged alibi name attached. This alibi defense was considered before the plea was entered and, at the motion hearing, Applicant never claimed that the defense itself was newly considered; only that work papers with the alibi name were allegedly newly discovered. In fact, Applicant was well aware that an alibi defense existed when he entered the plea, yet decided to enter the plea anyway.

Additionally, Applicant testified that he originally wanted his ex-wife to testify that he was in Florida with her at the time of the burglary, but was ultimately talked into taking the plea deal. The possibility of his ex-wife testifying was also discussed at the second PCR hearing, with the PCR judge concluding that Counsel was not ineffective for failure to assert an alibi defense. Further, Applicant alleged Counsel was ineffective in his second PCR action for failure to raise the alibi defense, alleging that he was in Florida at the time of the crimes.

This Court finds that because Applicant knew about the alibi defense since before taking the plea deal, it cannot properly be considered newly discovered evidence. Even if work papers were allegedly newly discovered, the alibi defense is not and, thus, any discovery of new work papers does not lead this court to a different finding than the original PCR court had reached. Even if the work papers exist, the impact these papers would have had during trial court proceedings was so small it does not warrant relief through allowing Applicant to withdraw an otherwise valid plea. This defense was waived by Applicant when he decided to plead. Further, because the defense was waived when Applicant decided to plead, Applicant cannot assert the defense now; this option is foreclosed. In this case, the waiver and solemn admission Applicant made at the plea hearing far outweighs any supposed damage towards Applicant by not granting relief. Therefore, Applicant has failed to show the defense was valid on its merits and, as such,

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the case shall be dismissed.

Statute of Limitations

The Court finds that this application must be summarily dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act. S.C. Code Ann. § 17-27-10 to -160. Specifically, the act requires as follows:

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An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision on appeal, whichever is later.

S.C. Code Ann. § 17-27-45(A).

The South Carolina Supreme Court has held that the statute of limitations shall apply to all applications filed after July 1, 1996. *Peloquin v. State*, 321 S.C. 468, 469 S.E.2d 606 (1996). A motion for summary judgment may properly be used to raise the defense of statute of limitations. *McDonnell v. Consolidated School District of Aiken*, 315 S.C. 487, 445 S.E.2d 638 (1994). In addition, S.C. Code Ann. § 17-27-70(c) authorizes the Court to “grant a motion by either party for summary disposition of [an] application when it appears from the pleadings ... that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.”

Applicant pled to all charges on August 26, 2008. The application was therefore due on August 7, 2009. This application was filed on December 5, 2017, well beyond the statutory filing period. Therefore, the application should be summarily dismissed for failure to file within the time mandated by Uniform Post-Conviction Procedure Act.

Successive

The application shall be summarily dismissed because it is successive to Applicant’s previous PCR application. Courts disfavor successive applications and place the burden on

applicants to establish that any new ground raised in a subsequent application could not have been earlier raised in a previous application. *Foxworth v. State*, 275 S.C. 615, 274 S.E.2d 415 (1981); *Arnold v. State*, 309 S.C. 157, 420 S.E.2d 834 (1992). Section 17-27-90 of the South Carolina Code states:

All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental, or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily, and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, unless the court finds a ground for relief asserted for sufficient reason was not asserted or was inadequately raised in the original, supplemental, or amended application.

Under this statute, successive PCR applications are forbidden unless an applicant can indicate a "sufficient reason" why new grounds for relief were not raised or were not properly raised in previous applications. *Aice v. State*, 305 S.C. 448, 409 S.E.2d 392 (1991). Any new ground raised in a subsequent application is limited to those grounds that "could not have been raised ... in the previous application." *Id.* at 450, 409 S.E.2d at 394. If the applicant could have raised these allegations in a previous application, then the applicant may not raise those grounds in successive applications. *Id.* Applicant bears the burden of showing the allegations could not have been previously raised. *Land v. State*, 274 S.C. 243, 262 S.E.2d 735 (1980).

Applicant's current allegations were or could have been raised in the proceedings based on Applicant's prior PCR application. In fact, even if existent work papers is a new claim, allegations concerning the alibi defense generally were addressed in previous PCR actions, as outlined above. Thus, the current application is successive and barred under South Carolina Code Annotated Section 17-27-90. Applicant has failed to establish any sufficient reason why he could not have raised his current allegations in his previous PCR application. Therefore, he has failed to meet the burden imposed upon him, and the application shall be dismissed as successive to

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Applicant's previous PCR application.

Conclusion

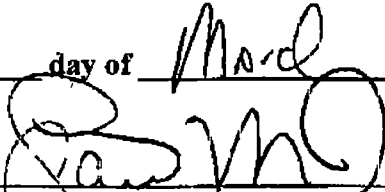
Based on all the foregoing, this Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

This Court notifies the Applicant that he 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, 409 S.E.2d 395 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCR provides that if the Applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 31 day of March, 2020


R. LAWTON MCINTOSH
Presiding Judge
Seventh Judicial Circuit

Anderson, South Carolina.

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