LAW OFFICE OF

Kristy Grafton Goldberg, LLC

ATTORNEY AT LAW

February 25, 2019

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

RE: Clifton Cooke, SCDC # 320091, vs. State of South Carolina
Appeal of Case No. 2015-CP-28-790

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. Cooke on his PCR.

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

Respectfully,

Kristy Goldberg

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

Clifton Cooke, SCDC # 320091
Tyger River Correctional Institution
200 Prison Road
Enoree, South Carolina 29335

Kershaw County Clerk of Court
ATTN: Lynn Lyons
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM KERSHAW COUNTY
Court of Common Pleas

R. D. Craig Brown, Circuit Court Judge

Case No. 2015-CP-28-790

Clifton Cooke, SCDC # 320091, ... Appellant

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 February 25, 2019 by depositing one copy in the U.S. Mail, postage prepaid:

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Other Counsel of Record:
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
FEB 27 2019
S.C. SUPREME COURT

APPEAL FROM KERSHAW COUNTY
Court of Common Pleas

R. D. Craig Brown, Circuit Court Judge

Case No. 2015-CP-28-790

Clifton Cooke, SCDC # 320091, ... Appellant

v.

State of South Carolina, ... Respondent.

NOTICE OF APPEAL

Applicant Clifton Cook hereby appeals from the Order of the Honorable R. D. Craig Brown presiding Judge for the 5th Judicial Circuit, filed February 21, 2019 and received by counsel for the Applicant on February 22, 2019 in the matter of Clifton Cooke v. State of South Carolina, Case No. 2015-CP-28-790.

February 25, 2019

Kristy Goldberg
Attorney for Plaintiff

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Other Counsel of Record:
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STATE OF SOUTH CAROLINA) COUNTY OF KERSHAW)	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT Case No. 2015-CP-40-0790	
Clifton Cooke, #320091,) Applicant,) v.) State of South Carolina,) Respondent.)	**ORDER OF DISMISSAL**	

This matter comes before the Court by way of an Application for Post-Conviction Relief filed August 24, 2015. Applicant filed an Amended PCR Application dated June 17, 2016. Respondent made a Return on November 9, 2015. The Court convened an evidentiary hearing into the matter on July 14, 2016, at the Richland County Courthouse. Applicant was present at the hearing and represented by Kristy Goldberg, Esquire. Jessica E. Kinard, Esquire, of the South Carolina Attorney General's Office, represented Respondent.

At the hearing, Applicant's guilty plea counsel, the Applicant and Assistant Public Defender Jason Kirincich, Esquire testified. The Court had before it a copy of the plea transcript, the records of the Kershaw County Clerk of Court regarding the subject convictions, Applicant's appellate records, Applicant's records from the South Carolina Department of Corrections, the pleadings, and the Return. The Court entered an oral order dismissing the application, as amended and requested a proposed order from the Respondent. The Respondent, through Deputy Attorney General Donald Zelenka provided this Court and opposing counsel a proposed order due to the fact Ms. Kinard was no longer a member of the Attorney General's Office. After receipt, this Court enters the following order.

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Kershaw County Clerk of Court. In April 2006, the Kershaw County Grand Jury indicted Applicant for murder (2006-GS-28-0116). Joshua Kendrick, Esquire, ("Counsel") and Theresa N. Johns, Esquire represented Applicant. On February 13-14, 2007, Applicant proceeded to trial before the Honorable James R. Barber, III and a jury. The jury found Applicant guilty as indicted. Judge Barber sentenced Applicant to imprisonment for a term of forty years.

Applicant filed a timely notice of appeal. Joseph L. Savitz, III, of the Office of Appellate Defense, perfected the appeal. The South Carolina Court of Appeals affirmed Applicant's conviction on November 19, 2009. State v. Cooke, 2009-UP-556 (S.C. Ct. App. filed November 19, 2009). The State filed a Petition for Writ of Certiorari to the South Carolina Supreme Court, but subsequently moved to withdraw its notice of appeal in the matter. The motion was granted by the Supreme Court on December 5, 2012. The Remittitur was returned to the lower court on December 27, 2012.

Applicant filed his first PCR Application on April 26, 2010 (2010-CP-28-0452). The State made its Return on May 10, 2010. An evidentiary hearing was convened on the matter on January 9, 2012 before the Honorable J. Ernest Kinard, Jr. The Applicant was present and was represented by Jeremy A. Thompson, Esquire. The State was represented by Assistant Attorney General Brian T. Petrano. February 29, 2012, Judge Kinard granted Applicant's PCR Application on the grounds of ineffective assistance of counsel, vacated Applicant's conviction

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and sentence for murder, and remanded the case to the Kershaw County Court of General Sessions for a new trial.

The Plea Proceeding before this Court

On March 6, 2014, Applicant pleaded guilty, pursuant to Alford, to the lesser included offense of voluntary manslaughter before the Honorable R. Ferrell Cothran, Jr. Applicant was represented by Assistant Public Defender Jason Kirincich, Esquire. Assistant Solicitor Curtis R. Hutchinson, Esquire prosecuted the case. Judge Cothran sentenced Applicant to twenty years of imprisonment.

A motion for reconsideration of the sentence based upon the alleged untimely disclosure that prior state witness Talmadge Dixon was not cooperating with the state was made. On March 14, 2014, Judge Cothran denied the order on May 20, 2014. See Record on Appeal, p. 31-32.

The Appeal from the Guilty Plea

Applicant filed a timely notice of appeal. Tiffany L. Butler, Esquire, of the Office of Appellate Defense, perfected the appeal. Applicant subsequently withdrew his appeal, and thus, pursuant to Applicant's withdrawal, the South Carolina Court of Appeals dismissed the appeal on August 3, 2015. State v. Cooke, Appellate Case No. 2014-001175 (S.C. Ct. App. filed August 3, 2015). The Remittitur was returned to the lower court on August 19, 2015.

II. ALLEGATIONS

In his initial application, Applicant alleged he was being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel

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a. "failed to investigate/failed to withdraw guilty plea"

2. Brady Violation

a. "Prosecutor withheld material evidence"

3. Involuntary Guilty Plea

a. "Applicant was not aware of the consequences of his guilty plea"

In his amended application made by his counsel on June 17, 2016, he alleged the following:

1. "Ineffective Assistance of Counsel"
   a. "Failure to investigate witnesses"
   b. "Failure to inform Applicant regarding witness availability/unavailability and what evidence would actually be offered during a re-trial."
   c. "Failure to request a continuance."
   d. "Failure to fully inform Applicant regarding the full consequences of his plea."
   e. "Failure to file a Motion to withdraw his guilty plea."

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court has reviewed the record in its entirety and has heard the testimony and arguments presented at the evidentiary hearing. The Court has further had the opportunity to observe the witness who testified at the hearing, and to closely pass upon his credibility. The Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80.

A. Evidence Adduced at Plea

On March 6, 2014, after the grant of post-conviction relief on the murder charge, the Applicant appeared before Judge Cothran and entered a guilty plea pursuant to North Carolina v Alford, 400 U.S. 25 (1970) to the lesser offense of voluntary manslaughter without recommendation or negotiation. Plea Tr. p. 3. In the factual basis of the guilty plea, Assistant Solicitor Curtis Hutchinson set forth the following:

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On January 5th, 2002, Troy Keitt was at his mother's house at _____ in Lugoff, South Carolina. There were family members there as well as others: Troy's wife, Althea; his mother, Tiller Keitt; his sister, Makeitha Hollis; neighbors, Calvin Moore and Cynthia Green; and also several children were there present.

At some point in the evening, between 7:00 and 8:00 p.m., there was a knock on the door. Althea turned on the porch light and answered the door. And there was a black male there whose identity was not known at the time who asked to speak to Troy Keitt.

Troy was in the restroom, but Althea told him to come to the door, and he went outside to speak with the person at the door.

A few moments later Troy Keitt's mother, who was playing cards with a neighbor, also glanced outside to see a black male speaking to Troy Keitt.

Your Honor, all three ladies were there going about their normal business when they heard gunshots. At the time they didn't know if it was gunshots or firecrackers, so they did run outside.

Makeitha ran outside to see two individuals running towards a vehicle, and Troy was sitting on the ground near the front of the yard clutching himself.

Althea also came outside to see two individuals running away from Troy Keitt and also to see Mr. Keitt on the ground clutching himself.

Troy's mother was inside calling 9-1-1 actually after she did hear the shots.

Your Honor, all three heard the victim say that, in response to who shot him, it was Clifton and Weasel. Weasel is a nickname for someone by the name of Talmadge Dixon.

Your Honor, Talmadge Dixon later learned the police were looking for him by a family member. At first -- and he did turn himself in to law enforcement. At first he denied ever being there, but then eventually he gave a statement to law enforcement.

According to Talmadge Dixon, he, the Defendant, and another person, that he knew only as Wess or West, decided go to _____. According to Mr. Cooke, he knew someone there who had drugs. According to Dixon, all three got into a Honda and went over to _____, and Clifton got out of the vehicle by himself -- this is according to Mr. Dixon -- and went to knock on the door and asked for Troy Keitt. Dixon stated that he was in the vehicle and saw Cooke talking to Troy on the step. The Defendant began to argue with Troy and then pulled out a revolver. They wrestled. And at that time the Defendant shot him and continued to shoot him.

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According to the autopsy, there were seven shots in his back, chest, ankle, knees, and legs. A GSR analysis was done by SLED, and neither Mr. Dixon nor the victim in this case had anything on their hand, indicating they did not have a gun.

Your Honor, this case did originally go to trial. The Defendant was found guilty and sentenced to 40 years. He was -- and this case was overturned by Judge Kinard on February 29th, 2012, on a PCR motion, due to another witness that it was claimed that said -- had another recollection of the facts.

Plea Tr. p. 6-9. The state responded to the court's inquiry that a .32 revolver was used.

The plea court accepted the plea to manslaughter under Alford.

The victim's sister Makeitha Keitt Hollis, confirmed the declaration made by the victim repeated that Clifton Cooke shot him and Weasel, and she repeatedly asked him who Cooke was until he passed out because she did not know him. Plea Tr.p. 11. She asked for the maximum sentence. Plea Tr.p. 12. Rosetta Evans, the victim's sister admitted that she was not at the incident, and described his family and their love while requesting the maximum sentence. Plea Tr. p. 12-13. Tiller Keitt, the victim's mother also requested the maximum. Id, at 13.

The State further noted that the Applicant had fled to New York where he was there two years and extradited two years later. Plea Tr.p. 14. The Applicant's prior record was a 1999 simple assault and a 1999 criminal possession of a loaded weapon from New York. Plea Tr.p. 14.

Defense counsel Kirincich asserted that the State left out in its factual basis that the earlier PCR on the murder trial was granted because of an exculpatory evidence issue. He asserted that at the past trial the State had represented that it would call Gloria Moore to testify, but after some testimony that he did not call Moore, although he asked other witnesses about her. Plea Tr.p.15. After the trial, investigator Dave MacDougall (then

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deceased) was hired by prior PCR counsel and spoke with Ms. Moore who he stated told him she had spoken with the investigators from the Sheriff's office and told them when she went to the scene after she heard gunshots and she overheard the victim speaking with the family and she heard him say Weasel shot him, but did not say anything about Clifton Cooke. Plea Tr.p. 15-16. Counsel stated that Deputy Rob Evans took notes after his response to the scene and in an incident report and indicated he learned that Talmadge Dixon identified in the report was subject 1 had shot the victim from the victim's wife Althea Keitt, and no reference that Evans heard anyone say that Cooke shot the victim. Id. Counsel questioned the use of negative GSR tests on the victim and Dixon because it was not done on Dixon immediately. Id. However, counsel acknowledge that when Ms. Keitt wrote her statement, she did state that the victim told Makeitha that Wesel and Clifton did it. Plea Tr.p. 17. Similarly in Makeitha's statement she responded that the victim stated Weasel, Talmadge Dixon, and Clifton shot him. Plea Tr.p. 17.

Counsel stated that Dixon worked out a deal after initially lying about the incident about a third party, and testified at the trial that Cooke shot him and was sentenced to time served for accessory after the fact. Plea Tr.p. 17-18. Counsel complained that all Dixon got was one year in jail, even though he was named as a shooter in many statements..

He asserted that the victim's family should be upset with the Solicitor's office on how Mr. Dixon's case was handled by the Solicitor's office. Plea Tr. p. 18. Counsel could not understand how the State made that deal with the statements. He stated that Cooke had already served 9 years, 5 months and 14 days at that time. Although Cooke did not deny that he was

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there and testified in his PCR action that he was there, counsel stated it was actually Dixon who shot Keitt. Plea Tr.p. 18.

Counsel stated that he had talked with Cooke who realizes that he should not have run. Counsel stated that at the time of the incident, Applicant was young and scared. Counsel noted that family members and friends were present in support of the Applicant, including Kenyatta Washington, a friend, his girlfriend, Tasha Stevens, Barbara Miles, Nita Watkins , his brother Anthony Cooke and his father Wayne Garrett. Plea Tr.p. 19. He felt that Cooke was remorseful about what happened. Id.

Counsel stated that this was a case that he wanted to try because of the statements from Ms. Moore and Deputy Evans who has since passed away. Further, counsel noted two investigators in the case, including Dave MacDougall also had passed away. Counsel stated that this made the defense case harder. He states that he thinks that Applicant should have been given the same opportunity for an accessory after the fact, though he knows he is not pleading to that crime. Counsel requested no more than a 15 year sentence. Plea Tr.p. 20, l. 21-24. He asked for a time served sentence.

The Applicant told the court in his allocution that he was sorry but that he did not shoot the victim. "The only reason why I'm pleading guilty to this is because I fear for my life. I feel like I ain't got a chance of winning." He stated that Talmadge Dixon shot the victim. He expressed remorse to the family of Keitt. He asked to be sentenced to no more than 15 years. Plea Tr. p. 21-22. His brother Anthony asked Judge Cothran to be lenient. Tasha Stevens asked

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for leniency. Ms. Miles expressed remorse to the victim's family and that she did not believe her nephew killed Troy. Plea Tr.p. 23.

Counsel stated that minutes before the plea that Dixon had refused to cooperate with law enforcement, which put both parties in a difficult situation. Plea Tr.p. 23-24. He admitted that Applicant was aware that he did not have a good shot at trial because what had happened the first time. He asserted this supported their request for time served and 15 years.

Judge Cothran sentenced the Applicant to 20 years with credit for time served. Plea Tr.p. 24.

B. Summary of PCR Testimony

During the post-conviction relief hearing, Clifton Cooke testified that he was arrested for murder on September 21, 2004. (PCR Tr. 6). He had a jury trial where he was represented by Josh Kendrick and Theresa Johns. (PCR Tr. 6). He received a 40 year sentence for murder but it was vacated when his first PCR was granted. Id.

He was sent back to Kershaw around January 9, 2013 and stayed in jail until the plea. (PCR Tr. 7). He was represented in that proceeding by Jason Kirincich.

Contrary to counsel's testimony, Applicant testified that Kirincich did not investigate his case or prepare for trial. Applicant declared: "he didn't do nothing." (PCR Tr.7). He denied receiving any plea offer. (PCR Tr. 7-8).

Applicant testified that he went to court on March 6 for a plea to 15 years for voluntary manslaughter. (PCR Tr. 8). He claimed that prior to the plea his counsel told him that he was going to try to work with me to get 15 years. (PCR 9, l. 1-2). He stated counsel told him this at the Sumter jail. Applicant denied that counsel told him that there was an agreement for 15 years,

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but said "he would try to get me 15 years." (PCR Tr. 9). Applicant said he was willing to plead under Alford that day. (PCR Tr. 10).

Applicant stated he met with counsel in Kershaw the morning of the plea. He said he had asked him to investigate the case from day one because he wanted to know what was going on with his co-defendant Talmadge Dixon and whether he was going to testify against him again. (PCR Tr. 10). However, he claimed his lawyer never reached out to Dixon to find out.

On the morning of the plea, Applicant claimed that his counsel told him that Dixon was going to testify against him and Applicant told him "I'm just going to go ahead and plead." He claimed that if his counsel told him that Dixon was not going to testify, he would have gone to trial. (PCR Tr. 11). He claimed he would have won if he was not a witness, (PCR Tr. 12).

Applicant testified that he learned "minutes before the plea" that Dixon was not going to testify against him. He claimed he learned it when counsel put it on the record to the judge during the plea. (PCR Tr. 12). He denied having a separate conversation with counsel about it before the plea. (PCR Tr. 13). He claimed his counsel learned it minutes before the plea as he stated on the record. (PCR Tr. 13).

Applicant stated that he went to court that day for a plea and knew it was not a trial date, but claimed he did not know if he decided not to plead that he would have gone to trial. Further, he claimed he did not know if he did not plead that his offer for manslaughter would be revoked. (PCR Tr. 13).

Applicant claimed after the plea, he asked counsel to withdraw the plea, but counsel filed a motion to reconsider instead. (PCR Tr. 13). He claimed he wanted to do this because he had learned that Dixon was not cooperating and not testifying against him. (PCR Tr. 14).

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Applicant stated the motion to reconsider was denied. He stated that they never brought him out for a hearing on his motion that was denied. (PCR Tr. 14).

Applicant stated he filed an appeal, but then withdrew it because he thought he would have a better chance in a PCR. (PCR Tr. 15). He stated his lawyer did not adequately advise him about the consequences of what his plea was going to be. He claimed his lawyer should have told him what was going on with Dixon. (PCR Tr. 15).

On cross-examination, Cooke confirmed that he told the court he understood his rights and was satisfied with counsel. (PCR Tr. 16). He stated he just learned that Dixon wasn't going to testify for the State until the end of the plea. (PCR Tr. 16, l. 20-22). He claimed that although two investigators on his case had passed away, counsel had said he didn't have a chance to go over anything. (PCR Tr. 17). Applicant stated that his counsel asked for 15 years on his behalf. He claimed he had not reviewed any offers or recommendations. He stated he pled guilty because counsel kept telling him [if] you go to trial, Talmadge would testify against you, you're going to get life, "so I just plead out." (PCR Tr. 17).

Cooke denied that the decision to plead guilty had anything to do with the judge that was available. (PCR Tr. 18). Applicant reviewed that the Order denying the motion for reconsideration and confirmed what it said that he could have taken any number of actions based upon information about Dixon testifying. (PCR Tr. 18).

Plea counsel Jason Kirincich testified that he had been practicing with the Kershaw County Public Defender's Office since 2007. He stated he began to represent Cooke when his case was returned to General Sessions when he was appointed in January 2013. (PCR Tr. 19). He stated he met with Applicant between 6 to 10 times at various detention centers and the

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courthouse.

Counsel stated that when he met with him that Applicant already had his trial transcript which he gave counsel at the first meeting in January 2013. He stated he received discovery from the State and brought a copy to Applicant which Cooke signed a receipt. "We went over every document that I received in this case. (PCR Tr. 21, l. 4-6).

Counsel stated that he weighed the pros and cons of a trial versus a guilty plea. PCR Tr. 21. He stated that they originally wanted a trial because they had thought they had a pretty good case based upon Ms. Gloria Moore's testimony at the PCR proceeding. However, he admitted that it "wasn't a "slam dunk. By any means." PCR Tr. 21, l. 17-21.

Counsel testified that this changed because initially the State was not offering anything and still wanted to proceed on the murder charge. He noted that there were two investigators and another officer, Deputy Evans, that he thought would have been helpful in the case that were no longer available. However, Deputy Evans had died. PCR Tr. 22. Counsel stated that Cooke had become more familiar with Judge Cothran's history while he was in the Sumter-Lee Detention Center. When the State offered voluntary manslaughter straight-up, Cooke advised counsel that he wanted to plead guilty in front of Judge Cothran. Counsel stated that he did not know Judge Cothran at the time, but had learned about him from members of the Sumter Public Defenders Office and private counsel. Counsel discussed with Cooke the possibility of the plea and that Applicant wanted 15 years. Counsel opined that based upon his testimony during the earlier PCR case, they thought this case was "really close to an accessory after the fact" case and that a 15 year sentence would be fair. PCR Tr. 22.

Counsel stated that prior to the plea Ms. Cavanaugh of the Solicitor's Office in Richland

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County contacted him and advised him that he also had charges there and that Dixon was going to be testifying against Cooke. PCR Tr. 23, l. 2-11.

On the morning of the Kershaw plea, the Applicant signed his paperwork and counsel went over his trial rights with him. PCR 23. Counsel and Assistant Solicitor Hutchison had a brief meeting with Judge Cothran to let him know about the plea before it was taken. At that point, Solicitor Hutchison advised him that Dixon was not going to be testifying against Cooke. PCR TR. 23, l. 17-19. Counsel stated that he went over to Cooke who was in the jury box and told him that Dixon would not be testifying against him according to the State. However, he made the decision to go forward with the plea. PCR Tr. 23, l. 21- p. 24, l. 5.

Counsel stated that his client then entered the plea and it went pretty straightforward. Counsel recalled contrasting in sentencing the Applicant and Dixon and declared he was the shooter and named by witnesses as the shooter and that Dixon had received time-served. Counsel asked for time served and no more than 15 years. PCR TR. 24. See Plea Tr. 18, 20, 23.

Counsel stated he filed a motion to reconsider after the plea to get an appeal. He stated that motion was scheduled and his family was in court, but it was denied after an in-camera hearing. PCR TR. 26. ROA 32. He stated he told Applicant of the decision in the holding cell where he had been brought. He subsequently filed an appeal. Id.

Counsel stated that in preparing for trial that he had hired Bobby Watkins who worked with the Public Defender's Office. He passed away shortly after. At that point, after discussing the case with Public Defender Fielding Pringle, he hired David MacDougall who had investigated the case during the first PCR action. He stated that MacDougall was excited to get the case and had been able then to get the testimony from Ms. Moore. He stated the goal was to

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flesh out the witnesses who were there given the multiple statements given by Keitt's family and that Moore had given a different statement as a neutral witness. He thought it was important to get Moore's testimony again to a jury. Id.

Counsel testified that even if Dixon decided not to cooperate that they still had problems because of other witnesses and the family's statements. He recalled that they still spoke at sentencing about those statements. PCR Tr. 27. Counsel confirmed that he had advised his client that if they went forward with the plea he would lose his ability to challenge any evidence against him. Id.

Counsel stated that he did not see a need to seek a continuance after he learned of Dixon's change of heart. He stated he spoke with Applicant and they still decided to go forward and that they were ready to do that. PCR Tr. 28. Counsel opined that the Applicant fully understood everything at the time concerning the consequences of the plea. PCR Tr. 28.

On cross-examination, counsel initially summarized the factual basis of the case, including the statements made by the witnesses. He noted that after the incident, Dixon was found a short time later or turned himself in. As to the fact that GSR was not found on his hands, counsel opined that it did not matter. He noted that Cooke was not immediately found but was later located in New York and then was brought back to Kershaw. PCR Tr. 30.

Counsel opined that the most damaging evidence against Applicant was the dying declaration, aside from the codefendant's testimony. PCR Tr. 30. He confirmed that Gloria Moore had not testified at the first trial, but only during the first PCR proceeding. Id. He opined that she would have been the main witness to dispute the substance of the dying declaration. PCR TR. 31. He noted that Deputy Rob Evans had written the original report, but that he had

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died.

Counsel could not recall if either of his investigators had reached out to Talmadge Dixon and that he did not have contact with Dixon. PCR Tr. 31. Concerning his involvement, counsel stated his Richland Public Defenders office was initially involved on those Richland charges and advised that they were advised by the Solicitors Office of the intent to prosecuted him and asked me and Jen Davis to conflict Dixon's case out of the office. He was told that Dixon was cooperating with the state at that time. After a new attorney was appointed for Dixon, he did not contact him.

Counsel confirmed that he told Cooke that he did not have to go forward with the plea at that time after he learned that Dixon was not cooperating with the State. Counsel stated that since the plea went forward, he did not have a discussion on whether the plea offer would have been taken away. PCR Tr. 33.

Counsel confirmed that the plea was entered under Alford. He stated that his client admitted being there, but did not admit that he was the shooter, instead asserting that Dixon was the shooter as he had testified at the first PCR hearing.

Counsel confirmed that he did not ask for a continuance because Cooke wanted to plead guilty in front of Judge Cothran. He stated that they had discussed in detail what to do when he told him that he did not have to plead. He noted that they decided if they plead in front of Judge Cothran that we could get a favorable sentence of 15 years or less. PCR Tr. 34.

After the plea, Applicant and counsel discussed some motions to make and counsel decided on the motion to reconsider. PCR Tr. 35. Counsel noted that the motion was based upon the disclosure that Dixon was not cooperating prior to the plea. PCR 35-36.

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Counsel stated that he supported the decision to plead guilty. Counsel further opined that Cooke understood that he did not have to go forward with the plea at that time. PCR Tr. 36.

C. Ineffective Assistance of Plea Counsel

In a PCR action, Applicant bears the burden of proving the allegations in his 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 [it] cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland v. Washington, 466 U.S. 668. First, Applicant must prove that counsel's performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). The Applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625.

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

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proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. To establish the prejudice prong of the Strickland test, a habeas petitioner who pled guilty must show "that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Hill v. Lockhart, 474 U.S. 52, 59 (1985).

A plea of guilty is considered by the court to be a solemn judicial admission that the charges against the defendant are true. The defendant may not later argue that his plea was invalid except in extremely limited circumstances, Blackledge v. Allison, 431 U.S. 63 (1977) (explaining that in a very limited number of cases the court will allow a defendant's challenge to his plea on the basis that the plea was "the product of such factors as misunderstanding, duress, or misrepresentation by others," though the allegations must be concrete and specific). "The accuracy and truth of an accused's statements at a Rule 11 proceeding in which his guilty plea is accepted are 'conclusively' established by that proceeding unless and until he makes some reasonable allegation why this should not be so." Crawford v. United States, 519 F.2d 347, 350 (4th Cir. 1975).

Failure to Investigate Witnesses

In his first allegation, Applicant alleges that he failed to investigate witnesses. At the PCR hearing, this issue was limited to plea counsel's failure to investigate Talmadge Dixon prior to the plea. The record reveals that counsel was aware that Dixon had testified against the Applicant at the trial and was informed of his intent to testify against Applicant in the new trial through the Solicitor's office. The likelihood of that event occurring again was

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revealed when the State asserted that the Public Defender's Office was advised of this and asked to conflict Mr. Dixon's cases from the office.

The Applicant has failed to show deficient performance by his failure to further investigate. Counsel had Dixon's sworn testimony at trial and made aware of his intent to testify again. It was not until immediately prior to the plea, the counsel as well as Applicant learned that Dixon was no longer cooperating. This Court finds that based upon counsel's discussion with the Applicant about Dixon's apparent change in his cooperation with the State, that Applicant decided to still go forward with the plea and sentencing before Judge Cothran. This was based upon counsel and the Applicant's research concerning Judge Cothran as well as his practice in the area.

In addition, Applicant has failed to show Strickland prejudice. With regard to the second prong of Strickland, a petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. However, to prevail on a claim of ineffective assistance of counsel in connection with a guilty plea, the Strickland test is "somewhat different." Burket v. Angelone, 208 F.3d 172, 189 (4th Cir. 2000). To establish the prejudice prong of the Strickland test, a habeas petitioner who pled guilty must show "that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Id. (quoting Hill v. Lockhart, 474 U.S. 52, 59 (1985)) (discussing the Strickland v. Washington standard to establish ineffectiveness of counsel in the context of a guilty plea). This Court must find that he has failed in his burden of proof. Counsel credibly testified that he advised Applicant

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that Dixon was not cooperating with the State prior to the entry of the plea and that he decided to go forward. He has failed in his burden of proof.

Failure to Inform Applicant Regarding Witness Availability

In his second allegation, he contends that counsel failed to inform Applicant of the availability of a witness. Apparently, this also concerns Dixon. This Court finds as a fact that counsel advised Applicant upon his own knowledge prior to the plea that Dixon was not cooperating. This Court further finds that this occurred before the entry of the plea consistent with counsel's credible testimony. He has failed in his burden of proof. Further, the testimony by Dixon from the initial trial may have been available under South Carolina Rule of Evidence Rule 804(b)(1). His allegations are without merit.

Failure to Request a Continuance

In his third allegation, he contends that counsel failed to request a continuance to allow him more time to reconsider the impact of the information about Dixon. This Court finds, consistent with counsel's testimony, that Applicant was advised that he did not need to go forward with the guilty plea after he was advised that Dixon was not cooperating. The Applicant indicated to counsel that he still wanted to proceed with the plea before Judge Cothran. Counsel did not see any basis for a continuance at that time. This was not deficient performance. Further, there has been no Strickland prejudice shown by the failure to request a continuance when the Applicant desired to plead before the judge at that time.

Failure to Inform Applicant of the Consequences of His Guilty Plea

In his fourth specification he contends that counsel failed to advise him of the consequences of the plea. The record reveals that the State and victim's family requested the

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maximum sentence for voluntary manslaughter and the Applicant and his counsel sought a sentence of time served or 15 years or less for voluntary manslaughter. The record reveals that this was a straight up plea with no negotiations or recommendations for sentence by the State in advance of the plea. Plea Tr. p. 3. He confirmed to the plea judge that he was aware that he could receive 30 years in prison without parole. Plea Tr. 4. Counsel testified that he advised his client of the consequences of the plea. Further, the applicant had already faced a trial and received a forty year sentence that was vacated. There is no showing that he was promised any sentence by the State. Further, there is no evidence that counsel misadvised Applicant. Counsel had a hope that he could convince the Court to limit the sentence to 15 years or less. However, this hope did not create deficient performance on his part. Similarly, prejudice is not shown. Although the Applicant may seek to second guess that decision he made in hindsight, this does not allow for the vacation of a free and voluntary plea and sentence within the statutory mandates. A disappointed hope or expectation of leniency- so long as it is not wrongfully induced by the government- does not justify withdrawal of a guilty plea nor afford occasion for invalidating it. United States v. Taylor, 303 F.2d 165, 168 (4th Cir. 1962); Vanater v. Boles, 377 F.2d 898, 900 (4th Cir. 1967). His allegation must be denied.

Failure to File a Motion to Withdraw Applicant's Guilty Plea

In his final specification, he claims that counsel's failure to file a motion to withdraw the plea. Counsel credibly testified that he made a motion to reconsider the sentence to apparently create an issue on appeal. However, the Applicant has failed to show that counsel was deficient in failing to move to withdraw the plea. As noted previously, the plea was entered under Alford

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and there was no negotiated sentence. The sentence of 20 years was within the court's discretion for voluntary manslaughter which carried 30 years. S.C. Code Section 16-3-50.

The withdrawal of a guilty plea is generally within the sound discretion of the trial judge. State v. Riddle, 278 S.C. 148, 150, 292 S.E.2d 795, 796 (1982). An abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law. State v. Bickham, 381 S.C. 143, 147, 672 S.E.2d 105, 107 (2009). The Applicant's reliance on Rolen v. State, 384 S.C. 409, 414-15, 683 S.E.2d 471, 474 (2009) is misplaced. In Rolen, the Court determined that the responses during the plea indicated that the Applicant wanted to withdraw his plea by claiming that he should not have pled guilty and similar comment at the plea. Here, there were no similar comments by the Applicant when entering his plea under Alford. Instead, he confirmed that he wanted the plea accepted under Alford, (Plea Tr. p. 10). The Applicant also confirmed his reason for pleading guilty under Alford. Plea Tr. 21-22.

Here the Applicant has failed to show circumstances where his counsel was under a Sixth Amendment duty to seek to withdraw the plea. Neither deficient performance nor prejudice has been shown. This Court notes that the denial of the motion to reconsider the sentence further speaks to the lack of prejudice concerning the motion to withdraw by failing to show had the motion been made there is a reasonable likelihood that Judge Cothran would have granted the motion.

D. Brady Violation

Applicant alleges in his initial application a Brady/Rule 5 violation, stating that the prosecutor withheld material evidence. The Brady disclosure rule requires the prosecution to provide a defendant any evidence in the prosecution's possession that may be favorable to the

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accused and material to guilt or punishment. State v. Kennerly, 331 S.C. 442, 452, 503 S.E.2d 214, 220 (Ct. App. 1998) (citing Brady v. Maryland, 373 U.S. 83, 87 (1963). Favorable evidence includes both exculpatory evidence and evidence which may be used for impeachment. United States v. Bagley, 473 U.S. 667, 676 (1985). "Impeachment or exculpatory evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993). This Court finds that Applicant did not demonstrate a Brady violation. To the contrary, it shows that the State revealed that witness Dixon was no longer cooperating with the State, not that there was any exculpatory or mitigating evidence. Further, the testimony by Dixon from the initial trial may have been available under South Carolina Rule of Evidence Rule 804(b)(1) under the exception to the hearsay rule for former testimony.

E. Involuntary Guilty Plea

Applicant also asserts his plea was involuntary. In PCR cases, an applicant asserting a constitutional violation must frame the issue as one of ineffective assistance of counsel. Al-Shabazz v. State, 338 S.C. 354, 363-64, 527 S.E.2d 742, 747 (2000) (citations omitted). An applicant who pleads guilty on the advice of counsel may collaterally attack the plea only by showing (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). An applicant alleging his guilty plea was induced by ineffective assistance of counsel must prove counsel's advice was not "within the competence demanded of attorneys in criminal cases." Hill v. Lockhart, 474 U.S. 52, 56 (1985). Further, "[t]hat a guilty plea must be intelligently made is not a requirement that all

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advice offered by the defendant's lawyer withstand retrospective examination in a post-conviction hearing." McMann v. Richardson, 397 U.S. 759, 770 (1970). Rather, "whether a plea of guilty is unintelligent . . . depends as an initial matter, not on whether a court would retrospectively consider counsel's advice to be right or wrong, but on whether that advice was within the range of competence demanded of attorneys in criminal cases." Id. at 771.

The record must establish the defendant had a full understanding of the consequences of his plea and the charges against him. Dalton v. State, 376 S.C. 130, 138, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing Boykin v. Alabama, 395 U.S. 238, 242 (1969)). A 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 the court and defendant, between the 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)). Further, "[a] guilty plea is a solemn, judicial admission of the truth of the charges" against the applicant; thus, a criminal inmate's right to contest the validity of such a plea is usually, but not invariably, foreclosed. Dalton, at 137–38, 654 S.E.2d at 874 (citing Blackledge v. Allison, 431 U.S. 63 (1977)). Therefore, 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. (citing Crawford v. United States, 519 F.2d 347 (4th Cir. 1975); Edmonds v. Lewis, 546 F.2d 566 (4th Cir. 1976)). "In considering an allegation on PCR that a guilty plea was based on inaccurate advice of counsel, the transcript of the guilty plea hearing will be considered to determine whether any possible error by counsel was cured by the information

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conveyed at the plea hearing." Id. at 138–39, 654 S.E.2d at 874 (citing Wolfe v. State, 326 S.C. 158, 165, 485 S.E.2d 367, 370 (1997)).

This Court finds that the record fully supports the knowing and voluntary nature of Applicant's plea. As stated above, the record reveals that the pleas was freely and voluntarily entered with a full understanding of the consequences of the plea upon effective assistance of counsel. The plea court made inquiry of the Applicant's desire to plead guilty. Plea Tr. 3. He confirmed he had adequate time to speak with his lawyer. His lawyer credibly testified that he had met with him at least 6 times, went over the trial transcript and discovery with him page by page. The Applicant advised the plea judge that he understood each of his trial rights that he was waiving, as well as the fact that he could receive 30 years in prison. Plea Tr. p. 4 - 6. In his plea in mitigation, he confirmed his desire to plead guilty and request leniency from the Court. Plea TR. 21-22. This free- standing allegation must be dismissed.

IV. CONCLUSION

Based on the foregoing, the Court finds and concludes 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.

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 of post-conviction relief. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek

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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 denied and dismissed with prejudice; and

2. Applicant must be remanded to the custody of the Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 11 day of February, 2019.

THE HONORABLE R.D. CRAIG BROWN
Presiding Judge
Fifth Judicial Circuit

Florence, South Carolina

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