WALLER
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FEB 14 2019
S.C. SUPREME COURT

February 11, 2019

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

Re: Thomas E. DuBose v State of South Carolina
C/A No: 2016-CP-40-01062

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. DuBose in this matter and am also enclosing a copy of the Order of Dismissal. If you have any questions, please do not hesitate to ask. My telephone number is 803-520-7278.

Sincerely,

Jonathan D. Waller

Cc: J. Anthony Mabry, South Carolina Office of Attorney General

Enclosures

Waller Law Group
1116 Blanding Street, Suite 2B
Columbia, SC 29201

803-520-7278
www.wallerlawgroup.com
jonathan@wallergroupsc.com

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FEB 14 2019

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM RICHLAND COUNTY
Clifton Newman, Circuit Court Judge

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2016-CP-40-01062

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Thomas E DuBose, # 166218,

Appellant,

v.

STATE OF SOUTH CAROLINA,

Respondent.

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NOTICE OF APPEAL

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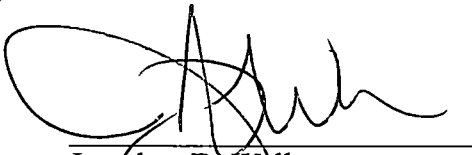
Thomas E DuBose, # 166218, appeals the Order of Dismissal denying his Application for Post-Conviction Relief filed January 29, 2018, issued by the Honorable Thomas A. Russo, Presiding Judge, Twelfth Judicial Circuit.



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ATTORNEY FOR PETITIONER

February 11, 2019

Other Counsel of Record:
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(803) 734-3319

STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

FEB 14 2019

S.C. SUPREME COURT

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APPEAL FROM RICHLAND COUNTY
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2016-CP-40-01062

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Thomas E DuBose, # 166218,

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v.

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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. Anthony Mabry, Senior Assistant Attorney General, by mailing in an envelope properly addressed with postage prepaid on this day, to her office located at P.O. Box 11549, Columbia, SC 29211.

Lyndsay Murray

February 11, 2019

STATE OF SOUTH CAROLINA )
)
COUNTY OF RICHLAND )

IN THE COURT OF COMMON PLEAS

Thomas E. DuBose, #166218
☐ Plaintiff

v.

State Of South Carolina
☒ Defendant.

CASE NO.
2016-CP-40-01062

MOTION AND ORDER INFORMATION FORM AND COVER SHEET

| Plaintiff's Attorney: | Defendant's Attorney: |
|---|---|
| Jonathan D. Waller, Bar No. 76290<br>Address:<br>1116 Blanding Street Suite 2B<br>Columbia, SC 29201<br>phone: (803) 520-7278 fax:<br>e-mail: other: | J. Anthony Mabry, Bar No. 11973<br>Address:<br>P.O. Box 11549<br>Columbia, SC 29211<br>phone: (803)734-6305 fax: (803) 734-4113<br>e-mail: other: |

☐ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☒ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

**SECTION I: Hearing Information**

Nature of Motion:
Estimated Time Needed: Court Reporter Needed: ☐ YES / ☐ NO

**SECTION II: Motion/Order Type**

☐ Written motion attached
☒ Form Motion/Order
I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☐ Plaintiff / ☒ Defendant — November 6, 2018 Date submitted

**SECTION III: Motion Fee**

☐ PAID – AMOUNT:
☒ EXEMPT: (check reason)
☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☒ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter:
☐ Other:

**JUDGE'S SECTION**

☐ Motion Fee to be paid upon filing of the attached order.
☐ Other:

JUDGE

CODE: Date:

**CLERK'S VERIFICATION**

Date Filed:

Collected by:

☐ MOTION FEE COLLECTED:
☐ CONTESTED – AMOUNT DUE:

SCCA/233 (11-03)

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA<br>COUNTY OF RICHLAND | ) | IN THE COURT OF COMMON PLEAS<br>OF THE FIFTH JUDICIAL CIRCUIT |
| Thomas E. DuBose, #166218,<br><br>Applicant,<br><br>v.<br><br>State of South Carolina,<br><br>Respondent. | ) | Case No.: 2016-CP-40-1062<br><br>(Proposed)<br>**ORDER OF DISMISSAL** |

This matter is before this Court pursuant to Applicant's post-conviction relief (PCR) application filed February 20, 2016. Respondent filed a Return to the application denying the allegations and requesting an evidentiary hearing. A PCR evidentiary merits hearing was convened before this Court on December 11, 2017 at the Richland County Courthouse. Applicant was present at the hearing and represented by Jonathan D. Waller, Esquire. Respondent was represented by Jessica E. Kinard, Assistant Attorney General.

At the hearing, Applicant testified in his own behalf. John Shipman, Esquire, testified for Respondent. This Court also had before it the transcript of Applicant's guilty plea and sentencing proceeding, the records of the Richland County Clerk of Court regarding Applicant's guilty plea conviction and sentences, and Applicant's records from the S.C. Department of Corrections. Additionally, this Court had the opportunity to view the testimony of each witness presented at the PCR hearing and judge their credibility accordingly.

## I. PROCEDURAL HISTORY

Applicant is currently incarcerated with the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Richland County. The Richland County Grand Jury indicted Applicant at the April 2014 term for attempted murder (Indictment # 2014-GS-40-2067). John Christopher Shipman, Esquire, and Anastasia L. Walker, Esquire, represented Applicant on the charge. At least ten (10) days prior to trial, the State through the Fifth Circuit Solicitor's Office served Applicant with a Notice that it would seek a sentence of Life Without the Possibility of Parole (LWOP) if Applicant was convicted on the above indictment for attempted murder.[1] On May 12, 2015, the day of trial, Applicant pled guilty to the charge, as indicted, before the Honorable Alison R. Lee, Circuit Court Judge. Applicant's plea was a "negotiated plea/sentence" entered in exchange for a negotiated sentence of twenty (20) years' imprisonment and the withdrawal by the State of the Notice of intent to seek LWOP. Judge Lee accepted the "negotiated plea/sentence," sentencing Applicant to twenty (20) years, and credited Applicant with 662 days' of time served. Applicant did not directly appeal his conviction or sentence.

## II. Allegations

In his application for post-conviction relief (PCR), Applicant alleged he was being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel.
2. Involuntary guilty plea.
3. 4th Amendment violations.

[1] Applicant had previously been convicted for assault and battery with intent to kill (ABWIK); therefore, a conviction for attempted murder would be Applicant's 2nd conviction for a "most serious offense," subjecting him to a mandatory sentence of life without parole pursuant to S.C. Code Ann. Section 17-25-45, South Carolina's "two strikes / three strikes" recidivist statute.

a. "Police failed to establish probable cause for my arrest warrants."

The State filed a Return denying the allegations and asking for dismissal of the final ground as not cognizable in post-conviction relief because it was a direct appeal ground and one waived by a plea of guilty. At the PCR hearing, Applicant proceeded only on the following grounds:

1. Involuntary guilty plea due to ineffective assistance of counsel in that:

   a. Counsel failed to develop a defense to the charge;
   b. Counsel failed to investigate the case;
   c. Counsel failed to challenge the arrest warrant.

## III.FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court had the opportunity at the PCR hearing to view the testimony of both Applicant and his trial counsel Mr. Shipman and judge each witness' credibility. This Court finds the testimony of Applicant to be not credible. This Court also finds the testimony of Mr. Shipman to be credible and supported by the record in this case including the guilty plea / sentencing transcript. As a result, this Court had the opportunity to weigh the testimony accordingly. This Court also had the opportunity to review the Clerk of Court records regarding the subject conviction, Applicant's records from the Department of Corrections, the application for post-conviction relief, the transcripts and documents from the prior proceedings, and the legal arguments of counsel. Pursuant to S.C. Code Ann. Section 17-27-80 (2015), this Court makes the following findings of fact and conclusions of law based upon all of the probative evidence presented.

Based on the following, this Court finds Applicant's allegations of involuntary guilty plea based on ineffective assistance of counsel are without merit. The record shows Applicant's attorneys rendered effective assistance well within the standard of "reasonableness within

professional norms" for a defense attorney. And, Applicant has failed to demonstrate resulting prejudice from any of counsels' alleged deficiencies.

***Standard of Review***

In a post-conviction relief action, the applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCP; 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 on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2064 (1984); Butler v. State, 286 S.C. at 442, 334 S.E.2d at 814.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Strickland, 466 U.S. at 690, 104 S. Ct. at 2066. The applicant must overcome this presumption in order to receive relief. See Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, Applicant must prove counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under prevailing professional norms." Cherry v. State, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S. Ct. at 2065). Second, counsel's 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." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. "A

reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984)).

In the guilty plea setting, Applicant must show deficient performance as defined above. And, in order to show prejudice, Applicant must show that but for his counsel's alleged deficient performance, there is a reasonable probability he would not have pled guilty but would have proceeded to trial. Hill v. Lockhart, 474 U.S. 52 (1985).

In post-conviction relief cases, an applicant asserting a constitutional violation must frame the issue as one of ineffective assistance of counsel. Al-Shabazz, 338 S.C. at 363-64, 527 S.E.2d at 747 (citing Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517 (1993); Hyman v. State, 278 S.C. 501, 299 S.E.2d 330 (1983); Richardson v. State, 310 S.C. 360, 426 S.E.2d 795 (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 defendant 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) (citing Hill v. Lockhart, 474 U.S. 52; Jackson v. State, 342 S.C. 95, 535 S.E.2d 926 (2000); Thompson v. State, 340 S.C. 112, 531 S.E.2d 294 (2000); Rayford v. State, 314 S.C. 46, 443 S.E.2d 805 (1994)). An applicant alleging that his guilty plea was induced by ineffective assistance of counsel must prove that counsel's advice was not "within the competence demanded of attorneys in criminal cases." Hill v. Lockhart, 474 U.S. at 56.

"A guilty plea is a solemn, judicial admission of the truth of the charges" against the applicant. Dalton v. State, 376 S.C. 130, 137, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing

Blackledge v. Allison, 431 U.S. 63 (1977)). Admissions "made during a guilty plea should be considered conclusive unless [an applicant] presents valid reasons why he should be allowed to depart from the truth of his statements." Id. at 137-38, 654 S.E.2d at 874 (citing Crawford v. United States, 519 F.2d 347 (4th Cir. 1975); Edmonds v. Lewis, 546 F.2d 566 (4th Cir. 1976)).

***Relevant Factual Background***

On July 19, 2013, the Applicant drove from Camden, S.C., to the Days Inn motel on Parklane Avenue in Richland County where Applicant's estranged wife was staying. Applicant's estranged wife had gone to the Days Inn to get away from Applicant. Applicant had told several individuals in Camden in the days leading up to July 19, 2013 that he was going to kill his wife and Applicant showed these individuals a knife when making these threats. On July 19, 2013, Applicant arrived at the Days Inn motel at approximately 6:45 a.m. Applicant went to his estranged wife's room and eventually stabbed her five (5) times with a knife. As a result, according to the Solicitor, the victim was hospitalized for approximately one (1) week. Applicant's step-daughter, who was an adult, witnessed the assault on her mother. (Guilty Plea Transcript, pp. 10-13). At the guilty plea, Applicant only denied he made the prior threats in Camden and that his wife had to remain in the hospital for an entire week. (Guilty Plea Transcript, pp. 13-14). Applicant admitted he stabbed his wife with a knife and blamed the incident on a crack cocaine addiction he was suffering from at the time. (Guilty Plea Transcript).

(1)(a) & (b) *Failure to Investigate the Case and Develop a Defense*

At the PCR hearing, Applicant testified his trial counsel did not investigate his case or develop a defense to the charge. Applicant also claimed his trial counsel did not give him a copy of his discovery and did not review the same with him. Applicant alleged these deficiencies

caused him to feel abandoned and as a result he involuntarily pled guilty. This Court viewed Applicant's testimony, and as previously stated, finds this testimony to be not credible; and, further finds this testimony is not supported by the record including the guilty plea transcript. (See Guilty Plea Tr. pp. 1-23).

Counsel testified at the PCR hearing that he and co-counsel did fully investigate the case including employing an investigator with his Office and employing an investigator from outside the Office in an attempt to locate witnesses. Counsel located Applicant's estranged wife, the victim. Counsel located Applicant's step-daughter, but she did not wish to be interviewed. Counsel was unable to locate Applicant's brother. Counsel testified he filed a discovery motion in the case and believes he obtained all of the discovery regarding the case from the State that he was entitled to. Counsel testified he and co-counsel reviewed the discovery in the case with Applicant. Counsel testified he specifically remembered going over the victim's medical records with Applicant. Counsel testified if Applicant wanted a copy of his discovery it would have been provided to him with a warning about sharing the same with other inmates. Counsel testified he reviewed the evidence the State had against Applicant with him.

Counsel testified there was no real defense to the case except to argue that Applicant was guilty of assault and battery of a high and aggravated nature (ABHAN) rather than attempted murder, the indicted charge. However, counsel testified this would have been a difficult argument to make given the number of times Applicant stabbed the victim with a knife, showing a specific intent to kill. Counsel testified there was sufficient evidence for the State to overcome a directed verdict motion on attempted murder and then it would have been up to the jury whether to convict Applicant of attempted murder or ABHAN. Counsel testified he advised

Applicant of all of the above. Counsel testified Applicant was served with an LWOP notice at least ten (10) days before trial, and Applicant would have been sentenced to LWOP if convicted of attempted murder because Applicant had a prior conviction for ABWIK. Counsel testified he negotiated with the State on Applicant's behalf and the lowest the State would go was an offer to withdraw the LWOP notice and Applicant receive a sentence of twenty (20) years on attempted murder if Applicant would plead guilty. Counsel testified he communicated the plea offer to Applicant as they were preparing for trial. Counsel also communicated to Applicant that even if they were successful in getting the jury to return with an ABHAN conviction, it was his belief that based on Applicant's record and the facts of this case, Applicant would be sentenced to near the maximum for ABHAN.[2] Counsel testified that in his opinion it was not worth the risk of going to trial and possibly receiving an LWOP sentence, in an attempt to shave a few years off of Applicant's sentence, and he informed Applicant of this. Counsel testified he was prepared to try the case and argue ABHAN rather than attempted murder, but Applicant chose to accept the "negotiated plea / sentence" of twenty (20) years offered by the State rather than risk being convicted by a jury of attempted murder and being sentenced to life without the possibility of parole (LWOP).

This Court had the opportunity to view trial counsel's testimony and finds that testimony to be credible and supported by the record including that of the guilty plea / sentencing proceeding. (Guilty Plea Tr. pp. 1-23). That transcript reflects both trial counsel reviewed with Applicant the discovery and evidence in the case, and that Applicant was fully aware of the risks

[2] As set forth in the guilty plea transcript, in addition to the prior ABWIK conviction, Applicant had a significant prior criminal record. (See Guilty Plea Tr. pp. 1-23).

of going to trial. That transcript reflects Applicant was fully satisfied with counsels' investigation, counsel's development of a defense of arguing the lesser included offense of ABHAN, and counsel's advice; and, Applicant chose to accept the "negotiate plea/sentence" rather than risk going to trial and being convicted of attempted murder and sentenced to LWOP. (Guilty Plea Tr. pp. 1-23). The transcript also reflects that Applicant was not threatened or coerced by either the State or trial counsel into pleading guilty, but it was Applicant's decision to plead guilty rather than go to trial. And, the transcript also reflects that Applicant stated under oath that his pleas of guilty were knowingly, voluntarily, and intelligently entered. (Guilty Plea Tr. pp. 1-23).

As a result, this Court finds and concludes that Applicant has failed to show that trial counsel was deficient in their investigation of the case or in attempting to develop a defense. Strickland. Counsel fully and thoroughly investigated the case and shared with Applicant the discovery and evidence in the case; however, trial counsel could not develop any defense to the charges other than argue a lesser included offense because of Applicant's actions and the State's evidence. Id. There was no question as to Applicant's identity as the perpetrator. And, there is no question Applicant stabbed the victim five (5) times with a knife. The record fully supports that counsels' investigation, development of a defense, and advice was reasonable and sound, given the evidence in the case against Applicant and the risks involved to Applicant, and it was Applicant who instead chose to accept the "negotiate plea/sentence" and plead guilty rather than proceed with that defense in a jury trial.

Furthermore, this Court finds and concludes that Applicant has failed to show prejudice from counsel's alleged deficient performance. Hill v. Lockhart. This Court finds given the

record in this case and the credible testimony of trial counsel, there is no reasonable probability, but for counsel's alleged deficient performance, Applicant would not have pled guilty and would have proceeded to trial given the overwhelming evidence of his guilt and the fact that he was facing LWOP if convicted of attempted murder. Hill v. Lockhart.

As a result of the fact Applicant has failed to prove deficient performance or resulting prejudice, there is no merit to these grounds and they must be denied and dismissed with prejudice. Strickland; Hill. Applicant has failed to show his guilty plea was involuntary due to ineffective assistance of counsel. Id.

1(c) *Failure to Challenge the Arrest Warrant*

Applicant alleges his guilty plea was involuntary because counsel was ineffective for failing to challenge the arrest warrant he was arrested on because the officer who investigated the case or interviewed him is not the same officer who signed the arrest warrant affidavit and presented the warrant to the magistrate for issuance. Applicant's allegation is without merit.

Even if a different officer obtained the arrest warrant, it makes no significant legal difference. First, it is not improper for another officer, working on the same investigation to obtain the arrest warrant. The knowledge of one (1) officer is imputed to other officers working on the same investigation. *See* State v. Pearson, 356 N.C. 22, 566 S.E.2d 50 (2002)(A police officer making the affidavit for issuance of a warrant may do so in reliance upon information reported to him by other officers in the performance of their duties.); State v. Stickelman, 207 Neb. 429, 299 N.W.2d (1980)(Probable cause is to be evaluated by the collective information of the police as reflected in the affidavit and is not limited to the first-hand knowledge of the officer who executes the affidavit.); *see also* United States v. Morales, 238 F.3d 952 (8th Cir.

2001)(probable cause may be based on collective knowledge of all law enforcement officers involved in an investigation and need not be based solely on information within knowledge of officer on scene if there is some degree of communication); Iddings v. State, 772 N.E.2d 1006 (Ind. Ct. App. 2002)(probable cause for a search warrant may be based upon information known to the law enforcement organization as a whole).

Second, a deficient arrest warrant or a defect in an arrest warrant will not defeat, excuse, or bar a subsequent prosecution of the defendant on an indictment. State v. Biehl, 271 S.C 201, 246 S.E.2d 859 (1978); State v. Carpenter, 257 S.C. 162 184 S.E.2d 715 (1971; State v. Holiday, 255 S.C. 142, 177 S.E.2d 541 (1970; State v. McCoy, 255 S.C. 160, 177 S.E.2d 601 (1970); Thompson v. State, 251 S.C. 593, 164 S.E.2d 760 (1968); State v. Swilling, 246 S.C. 144, 142 S.E.2d 864 (1965); State v. Waitus, 226 S.C. 44, 83 S.E.2d 629 (1954). It is the indictment on which the defendant is tried, not the original arrest warrants. State v. Castineira, 341 S.C. 619, 535 S.E.2d 449 (Ct. App. 2000), *affirmed on writ of cert.*, 351 S.C. 635, 572 S.E.2d 263 (2003); State v. Cody, 180 S.C. 417, 186 S.E. 165 (1936). The subsequent indictment cures any defect in the arrest warrant. State v. McCoy, 255 S.C. 160, 177 S.E.2d 601 (1970); Thompson v. State, 251 S.C. 593, 164 S.E.2d 760 (1968); State v. Swilling, 246 S.C. 144, 142 S.E.2d 864 (1965); State v. Walker, 232 S.C. 290, 101 S.E.2d 826 (1958). *See also* State v. Bowman, 43 S.C. 108, 20 S.E. 1010 (1895). Further, Applicant was properly on notice of the charge against him and what he must defend. *See* Magazine v. State, 361 S.C. 610, 606 S.E.2d 761 (2004).

Furthermore, as counsel credibly testified **the indictment** was legally sufficient and correct and there was no validity to a motion to quash the indictment; therefore, he did not make one. *See* State v. Gentry, 363 S.C. 93, 102-103, 610 S.E.2d 494, 500 (2005); Locke v. State, 341

S.C. 54, 533 S.E.2d 324 (2000); State v. Jones, 333 S.C. 6, 507 S.E.2d 324 (1998); Granger v. State, 333 S.C. 2, 507 S.E.2d 322 (1998); State v. Wade, 306 S.C. 70, 409 S.E.2d 780 (1991); State v. Munn, 292 S.C. 497, 357 S.E.2d 461 (1987); State v. Hardee, 279 S.C. 409, 308 S.E.2d 521 (1983); State v. Tabory, 262 S.C. 136, 202 S.E.2d 852 (1974); State v. McIntire, 221 S.C. 504, 71 S.E.2d 410 (1952); State v. Perry, 87 S.C. 535, 70 S.E. 304 (1911). Therefore, even if any error in the arrest warrant, the error was cured by the indictment. State v. McCoy, 255 S.C. 160, 177 S.E.2d 601 (1970); Thompson v. State, 251 S.C. 593, 164 S.E.2d 760 (1968); State v. Swilling, 246 S.C. 144, 142 S.E.2d 864 (1965); State v. Walker, 232 S.C. 290, 101 S.E.2d 826 (1958). As a result, Applicant has failed to prove either prong of the Strickland test. Counsel was neither deficient for not objecting to the arrest warrant nor has Applicant shown any resulting prejudice. Strickland. Even had counsel objected or moved to quash the arrest warrant on this basis, the result of Applicant's proceeding would not have been different as Applicant pled guilty on the valid indictment. Strickland; Hill v. Lockhart. There is no reasonable probability had counsel objected to the arrest warrant, that Applicant would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart. Additionally, the objection to the arrest warrant on this basis would have been overruled. As a result, Applicant has failed to show resulting prejudice. Hill; Strickland.

Furthermore, the indictment was true billed by the Richland County Grand Jury at the April 2014 term, and Applicant did not challenge the sufficiency of his indictment before pleading guilty. Applicant did not challenge the sufficiency of the indictment at the PCR hearing. The post-conviction relief (PCR) court cannot consider the sufficiency of the evidence against a convicted defendant. S.C. Code Ann. § 17-27-20(a)(6) (1985). Also, a guilty plea

generally acts as a waiver of all non-jurisdictional defects and defenses. State v. Munsch, 287 S.C. 313, 338 S.E.2d 329 (1985). The plea admits all elements of the offense charged and "leaves open for review only the sufficiency of the indictment and waives all other defenses." Id. at 314, 338 S.E.2d at 330; cf. United States v. Broce, 488 U.S. 563, 569, 109 S.Ct. 757, 102 L.Ed.2d 927 (1989). The Uniform Post-Conviction Procedure Act is not a substitute for remedies that were available before and during the original trial or by review on motion for a new trial or on appeal. Irick v. State, 264 S.C. 632, 216 S.E.2d 545 (1975); Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1975). As a result, Applicant waived and abandoned any challenge to his arrest warrant by accepting the "negotiated guilty plea/sentence" and pleading guilty before Judge Lee. He could not preserve a Fourth Amendment challenge and still plead guilty. As a result, Applicant cannot show deficient performance or resulting prejudice under this ground. Strickland; Hill v. Lockhart.

As a result, this Court finds Applicant has failed to show his guilty plea was involuntary due to ineffective assistance of counsel. This Court finds Applicant has failed to meet his burden of proof to show counsel was deficient in failing to challenge the arrest warrant for the reasons argued by Applicant. Strickland. This Court further finds that Applicant has failed to prove resulting prejudice from any alleged deficient performance as there is no reasonable probability that but for counsel's alleged deficient performance in this regard that Applicant would not have pled guilty and would have proceeded to trial. Hill v. Lockhart. Not on this record.

## 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, the Court finds Applicant failed to present any evidence regarding such allegations. Accordingly the Court finds the Applicant has abandoned any such allegations, and Applicant failed to meet his burden of proof regarding them. Strickland; Hill.

## CONCLUSION

As a result of all of the above, this Court finds that Applicant has failed to prove his guilty pleas were involuntary due to ineffective assistance of counsel. Therefore, this application must be denied and dismissed with prejudice.

This Court notes that Applicant must file and serve a notice of intent to appeal within thirty (30) days from receipt of this Order to secure the appropriate appellate review. See Rule 203, SCACR, Rule 71.1(g), SCRCP; and Bray v. State, 336 S.C. 137 620 S.E.2d 743 (2005), for the obligation of Applicant's counsel to file and serve a notice of intent to appeal. The Applicant's attention is also directed to South Carolina Appellate Court Rule 243 for appropriate procedures after notice has been timely filed.

**IT IS THEREFORE ORDERED THAT:**

1. The application for post-conviction relief is denied and dismissed with prejudice;
2. Applicant is remanded to Respondent for completion of his sentence.

**AND IT IS SO ORDERED this** 14 **day of** June, **2018.**

CLIFTON NEWMAN
Presiding Judge
5th Judicial Circuit

Columbia, South Carolina