

# THE BOOZER LAW FIRM, LLC

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**Lance S. Boozer, Esq.\***

\*Also admitted in Florida

1400 Laurel Street, Suite 4A  
Columbia, SC 29201

Telephone: 803-608-5543  
Fax: 803-926-3463

Email: [lsb@boozerlawfirm.com](mailto:lsb@boozerlawfirm.com)  
Website: [www.boozerlawfirm.com](http://www.boozerlawfirm.com)

September 1, 2017

The Honorable Daniel E. Shearouse  
Clerk, Supreme Court of South Carolina  
P.O. Box 11330  
Columbia, SC 29211

The Honorable Anita Williams  
Marlboro County  
P.O. Drawer 996  
Bennettsville, SC 29512

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SEP 05 2017

S.C. SUPREME COURT

**RE: Justin Henderson, #296885, v. State of South Carolina  
2014-CP-34-172**

Dear Mr. Shearouse and Ms. Williams:

Enclosed for filing is a Notice of Appeal in the above-referenced case. Also enclosed are the following:

- (1) Proof of Service of the Notice of Appeal;
- (2) A copy of the Order which is to be challenged on appeal; and
- (3) Prior Order of Appointment of Counsel.

As I was appointed to represent Mr. Henderson in his PCR proceeding, I anticipate that the Office of Appellate Defense will represent Mr. Henderson in this appeal.

Yours very truly,



Lance S. Boozer

cc: Johnny James, AAG  
Office of Appellate Defense  
Justin Henderson, #296885

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM MARLBORO COUNTY  
Court of Common Pleas

S.C. SUPREME COURT

The Honorable G. Thomas Cooper, Jr., Circuit Court Judge

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Case No. 2014-CP-34-172

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Justin Henderson, #296885, .....Petitioner,

v.

State of South Carolina,.....Respondent.

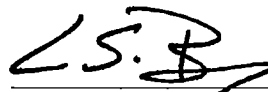
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**NOTICE OF APPEAL**

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The Petitioner appeals the Honorable G. Thomas Cooper's Order dated August 24, 2017, and filed August 29, 2017, denying post-conviction relief to the Petitioner and received by undersigned counsel on August 31, 2017. A copy of the Order on appeal is attached to this notice.

Respectfully submitted,



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Lance S. Boozar  
The Boozar Law Firm, LLC  
1400 Laurel Street, Suite 4A  
Columbia, SC 29201  
Tele: 803-608-5543

September 1, 2017

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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S.C. SUPREME COURT

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APPEAL FROM MARLBORO COUNTY  
Court of Common Pleas

The Honorable G. Thomas Cooper, Jr., Circuit Court Judge

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Case No. 2014-CP-34-172

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Justin Henderson, #296885, .....Petitioner,

v.


State of South Carolina,.....Respondent.

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**PROOF OF SERVICE**

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I, Lance S. Boozer, attorney for Petitioner, certify that I have today served within Notice of Appeal upon the Respondent by depositing a copy of it in the United States Mail, postage prepaid, addressed to Assistant Attorney General Johnny James, P.O. Box 11549, Columbia, SC 29211. I further certify that all parties required by Rule to be served have been served this 1st day of September, 2017.

  
Lance S. Boozer  
The Boozer Law Firm, LLC  
1400 Laurel Street, Suite 4A  
Columbia, SC 29201  
Tele: 803-608-5543

STATE OF SOUTH CAROLINA )  
COUNTY OF MARLBORO )

Justin Henderson, #296885, )

Applicant, )

v. )

State of South Carolina, )

Respondent. )

IN THE COURT OF COMMON PLEAS  
FOR THE FOURTH JUDICIAL CIRCUIT

Case No. 2014-CP-34-0172

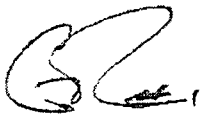
**ORDER OF DISMISSAL  
WITH PREJUDICE**

This matter comes before the Court by way of an Application for Post-Conviction Relief filed June 11, 2014. Respondent made its Return on June 17, 2015. An evidentiary hearing into the matter was convened on January 11, 2017 at the Marlboro County Courthouse. Lance Boozer, Esquire, represented Applicant. Valerie Garcia Giovanoli, Esquire, of the Office of the Attorney General represented Respondent.

At the hearing, Applicant testified on his own behalf. Applicant's plea counsel, T. Brandon Steen ("Counsel"), also testified. This Court had before it a copy of the records of the Marlboro County Clerk of Court, records from the South Carolina Department of Corrections, the application, Respondent's return, and the Guilty Plea transcript.

**PROCEDURAL HISTORY**

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Marlboro County Clerk of Court, the Greenville County Clerk of Court, and the Pickens County Clerk of Court. Only the Marlboro Charges are relevant to this application. In April 2013, the Marlboro County Grand Jury indicted Applicant for murder (2013-GS-34-106) and possession of a weapon during the commission of a violent crime (2013-GS-34-107). T. Brandon Steen, Esquire, represented Applicant. On December 3, 2013,



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Applicant pled guilty to voluntary manslaughter and possession of a weapon during the commission of a violent crime. The Honorable Edward B. Cottingham sentenced Applicant to twenty years imprisonment for voluntary manslaughter and a consecutive five (5) years imprisonment for possession of a weapon during the commission of a violent crime.<sup>1</sup> Applicant did not appeal his plea or sentence.

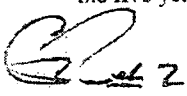
In his application, Applicant alleges he is being held in custody unlawfully for the following reasons:

1. "Ineffective Assistance of Counsel"
  - a. "Applicant contends that counsel rendered ineffective assistance of counsel because counsel failed to properly move to quash the indictments [...]"
  - b. "Applicant contends that counsel was ineffective for not informing nor explaining to Applicant his right to a direct appeal [...]"
  - c. "Applicant contends that counsel rendered ineffective assistance of counsel by ordering Applicant to plead guilty [...] even though Applicant wanted to go to trial [...]"
2. "Involuntary Guilty Plea"
  - a. "Applicant contends that his guilty plea was involuntarily made [...]"

At the hearing, Applicant proceeded on his claims of ineffective assistance of counsel and involuntary guilty plea.

At the start of the hearing, Applicant requested a continuance on the basis that Applicant had hired a private investigator, but that the investigator had failed to produce anything for Applicant. Applicant insisted on finding another inmate, Earl Warren, who he claims he asked to get help after stabbing his cell mate. Applicant's PCR counsel, Mr. Boozer, and Applicant had both attempted to reach this other inmate, with no success. Applicant also addressed the Court under oath, and provided details of the incident. Applicant claimed that he stabbed the victim

<sup>1</sup> Applicant committed these offenses while serving a prison sentence for his Greenville/Pickens convictions. Judge Cottingham ordered the twenty year sentence to be served concurrently with the Greenville/Pickens sentences and the five year sentence is to begin upon its completion.



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and the victim stabbed Applicant<sup>2</sup> and then he asked Warren to get help from an officer twice. Respondent argued that Applicant filed his application in June of 2014 and was appointed counsel shortly thereafter in August 2014. Applicant has had ample opportunity to track down this alleged witness. Furthermore, Respondent argued that the case had been previously set for hearing twice and that two continuances had already been granted for the same reason. Additionally, Respondent's witness travelled from Columbia for this case. This Court denies the request for a continuance, but will allow Applicant to supplement the record for a period not to exceed sixty days from the date of the PCR hearing.

### SUMMARY OF TESTIMONY

#### **Applicant testified as follows:**

Applicant was charged with murder, but pled guilty to voluntary manslaughter. He also pled guilty, as indicted, to possession of a weapon. He received five years for the weapon charge, consecutive to the voluntary manslaughter sentence. He was sentenced to 20 years for voluntary manslaughter. Applicant assumed that his sentence was concurrent to the sentence he was already serving at the time of the incident. Applicant thought that concurrent meant that he would get the credit for the time he had been serving on his previous sentence, however, a new twenty year sentence was started after he pled guilty. Applicant also thought that his voluntary manslaughter sentence was non-violent, but it is classified as violent. Applicant claims that Counsel should have moved to quash his indictment because there was no true billed signature on the face of the indictment.

Applicant and the victim were members of rival gangs. Prior to the killing, Applicant filed many grievances to get transferred out of Evans. Applicant testified that he first met

<sup>2</sup> The record and the evidence therein indicate that the victim was stabbed in the back of the throat, the neck, across the chest, and across the throat. Nothing in the record indicates Applicant received any wounds. Additionally, Applicant attested to those facts, under oath, during his guilty plea.

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Counsel at Evans Correctional Institute. Applicant was later transferred to Lee Correctional Institute and Counsel came to visit him there twice. Counsel brought his Rule 5/discovery material with him. Counsel only reviewed it with Applicant, but did not leave Applicant a copy. Applicant recalls the state offered him thirty (30) years and he rejected the offer, informing Counsel that he wanted a trial. Applicant says that the plea was not discussed until the day of his trial. Applicant recalls four (4) total meetings with Counsel. In those meetings, they discussed what happened, statements given, and trial.

Applicant claims that Counsel told him Applicant could take a polygraph at the State's expense and the results would be confidential. Counsel also told him that he arranged for a polygraph test a couple weeks later. Applicant reviewed Counsel's case notes and noticed that there were no notes indicating Counsel had spoken to anyone to arrange a polygraph test. Applicant testified that after the stabbing, he yelled to another inmate, Earl Warren, who was performing janitorial tasks at the time, to get a correctional officer's help. Applicant told Counsel about Warren. SLED spoke to Warren. Warren told SLED he knew nothing. Applicant assumes Counsel read that in the report and did not pursue contacting Warren. Counsel never spoke to Warren.

Applicant testified that he later found the State's offer was reasonable because he thought concurrent meant that he would receive credit for the time he had already served on an unrelated conviction. Applicant testified that he was transferred out of Evans to Lee, but then his Counsel arranged to have him transferred back, despite Applicant's concern for his safety, because it was more convenient for Counsel to visit him at Evans. Applicant alleges that Counsel also used this location at Evans as coercion to get him to plead guilty, by offering transport to a different facility as part of the plea deal.

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Applicant asked Counsel about going to trial and Counsel informed him that he could still proceed to trial. Applicant recalls discussing jury selection and motions for charges on voluntary and involuntary manslaughter. Applicant claims that he did not speak up about wanting a trial at his plea because he just wanted out of Evans. Applicant was also embarrassed because there were a class of students present in the court. Applicant claims when he asked Counsel what evidence they had against him, Counsel replied that he did not know.

Counsel gave Applicant a copy of his Rule 5 material at his plea and also mailed one to Applicant. Applicant complains that investigative reports were missing pages and medical reports and letters were missing. Applicant testified that he was never aware of his right to appeal his conviction and sentence. Applicant admitted that he had no discussion of an appeal with Counsel. Sometime after Applicant's guilty plea, Applicant sent Counsel a letter asking about an appeal. Counsel wrote back to him and explained that the time to file an appeal had lapsed.

**Counsel testified to the following:**

Counsel was appointed to Applicant's case as a Marlboro County Public Defender. Counsel had been with the Public Defender's Office for one year at the time. Applicant had handled prior murder cases. Counsel recalls meeting Applicant twice at Lee Correctional Institute and three other times at the courthouse. Counsel reviewed all of the evidence with Applicant. Counsel did not notice any flaws in the indictment. There was a lot of discovery in the case and Counsel reviewed all of it. When he noticed something was missing, Counsel would request it from the solicitor. Counsel received additional discovery from the assistant solicitor.

Counsel authenticated his case notes which were then moved into evidence as

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Applicant's exhibit 1. Counsel recalled that Applicant's primary concern was his safety. Counsel testified that he played no part in where Applicant was housed or any transfers. Counsel confirmed his notes indicating that he mailed Applicant's Rule 5 material to Lee, unaware that Applicant had been transferred back to Evans. It was an important part of the ultimate plea deal to ensure Applicant would not stay at Evans. Counsel testified that he received an offer from the State for thirty years for murder and relayed it to Applicant. On December 2, 2013, in chambers, Judge Cottingham encouraged the State to accept a plea to the lesser included offense of voluntary manslaughter and indicated that he would sentence Applicant to twenty years. A hearing was held December 3, 2013 for Applicant to accept or reject plea offer.

Prior to Applicant's plea, Counsel was preparing the case for trial. Counsel had subpoenaed records from South Carolina Department of Corrections. The case was scheduled for trial the next year, so Counsel felt he had plenty of time to prepare the case and was doing so. Counsel authenticated his hand written notes taken during a meeting he had with Applicant. The notes were introduced into evidence as Applicant's exhibit 2. Counsel and Applicant discussed Earl Warren during the meeting. They also discussed a polygraph test and self-defense. Counsel testified that he did not receive the SCDC records prior to Applicant's plea, but that had he received them and continued to prepare for trial, he would have reviewed them and interviewed any potential witnesses. Applicant had not spoken to Warren, but it was still early in trial preparations.

Counsel was not prepared for Applicant to plead guilty at the December hearing. He expected Applicant to reject the offer and continue to prepare for trial. Counsel testified that the December hearing, in which Applicant ultimately pled guilty, was not the trial date. Counsel did advise him that a plea to voluntary manslaughter was in his best interest, but also advised him

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MARLBOROUGH COUNTY, S.C.

that it was his decision. Counsel informed Applicant of the difference in concurrent and consecutive with regard to his sentence. Applicant never expressed any confusion with regard to the term concurrent and never asked for clarification. Applicant's only expressed concern in the negotiated plea was being transferred out of Evans. Applicant informed Counsel that he would accept the plea offer if he could be transported to a different facility. After Applicant's guilty plea, he was transported out of Evans, pursuant to his plea agreement.

Counsel received a letter requesting an appeal and responded in a letter informing Applicant that it was too late for an appeal. Counsel would have filed a notice of appeal on Applicant's behalf had he requested one within the required time period. Counsel recalls no discussion of an appeal with Applicant, outside of the untimely request letter. Counsel claims that the information from SCDC would have helped drop the murder charge to voluntary manslaughter, but that Applicant ultimately pled to voluntary manslaughter anyway.

**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 at the post-conviction relief hearing. This Court has had the opportunity to observe the witnesses presented at the hearing, and can weigh their testimony and credibility accordingly. Below are the findings of fact and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (2017). This Court finds the testimony of Counsel to be credible. This Court finds that Applicant's testimony is generally not credible, but that some of his testimony was credible, as discussed in detail below.

**Ineffective Assistance of Counsel**

Applicant alleges he received ineffective assistance of counsel. Applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence. (Citing Rule 1(e))

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SCRCF). When an applicant alleges ineffective assistance of counsel, 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, 104 S.Ct. 2052 (1984); Butler v. State, 286 S.C. 441, 334 S.E. 2d 813 (1985).

Applicant must prove that counsel's performance was deficient. Attorneys are held to an objective standard of "reasonably effective assistance" under "prevailing professional norms." Cherry v. State, 300 S.C. at 117, 386 S.E. 2d at 625, citing Strickland. The presumption will always be that counsel was effective and the applicant must overcome the presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E. 2d 624 (1989). The probability must lie that because of counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the proceeding. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984). A guilty plea defendant is entitled to effective assistance of counsel. In a PCR action, the guilty plea defendant must prove that because of counsel's deficient performance, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S. Ct. 366 (1985).

1. Failure to move to quash indictment

This Court finds Applicant has failed to meet his burden to prove Counsel rendered ineffective assistance for failing to move to quash Applicant's indictment. Applicant alleges his indictment is fatally flawed because it lacks the grand jury foreperson's signature. Respondent submits that the flaw is not fatal, but rather a scrivener's error.

First, because defects in the indictment do not affect subject matter jurisdiction, this Court need only address Counsel's failure to move to quash the indictment. See State v. Gentry, 363

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S.C. 93, 610 S.E.2d 494 (2005); U.S. v. Cotton, 535 U.S. 625, 122 S.Ct. 1781 (2002). The indictment is a notice document, and any challenges to its sufficiency must be made in accordance with S.C. Code Ann. § 17-19-90 (2003). *See also* S.C. Code § 17-19-20 (2003). Proceedings in a court of general jurisdiction will be presumed regular absent evidence to the contrary. *Pringle v. State*, 287 S.C. 409, 339 S.E.2d 127 (1986). In *Pringle*, the Supreme Court of South Carolina held an indictment which the grand jury foreman failed to sign was proper and the lower court had jurisdiction where there was evidence the regular indictment procedure had been followed. However, the jury foreman's signature is not essential to the validity of the indictment. *Id.*

In this case, Applicant has presented no evidence that the proceedings of the grand jury were irregular or that the proper procedure in securing the indictment was not followed. Simply the lack of a grand jury foreman's signature, alone, does not render the indictment defective. Therefore, Applicant has failed to show how moving to quash his indictment would have changed the course of events in his case. Applicant pled guilty and admitted, under oath, to the crime of voluntary manslaughter. Applicant also admitted to this court, under oath, that he stabbed the victim. No evidence has been presented that had Counsel moved to quash the indictment, Applicant would not have pled guilty. Applicant presents no evidence that a motion to quash the indictment would have been successful either. Furthermore, had Counsel moved to quash the indictment, the solution would have been to simply amend the indictment.

This Court finds that Applicant has failed to meet his burden to demonstrate how Counsel's failure would have changed Applicant's knowing and voluntary decision to plead guilty. Therefore, this claim is denied and dismissed with prejudice.

II. Failure to inform Applicant of right to appeal



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This Court finds that trial counsel was not ineffective for failing to file an appeal. The United States Supreme Court has rejected a "bright-line rule that counsel must always consult with the defendant regarding an appeal." Roe v. Flores-Ortega, 528 U.S. 470, 480, 120 S. Ct. 1029, 1036, 145 L. Ed. 2d 985 (2000). They instead held that "counsel has a constitutionally imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing." Id. "[A]lthough not determinative, a highly relevant factor in this inquiry will be whether the conviction follows a trial or a guilty plea, both because a guilty plea reduces the scope of potentially appealable issues and because such a plea may indicate that the defendant seeks an end to judicial proceedings." Id.

This Court finds that this allegation is without merit and Applicant has failed to carry his burden of proving Counsel was ineffective for failing to inform Applicant of his right to appeal. This Court finds that Counsel had no reason to think a rational defendant would want an appeal or that Applicant, specifically, demonstrated to Counsel that he was interested in appealing. This Court finds Applicant's testimony that he never discussed an appeal with Counsel and that the only time he expressed a desire to appeal was in his letter requesting an appeal, after the time for an appeal had expired, to be credible. This Court finds Counsel gave credible testimony that Applicant had never discussed an appeal with him and that Counsel received a letter from Applicant requesting an appeal, but that it was too late. Counsel also testified that had Applicant made a timely request to him, he would have filed a notice of appeal on Applicant's behalf. This Court finds that there is no evidence that a rational defendant would want to appeal or that the Applicant indicated he wanted to appeal.



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Because this Court finds Counsel was not deficient for failing to inform Applicant of his right to appeal, this claim is denied and dismissed with prejudice.

III. Counsel ordered Applicant to plead guilty instead of going to trial (Involuntary Guilty Plea)

This Court disposes of Applicant's claim that he was ordered by Counsel to plead guilty in conjunction with Applicant's involuntary guilty plea claim. This Court finds Applicant has failed to meet his burden to prove that his guilty plea was involuntarily entered or that Counsel was ineffective in advising Applicant to plead guilty.

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 (1969); Dover v. State, 304 S.C. 433, 405 S.E.2d 391 (1991). In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing. Harris v. Leeke, 282 S.C. 131, 318 S.E.2d 360 (1984).

This Court finds the transcript reflects that the pleas were knowingly and voluntarily entered with a full understanding of the charges and consequences of the plea. Boykin, supra; Dover, supra. Further, because a guilty plea is a solemn, judicial admission of the truth of the charges against an individual, a criminal inmate's right to contest the validity of such a plea is usually, but not invariably, foreclosed. Blackledge v. Allison, 431 U.S. 63, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977). Therefore, statements made during a guilty plea should be considered conclusive unless a criminal inmate presents valid reasons why he should be allowed to depart from the truth of his statements. Edmonds v. Lewis, 546 F.2d 566 (4th Cir. 1976).

A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of the plea by showing that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's

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errors, the defendant would not have pled guilty, but would have insisted on going to trial. Roscoe v. State, 345 S.C.16, 546 S.E.2d 417 (2001); Richardson v. State, 310 S.C. 360, 426 S.E.2d 795 (1993). Given the Applicant's burden of proof and the analysis to be applied to this claim, the Court finds the Applicant's claim of involuntary plea is, in essence, a claim of ineffective assistance of counsel.

This Court finds Applicant's allegation that Counsel ordered him to plead guilty instead of going to trial meritless. Counsel's case notes indicate and Counsel gave credible testimony that he was preparing to take this case to trial. Counsel was aware of Applicant's desire to pursue trial and had initiated his preparations by meeting with Applicant and discussing trial, a self-defense claim, potential witnesses, and a polygraph test. Counsel also subpoenaed records from the South Carolina Department of Corrections to assist in his trial preparations. Counsel had reviewed all of the discovery and evidence he received from the assistant solicitor, and on more than one occasion, requested more. This Court also finds credible Applicant's testimony that he met with Counsel at least four times and they discussed what happened, statements given, trial, a polygraph test, and Earl Warren. Applicant also admitted that Counsel brought the Rule 5 discovery and reviewed it with Applicant. Applicant's testimony that Counsel had him transported back to Evans in order to coerce Applicant to plead guilty is not credible, nor as any allegation that Counsel forced Applicant to plead guilty.

This Court also finds credible Counsel's testimony that he advised Applicant that accepting the plea offer was in Applicant's best interest, but always told Applicant that it was his decision to plead guilty and go to trial and Counsel would proceed based on Applicant's decision. Additionally, the record reflects that the plea court, in fact, inquired if Applicant was pleading freely and voluntarily to which Applicant, under oath, replied that he was.

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10, I. 5-7. This Court finds no reason to depart from the statements made during Applicant's guilty plea. Applicant has presented insufficient evidence to prove that he was forced or coerced to plead guilty. Therefore, this Court finds Counsel was not ineffective in his advice to Applicant that a guilty plea was in his best interest and that Applicant entered his plea freely and voluntarily

This Court finds that Applicant's guilty plea was entered into knowingly and voluntarily and upon the sound advice of competent counsel who was effective in his complete representation of Applicant. As such, this claim is denied and dismissed with prejudice.

### CONCLUSION

Based on all the foregoing, this Court finds and concludes that Applicant has not established any violations 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 also finds that Applicant failed to present evidence as to the other allegations, and thus, this Court deems the other allegations abandoned.

This Court notifies Applicant that he must file and serve a notice of appeal within thirty (30) days from receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. An applicant has a right to an appellate counsel's assistance when they are seeking review of the denial of PCR. Austin v. State, 305 S.C. 453 (1991). If an applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. See Rule 71.1 (g), SCRCP. You must look at Rule 243 of the South Carolina Appellate Court Rules for appropriate procedures for appeal.

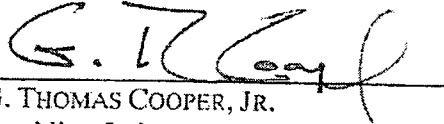
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HAYLEBORO COUNTY, S.C.

**IT IS THEREFORE ORDERED THAT:**

1. The application for Post-Conviction Relief is denied and dismissed with prejudice;
2. Applicant shall remain in the custody of the South Carolina Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 24 day of August, 2017.



G. THOMAS COOPER, JR.  
Presiding Judge  
Fourth Judicial Circuit

Candor, South Carolina

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MARLBORO COUNTY, S.C.

