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April 25, 2014

**Via Regular Mail**

Mr. Daniel E. Shearouse  
Clerk, The S.C. Supreme Court  
Post Office Box 11330  
Columbia, South Carolina 29211

**Re: OCTAVIUS LAMAR WHITMIRE v. State**

Dear Mr. Shearouse:

Enclosed you will find the original Notice of Appeal in the above matter along with Proof of Service upon the Respondents. The Notice has been filed with the Greenville County Clerk of Court.

These matters are being referred to the Office of Appellate Defense in that we were participating as Court appointed counsel at trial.

Thank you for your attention to this matter.

**RECEIVED**

Yours very truly,

APR 30 2014

**S.C. SUPREME COURT** Caroline M. Horlbeck  
Caroline M. Horlbeck, Esq.

Enclosure

cc: Office of the Attorney General  
Office of Appellate Defense

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas  
THE HONORABLE G. EDWARD WELMAKER

CA No. 2012-CP-23-7207

OCTAVIUS LAMAR WHITMIRE,

APPELLANT,

vs.

STATE OF SOUTH CAROLINA

RESPONDENT.

FILED-CLERK OF COURT  
GREENVILLE CO. S.C.  
PAUL B. WICKENS/IMB  
2014 APR 25 AM 10:53  
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APR 30 2014

NOTICE OF APPEAL

S.C. SUPREME COURT

Appellant OCTAVIUS LAMAR WHITMIRE, appeals from the Order of the Honorable G. EDWARD WELMAKER, Circuit Court Judge clocked March 25, 2014

Respectfully submitted,

*Caroline M. Horlbeck*

Caroline M. Horlbeck, Esq.  
101 Whitsett St  
Greenville, SC 29601

Date: April 25, 2014

Other Counsel of Record: Karen Ratigan, Esq.  
Assistant Attorney General  
Post Office Box 11549  
Columbia, SC 29211

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF GREENVILLE )  
 )  
 Octavius Lamar Whitmire, )  
 S.C.D.C. No. 249896, )  
 )  
 Applicant, )  
 )  
 v. )  
 )  
 State of South Carolina, )  
 )  
 Respondent. )

IN THE COURT OF COMMON PLEAS  
 C.A. No. 2012-CP-23-7207

**ORDER OF DISMISSAL**

FILED-CLERK OF COURT  
 GREENVILLE CO. S.C.  
 PAUL B. WICKENSIMMER  
 2014 FEB 25 PM 12 33

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed November 14, 2012. The Respondent made its return on May 3, 2013. An evidentiary hearing into the matter was convened on February 21, 2014 at the Greenville County Courthouse. The Applicant was present at the hearing and represented by Caroline Horlbeck, Esquire. Karen C. Ratigan, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

The Applicant testified on his own behalf at the PCR hearing. Also testifying was the Applicant's plea counsel, James W. Bannister, Esquire. The Court had before it the transcript of the guilty plea hearing, the Greenville County Clerk of Court records, the Applicant's South Carolina Department of Corrections records, the PCR application, and the return.

**PROCEDURAL HISTORY**

The Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Greenville County Clerk of Court. The Applicant was indicted at the June 2011 term of the Greenville County Grand Jury for trafficking cocaine (2011-GS-23-2911A). He was represented by James W. Bannister, Esquire.

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On October 11, 2012, the Applicant pled guilty pursuant to a negotiated sentence. The Honorable Steven H. John sentenced the Applicant to seven years for trafficking cocaine (10-28 grams), first offense. The Applicant did not appeal.

### **ALLEGATIONS**

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

1. Ineffective assistance of counsel:
  - a. Coerced the Applicant into pleading guilty.
  - b. Threatened the Applicant with a twenty-five year sentence.
  - c. “[M]ade it clear” to the Applicant that he should plead guilty because he could not pay an additional \$3000.
2. 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 their credibility. This Court has weighed the testimony accordingly.

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

#### **Ineffective Assistance of Counsel/Involuntary Guilty Plea**

The Applicant alleges his guilty plea was involuntary and that he received ineffective assistance of counsel. In a PCR action, “[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.” Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002).

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he

must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). When there has been a guilty plea, the applicant must prove that counsel's representation was below the standard of reasonableness 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. Hilli v. Lockhart, 474 U.S. 52, 58-59, 106 S. Ct. 366, 370 (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, 89 S. Ct. 1709, 1712 (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)).

The Applicant stated he retained plea counsel and had three meetings with him about his case. The Applicant stated they reviewed the State's evidence and his version of events. The Applicant stated, however, that they "somewhat" reviewed the search and seizure and that plea counsel should have further discussed the warrantless search. The Applicant stated plea counsel had questions about the drug dog at the preliminary hearing but did not say they'd argue this at trial. The Applicant stated they discussed that his defense would be that he was not the driver and the drugs were not his. The Applicant stated plea counsel told him – one week before the plea hearing – that the State made a plea offer for a seven-year sentence. The Applicant stated

he consulted with another attorney (Maurice McNab) and that attorney came to the courthouse and spoke to plea counsel. The Applicant stated, however, that the case was not continued and plea counsel told him a trial ~~counsel~~ <sup>could be</sup> cost \$3000 and he would receive a twenty-five year sentence. The Applicant stated this scared him, so he pled guilty. The Applicant admitted he told the plea judge he was guilty, the facts were accurate, and he was satisfied with plea counsel because this was part of the guilty plea process. The Applicant also admitted he did not tell the plea judge that he felt pressured to plead guilty.

Plea counsel confirmed he was retained. Plea counsel testified he filed discovery motions, received the discovery materials, and reviewed those materials "extensively." Plea counsel testified he likely met with the Applicant 10-15 times to review the case, discovery materials, and search. Plea counsel testified the Applicant admitted the drugs were his. Plea counsel testified he could not have called the Applicant as a witness, but would have argued the State could not prove the drugs were his. Plea counsel testified he reviewed the search and seizure with the Applicant. Plea counsel testified he spent one hour researching the drug dog's records and learned the dog was 50% accurate. Plea counsel testified there was a good argument in support of suppression and discussed this with the Applicant 4-5 times. Plea counsel testified the plea offer to reduce the charge to a first offense and offer a seven-year negotiated sentence was available for much longer than the week before the plea hearing. Plea counsel testified the Applicant neither wanted to accept the offer nor go to trial. Plea counsel testified the case as on the trial docket and he was prepared for trial. Plea counsel testified he was surprised when the Applicant brought McNab to court but that he spoke to McNab about the case and anticipated he would sit second chair to McNab at a trial. Plea counsel testified the State would have opposed any continuance request. Plea counsel testified he would have explained the sentence range for

the offense and the nature of a negotiated sentence. Plea counsel testified he did not pressure the Applicant to plead guilty, as he was prepared for trial.

The Applicant admitted to the plea judge both that he was guilty and that the facts recited by the solicitor were true. (Plea transcript, p.8; p.12). The Applicant also told the plea judge that he understood the trial rights he was waiving in pleading guilty, was satisfied with counsel, and had not been coerced in any way. (Plea transcript, pp.6-9). This Court finds there is no evidence in the guilty plea transcript to support the Applicant's assertion that he was pressured into entering a guilty plea; therefore the transcript has refuted this allegation. See Stalk v. State, 375 S.C. 289, 300, 652 S.E.2d 402, 407 (Ct. App. 2007); see also Rayford v. State, 314 S.C. 46, 48-49, 443 S.E.2d 805, 806 (1994) (where transcript of guilty plea proceeding refuted applicant's claim that he did not understand the terms of a plea bargain, grant of PCR was inappropriate notwithstanding applicant's claim lawyer misadvised him). This Court finds the Applicant entered a knowing and voluntary guilty plea. See Boykin v. Alabama, 395 U.S. at 243-44, 89 S. Ct. at 1712.

This Court finds the Applicant failed to meet his burden of proving plea counsel did not properly investigate and review the case. Plea counsel testified he reviewed discovery materials with the Applicant several times. Plea counsel testified he and the Applicant discussed the search and seizure issue, as well as the results of his investigation into the drug dog. This Court notes plea counsel is a very experienced criminal defense attorney and finds his testimony is credible. This Court finds plea counsel conducted a thorough investigation and was prepared to take the Applicant's case to trial. This Court finds the Applicant has failed to articulate what more plea counsel should have done to investigate and prepare his case. This Court also finds the Applicant has failed to present evidence of what counsel would have found with a more

thorough investigation. See Davis v. State, 326 S.C. 283, 486 S.E.2d 747 (1997) (denying relief where applicant failed to present witnesses or specific testimony establishing he would have had a defense with additional time to prepare for trial).

This Court finds the Applicant failed to meet his burden of proving plea counsel pressured him into pleading guilty. This Court finds credible plea counsel's testimony that he was prepared for trial in this case. This Court finds plea counsel explained the terms of the plea offer to the Applicant and the sentencing range for the offense. This Court finds that, while the Applicant made a last-minute attempt to secure new counsel and delay the trial, the Applicant ultimately made a voluntary and informed decision to accept the State's offer of a seven-year negotiated sentence. This Court notes the Applicant told the plea judge that he understood the questions asked of him during the plea colloquy and had given truthful answers. (Plea transcript, p.13). This Court finds the guilty plea transcript refutes the Applicant's assertions that he was pressured into pleading guilty and had been told how to answer the judge's questions. See Stalk, 375 S.C. at 300, 652 S.E.2d at 407.

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test – that plea counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that plea counsel committed either errors or omissions in his representation of the Applicant. This Court also finds the Applicant has failed to prove the second prong of Strickland – that he was prejudiced by plea counsel's performance.

This Court concludes the Applicant has not met his burden of proving counsel failed to render reasonably effective assistance. This Court also concludes the Applicant has failed to meet his burden of proving his guilty plea was not knowing and voluntary. See Frasier v. State,

351 S.C. at 389, 570 S.E.2d at 174.

**All Other Allegations**

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this Order, this Court finds the Applicant failed to present any testimony, argument, or evidence at the hearing regarding such allegations. Accordingly, this Court finds the Applicant has abandoned any such allegations.

**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 and the Applicant was not prejudiced by counsel's representation. Furthermore, the Applicant's guilty plea was entered knowingly and voluntarily within the mandates of Boykin. Therefore, this PCR application must be denied and dismissed with prejudice.

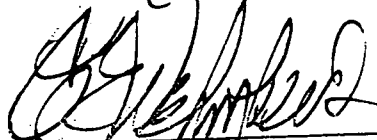
This Court advises the Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order if he wants to secure appropriate appellate review. His attention is also directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate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

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**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 19 day of March 2014.



G. Edward Welmaker  
Presiding Judge  
Thirteenth Judicial Circuit

Greenville, South Carolina.



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*Attorney At Law*

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