

THE

**GIESE**

LAW FIRM, LLC

September 12, 2016

Daniel E. Shearouse  
Clerk of Court  
Supreme Court of South Carolina  
Post Office Box 11330  
Columbia, SC 29211

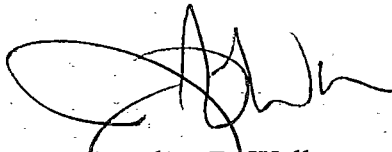
Re: Eriva Youomous vs. State of South Carolina  
C/A No: 2014-CP-40-05460

Dear Mr. Shearouse:

Please find enclosed one (1) original and one (1) copy each of Applicant's Notice of Appeal and Certificate of Service in the above referenced case. I would appreciate you filing the original and returning the clocked copies in the enclosed envelope.

I was appointed to represent Mr. Youomous in this matter and am also enclosing a copy of the Order Granting Relief in Part and Denying Relief in Part. If you have any questions, please do not hesitate to ask. My telephone number is 803-708-6767.

Sincerely,



Jonathan D. Waller

Cc: J. Clayton Mitchell, South Carolina Office of Attorney General

Enclosures

**RECEIVED**

SEP 14 2016

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM RICHLAND COUNTY  
G. Thomas Cooper, Jr., Circuit Court Judge

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2014-CP-40-05460

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**RECEIVED**  
SEP 14 2016  
S.C. SUPREME COURT

Eriva Youomous, #231443,

Appellant,

v.

STATE OF SOUTH CAROLINA,


Respondent.

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NOTICE OF APPEAL

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Eriva Youomous, #231443, appeals the Order Granting Relief in Part and Denying Relief in Part in regards to his Application for Post-Conviction Relief filed July 22, 2016 and served on counsel by letter dated September 6, 2016 issued by the Honorable G. Thomas Cooper, Jr., Presiding Judge, Fifth Judicial Circuit.



Jonathan D. Waller

Greese Law Firm  
SC Bar No.: 76290  
1315 Blanding Street  
Columbia, SC 29201  
803-708-6767 (phone)  
803-708-6769 (fax)  
jonathanwallerlaw@gmail.com  
ATTORNEY FOR PETITIONER

This 12 day of September, 2016.

Other Counsel of Record:  
J. Clayton Mitchell, Assistant Attorney General  
Post Office Box 11549  
Columbia, SC 29211  
(803) 734-3319

STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM RICHLAND COUNTY  
G. Thomas Cooper, Jr., Circuit Court Judge

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2014-CP-40-05460

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S.C. SUPREME COURT

Eriva Youomous, #231443,

Appellant,

v.

STATE OF SOUTH CAROLINA,

Respondent.

---

CERTIFICATE OF SERVICE

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The undersigned hereby certifies that one copy of the Appellant's Notice of Appeal in the above-entitled case has been served upon opposing counsel, J. Clayton Mitchell, Assistant Attorney General, by mailing in an envelope properly addressed with postage prepaid on this 12<sup>th</sup> day of September 2016, to his office located at P.O. Box 11549, Columbia, SC 29211.

  
\_\_\_\_\_  
Kelly Giese

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

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2014CP4005460

Eriva #231443 Youmous

State of South Carolina

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: \_\_\_\_\_

Attorney for :  Plaintiff  Defendant or  Self-Represented Litigant

**DISPOSITION TYPE (CHECK ONE)**

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):**  Rule 12(b), SCRPC;  Rule 41(a), SCRPC Vol. Nonsuit;  Rule 43(k), SCRPC (Settled);  Other \_\_\_\_\_
- ACTION STRICKEN (CHECK REASON):**  Rule 40(j), SCRPC;  Bankruptcy;  Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award of the \_\_\_\_\_
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**  Affirmed;  Reversed;  Remanded;  Other \_\_\_\_\_

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:  See attached order (formal order to follow)  Statement of Judgment by the Court:

**ORDER INFORMATION**

This order  ends  does not end the case.

Additional Information for the Clerk : \_\_\_\_\_

**INFORMATION FOR THE JUDGMENT INDEX**

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order: \_\_\_\_\_

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge \_\_\_\_\_ Judge Code \_\_\_\_\_ Date \_\_\_\_\_

**For Clerk of Court Office Use Only**

This judgment was entered on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_ and a copy mailed first class or placed in the appropriate attorney's box on this 25 day of July, 2014 to attorneys of record or to parties (when appearing pro se) as follows:

Jonathan D Waller

James Clayton Mitchell III

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter \_\_\_\_\_

Clerk of Court Jeanette W. McBride

STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND

Eriva Youomous, #231443,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS  
FIFTH JUDICIAL CIRCUIT

2014-CP-40-05460

ORDER GRANTING RELIEF IN PART  
AND DENYING RELIEF IN PART

RICHLAND COUNTY  
FILED  
2016 JUL 22 AM 11:25  
MEANETTE W. MCBRIDE  
C.C.P. & G.S.

This matter comes before the Court pursuant to an application for post-conviction relief (PCR) filed September 8, 2014. Respondent filed a Return on March 12, 2015, requesting an evidentiary hearing be convened. Jonathan D. Waller, Esquire, was appointed to represent Applicant. An evidentiary hearing was held on March 29, 2016, at the Richland County Courthouse. Applicant was present and represented by Counsel Waller. J. Clayton Mitchell, Esquire, of the South Carolina Attorney General's Office, represented Respondent.

At the PCR hearing, Applicant testified on his own behalf. Also testifying were Applicant's plea counsel, Mark A. Sawyer, Jr., Esquire. This Court had before it the Richland County Clerk of Court records, Applicant's South Carolina Department of Corrections records, the PCR application, the Return, and the transcript.

**I. PROCEDURAL HISTORY**

Applicant is currently incarcerated with the South Carolina Department of Corrections pursuant to the Richland County Clerk of Court's orders of commitment. The Richland County Grand Jury indicted the Applicant for Kidnapping (2013-GS-40-01495), two (2) counts of Assault and Battery – First degree (2014-GS-40-05968, -01506), two (2) counts of Grand Larceny – Value more than \$2,000 but less than \$10,000 (2013-GS-40-05998), Failure to Stop

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for a Blue Light (2013-GS-40-01508), Resisting Arrest (2013-GS-40-01507), three (3) counts of Financial Transaction Card Fraud – \$5,000 or less (2013-GS-40-6403, -6404, -6405).

On September 3, 2013, the Applicant pled guilty as indicted. The Honorable DeAndrea G. Benjamin sentenced the Applicant to an aggregate term of twenty-five (25) years imprisonment. A notice of appeal was filed on the Applicant's behalf at the South Carolina Court of Appeals. By Order dated November 14, 2013, the Court of Appeals dismissed the appeal based on the Applicant's failure to provide a written explanation as to what issues could be reviewed. See Rule 203(d)(1)(B)(iv), SCACR. State v. Youmous, Appellate Case. No. 2013-001913 (S.C. Ct. App. filed November 14, 2013). The Remittitur was sent on December 4, 2013.

In this action, Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Involuntary and unintelligent guilty plea.
  - a. Applicant was coerced to plead guilty because of the threat that the State would serve a notice with intent to seek a life without the possibility of parole (LWOP) sentence.
2. Ineffective assistance of counsel in:
  - a. Failing to move to dismiss the kidnapping charge;
  - b. Allowing Applicant to plead guilty to an indictment that was nolle prossed.

## II. APPLICABLE LAW

In a post-conviction relief action, Applicant bears the burden of proving the allegations in the 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 the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

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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. 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 in evaluating allegations of ineffective assistance of counsel. Id. at 117, 386 S.E.2d at 625. First, Applicant must prove counsel's performance was deficient. Id. Under this prong, courts measure an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, any 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." Id. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, the Applicant must show there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 59 (1985).

### III. 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 Clerk of Court records regarding the subject convictions, the guilty plea transcript, Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, and the legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80 (2003), this Court makes the following findings of fact based upon all of the probative evidence presented.



As a matter of general impression, this Court finds Applicant's testimony and assertions to be not credible. In contrast, this Court finds counsel's testimony to be credible and persuasive on all matters. These credibility findings have been applied to the Court's findings and conclusions set forth below.

### **Involuntary and Unintelligent Guilty Plea**

Applicant generally alleges he did not plead guilty knowingly and voluntarily. He argues that he was coerced to plead guilty because he was threatened with a life sentence. This Court finds Applicant's guilty plea was entered freely and voluntarily. To find a guilty plea is voluntarily and knowingly entered into, the record must establish the defendant had a full understanding of the consequences of his plea and the charges against him. Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L.Ed.2d 274 (1969). Defendant's knowing and voluntary waiver of statutory or constitutional rights must be established by a complete record, and "may be accomplished by colloquy between court and defendant, between court and defendant's counsel, or both." Roddy v. State, 339 S.C. 29, 34, 528 S.E.2d 418, 421 (2000) (citing State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993)). A guilty plea is a solemn, judicial admission of the truth of the charges against an individual; thus, a criminal inmate's right to contest the validity of such a plea is usually, but not invariably, foreclosed. Dalton v. State, 376 S.C. 130, 137-38, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing 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. Crawford v. United States, 519 F.2d 347 (4th Cir.1975).

Applicant claims he did not plead guilty knowingly and voluntarily because he was threatened with a life sentence. This Court finds this contention meritless. This Court finds

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Applicant was potentially facing a life sentence because of a prior armed robbery conviction. This Court finds very credible Counsel's testimony that Applicant was properly served with a notice of intention to seek LWOP. This Court finds Applicant's testimony not credible. Counsel properly advised Applicant regarding the risk of proceeding to trial with the life sentence being mandatory if convicted. This Court finds Applicant's intent to plead guilty was made clear to the plea judge. Applicant was fully informed of the nature and consequences of his plea by his attorney and was advised further by the plea court. This Court finds Applicant was not coerced in any manner. Counsel merely advised Applicant of the risks associated with proceeding to trial. This Court finds Judge Benjamin correctly found Applicant's plea was freely, voluntary, and intelligently made. This allegation is denied and dismissed with prejudice.

#### **Ineffective Assistance of Counsel**

Applicant also makes allegations of ineffective assistance of counsel. The Court will discuss each in turn.

#### *Failing to Move to Dismiss the Kidnapping Charge*

Applicant alleges Counsel was ineffective in failing to move to dismiss the kidnapping charge because he did not have the requisite intent to commit the crime. Applicant testified that, although he stole the victim's car, he did not intend to kidnap the child that was in the car seat. According to Counsel, the victim described a different version of facts in that she and Applicant had a "tug of war" over the child in the car seat, and it was not likely the charges could be dismissed for lack of intent. Applicant's testimony is not credible. Counsel's testimony is credible on the issue.

Post-conviction relief "is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of direct review of the sentence or conviction." S.C. Code Ann.

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§ 17-27-20(b); see also Simmons v. State, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1975) (“It is uniformly held that an application for post-conviction relief is not a substitute for an appeal.”). Applicant’s allegation regarding the charges against him is an inappropriate challenge to the sufficiency of the evidence. Simmons, 264 S.C. at 423, 215 S.E.2d at 885 (“[T]he Uniform Post-conviction Procedure Act ‘shall not be construed to permit collateral attack on the ground that the evidence was insufficient to support a conviction.’” (citing Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973))). “A guilty plea constitutes a waiver of nonjurisdictional defects and claims of violations of constitutional rights.” Jamison v. State, 410 S.C. 456, 467, 765 S.E.2d 123, 129 (2014) (citing State v. Rice, 401 S.C. 330, 331-32, 737 S.E.2d 485, 485-86 (2013); Hyman v. State, 397 S.C. 35, 44, 723 S.E.2d 375, 379 (2012)).

This Court finds this allegation is not proper for this forum. Applicant must have taken this case to trial and argued for dismissal of the charges at that stage. Instead, he admitted the truth to the allegations set forth in the indictments at the plea hearing. Applicant may now not challenge the sufficiency of the evidence.

In any event, it is noteworthy that Applicant was facing a statutory LWOP sentence if convicted at trial. Applicant has failed to prove Counsel rendered deficient performance. It was certainly reasonable for Counsel to advise Applicant to plead guilty to the charges. Further, the “tug of war” alleged by the victim would meet the intent requirement because Applicant knew a child was in the car, and he chose to drive off with the child anyway. This Court also finds Applicant has failed to show any prejudice because any motion to dismiss these charges would have been denied.



### *Failure to Interview Applicant's Codefendant*

Next, Applicant alleges Counsel was ineffective for failing to interview and speak to Applicant's codefendant, Travis Braddock. Applicant's wife testified that she was able to obtain an affidavit and letter from Braddock stating that Applicant was not involved in the crimes. Counsel testified that Braddock was going to be testifying for the State if the case were to go to trial. Counsel testified that all codefendants were planning to testify against Applicant.

This Court finds Applicant has not proven Counsel was ineffective. Braddock was charged as Applicant's codefendant. Braddock was facing several charges in different jurisdictions and was represented by his own counsel. It was certainly reasonable for Counsel not to further investigate Applicant's codefendant because he was going to testify for the State and was not going to be helpful to Applicant's case. Applicant has also failed to prove that he was prejudiced. Even if Counsel did call Braddock as a witness, it is very likely that he would have been advised to assert his Fifth Amendment rights. This allegation is denied and dismissed.

### *Indictments*

Applicant alleges Counsel was ineffective for allowing him to plead guilty to a grand larceny indictment that was not presented to the Grand Jury. He also alleges he did not waive presentment to the grand larceny indictment. When a crime is beyond the jurisdiction of a magistrate, the defendant is entitled to the presentment of an indictment before a Grand Jury. S.C. Constitution Article 1, Section 17; Article 5, Section 22. All proceedings following a *nolle prosequi* are void because the indictment is no longer valid, but the solicitor still retains the right to re-indict because jeopardy does not attach until a jury has been empaneled and sworn. Mackey v. State, 357 S.C. 666, 595 S.E.2d 241 (2004). A defendant may waive presentment by signing a sentencing sheet that indicates the crime charged, which gives rise to a presumed regularity in



the proceedings that he was informed of the charges against him. State v. Smalls, 364 S.C. 343, 613 S.E.2d 754 (2005) (plea to ABHAN on Lynching indictment).

Here, Applicant pleaded guilty to indictment number 2013-GS-40-5998. The sentencing sheet was marked that Applicant was pleading as indicted. There is no record of indictment number -5998 being presented to the grand jury, nor is there a record of Applicant waiving presentment to the grand jury on this indictment number.<sup>1</sup> Therefore, this Court grants the relief on the indictment 2013-GS-40-05998 only.

#### **All Other Allegations**

As to any and all allegations that were raised and not specifically addressed in this order, the Court finds Applicant failed to present any evidence regarding such allegations. Accordingly, the Court finds Applicant has abandoned any such allegations.

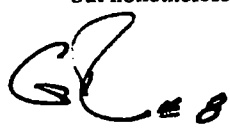
#### **IV. CONCLUSION**

Notwithstanding the indictment issue, the Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Applicant failed to demonstrate counsel's performance was unreasonable under prevailing professional norms. Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625; Stalk v. State, 383 S.C. 559, 563, 681 S.E.2d 592, 594 (2009). Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

The Court notes Applicant must file and serve a notice of appeal within thirty (30) days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). Applicant has a right to appellate counsel's assistance in seeking review of the denial

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<sup>1</sup> Applicant did waive presentment to the grand jury on indictment number 2013-GS-40-01500 (grand larceny) by signing that indictment, but that indictment was later nolle prossed. The Court assumes this was a scrivener's error, but nonetheless relief must be granted as to that indictment.

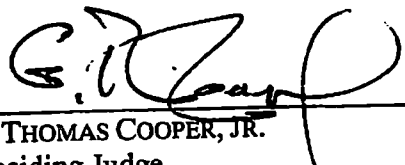


of post-conviction relief. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

**IT IS THEREFORE ORDERED THAT:**

1. The application for Post-Conviction Relief is granted on indictment 2013-GS-40-05998;
2. All other allegations are denied and dismissed with prejudice;
3. 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 21 day of July, 2016.

  
\_\_\_\_\_  
G. THOMAS COOPER, JR.  
Presiding Judge

COLUMBIA, South Carolina

THE

**GIESE**

LAW FIRM, LLC

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