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March 17, 2014

**VIA US MAIL**

Ashleigh R. Wilson, Esq.  
Assistant Attorney General  
P.O. Box 11549  
Columbia, SC 29211

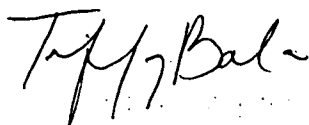
RE: **Bruce Hester vs. State of South Carolina**  
**Case #2013-CP-10-2851**

Dear Ms. Wilson:

Please find the enclosed filed Notice of Appeal and Proof of Service regarding the above referenced case. Should you have any questions please do not hesitate to contact Mr. Falk at the office.

Thank you for your assistance.

With best regards, I am,

  
Tiffany Barba, CP  
Paralegal  
Bush Law Group, P.C.

**RECEIVED**

MAR 19 2014

**S.C. SUPREME COURT**

Enclosures

cc: Supreme Court of South Carolina  
P.O. Box 11330  
Columbia, SC 29211

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

Honorable Kristi L. Harrington, Circuit Judge

Case No.: 2013-CP-10-2851

Bruce K Hester, 350900,.....Petitioner

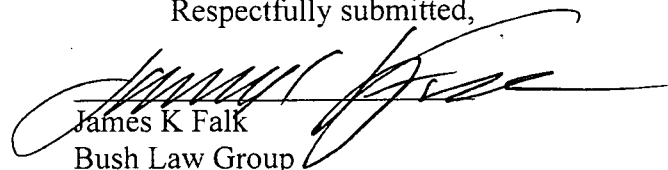
State of South Carolina, .....Respondent

**FILED**  
2014 MAR 17 PM 2:41  
JULIE J. ARMSTRONG  
CLERK OF COURT

**NOTICE OF APPEAL**

Petitioner, Bruce K. Hester, appeals the Honorable Kristi L. Harrington's February 28, 2014, ORDER OF DISMISSAL, of Petitioner's application for Post-Conviction Relief. Undersigned counsel received notice of the entry of the order on March 3, 2014. A copy of the order on appeal is attached to this notice

Respectfully submitted,



James K Falk  
Bush Law Group  
3 Broad Street, Suite 450  
Charleston, SC 29401  
Attorney for Applicant

**RECEIVED**

March 14, 2014

MAR 19 2014

**S.C. SUPREME COURT**

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

Honorable Kristi L. Harrington, Circuit Judge

Case No.: 2013-CP-10-2851

Bruce K Hester, 350900,.....Petitioner

State of South Carolina, .....Respondent

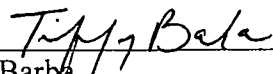
BY  
JULIE J. ARMSTRONG  
CLERK OF COURT

2014 MAR 17 PM 2:41

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**PROOF OF SERVICE**

I, Tiffany Barba, certify that I have today served the within notice of appeal upon the Respondent by depositing a copy of it in the United States Mail, postage prepaid, addressed to his attorney of record, Ashleigh R. Wilson, P.O Box 11549, Columbia SC 29211. I further certify that all parties required by Rule to served have been served this 17 day of March, 2014.

  
\_\_\_\_\_  
Tiffany Barba  
Paralegal to James K. Falk  
3 Broad Street, Suite 450  
Charleston, SC 29401

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STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF CHARLESTON )  
 )  
Bruce Kenny Hester, #350900, )  
 )  
Applicant, )  
 )  
v. )  
 )  
State of South Carolina, )  
 )  
Respondent. )

IN THE COURT OF COMMON PLEAS  
2013-CP-10-2851

ORDER OF DISMISSAL

FILED  
2014 MAR -3 PM 3:28  
JULIE HARRINGTON  
CLERK OF COURT

Presiding Judge: The Honorable Kristi L. Harrington  
Applicant's Attorney: James Falk, Esquire  
Respondent's Attorney: Ashleigh R. Wilson, Esquire  
Plea Counsel: Benjamin Lewis, Esquire  
Date of Hearing: January 15, 2014  
Court Reporter: Sharon Vizer

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed May 15, 2013. The Respondent made its Return on December 4, 2013. An evidentiary hearing into the matter was convened on January 15, 2014 at the Charleston County Courthouse. The Applicant was present at the hearing and represented by James Falk, Esquire. Ashleigh R. Wilson, Esquire, of the South Carolina Attorney General's Office represented the Respondent.

The Applicant testified on his own behalf at the PCR hearing. Applicant's plea counsel, Benjamin Lewis, Esquire, also testified at the hearing. This Court had before it the guilty plea transcript, the records of the Charleston County Clerk of Court, the Applicant's records from the South Carolina Department of Corrections, the PCR application, and Respondent's Return thereto.

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### PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Charleston County. The Applicant was indicted at the September and May 2011 terms of the Charleston County Grand Jury for armed robbery (2011-GS-10-0530) and forgery less than \$10,000 (2011-GS-10-3080). Benjamin Lewis, Esquire, represented the Applicant. The Applicant pled guilty to forgery and the lesser included offense of strong arm robbery. The Honorable T.L. Hughston sentenced the Applicant to confinement for five (5) years for forgery and ten (10) years for strong arm robbery. The sentences were to run concurrently. The Applicant did not appeal the plea or sentences.

### ALLEGATIONS

The Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel.
2. Constitutional violations.
  - a. Arrest in violation of his 4<sup>th</sup> amendment right.
  - b. State violated due process rights.
3. Subject matter jurisdiction.
  - a. Applicant did not waive presentment of indictment for armed robbery.
  - b. Court was without subject matter jurisdiction.

At the hearing, the Applicant waived all grounds for relief except ineffective assistance of counsel for counsel's failure to investigate and involuntary guilty plea.

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon his or her credibility. This Court has weighed the testimony accordingly. Set forth below are the

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relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

The Applicant testified he met with counsel two to three times. He testified he frequently corresponded with counsel by mail. The Applicant testified he discussed his Rule 5 materials with counsel. He testified counsel explained to him that to be found guilty of strong arm robbery the State did not need to prove he had a gun or a showing of force. The Applicant testified counsel tried to get him in the Strong Program, but the court would not allow it.

The Applicant testified trial counsel failed to investigate his case. The Applicant testified counsel should have obtained the Best Buy policy manual which would explain the store policy when a customer gets something from a locked cabinet. The Applicant testified counsel should have also investigated Detective Feeter to see if another detective was willing to drop the Applicant's charges. He testified further counsel should have gotten witness statements and if he had this information he would not have pled guilty.

The Applicant testified he initially wanted to go to trial and should have gone to trial because there was no gun. The Applicant also testified the victim gave multiple statements. The Applicant testified it was his decision to plead guilty. He testified he did not recall his attorney telling him about his constitutional rights. He testified he did recall counsel telling him he did not have to take the witness stand. He testified further he was also aware that a jury could not hold his silence against him. The Applicant also testified counsel told him he was presumed innocent. The Applicant testified counsel told him the State had to prove his guilt beyond a reasonable doubt.

The Applicant testified he recalled telling the plea judge he wished to plead guilty and that he was actually guilty. He testified he spoke with counsel about a jury trial. The Applicant

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testified he recalls the Court advising him of his potential sentences. He also testified he recalled telling the court that no one had threatened or coerced him to plead guilty. The Applicant testified counsel told him the State had to prove beyond a reasonable doubt that he had a gun. The Applicant testified he discussed with counsel the calling of witnesses at trial and he knew that State could call witnesses against him and his attorney would be able to question the State's witnesses.

Benjamin Lewis, Esquire testified he has been practicing criminal law for the last six years. He testified he was appointed to represent the Applicant on January 27, 2011. He testified he met with the Applicant at least five times and communicated frequently with him by mail. Counsel testified he filed Brady and Rule 5 motions on the Applicant's behalf. He testified he reviewed the discovery material with the Applicant including incident reports, witness statements, and video. Counsel testified there was no video of the alleged robbery and a big part of the case was that it did not matter if the Applicant actually had a gun because he represented that he had a gun to the victim. Counsel testified he discussed with the Applicant that not having a gun was not an absolute bar to prosecution for armed robbery, but may be a good defense.

Counsel testified prior to the Applicant's plea he discussed with the Applicant the elements of the charges he was facing and what the State was required to prove. Counsel testified he discussed with the Applicant the potential sentences and the fact that he had a prior robbery from Georgia and based on that prior robbery his case could have been eligible for life without parole. Counsel testified he would have tried the case, but the Applicant did not want to go to trial. He testified the Applicant's defense would have been the store video did not show anything.

Counsel testified Detective Feeter's testimony would not have been helpful because it

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was simply his interpretation of the video and his opinion that the Applicant was a nice guy. Counsel testified he did not want to present this type of evidence at trial. He testified Feeter's testimony could have been seen by the State as good character evidence and be used to attack the Applicant's character. Counsel testified as part of his investigation he went to Best Buy, obtained a blueprint of the store, and learned where all the cameras in the store were located. Counsel testified he obtained a copy of Best Buy's store policy manual. He testified from a trial strategy point of view he was not going to say the victim was at fault and the policy manual was not helpful to the Applicant's case. He testified further he investigated everyone willing to speak to him. He testified the victim was unwilling to speak with him, but he obtained the victim's statement from the solicitor.

Counsel testified that for the most part the Applicant was going to trial if the State did not offer anything less than armed robbery. He testified the State offered a plea straight up to forgery and the lesser included offense of strong arm robbery. Counsel testified he got the Applicant into the Strong Program but the court would not accept the program. Counsel testified he communicated the offer to the Applicant. He testified he discussed with the Applicant the consequences of his guilty plea and his constitutional rights. He testified he discussed with the Applicant his right to a jury trial, his right to remain silent, and his right to confront his accusers. Counsel testified it is also his general practice to review the sentencing sheet with his clients. He testified he discussed with the Applicant his right to appeal. He testified the Applicant is very intelligent and was aware of his constitutional rights at the time of his guilty plea. Counsel testified after their discussion about the Applicant's constitutional rights the Applicant indicated his desire to plead guilty.

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### Ineffective Assistance of Counsel

The Applicant alleges that he received ineffective assistance of counsel. As an initial matter, this Court finds the testimony of Benjamin Lewis, Esquire, to be credible. In a post-conviction relief action, the applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRPC; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. The applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test to evaluate allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Id. at 117, 386 S.E.2d at 625 (citing Strickland, 466 U.S. 668). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). When there has been a guilty plea, the applicant must prove that counsel's representation was below the standard of reasonableness

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and that, but for counsel's unprofessional errors, there is a reasonable probability that he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 58-59 (1985); Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001).

To be knowing and voluntary, a plea must be entered with a full understanding of the charges and the consequences of the plea. Boykin v. Alabama, 395 U.S. 238, 243-44 (1969); Dover v. State, 304 S.C. 433, 434, 405 S.E.2d 391, 392 (1991). When determining issues relating to guilty pleas, the court will consider the entire record, including the transcript of the guilty plea, and the evidence presented at the post-conviction relief hearing. Anderson v. State, 342 S.C. 54, 57, 535 S.E.2d 649, 657 (2000) (citing Harres v. Leeke, 282 S.C. 131, 318 S.E.2d 360 (1984)). When a defendant pleads guilty on the advice of counsel, the plea may only be attacked through a claim of ineffective assistance of counsel. Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2002) (citations omitted).

This Court finds counsel is a trial practitioner who has extensive experience in the trial of serious offenses. Counsel conferred with the Applicant on numerous occasions. During conferences with the Applicant, counsel discussed the pending charges, the elements of the charges and what the State was required to prove, the Applicant's constitutional rights, the Applicant's version of the facts, and possible defenses or lack thereof. The record reflects the Applicant's plea was entered freely, voluntarily, knowingly, and intelligently. The Applicant acknowledged that he was guilty of these offenses. The Applicant told the plea that no one had threatened him or promised him anything to plead guilty.

Regarding the Applicant's claims of ineffective assistance of counsel, this Court finds the Applicant has failed to meet his burden of proof. This Court finds that Applicant's attorney demonstrated the normal degree of skill, knowledge, professional judgment, and representation

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and that, but for counsel's unprofessional errors, there is a reasonable probability that he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 58-59 (1985); Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001).

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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). Counsel testified Detective Feeter's testimony may have opened the door for the State to attack the Applicant's character. This Court finds that this allegation is without merit and the Applicant has failed to carry his burden of proving counsel was ineffective for failing to fully investigate the Applicant's case.

This Court also finds the Applicant's guilty plea was entered freely and voluntarily. A guilty plea is a solemn, judicial admission of the truth of the charges against the defendant. Statements made during the plea should be considered conclusive unless the defendant presents reasons why he should be allowed to depart from the truth of those statements. Crawford v. U.S., 519 F.2d 347 (4<sup>th</sup> Cir. 1975); Edmonds v. Lewis, 546 F.2d 566 (4<sup>th</sup> Cir. 1976). The South Carolina Supreme Court has held that if the record reflects that the trial court has assured itself that the plea was voluntarily and intelligently entered with full knowledge of the nature of the offense, then lack of precise language in the record expressing these considerations is not of itself a valid reason for reversal. State v. Lambert, 266 S.C. 574, 579, 225 S.E.2d 340, 341 (1976). An enumeration of specific rights waived is not required where the record otherwise reveals affirmative awareness of the consequences of a guilty plea. Id. The voluntariness of a guilty plea is not determined by an examination of a specific inquiry made by the sentencing judge alone, but is determined from both the record at the time of the entry of the guilty plea and the record of the PCR hearing. Hynan v. State, 397 S.C. 35, 723 S.E.2d 375 (2012).

This Court finds and the record of the PCR hearing reflect the Applicant was fully advised of the consequences of his guilty plea and his constitutional rights prior to pleading guilty. The plea court advised the Applicant of his potential sentence (T. 3:9-13) and his right to

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a jury trial (T. 3:20-23). The Applicant also told the plea court that he had not been promised anything or threatened to plead guilty. (T. 4:3-5). This Court finds most persuasive counsel's testimony that he fully advised the Applicant of his constitutional rights and the elements of the charges he was facing prior to the Applicant's guilty plea. Counsel testified further that the Applicant was very intelligent and after their discussion about the Applicant's rights indicated he wanted to plead guilty. This Court also notes the Applicant's own testimony that he was made aware of several of his constitutional rights prior to his guilty plea. The Applicant testified he spoke with counsel and was aware of the following: his right to a jury trial, that he could confront the State's witnesses at trial, that he was presumed innocent, and that the State had to prove his guilt beyond a reasonable doubt. This Court finds in light of the record as a whole including the testimony presented at the evidentiary hearing, the Applicant's guilty plea was entered freely and voluntarily. This Court finds the Applicant failed to carry his burden of proving his guilty plea was not freely and voluntarily entered.

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test, specifically that counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that counsel committed either errors or omissions while representing the Applicant. The Applicant failed to show that counsel's performance was deficient. Therefore, this Court need not address prejudice. Applicant's complaints concerning counsel's performance are without merit and are denied and dismissed.

#### All Other Allegations

As to any and all allegations that were raised in the application in this matter and not specifically addressed in this Order, this Court finds the Applicant failed to present any

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testimony or argument regarding such allegations. Accordingly, this Court finds the Applicant waived such allegations. Therefore, they are hereby denied and dismissed.

**CONCLUSION**

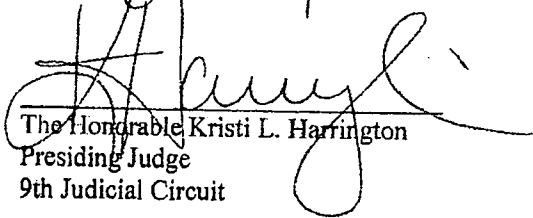
Based on all the foregoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations before or during his guilty plea and sentencing proceedings. Counsel was not deficient in any manner, nor was the Applicant prejudiced by counsel's representation. Therefore, this application for PCR must be denied and dismissed with prejudice.

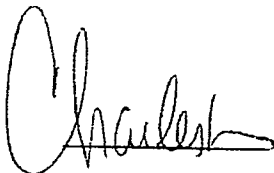
This Court advises the Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of written notice of entry of this Order to secure appropriate appellate review. His attention is also directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely served and filed.

**IT IS THEREFORE ORDERED:**

1. That the application for post-conviction relief be denied and dismissed with prejudice; and
2. That the Applicant be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 28<sup>th</sup> day of February, 2014.

  
The Honorable Kristi L. Harrington  
Presiding Judge  
9th Judicial Circuit

 South Carolina.

Bush Law Group, P.C.  
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Supreme Court of South Carolina  
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