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THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM CHEROKEE COUNTY

Court of Common Pleas

HONORABLE H. STEVEN DEBERRY, IV

2019-CP-11-00636

Jobe S. Hames, #378511

APPELLANT,

vs.

STATE OF SOUTH CAROLINA,

RESPONDENT.

NOTICE OF APPEAL

Jobe S. Hames appeals the denial of his Post Conviction Relief. The Post Conviction Relief Action was heard and denied by the Honorable H. Steven DeBerry, IV, Circuit Judge on August 2, 2021 an Order issued on September 9, 2021 and filed on September 13, 2021. The Appellant received notice of the judgment on September 17, 2021.

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STATE OF SOUTH CAROLINA COUNTY OF CHEROKEE	IN THE COURT OF COMMON PLEAS FOR THE SEVENTH JUDICIAL CIRCUIT
Jobe S. Hames, SCDC No. 378511 Applicant, v. State of South Carolina Respondent.	Case No. 2019-CP-11-00636 **ORDER OF DISMISSAL**

This matter comes before the Court by way of an application for post-conviction relief filed by Jobe S. Hames ("Applicant") on September 12, 2019. Respondent made its return on November 7, 2019, requesting an evidentiary hearing. The Court convened an evidentiary hearing into the matter on August 2, 2021.. Applicant was present at the hearing and represented by Attorney Rodney Richey. Assistant Attorney General William H. Ray of the South Carolina Attorney General's Office, represented Respondent. Applicant testified on his own behalf at the evidentiary hearing. Applicant's mother, Geneva Hames, and Applicant's plea counsel, Attorney Michael Berry ("Counsel") also testified. The Court had before it Applicant's records from the South Carolina Department of Corrections, a copy of the original plea transcript, the records of the Cherokee County Clerk of Court regarding the subject convictions, and the subject application for post-conviction relief.

Following a thorough review of the record in its entirety and all evidence and testimony presented at the evidentiary hearing, this Court finds Applicant has failed to meet his burden of proof of establishing any constitutional violations and denies this application with prejudice.

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I. PROCEDURAL HISTORY

Applicant is currently confined in the South Carolina Department of Corrections. Applicant waived presentment of an indictment for criminal sexual conduct, first degree (2018-GS-11-01538) to the grand jury. Applicant was represented by Attorney Michael Berry and Assistant Solicitor Adrienne Barry, of the Seventh Circuit Solicitor's Office, prosecuted the case. On December 12, 2018, Applicant appeared before the Honorable R. Keith Kelly and entered a guilty plea, as indicted. Judge Kelly accepted the plea and sentenced Applicant to twenty five years' imprisonment. Applicant did not file a direct appeal of his plea or sentence.

II. FACTUAL HISTORY

The underlying facts of the crime for which Applicant is incarcerated were articulated by the State during the plea proceeding as follows:

> On January the 3rd of 2017, Erica Barber with the Department of Social Services contacted the Cherokee County Sheriff's Office in reference to the victim being sexually assaulted by his uncle. She was provided this information from Ashley Rodriguez, who is a cousin of the victim's mother.
>
> Ashley stated that the victim and his brothers came to stay with her a couple Saturdays prior to the victim disclosing to her and he had asked to talk to her. She asked him if he was all right and he said that – he asked her if it was right for uncles to touch their nephews wee-wee. She asked him if he meant his private areas and he stated yes. He said that his uncle Jobe had been putting his private parts inside of him since he was six years old. He said that when this would happen his Uncle Jobe would tell him everything is going to be okay and to just be quiet. He stated it hurt when he would do this and it made him want to kill himself.
>
> The victim was then sent to the Children's Advocacy Center. During that interview the victim became very uncomfortable when the interviewer began to ask him about the [sic] what the defendant would do to him. The interview had to be ended early based off of the victim becoming upset. The victim is autistic, Your Honor, so the conditions of the room, coupled with the fact that he did not want to talk about what happened to him caused him to become upset and they had to cancel that interview.

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They did reschedule the interview and he did disclose that the defendant would touch his private parts under his clothes. This happened on more than one occasion, more than one occasion at the defendant's house, in the defendant's bedroom on his bed, in the hallway, in the bathroom, and in his parents room.

On June the 16th of 2017 officers spoke with the victim's mother, who was this defendant's sister. She and her husband were living with the defendant at [address omitted] here in Cherokee County where all of the incidents took place.

She stated that all of this came to light when one night she heard the victim and the defendant talking and a bad feeling came over [her]. She stated when she went to bed the victim was asleep on the couch and was not supposed to be in bed with the defendant. She went into the defendant's bedroom and saw the victim with his underwear down and the defendant was buckling his belt. She stated the victim's penis was hard. She said she confronted the defendant and he ran out of the house.

She spoke to the victim and he stated that the defendant told him if he told anyone what was happening, the police would put his parents and grandparents in jail, and the victim told her the defendant touched his private parts and put his fingers inside of his bottom.

The victim – I mean, excuse me, the victim's mother told her husband, who confronted this defendant. He denied it. He then asked the victim in front of this defendant if he had ever touched him and he said "yes, lots of times."

The defendant was questioned initially on February the 18th of 2017, and he stated to law enforcement that he never touched the victim, other than to discipline him. He was then scheduled for a polygraph. They couldn't do the polygraph at that time because the defendant stated that he suffered from seizures, so they had to get him medically cleared before they did another polygraph.

The second polygraph occurred on May the 30th of 2017. He was asked if he touched the victim in a sexual manner and if he touched the victim in a sexual manner at his house. He stated no both times and deception was indicated.

He was then advised of the results of that polygraph and told the examiner that on one occasion while wrestling with the victim he accidentally put his mouth on the victim's penis. He told the examiner that he had masturbated in the presence of the victim and while the victim slept next to him in the same bed. He told the examiner that he had several dreams about the victim that were sexual in nature. He described one of the dreams as starting out with him having sex with a woman.

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Then it changed to him having sex with a hermaphrodite. Then it changed to him having sex with his nephew, the victim. He stated he woke up naked next to the victim who was looking at him in an uneasy way.

The defendant then spoke with law enforcement again. HE stated there was another incident where the victim was getting out of the shower and was wrapped in a towel. The defendant snatched the towel away from the victim and wrestled him to the bed playing with him. He stated he was blowing on the victim's belly and the victim's penis accidentally went into his mouth.

Your Honor, as I stated earlier, the victim is autistic in this case. I have met with this victim. It was in the best interests of this victim to keep him off of the stand to testify in front of twelve strangers about what a family member had done to him. We discussed the offer of reducing it to criminal sexual conduct in the first degree and they were in agreement with that.

The victim's grandmother is here. She's standing to my right. At this point I don't know if she wishes to address Your Honor, but I will have Your Honor ask her that at the appropriate time, but based off of all the circumstances it was the State's decision to reduce it to the criminal sexual conduct in the first degree, Your Honor.

(Tr. 8-12). Upon inquiry by the Court, Applicant confirmed "most" of the above articulated facts. (Tr. 13-14).

III. CURRENT APPLICATION

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

1. "Ineffective Assistance of Counsel"
   a. "failure to Investigate the facts of the case"
   b. "Sentenced errors"
   c. "Mental Health"
   d. "14 Amendment Due Process"

At the hearing Applicant's PCR counsel stated that he was going forward on the allegation that Counsel was ineffective for failing to investigate the facts of the case and failing to have a mental evaluation performed prior to the guilty plea hearing.

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IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court has reviewed the records submitted to it by the parties and the legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80, this Court makes the following findings based upon all of the probative evidence presented.

A. Ineffective Assistance of Counsel

Applicant's allegations of ineffective assistance of counsel are without merit. In a PCR action, Applicant bears the burden of proving the allegations in his application. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant must prove that "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.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in *Strickland*. First, Applicant must prove that counsel's performance was deficient. *Strickland*, 466 U.S. at 686; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Applicant must so prove his factual allegations by a preponderance of the evidence. Rule 71.1(e), SCRCP. Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." *Cherry*, 300 S.C. at 117, 386 S.E.2d at 625 (quoting *Strickland*, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate

assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* (citing *Strickland*, 466 U.S. at 690). "When counsel focuses on some issues to the exclusion of others, there is a strong presumption that he [or she] did so for tactical reasons rather than through sheer neglect." *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003) (citing *Strickland*, 466 U.S. at 690). The Court, in determining deficiency, must affirmatively entertain the range of possible reasons counsel may have had for proceeding as they did. *Cullen v. Pinholster*, 563 U.S. 170, 196 (2011); *Harrington v. Richter*, 562 U.S. 86, 109-10 (2011). "[E]ven if an omission is inadvertent, relief is not automatic. The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." *Yarborough*, 540 U.S. at 6; *see also Murphy v. Davis*, 901 F.3d 578, 592 (5th Cir. 2018) ("[C]ounsel's performance need not be optimal to be reasonable."). Applicant must overcome this presumption to receive relief. *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625.

Second, counsel's deficient performance must have prejudiced Applicant such 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, 386 S.E.2d at 625. "This does not require a showing that counsel's actions 'more likely than not altered the outcome,' but the difference between *Strickland's* prejudice standard and a more-probable-than-not standard is slight and matters 'only in the rarest case.'" *Harrington*, 562 U.S. at 111-12 (quoting *Strickland*, 466 U.S. at 697). "The likelihood of a different result must be substantial, not just conceivable." *Id.* at 112. "The prejudice analysis requires the court deciding the ineffectiveness claim to consider the totality of the evidence before the judge or jury." *United States v. Basham*, 789 F.3d 358, 371-72 (4th Cir. 2015) (quoting *Elmore v. Ozmint*, 661 F.3d 783, 858 (4th Cir. 2011)).

In the context of a guilty plea, Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he/she would not have pleaded guilty and would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). Because a guilty plea is a solemn, judicial admission of the truth of the charges against an individual, the PCR applicant's right to contest the validity of such a plea is usually, but not invariably, foreclosed. *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."). Statements made during a guilty plea should be considered conclusively, unless an Applicant presents valid reasons why he or she should be allowed to depart from the truth of his statements. *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)).

Failure to Request a Mental Evaluation

Applicant alleges that counsel was ineffective for failing to have a mental evaluation performed prior to his guilty plea.

"Due process of law prohibits the conviction of a person who is mentally incompetent." *Jeter v. State*, 308 S.C. 230, 232, 417 S.E.2d 594, 595 (1992). An accused is competent to stand trial if he or she has sufficient capability to consult with his or her lawyer with a reasonable degree of rational understanding and have a rational as well as factual understanding of the proceedings. *Id.*, 308 S.C. at 232, 417 S.E.2d at 596. "The focus of a competency inquiry is the defendant's mental capacity; the question is whether he [or she] has the *ability* to understand the proceedings." *Garren v. State*, 423 S.C. 1, 14, 813 S.E.2d 704, 711 (2018) (quoting *Godinez v. Moran*, 509 U.S. 389 (1993)).

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As to the deficiency prong under *Strickland*, an attorney may reasonably rely upon his or her own perceptions of a defendant in determining whether or not their client should be mentally evaluated. *Jeter*, 308 S.C. at 233, 417 S.E.2d at 596. When establishing *Strickland* prejudice in the context of counsel's failure to request a mental competency evaluation, the applicant need only show a reasonable probability that he was incompetent at the time of the original proceeding. *Garren*, 423 S.C. at 12, 813 S.E.2d at 710 (citing *Ramirez v. State*, 419 S.C. 14, 21, 795 S.E.2d 841, 845 (2017)). As is the case with any other allegation that a defense attorney failed to adequately investigate some matter, an applicant must present some proof of identifiable mental health issues which undermine his or her competency; mere speculation and conjecture by the applicant is insufficient to establish prejudice. *Id.*, 423 S.C. at 13-14, 813 S.E.2d at 711.

An applicant alleging incompetence *in fact* must show by a preponderance of the evidence that he was incompetent at the time of his original proceedings. *Id.*, 423 S.C. at 16, 813 S.E.2d 704, 713; *Hall v. Catoe*, 360 S.C. 353, 358, 601 S.E.2d 335, 338 (2004). If an applicant claims he was rendered incompetent due to medication, he or she must show that his or her mental faculties were so impaired by drugs during the original proceedings that he or she was incapable of full understanding of the proceedings. *Garren*, 423 S.C. at 15, 813 S.E.2d at 712 (quoting *United States v. Truglio*, 493 F.2d 574, 578 (4th Cir. 1974)). "A PCR court must consider 'objective data' about the nature and effect of the medication the defendant had taken and evaluate whether such medication 'had the capability to produce a sufficient effect on his mental faculties to render him incompetent[.]'" *Id.* (quoting *United States v. Damon*, 191 F.3d 561, 565 (4th Cir. 1999)).

Applicant testified at the PCR hearing that he wanted his counsel to have a mental evaluation performed because of issues with his mental health history. He explained that he wanted to be evaluated and to have a psychiatrist present to speak on his behalf at his plea hearing. He

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explained that he told this to his counsel but his counsel did not feel that one was necessary because he had other clients who appeared less competent that him, but nevertheless had been determined fit to stand trial. He explained that if his counsel had requested the evaluation he believes the outcome of the proceedings would have been different. He noted that in his transcript his counsel had expressed concern about his delayed intelligence.

On cross-examination Applicant stated that he had met with counsel three or four times prior to his plea hearing, and that he had been previously represented by his counsel on an unrelated case. He said that he expressed his prior mental issues to his counsel one time, and the issue did not come up during the previous case with his counsel. Applicant also stated that he had never been diagnosed with mental health issues and all his issues related to marijuana use and prior abuse. He also stated that he understood he had committed a crime, had discussed his case and defenses with his counsel, and never considered going to trial.

Applicant's mother, Geneva Hames, was sworn and provided testimony on Applicant's behalf.[1] She explained that Applicant suffered from attention deficit/hyperactivity disorder (ADHD) and was also autistic. She stated that she did not realize how serious his issues were when he was younger and had never taken him to a doctor to receive a diagnosis or treatment for these issues. She indicated that a school Applicant had attended informed her about his mental issues. She stated that mental illness runs in the family, and numerous relatives are autistic. She also explained that her son was twelve-years old when she was incarcerated. She expressed her belief that Applicant is entitled to a new trial and believes that his counsel should have had a mental

[1] Ms. Hames was convicted of grand larceny, first degree burglary, armed robbery, assault and battery with intent to kill, and kidnapping in November, 2006. She was incarcerated at the time of the hearing, and was present after being transported by the South Carolina Department of Corrections.

health evaluation and also should have told the Court that he was autistic and had ADHD. On cross-examination she stated that she was incarcerated at the time of Applicant's plea hearing and that her only communication with him at the time was in written letters.

Applicant's counsel testified that while Applicant was "simple minded," he did not believe there were any issues with his competency or mental health. He stated that Applicant had assisted him during their pretrial meetings, appeared competent, and actually made the decision to forgo a bond hearing to accumulate additional credit for time served. He also stated that Applicant understood the charges and sentencing exposure, asked questions about the discovery, and understood the facts of his case. Therefore he believed an evaluation would be fruitless and unwarranted.

This Court finds Applicant's allegation that his counsel was ineffective for failing to have a mental evaluation performed before his plea hearing to be without merit. Applicant has failed to meet his burden of proving that his counsel's performance was deficient. The evidence shows that Applicant was capable to consult with his lawyer about the case. He asked counsel questions about the discovery and helped him develop a defense against the charge. Furthermore, Applicant's understanding of the proceedings is evidenced by his decision to forgo the bond hearing to accumulate more credit for time served, by his unambiguous responses to the plea court's colloquy, and by counsel's testimony that he believed Applicant understood the facts of his case. Applicant may be "simple minded" but that alone did not render him unfit to stand trial due to incompetency, nor did it necessarily obligate counsel to obtain a mental evaluation prior to his plea hearing. Therefore this Court finds that Applicant's counsel's representation was objectively reasonable under the circumstances. As such, Applicant has failed to meet his burden of proving that counsel provided deficient representation.

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Furthermore, Applicant has failed to prove that he was prejudiced by his counsel's performance. The only evidence offered that suggests he was incompetent at the time of trial is his own testimony that he has a problem with marijuana, that he had previously suffered abuse, and his mother's testimony that he has undiagnosed and untreated ADHD and autism. Applicant has presented no credible proof of ADHD or autism because his mother testified that he was not diagnosed because she did not realize how bad it was when he was a child. Even assuming Applicant does suffer from those disorders, his mother's testimony on that point is largely irrelevant because she had been incarcerated for years at the time of Applicant's plea hearing and did not have first-hand knowledge of his mental state at that time. Applicant's testimony that his marijuana use or prior abuse rendered him incompetent is also unpersuasive. There is nothing in the record outside of his self-serving testimony to indicate that these issues were so significant that they rendered him unfit to stand trial. As such, Applicant has failed to meet the burden imposed upon him of showing that he was prejudiced by counsel's failure to request a mental evaluation because there was a reasonable probability that he was incompetent at the time of his plea hearing. Applicant's claims must be denied and dismissed with prejudice.

Failure to Investigate

Applicant alleges that his counsel was ineffective for failing to investigate the facts of his case that would have shown he was incompetent.

"[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland*, 466 U.S. at 690-91. "In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular

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investigations unnecessary." *Id.* at 691. "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." *Id.*

"The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." *Id.* "Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant." *Id.* "In particular, what investigation decisions are reasonable depends critically on such information." *Id.*

In order to prevail upon a claim that counsel did not adequately prepare or investigate a case, an applicant must present evidence of what counsel could have discovered or what other defenses applicant could have requested counsel develop and present had counsel been more prepared. *Harris v. State*, 377 S.C. 66, 75-76, 659 S.E.2d 140, 145-46 (2008) (citing *Jackson v. State*, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998)). Furthermore, an applicant must also present evidence to show how the discoverable matters or defenses would have resulted in a different outcome. *Id.* (citing *Davis v. State*, 326 S.C. 283, 288, 486 S.E.2d 747, 749 (1997); *Skeen v. State*, 325 S.C 210, 214, 481 S.E.2d 129, 132 (1997)). Mere speculation as to how the alleged lack of preparation prejudiced an applicant is not sufficient to support a grant of relief. *Id.*, 377 S.C. at 75, 659 S.E.2d at 145 (citing *Glover v. State*, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995)).

Applicant stated that he discussed his prior mental health issues and childhood abuse with his attorney. He stated that his parents were aware of his mental health issues and they had reached out to his counsel about what he went through during his childhood. He did not explain the extent of this childhood abuse.

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Applicant's mother explained that many members of their family have issues with their mental health. Specifically her father was schizophrenic, and her grandson, niece, and nephew, along with Applicant, are autistic.

Applicant's counsel explained that he had received the discovery and reviewed it with Applicant prior to his plea hearing. He stated that he was unaware of any diagnosis of autism or ADHD and had not seen any school records indicating such a diagnosis. He explained that he had spoken with Applicant's grandmother who had raised him, but was not given concrete information about any mental health issues. Instead he was just told vaguely that Applicant was suffering from mental issues at the time.

This Court finds that Applicant's allegation that his counsel failed to properly investigate the facts of his case regarding his mental health and competency to be without merit. Applicant has failed to prove his counsel was deficient because, as described above, no reason necessitating a mental evaluation existed prior to trial. The record shows that counsel did investigate the issue by reaching out to Applicant's family members who would have actually known his mental status at the time of the trial, but he was not given anything compelling or reliable information on that point. Without more, Applicant cannot show that his counsel was obligated under prevailing professional norms to have him evaluated. Applicant has failed to prove that his counsel was deficient for failing to investigate the facts of his case or his mental health issues.

As for prejudice, Applicant has not presented any credible testimony or evidence that counsel's alleged failure to investigate would have uncovered. His mother's testimony is largely irrelevant and incredible because she had not observed Applicant for years before his plea hearing. Likewise, no medical records were presented corroborating any of Applicant's claims. As such, Applicant has failed to show what could have been discovered had counsel further investigated his

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case. He has failed to meet his burden of proving that he was prejudiced by his counsel's performance, the application therefore shall be dismissed and denied with prejudice.

V. 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), 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. 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 remain in the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 9th **day of** September **2021.**

H. STEVEN DEBERRY, IV
Presiding Judge
Seventh Judicial Circuit

Florence, South Carolina