

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT
APPEAL FROM CHEROKEE COUNTY
Court of Common Pleas
HONORABLE G. THOMAS COOPER
2018-CP-11-0467

RECEIVED
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S.C. SUPREME COURT

LARRY D. BROWN, SCDC# 244139

APPELLANT,

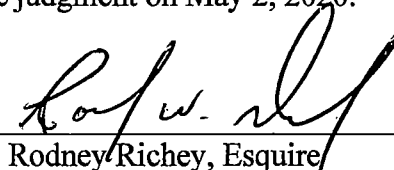
vs.

STATE OF SOUTH CAROLINA,

RESPONDENT.

NOTICE OF APPEAL

Larry D. Brown appeals the denial of his Post-Conviction Relief. The Post Conviction Relief Action was heard and denied by the Honorable G. Thomas Cooper, Circuit Judge on October 11, 2019 order issued on April 17, 2020 and filed on April 24, 2020. The Appellant received notice of the judgment on May 2, 2020.



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STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

Larry D. Brown, #244139

Applicant,

v.

State of South Carolina,

Respondent.

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

)
) Case No.: 2018-CP-11-0467

)
) **ORDER OF DISMISSAL**

FILED IN OFFICE OF
CLERK OF COURT
THE CLERK'S OFFICE
2020 APR 24 AM 10:47
BRANDY W. MOBILE

This matter comes before the Court by way of a post-conviction relief (hereafter "PCR") application filed by Larry D. Brown (hereafter "Applicant") on July 20, 2018. Respondent made its return on May 1, 2019. The Court convened an evidentiary hearing into the matter on October 11, 2019, at the Spartanburg County Courthouse. Applicant was present at the hearing and represented by Rodney W. Richey, Esquire. Assistant Attorney General Jacob A. Isenberg, Esquire, of the South Carolina Attorney General's Office, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant's plea counsel, E. Joshua Schultz, Esquire (hereafter "Counsel") also testified. After a thorough review of all records and evidence before this Court, this Court finds Applicant has not met his requisite burden of proof in establishing he is entitled to post-conviction relief and hereby 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 Cherokee County Clerk of Court. During the May 2016 term, the Cherokee County Grand Jury indicted Applicant for two counts of first-degree burglary (2016-

GS-11-00696 and -00698). During the June 2016 term, Applicant was indicted for possession of stolen goods (2016-GS-11-00762). During the July 2016 term, Applicant was indicted for escape/attempt to escape (2016-GS-11-00906) and malicious injury to courthouse/jail (2016-GS-11-00907). During the September 2016 term, Applicant was indicted for another count of first-degree burglary (2016-GS-11-01176).

E. Joshua Shultz, Esquire, represented Applicant. Assistant Solicitor Kimberly Leskanic, Esquire, of the Seventh Circuit Solicitor's Office, prosecuted the case. On August 4, 2017, Applicant appeared before the Honorable J. Mark Hayes II, circuit court judge, and pled guilty as indicted to three counts of first-degree burglary; possession of stolen goods, third or subsequent property offense; attempted escape; and malicious injury. In exchange for the guilty plea, the State agreed to a negotiated cap of twenty-five years on each burglary charge, the malicious injury and escape sentences running concurrent with the burglary sentences, and a negotiated ten-year sentence for receiving stolen goods, suspended to probation, with restitution. Judge Hayes sentenced Applicant to twenty-five years for each count of first-degree burglary; fifteen years for escape; and three years for malicious injury, all running concurrently. Judge Hayes also sentenced Applicant to a consecutive term of ten years for possession of stolen goods, suspended upon the time served, followed by five years of probation. Applicant did not appeal his plea or sentence.¹

Statement of Facts

On either November 24 or 25, 2015, Betty Grigg's home was broken into. (Plea Tr. 17). She called the police when she returned home and discovered a window had been broken. (Plea

¹ Applicant stated in the PCR Application that he did not appeal because his attorney "was not paid in full and wanted \$1500.00 for the appeal."



Tr. 17). Responding officers collected a sample from the blood residue found near the window. (Plea Tr. 17). This was sent to SLED for DNA analysis, and a CODIS hit matched with Applicant. (Plea Tr. 17). A buccal swab was obtained from Applicant, which also matched to the blood residue left on scene, and he was charged with first-degree burglary. (Plea Tr. 17-18).

Sometime between December 20, 2015, and January 21, 2016, a building owned by Timothy Spencer was broken into. (Plea Tr. 18). Tools and toys were stolen out of the building. (Plea Tr. 18). Applicant was charged with possession of stolen goods after he sold some of them to a witness who told the police she purchased them from Applicant around the time of the burglary. (Plea Tr. 18).

Sometime between January 15, 2016, and January 19, 2016, Applicant broke into Marison Lopez Dawkins' and Emmanuel Isaiah Dawkins' home and stole numerous items, including a coin collection in a safe found pried open in a building behind the house. (Plea Tr. 18). The same witness to whom applicant sold the toys and tools confirmed she also received some of these stolen coins from Applicant. (Plea Tr. 18). She accompanied Applicant "to sell a NASCAR car selection that was stolen,"² but placed Applicant with the stolen items. (Plea Tr. 18-19). Another witness stated she picked Applicant up at a residence behind the Dawkins' home. (Plea Tr. 19). Applicant called her for a ride and, when she picked him up, he had the items that matched the items reported stolen from the Dawkins' home. (Plea Tr. 19).

When the police tried to arrest Applicant, he fled from them. (Plea Tr. 19). Officers tracked him for over an hour, but he was not apprehended until he was later arrested in a hotel room. (Plea Tr. 19). When he was arrested, Applicant had on a backpack containing stolen items

² It is unclear from the plea transcript exactly what the solicitor meant by this statement, but this Court interprets it to mean the witness accompanied Applicant to when he was trying to sell "a NASCAR car selection," which turned out to be stolen. See Plea Tr. pp. 18-19.



from a March 9, 2016, burglary. (Plea Tr. 19). The burglary occurred at Jeff Cole's home, where a window was broken, and Applicant stole money and coins from the home. (Plea Tr. 19).

On April 28, 2016, while Applicant was detained at the Cherokee County detention center, he attempted to escape by breaking through the wall of the jail, damaging the cell. (Plea Tr. 19). He was charged with malicious injury and attempted escape. (Plea Tr. 19-20). Upon inquiry by the Court, Applicant confirmed the above-articulated facts. (Plea Tr. 20).

Current Action before this Court

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

1. "Prosecutorial misconduct."
2. "Ineffective assistance of counsel."
 - a. "Trial counsel's representation fell below an objective."
3. "Failure to adequately investigate the case."
 - a. "Counsel [failed] to investigate crime scene and state witness."
4. "Perjury."
 - a. "Prosecution knowingly used Perjury evidence..."

Regarding relief, Applicant requests a "[n]ew [s]entence".

At the evidentiary hearing, the only claim Applicant raised was that Counsel was ineffective for failure to argue that Applicant should not have been charged with first-degree burglary because he did not actually enter the home during any of the burglaries. Accordingly, this Court finds Applicant has waived all other issues listed in this application, and those allegations are dismissed with prejudice.

Summary of Testimony Presented at the Evidentiary Hearing

Applicant's Testimony



Applicant testified he was confined in the South Carolina Department of Corrections after pleading guilty to the aforementioned charges. (PCR TR. 7-8). Applicant stated he did not believe Counsel was effective. (PCR Tr. 8). Applicant stated that leading up to the plea hearing, he and Counsel discussed the charges and the elements of the crimes charged. (PCR Tr. 8-9). Applicant stated that, on the first burglary incident at the Griggs' home, he thought he should not have been charged with first-degree burglary, but should have been charged with attempted or malicious damage, because he was always outside the home and never went inside. (PCR Tr. 10). He said he discussed this with Counsel, but Counsel still recommended he plead guilty to first-degree burglary. (PCR Tr. 10). Applicant deflected when asked if his hand went inside the house. (PCR Tr. 20).

Applicant said that after the second burglary he was found away from the home, and there was no evidence he entered the home, other than the fact that he was found with items stolen from the home. (PCR Tr. 10-11). Applicant stated there was no evidence he was in the residence, and Counsel should have known he should have been charged with possession of stolen goods instead. (PCR Tr. 15). Applicant testified that he told Counsel this, and Counsel recommended he plead to the first-degree burglary charge due to his prior record. (PCR Tr. 11).

Applicant acknowledged he was served with a Notice of Intent to Seek Life Without Parole (LWOP) and conceded this notice was not defective. (PCR Tr. 11-12). Applicant stated he pled guilty as indicted based on his worry about being sentenced to LWOP after a trial, not because of the evidence against him or the facts of the case. (PCR Tr. 12). Applicant testified he now thinks he should have had a trial because he does not think the State could prove any of the first-degree burglary charge. (PCR Tr. 12-13).

Applicant testified he thought at least one of his charges was inappropriately enhanced



based on his prior record, because he believed some of the prior charges were dismissed and, thus, were not convictions. (PCR Tr. 13-15). According to Applicant, Counsel was ineffective because if Counsel had properly investigated the case, he would have discovered this and could have argued against the sentencing enhancement. (PCR Tr. 14-15).

Applicant also testified that he should not have been charged and convicted of first-degree burglary because there was no evidence that he entered the buildings he burglarized in any of the cases. (PCR Tr. 15). Applicant testified that he should have been charged and convicted of possession of stolen goods, but Counsel failed to discuss this with Applicant and Applicant did not learn about the lesser offense until he was already in prison. (PCR Tr. 15). Applicant stated he did not try to contact Counsel about this information because he was too busy trying to obtain the discovery and evidence. (PCR Tr. 15).

Applicant stated he pled guilty because he was served with the LWOP notice and that, if he had gone to trial, he would have been subject to life without parole. (PCR Tr. 17-18). Applicant conceded that he remembered the Solicitor giving the supporting facts at the plea hearing, including the evidence found at the scene. (PCR Tr. 18). Applicant conceded he told the plea court he was guilty of first-degree burglary and had entered the house, but Applicant testified he is now asserting he did not enter the house. (PCR Tr. 21). He explained he conceded to entering the house at the plea hearing because he thought his prior criminal history would cause him to be convicted at trial. (PCR Tr. 21). Applicant testified if he had not been threatened with LWOP, he would not have pled guilty. (PCR Tr. 22).

Trial Counsel Testimony

Counsel testified he represented Applicant on these charges. (PCR Tr. 23). Counsel agreed the State served Applicant with its LWOP notice, and the notice was accurate and not

 6

defective. (PCR Tr. 23). Counsel further testified he discussed the LWOP notice, charges, and DNA evidence with Applicant. (PCR Tr. 24).

Counsel testified he did not agree that Applicant was not guilty of the first-degree burglary charge(s) because of lack of evidence that Applicant entered the home. (PCR Tr. 24). Counsel stated that was a possible defense he discussed with Applicant, but Applicant decided not to go to trial because of the possibility of being sentenced to LWOP if he was convicted of any one of the first-degree burglary charges and because the defense was not particularly strong. (PCR Tr. 24). Counsel further testified that on the second and third burglary charges there were some defensible issues, but the defenses were not strong enough to risk a life sentence. (PCR Tr. 25). Counsel testified he investigated the basis for the LWOP notice, discovered Applicant's prior convictions and criminal history, and found the notice was appropriate because of Applicant's prior convictions. (PCR Tr. 27).

Findings of Fact and Conclusions of Law

Before this Court are the Spartanburg County Clerk of Court Records, Applicant's South Carolina Department of Corrections Records, the plea transcript, and the records for this PCR action. Based on this Court's review of the above and the testimony and evidence presented at the hearing, pursuant to sections 17-27-70 and -80 of the South Carolina Code, this Court denies relief and dismisses the application based upon the following findings:

Ineffective Assistance of Counsel

Applicant's allegations of ineffective assistance of counsel are without merit. In a PCR action, the applicant bears the burden of proving allegations contained in the application. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant asserts ineffective assistance of counsel as a ground for relief, the applicant must show "counsel's conduct so undermined the



proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result.” *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. Ineffective assistance of counsel is governed by the Sixth Amendment, which the Supreme Court expanded upon through developing the two-pronged test outlined in *Strickland*.

Pursuant to the first prong of the *Strickland* analysis, the applicant must prove defense counsel’s performance was deficient. *Id.* at 686; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). To show deficiency, the applicant must prove by the preponderance of the evidence that counsel’s actions fell outside of the zone of “reasonableness under prevailing professional norms.” *Strickland*, 466 U.S. at 688. *See also* Rule 71.1(e), SCRCP (“The applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence.”). Reasonableness is determined by the “variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how to best represent a criminal defendant,” and the scope of the inquiry is limited to facts available to counsel at the time of the representation. *Id.* at 689. “Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003) (citing *Strickland*, 466 U.S. at 690). Judicial scrutiny of counsel’s performance remains highly deferential towards defense counsel with a strong presumption that counsel acted competently, because competent representation may be executed in virtually “countless” ways. *Strickland*, 466 U.S. at 688-89.

Second, counsel’s deficient performance must have prejudiced the applicant so that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Cherry*, 300 S.C. at 117-18. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694.



The court makes this determination based upon the totality of the evidence. *Id.* at 695.

Realistically, this matters “only in the rarest case” because “[t]he likelihood of a different result must be substantial, not just conceivable.” *Harrington v. Richter*, 562 U.S. 86, 111-12 (2011) (quoting *Strickland*, 466 U.S. at 697).

Regarding guilty pleas, specifically, the applicant must show there is a reasonable probability that, but for ineffective assistance of counsel, he or she would not have pled guilty but, instead, would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). The applicant’s right to contest the validity of a plea is usually, but not invariably, foreclosed because of the solemnity and truthfulness inherent in the plea proceeding. *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 admissions made at the plea hearing, sworn statements made during the original proceeding remain conclusive. *Dalton v. State*, 376 S.C. 130, 137-38, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing *Crawford v. United States*, 519 F.2d 347, 350 (4th Cir. 1975)).

For a plea to be valid, the applicant must have been aware of the nature and crucial elements of the offense, the maximum and minimum penalties, and the rights he is waiving by accepting the plea. *Boykin v. Alabama*, 395 U.S. 238 (1969); *Roddy v. State*, 339 S.C. 29 (2000). A plea is not knowing or voluntary if a defendant “lacks knowledge of material evidence in the prosecution’s possession.” *Gibson v. State*, 334 S.C. 515, 523, 514 S.E.2d 320, 324 (1999).

A defendant’s knowing and voluntary waiver of statutory or constitutional rights must be established by a complete record, and “may be accomplished by colloquy between the court and



defendant, between the court and defendant's counsel, or both." *Roddy v. State*, 339 S.C. at 34, 528 S.E.2d at 421 (citing *State v. Ray*, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993)). "[T]he voluntariness of a guilty plea is not determined by an examination of the specific inquiry made by the sentencing judge alone, but is determined from both the record made at the time of the entry of the guilty plea and the record of the post-conviction hearing." *Dalton*, 376 S.C. at 138, 654 S.E.2d at 874 (quoting *Harres v. Leeke*, 282 S.C. 131, 133, 318 S.E.2d 360, 361 (1984)). Further, "guilty pleas, freely and voluntarily entered, act as a waiver of all non-jurisdictional defects and defenses, including claims of a violation of a constitutional right prior to the plea." *Whetsell v. State*, 276 S.C. 295, 297, 277 S.E.2d 891, 892 (1981).

Here, Applicant claims Counsel was constitutionally ineffective because he failed to assert a defense or otherwise mitigate the first-degree burglary charges. (PCR Tr. 8, 10, 15). Specifically, Applicant asserts Counsel should have argued that Applicant should not have been charged with first-degree burglary, because there was no evidence Applicant entered the homes during any of the burglary incidents, other than the fact that he was caught in possession of stolen items originally located inside the houses. (PCR Tr. 8, 10, 15).

However, at the plea hearing, Applicant told the plea judge that no one threatened him or promised him something to accept the plea. (Plea Tr. 13). Applicant also stated he was satisfied with the work Counsel did for him. (Plea Tr. 12). Applicant affirmed the decision to plead guilty was free and voluntary on his part. (Plea Tr. 13). Applicant further confirmed he was aware of the constitutional rights he was giving up to enter the plea, including the right to present a defense, present witnesses, and the right to a jury trial. (Plea Tr. 13-14). Applicant stated he understood he was waiving these rights and decided to enter a plea anyway. (Plea Tr. 14). At the hearing, Applicant conceded he broke into multiple homes. (Plea Tr. 18). When specifically



asked if he was guilty of all three first-degree burglary charges, Applicant stated he was. (Plea Tr. 21).

At the PCR hearing, Counsel credibly testified the defense that Applicant had not actually entered the homes was explored, but Counsel still encouraged Applicant to plead guilty because he felt it was a weak defense, and Applicant was facing a life sentence if found guilty at trial. (PCR Tr. 26). Counsel testified that he believed the State could prove Applicant committed at least one count of first-degree burglary beyond a reasonable doubt, which would subject Applicant to a sentence of LWOP. (PCR Tr. 26). Further, Counsel testified that, after careful investigation, he found there was a sufficient enough basis for the State's LWOP notice. (PCR Tr. 27-28). Counsel testified he communicated all of this information to Applicant, who ultimately decided enter a guilty plea. (PCR Tr. 26).

Therefore, based on the combined record of the guilty plea transcript and Counsel's credible testimony at the PCR hearing, this Court finds that the plea was voluntarily, knowingly, and intelligently entered by Applicant and, consequently, any defenses were waived at the plea hearing and cannot be asserted now. Counsel was not deficient in any way, nor was Applicant prejudiced by Counsel's performance. Thus, Applicant's allegations are dismissed and relief is therefore denied.

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 PCR application must be denied and dismissed with prejudice.

This Court notifies Applicant that he must file and serve a notice of appeal, through counsel, within thirty days from the counsel's receipt of written notice of entry of judgment to

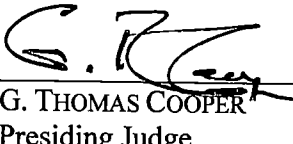


secure the appropriate appellate review. *See* Rule 203, SCACR. Pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP provides that if the Applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. PCR counsel's attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the PCR Application must be denied and dismissed with prejudice;
and
2. The Applicant must remain in the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 17 day of April, 2020.


G. THOMAS COOPER
Presiding Judge
Seventh Judicial Circuit

Caution, South Carolina

FORM 4

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

JUDGMENT IN A CIVIL CASE
 CASE NUMBER 2018CP1100467

Larry D. Brown, #244139		State Of South Carolina	
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PLAINTIFF(S)	DEFENDANT(S)
Submitted by:	Attorney for: <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant <input type="checkbox"/> 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. See Page 2 for additional information.
- 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: _____
- STAYED DUE TO BANKRUPTCY**
- 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 the Court:

ORDER INFORMATION

This order ends does not end the case.
 Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT 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 (List amount(s) below)
n/a		

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.

E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

s/ Thomas G. Cooper
 Circuit Court Judge

2126
 Judge Code

4/24/2020
 Date

For Clerk of Court Office Use Only

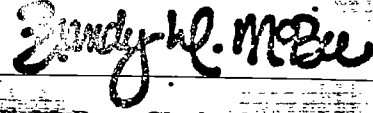
This judgment was entered on , and a copy mailed first class or placed in the appropriate attorney's box on, to attorneys of record or to parties (when appearing pro se) as follows:

Rotney Wade Richey PO Box 10916 Greenville, SC
29603-0916

Alan McCrory Wilson S.C. Attorney General's Office PO
Box 11549 Columbia, SC 29211-1549

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)



Court Reporter

Brandy W. McBee - Clerk of Court

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

CLERK OF COURT
BRANDY W. MCBEE
2020 APR 24 AM 11:16
SOUTH CAROLINA