

# Kristy Grafton Goldberg, LLC

ATTORNEY AT LAW

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June 25, 2018

RECEIVED

JUN 28 2018

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

S.C. SUPREME COURT

RE: Brian Morton, SCDC # 366047, vs. State of South Carolina  
Appeal of Case No. 2017-CP-02-0591

Dear Mr. Shearouse,

Enclosed for filing is a Notice of Appeal in the above referenced case. Also enclosed are a certificate of service and a copy of the original court order which is to be challenged on appeal. I would appreciate it if you could file the Notice of Appeal and mail a date-stamped copy back to me in the enclosed pre-stamped envelope.

By copy of this letter I am informing the Office of Appellate Defense of this Appeal. I was **appointed** to represent Mr. Morton on his PCR.

Please let me know if you have any questions or concerns regarding this matter.

Respectfully,



Kristy Goldberg

CC: Julie Coleman  
Assistant Attorney General  
Post Office Box 11549  
Columbia, South Carolina 29211-1549

Brian Morton, SCDC # 366047  
Lee Correctional Institution  
990 Wisacky Highway  
Bishopville, SC 29010

The Honorable Robert J. Harte  
Clerk of Court  
Post Office Box 583  
Aiken, South Carolina 29802

Office of Appellate Defense  
Chief Appellate Defender -- Robert Dudek  
PO Box 11433  
Columbia, SC 29211-1433

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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JUN 28 2018

S.C. SUPREME COURT

APPEAL FROM AIKEN COUNTY  
Court of Common Pleas

R. Scott Sprouse, Circuit Court Judge

Case No. 2017-CP-02-0591

Brian Morton, SCDC # 366047, ..... Appellant

v.

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

NOTICE OF APPEAL

Applicant Brian Morton hereby appeals from the Order of the Honorable R. Scott Sprouse presiding Judge for the 2<sup>nd</sup> Judicial Circuit, filed June 11, 2018 and received by counsel for the Applicant on June 12, 2018 in the matter of Brian Morton v. State of South Carolina, Case No. 2017-CP-02-0591.

June 25, 2018

  
\_\_\_\_\_  
Kristy Goldberg  
Attorney for Plaintiff

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Other Counsel of Record:  
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Office of the Attorney General  
Post Office Box 11549  
Columbia, South Carolina 29211

THE STATE OF SOUTH CAROLINA  
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v.

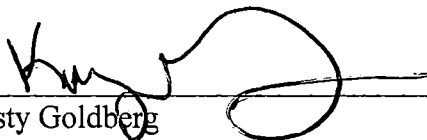
State of South Carolina, ..... Respondent.

PROOF OF SERVICE

Personally appeared before me, Kristy Goldberg, Esquire, who being duly sworn, deposes  
and states:

She is the counsel of record for Applicant;  
Service by mail is proper in this instance; and  
She has served the NOTICE OF APPEAL on the following party on June 25, 2018 by  
depositing one copy in the U.S. Mail, postage prepaid:

Assistant Attorney General, Julie A. Coleman  
Office of the Attorney General  
Post Office Box 11549  
Columbia, South Carolina 29211

  
\_\_\_\_\_  
Kristy Goldberg  
Attorney for Plaintiff

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Other Counsel of Record:  
Assistant Attorney General, Julie A. Coleman  
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Post Office Box 11549  
Columbia, South Carolina 29211

STATE OF SOUTH CAROLINA )  
COUNTY OF AIKEN )

IN THE COURT OF COMMON PLEAS )  
SECOND JUDICIAL CIRCUIT )

Brian Z. Morton, #366047, )

2017-CP-02-0591 )

Applicant, )

v. )

ORDER OF DISMISSAL )

State of South Carolina, )

Respondent. )

This matter comes before the Court by way of a post-conviction relief (PCR) application filed on March 14, 2017. Respondent submitted its Return on July 7, 2017. An evidentiary hearing into the matter was convened on May 7, 2018, at the Aiken County Courthouse. Applicant was present at the hearing and was represented by Kristy Goldberg, Esquire. Respondent was represented by Assistant Attorney General Julie A. Coleman of the South Carolina Attorney General's Office.

At the evidentiary hearing, Applicant testified on his own behalf and presented testimony from Leon Simmons. Respondent presented testimony from C. David Hayes, Esquire ("Plea Counsel"). This Court had before it the records of the Aiken County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the plea transcript, and the pleadings. The Court finds as follows:

#### I. PROCEDURAL HISTORY

The records before this Court indicate Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Aiken County Clerk of Court. In November 2013, the Aiken County Grand Jury indicted Applicant for murder (2013-GS-02-1737), armed robbery (2013-GS-02-1738), and first degree burglary (2013-GS-02-

1739). The charges resulted from Applicant's involvement in a late-evening home invasion on May 28, 2013, in Aiken County that left a victim dead as a result of three gunshot wounds. (Tr. p. 26). Assistant Public Defender C. David Hayes, Esquire represented Applicant. Deputy Solicitor John William Weeks, Esquire prosecuted the case. On November 12, 2015, Applicant pled guilty as indicted to all charges before the Honorable Doyet A. Early, III. Judge Early sentenced Applicant pursuant to a negotiated sentence to imprisonment for concurrent terms of thirty years for each charge.

Applicant filed a timely notice of appeal on November 19, 2015 through Plea Counsel Hayes. However, Plea Counsel also provided an explanation stating that there was a good faith basis to believe that there were no issues properly before the South Carolina Court of Appeals, as Applicant did not object to the sentence or file a motion to reconsider the sentence. The South Carolina Court of Appeals dismissed Applicant's appeal on June 13, 2016, stating that Applicant failed to provide a sufficient explanation for appealing. State v. Morton, Op. No. 2015-002612 (S.C. Ct. App. filed June 13, 2016). The Remittitur was sent on June 30, 2016.

## II. ALLEGATIONS

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

1. "Ineffective Counsel"
  - a. "Appeal brief filing"
  - b. "Failure to review possible defenses"
  - c. "Lack of communication"
  - d. "Failure to disclose evidence"
  - e. "Failure to interview witnesses and not following through with negotiated plea"
  - f. "Any confession which appears to be basically a springboard for Mr. Hayes' determination, as he testified before, had Mr. Hayes investigated, the State may have determine at the very least Applicant was guilty as an accessory after the fact before he even pled, getting in Applicant's mind "he is guilty" without even testing the evidence."
2. Involuntary Guilty Plea

- a. "Applicant relied on Mr. Hayes to interpret that evidence and give him an intelligent platform from which to make a decision."

Applicant filed an amended application on April 6, 2018, adding the following allegations:

- (a) Ineffective assistance of counsel—counsel failed to adequately advise client regarding all facts and circumstances leading up to advising the Applicant to give a second statement to law enforcement.
- (b) Ineffective assistance of counsel—counsel was ineffective in improperly advising Applicant to give a statement to law enforcement, effectively precluding the Applicant's opportunity to have a meaningful jury trial.
- (c) Ineffective assistance of counsel—counsel improperly coerced Applicant to enter into plea agreement.
- (d) Ineffective assistance of counsel—counsel failed to sufficiently review discovery materials with client.
- (e) Ineffective assistance of counsel—counsel failed to sufficiently explain charges to client.
- (f) Ineffective assistance of counsel—counsel failed to investigate and interview potential witnesses.
- (g) Ineffective assistance of counsel—counsel informed Applicant that he would receive a plea offer to voluntary or involuntary manslaughter after giving statement to law enforcement.
- (h) Ineffective assistance of counsel—counsel failed to object to the fact that Applicant was charged as a principal and failed to request that he be allowed to plead to a Conspiracy charge.

### III. SUMMARY OF RELEVANT TESTIMONY PRESENTED

#### *Applicant's testimony*

At the evidentiary hearing, Applicant testified he was arrested on May 29, 2013 for these charges and gave a statement denying his involvement in the crime after his arrest. He stated he was appointed an attorney, Plea Counsel, a week later, and he met with him a total of six times before his guilty plea two and a half years later. Applicant testified he never reviewed discovery with Plea Counsel, and Plea Counsel never fully explained to him the elements of the charges. He stated he did not realize at the time that murder required malice aforethought, and there was none in his case, so they could have challenged this at trial. He stated he did not understand what happened with the DNA analysis that was supposed to be done but was not.

Applicant testified he filed seven motions to relieve counsel and had four hearings with different judges over his motions, but all were denied. He stated his motions were all filed on the same basis—Plea Counsel was not communicating with him or his family, and he was lacking in his performance. Applicant stated he was planning on having a jury trial, and he wrote to Plea Counsel with trial strategies, but his suggestions were ignored. He stated he was given a plea offer on July 1<sup>st</sup> for a thirty year sentence, but he denied it. Applicant testified that he wanted a trial because the State had no evidence to prove his involvement in the crime.

Applicant testified that he was visited on October 22<sup>nd</sup> by Plea Counsel and the attorney who represented his co-defendant, Leon Simmons. He stated they brought him a letter allegedly from Simmons to inform him that Simmons was going to give a statement to law enforcement. He stated he told Plea Counsel that he did not want to give a statement and he wanted to go to trial. He stated Plea Counsel told him that if he gave a statement the State would drop or lower some of the charges against him, so Plea Counsel coerced him into pleading guilty. He stated that when he was taken to give his statement to law enforcement, Plea Counsel told him Simmons had given a statement the day before, which he later found out was not true, but this coerced him to give his own statement. He stated Plea Counsel threatened him by telling him he would get life in prison if he went to trial.

Applicant testified he ended up taking the same plea offer that was given in July for thirty years concurrent. He stated he was confused, and he had so much stuff against him that he felt he had no choice but to plead guilty. He stated he got no benefit from giving the statement, although he later agreed that he could have been convicted of two life sentences and an additional thirty years if convicted at trial. Applicant testified Plea Counsel gave erroneous advice to give a statement because there was no evidence against him up until that point. Applicant stated he and

his co-defendants all should have gotten the same sentence. He testified that he was innocent, and he did not participate in the crime.

*Leon Simmons' testimony*

Leon Simmons testified at the evidentiary hearing that he was Applicant's co-defendant, and he pled guilty at the same time as Applicant. He stated he was represented by an attorney on his pending PCR action, and he had spoken to his attorney before testifying at the hearing. He testified that the letter he allegedly sent to Applicant about giving a statement to law enforcement was only supposed to be a mere suggestion from his attorney, and he did not ask his attorney to send the letter because it was not his intention to send the letter. He stated that he did not type the letter, but it is his signature and his handwriting on the letter. Simmons testified he told his attorney he wanted to get together with Applicant and their attorneys to discuss giving statements, but they never did. He stated his attorney told him they were writing the letter to protect him from Applicant's statement if he chose to give one. He stated the only reason he gave a statement to law enforcement is because Applicant had already given one, so he gave a false statement in hopes of getting a lesser charge.

*Plea Counsel's testimony*

At the evidentiary hearing, Plea Counsel testified he met with Applicant no less than ten times at the jail, as well as four times with Applicant's family, and he spoke on the phone with him thirteen times. He stated the evidence against Applicant consisted of multiple statements from co-defendants, the victim's cell phone that was stolen and used to track Applicant's car to his house, where he was arrested, and a ski mask and gloves, which the State chose not to test for DNA after the co-defendants gave statements. Plea Counsel testified he did not want to test the DNA because he did not want to create evidence that could be used against his client. He stated

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Applicant confessed his guilt to him early on in his representation. He testified that Applicant rejected the State's plea offer several times until they received the text messages that would be used as evidence in the case, showing Applicant's involvement in planning the crime before it was executed.

Plea Counsel testified the attorney who represented co-defendant Leon Simmons told him Simmons wanted to take a plea deal and "give it up." He stated they could not get Applicant and Simmons together in one room because of a keep away order from SCDC, so they knew they could not all meet together. Plea Counsel testified he had discussions with Applicant about giving a statement, and he told him Simmons was going to flip sides. He stated he was familiar with the letter from Simmons, and it was typed up by Simmons' attorney, but he saw Simmons sign it himself. He stated they discussed a possibility of a voluntary manslaughter offer, but he explained that this was only a possibility, not a promise, and giving a statement would make it more possible to get this reduced charge. He stated that he did ask the State for a voluntary manslaughter offer, but the State did not extend the offer.

Plea Counsel testified that Applicant would likely have gotten more than thirty years if convicted at trial, and potentially life in prison. He stated the evidence against him would have been an uphill battle at trial, and it was more likely than not that Applicant would be convicted. He stated he was preparing for trial and would have gone to trial if Applicant had chosen to do so, and his strategy would have been to move to suppress the text messages from Applicant's phone. He stated he would not have had standing to move to suppress the information collected from the victim's stolen cell phone. Plea Counsel testified it was Applicant's decision to plead guilty, and he agrees with that decision. He stated by pleading guilty Applicant got the benefit of

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a negotiated thirty year concurrent sentence, rather than getting a sentence ranging from thirty years to life in prison at trial.

#### IV. APPLICABLE LAW

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 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813 (1985). The applicant must overcome this presumption 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. First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (citing Strickland). 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." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. With respect to guilty pleas, the applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not

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have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366 (1985).

#### V. 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 further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

As a matter of general impression, this Court finds Applicant's testimony to be not credible. In contrast, this Court finds Plea Counsel's testimony to be credible. These findings apply to the specific findings laid out below.

#### INEFFECTIVE ASSISTANCE OF COUNSEL

Applicant alleges Plea Counsel was ineffective in his representation surrounding his guilty plea. In post-conviction relief cases, an applicant asserting a constitutional violation must frame the issue as one of ineffective assistance of counsel. See Al-Shabazz v. State, 338 S.C. 354, 363, 527 S.E.2d 742, 747 (1999) (citing Drayton v. Evatt, 312 S.C. 4, 9, 430 S.E.2d 517, 520 (1993)). An applicant who pleads guilty on the advice of counsel may collaterally attack the plea only by showing that (1) counsel was ineffective and (2) there is a reasonable probability that but for counsel's errors, the applicant would not have pled guilty and would have insisted on going to trial. Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001) (citations omitted). An applicant alleging his guilty plea was induced by ineffective assistance of counsel must prove that counsel's advice was not "within the range of competence demanded of attorneys in criminal cases." Hill v. Lockhart, 474 U.S. 52, 56, 106 S. Ct. 366, 369 (1985).

After considering the testimony, judging the credibility of the witnesses, and reviewing the materials presented to the court, this Court finds Applicant has failed to meet his burden in proving Plea Counsel was ineffective in any regard. Plea Counsel credibly testified he reviewed the discovery with Applicant and prepared the case for trial until Applicant chose to plead guilty. The testimony presented at the evidentiary hearing shows Plea Counsel investigated the case and was preparing a defense for trial which included moving to suppress the cell phone records, and this Court finds credible Plea Counsel's testimony that the State's evidence against Applicant was strong and their likelihood of success at trial was low, which led to Applicant's choice to plead guilty. This Court finds Applicant has failed to present any credible evidence that he was coerced or tricked into giving a statement to law enforcement or pleading guilty.

This Court finds Plea Counsel's representation and advice was reasonable under the circumstances and nothing he did was outside the scope of reasonable professional norms. Plea Counsel thoroughly investigated the case and fully represented his client and advised him based on his best interests in light of the evidence against him, which was to plead guilty. Accordingly, Applicant has failed to prove that Plea Counsel was deficient or that he would have gone to trial but for these deficiencies, and post-conviction relief is denied.

#### INVOLUNTARY GUILTY PLEA

Applicant alleges his guilty plea was not given freely and voluntarily. This Court finds otherwise and concludes Applicant's 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 alleges he was coerced into pleading guilty because his attorney tricked him into giving a statement to law enforcement. The record and Plea Counsel's testimony clearly show Applicant was not threatened, forced, or coerced to give a statement or to plead guilty. This Court finds very credible Plea Counsel's testimony that he thoroughly discussed the evidence, the statement, and his option to plead or go to trial with Applicant and he was prepared to argue a defense if Applicant chose to proceed to trial, which he did not wish to do. It was clearly Applicant's decision to plead guilty after receiving the very damaging evidence of the records of his text messages with his co-defendants planning the crime.

At the guilty plea, the plea court asked Applicant if anyone had threatened him or promised him anything to get him to plead guilty, and Applicant responded "No, sir." Tr. 14, line 25. Applicant testified at the plea hearing that he was not satisfied with his attorney, and he was given the chance to voice all his complaints against his attorney at the plea. Tr. 15, line 1. Despite his complaints, Applicant pled guilty notwithstanding the fact that he was not completely

satisfied with Plea Counsel. Tr. 21, line 12. Applicant has failed to prove he was coerced into pleading guilty and would have gone to trial otherwise.

Notably the South Carolina Supreme Court has held "[a] guilty plea represents a break in the chain of events which has preceded it in the criminal process." Id. (citations omitted). "When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea." Id. (citing Rice, 401 S.C. at 332, 737 S.E.2d at 486). This Court finds Applicant has not presented any credible evidence that he should be allowed to depart from the truth of the statements he presented to the plea court. Therefore, this Court finds the plea court correctly found Applicant's plea was freely, voluntary, and intelligently made. Accordingly, this allegation must be denied and dismissed.

## VI. CONCLUSION

Based on all the foregoing, this Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

This Court notes that Applicant must file and serve a notice of appeal within thirty days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on the Applicant's

behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

**IT IS THEREFORE ORDERED:**

1. That the application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. Applicant must be remanded to the custody of Respondent.

AND IT IS SO ORDERED this 1 day of June, 2018.



R. SCOTT SPROUSE  
Presiding Judge  
Second Judicial Circuit

Wallalla, South Carolina



LAW OFFICE OF  
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ATTORNEY AT LAW  
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The Honorable Daniel E. Shearouse  
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