

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

Honorable Paul M. Burch, Circuit Court Judge

DAVID ANTONIO KUCINSKI,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2019-000891

APPENDIX

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1 STATE OF SOUTH CAROLINA
2 COURT OF GENERAL SESSIONS
3 COUNTY OF LANCASTER
4 2016-GS-29-01131, 01132
5
6 State of South Carolina
7 Vs.
8 David Kucinski
9
10 Lancaster, South Carolina
11 August 22, 2017
12 Before the Honorable Daniel D. Hall
13 APPEARANCES
14 For the State: Lisa Collins
15 For the Defendant: Mark Grier
16
17 Reported by: Michael C. Watkins
18 Official Court Reporter
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1 MS. COLLINS: Thank you, Your Honor. Your Honor, standing
2 before you with appointed counsel, Mark Grier, is David
3 Kucinski, we have called the following case for trial:
4 Indictment 2016-GS-29-1131, an indictment for murder, count
5 two, possession of a firearm during the commission of a violent
6 crime. 2016-GS-29-1132, an indictment for armed robbery, count
7 two, possession of a firearm possession during the commission
8 of a violent crime. The defendant has indicated his intention
9 to enter a plea to three of those counts. We have simply added
10 one count because the statute requires that the possession of a
11 firearm be a count two to the underlying violent crime and that
12 is why technically one had to be added. He was charged
13 originally with three warrants and that's what he is pleading
14 to; count one, murder; count two, possession of a firearm
15 during a violent crime, those are both under indictment ending
16 with 1131; and then on 1132 the count one armed robbery, again
17 consistent with his original charges. As you know the family
18 of the victim is present, they would like to be heard at the
19 appropriate time as are members of the law enforcement
20 community. 'This is a straight-up plea to the charges. The
21 only thing that the prosecution has conceded is that we will
22 stand silent, Solicitor Newman and I, as to the sentence that
23 the defendant is to receive. I understand it is a guilty plea
24 under Alford versus North Carolina as Your Honor, I know, is
25 aware of. Your Honor, at the proper time I have his prior

1 record, I also have a statement of the facts at the proper
2 time.

3 THE COURT: All right, thank you. Mr. Grier, you have
4 certainly had plenty of time to meet with your client; is that
5 correct?

6 MR. GRIER: Yes, sir.

7 THE COURT: And how does he indicate he wishes to plead?

8 MR. GRIER: He does wish to plead guilty pursuant to
9 Alford, Your Honor.

10 THE COURT: And have you explained to him what an Alford
11 plea is?

12 MR. GRIER: I have explained to him what an Alford plea
13 is, Your Honor.

14 THE COURT: And I'll certainly talk to him about that as
15 well. Mr. Kucinski, am I pronouncing your name correctly?

16 THE DEFENDANT: Yes, Your Honor.

17 THE COURT: Mr. Kucinski, how old are you?

18 THE DEFENDANT: Twenty-two years.

19 THE COURT: How far did you go in school?

20 THE DEFENDANT: Up to college at York Technical College.

21 THE COURT: And you understand what you're doing here
22 today.

23 THE DEFENDANT: Yes, sir.

24 THE COURT: Mr. Kucinski, I have three -- actually I have
25 three different charges that have been presented to the Court,

1 let me go over those with you. First, your lawyer has
2 indicated that you wish to enter this plea under what we call
3 North Carolina versus Alford, or an Alford plea; is that
4 correct?

5 THE DEFENDANT: Yes, Your Honor.

6 THE COURT: And I'm going to talk to you about that and
7 what it means in just a little bit, let me go over the
8 allegations with you. Indictment 2016-GS-29-1131 is a two
9 count indictment. That indictment on count one alleges that on
10 or about April 5th of last year at [REDACTED] Little River Trail in
11 Indian Land here in Lancaster County that you feloniously,
12 willfully and with malice aforethought kill and murder the
13 victim, Randy Tran, by shooting the victim in the head which
14 caused his death, the proximate cause of his death. You could
15 get -- that carries a minimum of 30 years in prison, it is a
16 violent, most serious offense, and I'll talk to you about that
17 in just a moment, thirty years up to life. Do you understand
18 what you're charged with on that count and what the potential
19 penalty is?

20 THE DEFENDANT: I understand, Your Honor.

21 THE COURT: Count two of that indictment alleges that here
22 in Lancaster County on or about April 5th that you possessed or
23 visibly displayed a firearm; to wit, a handgun, during the
24 commission of a violent crime; to wit, the murder of Randy.
25 Tran. You could get up to five years in prison. And that is

1 a day for day sentence on the possession of a firearm during
2 the commission of a violent crime. Do you understand what
3 you're charged with and the potential penalty?

4 THE DEFENDANT: Yes, Your Honor.

5 THE COURT: Indictment 2016-GS-29-1122, one count to which
6 you've indicated that you would be pleading under North
7 Carolina versus Alford to, and let me go over that with you.
8 That indictment alleges that in count one that here in
9 Lancaster County on or about April the 5th of last year while
10 armed with a deadly weapon; to wit, a handgun, you did
11 feloniously take and carry away from the person or presence of
12 Randy Tran by means of force, threats or intimidation, goods or
13 money of Randy Tran, and those goods or money being described
14 as illegal narcotics with the intent to deprive the owner of
15 that property. Armed robbery carries up to 30 years, it is
16 also a violent and most serious offense, do you understand
17 that?

18 THE DEFENDANT: Yes, Your Honor.

19 THE COURT: Let me explain to you what violent -- the
20 significance of a violent and serious offense. Most serious
21 offenses in South Carolina, we have a law where if you are
22 convicted of two most serious offenses the State could seek a
23 life without parole where the judge -- if you were convicted on
24 the second most serious offense the judge would not have any
25 discretion and you were found guilty at trial you would be

1 sentenced to a life without parole. You certainly now as a
 2 result of this plea today will have two convictions for most
 3 serious offenses on your record. Depending on when you are
 4 released from the department of corrections if you were
 5 convicted of another most serious or serious offense in the
 6 future the State could seek a life without parole on that
 7 charge, you understand that?

8 THE DEFENDANT: Yes, Your Honor.

9 THE COURT: In addition these are violent offenses which
 10 significantly affect your status in the department of
 11 corrections and your parole eligibility because they're violent
 12 offenses, do you understand that?

13 THE DEFENDANT: Yes, Your Honor.

14 THE COURT: Your lawyer has indicated that you wish to
 15 plead to all three of these charges under what we call North
 16 Carolina versus Alford; is that correct?

17 THE DEFENDANT: Yes, Your Honor.

18 THE COURT: Let me explain to you what a North Carolina
 19 versus Alford plea is. There are two things that you have to
 20 understand to enter a plea under North Carolina versus Alford.
 21 One is that it is treated -- actually several things -- one is
 22 that it is treated just like a conviction and it is a
 23 conviction. When you leave here you will have a record and a
 24 conviction for all three of these offenses. For me to accept a
 25 plea under Alford our law says that you can consent

1 voluntarily, knowingly and understandably to the imposition of
2 a prison sentence, although you are unwilling to admit
3 culpability, that means that you don't have to say that you're
4 guilty or even if your guilty plea contains a protestation of
5 innocence is what our law says. However, when you -- even if
6 you view this case that way, when -- if you intelligently
7 conclude that your interests require a guilty plea, that's the
8 first prong, if you intelligently believe and intelligently
9 conclude that your interests require a plea to these charges.
10 And then secondly, when the solicitor goes over the facts of
11 the case and at the conclusion of their reading of the facts of
12 the case I'm going to ask you if -- do you believe that that
13 evidence strongly supports your guilt of what you're charged
14 with. So those are the two things. Is that what has been
15 explained to you under a North Carolina versus Alford plea?

16 THE DEFENDANT: Yes, Your Honor.

17 THE COURT: And so how do you plead to all three of these
18 charges?

19 THE DEFENDANT: From what I've talked with with my public
20 defender and what we're facing here with the State's evidence
21 versus the truth that I've spoken, it seems in my best interest
22 to plead guilty for the following three crimes, not saying
23 that, one, I shot Randy Tran or had anything to do with the
24 robbery. But based off of the State's evidence that could
25 compel a jury to say yes, he is guilty and prosecute me in the

1 possibility of it being the life sentence that pushes me to
2 come before the Court and beg for mercy on a plea in regards to
3 saying that I'm guilty.

4 THE COURT: All right. And so is it your desire to enter
5 this plea under a North Carolina versus Alford plea?

6 THE DEFENDANT: Yes, Your Honor.

7 THE COURT: Are you doing this of your own free will?
8 This is your decision. Your lawyer can't tell you to do that,
9 your family can't force you to do that, this has to be your
10 decision. Is this your decision to freely and voluntarily and
11 knowingly enter a plea under North Carolina versus Alford to
12 these three charges?

13 THE DEFENDANT: Yes, Your Honor.

14 THE COURT: You understand when you enter your plea under
15 North Carolina versus Alford that it's treated just like a
16 guilty plea, and that you give up and waive your right to a
17 jury trial. And certainly it appears that you understood that
18 right, you certainly today appear to be very intelligent
19 completely understanding what we have talked about so far and
20 have certainly understood even the difference between the North
21 Carolina versus Alford plea and then what we might call a
22 straight-up plea. It appears that the Court now finds that you
23 have been able to knowingly and intelligently and without
24 coercion enter that plea, but when you do that you give up your
25 right to a jury trial. It appears that you were prepared for a

1 jury trial, the State was ready, in fact, we had drawn a jury,
2 we have a jury ready and waiting to go forward with this trial,
3 and is it your desire to give up your right to a jury trial?

4 THE DEFENDANT: It seems to be in my best interest, Your
5 Honor, yes.

6 THE COURT: When you give up your right to a jury trial
7 what you're giving up is the State has to prove your guilt
8 beyond a reasonable doubt at trial on each of the elements of
9 these offenses. You would have the right to remain silent, you
10 wouldn't even have to say anything about the facts in the case.
11 In fact, you wouldn't even have to put up a defense if you
12 wish, you could -- however you could put up a case and present
13 witnesses. But if you exercise your right to remain silent and
14 not put up a defense the Court would instruct the jury, I will
15 tell a jury that they are not even to consider that in
16 determining whether you're guilty or not guilty, because the
17 burden is on the State of South Carolina to prove your guilt
18 beyond a reasonable doubt on each one of these offenses. If we
19 had a trial certainly you would be able to be here in the
20 courtroom to see witnesses, hear witnesses, your lawyer could
21 cross examine any of the State witnesses on your behalf, that's
22 called a right to confrontation. At trial 12 jurors would have
23 to all unanimously agree that the State has met their burden in
24 proving your guilt with evidence that they bring here in the
25 courtroom beyond a reasonable doubt before you could be found

1 guilty. Do you understand your rights in a jury trial?

2 THE DEFENDANT: Yes, Your Honor, I do.

3 THE COURT: Are you satisfied with Mr. Grier and the way
4 he's represented you?

5 THE DEFENDANT: Yes, Your Honor.

6 THE COURT: Have y'all been able to go over the details of
7 this case in preparation for trial here today and talk about
8 any defenses that you may or may not have, and has he provided
9 you with information and documents that he received from the
10 solicitor's office in regards to this case? Y'all have been
11 able to go over all of that?

12 THE DEFENDANT: Yes, Your Honor, we have.

13 THE COURT: Today do you have any complaints about Mr.
14 Grier or the way he's represented you?

15 THE DEFENDANT: No, Your Honor.

16 THE COURT: Are you pleading to this charge under North
17 Carolina versus Alford of your own free will?

18 THE DEFENDANT: Yes, Your Honor.

19 THE COURT: Have you been promised anything, have you been
20 threatened in any way or have you been coerced in any way in
21 order to get you to enter this plea under North Carolina versus
22 Alford today?

23 THE DEFENDANT: No, Your Honor.

24 THE COURT: I find the decision of this defendant to enter
25 this plea under North Carolina versus Alford to be freely,

1 voluntarily, intelligently made with the advice of a competent
2 attorney with whom he says he is satisfied. Mr. Kucinski, you
3 have ten days from today's date in which to appeal, if I make
4 and error, if you disagree with the sentence you have a right
5 to an appeal, however, you have to file that appeal within ten
6 days. You normally start that process by notifying your
7 attorney of your desire to appeal, do you understand that
8 right?

9 THE DEFENDANT: Yes, Your Honor, I do.

10 THE COURT: All right. Solicitor, give me a factual basis
11 for the charges.

12 MS. COLLINS: Your Honor, before I do that I would state
13 the defendant has a very minimal prior record, in fact, they
14 post-date this incident. On June 14th of 2016 he was found
15 guilty at a bench trial in magistrate's court for malicious
16 injury under 2,000. On June 21st of 2017 he pled guilty in
17 magistrate court here to malicious injury to property under
18 2,000. And also he has a conviction of petty larceny in
19 magistrate court in -- I put June of 2014 but I think that's
20 also 2017. Your Honor, as to the facts of this case, had we
21 gone to trial the State would have presented evidence to the
22 jury that on April 5th of 2016 here in Lancaster County that
23 the victim, 20 year old Randy Tran was with the defendant,
24 David Kucinski. That prior to that time we would have
25 presented text evidence -- text messages or instant messages

1 from a co-defendant's phone, Nachon Hayden, indicating that the
2 defendant on two occasions had asked him for a gun and
3 indicated that he wanted to get a gun from the codefendant,
4 that he was going to do a lick. The day before this incident a
5 witness would have testified that she saw the defendant with a
6 handgun, that it was initially jammed but that he unjammed it
7 and it was operative the last time she saw it, and that he was
8 excited and saying how he was going to get a new car. We would
9 have presented evidence from other witnesses that on the
10 morning of this incident, or earlier in the day on this
11 incident of April 5th of 2016, that the defendant came by the
12 home of Melissa Gordon with whom he used to live, who is the
13 mother-in-law of the codefendant, Nachon Hayden. That the
14 defendant came by, asked her to use her phone, that he was very
15 excited about getting a new car and that he made a few calls or
16 texts or both from the phone outside. The evidence would then
17 have shown that the defendant and the victim met at Little
18 River Road here in Lancaster County at about 6:30 or 6:40 p.m.
19 and they met up with -- they were riding in the same car, the
20 victim's vehicle, a very notable 2015 Toyota Scion, burnt
21 orange in color. They met up with the co-defendants, Nachon
22 Hayden and Chris Glass and Tony Maynard at that location, the
23 text messages indicated there would be a sell of a high quality
24 of marijuana known as Koosh, or OG Koosh, k-o-o-s-h,
25 approximately six pounds was the suspected weight of what was

1 going to transpire. We would have presented evidence that
2 during the course of that that the victim was shot in the back
3 of his head one time, and we would have presented -- and he
4 died almost instantly. We would have presented evidence from
5 Dr. Ross that when she did the autopsy she determined the shot
6 entered the back of his left skull, went through the brain and
7 exited out of the right eye of the victim resulting in a
8 laceration of the brain and death within a matter of minutes.
9 We would have presented testimony that immediately after
10 that -- our testimony would have been -- our evidence would
11 have been that the victim was shot during this and that it was
12 an attempted armed robbery, and ultimately was an armed
13 robbery, and under the hand of one, hand of all all four
14 co-defendants were charged. However our evidence would have
15 shown that Chris Glass and Tony Maynard stayed in the vehicle
16 and that Nachon Hayden was the only one outside of the car with
17 this defendant, and their testimony would have been that the
18 defendant was the one who shot the victim. However, again,
19 under the hand of one, hand of all the victim got shot in the
20 course of this incident that started as an armed robbery. Our
21 evidence would have shown that Nachon Hayden and Chris Glass
22 and Tony Maynard then leave, but as they're about to leave
23 another citizen drives up, Vicki Gordon and her son C. J.
24 Loftis and his girlfriend. Vicki and C. J. would have
25 testified that as they came riding up they knew Dave because he

1 had lived with Melissa Gordon earlier as a part of the family
2 and that they saw Dave, the defendant, trying to put a bloody
3 body in the trunk of the orange car and that they saw Nachon
4 leaving at this time. They then go on down and ultimately 911
5 is called and the officers come out to investigate. At that
6 time the car was missing, the orange car was gone, there was no
7 one at the area where it had happened other than a large area
8 of blood. And ultimately law enforcement in their
9 investigation do find the body of Randy Tran. Randy's body had
10 been rolled or dragged down a gorge or a gully just off the
11 area of the incident and covered with some trash and debris
12 that was there, I believe a cooler and plastic fence bar.
13 Through the course of law enforcement's investigation they
14 determined that the defendant was seen with the victim's car
15 immediately after this incident within 15 or 20 minutes at a
16 man's home named Trent Sucie (phonetically.) Trent knew the
17 defendant. He would have testified that previously the
18 defendant had no money, no marijuana, no car, but that on this
19 day, April 5th of 2016, at about 7:30 or so in the evening that
20 the defendant comes by his house, he's got a new car and he's
21 like, "Where did you get this car?" And that the defendant
22 would have said, "I bought it from my homeboy." And Trent
23 Sucie would have testified he saw the defendant with six pounds
24 of what appeared to be very high quality marijuana, and that
25 the defendant had left two pounds with Trent which he says he

1 later flushed. Trent's sister, who was there, would have
2 testified that the defendant said that he has a .45 and he's
3 not afraid to use it, although Trent would have testified that
4 he did not remember that. In the course of the investigation
5 law enforcement located the victim's car at an apartment
6 complex in North Carolina. We would have presented evidence of
7 flight as indicative of guilt that the defendant left, whereas
8 the other three co-defendants had not fled the area. The car
9 of the victim was ultimately recovered and the defendant
10 ultimately turned himself in by speaking with Investigator Brad
11 Whitesides who encouraged him to do so and he told them where
12 he was, and law enforcement came and got him and he was placed
13 at the Charlotte Mecklenburg jail initially and law enforcement
14 here went up and interviewed him. The defendant did waive his
15 Miranda rights and spoke with them. His first statement was
16 that he was not there at all, that he didn't know what had
17 happened but he was not there when Randy was killed. However,
18 when law enforcement ends the interview and says, well we'll
19 check out, you've indicated you have an alibi, we'll check it
20 out, hope it works out for you, hope it checks out. Within
21 about less than five minutes the defendant then asks if the
22 detectives were still there and he asked that they come back
23 into the room. He had not terminated the interview by invoking
24 Miranda, officers had said we will go check things out. So the
25 officers come back in. At that time the defendant got very

1 emotional and he admitted that he was there when it happened,
2 however his statement was that Chris Glass had shot Randy in
3 the back of the head, that they had threatened him as well. He
4 gave some additional statements which we would have presented
5 other statements that we believe would have contradicted this
6 version of the events, including text messages from the
7 defendants's own phone afterwards. Immediately after the
8 incident where he's texting other individuals, not participants
9 in the crime, saying things like, "You should see my new car.
10 I have so much weed, we're going to party." And then later
11 when people are like, well, wait a minute, they're saying you
12 might have murdered somebody, he says initially, "I was in
13 Columbia all day," and then later he says "I was in Charlotte
14 all day," and then later he says, "I'm just going to sell the
15 weed and run, see you in five years." And then other
16 individuals encourage him not to run, to cooperate, which again
17 he ultimately did and turned himself in or told law enforcement
18 where they could come and get him. Again, our presentation of
19 the case would have been under the hand of one is the hand of
20 all, that an armed robbery of the victim had been planned and
21 that it went array with the murder of the victim, Randy Tran,
22 and that he died as a result of that. And that afterwards the
23 defendant was seen with his car and by his own statements in
24 his phone had a large quantity of weed.

25 THE COURT: All right. Thank you. Mr. Kucinski, you have

1 heard what the solicitor has indicated would be some of the
2 evidence that they intend to produce at trial. Do you believe
3 that that evidence strongly supports your guilt of each of
4 these three charges?

5 THE DEFENDANT: Some of the evidence I agree with, some of
6 it I do not.

7 THE COURT: Well, here is the thing. You don't have to
8 agree with any of it under a North Carolina versus Alford plea.
9 You -- in fact, you can protest what the case law says about
10 the evidence. However, you do have to understand, and my
11 question to you that when the State presented that evidence and
12 the evidence that you've been able to see that has been
13 provided to you through your attorney, that evidence, whether
14 you agree with it or not, do you believe that that evidence
15 strongly supports your guilt of all three of these offenses?

16 THE DEFENDANT: Yes, Your Honor.

17 THE COURT: Thank you. Again, I find that he has
18 knowingly, intelligently, voluntarily and understandably
19 entered this plea under North Carolina versus Alford to all
20 three of these charges, and again I will accept his plea as an
21 Alford plea. I'll be glad to hear from anyone on behalf of the
22 victim from the State.

23 MS. COLLINS: Thank you, Your Honor. Again the solicitor
24 and I have agreed to stand silent, but there are members of the
25 family that wish to address the Court. And I know that

1 Investigator Whitesides also wishes to address the Court on
2 behalf of law enforcement. If as you come forward you will
3 state your name first and your relationship to Randy Tran.

4 THE COURT: Mr. Grier, I will ask if you and your client
5 will just stand on this side of the podium, if that's okay
6 security wise, if y'all would just stand there, that way I'll
7 be able to see. Yes, sir, if you would tell me your name?

8 SPEAKER: Yes, Your Honor. My name is Jimmy Fo
9 (phonetically), I'm one of the uncles of the victim. Forgive
10 me if my English is not good enough for me but I will do my
11 best.

12 THE COURT: You're doing fine.

13 SPEAKER: Thank you. I knew Randy Tran from the day he
14 was born and I could never imagine that there would be a day
15 like today that I have to come to court, a trial for his
16 murder. And I was sitting there and listening to what the
17 State described in their statement, I couldn't believe how
18 cruel the crime was. Our Randy was only 20 years old. He was
19 always a very bright, happy kid. And I don't exactly know what
20 happened that day, but how could somebody 22 years old plan out
21 something to kill the kid and even try to get weed off his body
22 after they shot him. And the fact that they actually shot him
23 behind his back or behind his head, that is like intent to
24 kill. And after all of that they even tried to get rid of the
25 body. If not because God's eyes I don't think we would ever

1 find Randy's body at all. I stand behind my family. I went
2 all through the pain that -- I am facing all of the pain that
3 my family went through and I listened what was happened in the
4 court. I haven't missed a single bail hearing, bond hearing or
5 anything at all. I tried to understand exactly as a family
6 member, as a parent we try to figure out what did we do wrong
7 with our kids that led to something like this happened but we
8 couldn't find anything. And even after everything happened the
9 defendant still showing no remorse, no regret at all. Even
10 showing in the texting communication that we hear he was so
11 happy that he got a new car, he got new stuff, he was happy.
12 He drove away with Randy's new car happily to enjoy the party
13 and even he was already in jail he still showing no remorse to
14 nobody, nothing at all. And today he only come to enter his
15 plea of guilty in the front of Your Honor and to ask for mercy.
16 But remember this, our Randy never even had the slightest
17 chance to beg for his mercy, to even ask -- begging for his
18 life. No. He was shot in the back of his head. That is
19 cruel. And it's not something that an accident happen or bad
20 event happen, but this thing was planned out to execute and to
21 accomplish what they wanted to do. So on behalf of our family
22 I'm standing behind, Your Honor, I'm asking you, not give him
23 any mercy at all. Whatever you decide to sentence, whatever
24 you decide to do today will not bring our Randy Tran back, but
25 at least you think about how cruel this were. So for the sake

1 of our community, for the sake of our youth I'm asking Your
2 Honor not to consider any mercy at all. Thank you very much.

3 THE COURT: Thank you. I'm sorry you're here, sorry you
4 have to be here.

5 MS. COLLINS: Is there another member of family that
6 wishes to speak? Again, please state your name and your
7 relationship to Randy.

8 SPEAKER: Your Honor, my name is Brandy Tran, I'm Randy
9 Tran's cousin. I'm speaking on behalf of my family. It has
10 been over a year since the death of Randy Tran and my family
11 and I have been through so much pain and suffering these past
12 16 months. No words can explain the sadness and grief that
13 David has caused my family. As you can tell we have a very
14 large and supportive family, this isn't even half of them. We
15 have attended every bond hearing and plea trial that there was
16 to offer hoping that it would come one step closer for justice
17 to be served. Day by day we want for justice and closure, and
18 we deserve closer. We know that nothing will ever bring Randy
19 back, but now all we can ask for is that David will be put
20 behind bars and the rest of them for what they've done to him.
21 And that we love him and miss him very much, and nothing is
22 ever going to bring him back. That's all I have to say.

23 THE COURT: Thank you.

24 MS. COLLINS: Is that all for the family? Thank you.
25 Investigator Brad Whitesides on behalf of the sheriff's

1 department.

2 SPEAKER: Your Honor, first and foremost I want to thank
3 you for your time. In this case Solicitor Newman, Mr. Grier, I
4 appreciate the cooperation and communication in this case
5 between both sides. This was a very violent crime that took
6 place in what I consider a non-violent community. I'm from
7 that community, I grew up there. This happened literally down
8 the street from where I went to school. As you can see the
9 family, the turnout throughout this whole trial has been just
10 tremendous the support that they've shown is overwhelming. You
11 know the actions of David Kucinski this day resulted in the
12 violent death of Randy Tran in that. That shook the community,
13 multiple families not only for the victim but for the
14 defendants in this case. It's my job and I took an oath to
15 protect this community and people that live in this community,
16 I just ask that you help me do that by sentencing Mr. Kucinski
17 to life in prison. Thank you.

18 MS. COLLINS: Your Honor, that completes the presentation
19 of the State's case. Thank you.

20 THE COURT: All right. Why don't y'all move back around
21 here, Mr. Grier. Mr. Grier, I will be happy to hear from you
22 and anyone on behalf of Mr. Kucinski.

23 MR. GRIER: Thank you, Your Honor. First of all, Your
24 Honor, David's sister, Monica Strowser (phonetically), is here
25 and his stepmother, Kim Kucinski, is here. They live up in the

1 Indian land community as well at this time with his father,
2 George Kucinski, or David George Kucinski as well. Mr.
3 Kucinski was just unable to be here just out of difficulty of
4 the circumstances, Your Honor. His mother is Portuguese and
5 lives in the Azores, and I can't pronounce the island but at
6 any rate out in the Atlantic in the Azores. Of course, she --
7 that's her homeland and his dad is not Portuguese, he's
8 American. But I met his mother, she came and visited him in
9 the jail once and had every indication just -- and I've talked
10 with her on the phone many times and we communicate a lot by
11 email to keep her abreast of what's going on along with a local
12 family here, Your Honor, just a loving family that loves David.
13 And Dave and I looked at family photos and lamented the
14 circumstance that he got himself into, which is -- Your Honor,
15 the evidence is -- the uncontradicted evidence is that he had
16 gotten involved in the drug trade, and certainly if we would
17 have gone to trial that would have been something that is
18 unavoidable, we would have been admitting. But he was on
19 this -- in this particular -- the evidence -- and certainly I
20 know that we have -- would have shown that he was drawn into
21 this particular deal. I think the evidence is strong and he
22 was asked to assist with this drug deal in which he did. And
23 we don't really know what happened there that day, but based on
24 what the State's evidence you've heard would show, it appears
25 to be that there's a substantial likelihood that it was

1 accidental, that he was being robbed and resisted and
2 unfortunately his death ensued tragically. If we were able to
3 extricate ourself from the jury believing that Mr. Kucinski was
4 guilty of being the gunman, the hand of one hand of all was
5 seemingly virtually an insurmountable obstacle to being able to
6 prevail. Your Honor, there has been -- I think Dave met Mr.
7 Tran in the 8th grade and they were involved in sports
8 together, and obviously -- I don't know how close their
9 friendship is, certainly Mr. Kucinski has indicated that it had
10 been a strong one, a strong friendship. One of the
11 difficulties with the case was that we couldn't -- there was
12 not a documentation of reaction immediately after this that
13 would have established, I think, that in a convincing way.
14 Just I spent a lot of time with Mr. Kucinski and certainly I
15 have seen genuine sorrow about Randy's demise, Your Honor. I
16 will say one thing that we found that would have come to light
17 had we gone to trial is that he did ask within about an hour
18 and a half of this happening, he did ask for the phone number
19 for the sheriff's department and he tells me that his intention
20 was he knew one of the investigators that would have testified,
21 Officer Lyons, he had had encounters with Lyons, I don't have
22 any documentation, he indicates that he left messages for Lyons
23 that were never responded to and I was not able to establish
24 that. But he obviously was attempting to get the number and I
25 think indicates that he was intending to call. However, that

1 didn't materialize for -- his mother actually in Portugal and
2 his sister who is in this courtroom I believe orchestrated him
3 turning himself in in Charlotte. And, Your Honor, he
4 ultimately did that without incident according to the report.
5 And he, of course, everything that has transpired since, Your
6 Honor. He is 22 years old, like he said, he's got, I guess, a
7 year at York Tech. He has done odd job work. He had worked at
8 one of the shops up here at Indian Land for some time a couple
9 of years ago. And he, of course, is not married and he has no
10 children and he has no substantial record. Your Honor, if I
11 could indulge, I did speak with his mother, she made me promise
12 I would read a letter from her to the Court if I might.

13 THE COURT: I will be happy to hear his mom's letter.

14 MR. GRIER: "Your Honor, I feel there are no words as a
15 mom I can say to describe how impotent I feel. It's like I'm
16 on trial, on trial for not teaching, guiding, reaching and
17 loving enough. A parent's worse nightmare is that one day this
18 could happen. As I recall I gave birth to the most beautiful
19 perfect human being, the perfect baby, just cried to eat and be
20 changed, a very happy baby. As David was growing he loved
21 animals. My son would bring home birds that fell out of the
22 nest with broken wings, cats with broken paws. The most
23 touching moment was an orange female cat that someone had been
24 set on fire, Dave came home screaming, I thought something
25 happened to him. He was so traumatized he couldn't talk. The

1 animal had no skin. We took it to the vets. David took care
2 of her, slept with her, fed her, talked to her. I can't
3 imagine that my son would hurt another human being. My son can
4 and does many things wrong, stupid things, too, but I think
5 he's got good qualities. I can't believe only -- I have all of
6 these thoughts that run through my mind. What went wrong?
7 What did I miss? Did I give my son all of the love he wanted
8 and needed? As a single parent at the time my son, David, was
9 growing up life was not easy, I can say that, it was a trial.
10 But we were and are a family. My son does have a family, not a
11 homeless abandoned animal as my son was made out to be. My son
12 has a family that loves him very much, that misses him. Over A
13 year ago my son was here with me in the islands -- this is
14 true -- on the farm. They own a goat farm that functions to
15 give back to the children that have no voice in society,
16 children from dysfunctional abusive families, children with the
17 same life trial as our family quite some time ago. I saw my
18 son come to life helping feed baby goats, being a midwife to
19 birth others, learning how to make cheese and fresh bread,
20 picking fresh eggs for breakfast and other traditional foods.
21 I really hoped that my son would not go back to the U.S. As
22 odd as it may be something in my heart tormented me, a very
23 dark feeling, the thought that I would not see him again. The
24 day before my son's trip I gave him a kiss and hugged him as it
25 was the last time as I was saying goodbye and I told him that.

1 My son smiled at me, told me to quit being silly, said, "Mom,
2 I'm coming back to you, I'm not leaving you, I'm always with
3 you Mamasan. That's my sons favorite word to me, that's my
4 Davey. He also said 'I want to make some money so don't go
5 take it off of you.' I told my son we have lots of work here,
6 you don't need to go back. Only God knows how many tears I
7 have cried, seeing my son leaving back to go to the United
8 States knowing in my heart something was not right. It's very
9 hard for a mother to hear and read so far away all the things
10 that have happened. I could only ask for forgiveness and
11 healing for all our family. This is our trial, my trial as a
12 mom to put to the test, the most painful test. It showed me
13 that after all my son has had courage and character. He called
14 me and told me what happened that day, it was like I was
15 stripped, cut open, my insides were out, my mind, all I could
16 think about is the family meaning is taken away. We talked for
17 a very short time. I told my son what I was going to do and he
18 agreed. I called the investigators, he told me please be calm,
19 we have your son, it's okay. I was the one, I helped my son
20 turn himself in. I asked him to tell the truth. The truth is
21 my son, as all of us, has made mistakes and with our mistake
22 we're accountable for them. I believe that through our mistake
23 we learn how to grow, how to redeem ourself and also through
24 forgiveness and love I can only ask this Court to please reach
25 out and help my son. He is very young. He has a family that

1 loves him. My son does have a home with open arms, a home
2 where he belongs and can be a testimony to many and help change
3 their lives. Thank you, Your Honor, for allowing me to speak
4 indirectly before you. Thank you and may God bless all of us
5 and our families." Thank you for allowing me to fulfill that
6 promise, Your Honor. This is David's sister, Your Honor.

7 THE COURT: If you could tell me your name?

8 SPEAKER: My name is Monica Strowser, Your Honor.

9 THE COURT: Yes, I would be glad to hear from you.

10 SPEAKER: I'm David's sister. Ever since David was a
11 little kid he's always been a great kid. He was very smart,
12 extremely intelligent, you know, always trying to do the right
13 thing for the most part. He's had his issues but always been a
14 good kid. Absolutely extremely smart in school. And when he
15 came here he did really good in Fort Mill. He joined the ROTC,
16 he was in church, helped little kids, all of that stuff. All
17 in all David was a really good kid, he had really good friends.
18 And then all of the sudden he got grouped in with the wrong
19 people and, you know, it's unfortunate these days the way kids
20 get grouped into drugs. It's very sad to see them get involved
21 with that when they have so much potential to do better for
22 themselves but instead take a different path. I believe my
23 brother could have done great things with his life if he didn't
24 get involved with the wrong people. He has an amazing heart,
25 very loving. It breaks my heart to even stand up here and have

1 to defend my brother because he is a good person. And I could
2 not see him point blank shoot somebody in the head. Yeah, he
3 may have been involved with it but I don't see him doing that.
4 David is a very gullable person, he tries to impress people.
5 He takes it to heart when he is not accepted by people and,
6 like I said, kind of falls with the wrong people. It is
7 unfortunate. But I don't feel -- my heart hurts for the Tran
8 family but my heart also hurts for my family. There's a rim
9 effect when you do something wrong, and this went states,
10 countries. And I just hope that David does get the chance to
11 live his life one more time, turn things around and do good
12 things with the rest of his life if he hadn't completely
13 destroyed it as it is. So I love my brother very much. Just
14 praying for the best.

15 THE COURT: Thank you. I'm sorry you have to be here.

16 MR. GRIER: Thank you, Your Honor. And he's been in the
17 Lancaster County Detention Center for 502 days, Your Honor.
18 And I don't know if Mr. Kucinski wants to say anything, but --

19 THE COURT: All right. Mr. Kucinski, anything you have to
20 say?

21 THE DEFENDANT: Yes, Your Honor. For nine years I have
22 known Randy Tran, and as Mark has shared, we were very good
23 friends. I came back from Portugal in 2008. I had some
24 problems at the Norman Middle School and was moved to Fort Mill
25 Academy where I met Randy Tran. He and I were a pair of

1 goofballs in class, always making the teacher laugh, always
2 making everybody else laugh. We connected like that. It
3 seemed all of the pains that him and I might have in the world
4 would just go away when we get together and joke around, we
5 would make funny comments and his Asian accent. I love him
6 like a brother. And over the years our friendship has grown
7 and it has become stronger. After high school when I started
8 working at the store up in Indian Land he would always come
9 visit me, take time to enjoy Hookah with me or just laugh, go
10 out to eat at the Mexican restaurant next door or down to Casa
11 Columbia or at the China Inn, too. We shared some fun times.
12 We would go down to the Catawba River and hang out and enjoy
13 the atmosphere, do just Randy and Dave adventures or other
14 friends would join us as well. We had gotten interested in
15 some of the movements regarding the medical marijuana industry
16 and we saw as the other side of the United States progressed
17 along and vouchers came in that it wasn't so bad after all and
18 legalization happened. We had in our minds maybe to be part of
19 that as well. We talked to a couple of people and we've always
20 been supporters of that movement, with all of the benefits it
21 could bring. We were dreamers always. You know, he's never
22 done me wrong and I've never done him wrong. I came down here
23 to get my school paperwork and my dog is down here and I
24 visited with Randy a couple of times before the incident
25 happened. And, you know, the day of we both had an off

1 feeling, neither one of us knew what was about to happen, we
2 were down there laughing, joking around. When Chris shot Randy
3 his head exploded and blood went all over my shirt and all over
4 my hands, and I remember getting down next to Randy and shaking
5 him, "Randy, wake up." They didn't give me any mercy. There
6 was -- I don't know how to explain it, I don't know how to talk
7 about something like this, it hits me hard. And to have the
8 people who did this to the both of us go out and say that I had
9 pulled the trigger, that they had left me there and not include
10 the stuff that they did, how they ran off on us, how they lied
11 to the police portraying me as a bad person, it hits hard. And
12 I feel for Randy's family and I have been praying for them over
13 the past year and five months that they're able to recover and
14 they be able to heal and that they forgive me for not being
15 able to do anything to save Randy's life or to pull away from
16 that moment in time. I know Randy is up in heaven watching all
17 of us right now. I would like to think he's doing the jerk
18 over my head, which is the dance he used to do all of the time
19 in front of me. He's a great person. And I appreciate Your
20 Honor, for --

21 THE COURT: All right. Thank you. Sentence on indictment
22 2016-GS-29-01132, count one, State versus David Kucinski,
23 having entered a plea under North Carolina versus Alford to
24 armed robbery, sentence is he be committed to the department of
25 corrections for a determinative term of 25 years, to run

1 concurrent to all sentences on 8/22/17, credit for 502 days.
2 Indictment 2016-GS-29-01131, count one, David Antonio Kucinski,
3 having pled guilty under North Carolina versus Alford to
4 murder, sentence is he be committed to the department of
5 corrections for a determinat term of 30 years, concurrent to
6 all sentences on 8/22/17, credit for 502 days. Indictment
7 2016-GS-29-01131, count two, that's a direct indictment,
8 possession of a weapon during the commission of a violent
9 crime, sentence is David Kucinski, having pled guilty under
10 North Carolina versus Alford, that he be committed to the
11 department of corrections for a determinat term of five years,
12 that runs concurrent to all sentences on 8/22/17, credit for
13 502 days. Thank you.

14 (End of proceedings.)

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1 I, the undersigned, Michael C. Watkins,
2 Official Court Reporter for the Sixth Judicial
3 Circuit of the State of South Carolina, do hereby
4 certify that the foregoing is a true, accurate and
5 complete transcript of the proceedings had and
6 evidence introduced in the trial of the captioned
7 case relative to appeal in the Court of General
8 Sessions for Lancaster County, South Carolina, on
9 the 17th day of August, 2017.

10 I do further certify that I am neither of kin, counsel,
11 nor interest to any party hereto.

12

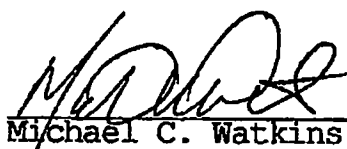
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July 11, 2018

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Michael C. Watkins

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Court Reporter

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FORM 5

STATE OF SOUTH CAROLINA

COUNTY OF Lancaster

IN THE COURT OF COMMON PLEAS

2018 CP 29 01536

Full name and prison number (if any) of Applicant.

David Antonio Rudinski #373636
v.

APPLICATION FOR

State of South Carolina

POST-CONVICTION RELIEF

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Broad River Correctional Institution
2. Name and location of Court which imposed sentence Lancaster County's General Sessions Court 104 W. Main St.
3. Name(s) of co-defendant(s) (if any) Nathan Hayden, Terry Maynard, Chris Gless
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2016 GS 2901132 (Armed Robbery)
 - (b) 1 Murder/Murder (Not knowing of murder)
 - (c) Possession of a firearm during the commission of a violent crime (Not knowing of murder)
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) August 22nd 2017
 - (b) 30 years concurrent on all 3 charges

- (c) ~~_____~~
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty ~~_____~~
- (b) after a plea of not guilty ~~_____~~
- (c) after a plea of nolo contendere ☒ (Alford vs. NC)
7. Did you appeal from the judgment of conviction or the imposition of sentence?
Yes
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. The South Carolina Court of Appeals
- ii. The South Carolina Court of Appeals
- iii. ~~_____~~
- (b) the result in each such Court to which you appealed:
- i. denied
- ii. denied
- iii. ~~_____~~
- (c) the date of each such result:
- i. Dec. 28th 2017
- ii. Jun. 31 2017
- iii. ~~_____~~
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. failed to give ^{sufficient} explanation
- ii. "to the extent that defendant wishes to relieve counsel motion is denied"
- iii. ~~_____~~
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) ~~_____~~
- (b) ~~_____~~
- (c) ~~_____~~
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

- (a) Judge Daniel D. Hall on August 22nd 2017 said that I have 10 days from the time of receipt
 (b) my plea to withdraw my plea bargain and another trial will be scheduled. I
 (c) wrote Mark Guter (PB) and told him to withdraw and schedule a trial (bench) this was
 August 23rd 2017. It should be in the County awaiting a trial. No news yet.
11. State concisely and in the same order the facts which support each of the grounds set out
 in (10):
- (a) Court transcripts of August 22nd 2017 by Mike Watkins (court reporter) proves
 (b) Judge Daniel D. Hall said such regarding the withdrawal. Mark Guter has
 (c) copies of letter to and fro regarding my request to withdraw and go to trial.
 So does the Supreme Court of South Carolina.
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? No
 (b) any petition in State or Federal Courts for habeas corpus or post-convictions
 relief? NO
 (c) any petition in the United States Supreme Court for certiorari other than petitions,
 if any, already specified in (8)? NO
 (d) any other petitions, motions or applications in this or any other Court? to the President of the
United States (Trump/Obama)
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or
 application:
- (a) the specific nature thereof:
- i. Requesting Executive help to remove the false accusations and charge
 ii. to my name and informing him of truth of incident April 5th 2016
 iii. X
 iv. X
- (b) the name and location of the Court in which each was filed:
- i. The White House
 ii. 1400 Pennsylvania Avenue Washington DC
 iii. X
 iv. X
- (c) the disposition thereof:
- i. No Answer
 ii. X
 iii. X

iv. ☒

(d) the date of each such disposition:

i. ☒

ii. ☒

iii. ☒

iv. ☒

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. ☒

ii. ☒

iii. ☒

iv. ☒

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

No

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

i. ☒

ii. ☒

iii. ☒

(b) the proceedings in which each ground was raised:

i. ☒

ii. ☒

iii. ☒

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) ☒

(b) ☒

(c) ☒

17. Were you represented by an attorney at any time during the course of:

- (a) your arraignment and plea? Yes
 (b) your trial, if any? Yes
 (c) your sentencing? Yes
 (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes
 (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? Yes

18. If you answered "yes" to one or more parts of (17), list:

(a) the name and address of each attorney who represented you:

- i. Public Defend Mark "Marion" Grier Esq. Seale Indwold Court
Public Defenders Office
104 N Main St.
PO Box 1809
Lancaster, SC 29301
 ii. X
 iii. X

(b) the proceedings at which each such attorney represented you:

- i. Preliminary Hearing / Bond Hearings
 ii. Trial
 iii. Sentencing / Plea Accepting

19. State clearly the relief you seek in filing this application:

A retrial as I am entitled to for I withdrew my acceptance of the plea
again (8/23/17) for I am innocent and was forced to plead by individuals from
my codefendants family threatened my sister
(8/23/17)

20. Are you now under sentence from any other court that you have not challenged?

N

even though
 they were
 out of jurisdiction
 and in another state

#19
 Cont on
 back's top page!

I were robbed at gunpoint my buddy was
 shot once at a distance in the back of the
 head and killed. I was forced to run
 for my life in his car. I called law
 enforcement in SC where they met me in
 NC (Charlotte) and told them what happened.
 SC law enforcement told me during the interview
 that I couldn't leave that I was under
 arrest. NC held me overnight for transportation
 to Lancaster County Detention Center. No NC officer
 checked me under arrest, presented no warrants
 nor read Miranda rights. I was taken
 to LCC April 8th 2016 and have been detained
 on false accusations and lies from murderous
 codefendants. I deserve to be free and move
 on with my life. I even before being detained called
 my friends family and told them what happened, they
 promised to support me as I brought out the truth.
 But they didn't because of my codefendants false statements
 saying I killed Randy. When I arrived in SC

Revised 3/2003

#19 cont

Also Tony says I shot ^{him} in the back of the head (autopsy show bullet enters left backside ~~into~~ right eye) it was standing to the right of Randy, Nadon Hayden even says so as well! Also there was no flash burn from the gun at the entrance wound which proves I could not ~~be~~ shot Randy at point blank range! Proves that Chris Glass shot Randy from a distance. Diagram below

APPLICATION TO PROCEED WITHOUT PAYMENT OF COSTS AND AFFIDAVIT IN SUPPORT THEREOF

I, David A. Kwinde, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or security thereof.

David Antonio Kwinde
Applicant

SWORN or affirmed to and subscribed before me this 26th day of April, 2018.

[Signature]
Notary Public

My Commission Expires: March 8, 2028



19 cont.) I was forced at gunpoint to put Randy ^{41.} in his own trunk, when Vicky Gordon arrived I was forced to drag Randy into the woods. I was told they would be waiting on the gravel road for me to leave. When I saw them ~~later~~ ^{later} I told Nachon that Randy was in the trunk he made me follow him, I drove away on Henry Harris Road, shots were fired in my direction but none hit the mark. I stopped at the nearest friend's house to charge my phone so I could call my friend in Charlotte so I could have ~~some~~ ^{some} somewhere to spend the night could surface. Whether or not there was still weed which ~~the 3 didn't steal~~ I cannot voice what happened to it or the whereabouts of where they ended up at, they did ^(independently) take approximately 4-6 pounds which is what they were supposed to buy. I do not sell marijuana but I do try to have my buddies back to make sure he's safe while doing what he does. I promote legalization and know everybody and their brother so I can't say I despise the plant but I will say I will never again go near it for what happened to my brother Randy. After I left Indiana I wound up in Charlotte, NC until the day I met with Tw. Brad Whitesides and Master Dely Marshall to explain what happened, they did (SC law enforcement) arrest me with no warrant and out of their jurisdiction in which they worked. No NC police officer arrested me, they just said the SC investigator wanted me to stay in CMFD jail until they could pick me up in the AM. They had a warrant to me upon LCSD arrival with me at LCDC for my arrest on the grounds of me being seen holding Randy's body while 3 others stood nearby. That was Vicky Gordons, Alisha Culp and Vicky Gordons sons statement. I did nothing wrong except being present while Randy sold his product, I called the police as I should've even though it's not a crime to not call them if scared for your life. I did not kill Randy or conspire against him. All my texts between Randy and I were loving and friendly, we've been friends for 10 years. There is record on Randy's phone of calls between Nachon and Randy which proves there was a deal to take place. Texts between Nachon and I were solely about him buying Randy's pounds and me telling him to make sure everything is good and that there's no issue, but it was ~~noted~~ ^{noted} in Indiana 1/1/19

Lancaster County

Jeff Hammond
Clerk of Court

Clerk of Court of Lancaster County
Post Office Box 1809
Lancaster, S.C. 29721

Phone (803) 285-1581
Fax (803) 416-9388

STATE OF SOUTH CAROLINA
COUNTY OF LANCASTER

IN THE COURT OF COMMON PLEAS
6TH JUDICIAL CIRCUIT

David Antonio Kucinski #373636

Applicant

VS

State of South Carolina

Respondent

CERTIFICATE OF SERVICE

CASE# 2018-CP-29-00536

I certify that, on May 7, 2018, I served a copy of the Post-Conviction Relief Application by mailing to him, at his last known address, by depositing it in the U.S. Mail, in an envelope with sufficient postage affixed, addressed as follows:

David Antonio Kucinski #373636
Murray 229
Broad River Correctional Institution
4460 Broad River Road
Columbia, SC 29210

DeShawn H Mitchell
Assistant Attorney General
Post Office Box 11549
Columbia, SC 29211-1549

FILED
OFFICE OF CLERK
OF COURT
2018 MAY -4 PM 4:34
CLERK OF COURT
LANCASTER, SC

5.4.18
Date

Jeff Hammond
Signature

STATE OF SOUTH CAROLINA
COUNTY OF LANCASTER

David Kucinski, # 373636

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FOR THE SIXTH JUDICIAL CIRCUIT

2018-CP-29-0536

RETURN

In response to the application for post-conviction relief (PCR) filed by David Kucinski on May 8, 2018, the State files this return:

I. Procedural History

Kucinski is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Lancaster County Clerk of Court. Kucinski was indicted at the July 2016 term of the Lancaster County Grand Jury for murder, armed robbery, and two counts of possession of a firearm during the commission of a violent crime. (2016-GS-29-1131) (2016-GS-29-1132). Kucinski was represented by Mark Grier of the sixth-circuit public defender's office. On August 22, 2017, Kucinski entered an *Alford*¹ plea before Judge Daniel D. Hall to murder, armed robbery, and one of the weapons charges. The plea was entered without sentencing recommendations or negotiations; however, the solicitor agreed to remain silent during sentencing. Judge Hall accepted Kucinski's *Alford* plea and sentenced him to concurrent terms of imprisonment of thirty years for murder, twenty-five years for armed robbery, and five years for possession of a weapon during the commission of a violent crime.

¹ See *North Carolina v. Alford*, 400 U.S. 25 (1970).

Plea counsel filed a notice of appeal and statement pursuant to Rule 203(d)(1)(B)(iv), SCACR, and *In re Anonymous Member of the Bar*, 303 S.C. 306, 400 S.E.2d 483 (1991), on September 5, 2017. Kucinski filed a *pro se* statement with the court of appeals on September 12, 2017. The court of appeals dismissed the appeal on December 28, 2017 and remitted the case on January 29, 2018. Kucinski commenced this PCR action on May 4, 2018.

II. Facts

David Kucinski was arrested for the armed robbery and murder of Randy Tran. On April 5, 2016, Tran had planned to sell six pounds of high-quality marijuana to Nachon Hayden, Chris Glass, and Tony Maynard. Hayden, Glass, and Maynard arrived in one car. Kucinski and Tran arrived in Tran's car, an orange Scion. (Tr. 13). During the drug deal, Tran was shot in the back of the head. He died. (Tr. 14).

After Tran was shot, Hayden, Glass, and Maynard fled in the vehicle they arrived in. Two witnesses saw them flee; however, these witnesses also observed Kucinski stuffing a bloody body into the trunk of an orange Scion. Tran's body was eventually found in a ditch. (Tr. 15).

Kucinski left the scene, driving the Scion, and went to a friend's house. He brought six pounds of high-quality marijuana with him. Kucinski's friend inquired about the Scion, and Kucinski claimed to have purchased it from his "homeboy." Kucinski gave his friend two pounds of the marijuana. (Tr. 15).

Kucinski learned he was wanted in connection to the murder, and eventually called law enforcement and gave up his location. He was arrested in Charlotte, North Carolina. He waived his right to remain silent and gave law enforcement two statements. In his first statement, Kucinski claimed he did not know what happened and that he was not present when Tran was killed. However, when the interviewing officers stated they would look into his alibi, he

changed his story. (Tr. 16). In his second statement, Kucinski claimed that Glass shot Tran in the back of the head, and then threatened him. (Tr. 17).

Phone records taken from Kucinski's and Hayden's phones contradict Kucinski's version of events. Sometime before the incident, Kucinski sent two text messages to Hayden (1) asking Hayden for a gun, and (2) stating he wanted to get a gun because he was going to do a "lick." (Tr. 12-13). Kucinski also sent text messages to other individuals immediately following the incident.

First, Kucinski sent text messages to friends bragging about his new car, that he had "so much weed," and he wanted to party. (Tr. 17). However, when people informed him that he was suspected of murder, he claimed to have been either in Columbia or Charlotte all day. (Tr. 17). At one point, Kucinski sends a text message stating, "I'm just going to sell the weed and run, see you in five years." (Tr. 17). However, as mentioned above, he eventually turned himself in. Kucinski and his co-defendants were all charged under the hand of one, hand of all theory of accomplice liability.

The case was called for trial on August 22, 2017. A jury was empaneled and ready to be selected, but Kucinski informed the State that he wished to plead pursuant to *North Carolina v. Alford, supra*, to murder, armed robbery, and one of the weapons charges. The plea was entered without recommendations or negotiations; however, there was an agreement that the assistant solicitor and Solicitor would remain silent during the sentencing phase of the hearing. (Tr. 3).

The plea court asked Kucinski whether he wished to plead pursuant to *Alford*. Kucinski responded affirmatively. (Tr. 5). The plea court advised Kucinski of the charges against him and the maximum and any mandatory minimum sentences for each charge. Kucinski affirmed that he understood the charges against him and the sentencing exposure he faced. (Tr. 5-7). The

plea court then advised Kucinski of the meaning and consequences of entering an *Alford* plea. (Tr. 7-8). Kucinski affirmed that he understood the nature and consequences of his plea. (Tr. 8, 9). The plea court asked:

Q: And so how do you plead to all three of these charges?

A: From what I've talked with [] [plea counsel] and what we're facing here with the State's evidence versus the truth that I've spoken, it seems in my best interest to plead guilty for the following three crimes, not saying that, one, I shot Randy Tran or had anything to do with the robbery. But based off of the State's evidence that could compel a jury to say yes, [I] [am] guilty and prosecute me in *the possibility of it being the life sentence that pushes me to come before the [plea court] and beg for mercy* on a plea in regards to saying that I'm guilty.

Q: All right. And so is it your desire to enter this plea under a [*Alford*] plea?

A: Yes, Your Honor.

(Tr. 8-9) (emphasis added).

The plea court asked Kucinski whether he was entering the plea freely, voluntarily and knowingly. (Tr. 9, 11). Kucinski affirmed. (Tr. 9, 11). The plea court found Kucinski's decision to enter the plea to be "freely, voluntarily, and intelligently made . . ." (Tr. 11-12). The plea court then advised Kucinski:

[Y]ou have ten days from today's date in which to appeal, if I make an[] error, if you disagree with the sentence you have a right to an appeal, however, you have to file that appeal within ten days. You normally start that process by notifying your attorney of your desire to appeal, do you understand that right?

(Tr. 12). The factual basis for the charges were then placed on the record. (Tr. 12-17).

After hearing the State's version of the facts, Kucinski reaffirmed that he wished to plead pursuant to *Alford*. (Tr. 18). The plea court sentenced Kucinski to concurrent terms of

imprisonment of thirty years for murder, twenty-five years for armed robbery, and five years for possession of a weapon during the commission of a violent crime.

On September 5, 2017, plea counsel filed a notice of appeal, and statement pursuant to Rule 203(d)(1)(B)(iv), SCACR, citing *In re Anonymous Member of the Bar*, 303 S.C. 306, 400 S.E.2d 483 (1991). Kucinski filed a *pro se* statement with the court of appeals on September 12, 2017. The court of appeals dismissed the appeal on December 28, 2017, and remitted the case on January 29, 2018. Kucinski commenced this PCR action on May 4, 2018.

III. Current Application

Kucinski alleges he is being held in custody unlawfully because:

Judge Daniel D. Hall on August 22, 2017 said that I have 10 days from the time of accept[ing] my plea to withdraw my accepted plea bargain and another trial will be scheduled. I wrote [plea counsel] and told him to withdraw and schedule a trial (bench) this was August 23rd 2017. I should be in county awaiting a fair trial. No news yet.

Kucinski bases his allegation on the following facts:

Court transcripts of August 22nd 2017 . . . proves [the plea court] said such regarding the withdrawl. [Plea counsel] has copies of letter to and fro regarding my request to withdraw and go to trial. So does the Supreme Court of South Carolina.

Kucinski requests, "A retrial as I am entitled to for I withdrew my accept[ance] of the plea bargain (8/23/17) for I am innocent and was forced to plead [because] individuals from my codefendant[']s family threatened my sister. . . ."

Attached to this return and incorporated herein are the Lancaster County Clerk of Court records, Kucinski's records from the South Carolina Department of Corrections, the plea transcript, and the records of this current PCR action.

IV. Response to Allegation of Ineffective Assistance of Counsel

The State interprets Kucinski's allegation as ineffective assistance of counsel. Specifically, Kucinski attacks the voluntary and intelligent nature of his plea. The State submits this allegation is without merit.

To establish ineffective assistance of counsel, the PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness, and (2) the applicant sustained prejudice as a result of counsel's deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984); *Cherry v. State*, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). "The test for effective assistance of counsel is whether the representation was within the range of competence demanded of attorneys in criminal cases." *Watson v. State*, 287 S.C. 356, 357, 338 S.E.2d 636, 637 (1985).

Counsel is presumed to have adequately assisted and exercised reasonable professional judgment in making decisions in the case. *Edwards*, 392 S.C. at 456, 710 S.E.2d at 64. "[W]here counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel." *Whitehead v. State*, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992).

A defendant who entered a guilty plea on the advice of counsel, may only attack the voluntary and intelligent nature of the plea. *Roscoe v. State*, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001). A defendant "must be aware of the nature and crucial elements of the offense, the maximum and any mandatory minimum penalty, and the nature of the constitutional rights being waived." *Pittman v. State*, 337 S.C. 597, 599, 524 S.E.2d 623, 624 (1999). Plea counsel is not deficient for advising a defendant to plead guilty based on what counsel believes the sentence would be if the defendant were convicted at trial. See *Bennett v. State*, 371 S.C. 198, 204–05,

638 S.E.2d 673, 676 (2006). Whether to allow the withdrawal of a guilty plea is within the discretion of the plea judge. *State v. Riddle*, 278 S.C. 148, 150, 292 S.E.2d 795, 796 (1982).

To prove prejudice, the applicant must show a reasonable probability he would not have pled guilty and would have insisted on going to trial absent plea counsel's alleged deficiency. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

1. **Voluntary:** The State interprets Kucinski's allegation as an attack on the voluntary nature of his plea. Specifically, Kucinski asserts he was coerced into pleading guilty. The State submits this allegation is without merit, and moves for the allegation to be dismissed as a matter of law.

Nothing in the plea transcript suggests Kucinski was coerced into entering an *Alford* plea. To the contrary, Kucinski informed the plea court twice that he was pleading freely and voluntarily. (Tr. 9, 11). Kucinski's allegation merely alleges he was coerced into pleading by a third party. Even so, the plea transcript directly disputes this allegation as Kucinski states he is pleading to avoid the possibility of receiving a life sentence. (Tr. 9).

The record directly disputes Kucinski's allegation that he was coerced into pleading guilty. Accordingly, the State requests this allegation be summarily dismissed as a matter of law.

2. **Intelligent:** The State also interprets Kucinski's allegation as an attack on the intelligent nature of his plea. Kucinski alleges the plea court advised him during the plea hearing that he had ten days to withdraw his guilty plea. (PCR App. 3). Kucinski claims that when he entered his plea, he believed he had ten days to change his mind and withdraw. The State submits this allegation is without merit.

V. Response to Claim of Innocence

Kucinski claims that he is innocent. The State submits this claim is without merit. Kucinski has always claimed innocence, as he entered an *Alford* plea. While he has always maintained his innocence, Kucinski waived his right to challenge the evidence against him when he entered an *Alford* plea. See *Whetsell v. State*, 276 S.C. 295, 297, 277 S.E.2d 891, 892 (1981) (stating a freely and voluntarily given guilty plea waives all non-jurisdictional defects and defenses); see also *State v. Herndon*, 403 S.C. 84, 91, 742 S.E.2d 375, 379 (2013) (“The *Alford* plea is, in essence, a guilty plea and carries with it the same penalties and punishments.”). Because Kucinski waived his right to challenge the evidence against him, the State moves to dismiss this allegation as a matter of law.

VI. Any Future Amendments

Kucinski must specify any claims he intends to raise at the PCR evidentiary hearing. Any claims not specifically laid out in this PCR application or in amendments will be opposed by the State at an evidentiary hearing pursuant to the Uniform Post-Conviction Relief Act² and Rule 71.1 of the South Carolina Rules of Civil Procedure. See also Rules 15(a)–(b), SCRCP. All claims should be made well in advance of the evidentiary hearing. Because Kucinski has been appointed an attorney, the attorney, and not Kucinski, is the only individual authorized to file amendments to this application. See Rule 11, SCRCP. *Pro se* filings will not be considered at the PCR hearing. The State reserves the right to request that any amendments withheld until the last minute be stricken because of undue prejudice to the State. See Rule 15(a), SCRCP.

² S.C. Code Ann. §§ 17–27–10 to –160.

VII. Response to Any and All Other Allegations

Each and every allegation contained within the application not expressly admitted, qualified, or explained in this return is hereby denied.

VIII. Request for an Evidentiary Hearing

WHEREFORE, The State requests that an evidentiary hearing be held on the claims of ineffective assistance of plea counsel.

Respectfully submitted,

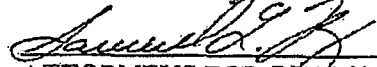
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By:


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November 29, 2018

STATE OF SOUTH CAROLINA

COUNTY OF LANCASTER

DAVID KUCINSKI, 373636

Applicant,

vs

STATE OF SOUTH CAROLINA,

Respondent.

IN THE COURT OF COMMON PLEAS

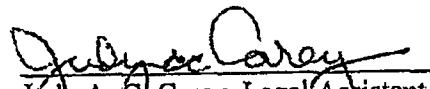
2018-CP-29-0536

AFFIDAVIT OF SERVICE BY MAIL

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the Return in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Donae A. Minor, Esquire
 Minor Law Offices, LLC
 1750 Highway 160 W; Suite 101 #259
 Fort Mill SC 29708

DATED this 29th day of November, 2018.


 Judy A. C. Carey, Legal Assistant
 For Respondent

-----X
STATE OF SOUTH CAROLINA, :
 :
 vs. : TRANSCRIPT OF RECORD
 :
 DAVID A. KUCINSKI, :
 :
 Defendant. :
-----X

KYMBERLEE M. WILLIAMS, CSR/RPR – kwilliams@sccourts.org

I N D E X

PROCEEDINGS	3
CERTIFICATE OF DELIVERY	29

E X H I B I T S

(NONE OFFERED)

1 P R O C E E D I N G S

2 * * *

3 WEDNESDAY, JANUARY 23, 2019

4 LANCASTER, SOUTH CAROLINA

5 (Whereupon, the following proceedings were
6 held in open court. The defendant was
7 present with his attorney, along with
8 counsel for the State.)

9 MR. KEY: If it please the Court. This is David
10 Kucinski v. State of South Carolina, Case Number
11 2018-CP-29-0536. Kucinski is confined in the South
12 Carolina Department of Corrections pursuant to Orders of
13 Commitment of the Lancaster County Clerk of Court. He
14 was indicted at the July 2016 term to the Lancaster
15 Grand Jury for murder, armed robbery, and two counts of
16 possession of a firearm in the commission of a violent
17 crime.

18 He was represented by Mark Grier. On August 22,
19 2017, Kucinski entered an Alford Plea before Judge
20 Daniel D. Hall to murder, armed robbery, and one of the
21 weapons charges.

22 The plea was entered without sentencing
23 recommendations or negotiations; however, the Solicitor
24 agreed to remain silent during sentencing.

25 Judge Hall accepted Kucinski's Alford Plea and

1 sentenced him to concurrent terms of imprisonment of 30
2 years for murder, 25 years for armed robbery, and 5
3 years for possession of a weapon during the commission
4 of a violent crime.

5 Plea counsel filed a Notice of Appeal and Statement
6 pursuant to Rule 203, in re: "An anonymous member of the
7 Bar" on September 5, 2017.

8 Kucinski filed a pro se statement with The Court of
9 Appeals on September 12, 2017. The Court of Appeals
10 dismissed the appeal on December 28, 2017, and remitted.

11 Kucinski alleges he is being held in custody
12 unlawfully, because -- Judge Hall told him he had 10
13 days from accepting the plea to withdraw accepted plea.
14 He states he wrote plea counsel and told him to withdraw
15 and schedule a trial on August 23, 2017.

16 He is represented today by Donae Minor. At this
17 time, I will hand it over to her.

18 THE COURT: Ms. Minor.

19 MS. MINOR: Yes, Your Honor. May it please the
20 Court. I will call my client, David Kucinski.

21 * * *

22 DAVID KUCINSKI,

23 called as a witness by and on behalf of
24 the Applicant to testify, being first duly
25 sworn was examined and testified as follows:

1 DIRECT EXAMINATION

2 BY MS. MINOR:

3 Q Mr. Kucinski, you are aware that I requested a
4 continuance on the basis that I hadn't received your
5 trial file from your attorney, Mr. Mark Grier; correct?

6 A Yes, ma'am.

7 Q You are aware that that continuance was granted on
8 the basis so that I could have time to receive and
9 review that file to better prepare for your trial; is
10 that correct?

11 A Yes, ma'am.

12 Q Despite my request for a continuance, even today
13 you do still wish to move forward?

14 A Yes, ma'am.

15 Q Today we are here for your PCR application, in
16 which you have alleged in your application that Judge
17 Hall said you had 10 days to withdraw your plea; that
18 you wrote Mr. Grier a letter indicating that.

19 Can you tell the Court about this allegation?

20 A Yes, ma'am. On top of that, in the application
21 for post-conviction relief, there was also -- on that,
22 regarding the withdrawal, there was that, and the fact
23 that myself, my family, and I believe other members,
24 including my prior Public Defender were threatened by
25 what the State calls a co-defendant. I am a victim in

1 this case. These three individuals robbed me and my
2 friend at gunpoint. They threatened my sister, my
3 niece's father, my mother when she traveled overseas
4 from Portugal. Mark even seemed like they had come to
5 him and threatened him.

6 Let me answer your first question. Regarding this
7 withdrawal, it did seem -- and as I was listening to
8 Honorable Mr. Hall, he did say that you have 10 days to
9 withdraw this plea bargain if I make a mistake or error.
10 I believe it is very similar. The transcript that is
11 dated on the front August 22, 2017 -- and in the back it
12 does say August 17, 2017, but it does say you have 10
13 days from today's date in which to appeal.

14 If I make an error or if you disagree with that
15 sentence, you have the right to appeal; however, you
16 have to file that appeal within 10 days. You normally
17 start that process by notifying your attorney.

18 Where it says, "appeal," through my hearing,
19 vision, my senses, it said "Withdraw." If the plea was
20 not spoken on until after that 10 days, you have to go
21 through the regular appeal process.

22 Q So it's your testimony that you reached out to Mr.
23 Grier about that?

24 A Yes, ma'am. When I wrote him on August 23, 2017, I
25 did not write him concerning an appeal whatsoever. It

1 was hearing what my mother said and then the Judge
2 saying you have 10 days to withdraw this plea bargain.

3 I want to withdraw, because I am an innocent man.
4 I watched my best friend be killed in front of me. My
5 family has been threatened for over a year-and-a-half
6 now for me to keep silent so that nothing happens. My
7 wife is in danger.

8 I have been incarcerated since August 28, 2017 in
9 the South Carolina Department of Corrections. I have
10 been stabbed. I have been raped. I have been extorted
11 for money. My family on the street has had visits at
12 shopping centers. Their lives have been threatened to
13 make sure that I don't come into court and let this out
14 to everybody.

15 It's not right that I have to sit in prison for 30
16 years on something that I didn't even commit. I don't
17 consider myself a drug dealer. I don't consider myself
18 a junkie -- none of that.

19 I enjoy everything in this country, and I believe
20 that there needs to be certain laws and legislations on
21 things. That is what myself and my friend who has
22 passed, God bless his soul were trying -- that's why we
23 got into the marijuana industry, as they call it.

24 Q Did you talk to Mr. Grier about all of that?

25 A Yes, ma'am, I have.

1 Are you talking about regarding the withdrawal, or
2 are you talking about everything in general?

3 Q I am referring to when --

4 A The threats, Mr. Grier knew about them. He knew
5 that going into the trial. When my sister came down
6 from the courthouse and she came in here with Mr. Grier,
7 my lawyer said, "I am going to have to take your sister
8 aside. You have to take this plea bargain. This is
9 your family on the line. It's their life on the line if
10 you walk out of here and they kill you or kill your
11 family. What are you going to do?

12 Q So it's your testimony that you felt forced to take
13 the plea?

14 A Yes, ma'am.

15 Q Did you ever ask Mr. Grier about going to trial?
16 Did you have a discussion about going to trial?

17 A Our whole plan for the whole year-and-a-half that I
18 was in the county was, "Why am I not free right now?"

19 Why did Mr. Whitesides -- I was in Charlotte, North
20 Carolina. When I agreed to come speak with him, he told
21 me I wasn't under arrest. "We don't believe you killed
22 anybody, so we need to know what happened."

23 Are those people -- you guys are going to be
24 followed up there. I was scared for my life. I live
25 five minutes from South Carolina in North Carolina.

1 I was down here visiting with a family friend. I
2 am not even a citizen of South Carolina anymore. I live
3 in New York, [REDACTED] Johnson Creek Road, Middleport, New
4 York.

5 My plans were to return to Portugal, and I would
6 take my mother's business to help dysfunctional
7 families, addicts, children with mental health
8 disorders. They come to the farm and they make goat
9 cheese, and they can bring it home to their parents.
10 Play with farm animals. It's something productive that
11 the Government actually funds over there.

12 So I have big things on my plate. So because of my
13 loyalty to my friend, yes, I was there as his bodyguard.
14 One might infer that I was there.
15 They pulled guns out on us. There are known cocaine
16 dealers in the area. They are gang-bangers.

17 Mishawn (phonetic), in the document, said that he
18 didn't like the fact that I was over at his -- I
19 guess -- I don't know if they are married or what, but
20 he has a child by her. He told the investigators that
21 he didn't like the fact that I was there.

22 Come to find out, there were two witnesses from the
23 County that -- that is the exact reason why me and Randy
24 got attacked, was because of this woman, Katherine Dore
25 (phonetic). They may have written statements and turned

1 those in to the investigators before trial.

2 There is enough governing evidence that I believe
3 went beyond Mr. Hall. He would have seen the innocence.
4 He would have seen that. You are in the wrong
5 thing.

6 Q You talked about that evidence with --

7 A With Mr. Grier, yes, for a year-and-a-half we have.

8 Q So your testimony -- is that based on your
9 discussions with Mr. Grier and everything that you just
10 said -- you were forced to take your plea; is that
11 correct?

12 A Yes, ma'am.

13 Q Is there anything else regarding your plea or
14 anything --

15 A I can never discredit anything that the State
16 brings forward. As far as these transcripts -- Mr.
17 Watkins, I can't discredit his transcripts because he is
18 a State Official. I could have heard him wrong with
19 withdrawing the plea bargain.

20 I was in severe mental distress. I had to be
21 hospitalized. I almost committed suicide about seven
22 times, because I just wanted to be gone and off the face
23 of the earth so my family would be left alone. I was in
24 the rubber room more times then -- I never even went
25 back to populations. I couldn't go back there, because

1 these guys had people that were ready to kill me.

2 When I got back to SCDC, I was jumped right away
3 and placed in protective custody. If you look at where
4 the State pulled my record, it says, "Protective
5 Custody."

6 Q Did you talk about that with Mr. Grier?

7 A Yes, ma'am, I did. All of this was discussed with
8 him.

9 Q What was his response?

10 A "Just be patient, Dave. Everything is going to
11 work out. I am talking to the office to see what we can
12 do." Investigators. They said they were going to come
13 down here. I spoke to the investigators one time, on
14 August 7 -- April 7, 2016. That is the date when they
15 told me to come in and speak with them and tell them
16 what is going on, and I did. Since then, I have not
17 talked to them or any other official besides Mr. Grier
18 himself and everybody here today with the courts.

19 I haven't gotten a chance to dispute. I live for
20 my family. I have two beautiful little nieces that I
21 have raised and be there because their fathers are not
22 there. I talk to my nieces on the phone. My youngest
23 niece says, "Dave, I want to come live with you. Where
24 are you at right now? I miss you. I want to go out to
25 the farm."

1 It breaks my heart that I have put myself in this
2 situation.

3 Q You understand that today we are here to complain
4 about Mark Grier's ineffective assistance of counsel?

5 A Yes, ma'am. I believe this all coincides. One of
6 the things that the State said in the return was, "A
7 lawyer must use professional and reasonable judgment."

8 If an individual is explaining what is going on to
9 you -- what happened that day, what is going on
10 presently, the threats on my family. The people that I
11 was surrounded by -- why would you not put in motions to
12 the Court that this individual is really a witness?

13 There are things going on out in the world right
14 now. He needs to be protected. His family needs to be
15 protected. He was forced into this plea.

16 He never spoke on it. He will tell you, "Mr.
17 Kucinski's mother even said that they came to her motel
18 down here in Lancaster and banging on the door trying to
19 get in there, and bandanna'd up and ready to go in
20 there." If it wasn't for the lady up front, they would
21 have probably killed my mother that night.

22 Q Is there anything else you would like this Court
23 to know about Mark Grier's ineffective assistance of
24 counsel?

25 A The return also states that -- one -- I am not -- I

1 started to study criminal justice at York Tech. I did
2 not complete it, but it is my wish to complete college
3 and have a four-year degree and enter a commission in
4 the United States Marine Corp.

5 They said that they believe that if I am going off
6 of ineffective counsel that I can only attack the
7 voluntary and intelligent nature of the plea.

8 So as far as intelligence, I have stated that my
9 mental health distress is all over the place. Different
10 medications that have me feeling this way, that way, up
11 and down, left and right. Medications that I don't even
12 know what they are.

13 I haven't had a chance to -- really, I didn't care.
14 I was ready to die at that time. I just wanted to save
15 my family. Now I am in a position to where my family
16 has assured me that they are in a safe position. They
17 are away from home.

18 My father lives on a road that bisects these three
19 individuals that attacked us. Their family lives on
20 this bisecting road. It scared me, what was going to
21 happen.

22 Q So because you discussed all of that information
23 with Mr. Grier and he failed to take action, today you
24 are saying that that is your attack on the voluntary and
25 intelligent nature of the plea; correct?

1 A As far as legal terms? My legal dictionary -- I am
2 not sure. I was pretty much told that -- after the
3 appeal come back and it said that it was dismissed,
4 first because I didn't give a good enough explanation
5 then, because I wanted to relieve the counsel, as I
6 intended to do at the preliminary hearing, which was a
7 requirement.

8 For whatever reason, I ended up being hospitalized.
9 I was then told by another inmate that there is
10 something called "Post-Conviction Relief." It's almost
11 like a hearing or a trial where you can speak directly
12 in front of the Court, the Honorable Judge, and explain
13 what is going on in your case and what actually
14 happened.

15 So I am here telling the truth of what had
16 happened; that the State has said that the voluntary and
17 intelligent nature of the plea, and say that Mark Grier
18 is this and that. That is fine. Of course, he didn't
19 do his job. Of course, it's factual based off of, in my
20 mind, what has happened to me and what has transpired in
21 the past almost three years now.

22 Would you repeat the question one more time?

23 Q I just asked that based off of all of that, you are
24 stating that your plea was not voluntary?

25 A No, ma'am.

1 MS. MINOR: I have no further questions, Your
2 Honor.

3 THE COURT: All right.

4 Mr. Key.

5 MR. KEY: No questions from the State on this
6 witness.

7 THE COURT: You may step down. Thank you, sir.

8 (Whereupon, the witness exited the witness stand.)

9 THE COURT: We will take a five-minute break.

10 (Whereupon, a brief recess was held.)

11 MS. MINOR: Your Honor, we call Mark Grier to the
12 stand.

13 * * *

14 MARK GRIER, ESQ.

15 called as a witness by and on behalf of
16 the Applicant to testify, being first duly
17 sworn was examined and testified as follows:

18 DIRECT EXAMINATION

19 BY MS. MINOR:

20 Q Good morning, Mr. Grier. How long have you been
21 practicing?

22 A Since 1991, 30 years.

23 Q You did represent Mr. Kucinski; is that correct?

24 A I did, yes.

25 Q Over the course of your representation, what did

1 you do to investigate his case?

2 A I got all the discovery. I discussed it with him.
3 I hired a private investigator. I ran down every lead.
4 I contacted every person that he asked me to that I
5 could make contact with. I considered all of his
6 arguments. I talked with him. I discussed it. I
7 pursued everything.

8 I got his phones. I got all the phones involved in
9 the case. I hired an expert. I extracted all the
10 phones. I went through all the telephone exchanges
11 between all of the parties. I talked to a couple of
12 witnesses who may have been helpful had we gone to trial
13 that were in SCDC. I just investigated every lead that
14 my experience told me to investigate and pursue.

15 I met with Mr. Kucinski I don't know how many
16 times. I don't have that in front of me, but I think he
17 will tell you we met quite a few times.

18 Q Do you think that he understood the information
19 that you discussed with him, as far as the evidence?

20 A To go through the entire process, Mr. Kucinski had
21 some difficulties. We had some difficulties
22 communicating fairly early on in the process. Mr.
23 Kucinski was suffering from some sort of mental
24 disorders, and he has a history. We had to obtain
25 records from Oregon where he had some difficulties and

1 was institutionalized for a while, I think.

2 So I had him evaluated certainly for Blair and
3 McNaughton. If I am not mistaken -- I think we had to
4 get an order to hold him and regain competence through
5 treatment, which is part of the process sometimes when
6 people are diagnosed as just not being competent but
7 able to restore. If I am not mistaken, that may have
8 happened with Mr. Kucinski.

9 At any rate, his competence was restored, and we
10 began a dialogue and pursued every avenue that I could
11 imagine could have been pursued to try to find evidence
12 and discuss the case.

13 Certainly, I had an investigator who went out and
14 tried to talk to all the witnesses that we thought could
15 possibly be beneficial to us. They reported back to me,
16 and I prepared.

17 Q So his competence -- you said his competence was
18 restored. Was there any time during the representation
19 that you had discussions with him when he wasn't at that
20 point when the competence was restored?

21 A Not after it was restored. Certainly, the whole
22 point of having him evaluated was -- there was a time
23 when he even alluded to it, certainly he is aware of it
24 -- where he -- actually, I don't think they held him. I
25 believe the determination was malingering, I believe.

1 All I can say is that we went through a period
2 where he was not able to assist his attorney with the
3 preparation of his case, where I believed him to be not
4 competent. I had him evaluated. He did become
5 competent, and we were able to discuss his case in all
6 its detail, and through therapy. From that point on, I
7 never felt like he was incompetent.

8 Q So once competence was restored, you were able to
9 have an intelligent discussion about his case?

10 A Yes.

11 Q Is it your testimony that based off of that, he
12 understood the evidence and what you have done with the
13 investigation?

14 A Yes. He wouldn't have been competent had he not,
15 and he was. He understood it thoroughly. He was very
16 articulate. He is a very smart guy. He is intelligent.
17 He was creative in his approach to his defense.
18 Certainly, I took everything that he told me and put it
19 into the analysis.

20 Q So do you believe that -- when you discussed the
21 plea bargain under Alford, it's your testimony that he
22 understood that he didn't have to take the plea?

23 A Certainly, I believe he understood he did not have
24 to take the plea. His sister did want to talk him. He
25 wanted to talk to his sister. I think his sister played

1 a part in convincing him that it was in his best
2 interest, and I concurred with, to plea.

3 He was never coerced into pleading.

4 Q You discussed the consequences of taking the plea
5 with Mr. Kucinski?

6 A I did.

7 Q It's your testimony that he understood those
8 consequences?

9 A Yes, he did.

10 Q Did you discuss -- did he ever write you about the
11 10 days that he is referring to regarding withdrawing
12 his plea? Did he ever write you about that?

13 A I never saw a letter from him during that time
14 period where he says he wrote me. Certainly, there was
15 never -- I saw the letter when -- I think he filed a
16 grievance, if I am not mistaken. I did receive a copy
17 of a letter stating that he wished to withdraw the plea.
18 The first time I saw it was certainly during the appeals
19 process. I believe it was the grievance process when I
20 received a copy of the letter.

21 I did respond, so it would have been a grievance
22 the first time I saw the letter. Certainly, when I
23 received the letter -- that wasn't what the Judge said,
24 and that wasn't an option. So I don't know if I had
25 received the letter, what good it would have done.

1 I suppose I would have been obligated to file a
2 motion and ask the Judge to reconsider based on his
3 statement that that was said, even though I knew that
4 not to be the case. That just didn't happen.

5 Q So it's your testimony that you didn't do that?

6 A I didn't do it, because I didn't know he asked to
7 do it, if he did ask to do it. Frankly, it appeared to
8 me that that was kind of reconstructed after the fact.

9 MS. MINOR: Nothing further from this witness,
10 Your Honor.

11 THE COURT: All right.

12 Mr. Key.

13 * * *

14 CROSS-EXAMINATION

15 BY MR. KEY:

16 Q Mr. Grier, you testified that you did have Mr.
17 Kucinski evaluated in this case.

18 A I did.

19 Q And that his competency was restored.

20 A I can't say with certainty whether -- he became
21 competent. I think he was held and his competency was
22 restored. He was also determined to be malingering, as
23 well, as part of the evaluation process. I would have
24 to pull the file to say with 100 percent conviction that
25 I am accurate about that.

1 At any rate, there was a period where I clearly
2 believed him not to be competent. After going through
3 the evaluation process, his medicines were changed, and
4 we were able to engage and work on his case.

5 Q So he was able to help you prepare for the case?

6 A Yes, he was.

7 Q Do you believe he was competent the day he entered
8 the plea?

9 A Yes, I do.

10 Q Did he ever bring up to you that these threats had
11 been made against him?

12 A Yes, he did. There was never any particular,
13 factual lead to be able to follow up on it or to --
14 there was nothing to investigate to that end. Frankly,
15 it really wouldn't have anything to do with whether it
16 was guilt or innocence in terms of that.

17 Certainly, if there had been some action that could
18 have been taken to try to protect his interest, I would
19 have taken that had I been able to determine what it was
20 and where it was coming from.

21 If I understood him correctly, he intimated that I
22 had been threatened as well. I was never threatened or
23 aware that I was threatened. That didn't factor into
24 the representation, as far as I was concerned.

25 Q Did you go over the discovery with Mr. Kucinski

1 when he was competent?

2 A Yes, I did.

3 Q Did he understand what you were relaying to
4 him.

5 A Yes, he did. I believe he did.

6 Q He pled pursuant to Alford. Do you recall what
7 evidence the State had against him in this case?

8 A Yes. I could try to summarize it, if you wish.
9 Basically, he had three co-defendants, two of them
10 certainly directly implicated him as being -- arranging
11 a drug deal and double-crossing his partner who
12 ultimately was killed.

13 That was the theory of the case; that these three
14 other co-defendants -- and there was a pretty extensive
15 electronic messaging that corroborated that prior to the
16 event. After the event, the death of Mr. Tran, there
17 was -- within hours there was a communication from Mr.
18 Kucinski that he was in possession of drugs for sale.
19 That was the evidence that the State was prepared to
20 present at trial.

21 It was compelling in that if it were successful --
22 and it appeared to me that the likelihood was great that
23 it would be -- that it implied that it was intentional
24 and not an accident; that it was an intentional act on
25 his part, and the consequences would have been much

1 worse for him in terms of the likelihood of his
2 sentencing would have appeared to have been greater than
3 it ultimately was.

4 Q Did Mr. Kucinski ask you to enter into plea
5 negotiations?

6 A He did. My recollection is that he had a number of
7 -- my recollection is that he had said he would take a
8 12-year plea deal fairly early on. In fact, there is a
9 letter in the file to that effect from him.

10 Q Did the State ever offer 12 years?

11 A No. They did not.

12 Q Did you ever promise him?

13 A No, I did not. I promised him that I would present
14 that to them, which I did, but it was, done -- rejected.

15 Q Was it Mr. Kucinski's idea to plead guilty?

16 A Did he --

17 Q Did he want to plead guilty?

18 A I wouldn't say he was enthusiastic about it. I
19 don't think I have ever had a client that was. Well, I
20 take that back. Maybe I have had one that comes to mind
21 that was, based on the deal in terms of a serious case,
22 he was enthusiastic about the deal.

23 No. Admittedly, he was reluctant. We had -- over
24 the week that I had met with him -- I don't know.
25 Probably six or seven times over the week, maybe more.

1 I was getting -- negotiating with the Solicitor. I
2 think we struck a deal, then Mr. Kucinski had rejected
3 it during the course of the week or so or the few days
4 prior to the trial starting.

5 I may have wandered off the question. I have
6 forgotten exactly what you asked me.

7 Certainly, there were plea negotiations. He was
8 reluctant in terms of -- ultimately, when we arrived, we
9 picked a jury. Certainly, we were ready to start the
10 trial.

11 Ultimately, in discussions he believed it was in
12 his best interest to take that plea deal, and I believe
13 that he believed it was in his best interest at the
14 time. I think that he did believe that at the time, but
15 subsequent to doing it, he doesn't believe that it was.

16 Q Did you recommend that he plead guilty in this
17 case?

18 A I won't say that I recommended it, but I did
19 present to him that I thought the evidence was
20 compelling and the likelihood of prevailing was not good
21 for him. Frankly, I think I told him that I didn't
22 think that he would see the outside again if we lost at
23 trial. I felt the evidence was compelling.

24 Q Mr. Grier, you mentioned that Mr. Kucinski did tell
25 you that threats were made against him?

1 A He did.

2 Q During the plea, did he ever indicate that he was
3 pleading because of those threats, or was it his
4 decision to plead?

5 A During the plea? No. That didn't factor in.
6 There was no discussion of those threats at the time of
7 the plea. So those didn't factor into the plea. It was
8 his decision based on discussing it, going back through
9 it, and getting him to discuss it with his sister.

10 Q Did Judge Hall ask Mr. Kucinski if anyone had made
11 any threats against him on the record?

12 A I don't recall that. I would have to check the
13 transcript. I don't recall -- unless that is part of
14 the colloquy, and it might be. I hate to admit that I
15 can't specifically say that he did or he didn't.

16 MR. KEY: Your Honor, I will point to Page 11 of
17 the transcript where Judge Hall asked Mr. Kucinski if he
18 had been threatened or if he was pleading because he had
19 been threatened.

20 Nothing further from the State.

21 THE COURT: Thank you.

22 Ms. Minor, anything further?

23 MS. MINOR: Briefly, Your Honor.

24 * * *

25 REDIRECT EXAMINATION

1 BY MS. MINOR:

2 Q Mr. Grier, you testified that you guys picked a
3 jury?

4 A I believe we picked a jury, yes.

5 Q What discussions were made that changed his mind?
6 Tell me about the discussions that you had with Mr.
7 Kucinski where he changed his mind from the trial to
8 enter that guilty plea.

9 A I don't know that there were any changes in
10 discussion, specifically, that we hadn't already
11 discussed. I just think that a trial, facing trial
12 ultimately, results in a lot of pleas when clients are
13 faced with the reality of it.

14 I think a factor was that his sister had reviewed
15 the evidence and took a -- what appeared to be important
16 and maybe changing his decision was that his sister had
17 gone through the evidence with me that morning and would
18 have become more versed on the case than I think she had
19 been prior and saw the writing. We had a pretty long
20 conversation with his sister, me and Mr. Kucinski and
21 his sister. I think that was a contributing factor that
22 brought the reality around to Mr. Kucinski that it was
23 in his best interest.

24 MS. MINOR: Nothing further, Your Honor.

25 THE COURT: Mr. Key?

1 MR. KEY: Nothing from the State.

2 THE COURT: You may step down.

3 (Whereupon, the witness exited the witness stand.)

4 THE COURT: Anything further?

5 MS. MINOR: Your Honor, at this time I would like
6 to make a motion for an evaluation of Mr. Kucinski based
7 off his testimony and also Counsel's testimony that
8 there were periods of time that he was incompetent. My
9 concern today is that although Counsel mentioned that he
10 had restored competence, I am not quite sure if, based
11 off of testimony that Mr. Kucinski gave today, that he
12 is competent for this particular trial.

13 So at this time I would like to move for a motion
14 for an evaluation.

15 THE COURT: All right.

16 What says the Attorney General?

17 MR. KEY: The State would cite to Counsel v. Catoe,
18 3,000 Island, SC 120, 2004 (phonetic). In Counsel, the
19 South Carolina Supreme Court says that PCR proceedings
20 are not to be stayed because of competency issues at the
21 PCR hearing.

22 Mr. Grier testified that there were competency
23 issues with Mr. Kucinski, but he was competent when he
24 pled. So the State would cite Counsel v. Catoe on the
25 mental evaluation and going forward with the PCR

1 hearing.

2 THE COURT: The motion is noted; however, on review
3 of the transcript, it appears to the Court just from the
4 transcript and the responses and the statements made by
5 Mr. Kucinski -- it appears to me that he was competent
6 at that time. Also, based on not only the case that you
7 just cited to today and carefully listening to his
8 testimony today, the Court doesn't have any concern
9 about it.

10 So I will deny the motion; however, I do need some
11 time to look over these other documents and give
12 consideration of that. Mr. Gibson will be in touch with
13 you about any additional matters that I might need.

14 Thank you very much.

15 * * *

16 - - -END OF TRANSCRIPT- - -

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CERTIFICATE OF REPORTER

I, Kymberlee M. Williams, Certified Shorthand Reporter/Registered Professional Reporter for the 6th Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Circuit Court for Lancaster County, South Carolina, on the 23rd day of January, 2019.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

This, the 1st day of August, 2019.


KYMBERLEE M. WILLIAMS, CSR/RPR

STATE OF SOUTH CAROLINA)
COUNTY OF LANCASTER)

David Antonio Kucinski, # 373636,)

Applicant,)

v.)

State of South Carolina,)

Respondent.)

IN THE COURT OF COMMON PLEAS
FOR THE SIXTH JUDICIAL CIRCUIT

Case No.: 2018-CP-29-0536

ORDER OF DISMISSAL

CLERK OF COURT
LANCASTER, SC

2019 MAY 16 PM 12: 01

FILED
OFFICE OF CLERK
OF COURT

The matter before the Court is an action for post-conviction relief (PCR) commenced by David Kucinski May 8, 2018. In his PCR application, Kucinski alleged ineffective assistance of counsel for failing to move to withdraw his plea.

Donae A. Minor, Esquire, was appointed as Kucinski's PCR counsel. Assistant Attorney General Samuel Key represented the State. Kucinski's PCR hearing was scheduled to be held January 23, 2018, in Lancaster. However, PCR counsel moved for a continuance by email to the Chief Administrative Judge on January 15, 2019, because plea counsel had not yet provided PCR counsel with a copy of his defense file for her review. The State had no objection to PCR counsel's continuance request, and the continuance was granted by email the same day. However, the following day, PCR counsel spoke with Kucinski regarding his case, and he indicated he did not want his hearing continued and insisted his hearing proceed as originally scheduled against PCR counsel's advice. PCR counsel notified the State by email of Kucinski's insistence, and the State replied by stating it would not cancel Kucinski's scheduled transport to court.

On January 23, 2019, PCR counsel and the State placed the above stated events on the record before this Court. PCR counsel reiterated she felt it was in Kucinski's best interest for the hearing to be continued, but Kucinski insisted, against PCR counsel's advice, for the hearing to proceed on the merits. The Court ruled to proceed on the merits.

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During the PCR hearing, Kucinski testified his plea was involuntary and amended his pleadings to allege ineffective assistance of counsel to include the allegation of involuntary guilty plea. The State did not object to the amended pleadings. For the reasons stated below, the Court finds Kucinski's allegations to be without merit and concludes plea counsel was not ineffective. Therefore, the Court denies relief and dismisses this action with prejudice.

I. PROCEDURAL HISTORY

Kucinski is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Lancaster County Clerk of Court. Kucinski was indicted at the July 2016 term of the Lancaster County Grand Jury for murder (2016-GS-29-1131), armed robbery (2016-GS-29-1132), and two counts of possession of a firearm during the commission of a violent crime. Kucinski was represented by Mark Grier of the Sixth Circuit Public Defender's Office. On August 22, 2017, Kucinski entered an *Alford*¹ plea before Judge Daniel D. Hall to murder, armed robbery, and one of the weapons charges. The plea was entered without sentencing recommendations or negotiations; however, the solicitor agreed to remain silent during sentencing. The plea court accepted Kucinski's *Alford* plea and sentenced him to concurrent terms of imprisonment of thirty years for murder, twenty-five years for armed robbery, and five years for possession of a weapon during the commission of a violent crime.

Plea counsel timely filed a notice of appeal and statement pursuant to Rule 203(d)(1)(B)(iv), SCACR, and *In re Anonymous Member of the Bar*, 303 S.C. 306, 400 S.E.2d 483 (1991), on August 30, 2017. Kucinski filed a *pro se* statement with the court of appeals on September 12, 2017. The court of appeals dismissed the appeal on December 28, 2017 and remitted the case on January 29, 2018. Kucinski commenced this PCR action on May 4, 2018.

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II. FACTS

Kucinski was arrested for the armed robbery and murder of Randy Tran. On April 5, 2016, Tran had planned to sell six pounds of high-quality marijuana to Nachon Hayden, Chris Glass, and Tony Maynard. Hayden, Glass, and Maynard arrived in one car. Kucinski and Tran arrived in Tran's car, an orange Scion. (Tr. 13). During the drug deal, Kucinski shot Tran in the back of the head. Tran died. (Tr. 14).

After Kucinski shot Tran—Hayden, Glass, and Maynard fled in the vehicle they arrived in. Two witnesses saw them flee. These witnesses also observed Kucinski stuffing a bloody body into the trunk of an orange Scion. Tran's body was eventually found in a ditch. (Tr. 15).

Kucinski left the scene, driving the Scion, and went to a friend's house. He brought six pounds of high-quality marijuana with him. Kucinski's friend inquired about the Scion, and Kucinski claimed to have purchased it from his "homeboy." Kucinski gave his friend two pounds of the marijuana. (Tr. 15).

Kucinski learned he was wanted in connection to the murder, and eventually called law enforcement and gave up his location. He was arrested in Charlotte, North Carolina. He waived his right to remain silent and gave law enforcement two statements. In his first statement, Kucinski claimed he did not know what happened and that he was not present when Tran was killed. However, when the interviewing officers stated they would look into his alibi, he changed his story. (Tr. 16). In his second statement, Kucinski claimed Glass shot Tran in the back of the head, and then threatened Kucinski. (Tr. 17).

Phone records taken from Kucinski's and Hayden's phones contradict Kucinski's version of events. Sometime before the incident, Kucinski sent two text messages to Hayden (1) asking Hayden

1 *North Carolina v. Alford*, 400 U.S. 25 (1970).

for a gun, and (2) stating he wanted to get a gun because he was going to do a "lick." (Tr. 12-13). Kucinski also sent text messages to other individuals immediately following the incident.

First, Kucinski sent text messages to friends bragging about his new car, saying he had "so much weed," and he wanted to party. (Tr. 17). However, when people informed him that he was suspected of murder, he claimed to have been either in Columbia or Charlotte all day. (Tr. 17). At one point, Kucinski sent a text message stating, "I'm just going to sell the weed and run, see you in five years." (Tr. 17). However, as mentioned above, he eventually turned himself in. Kucinski and his co-defendants were all charged under the "hand of one, hand of all" theory of accomplice liability.

The case was called for trial on August 22, 2017. A jury was empaneled and ready to be selected, but Kucinski informed the State that he wished to plead pursuant to *North Carolina v. Alford, supra*, to murder, armed robbery, and one of the weapons charges. The plea was entered without recommendations or negotiations; however, there was an agreement for the assistant solicitor and Solicitor to remain silent during the sentencing phase of the hearing. (Tr. 3).

The plea court asked Kucinski whether he wished to plead pursuant to *Alford*. Kucinski responded affirmatively. (Tr. 5). The plea court advised Kucinski of the charges against him and the maximum and any mandatory minimum sentences for each charge. Kucinski affirmed he understood the charges against him and the sentencing exposure he faced. (Tr. 5-7). The plea court then advised Kucinski of the meaning and consequences of entering an *Alford* plea. (Tr. 7-8). Kucinski affirmed he understood the nature and consequences of his plea. (Tr. 8, 9). The plea court asked:

Q: And so how do you plead to all three of these charges?

A: From what I've talked with [] [plea counsel] and what we're facing here with the State's evidence versus the truth that I've spoken, it seems in my best interest to plead guilty for the following three crimes, not saying that, one, I shot Randy Tran or had anything to do with the robbery. But based off of the State's evidence that could

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compel a jury to say yes, [I] [am] guilty and prosecute me in *the possibility of it being the life sentence that pushes me to come before the [plea court] and beg for mercy* on a plea in regards to saying that I'm guilty.

Q: All right. And so is it your desire to enter this plea under a[n] *[Alford]* plea?

A: Yes, Your Honor.

(Tr. 8-9) (emphasis added).

The plea court asked Kucinski whether he was entering the plea freely, voluntarily and knowingly. (Tr. 9, 11). Kucinski affirmed. (Tr. 9, 11). The plea court found Kucinski's decision to enter the plea to be "freely, voluntarily, and intelligently made . . ." (Tr. 11-12). The plea court then advised Kucinski:

[Y]ou have ten days from today's date in which to appeal, if I make an[] error, if you disagree with the sentence you have a right to an appeal, however, you have to file that appeal within ten days. You normally start that process by notifying your attorney of your desire to appeal, do you understand that right?

Kucinski affirmed he understood. (Tr. 12). The factual basis for the charges were then placed on the record. (Tr. 12-17).

After hearing the State's version of the facts, Kucinski reaffirmed that he wished to plead pursuant to *Alford*. (Tr. 18). The plea court sentenced Kucinski to concurrent terms of imprisonment of thirty years for murder, twenty-five years for armed robbery, and five years for possession of a weapon during the commission of a violent crime.

On August 30, 2017, plea counsel timely submitted a notice of appeal and statement pursuant to Rule 203(d)(1)(B)(iv), SCACR, citing *In re Anonymous Member of the Bar*, 303 S.C. 306, 400 S.E.2d 483 (1991). Kucinski filed a *pro se* statement with the court of appeals on September 12, 2017. The court of appeals dismissed the appeal on December 28, 2017, and remitted the case on January 29, 2018. Kucinski commenced this PCR action on May 4, 2018.

III. ISSUES

Kucinski alleges he is being held in custody due to ineffective assistance of counsel.

Kucinski's allegations of ineffective assistance of counsel are:

1. Plea counsel's failure to move to withdraw Kucinski's plea; and
2. Kucinski unknowingly and involuntarily pleaded guilty.²

IV. DISCUSSION

The central issue before the Court is whether Kucinski's plea was the result of ineffective assistance of counsel. To establish ineffective assistance of counsel, the PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness, and (2) the applicant sustained prejudice as a result of counsel's deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *Cherry v. State*, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989). "The test for effective assistance of counsel is whether the representation was within the range of competence demanded of attorneys in criminal cases." *Watson v. State*, 287 S.C. 356, 357, 338 S.E.2d 636, 637 (1985).

Kucinski alleges plea counsel was ineffective for two reasons: (1) for failure to move to withdraw Kucinski's plea; and (2) Kucinski involuntarily pleaded guilty. For the reasons stated below, the Court finds plea counsel was neither deficient in his representation, nor was Kucinski prejudiced by the alleged deficiencies. Further, the Court finds Kucinski knowingly and voluntarily entered his plea; therefore, the Court denies relief and dismisses the action with prejudice.

1. Failure to move to withdraw Kucinski's plea

In his PCR application, Kucinski alleged the plea court advised that he had ten days to withdraw his guilty plea. The Court interprets this allegation as ineffective assistance of counsel for failure to move to withdraw Kucinski's guilty plea. The Court finds this allegation is without merit.

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In a PCR action, the applicant bears the burden of proving his allegations. *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985)

At his PCR hearing, Kucinski waived this allegation from the witness stand. Kucinski explained, at the time he pleaded, he thought the plea court advised him he had ten days to withdraw his plea. However, Kucinski testified that after review of the transcript from his plea hearing, the plea court advised he had ten days to appeal, not withdraw, his plea. Kucinski is correct, the plea court advised him he had ten days to appeal his plea. (Tr. 12). Based upon Kucinski's testimony at the PCR hearing which is supported by the plea transcript, the Court finds Kucinski has failed to meet his burden of proof in regard to this allegation. See *Butler*, 286 S.C. at 442, 334 S.E.2d at 814 (stating the applicant bears the burden of proving his allegations). Therefore, the Court denies relief on this issue and dismisses the allegation with prejudice.

2. Involuntary Guilty Plea

The Court now turns to the issue that arose during Kucinski's PCR hearing: whether Kucinski received ineffective assistance of counsel rendering his plea unknowing and involuntary. For the reasons discussed below, the Court finds Kucinski pleaded with the advice of plea counsel; therefore, the issue before the Court is whether his plea was knowingly and voluntarily entered. See *Roscoe v. State*, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001) (stating a defendant who entered a plea on the advice of counsel may only attack the voluntary and intelligent nature of the plea).

The test for determining the validity of a guilty plea is "whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." *North Carolina v. Alford*, 400 U.S. 25, 31 (1970). "[A] defendant entering a guilty plea must be aware of the nature and crucial elements of the offense, the maximum and any mandatory minimum

² Kucinski's second allegation arose during his testimony at the PCR hearing; however, the State did not object to the testimony and cross-examined Kucinski and plea counsel on the issue.

Paul

penalty, and the nature of the constitutional rights being waived." *Pittman v. State*, 337 S.C. 597, 599, 524 S.E.2d 623, 624 (1999). To prove prejudice, the applicant must show a reasonable probability he would not have pleaded guilty and would have insisted on going to trial absent plea counsel's alleged deficiency. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

Kucinski attacked the voluntary nature of his plea through his testimony at the PCR hearing. Specifically, Kucinski alleged he was coerced into pleading guilty by one of his co-defendants and by plea counsel. Kucinski claimed his co-defendant threatened Kucinski and his sister in exchange for the plea. Kucinski further alleged his co-defendant threatened plea counsel, and plea counsel forced Kucinski to plead because of the alleged threats. The Court finds these allegations are without merit.

The Court finds Kucinski's testimony regarding threats made by his co-defendant towards Kucinski, his sister, and plea counsel not credible. The plea court specifically questioned Kucinski regarding the voluntariness of his plea during the plea hearing, and at no time during the plea court's colloquy did Kucinski indicate he was pleading involuntarily. Additionally, plea counsel credibly testified Kucinski never mentioned any threats made towards him or his sister while he represented Kucinski. Further, plea counsel credibly testified he was never threatened by anyone involved in Kucinski's case, and no threats were made towards him that affected his representation of Kucinski.

Finally, plea counsel testified as to Kucinski's history of mental competency. Plea counsel recalled one point early in his representation when Kucinski was not competent, so plea counsel had Kucinski evaluated. However, plea counsel stated Kucinski's competency was restored well before he pleaded guilty. Plea counsel was able to discuss the facts and evidence of the case with Kucinski, and Kucinski seemed to fully understand the meaning and consequences surrounding his case. Plea counsel stated he advised Kucinski of the nature of the charges against him, the maximum and any mandatory minimum penalties he faced, and the nature of the constitutional rights he waived in pleading guilty. Plea counsel testified Kucinski seemed fully aware of everything going on the day

of the plea. The Court finds credible plea counsel's testimony that Kucinski's competency was fully restored well in advance of his plea. Therefore, the Court finds Kucinski knowingly and voluntarily pleaded guilty.

At the end of the PCR hearing, Kucinski, through PCR counsel, moved to have himself evaluated based upon his behavior the day of the PCR hearing. The Court denied Kucinski's motion based upon its observation of Kucinski during the PCR hearing. The Court listened to and observed Kucinski carefully during the PCR hearing and finds Kucinski was competent and understood exactly what transpired during the hearing. While the Court does not find Kucinski's PCR hearing testimony credible, he displayed rational thought and behavior throughout the hearing.

Based upon the foregoing analysis, the Court finds Kucinski knowingly and voluntarily entered his plea. The Court is not swayed by Kucinski's testimony that he and his sister were threatened by his co-defendant, and therefore denies relief on the issue. Further, plea counsel credibly testified he was never threatened nor did he force Kucinski to plead, and Kucinski's competency was restored in advance of the plea hearing. The Court makes these determinations based on the testimony given at the PCR hearing and the record before the Court. Accordingly, the Court denies relief and dismisses this allegation with prejudice.

V. CONCLUSION

The Court finds plea counsel's representation was neither deficient nor prejudicial. Kucinski pleaded guilty pursuant to the advice of plea counsel. Kucinski knew the meaning and consequences of pleading guilty to the charges, and voluntarily chose to plead. Kucinski failed to show plea counsel was deficient for failing to move to withdraw his plea and failed to show any prejudice resulting from such alleged deficiency. Finally, the Court finds Kucinski was competent during his PCR hearing.

AKB

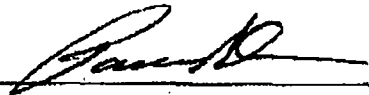
The Court notes Kucinski must file and serve a notice of appeal within thirty days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review pursuant to Rule 203, SCACR. Kucinski has a right to appellate counsel's assistance in seeking review of the denial of PCR. *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991). Rule 71.1(g), SCRCP, provides that if Kucinski wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Kucinski's behalf. Kucinski is directed to Rule 243, SCACR, for appropriate procedures for appeal.

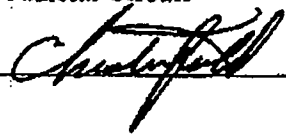
THEREFORE:

1. The Court denies relief and dismisses the action with prejudice; and
2. Kucinski shall be remanded to the custody of the State.

AND IT IS SO ORDERED.

May 13th, 2019.


PAUL M. BURCH
Presiding Judge
Sixth Judicial Circuit


Christopher D. Chantrell, South Carolina

WITNESSES

J. Catoe - LCSO #16-16999

M. Adams

ARREST WARRANT NUMBER/DOA

Count I

2016A2910100551 (DOA-4-8-16)

Count II - Direct Indictment IN RE: AW#

2016A2910100551

ACTION OF GRAND JURY

TRUE BILL

J. J. [Signature]
Foreperson of Grand Jury
Date: JUL 28 2016

VERDICT

Foreperson of Petit Jury
Date:

DOCKET NO. 2016-GS-29- 1131

The State of South Carolina

County of Lancaster

COURT OF GENERAL SESSIONS

JULY TERM 2016

**THE STATE
vs.**

David Antonio Kucinski

Indictment for

**Count I
Murder**

SC Code: §16-3-10

CDR Code: 0116

Class: Felony, EXM

Count II

**Possession of a Firearm During the
Commission of a Violent Crime**

S. C. Code: § 16-23-490

CDR Code: 0549

Class: Felony, F

FILED
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OF COURT

2016 JUL 28 PM 2:38

CLERK OF COURT
LANCASTER, SC

STATE OF SOUTH CAROLINA)
)
 COUNTY OF LANCASTER)

INDICTMENT

At a Court of General Sessions, convened on July 28, 2016, the Grand Jurors of Lancaster County present upon their oath:

COUNT I

MURDER

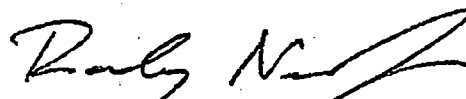
That David Antonio Kucinski did at [REDACTED] Little River Trail, Indian Land, S. C. , in Lancaster County, South Carolina on or about April 5, 2016, feloniously, willfully, and with malice aforethought kill and murder the victim Randy Tran by shooting the victim in the head which constituted the proximate cause of the death of the victim on April 5, 2016, in violation of Section 16-3-10 of the *Code of Laws of South Carolina*.

COUNT II

POSSESSION OR DISPLAY OF FIREARM DURING COMMISSION OF A VIOLENT CRIME

That David Antonio Kucinski did in Lancaster County, South Carolina, on or about April 5, 2016, possess or visibly display a firearm, to wit: a handgun during his commission of a violent crime, to wit: Murder of Randy Tran, in violation of §16-23-490, *Code of Laws of South Carolina, (1976), as amended*.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


 Randy E. Newman, Jr., SOLICITOR

WITNESSES

Whitesides/T. Murphy - LCSO #16-16999

M. Adams

ARREST WARRANT NUMBER/DOA

Count I

2016A2910200083 (DOA 4-26-16)

Count II

2016A2910200081 ✓

ACTION OF GRAND JURY

TRUE BILL

J. J. Wetters
Foreperson of Grand Jury
Date: JUL 28 2016

VERDICT

Foreperson of Petit Jury
Date:

DOCKET NO. 2016-GS-29- 1132

The State of South Carolina

County of Lancaster

COURT OF GENERAL SESSIONS

JULY TERM 2016

THE STATE
vs.

David Kucinski

Indictment for
COUNT I

Armed Robbery

SC Code: §16-11-0330(A)

CDR Code: 0139

Class: Felony, A

COUNT II

Possession of Firearm During
Commission of a Violent Crime

SC Code: § 16-23-490

CDR Code: 0549

Class: Felony, F

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OF COURT

2016 JUL 28 PM 2-38

CLERK OF COURT
LANCASTER, SC

*Def. pled to this Count I
of this ind. 8-23-17*

*This Count II
Nolle prossed per plea
agreement - Def. pled to
other charges on
8-23-17.*

8-25-17

STATE OF SOUTH CAROLINA)
COUNTY OF LANCASTER)

INDICTMENT

At a Court of General Sessions, convened on July 28, 2016, the Grand Jurors of Lancaster County present upon their oath:

COUNT I

ARMED ROBBERY

That David Kucinski did in Lancaster County, South Carolina, on or about April 5, 2016, while armed with a deadly weapon, to wit: a handgun feloniously take and carry away from the person or presence of Randy Tran by means of force, threats or intimidation goods or money of Randy Tran such goods or monies being described as follows: illegal narcotics, with the intent to deprive the owner permanently of such property, in violation of § 16-11-0330(A), *Code of Laws of South Carolina, (1976), as amended.*

COUNT II

**POSSESSION OR DISPLAY OF FIREARM DURING COMMISSION OF A VIOLENT
CRIME**

That David Kucinski did in Lancaster County, South Carolina, on or about April 5, 2016, possess or visibly display a firearm, to wit: a handgun during his commission of a violent crime, to wit: Armed Robbery of Randy Tran, in violation of §16-23-490, *Code of Laws of South Carolina, (1976), as amended.*

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


Randy E. Newman, Jr., SOLICITOR