THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

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APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

G. Thomas Cooper, Circuit Court Judge

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2018-CP-42-1206

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Genuine Truth Banner, ..................... Appellant,
v.
The State, ........................... Respondent.

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# NOTICE OF APPEAL

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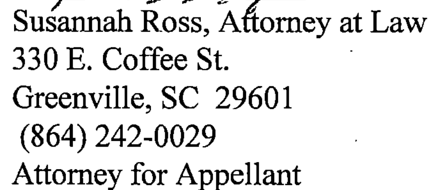
Genuine Truth Banner appeals the Honorable G. Thomas Cooper's Order of Dismissal filed May 7, 2020.

This 12 day of May, 2020.



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STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG ) FOR THE SEVENTH JUDICIAL CIRCUIT

Genuine Truth Banner, #375165
Applicant, ) Case No.: 2018-CP-42-1206

v.

) **ORDER OF DISMISSAL**

State of South Carolina,
Respondent.

This matter comes before the Court by way of a post-conviction relief application filed by Applicant Genuine Truth Banner on April 10, 2018. Respondent made its return on July 30, 2018. The Court convened an evidentiary hearing into the matter on October 11, 2019, at the Spartanburg County Courthouse. Applicant was present at the hearing and represented by Susannah C. Ross, Esquire. Assistant Attorney General Jacob A. Isenberg, Esquire, of the South Carolina Attorney General's Office, represented Respondent.

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Applicant testified on his own behalf at the evidentiary hearing. Applicant's plea counsel, William J. Nowicki (hereafter "Counsel") also testified. After a thorough review of all records and evidence before this Court, this Court finds Applicant cannot meet his requisite burden of proof of establishing he is entitled to post-conviction relief and denies and dismisses this application with prejudice. Specific findings of fact and conclusions of law are set forth below.

**Procedural History**

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. During the October 2016 term, the Spartanburg County Grand Jury indicted Applicant for armed robbery (count one) and bank robbery (count two) (2016-GS-42-05451), armed robbery (count one) and possession of a weapon during commission of a violent crime (count two) (2016-GS-42-5452), and five counts

of kidnapping (2016-GS-42-5453, -5454). William J. Nowicki, Esquire, represented Applicant. Assistant Solicitor Barry Barnette, Esquire, prosecuted the case. On January 22, 2018, at the conclusion of pre-trial motions, Applicant pled guilty as indicted to all charges before the Honorable J. Mark Hayes, II. The only request from the State was that the armed robbery and bank robbery sentences run concurrent. On January 23, 2018, Judge Hayes sentenced Applicant to twenty years' imprisonment for kidnapping, armed robbery, and bank robbery, and five years' imprisonment for possession of a weapon during commission of a violent crime, sentences running concurrently.

Applicant filed a *pro se* notice of appeal on March 27, 2018. This was denied and dismissed by written order, filed on April 25, 2018. Applicant's timely motion to reconsider sentence was withdrawn, the notice of appeal was untimely and not served within ten days of imposition of the sentence, pursuant to 221(b), SCACR. The remittitur was issued on May 14, 2018.

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## Statement of Facts

On October 29, 2016, Applicant, armed with a shotgun, robbed Spartan Federal Credit Union. (Plea Tr. 91). Applicant held bank customers, including a minor, hostage while the bank tellers collected money from registers. (Plea Tr. 91-92). Applicant took one of the tellers by the arm and led her around the room, forcing her to open drawers. (Plea Tr. 92). Thereafter, he ordered her to go faster and, emphasizing his point, fired a shotgun into the roof. (Plea Tr. 92). The other teller came around to help empty the drawers. (Plea Tr. 92). Seed money, which had serial numbers marked for robbery cases and totaled over $15000, was dropped on the floor by one of the tellers. (Plea Tr. 92-93). Applicant took part of the seed money, went around the room, and fired another round into the floor of the breakroom. (Plea Tr. 93). He then put the money in

his backpack, loaded it on his back, and left through the back door. (Plea Tr. 93). Applicant stole a victim's truck and fled the crime scene. (Plea Tr. 93).

The Applicant was later apprehended after he reported his license plate had been stolen. As it happened, prior to the robbery Applicant had backed his gray BMW into some bushes at a parking lot near the crime scene. A Spartanburg County deputy patrolling the area investigated the BMW and found it had an expired license plate with no insurance and removed the plate. After the robbery, the getaway truck stolen from the scene was found in the lot but the gray BMW was gone. The same deputy who took the plate went to the address given by the person who reported the stolen plate and saw a grey BMW backed up in the driveway. He walked up the driveway and looked in the car and walked around the car to see the VIN number and tag area. This was the same car he had seen at the parking lot. He then got a search warrant.

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In the vehicle, officers found ammunition shells that matched the gun used during the robbery, and clothing that matched what the robber wore during the armed robbery. (Plea Tr. 97-98). A shotgun was found under the deck of Applicant's house. (Plea Tr. 97). Additionally, when the officers entered the house they found a bag containing the money, including the seed money that was traced back to the money stolen from the bank. (Plea Tr. 98). This money was taken into evidence. (Plea Tr. 98). In the bottom of the bag was Applicant's photo identification card, containing his name and social security number. (Plea Tr. 98-99). Based off of these facts, Applicant was arrested for and charged with the crimes listed above.

**Current Action before this Court and Summary of Testimony at the Evidentiary Hearing**

***Current Action before this Court***

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

1. "Ineffective Assistance of Counsel"
    a. "My motion of discovery was never viewed in its entirety by myself because I was not afforded the opportunity by my counselor."
    b. "During the motion to suppress evidence, Mr. Nowicki never subpoenaed my witnesses to court so that the judge could evaluate their input into my argument that the arresting officer committed an illegal search prior to obtaining a search warrant."

2. "Illegal search and seizure"
    a. "This was an illegal search as verified by court transcripts, even the judge admitted there was a violation but called it minimal."

3. "Miranda rights violation by arresting officer"

Applicant, through Counsel, filed an amended application on September 11, 2018. In the amended application, Applicant alleged the following (excerpts verbatim):

1. Ineffective assistance of trial counsel for"
    a. "Failure to investigate and prepare for trial."
    b. "Advising him to plea under *Alford* without a proper inducement or benefit."
    c. "Failing to request a continuance to wait for ruling on *Collins v. Virginia*, which had oral argument on January 9, 2018; 584 U.S. ___ (May 29, 2018)."
    d. "Failing to challenge jurisdiction as Applicant was enlisted in the U.S. Navy at the time of plea."
    e. "Failure to advise Applicant that his right to appeal the ruling on his pretrial motion to suppress would be waived he pled guilty."
    f. "Failure to appeal plea and sentence on behalf of the Applicant."

2. Involuntary Plea:
    a. "Due Process violations because the plea was not knowingly and voluntarily made because the Applicant was not advised that the guilty plea would waive his right to appellate review of the court's ruling on his pretrial motion to suppress."

Regarding relief sought, Applicant requested: "conviction to be overturned on ground of illegal search and seizure and Miranda rights violation or vacated on the grounds of ineffective assistance of counsel."

At the PCR hearing, Applicant proceeded on the allegations listed in his amended



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application.

***Motion for Judgment as a Matter of Law***

At the PCR hearing, Respondent requested a motion for judgement as a matter of law after Applicant presented his case. Respondent argued that essentially the only argument Applicant presented at the hearing was that he wanted relief so he could appeal the suppression hearing and base his argument on the U.S. Supreme Court's decision in *Collins v. Virginia*,[1] which came out months after the plea hearing. Respondent argued this was essentially the sole issue raised and has nothing to do with the ineffectiveness of counsel or invalidity of the plea. PCR Counsel objected, stating that Applicant's appeal issues were not preserved for review and plea Counsel was ineffective for failure to inform Applicant he was waiving his right to appeal, which are both cognizable claims under the Uniform Post-Conviction Procedure Act.[2] Respondent's motion was overruled.

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***Applicant's Testimony***

Applicant alleged Counsel was ineffective because Applicant was never afforded the opportunity to view his entire discovery other than the search warrant and officer's incident report. (PCR Tr. 8). Applicant said he remembered Counsel bringing discovery to only one meeting, but they only discussed the search warrant and incident report. (PCR Tr. 8). Applicant stated he never received a full copy of the discovery. (PCR Tr. 8).

Applicant said his intention was always to go to trial. (PCR Tr. 8). Applicant said he thought his strongest issue at trial was the illegal search and seizure issue originally brought up at a suppression hearing. (PCR Tr. 9). Specifically, Applicant stated that officers went to

[1] 584 U.S.__ (2018).
[2] S.C. Code Ann. §§ 17-27-10 – 17-27-160.

Applicant's property to search and verify a few things, including that the plate reported stolen was on the car on his property. (PCR Tr. 9). Applicant also stated the officer ran the car's plate and found the car was uninsured. (PCR Tr. 9-10). He also said that after the robbery, a call was made regarding a stolen license plate. (PCR Tr. 9-10). Applicant testified that the officer showed up at Applicant's house and, while no one was home, entered the curtilage of the house to search and verify that the car's VIN number was the same car as the one reported. (PCR Tr. 10-11). Applicant stated that based upon verification of the VIN number, the officer requested a search warrant. (PCR Tr. 10-11). Applicant stated that he wanted to raise this issue, claiming it was an illegal search and seizure pursuant to *Florida v. Jardines*[3] and *Collins v. Virginia.* (PCR Tr. 12-13). Applicant said he requested a continuance from the trial judge based upon the pending decision in *Collins* because it dealt with the similar physical intrusion onto private property prior to a search warrant. (PCR Tr. 15). Instead, he said because Counsel did not think the judge would continue the case indefinitely, Counsel did not request a continuance. Instead, he advised Applicant to plead under *North Carolina v. Alford,*[4] which he did. (PCR Tr. 15). Applicant testified that he was not informed that *Alford* was "actually a guilty plea", and pled thinking he could still appeal the denial of the motion to suppress. (PCR Tr. 15).

Applicant said he enlisted in the Navy, which Counsel mentioned at the plea hearing, but proof was never submitted to the plea Court for sentence mitigation purposes. (PCR Tr. 16-17). He said this was particularly true within the context of *Williams v. Taylor,*[5] where the court found counsel ineffective for failing to investigate and present substantial mitigating evidence. (PCR Tr. 18). Applicant argued that there was a reasonable probability that sentencing would

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[3] 569 U.S. 1 (2013).
[4] 400 U.S. 25 (1970).
[5] 529 U.S. 362 (2000).



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have been different if this was presented. (PCR Tr. 18). Applicant also stated he was on heavy prescribed medications leading up to the incident and Counsel never argued these drugs affected his decision-making during the incident. (PCR Tr. 17). Applicant said Counsel failed to show the case belonged in a military tribunal as a mitigating factor or defense. (PCR Tr. 16-17).

Applicant stated he filed an appeal because he thought he did not waive this right. (PCR Tr. 18-19). Applicant stated he would not have pled if he knew he had to waive his right to appeal. (PCR Tr. 19). Additionally, Applicant stated he was never Mirandized throughout the entire arrest and booking process, and Counsel never brought this up in Court. (PCR Tr. 19). Applicant testified that Counsel never stated that the search and seizure violated his state constitutional rights to privacy. (PCR Tr. 19). Applicant said he believed he would have won on the motion to suppress if appealed and suppression of the evidence would have changed the case's outcome. (PCR Tr. 20-21).

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On cross-examination, Applicant stated that Counsel made a suppression argument originally, but refused to preserve it for appeal. (PCR Tr. 21-22). Applicant stated when he appealed from the suppression decision it was denied as untimely and conceded that untimely is not the same thing as unpreserved. (PCR Tr. 22). Applicant testified Counsel failed to investigate and prepare for trial, because they both thought they would win on the motion to suppress and the trial would not occur. (PCR Tr. 25).

Applicant said he thought he would win the motion, but admitted Counsel did well at the motion hearing and still lost. (PCR Tr. 25-26). Applicant also said that after the denial of the motion, there was a lot of evidence admissible against him at trial that connected him to the bank robbery. (PCR Tr. 26). Thus, after losing the suppression hearing, Applicant said he and Counsel thought he had a lesser chance of winning at trial and, consequently, Counsel advised him to

plead thereafter. (PCR Tr. 26-27).

Applicant said he wanted a continuance until after *Collins* was decided, so he and Counsel would have a better idea regarding likelihood of success at trial. (PCR Tr. 28). At the PCR hearing, Applicant deflected when asked if an indefinite continuance is appropriate. (PCR Tr. 29). Additionally, though Applicant enlisted in the military, he said he never went to basic training because of a medical emergency that delayed him. (PCR Tr. 29-30). He also said he never gave Counsel relevant paperwork, but was informed by his family that they gave him the paperwork and mentioned it to Counsel. (PCR Tr. 30).

Applicant stated he was confused regarding the concept of an *Alford* plea and had not heard of the term prior to the plea hearing. (PCR Tr. 31). He also stated he did not understand it was a guilty plea because Counsel told him it did not involve an admission of guilt. (PCR Tr. 31-32).

Applicant conceded that if all evidence was admissible, he would probably be found guilty at trial. (PCR Tr. 34). However, he alleged that if he appealed the suppression issue and utilized *Collins* advantageously, the appeal would be granted and he would win at trial. (PCR Tr. 34-35).

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***Trial Counsel's Testimony***

Counsel William J. Nowicki stated he has been practicing law for eighteen years, the bulk of his practice has always been criminal law, and has represented clients accused of armed robbery and bank robbery previously. (PCR Tr. 39).

Counsel said Applicant's parents retained him to represent Applicant. (PCR Tr. 40). Counsel stated that a week after he was retained, he visited Applicant. (PCR Tr. 40). During their first meeting, Counsel said he asked for Applicant's point of view and discussed armed robbery

and kidnapping in general terms, including the sentencing ranges. (PCR Tr. 40-41). Counsel stated he did not remember if Applicant told him he enlisted in the military during the initial meeting, but mentioned it at one point prior to the plea hearing. (PCR Tr. 41). Counsel said he was given the name of an individual involved in Applicant's enlistment process and attempted to contact him, but was unable to do so. (PCR Tr. 41). Counsel also stated that he was never presented with any pertinent documents regarding Applicant's enlistment. (PCR Tr. 41-42).

After reviewing the discovery, Counsel said his strategy was to attack the vehicle search because the vehicle was backed into the garage and, to get a search warrant, officers entered Applicant's property and retrieved information off of the vehicle, including the VIN number. (PCR Tr. 44). Counsel said he thought this was an illegal search and seizure and, thus, a violation of the Fourth Amendment. (PCR Tr. 45). Counsel testified that he discussed this with Applicant, and Applicant was satisfied with the strategy. (PCR Tr. 45).

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Before the motion hearing, Counsel said he and Applicant discussed *Collins*. (PCR Tr. 46). Counsel also stated that the decision was not released, but the facts were very similar and Counsel agreed it would be a good case to argue because it was before the U.S. Supreme Court. (PCR Tr. 46). Counsel said he advised the Court about the case and found other law that would supporting their argument, but the motion hearing judge ruled against them. (PCR Tr. 46). Counsel testified that he did not request another continuance, feeling like he had to proceed before the decision was rendered because Applicant did not request Counsel continue the case, the case was set for trial, one continuance was already granted, and it remained unknown when the Supreme Court would release the decision. (PCR Tr. 47).

Counsel stated he was prepared for the motion hearing and if he had more time to prepare, would not have changed his approach. (PCR Tr. 47-48). Counsel also stated he thought

the motion to suppress was denied because *Collins* was not decided and, though other case law existed, indicating the search was a Fourth Amendment violation, the cases were not on point. (PCR Tr. 45-46). Counsel testified that the judge found that if an invasion occurred, it was at most minimal, an argument Counsel said he struggled to understand, claiming a search and seizure violation was all or nothing and there is no such thing as a "minimal" violation. (PCR Tr. 45-46).

After losing the motion, Counsel said he advised Applicant there was a lot of evidence against him and pleading would probably give him a shorter sentence than if he proceeded to trial and lost. (PCR Tr. 49). Counsel stated he discussed the difference between an *Alford* plea, a no contest, and a regular plea. (PCR Tr. 49). Counsel also stated told Applicant an *Alford* plea would be treated the same as a guilty plea, but was similar to a no contest plea where Applicant states he was offered a good deal and he will take it. (PCR Tr. 50). Counsel testified thought Applicant understood what an *Alford* plea was and he never indicated to Counsel he did not. (PCR Tr. 51). Counsel testified he told Applicant the Solicitor would request the armed robbery and bank robbery sentences run concurrent if he pled. (PCR Tr. 51). Counsel said Applicant was hesitant at first, but ultimately decided to plead. (PCR Tr. 49).

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Counsel said he told Applicant he had a right to appeal and could move to reconsider. (PCR Tr. 52). Counsel testified he then submitted a motion to reconsider because of the amount of time Applicant was facing and the search issue discussed in the suppression motion. (PCR Tr. 52). Counsel said he and Applicant made the decision to withdraw based upon the Solicitor saying he was going to ask for more time and bring the victims back. (PCR Tr. 52).

Counsel testified he told Applicant he had ten days to appeal. (PCR Tr. 53). Applicant said he did not contact Counsel during those ten days. (PCR Tr. 53-54). Counsel stated he

understood that the appeal was dismissed for untimeliness. (PCR Tr. 54). Counsel testified he would have appealed if Applicant requested one. (PCR Tr. 54).

On cross-examination, Counsel stated that after the sentence was given the Solicitor walked very quickly out of the courtroom and some of the victims were upset. (PCR Tr. 54). Counsel said he does not remember telling Applicant he would waive his right to appeal by entering a plea, but told him he was waiving all of his rights when doing so. (PCR Tr. 55).

**Findings of Fact and Conclusions of Law**

This Court has reviewed the pleadings, records submitted by the parties, and applicable law. Before this Court are the Spartanburg County Clerk of Court Records, Applicant's South Carolina Department of Corrections Records, the plea transcript, and the PCR action records. Pursuant to South Carolina Code Annotated, Sections 17-27-70 and -80, this Court dismisses the application based upon the following findings:

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***Ineffective Assistance of Counsel***

Applicant's allegations of ineffective assistance of counsel are without merit. In a PCR action, the applicant bears the burden of proving allegations contained in the application. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant asserts ineffective assistance of counsel as a ground for relief, the applicant must show "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. Ineffective assistance of counsel is governed by the Sixth Amendment, which the Supreme Court expanded upon through developing the two-pronged test outlined in *Strickland*.

Pursuant to the first prong of the *Strickland* analysis, the applicant must prove defense counsel's performance was deficient. *Id.* at 686; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d

624, 625 (1989). To show deficiency, the applicant must prove by the preponderance of the evidence that counsel's actions fell outside of the zone of "reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688. *See also* Rule 71.1(e), SCRCP ("The applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence."). Reasonableness is determined by the "variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how to best represent a criminal defendant," and the scope of the inquiry is limited to facts available to counsel at the time of the representation. *Id.* at 689. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003) (citing *Strickland*, 466 U.S. at 690). Judicial scrutiny of counsel's performance remains highly deferential towards defense counsel with a strong presumption that counsel acted competently, because competent representation may be executed in virtually "countless" ways. *Strickland*, 466 U.S. at 688-89.

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Second, counsel's deficient performance must have prejudiced the applicant so that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 117-18. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. The court makes this determination based upon the totality of the evidence. *Id.* at 695. Realistically, this matters "only in the rarest case" because "[t]he likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 111-12 (2011) (quoting *Strickland*, 466 U.S. at 697).

Regarding guilty pleas, specifically, the applicant must show there is a reasonable probability that, but for ineffective assistance of counsel, he or she would not have pled guilty

but, instead, would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). The applicant's right to contest the validity of a plea is usually, but not invariably, foreclosed because of the solemnity and truthfulness inherent in the plea proceeding. *See Blackledge v. Allison*, 431 U.S. 63, 73-74 (1977) ("Solemn declarations in open court carry a strong presumption of verity. The subsequent presentation of conclusory allegations unsupported by specifics is subject to summary dismissal, as are contentions that in the face of the record are wholly incredible."). Absent valid reasons why the applicant is entitled to depart from admissions made at the plea hearing, sworn statements made during the original proceeding remain conclusive. *Dalton v. State*, 376 S.C. 130, 137-38, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing *Crawford v. United States*, 519 F.2d 347, 350 (4th Cir. 1975)).

For a plea to be valid, the applicant must have been aware of the nature and crucial elements of the offense, the maximum and minimum penalties, and the rights he is waiving by accepting the plea. *Boykin v. Alabama*, 395 U.S. 238 (1969); *Roddy v. State*, 339 S.C. 29 (2000). A plea is not knowing or voluntary if a defendant "lacks knowledge of material evidence in the prosecution's possession." *Gibson v. State*, 334 S.C. 515, 523, 514 S.E.2d 320, 324 (1999).

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A defendant's knowing and voluntary waiver of statutory or constitutional rights must be established by a complete record, and "may be accomplished by colloquy between the court and defendant, between the court and defendant's counsel, or both." *Roddy v. State*, 339 S.C. at 34, 528 S.E.2d at 421 (citing *State v. Ray*, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993)). "'[T]he voluntariness of a guilty plea is not determined by an examination of the specific inquiry made by the sentencing judge alone, but is determined from both the record made at the time of the entry of the guilty plea and the record of the post-conviction hearing.'" *Dalton*, 376 S.C. at 138, 654 S.E.2d at 874 (quoting *Harres v. Leeke*, 282 S.C. 131, 133, 318 S.E.2d 360, 361 (1984)).

Further, "guilty pleas, freely and voluntarily entered, act as a waiver of all non-jurisdictional defects and defenses, including claims of a violation of a constitutional right prior to the plea." *Whetsell v. State*, 276 S.C. 295, 297, 277 S.E.2d 891, 892 (1981).

***Failure to Mitigate the Sentence***

Applicant stated Counsel was deficient for failure to mitigate the sentence. In similar cases, counsel was deficient for failing to mitigate the sentence when they put forth little to no effort in investigating potential mitigating factors and when they intentionally did not present mitigating factors after providing an insufficient reason for the deficiency. *See Council v. State*, 380 S.C. 159, 172, 670 S.E.2d 356, 363 (2008) (finding it unreasonable for counsel not to further investigate the defendant's background and present even minimal mitigating evidence obtained); *Wiggins v. Smith*, 539 U.S. 510, 521 (2003) (finding it unreasonable when Counsel failed to investigate mitigating evidence beyond a couple retained records, including the presentence investigation report and social service records); *Williams v. Taylor*, 529 U.S. 362, 398 (2000) (finding that Counsel was unreasonable for failing to evaluate the totality of available mitigation evidence). An applicant is prejudiced by this deficiency if there is a reasonable probability that a different sentence would have been imposed but for counsel's failure to investigate and present mitigating evidence. *Council v. State*, 380 S.C. 159, 171, 670 S.E.2d 356, 362 (2008).

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At the PCR hearing, Applicant testified that at the sentencing hearing Counsel mentioned Applicant's military enlistment, but did not present proof of enlistment nor argue that the case was improperly brought in that court's jurisdiction, as opposed to a military tribunal, to mitigate the sentence. (PCR Tr. 16-17). Applicant argued that there was a reasonable probability that sentencing would have been different if proof was submitted or the jurisdiction issue argued. (PCR Tr. 18). Applicant also stated he was on heavy prescribed medications leading up to the

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incident and Counsel never used this as a mitigating factor. (PCR Tr. 17).

However, at the plea hearing, Applicant told the judge that he enlisted, but never served. (Plea Tr. 87). Counsel was given the name of an individual who was involved in the Applicant's enlistment process, but could not connect with him after trying to establish contact and was not presented with any relevant documents regarding Applicant's enlistment. (PCR Tr. 41-42). Counsel pointed out Applicant was on pain pills post-surgery when the robbery took place; again, attempting to mitigate the sentence. (Plea Tr. 113). Further, because the only recommendation given was that the armed robbery and bank robbery sentences run concurrently, it was within the judge's discretion to determine the sentence after learning of his military enlistment and prescribed drug use. (Plea Tr. 81, 87, 113).

Thus, this Court finds that Counsel was not ineffective for failing to present mitigating evidence. Counsel's argument for mitigation revolved around the two issues Applicant contends Counsel did not present. Specifically, Counsel brought up Applicant's enlistment and drug use at the sentencing hearing to mitigate the sentence. Additionally, Applicant has made no showing, beyond mere speculation, that his sentence would have been lessened if Counsel presented a stronger argument or investigated further into mitigating factors. Thus, this Court finds Applicant has not met his burden of proof and, as such, relief is denied.

***Valid Guilty Plea***

*Failure to Warn of Appellate Consequences of Accepting the Plea*

Applicant alleged that Counsel was ineffective and the plea invalid for failure to advise him he was waiving his right to appeal from the suppression decision. Applicant stated he filed an appeal because he thought he did not waive this right. (PCR Tr. 18-19). Applicant stated if was made aware of this waiver, he would not have pled. (PCR Tr. 19). Applicant believed he

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would have won on the suppression issue if it was appealed and the suppression of the evidence would have changed the outcome of the case. (PCR Tr. 20-21).

However, on cross-examination, Applicant stated that when he appealed from the suppression decision, it was denied as untimely and conceded that untimely is not the same thing as unpreserved. (PCR Tr. 22). Also, Counsel testified that he told Applicant he had a right to appeal and could move to reconsider. (PCR Tr. 52). Counsel submitted a motion to reconsider because of the amount of time Applicant was facing and the search issue discussed in the suppression motion. (PCR Tr. 52). Counsel and Applicant made the decision to withdraw based upon the Solicitor saying he would ask for more time and bring the victims back. (PCR Tr. 52).

Counsel told Applicant he had ten days to appeal. (PCR Tr. 53). Applicant did not contact Counsel during those ten days. (PCR Tr. 53-54). Counsel understood that the appeal was dismissed for untimeliness. (PCR Tr. 54). Counsel testified he would have filed a notice of appeal if Applicant requested one. (PCR Tr. 54). Counsel does not remember telling Applicant he would waive his right to appeal by entering a plea, but told him he was waiving all of his rights when doing so. (PCR Tr. 55).

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Thus, this Court finds that Applicant was informed of his right to appeal, Counsel would have appealed if Applicant requested it. Counsel filed a motion to reconsider but was withdrawn upon request by Applicant. Additionally, Applicant's appeal request was not denied because Counsel failed to preserve the issue, but because Applicant did not file the appeal before this right expired, through no fault of Counsel. Thus, this Court declines to find that the plea was invalid because of failure to warn of appellate consequences.

*Confusion Concerning Alford Plea and Validity of Plea*

Applicant also alleges that he was confused about the concept of an *Alford* plea. At the

hearing, Applicant stated he was confused regarding the concept of an *Alford* plea, including that he did not know it was a guilty plea and had not heard of the term prior to the plea hearing. (PCR Tr. 31). Applicant testified that Counsel told him an *Alford* plea did not involve an admission of guilt. (PCR Tr. 31-32). Applicant stated if all the evidence was admitted at trial, he would probably be found guilty. (PCR Tr. 34).

However, at the hearing, Applicant stated no one threatened him into taking the plea and that the decision to plead was free and voluntary. (Plea Tr. 88). He was told about the sentencing ranges pertinent to the charges pled to and all the rights he was giving up when taking the plea and still proceeded in entering the plea. (Plea Tr. 89-102).

According to Counsel, he advised Applicant there was a lot of evidence against him and pleading would probably give him a shorter sentence than being found guilty at trial. (PCR Tr. 49). After this discussion, Applicant decided to plead. (PCR Tr. 49). Counsel told Applicant the difference between an *Alford* plea and no contest and regular plea and told him that an *Alford* plea would be treated the same as a guilty plea, but was similar to a no contest plea where Applicant states he is offered a good deal, on record, and that he will take it. (PCR Tr. 50). Counsel thought Applicant understood what an *Alford* plea was when deciding to take it and Applicant never indicated to Counsel he did not. (PCR Tr. 51). Counsel told Applicant the Solicitor would request the sentences run concurrent if he pled. (PCR Tr. 51).

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Accordingly, this Court finds that Applicant voluntarily, knowingly, and intelligently entered the *Alford* plea. This Court has already disposed of the allegation that Counsel failed to warn of appellate consequences regarding the plea. The plea transcript establishes that Applicant knew what rights he was giving up, the sentencing range of the crimes pled to, and the charges against him. This Court finds Applicant has failed to present a sufficient reason why this Court

should disregard his sworn testimony and waiver given at the plea hearing. Thus, this Court finds that Applicant has not met his burden of proof and, thus, his request for relief must be denied.

***Failure to Review Discovery, Request a Continuance, and Prepare a Defense***

Applicant claims Counsel was ineffective for failing to review discovery with him, failing to request a continuance, and failing to investigate, prepare, and assert defenses for trial. These allegations are addressed, in turn, below.

*Failure to Review Discovery*

Applicant alleged Counsel was ineffective because he was never afforded the opportunity to review the discovery, other than the search warrant and officer's incident report. (PCR Tr. 8). Applicant only remembers Counsel bringing discovery to one meeting where they only discussed the search warrant and incident report. (PCR Tr. 8). Applicant alleged he never received a full copy of the discovery. (PCR Tr. 8).

However, Counsel testified he reviewed all of the evidence and discovery and discussed it with Applicant, along with discussing the Fourth Amendment issue. (PCR Tr. 45). After losing the suppression motion, Counsel discussed with Applicant all of the evidence that the State would admit at trial to incriminate him and, because of this evidence, Applicant would most likely be found guilty. (PCR Tr. 49).

This Court finds that Counsel did not fail to review discovery with Applicant, given the testimonies outlined above. Even so, Applicant waived this right when he entered the plea and cannot reassert this argument now.

Regarding prejudice, applicants must go beyond mere speculation that that the evidence not obtained or reviewed prejudiced him but, rather, must present the evidence he claims was not properly reviewed, obtained or presented. *Glover v. State,* 318 S.C. 496, 498-99, 458 S.E.2d 538,

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540 (1995). Further, when the allegations is failure to investigate or discover evidence, whether an applicant is prejudiced depends on the likelihood of the evidence changing counsel's recommendation as to the plea. *Stalk v. State*, 383 S.C. 559, 562, 681 S.E.2d 592, 594 (2009). Applicant did not specifically state what evidence was not shared with him, nor state how that evidence would have affected his decision to plead. Thus, prejudice is not found. Accordingly, this Court rejects Applicant's argument and relief is denied on this allegation.

*Failure to Request a Continuance*

Applicant requested a continuance based on *Collins* pending decision because it dealt with the similar physical intrusion onto private property prior to a search warrant. (PCR Tr. 15). Applicant wanted an indefinite continuance until after *Collins* was decided, so he and Counsel would have a better idea regarding likelihood of success at trial. (PCR Tr. 28). Counsel did not request an indefinite continuance because the case was up for trial, one continuance was already granted, and it remained unknown when the Court would release the *Collins* decision. (PCR Tr. 47).

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This Court finds that the likelihood of an indefinite continuance being granted was unlikely. Even if a continuance could have been granted, this option was waived when Applicant entered his plea. It appears that Applicant knew he was giving up the option of a continuance. Counsel and Applicant both seemed aware of the *Collins* case before the U.S. Supreme Court and decided not the request another continuance nor to go to trial and, instead, decided to enter a plea which they did. (PCR Tr. 12-15, 46-47). Thus, Applicant knew by entering a plea on that date he was waiving his right to try to hold off proceeding with the case until after *Collins* was decided and, as such, cannot reassert this claim now. This Court rejects Applicant's argument and relief is denied on this allegation.

*Failure to Investigate and Prepare a Defense*

Applicant testified Counsel failed to investigate and prepare a defense for trial. This Court finds that Applicant and Counsel thought they would succeed on the suppression issue and the trial would not occur. (PCR Tr. 25). Though he was hesitant at first, Applicant stated at the plea hearing he understood and was willing to give up his right to a jury trial. (Plea Tr. 89-90). He was also told he was waiving his right to cross-examine witnesses and present a defense. (Plea Tr. 90). He stated he understood this and wished to give up this right. (Plea Tr. 90). He entered the plea, freely and voluntarily. (Plea Tr. 89-90).

Additionally, even if Counsel failed to investigate and present a defense, the right to assert a defense was waived knowingly and voluntarily at the plea hearing and Applicant cannot reassert this claim now. Further, to demonstrate prejudice at the PCR hearing Applicant is required to present the evidence or witnesses he alleges Counsel did not properly investigate. *Glover v. State*, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995). Applicant failed to present any evidence or witnesses at the PCR hearing and, thus, this Court finds that Applicant has failed to meet his burden of proof. Therefore, because Applicant has failed to meet his burden of proving either deficiency or prejudice, relief is denied on this ground.

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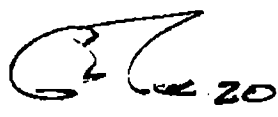
**Conclusion**

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

This Court notifies Applicant that he must file and serve a notice of appeal within thirty days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. *See* Rule 203, SCACR. Pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d



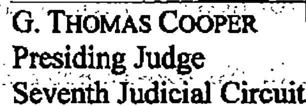
395 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP provides that if the Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on the Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

**IT IS THEREFORE ORDERED:**

1. That the PCR application must be denied and dismissed with prejudice; and

2. The Applicant must be remanded to the custody of the South Carolina Department of Corrections.

**AND IT IS SO ORDERED this** 4th **day of** May**, 2020.**



G. THOMAS COOPER
Presiding Judge
Seventh Judicial Circuit

Clinton, South Carolina

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# State of South Carolina
# The Circuit Court of the Fifth Judicial Circuit

**G. Thomas Cooper, Jr.**
**Judge, Active-Retired**

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Spartanburg, SC 29304-3483

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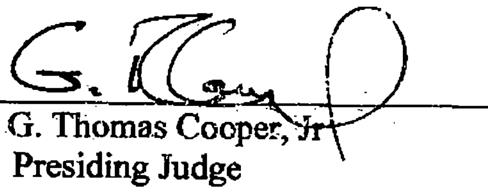
Re: Genuine Truth Banner- PCR
2018-CP-42-01206

Dear Ms. Cox:

Enclosed for filing is my Order of Dismissal. Please return a time stamped copy to me. Thank you.



May 4, 2020

G. Thomas Cooper, Jr
Presiding Judge

Cc: Chelsey Marto, Esq.
Susannah Ross, Esq.