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MAR 05 2019

S.C. SUPREME COURT

February 25, 2019

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

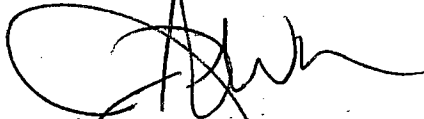
Re: Ryais Ryche Rivers v The State of South Carolina  
C/A No: 2014-CP-40-07536

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. Rivers 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. Clayton Mitchell, III, 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

STATE OF SOUTH CAROLINA  
In The Supreme Court

APPEAL FROM RICHLAND COUNTY  
J. Derham Cole, Circuit Court Judge

2014-CP-40-07536

RECEIVED

MAR 05 2019

S.C. SUPREME COURT

Ryais Ryche Rivers, # 356951,

Appellant,

v.

STATE OF SOUTH CAROLINA,

Respondent.

NOTICE OF APPEAL

Ryais Ryche Rivers, # 356951, appeals the Order of Dismissal denying his Application for Post-Conviction Relief filed February 19, 2019, issued by the Honorable J. Derham Cole, Presiding Judge, Fifth Judicial Circuit.



Jonathan D. Waller  
Waller Law Group  
SC Bar No.: 76290  
1116 Blanding Street  
Suite 2B  
Columbia, SC 29201  
803-520-7278 (phone)  
jonathan@wallergroupsc.com  
ATTORNEY FOR PETITIONER

February 27, 2019

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

STATE OF SOUTH CAROLINA  
In The Supreme Court

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RECEIVED

MAR 05 2019

APPEAL FROM RICHLAND COUNTY  
J. Derham Cole, Circuit Court Judge

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S.C. SUPREME COURT

2014-CP-40-07536

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Ryais Ryche Rivers, # 356951,

Appellant,

v.

STATE OF SOUTH CAROLINA,

Respondent.

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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. Clayton Mitchell, III, Assistant Attorney General, by mailing in an envelope properly addressed with postage prepaid on this day, to his office located at P.O. Box 11549, Columbia, SC 29211.

  
Lyndsay Murray

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February 27, 2019

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2014-CP-40-07536

Ryals Ryeche RIVERS, SCD CID# 356951  
Applicant

The STATE of South Carolina,  
Respondent

CHECK ONE:

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


RICHLAND COUNTY  
 FILED  
 2019 FEB 19 PM 4:04  
 JEANETTE W. MCBRIDE  
 CLERK OF COURT

**IT IS ORDERED AND ADJUDGED:**  Formal order is attached;  Statement of Judgment by the Court:

This matter came before this court on an application for post-conviction relief filed pursuant to *South Carolina Code Annotated Section 17-27-10 et seq.*

Based upon the record of the case, the evidence presented at the evidentiary hearing held in this matter, the argument of counsel, and consideration of the applicable statutory and case law, this court finds that the applicant's request for **post-conviction** relief should be and is therefore **denied** and the **application** is **dismissed** with prejudice for failure of the applicant to establish deficient performance of counsel and/or prejudice resulting from counsel's performance.

Dated at Spartanburg, South Carolina, this **12th** day of **February**, 2019.

  
 \_\_\_\_\_  
 PRESIDING JUDGE, J. Derham Cole

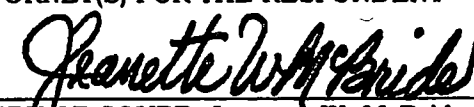
This judgment was entered on the \_\_\_\_\_ day of **February**, 2019, and a copy mailed first class this **19th** day of **February**, 2019 to attorneys of record or to parties (when appearing pro se) as follows:

**Jonathan D. Waller, Esq.**  
 1116 Blanding Street, Suite. 2B  
 Columbia, South Carolina 29301

**J. Clayton Mitchell, Esq.**  
 Post Office Box 11549  
 Columbia, South Carolina 29211-1549

ATTORNEY(S) FOR THE APPLICANT

**Kelly Oppenheimer, Esq.**  
 Post Office Box 11549  
 Columbia, South Carolina 29211-1549  
 ATTORNEY(S) FOR THE RESPONDENT

  
 \_\_\_\_\_  
 CLERK OF COURT, Jeanette W. McBride

STATE OF SOUTH CAROLINA )  
COUNTY OF RICHLAND )  
) )  
Ryais Ryche Rivers, #356951, )  
) )  
Applicant, )  
) )  
v. )  
) )  
State of South Carolina, )  
) )  
Respondent. )

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IN THE COURT OF COMMON PLEAS  
FOR THE FIFTH JUDICIAL CIRCUIT

Case No. 2014-CP-40-07536

ORDER OF DISMISSAL

RICHLAND COUNTY  
FILED  
2015 FEB 19 PM 4:04  
JEANETTE H. MCGRIDE  
C.P. & G.S.

This matter comes before this Court by way of an application for post-conviction relief filed December 8, 2014, by Ryais Ryche Rivers (Applicant). The State (Respondent) made its return on June 5, 2015, requesting an evidentiary hearing be held. An evidentiary hearing into the matter was convened on February 5, 2016, at the Richland County Courthouse before the Honorable J. Derham Cole. Applicant was present at the hearing and represented by Jonathan D. Waller, Esquire. Assistant Attorney General J. Clayton Mitchell, III, of the South Carolina Attorney General’s Office, represented Respondent.

Following a thorough review of the record in its entirety, and the testimony and evidence presented at the evidentiary hearing, this Court finds Applicant has failed to establish any constitutional violations and denied this application with prejudice.

**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 Richland County Clerk of Court. During its March 2013 term, the Richland County Grand Jury indicted Applicant for three counts of kidnapping (2013-GS-40-01521; -01522; 01524) and two counts of armed robbery (2013-GS-40-01520; -01526). Assistant Public Defender Kris Hines, of the Fifth Circuit Public Defender’s Office, represented Applicant on these charges. On September 5, 2013, Applicant appeared before the Honorable DeAndrea G. Benjamin and pled guilty as indicted to all charges.

Pursuant to a negotiated sentence, Judge Benjamin sentenced Applicant to a term of imprisonment of twenty years for each charge. The sentences were to be served concurrently.

Applicant filed a timely notice of appeal. Thereafter, by written order dated February 26, 2014, the South Carolina Court of Appeals dismissed Applicant's appeal for failing to provide a sufficient explanation as required by Rule 203(d)(1)(B)(iv), SCACR. The remittitur was issued on March 19, 2014.

### STATEMENT OF FACTS

On December 4, 2012, two males wearing masks and gloves walked into the Nancy's Nook, located on Broad River Road, with a handgun and a sawed-off shotgun. Tr. 7. As they walked into the store, the men pointed the guns at the store clerks. Tr. 7. Applicant's co-defendant, Carroll Phillips, III, told a patron in the store to: "[D]rop your fucking pocket book and back the fuck up." The patron complied, and the co-defendant took her purse and everything inside. Tr. 7. Applicant then tossed a black over the counter, and one of the clerks began filling it up. Tr. 7-8.

Deputy Shelia All, of the Richland County Sheriff's Office, was dispatched at approximately 9:51 in the evening to Nancy's Nook, located on Broad River Road. Tr. 6-7. As Deputy All approached the scene, someone flagged her down and reported seeing two black males exit the store with guns and a black bag. Tr. 7. K-9 units were, therefore, dispatched but unable to track the suspects. Tr. 7.

At that point, the case was turned over to the investigative unit. Tr. 8. Investigator Carwell later received a tip that Applicant and Phillips had robbed the Nancy's Nook with a sawed-off shotgun. Tr. 8. The tipster also informed Investigator Carwell Applicant and Phillips lived at Cross Roads Apartment complex. Tr. 8.

Investigator Carwell then confirmed with the apartment manager that Applicant and Phillips lived in apartment number 1508. Tr. 8. Investigator Carwell attempted to make contact with the two suspects by knocking on their door, but he was unsuccessful in making contact with them. Tr. 8-9. Investigator Carwell also searched for the two men on Facebook, where he observed photographs of Applicant and Phillips with the weapons used in these crimes. Tr. 9. Investigator Carwell obtained a search warrant and executed the warrant at their apartment. Tr. 9.

During the search, law enforcement officers found the patron's belongings, as well as clothing matching the description of the robbers. Tr. 9.

### CURRENT APPLICATION

In his application for post-conviction relief, Applicant alleges he is being held in custody unlawfully for the following allegations:

1. Did the trial court err, and was the [Applicant's] 5<sup>th</sup>, 6<sup>th</sup>, 13<sup>th</sup>, 14<sup>th</sup>, 15<sup>th</sup> Amendment rights of the U.S. Constitution, as well as Article IV § 2, and his due process rights violated, by the language and or charge contained therein, which did created and or form conclusive presumption(s), that took away the Applicant's presumption of innocence, and automatically shift [sic] the burden of persuasion to the [Applicant], in regard to the crucial elements of dispute?
2. Did the trial court err, and was the Applicant's 5<sup>th</sup>, 6<sup>th</sup>, 14<sup>th</sup> Amendment rights of the U.S. Constitution violated, as well as Article IV § 2 and his due process rights violated, as well as rules of court, to include rules of criminal procedure, as well as the court lacking subject matter jurisdiction, and or was prohibited from enacting and or invoking and or continuing its subject matter jurisdictionary [sic] "[p]owers" due to the "[p]rocedural [d]efect" in that there was no "[w]ritten" (emphasis added) order of continuance obtained pursuant to Article 4 § 4 of the South Carolina Constitution?
3. Did the trial court err, and was the Applicant's 5<sup>th</sup>, 6<sup>th</sup>, 14<sup>th</sup> Amendment rights of the U.S. Constitution violated, as well as Article IV § 2 and his due process rights violated, due to the "procedural defect," in that the prosecuting agents acted as sole witnesses on the warrants and or indictment(s)?
4. Did the trial court err, and was the Applicant's 5<sup>th</sup>, 6<sup>th</sup>, 14<sup>th</sup> Amendment rights of the U.S. Constitution violated, as well as Article IV § 2 and his due process rights violated, by the indictments for kidnappings' failure to descend to particulars, making use of the generic terms of the statute, in the body of the charging instrument?
5. Did the trial court err, and was the Applicant's 5<sup>th</sup>, 6<sup>th</sup>, 14<sup>th</sup> Amendment rights of the U.S. Constitution violated, as well as Article IV § 2 and his due process rights violated, by the indictments for armed robbery's failure to allege money amounts, items stolen, making use of the generic terms of the statute, not alleging what the Applicant was armed with, and making use of other loose, cryptic and ambiguous language in the body of the charging instrument?
6. Did the trial court err, and was the Applicant's 5<sup>th</sup>, 6<sup>th</sup>, 14<sup>th</sup> Amendment rights of the U.S. Constitution violated, as well as Article IV § 2 and his due process rights violated, by the prosecution making reference to various

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statements at the Applicant's plea hearing, being entered into verbal evidence as they relate to his plea hearing, where there was no evidence adduced at the plea hearing that demonstrates that the alleged victims (or co-defendants) were given a copy of those statements at the time they were made, nor was there signed by them a copy of a receipt for the taking therefor?

7. Did the trial court err, and was the Applicant's 5<sup>th</sup>, 6<sup>th</sup>, 14<sup>th</sup> Amendment rights of the U.S. Constitution violated, as well as Article IV § 2 and his due process rights violated, by the trial and or plea court allowing constructive amendment of the indictments at the Applicant's trial and or plea hearing?
8. Was counsel appointed by the State inept and constitutionally ineffective in violation of the Applicant's 5<sup>th</sup>, 6<sup>th</sup>, 14<sup>th</sup> Amendment rights of the U.S. Constitution, as well as Article IV § 2, and his due process rights which led to an unreasonable guilty plea that was not freely, knowingly, voluntarily or intelligently given, creating an egregious miscarriage of justice?
  - a. Counsel was inept and constitutionally ineffective because counsel failed to protect the Applicant's due process rights, in that when the indictments possessed a structural constitutional error and or defect, by the language and or charge contained therein, took away the Applicant's presumption of innocence and automatically shift [sic] the burden of persuasion [sic] to the [Applicant], counsel said nothing, nor did counsel do anything. Counsel should have objected and motioned to quash the indictments[;]
  - b. Counsel was inept and constitutionally ineffective because counsel failed to protect the Applicant's due process rights, in that when the trial court went beyond the (180) day deadline mandated and prescribed by judicial order issued by the South Carolina Supreme Court pursuant to the provisions of Article V § 4 of the South Carolina Constitution, counsel said nothing, nor did counsel do anything. The court was prohibited from continuing their subject matter jurisdictionary [sic] powers. . . . Counsel should have objected and motioned for default and judgment [sic][;]
  - c. Counsel was inept and constitutionally ineffective because he [sic] failed to protect the Applicant's due process rights, in that where there was a "[p]rocedural [d]effect" in the establishing of the warrants and or indictments due to the prosecuting agents acting as sole witnesses on the warrants and or indictments, counsel said nothing, nor did counsel do anything. Counsel should have objected to at least preserve the issue for appellate review. Counsel should have motioned to quash the indictments[;]
  - d. Counsel was inept and constitutionally ineffective because he [sic] failed to protect the Applicant's due process rights, in that when the indictments for kidnapping and the indictments for armed robbery either failed to descend to particulars, failed to allege how the kidnapping

occurred, makes use of the generic terms of the statute, makes the use of the terms "and/or," do not alleged who the supposed co-defendants were, do not sufficiently allege the elements, or conspiracy or whether the Applicant is principle 1<sup>st</sup>, 2<sup>nd</sup>, or 3<sup>rd</sup>, the armed robbery fails to allege money amounts or items stolen, alleges I was armed or pretended to be armed two materially different sets of facts. . . . None of these essential requirements were properly alleged in the body of the charging instrument yet counsel said nothing, nor did counsel do anything. Counsel should have objected and motioned to quash the indictments . . .[;]

- e. Counsel was inept and constitutionally ineffective because he [sic] failed to protect the Applicant's due process rights, in that he [sic] allowed the prosecution to make reference to various statements at the Applicant's plea hearing, being entered into verbal evidence also pursuant to establishing the court record as it relates to the Applicant's plea hearing where there was no evidence adduced at the plea hearing that demonstrates the alleged victims and or co-defendants were given a copy of those statements at the time they were made, nor was there a receipt signed by them for the taking therefor which stands in clear defiance to the applicable statutes SC Code Ann §§ 19-1-80 and 19-1-90. Counsel said nothing nor did counsel do anything. This matter should have been addressed before the court and placed on the court record to preserve it for appeal[;]
  - f. Counsel was inept and constitutionally ineffective because counsel failed to protect the Applicant's due process rights, in that when constructive amendment of the indictments occurred before the court, counsel said nothing, nor did counsel do anything. Counsel should have at least objected to preserve this issue in the court record. He [sic] should have motioned for a directed verdict based upon this issue and the impossibility to prove all the various allegations alleged within the indictments. Counsel should have motioned to quash the indictments or for a trial based upon the inability to prove all the various allegations . . .[;]
  - g. Counsel was inept and constitutionally ineffective because he [sic] failed to protect the Applicant's due process rights, when any competent attorney could see that the SC Supreme Court engaged in acts of fraud on the court, modern day slavery and abused its discretion in their holdings. . . . Counsel should have done a better job researching and or studying his or her profession . . .[;]
  - h.
9. Did the SC Supreme Court in State v. Gentry supra err, engaged in acts of fraud on the court to essentially establish modern day slavery, and abused their discretionary "[p]owers," which even took away our right to vote, and in such, the trial court did err, and lacked subject matter jurisdiction, and or was

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prohibited from enacting and or invoking and or continuing its subject matter jurisdictionary [sic] "[p]owers," even though they possess such "[p]ower," due to the indictment defects and or errors contained and argued within this documents, in violation of the Applicant's 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 13<sup>th</sup>, 14<sup>th</sup>, 15<sup>th</sup> Amendment rights of the U.S. Constitution, as well as Article IV § 2 and the laws of Due Process?

At the evidentiary hearing, Applicant proceeded forward on allegations of ineffective assistance of counsel for: (1) failing to prepare for trial; (2) failing to show Applicant the underlying video; and (3) failing to challenge the search warrant, as well as an allegation his plea was involuntarily made.

### **TESTIMONY PRESENTED AT THE EVIDENTIARY HEARING**

At the evidentiary hearing, Applicant testified on his own behalf. Respondent presented the testimony of Assistant Public Defender Hines (Counsel). This Court also had before it a copy of Applicant's plea transcript, the records of the Richland County Clerk of Court, Applicant's records from the South Carolina Department of Corrections, and Applicant's appellate records.

During the evidentiary hearing, Applicant testified on his own behalf. Applicant testified he was facing two counts of armed robbery and three counts of kidnapping. He denied that he was facing five counts of kidnapping and three counts of armed robbery. He further testified Counsel was appointed to represent him, and they met three times. He testified he could not recall the first time after he was arrested he met with Counsel. He estimated, however, he first met with Counsel approximately four or five months after his arrest. Applicant further testified during their first meeting, Counsel only asked him whether or not he wanted to plead guilty. He elaborated they did not discuss his constitutional rights and he had not seen any discovery at that point. He further elaborated he did not see any discovery materials until four or five months before he pled guilty. He also testified he did not see the surveillance video, and he and Counsel did not discuss the video. He explained, however, he knew there was a video and he and a law enforcement officer viewed the video once before Counsel represented him. He further explained he never asked Counsel about watching the video. He testified, however, at the plea and after being shown the video, he admitted to being on the video. Applicant also testified Counsel did not explain to him what the State would be required to prove at trial, but rather she just told him the potential

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sentences for each charge. He elaborated he did not understand what the State would have to prove. He further elaborated he thought the only evidence the State had against him was the video, a weapon, and the statement his co-defendant gave. He testified he and Counsel reviewed his co-defendant's statement, they talked about it "a little bit," and she read the statement to him. He also testified he never gave a statement to law enforcement, but his co-defendant implicated him in his confession to law enforcement.

Applicant also testified a search warrant was executed in connection with this case. He explained the search warrant was for his apartment and he and his co-defendant lived there together. Applicant testified he and Counsel never discussed how the warrant was obtained and never discussed whether or not the warrant was proper. He testified he believed law enforcement searched his apartment prior to obtaining a search warrant. He explained he has this belief because on the initial summary it states what the investigator did and he was present during the execution of the search warrant, but on the follow-up summary it states the investigator obtained a search warrant and other officers executed the search warrant. Applicant testified he did not raise this concern with Counsel, because he did not see this paperwork until after he was in the Department of Corrections. He elaborated he and Counsel never discussed the search warrant, as it never came up in conversation. He further elaborated, however, he knew a search warrant had been executed, and law enforcement allegedly found stolen items in his apartment. Applicant also testified he did not ask Counsel about the circumstances of the search warrant because he did not know about what to ask Counsel. He testified an investigator would have been beneficial because the investigator could have "investigated the, the whole search warrant and went through the case, chopped it up and broke it down to bits and pieces and investigated certain things that he felt needed to be investigated."

He further testified he and Counsel discussed his right to a jury trial, but Counsel informed him she did not believe it would be a good idea to go to trial and it was her belief it was in his best interest to plead guilty because the evidence against him was strong. He testified he told Counsel he wanted to go to trial, and he told her that a few days before he "got sentenced, before [he] went to court." Applicant elaborated he and Counsel did not discuss what would happen at trial and did not discuss the procedures involved in proceeding to trial. He further elaborated he and Counsel never discussed a date on which the trial would take place. He testified, however, when Counsel



came to ask him if he wanted to plead guilty and he told her he had not decided, she told him a court date was set. He explained Counsel told him the specific date, but he could not remember the date at the time of the evidentiary hearing. He further explained when he "got down to the holding tank," Counsel came to talk to him and asked him if he wanted to "sign the plea." Applicant testified at that time, when he told her he did not want to plead guilty and wanted to proceed to trial, Counsel told him he would go to trial the next week, which concerned him because they did not have a trial strategy. He elaborated he and Counsel had not discussed anything in preparation for trial and had not discussed obtaining an investigator, which he believes could have been used. He also testified Counsel's boss, who he had never met prior to his plea, told him if he went to trial, "there's no winning this." He elaborated he was adamant about proceeding to trial "until all this stuff came up about her and her boss coming to speak with me."

Applicant admitted to lying to the plea court. He testified at his plea, when he told the plea court no one had threatened him or coerced him into pleading guilty, that statement was not true. He further testified he believes had he told the plea court he was pressured and threatened into pleading guilty, the plea court would not have accepted his plea. He further elaborated had he told the plea court he was not on the video, he believes the plea court would not have accepted his plea. He explained he was told to answer the plea court's questions with "yes ma'am" or "no ma'am" and was told to be respectful. Applicant also testified he felt he needed to agree with the plea court's questions in order to get the matter resolved, and he did not want to irritate the plea court, which was why he admitted to being on the video. He testified had he denied being on the video, it would have irritated the plea court because "everybody was ready to proceed. You're throwing a wrench in the whole program." He explained he admitted to being on the video because he wanted to "get everything over with."

He testified he wanted to trust Counsel and believed she had everything "under wraps," so he tried to go with the flow. He explained the thought of going to trial the next week played heavily on his decision to plead guilty. He testified he decided not to proceed to trial and to plead guilty, and he did so because he trusted Counsel. He denied pleading guilty to avoid the risk of receiving a lengthier sentence if convicted at trial. Applicant elaborated had Counsel been prepared for trial the next week, he would have proceeded to trial. He further elaborated the plan

was for him to plead before his co-defendant so that the court would be more lenient on him, but his co-defendant pled guilty on the same day and at the same hearing as Applicant.

Applicant testified at his plea, he did not know what negotiated meant, and he and Counsel did not discuss that beforehand. He elaborated Counsel told him if he took the plea, his sentences would be concurrent. He further elaborated he did not know whether or not Counsel had negotiated concurrent sentences with the solicitor. Applicant also testified he knew he would receive a concurrent sentence going into the plea, and he knew his sentence would either be twenty or thirty years on all charges. He elaborated, however, Counsel told him she would push for a ten-year sentence and that nine times out of ten, he would get ten years. He further testified he recalled Counsel asking the plea court for ten years, but he was not sure for what sentence the State was asking. He testified he received a twenty-year sentence.

Applicant rested his case after his testimony, and Respondent presented the testimony of Counsel. She testified she graduated from law school in 2004, at which point she clerked for a federal judge for a year-and-a-half. She further testified after her clerkship, she worked for Jack B. Swerling, Esquire, doing criminal defense work. She testified she began working for the Richland County Public Defender's Office in 2008, and she has been practicing criminal law for her entire career except for a year-and-a-half. She further testified she has handled many cases of a serious nature, including armed robbery and kidnapping case.

Counsel also testified she was appointed to represent Applicant, and she met with Applicant for the first time on January 2, 2013. She testified at that time, they did not discuss the specifics of the case. She explained she did not discuss the specifics because at that time, the Public Defender's Office had open cases for Applicant and his co-defendants, so they had to perform a conflict review. She further explained she told Applicant she could not discuss the specifics at that time and also advised him of the conflict review.

She testified she met with Applicant seven times. She testified after the initial meeting and after the conflict had been resolved, she and Applicant discussed the particulars of this case. She further testified she advised Applicant of his constitutional rights, the elements of the offenses, and the penalties. She explained she tells all of her clients they have a right to go to trial or to plead guilty, and that is their decision to make. She further explained detailed explanations of the

\*9

right to testify and the right to confront witnesses arise during preparation for trial. Counsel also testified during their meeting on September 4<sup>th</sup>, she and Applicant discussed trial and plea strategy.

Counsel further testified she filed discovery motions in this case and reviewed the discovery with Applicant. She testified in discovery were the following materials: the incident report, the surveillance video, a search warrant and incident reports from Charleston, which involved Applicant's co-defendant, Phillips, Phillips's statement, records from the pawn shop where the gun was purchased, statements from other co-defendants, an anonymous tip indicating the suspects lived at the address where Applicant and Phillips lived, Facebook photos, and the search warrant. Counsel testified these statements implicated Applicant. She explained Angel Young, who was also a co-defendant, gave a verbal statement indicating she was there and knew Applicant and the other co-defendants. She further testified she and Applicant discussed the evidence against him and also discussed the items found when the search warrant was executed. She explained, however, she probably did not review the video with Applicant because it is very difficult to bring a laptop into the detention center. She further explained typically when she wants to show her clients a video, she has them brought to the courthouse. She testified Applicant was brought to the courthouse, but she could not recall if she and Applicant watched the video. However, she recalled discussing the video and what she had seen on the video with Applicant. She further testified she recalled Applicant had seen the video, and believed an investigator showed it to him. Counsel testified the video was clear, and she could clearly see one of the guns, which Phillips was carrying. She explained the gun was very distinctive, as it was a sawed-off shotgun with camouflage tape on it. She further explained, on the video, Applicant can be seen with a nine millimeter gun, throwing a backpack across the counter at the person behind the counter.<sup>1</sup> She testified Applicant and Phillips were wearing masks, so she could not see their faces; so the identity of the robbers would have not come from the video, but rather the co-defendants' statements. She could not recall whether Applicant ever indicated to her which person he was on the video. Counsel also testified had this case proceeded to trial, the State would have sought to play the entire video.

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<sup>1</sup> At the plea, Phillips testified he was the one who threw the bag over the counter. Tr. 11-12. Counsel explained her confusion at the evidentiary hearing, indicating she had not watched the video since 2013.

*AS*  
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She also testified she did not see any issues with the search warrant. She did not recall whether there were any discrepancies with the investigators' summaries of the warrants. She testified she did not recall whether or not she and Applicant specifically discussed a challenge to the search warrant. She explained, however, if she had seen any issues with the search warrant, she would have challenged the warrant if the case had proceeded to trial. She further testified she did not hire an investigator, so she did not investigate the anonymous tip law enforcement received.

Counsel testified she advised Applicant he should accept the plea offer. She further testified she advised him to take the plea, because she believed Applicant would have been convicted at trial. Counsel explained had he proceeded to trial at least two, if not all, of the co-defendants would testify against Applicant and the State would also introduce the surveillance video, which all amounted to a substantial amount of evidence against Applicant. She further explained her concern was Applicant had a pending charge in Orangeburg County and, therefore, Applicant might be looking at life without parole if convicted at trial on these charges. Counsel testified the warrants in Orangeburg were not served until much later after his arrest in Richland County, but the Orangeburg County Solicitor's Office very quickly offered Applicant a plea for which his sentence on the Orangeburg County charge would run concurrent to the Richland County charge. She also testified it would be in Applicant's best interest not to proceed to trial, but rather attempt to handle all of the charges at once and get concurrent sentences on all of them. She testified at trial, Applicant would have been facing 150 years imprisonment.

She testified on September 4<sup>th</sup>, she and Assistant Public Defender Breen Stevens, of the Orangeburg County Public Defender's Office and who had been appointed to represent Applicant on his pending Orangeburg County charge, met with Applicant. She testified at that time, Applicant did not have any plea offers for the Richland County charges but had an offer for the Orangeburg County charge, and his case was on the trial docket for the next week. She further testified at that meeting, Applicant indicated he wanted to plead guilty. She testified Applicant was brought to the courthouse on September 5<sup>th</sup>; but as she and Applicant were discussing the plea, Applicant indicated he did not want to plead guilty. She explained at that point, she asked Doug Strickler, Esquire, who was the Chief Public Defender for the Fifth Circuit and Counsel's boss at the time, to discuss with Applicant his decision to proceed to trial and to encourage Applicant to plead guilty because she believed Applicant proceeding to trial was a poor decision. She further

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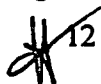
explained during the meeting, Chief Public Defender Strickler, who did not know the specific facts of the case, asked Applicant to explain to him the evidence the State would present at trial and what Applicant believed the result would be if the jury saw that evidence. Counsel testified during that meeting, Applicant clearly explained the evidence against him, including the statements and the video, and indicated he thought he would be convicted at trial, to which Chief Public Defender Strickler asked him why then were they discussing a trial rather than a plea. She testified Chief Public Defender Strickler also asked Applicant what he believed would happen at sentencing after being convicted at trial. She further testified Applicant then decided to proceed with the plea, thinking it was not a good idea to proceed to trial. Counsel also testified Chief Public Defender Strickler never told Applicant he believed he should take a plea. She explained at the time, she had never thought of approaching a client with his option to proceed to trial or plead guilty in the manner in which Chief Public Defender Strickler did with Applicant; but now she typically approaches all of her clients in this manner. She testified although she was telling Applicant the evidence was strong against him, Applicant did not want to plead guilty until after speaking with Chief Public Defender Strickler. She further testified she, as well as other attorneys in her office, frequently brought Chief Public Defender Strickler in to have these conversations with defendants because he had a vast amount of experience as a public defender.

Counsel further testified by the time Applicant decided to plead guilty, she had already underwent basic trial preparation. She explained she had a second chair for trial and had discussed trial strategy. She further explained she had prepared potential cross-examination of the witnesses.

Counsel also testified she did not coach Applicant regarding his answers to the plea court's questions. She testified she informs all of her clients they needed to be respectful towards the judge at the plea, and they also need to be truthful at the plea. She testified she did not tell Applicant he would likely receive a ten-year sentence, but rather he would receive a concurrent sentence and the sentence he would get at a plea would be less than he would receive at trial.

#### **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

 12

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).

Applicant's allegations are two-fold: (1) ineffective assistance of counsel for failing to prepare for trial, for failing to show Applicant the underlying video, and for failing to challenge the search warrant; and (2) involuntary guilty plea.

### *Ineffective Assistance of Counsel*

In a post-conviction relief action, an 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). When an applicant alleges ineffective assistance of counsel as a ground for relief, the applicant must prove "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.

The proper measure of performance is whether an 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. *Butler*, 286 S.C. 441, 334 S.E.2d 813. 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 counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." *Cherry*, 300 S.C. at 117, 385 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. In order to satisfy the prejudice prong of this test following a guilty plea, the applicant "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).

After careful review based on the standard discussed above, this Court finds Applicant has failed to carry his burden in this action. Below are this Court's findings in regards to each of Applicant's allegations of ineffective assistance of counsel.

*Counsel's alleged failure to prepare for trial*

Applicant alleges Counsel was ineffective for failing to prepare for trial. "There is a strong presumption counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). Moreover, when there is evidence counsel met with Applicant in preparation for trial and there is no evidence additional preparation on the part of counsel would have affected the outcome at trial, counsel cannot be said to have been ineffective. *Harris v. State*, 377 S.C. 66, 659 S.E.2d 140 (2008), *abrogated on other grounds by Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018).

This Court finds Counsel's testimony with respect to this allegation very credible, whereas Applicant's testimony is not credible. Counsel testified she met with Applicant seven times prior to his guilty plea. During these meetings, they discussed everything, including potential sentences, the elements of the offenses, Applicant's constitutional rights, and the evidence the State had against Applicant. Furthermore, Counsel informed Applicant of the risk of a possible sentence of life without parole on the pending Orangeburg County charge should Applicant proceed to trial and be convicted of the Richland County charge, thereby advising Applicant of the strike laws in South Carolina. In addition, Counsel testified at the time of Applicant's plea, she had already undergone preliminary trial preparation, including developing trial strategy and preparing cross-examination. Counsel was preparing for trial, as she not only reviewed with Applicant the elements of the charge and potential sentences but also reviewed with Applicant the discovery and the risks and benefits at trial. In addition, Counsel reviewed the extent of the evidence against Applicant with him, particularly highlighting the likelihood of prevailing at trial. This Court, therefore, finds Applicant has failed to establish any deficiency on the part of Counsel. *See Harris*, 377 S.C. at 75, 659 S.E.2d at 145 (finding trial counsel was not deficient when he had been practicing law for a number of years and had met with the applicant, however brief, particularly in

light of the fact counsel is presumed to have rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case).

This Court similarly finds Applicant has presented no evidence which would establish any prejudice on the part of Applicant. In particular, Applicant has wholly failed to provide this Court with any evidence as to what benefit could have been realized from additional preparation by Counsel. *See Harris*, 377 S.C. at 75, 659 S.E.2d at 145 (“Furthermore, Harris did not offer any evidence or argument as to how counsel’s alleged lack of preparation prejudiced him. Therefore, it is merely speculative that counsel’s alleged deficient performance was prejudicial to Harris.”). Accordingly, this allegation must be denied and dismissed with prejudice.

*Counsel’s alleged failure to review the evidence*

Applicant further alleges Counsel was ineffective for failing to review all of the evidence with Applicant. Specifically, Applicant alleges Counsel never showed him the surveillance video from the crime scene. Applicant testified he and Counsel never viewed the video and, similarly, never discussed the video. He testified, however, he was aware of the surveillance video, as a law enforcement officer had previously shown him it. On the other hand, Counsel testified although she probably did not watch the video with Applicant, she reviewed it and she and Applicant discussed it. Counsel further testified the video was very clear, and she was able to clearly view everything that happened on the video. This Court finds Counsel’s testimony very credible, whereas Applicant’s testimony is not credible. This Court further finds, based on the foregoing testimony, Applicant has failed to establish any deficiency on the part of Counsel.

Similarly, this Court finds Applicant has failed to establish any resulting prejudice from this alleged deficiency. Applicant wholly failed to present this Court with any concrete evidence as to what benefit would have been realized from these videos. Because Applicant failed to produce the video at the evidentiary hearing, any testimony as to how this video could have been beneficial is “purely speculative.” *Bannister v. State*, 333 S.C. 298, 304, 509 S.E.2d 807, 810 (1998). Moreover, at the plea, Applicant agreed with the facts as presented by the State and further indicated one of the men in the video was, in fact, him. Tr. 11. This Court finds this allegation must be denied and dismissed with prejudice.

***Counsel's alleged failure to challenge the search warrant***

Applicant alleges Counsel was ineffective for failing to challenge the search warrant. Applicant testified there were some discrepancies in the summaries of the warrants; and based on those discrepancies, he believed law enforcement searched his apartment prior to obtaining a search warrant. Counsel, however, testified she did not see any problems with the search warrant. She further testified had she seen any deficiencies in the warrant, she would have challenged the warrant at trial. This Court finds Counsel's testimony very credible, whereas Applicant's testimony is not. Accordingly, because there were no deficiencies in the warrant upon which Counsel could move to suppress, Applicant has failed to establish Counsel was deficient.

Similarly, this Court finds Applicant has wholly failed to establish any resulting prejudice from the alleged deficiency. A guilty plea generally acts as a waiver of all non-jurisdictional defects and defenses." *State v. Thomason*, 341 S.C. 524, 526, 534 S.E.2d 708, 710 (Ct. App. 2000) (citing *State v. Munsch*, 287 S.C. 313, 338 S.E.2d 329 (1985)). Through a plea, a defendant admits all of the elements of the offense charged and waives all defenses, except for the sufficiency of the indictment. *Id.* At Applicant's plea, Applicant indicated the facts as recited by the State were correct. Tr. 11. Moreover, Applicant indicated to the plea court he understood by pleading guilty he would not have a jury trial, would not be able to confront the witnesses against him, and would not be able to present a defense. Tr. 15-16. Based on Applicant's solemn admission of guilt at the plea, this Court finds this allegation must be denied and dismissed with prejudice.

***Involuntary Guilty Plea***

Applicant further alleges his guilty plea was not voluntarily made. In particular, Applicant alleges Counsel had her boss, Chief Public Defender Strickler, speak with Applicant in order to coerce him into pleading guilty. This Court finds Applicant's guilty plea was freely and voluntarily made. In evaluating issues concerning guilty pleas, this Court will consider the entire record, including the transcript of the guilty pleas and the evidence presented at the post-conviction relief hearing. *Roddy v. State*, 339 S.C. 29, 528 S.E.2d 418 (2000). 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 court and defendant, between court and defendant’s counsel, or both.” *Id.* at 34, 528 S.E.2d at 421 (citing *State v. Ray*, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993)). Voluntariness of a guilty plea is not merely determined by an examination of a specific inquiry by the plea court alone but rather is determined by the record of both the guilty plea proceeding and the post-conviction relief hearing. *Id.* However, the overarching concept remains “a guilty plea should only be accepted where the record evidences ‘an affirmative showing that it was intelligent and voluntary.’” *Boykin v. Alabama*, 395 U.S. 238, 242 (1969) (internal quotation omitted); *Parke v. Raley*, 506 U.S. 20, 29 (1992). This is because “waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.” *Brady v. United States*, 397 U.S. 742, 748 (1970).

Key to the analysis in reviewing a plea for voluntariness is looking to “whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.” *Raley*, 506 U.S. at 29 (quoting *Alford*, 400 U.S. at 31). In order to find a guilty plea was knowingly and voluntarily entered into, the record must establish the defendant had a full understanding of the consequences of his plea and the charges against him. *Boykin*, 395 U.S. at 244. Further, “[a] guilty plea is a solemn, judicial admission of the truth of the charges” against the applicant; thus, an applicant’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 (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).

This Court finds this allegation is without merit, and Applicant has failed to carry his burden of proving his guilty plea was involuntarily made. This Court finds Applicant’s plea was entered into freely and voluntarily. The record before this Court reflects the trial court thoroughly reviewed all of Applicant’s constitutional rights with him, including his right to a jury trial. Tr. 15-16. Applicant indicated he understood his constitutional rights and, understanding he would be waiving those rights, entered a guilty plea. Tr. 16. Applicant further indicated no one had

promised him anything or held out any hope of reward in order to get him to plead guilty. Tr. 20. Additionally, Applicant indicated he was pleading guilty of his own free will. Tr. 20-21.

Additionally, Counsel testified she and Applicant reviewed all discovery materials, the elements which the State would be required to prove at trial, the potential punishments, and his constitutional rights. Counsel further testified despite the fact she told Applicant the evidence was strong against him and thought a guilty plea would be in his best interest, Applicant still wanted to proceed to trial. It was at that time, Counsel asked Chief Public Defender Strickler to discuss the matter with Applicant. Chief Public Defender Strickler had little knowledge of the specifics of this case and merely asked Applicant to explain to him the evidence against him and what he thought would happen at trial given all of the evidence that would be presented. It was at that time Applicant indicated he believed he would be convicted at trial and, therefore, Applicant made the decision to plead guilty. Neither Counsel nor Chief Public Defender Strickler coerced him or forced him to plead guilty.

Therefore, this Court finds Applicant had a full understanding of the consequences of his plea and the charges against him, and the plea court correctly found Applicant's plea was freely, voluntarily, and intelligently made. Consequently, this allegation must be denied and dismissed with prejudice.

### CONCLUSION

Based on all the foregoing, this 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.


This Court notes 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, 409 S.E.2d 395 (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 if the applicant wishes to seek appellate review, post-conviction relief 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.

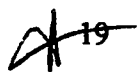
**IT IS THEREFORE ORDERED:**

1. That this application for post-conviction relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to and remain in the custody of the State.

AND IT IS SO ORDERED this 12 day of February, 2018.

  
\_\_\_\_\_  
J. DERHAM COLE  
Presiding Judge  
Fifth Judicial Circuit

\_\_\_\_\_, South Carolina

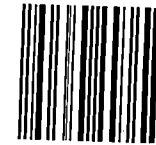
  
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Supreme Court of South Carolina  
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Columbia, SC 29211