**FORM 1**

**NOTICE OF APPEAL IN A CIVIL CASE**

APR 27 P 3:45

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS
[IN THE SUPREME COURT]

CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Case No. 2019-CP-39-1276

State of South Carolina, Respondent,

v.

Gary Z, Thomas, Appellant.

NOTICE OF APPEAL

Gary Z. Thomas appeals the order of the Honorable Edward W. Miller dated January 22, 2020. Since receiving the proposed order on March 3, 2020 Mr. Thomas has filed a Motion pursuant to SCRCP Rule 59, but doesn't expect any relief from that Motion, and therefore wishes to commence with the Appeal process.

April 17, 2020

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Trenton Correctional
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Trenton, SC 29847

Other Counsel of Record:
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STATE OF SOUTH CAROLINA )
) IN THE COURT OF COMMON PLEAS
COUNTY OF PICKENS )
)
) Case No: 2018-CP-39-1276
Gary Z. Thomas, )
) AMENDED MOTION TO AMEND/ALTER
Applicant, ) JUDGMENT
v. )
)
State of South Carolina, )
)
Respondent.



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COMES NOW the Applicant, Gary Z. Thomas, pro se, and submits this AMENDED MOTION TO AMEND/ALTER JUDGMENT pursuant to Rule 59, SCRCP, and asserts that all issues herein must be specifically addressed and ruled upon by the PCR Court to enable Applicant fair review of the legal conclusions reached by the PCR Court.

Applicant submits that the following issues have not been specifically and properly addressed in the ORDER OF DISMISSAL (hereinafter "Order") and further submits that addressing said issues will illustrate how the legal conclusions reached by the Court are clearly erroneous:

1. Whether Applicant's 1st Degree domestic violence charge was sufficiently grounded in probable cause, and therefore a *lawfully* prosecuted offense;
   A. *Not* susceptible to dismissal for lack of probable cause; and
   B. *Legitimately* triable as a 10-year felony domestic violence if Applicant declined plea offers; and

C. *Legitimately* used to induce Applicant's plea to the separately charged 2nd degree domestic violence?

2. Whether 17-23-90[1] was an available remedy for Counsel to:

   A. Secure Applicant's desired "speedy trial" on the 1st degree domestic violence charge; ***or***

   B. Secure Applicant's desired release without bail if the State did not try Applicant by the second term of Court following Applicant's felony arrest and imprisonment?

3. Whether the South Carolina Supreme Court's definition "term of imprisonment" (equating probation with incarceration) was intended to be applicable *only* in the case of license suspensions resulting from DUI convictions[2]?

4. Whether Counsel's advice concerning sentence possibilities if Applicant declined plea offers and asserted his right to go to trial was erroneous advice?

5. Whether Counsel's decision to not investigate the contents of the USB drive "touted" by Applicant to contain exculpatory evidence was grounded in a specific determination that revealing the contents of the drive was not necessary to Applicant's defense if he decided to go to trial?

6. Whether Counsel's *discomfort* qualifies as a constitutionally sufficient reason to forsake his "duty" to investigate *all reasonably available* and lawfully available evidence offered by Applicant and immediately accessible?

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[1] South Carolina Code of Laws, Section 17-23-90. Applicant refers to statutory provisions herein in their abbreviated versions (e.g. "17-23-90"). All statutes cited herein are from the South Carolina Code of Laws. The *sole discussion* in the 1-headnote, 2-paragraph State v. Campbell, 277 SC 408 (1982) was the applicability of and interpretation of 17-23-90, which Counsel admitted printing at Applicant's request at least two weeks prior to the first term of court following Applicant's *felony arrest*.

[2] See State v. Ellis, 397 SC 576 (2012); See also State v. Proctor, 345 SC 299 (2001).

THE UNLAWFUL 1ST DEGREE DOMESTIC VIOLENCE PROSECUTION

Both the warrant issued in September 2017 and the testimony of Counsel at the 2019 PCR hearing clearly show that Applicant's 1st degree domestic violence charge was based on allegations that the purported victim received "fractures" as a result of being struck once in the face with a closed fist.[3] According to the ORDER (at page 9) Counsel described the underlying offense as "*an altercation during with the victim was struck in the face, and the victim received facial fractures as a result.*"

> The statute describing 2nd degree domestic violence states in pertinent part:
>
> A person commits the offense of 2nd degree domestic violence if the person violates subsection (A) and *moderate bodily injury* to the person's own household member results.

16-25-20(C)(1) (emphasis added). "Moderate bodily injury" is defined as follows:

> Moderate bodily injury means physical injury that involves prolonged loss of consciousness, or that causes temporary or moderate disfigurement or temporary loss of the function of a bodily member or organ, or *injury that results in a fracture* or dislocation. . . .

16-3-600(a)(2) (emphasis added).

The offense of *1st degree* domestic violence is committed by the infliction of "great bodily injury" or "is accomplished by means likely to result in great bodily injury." 16-25-20(B).

> Great bodily injury means bodily injury which causes a substantial risk of death or which causes serious permanent disfigurement or protracted loss or impairment of a bodily member or organ.

16-3-600(A)(1). First degree domestic violence is a *felony* punishable by ten years imprisonment, whereas 2nd degree domestic violence is punishable by three years imprisonment.

[3] There were no aggravating factors alleged to have been applicable to the offense charged. The first degree domestic violence was based entirely on the degree of injury alleged.

It is clear from both the warrant charging Applicant with 1st degree domestic violence and Counsel's summary of the injuries alleged in the case that the Applicant should never have been charged with 1st degree domestic violence. It is clear that the warrant facially failed to establish probable cause for a charge of *1st degree* domestic violence. *See Pickens County A/W 2017A3920700174* (Attached).

While the PCR Court's ORDER finds that Counsel provided competent representation with respect to pre-trial issues and plea negotiations, such findings are based solely on the excuses Counsel offered for his negligent representation; not on the actual failures Counsel himself admitted. One of the most obvious failures that influenced Applicant's decision to plea was Counsel's refusal to utilize available legal procedure to seek the dismissal/reduction of his illegally prosecuted offense before it was unlawfully used (with Counsel's assistance and cooperation) to induce Applicant's plea to the separately charged offense of 2nd degree domestic violence.

The ORDER (at page 8) clearly notes that Counsel specifically and clearly *admitted* that he "*asked the Solicitor to dismiss the 1st degree charge* ***as a part of Applicant's agreement to plead guilty*** *to the separate offense of 2nd degree domestic violence,*" rather than demand dismissal for lack of probable cause, *without* requiring Applicant's guilty plea to anything.

Although Counsel indicated he didn't know any other method by which he could get the charge reduced or dismissed, Applicant submits that 17-23-90 and preliminary hearing procedures and motion procedures were available. Counsel simply failed to use them to Applicant's advantage as instructed. Instead he bargained the illegal charge away with Applicant's guilty plea.

Consequently, the Applicant's guilty plea to the current 2nd degree domestic violence was

(as shown) the product of coercion and misrepresentation, both of which render the plea involuntary. The State (through unchecked misrepresentation) put Applicant in peril of a possible aggregate sentence of thirteen years in order to induce a plea.

Additionally, Counsel's advice regarding sentence possibilities if Applicant ***did not*** plea was *erroneous and misleading* based on Counsel's erroneous belief that consecutive sentences for both 1st and 2nd degree domestic violence (13 years) could result. Because the 1st degree charge could not realistically be tried as a 1st degree offense, the realistic actual possible sentence was an aggregate six years.

Applicant's eventual decision to plea was clearly based, at least in part, on erroneous advice from plea counsel, and in part on the State's misrepresentation of prosecution possibilities.

Guilty pleas entered "based on trial Counsel's erroneous sentencing advice . . . must be reversed." Alexander v. State, 303 SC 539 (1991); Ray v. State, 303 SC 374 (1991); Jackson v. State, 342 SC 95 (2000). Likewise, when a plea is at least partially motivated by "a threat by a prosecutor to do what the law will not permit . . . [the misrepresentation] renders the plea involuntary. . . .in effect, the defendant is deceived into making the plea, and the deception prevents the act from being a true act of volition." Lassiter v. Turner, 423 F.2d, 899-900 (1970).

THE MANDATORY PROVISIONS OF 17-23-90 (Summarized in Campbell, Supra)

The provisions of 17-23-90 are mandatory and would have required the felony-charged Applicant's release without bail "if he was not indicted and tried by the second term" after his arrest; ***provided*** that Counsel would have demanded, on Applicant's behalf, the Applicant be brought to trial on the felony domestic violence count that was keeping him jailed.

As stated in Campbell, which Counsel admitted to printing *at Applicant's request, and weeks before the first term of court*;

> Section 17-23-90 provides for discharge from imprisonments when a person is committed for a felony, *demands to be brought to trial,* and is not indicted and tried by the second term following his commitment. . . .[T]he statutory reference to discharge. . . .indicates the prisoner should be released without bail. . . .

Id., 277 SC at 409. (Emphasis added.)

Counsel acknowledged his awareness that Applicant desired both speedy trial and release from jail, testified that he wasn't aware of any procedure by which he could accomplish either for Applicant, and didn't think any statutes or cases cited for the circuit court would have helped any more than Counsel's falsely claimed repeated "unsuccessful" attempts to get Applicant a PR bond.[4]

Applicant submits that Counsel could have and ***should have*** complied with Applicant's instructions to use 17-23-90 to force either (a) a speedy trial for the 1st degree domestic violence charge, or (b) Applicant's release from jail without the requirement of bail. One or the other would have been achieved if Counsel had simply demanded trial.

Counsel's feigned ignorance of the provisions of 17-23-90 (which Counsel admitted was supplied to Counsel by the Applicant) is no excuse for Counsel's failing to secure trial or release by that ***November*** term of court which, incidentally, preceded the December hearings in which Counsel *remained* ineffective for Applicant.

As of the date of Applicant's plea, Counsel had utterly failed Applicant in several ways,[5]

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[4] Public index reveals that "credible" Counsel made no motions for bail on Applicant's behalf, contrary to his claims before the PCR Court (Attached). Applicant also asserts that Counsel's credibility should be re-evaluated in light of the false testimony given.

[5] The failure to confront the deficient arrest warrant; the refusal to review evidence offered by Applicant; the refusal to use 17-23-90 to Applicant's advantage; the failure to research and confront the legality of the jail's lack of legal research materials necessary for self-representation. See Harden v. Bodiford, 442 Fed. Appx. 893 (4th Cir. 2011); Bounds v. Smith.

all of which wholly undermined Applicant's confidence and trust in Counsel's ability to competently try his case. Counsel's failures were complete ***before*** Applicant elected to plead out; not the other way around.

The mere fact that Applicant was still in jail beyond that second (November) term of court was alone sufficient motivation for Applicant to plead guilty for release from further imminent harm resulting from deficient Counsel. The alternative was to remain in jail for probably at least another year awaiting trial with incompetent unprepared Counsel.

THE APPLICABILITY OF TERM OF IMPRISONMENT TO APPLICANT'S UNLAWFULLY EXCESSIVE SENTENCE

The ORDER OF DISMISSAL cites 24-21-410 and 24-21-440 for the proposition that the imposition of five years' probation for Applicant's three-year offense was lawful. Applicant submits that the Court's reliance on either or both cited statutes is clearly erroneous for several reasons. First, there are rules of statutory interpretation that require courts to interpret statutes in such a fashion that the interpretation serves to effectuate legislative intent. Wigfall v. Tideland Utilities, Inc., 354 SC 100, 110 (2003). Further, in its interpretation of statutes a court is required to avoid construing statutes in such a fashion that the construction produces "absurd results that could not have been intended by the legislature." State v. Kinnard, 427 SC 367, 375 (2019).

As a first point, it is clear from a glance at 24-21-440 that the provisions of that statute apply only to terms of imprisonment which *allow* the suspension of five years. The language "shall not exceed" merely sets an outside limit for periods of suspension; there is nothing in the language of the statute that can reasonably be interpreted as *extending* suspension or probation periods beyond statutory limits established for any particular offense. Courts are not empowered

to create laws by reading into statutes terms not expressly put there by legislators. Article 1, Section 8, SC Constitution.

Furthermore, considering that legislative intent is an important factor in applying statutes, it is clear that the PCR Court's interpretation and application of 24-21-440 in connection with 24-21-410 produces an absurd result: five-year probationary terms of imprisonment for offenses as minor as littering,[6] petit larceny, trespass, or 3rd degree domestic violence. For, the provisions of 24-21-410 clearly apply in equal form to "any offense" (meaning all offenses) not punishable by death or life imprisonment. Littering, trespass, and every other 30-day offense falls squarely with the meaning of "any offense" for purposes of 24-21-410.

Of a truth, if 24-21-410 and 24-21-440 may be interpreted to operate to permit five years probation for Applicant's 3-year offense, the same must apply to littering, trespass, etc. Such a strained interpretation of the aforementioned statutory provisions obviously contradicts legislative intent. It would be absurd to assume that legislators anticipated or intended probation terms of five years for trespass, etc.

Additionally, and most importantly, the PCR Court's erroneous application of the above-referenced statutes results from its adamant denial of the fact that, over two decades ago, our Supreme Court declared that "[p]robation . . . is *clearly part of a criminal defendant's 'term of imprisonment'*. . . " State v. Ellis, 397 SC 576, 579 (2012) (quoting Thompson v. SC Department of Public Safety, 335 SC 52, 55 (1999)).

As noted in State v. Ellis, the Court previously "*explained the relationship* between incarceration, probation, and parole."

In sentencing a trial judge may impose a term of years but provide for a suspension of a

[6] This Court should note that in 16-11-700(C) (proscribing punishment for littering), the General Assembly uses the terms "imprisoned" and "term of imprisonment" interchangeably, meaning the two terms are one and the same to our lawmakers.

> part of such term of imprisonment, and the placing of a defendant on probation after serving a designated portion of the term of imprisonment . . . ***Probation***, a suspension of the period of incarceration, ***is clearly part of a criminal defendant's term of imprisonment***, as is actual incarceration, parole, and the suspended portion of the sentence, or supervised furlough.

State v. Ellis, 397 SC at 580-81 (quoting Thompson, 335 SC at 55-56)[7].

Furthermore, the Court of Appeals, in State v. Proctor, 345 SC 299 (2001), correctly noted that the Thompson Court explained:

> "The phrase "term of imprisonment" has a *well established meaning* in South Carolina criminal law." According to Thompson, the phrase "term of imprisonment" includes actual incarceration, parole, the suspended portion of the sentence, ***probation***, and supervised furlough . . . The court *rejected a narrow view of the phrase that would limit it to the period of actual incarceration."*

State v. Proctor, 345 SC at 303. Indeed, even the Court of Appeals noted the 1999 reference to the "well-established meaning" of the phrase term of imprisonment in South Carolina and the Supreme Court's rejection of a "narrow view" that imprisonment means only actual incarceration. Again turning to the rules of statutory interpretation, Applicant submits that the law clearly states that the legislature is presumed to be aware of the Supreme Court's interpretation of its statutes. Wigfall, supra, 345 SC at 111. As such, the General Assembly is ***presumed*** to be aware of our Supreme Court's interpretation of "term of imprisonment" equating probation with actual incarceration, and the General Assembly is also presumed to be in agreement with that interpretation if it fails over a 20-year period to define imprisonment to mean only physical incarceration. Id.

Based on a *correct* reading of applicable laws Applicant submits that "imprisoned" (see

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[7] Insofar as the Order of Dismissal suggests that Applicant's reliance on the Thompson definition of "term of imprisonment" is ***misplaced,*** it is clearly in error. As the Ellis decision clearly illustrates, the Court's earlier interpretation of "term of imprisonment" was not intended to be strictly limited to cases involving license suspensions resulting from DUI convictions. Indeed, the Thompson Court applied the term to "criminal sentence". Ellis applied the term in a burglary case. The Court of Appeals applied the term in a grand larceny case. State v. Proctor, 345 SC 299, 303 (2001). The phrase "term of imprisonment" applies to Applicant's "criminal sentence" as well, regardless of how little the State (or the Circuit Court) may care for that idea.

N.6) within the meaning of 16-25-20(C) is accomplished by the placing of a defendant on probation *in lieu of* the suspended incarceration term, not beyond the duration of. Based on the broad definition of "term of imprisonment" given by our Supreme Court, and accepted by our legislators, it is clearly understood that the language "imprisoned for not more than three years" means that Applicant could only have been placed in a probationary term of imprisonment for not more than three years pursuant to the limit set by 16-25-20(C).

Because the probationary sentence incompetently and admittedly *negotiated* by plea Counsel was beyond statutory limits, it was unlawful, the product of *deficient* performance by Counsel and the State's argument to the contrary has been ***clearly a frivolous argument.***[8]

THE RIGHT OF SELF-REPRESENTATION IMPAIRED (DENIED) BY THE JAIL'S *BOUNDS v. SMITH* VIOLATION

It is well recognized that pre-trial detainees have a constitutional right to reasonable legal resources in jail. See, e.g. Harden v. Bodiford, 442 Fed. Appx. 893 (4th Cir. 2011)(citing Bounds v. Smith).

Insofar as the PCR Court determined that the jail's lack of a law library or other minimal material necessary for reasonable legal research was not relevant to the issue of whether Applicant's right of self-representation was being unlawfully obstructed, the Court was clearly in error. The lack of a law library (a violation of Applicant's rights in itself) was *central* to the issue

[8] If the ***pro se*** Applicant can so easily defeat the State's argument that his sentence was not unlawful from its imposition, he believes he is entitled to the benefit of the Courts acknowledgement that the State's attorney ***should have known*** that the sentence has been unlawful from its imposition. Applicant also submits that Taylor Smith has been fully aware that the "term of imprisonment" was not defined ***strictly*** for the purpose of license suspensions. Taylor Smith would not imply that the Ellis court's reliance on Thompson was "misplaced" because Ellis was a burglary case. His position that Applicant's sentence was lawful continues to be frivolous and sanctionable.

of whether Applicant was effectively denied the right to proceed pro se. The denial of a ***right*** which *substantially interferes with the free exercise of the right of self-representation* was certainly an issue of relevance and should have been addressed and remedied by Counsel in the hearing in which it became an issue.

The PCR Court's acceptance of Counsel's stated belief that he was not under an obligation to bring it to the Court's attention that Applicant's right to represent himself was being denied due to his being deprived of the ***means*** to represent himself was error. Counsel himself agreed he continued to be *appointed* through the hearing in which he left Applicant to defend his position alone.[9]

The PCR Court failed to consider that which was clearly acknowledged by Judge Verdin at the time: *Applicant's decision not to relieve Counsel and proceed pro se was "**due to [his] circumstances**" at the time* (Motion Tran. 3) which involved unlawful circumstances as a matter of law. Harden, supra; Bounds, supra.

Counsel's silence in the Motion hearing was tantamount to abandonment of the Applicant and his right to move forward as a pro se litigant without unlawful hindrances. Consequently, this final abandonment pushed Applicant to plead out to avoid more betrayals from Counsel, *since self-representation was not going to be a feasible option.*

COUNSEL'S UNREASONABLY NEGLIGENT INVESTIGATION

Correctly noted in the ORDER OF DISMISSAL (at page 17) a criminal defense attorney "*has a duty to undertake reasonably investigations **or to make a decision that renders a***

[9] Counsel spoke not one word in Applicant's defense at the December Motion hearing.

***particular investigation unnecessary*** *. . . and has the duty to conduct a reasonable investigation to discover all reasonably available mitigating [and rebuttal] evidence. . .*"

It appears that the PCR Court overlooked the legal requirement that a criminal defendant's attorney's decision to place limitations on investigations may only be deemed reasonable where "reasonable professional judgements support the limitation on investigation." Wiggins v. Smith, 539 US 510, 533 (2003) (quoting Strickland v. Washington, 466 US (1991); McKnight v. State 378 SC 33 (2008); Sparkman v. State, 2007-MO-054. This means that when Counsel chooses not to investigate an immediately available source of evidence (e.g. a USB drive in his possession and an email account containing literally hundreds of emails from Applicant's so-called victim),[10] counsel must "***articulate a valid reason***" [for not investigating] to avoid a finding of ineffectiveness. McKnight, supra; Walker v. State, 408 SC 400, 405 (2014) (failure to put forth "some effort . . . to ascertain whether [available evidence] would aid the defense is unreasonable.). Limited investigations that are "the result of inattention [rather than] reasoned strategic judgements" are not of the ***valid reason*** variety. Wiggins, 539 US at 534.

Counsel testified he "wasn't able to" review the USB drive contents because his computer didn't immediately open the file stored on the device, but offered no testimony to the effect that he put forth any effort beyond his initial unsuccessful attempt at plugging the device into a USB port on his computer. *See Order, generally.* Counsel simply informed Applicant that he "couldn't" access the file on the drive because it didn't automatically load. Counsel's effort to investigate the drive's contents was not even *arguably* "reasonable." Counsel did not testify that he made a decision that the drive's contents were not necessary for Applicant's defense; he

[10] Although the PCR Court refused to allow Applicant to introduce evidence during his testimony, Applicant did appear at the PCR hearing with one such email that was sent from Applicant's Google account to Counsel's email on October 12, 2017. In this particular email the "victim" indicated she was *forced* to seek an Order of Protection and stated "I just want to be able to fix all this." (Meaning the falsified charges) See Attached.

simply stated he did not review the contents because they were not immediately and ***effortlessly*** accessed with his computer.

Counsel testified that he refused to access Applicant's email and Google accounts to review and retrieve evidence despite being instructed to do so. Counsel admitted he told Applicant he would not comply because he "was not comfortable" reviewing the *lawfully and reasonably available evidence* in Applicant's email account. Unfortunately, Counsel's testimony failed to explain how "not comfortable" translates to "not necessary" or how the evidence offered may (or may not) have impacted Applicant's defense if he chose to go to trial. To this day, Counsel has no idea the exculpatory value or impeachment value of the evidence he refused to review because he was "not comfortable" doing so.

When indigent's criminal defense attorneys are permitted to excuse negligent investigations simply by claiming *discomfort*, the sixth amendment's right to competent counsel will cease to be enforceable.

According to Counsel's own testimony, his "investigation" was limited to interviewing only one potential witness in connection with the 1st degree domestic violence charge and that only occurred because the witness came to Counsel. The PCR record reflects that Counsel has not offered any valid reason for excluding Applicant's Google account and the USB drive from his investigation in the 2nd degree domestic violence case. Counsel offered only excuses for his obvious ***inattention*** to Applicant's trial defense.

Had the PCR Court allowed Applicant to introduce evidence, Applicant would have introduced the attached email between Counsel and the State (dated November 10, 2017) to show that Counsel was concentrating his efforts on inducing a guilty plea while Applicant was seeking to relieve Counsel for doing so instead of preparing for trial.

The Application for PCR stated several grounds for relief, each ground identifying a separate instance of deficient performance by Counsel (omissions, misrepresentations of law, and poor advice based on Counsel's own misunderstanding of law), and all of which were contributing factors in Applicant's *eventual, last minute* decision to plead guilty[11].

At the PCR hearing, Counsel's "credible" testimony was the equivalent of *credible admissions* to the errors enumerated in the Application and maintained at the PCR hearing. These cumulative errors/omissions:

1. Left Applicant in jail for 78 days on *illegal charges* with a bail he could not pay;
2. Resulted in Applicant's eventually being coerced into pleading guilty through the State's misrepresentation of the possible range of consequences should Applicant proceed to trial and be convicted;
3. Deprived Applicant of the right to be either (a) tried immediately, ***or*** (b) released without bail;
4. Resulted in Applicant's being *unconstitutionally* deprived of the right (by deprivation of the means) to represent himself[12];
5. Wholly and irrevocably undermined Applicant's confidence in Counsel's ability to

[11] The Order implies that Applicant's plea freed Counsel from his duty to investigate although the refused investigation was refused ***before the plea***. The record clearly does not support ***any*** findings that plea Counsel's choices and failures were grounded in Applicant's decision to plead guilty; the transcript of the Motion to Relieve Hearing (held *immediately before* the plea hearing) clearly demonstrates that Applicant's alluding to "a plea offer" came after – ***not before*** – the challenged omissions from Counsel. The Order also noted the consistent testimonies of Counsel and Applicant that Applicant went into plea negotiations very displeased with Counsel's representation. All evidence in the record shows that Applicant wasn't intending to plead guilty until relieving Counsel wasn't going to prove beneficial due to there being no law library or legal resources within the jail to enable Applicant to move forward as a pro se litigant. Judge Verdin acknowledged the Applicant's decision to not relieve Counsel was "due to [his] circumstances" (Motion Transcript 3-4) which involved the deprivation of one constitutional right (legal access) that was not going to be addressed by Counsel as a deprivation that actually and realistically ***prevented*** the meaningful exercise of the right to self-representation. While the PCR Court seemingly misses the importance and relevance of the jail's unlawful denial of a law library, it does not change the fact that the constitutional right of self-representation was actually and substantially effected (denied) by the denial of the right to legal access at the jail.

[12] See Note 9 above.

competently try his case before a jury; and

6. Wholly and irrevocably undermined Applicant's confidence in Counsel's intent to defend Applicant's position before a jury.

Applicant's unrefuted testimony was that his guilty plea was motivated by Counsel's failures and poor advice. He has therefore satisfied the "prejudiced prong" of his ineffective Counsel claim. See Alexander v. State, 303 SC 539 (1991) and Jackson v. State, 342 SC 95 (2000).

Applicant has in fact shown that Counsel's performance was substandard, his advice was erroneous, and his omissions and poor advice motivated – ***compelled*** – Applicant to plead for the unlawful sentence he is now serving.

THE IMPROPER DENIAL OF APPLICANT'S PROPERLY SUBPOENAED WITNESS

It was improper for the Court to even *entertain* the State's[13] MOTION TO QUASH as the Motion sought to ask the Court deny Applicant his properly subpoenaed witness on the grounds that it would "cause inconvenience if [Phillips] were required to comply." It was even more improper for the Court to imply that Applicant's failure to *argue* with the Court for his properly subpoenaed witness justified a finding that "Applicant abandoned the issue, conceding the issue to the [State]" (ORDER at page 4-5).

State's improperly selected Judge had already threatened Applicant with an additional six months' imprisonment for *interrupting*; Applicant certainly knew better than to argue.

[13] The ORDER OF DISMISSAL at page 3 defectively state that the MOTION TO QUASH was brought by "Patricia D. Phillips, Esquire . . . on behalf of the victim." However, Phillips was the subpoenaed witness (and the "speaker" referenced at page 8, footnote 4) and the Motion was signed by the State's attorney.

THE IMPROPER DENIAL OF APPLICANT'S MOTION FOR SANCTIONS

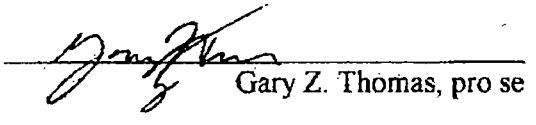
It is well settled that Article 1, Section 8 of the South Carolina Constitution does not permit the State's granting itself continuances if or when the State might deem appropriate or necessary. See Williams v. Borden's, Inc., 274 SC 275 (1980).

> The authority of the Court to grant continuances and determine the order in which cases shall be heard is derived from its power to hear and decide cases. This adjudication power of the Court carries with it the *inherent power to control the order of its business* to safeguard the rights of litigants.

Id. 274 SC at 279. The Williams Court didn't provide for departures from this firm Constitutional rule where the State believed it to be appropriate. The terms of Hon. Alex Kinlaw's ORDER RELIEVING COUNSEL AND CONTINUING THE MATTER were clearly violated. That was an act of contempt and a violation of the state constitution on the part of Taylor Smith. The same, however, was obviously not going to be properly addressed by the judge chosen for the occasion[14].

The evidence has established Applicant's entitlement to relief; only the erroneous conclusions of the PCR Court deny Applicant's entitled relief.

Signed this 2nd day of March, 2020. Respectfully submitted.



Gary Z. Thomas, pro se

[14] If judges are "presumed to know the law and correctly apply it." State v. Ray, 310 SC 431, 437 (1993); Walton v. Arizona, 497 US 639 (1990), then it must be presumed that Judge Miller intentionally violated the Judicial Oath (the oath to "preserve, protect, and defend" the Constitution) when he rewarded Smith's blatant violation of the separation of powers clause of our state Constitution.

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| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS<br>13TH JUDICIAL CIRCUIT |
| COUNTY OF PICKENS | ) | |
| Gary Z. Thomas, | ) | Case No. 2019-CP-39-1276 |
| Applicant/Appellant, | ) | |
| State of South Carolina, | ) | AFFIDAVIT OF<br>SERVICE |
| Respondent. | ) | |

I certify that I have served the Amended Motion to Alter/Amend Judgment for the above referenced case on Taylor Smith, Assistant Attorney General, Post-Conviction Relief Section, at SC Attorney General's Office, Rembert C. Dennis Bldg. 1000 Assembly St. Columbia, SC 29201 by depositing a copy of same in the United States Mail, postage prepaid on March 24, 2020, and via email to Mr. Smith at tsmith@scag.gov on March 23, 2020. I also served same on Judge Edward W. Miller via personal service at his office at 305 E. North Street, Suite 219, Greenville, SC 29601 on March 24, 2020 and via email at emillersc@sccourts.org on March 23, 2020.

Signed this 19th day of May, 2020.

Respectfully submitted.

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| STATE OF SOUTH CAROLINA<br>COUNTY OF PICKENS | IN THE COURT OF COMMON PLEAS<br>FOR THE THIRTEENTH JUDICIAL CIRCUIT |
| Gary Z. Thomas, #[illegible],<br><br>Applicant,<br><br>v.<br><br>State of South Carolina,<br><br>Respondent. | Case No. 2018-CP-39-1276<br><br>**ORDER OF DISMISSAL** |



This matter comes before this Court by way of an application for post-conviction relief filed on November 30, 2018, by Gary Z. Thomas (Applicant). The State (Respondent) filed a return on February 28, 2019, in which it requested an evidentiary hearing on some claims and moved to dismiss on others. Applicant filed an amended application on July 22, 2019. Respondent filed a return to the amended application on October 11, 2019, again requesting an evidentiary hearing for the resolution of some claims and moving to dismiss others. Respondent also filed a return to Applicant's motion for sanctions, which had been served upon Respondent by Applicant on or around September 6, 2019.

An evidentiary hearing in the matter was held before the undersigned on October 22, 2019, at the Greenville County Courthouse. Applicant was present and represented himself.[1] Respondent was represented by Assistant Attorney General Taylor Z. Smith of the South Carolina Attorney General's Office. At the hearing, Applicant testified on his own behalf and called Ferris Harvley, Assistant Public Defender John Maxwell Gravlee (plea counsel) of the Greenville County Public Defender's Office and Assistant Solicitor James Durham Hill

[1] Applicant was present at the hearing as a pro se litigant, as he had moved successfully to relieve his PCR counsel and proceed pro se in this PCR action at an earlier hearing. Thomas v. State, No. 18-CP-39-1276 (Greenville, S.C. Ct. Common Pleas, April 18, 2019). This Court notes the order resulting from that hearing indicates Judge Kinlaw questioned Applicant thoroughly and gave him proper warnings regarding the dangers of self-representation.

(solicitor) of the Thirteenth Circuit Solicitor's Office as witnesses. Following a thorough review of the record in its entirety and the testimony and evidence presented at the evidentiary hearing, this Court finds that Applicant has failed to meet his requisite burden of proof and denies his application for post-conviction relief.

## PROCEDURAL HISTORY

Applicant is presently incarcerated in the South Carolina Department of Corrections.[2] On December 1, 2017, he appeared before the Honorable Letitia H. Verdin in order to move to relieve plea counsel; however, Applicant ultimately waived presentment to a count of second-degree domestic violence (2014-GS-39-2623) and pleaded guilty to the same. The solicitor's recitation of facts at the plea hearing indicated the victim was Applicant's live-in girlfriend, and that law enforcement officers responded to a call from Applicant's residence regarding domestic violence. Plea Tran. 5-6. The solicitor stated Applicant and the victim had been arguing about a cell phone, and that Applicant threw her down on the couch and punched her when she threatened to call police, at which point the victim called police from her sister's home. Plea Tran. 5-6. In accordance with the solicitor's recommendation, Judge Verdin sentenced Applicant to imprisonment for three years, suspended to probation for five years. Applicant did not appeal his plea or sentence.

## CURRENT PROCEEDING

On November 30, 2018, Applicant filed an application for post-conviction relief, in which he challenged his guilty plea and alleged that he was being held in custody unlawfully because he (1) received the constitutionally ineffective assistance of counsel, (2) was deprived of

[2] Although Applicant was sentenced to time served, a review of SCDC's inmate search detail report for Applicant and the public index entry for Applicant's underlying criminal conviction shows that Applicant is presently incarcerated in SCDC for this offense of second-degree criminal domestic violence after the Circuit Court revoked his probation.

the right to represent himself adequately, (3) was prejudiced by the solicitor's manipulation of the General Sessions roster, (4) was sentenced to probation for five years in excess of the statutory maximum, and (5) entered his guilty plea involuntarily due to the constitutionally ineffective assistance of counsel and the denial of his right to adequately represent himself. On July 22, 2019, Applicant filed an amended application for post-conviction relief, setting forth the addition claim that he was being held in custody unlawfully because his guilty plea was not entered into voluntarily, knowingly, and intelligently due to a supposed defect in Judge Verdin's colloquy during Applicant's plea hearing.

At the start of the PCR hearing, Respondent asked that Applicant clarify for the record the claims upon which he intended to proceed, and Applicant specified he wanted to present the following allegations: (1) his sentence exceeds the maximum allowed by statute, (2) plea counsel was constitutionally ineffective for failing to object to Applicant's illegal sentence, (3) Applicant's probation officer made Applicant sign additional conditions of release that were not part of his sentence, (4) plea counsel was constitutionally ineffective for failing to conduct an adequate investigate, (5) plea counsel was constitutionally ineffective for failing to move for speedy trial, and (6) Applicant's guilty plea was not knowingly and voluntarily entered. This Court finds that all allegations other than these have been waived by Applicant and they will not be addressed in this order.

**Victim's Motion to Quash Applicant's Subpoena**

On October 21, 2019, Patricia D. Phillips, Esquire, filed a motion to quash Applicant's subpoena of the victim in the underlying criminal action on behalf of the victim. Before the evidentiary hearing began, this Court heard argument from the parties and the victim's counsel as to this motion so that the victim would have notice that her attendance would be required at

the evidentiary hearing if the Court denied the motion to quash. Phillips argued the victim had been served with the subpoena only a few days before the hearing, which would thereby cause inconvenience if she were required to comply and testify at the evidentiary hearing with such short notice. She also argued the victim's testimony would not be relevant to the hearing as the victim did not testify or address the plea court during Applicant's plea hearing and characterized the subpoena as Applicant's using the post-conviction relief process to harass the victim. Applicant argued his last-minute subpoena could not have been sent earlier because he did not have time to prepare for the evidentiary hearing or subpoena the victim earlier due to his lack of sufficient notice of the time and place of the hearing; additionally, Applicant argued the victim's testimony was critical to his case because he had been framed, and he required her testimony in order to support his claims. Respondent did not take a position on the issue.

This Court finds Applicant is entitled to call any witness with admissible testimony as allowed under the South Carolina Rules of Evidence; however, Applicant failed to establish that the victim's testimony was relevant or material to his claims. This Court ruled the victim would be required to be present in the Greenville County Courthouse in compliance with Applicant's subpoena at the time of the evidentiary hearing, which was held later in the day. This Court informed the parties and the victim's counsel that Applicant would have to put up sufficient evidence during his hearing in order to establish a prima facie case that the victim's testimony was necessary to establish his claims, and that this Court would grant the victim's motion to quash if Applicant failed to do so. Later in the day, at the start of the evidentiary hearing, Applicant asked the Court if he would be allowed to call the victim as a witness. This Court informed Applicant that its ruling stood and Applicant had not yet made any showing that the victim's testimony would be necessary. Applicant never again asked to call the victim as a

witness, and this Court finds Applicant abandoned the issue, conceding the issue to the victim and her counsel. Therefore, it was not necessary for this Court to issue a final ruling on the motion.

**Denial of Applicant's Motion for Sanctions**

On September 6, 2019, Applicant filed a motion for sanctions, titled "Notice of Motion and Motion for Sanctions (S.C. Code Ann. § 15-36-10)".[3] Applicant moved for sanctions therein, in accordance with S.C. Code Ann. § 15-36-10, et seq., alleging Assistant Attorney General Smith had knowingly, intentionally, and maliciously maintained a frivolous defense on Respondent's behalf against Applicant's claim that he had been subjected to an illegal sentence of five years' probation, causing Applicant to be wrongfully incarcerated. Applicant also alleged therein that Respondent had violated a court order requiring the evidentiary hearing to be held in an earlier term than that of October 21, 2019. Respondent filed a return to Applicant's motion on October 11, 2019, arguing therein that it had complied with the terms of Judge Kinlaw's order of continuance, issued in April of 2019, and acted without any impropriety in adding Applicant's case for an evidentiary hearing during the October of 2019 PCR term in the Thirteenth Judicial Circuit. Respondent also argued its position in response to Applicant's PCR allegations was not a frivolous position being offered knowingly, intentionally, and maliciously, as required by the relevant code section.

This Court finds Applicant has failed to establish any frivolous arguments on the part of Respondent and failed to demonstrate any improper actions in scheduled Applicant's evidentiary hearing. Respondent has established a basis to proceed with litigation and assert its legal positions therein that is not frivolous. Applicant's motion for sanctions is denied.

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[3] This written motion does not appear in the public index, but this Court was provided with a copy bearing the file markings of the Pickens County Clerk of Court, which indicated that the motion had been filed on the aforementioned date. Applicant was a pro se litigant when he filed the motion.

**Testimony at PCR Hearing**

Applicant called Ferris Harvley as his first witness at the PCR hearing. She testified she is in a romantic relationship with Applicant, and was cohabitating with him in an apartment from early in May of 2017 until his arrest in September of 2017. She testified he scheduled an appointment with plea counsel in order to provide him with some "paperwork" on Applicant's behalf, but that she did not keep that appointment. She testified the purpose of the meeting was to give evidence to plea counsel that the victim had been stalking her and Applicant. She testified she never invited the victim to their apartment, and she told the victim by text message not to come to the apartment. She testified she went with Applicant to the police so that they could file a report concerning the victim's supposed harassing her and Applicant, and Applicant gave some documents to the police at that time in support of their allegations against the victim. She testified she asked plea counsel to come to her to get these documents but that he did not do so. She testified she did take some but not all of the documents to plea counsel, but that he did not contact her after that meeting, ask any questions of her, or try to get any other information from her.

She affirmed she was a witness to Applicant's second arrest, and summarized the event by testifying that the victim came to the parking lot at the apartment in order to make accusations against Applicant. She testified she asked the victim to leave the apartment and tried to retreat into the apartment, at which point the victim tried to force her way in despite her yells that the victim should leave. She testified Applicant appeared and knocked the victim unconscious on the front porch of the apartment. She testified a maintenance worker was calling police during the incident, and that the victim informed them that she was going to call the police once she sat up, and that she then left. She testified that threats were made.

Applicant then called as a witness plea counsel. He affirmed he still had in his possession copies of all documents given to him by Harvley and a USB drive given to him by either Applicant or Harvley. When asked if he had inspected the contents of the drive, he testified Applicant had given the drive to the solicitor who gave it to plea counsel. He testified he tried to access the single file on the drive, but was unable to do so because he did not have any program on his computer that would open it, and he did not recall the format of the file. He testified he did not remember the exact time at which the solicitor passed the drive along to him, but that he informed Applicant in September of 2017 that he had been unable to open the file on the drive, at which time Applicant was in jail. When asked if he could plug the drive into a computer at the PCR hearing in order to describe the file, he answered that he did not have access to a computer. He testified they went before Judge Verdin in December of 2017 because Applicant had indicated to him that he wished to have plea counsel relieved so that he could proceed as a pro se defendant, but that they were able to negotiate a deal on the day of that hearing wherein Applicant would plead guilty and be sentenced to time served with probation so that he could be released on the same day.

He testified he requested a personal recognizance bond at Applicant's request, but that Judge Verdin instead ordered that Applicant pay a $50,000 surety bond with GPS monitoring. He testified that this would have occurred during the first term of General Sessions in Pickens County, as there is usually only a single term per month. He testified he was ultimately able to get a charge of first-degree domestic violence dismissed on Applicant's behalf, and described the underlying incident that case as the one in which Applicant pushed the victim down and out of Applicant's door. He did not remember how many terms of court went by while Applicant was in jail. In response to questioning from this Court, plea counsel testified he moved for a bond

reduction at Applicant's request. He testified he requested Applicant receive a personal recognizance bond, but that Judge Verdin denied the motion. He noted the solicitor moved to revoke Applicant's bond and testified he was able to convince the bond court not to revoke. At Applicant's request, plea counsel read portions of State v. Campbell, 277 S.C. 408, 288 S.E.2d 395 (1982). He testified he did not cite Campbell at Applicant's bond hearing because he did not think the case was relevant, and that he probably did not cite any specific statutes either. He testified he probably would not have made a difference whether or not he had cited any statutes at Applicant's bond hearing.

Applicant asked if plea counsel knew of any procedures whereby he could have requested that the first-degree domestic violence charge against Applicant be reduced. Plea counsel testified he asked the solicitor to dismiss the first-degree charge as a part of Applicant's agreement to plead guilty to the separate offense of second-degree domestic violence, and the solicitor agreed to do so. Plea counsel testified the solicitor refused to make a recommendation that Applicant be sentenced to time served.

Plea counsel affirmed Applicant noted he did not want to have plea counsel relieved during the December of 2017 hearing before Judge Verdin due to Applicant's lack of access to legal resources while in jail, and testified he supplied Applicant with various legal resources at the time.

Applicant played a recording for the Court and plea counsel, in which someone claims to be looking at a police report and commenting that the speaker does not remember much about "that night" but that the speaker would have been in the hospital if another had punched her.[4] Plea counsel his estimation of the recording was that the speaker was not making a categorical

[4] Applicant asserted that the speaker was the victim, and that the message was directed towards him as the person who punched her.

denial of assault that Applicant committed, saying only that Applicant did not punch the victim three times.

When asked on cross-examination to summarize the facts giving rise to the first-degree and second-degree criminal domestic violence charges against Applicant, plea counsel testified there was a pending second-degree CDV charge against Applicant when the victim showed up at the apartment where Applicant and Harvley lived, that an altercation ensued during which the victim was struck in the fact, and that the victim received facial fractures as a result. He testified their defense would have been that Applicant struck the victim in self-defense. He testified the second-degree CDV charge, which proceeded the first-degree CDV charge, came about when Applicant and the victim got into an argument in their mutual home, and a fight occurred over a phone, after which the victim claimed Applicant had struck her in the face multiple times. He testified there were photographs he received in discovery in the case that showed the victim with bloody lips and a red face. He testified Applicant pleaded guilty to this second-degree offense because the State had a stronger case there than it did in the first-degree CDV case. He testified he informed Applicant of his right to a trial and left the decision about whether to plead guilty or proceed trial to his client.

He affirmed he informed Applicant that he had not been able to access the file on the USB drive before Applicant pleaded guilty. He explained that his defense at trial if Applicant had pleaded not guilty to second-degree CDV would have been to attack the credibility of the victim and would have had no choice but to call the victim as a witness in order to cross-examine her. He testified he explained to Applicant that the victim would have had to testify at trial because Applicant had a right to confront her under the Confrontation Clause.

He testified he spoke with Harvley on multiple occasions by phone. He spoke to her on October 12, 2017, about the first-degree CDV case against Applicant. He testified Harvley came to the courthouse at some point after that during October of 2017 and told him she did not like being in public because it gave her anxiety, and told him she preferred to meet at her car. He testified he followed her to her car and received copies from her of things on Applicant's behalf. He testified those documents contained some good and some bad evidence. He discussed the evidence with Applicant, and told him the elements the State would have to prove should Applicant plead not guilty. He testified Applicant gave no indication that he did not understand. He testified he could not believe he could have done anything further to get a speedier trial for Applicant.

He testified he informed Applicant that the plea deal included a recommended five years' probation. The original plea deal, he testified, included active prison time and home incarceration for two years. Since Applicant did not want home incarceration, he was able to negotiate ninety days of active time plus probation for five years. Eventually, he was able to get the offer reduced to a recommendation to time served and probation, with no active time. He testified he explained this final offer to Applicant, and that Applicant wanted to take it so that he could be released from jail on the same day. He testified Applicant decided to plead guilty and take this final offer before the conclusion of the hearing on Applicant's motion to relieve counsel and proceed as a pro se defendant. He testified that, if Applicant had indicated during that final plea negotiation during the hearing that he did not want to continue with plea counsel as his attorney, he would have informed Judge Verdin that they could not move forward with the entry of a guilty plea because Applicant wanted to relieve him as counsel.

On redirect, plea counsel testified he did not believe it was his duty to inform Judge Verdin during Applicant's plea hearing that Applicant had only limited access to a law library at the jail because Applicant wanted to plead guilty in exchange for the State's sentencing recommendation, making Applicant's complaint about the law library irrelevant. Plea counsel affirmed Applicant had told plea counsel his email address and account password so that plea counsel could access emails contained therein, and plea counsel testified he did not access that account because he was not comfortable logging into his client's personal email account.

Applicant called the solicitor as a witness. He testified Applicant dropped off a USB drive with the solicitor's receptionist, and that he passed it along without opening it to plea counsel. He did not open any files on the drive because Applicant was represented at the time and the solicitor did not feel comfortable plugging it into any of his computers. He testified he would have scheduled a bond hearing for Applicant at the next term of court after his second arrest, and does not remember its being rescheduled. On cross-examination, the solicitor testified Applicant had filed the motion to relieve plea counsel and that Applicant was taken to the courthouse for a bond hearing. He testified Applicant was arrested in early May of 2017 for second-degree criminal domestic violence and pleaded guilty in December of that year, meaning that he was incarcerated for approximately seventy-eight days. He testified he did not do anything intentional to delay Applicant's court appearances.

Finally, Applicant testified on his own behalf. He testified he pleaded guilty to second-degree domestic violence because he was booked in September of 2017 for first-degree criminal domestic violence. He testified he asked plea counsel to get the charge reduced in order to get a hearing and that plea counsel did not comply. He asked plea counsel to get the charge reduced afterwards in order to have his bond reviewed against evidence to the court's attention. He

testified plea counsel did not do enough in his defense, and that plea counsel could have asked to have the charge reduced. He testified the only method he had for gathering the evidence necessary for him to defend himself was to plead guilty in order to get out of jail since plea counsel did not do a proper investigation. He testified the victim has continued to "terrorize" him to this day, and that she has also terrorized Harvley. He testified the solicitor behaved inappropriately by refusing to reduce the charge despite having seen the evidence. He was scared to let plea counsel try the case considering his lack of preparation. He testified he would have been confident to proceed to trial if plea counsel had had the evidence of Applicant's innocence. He testified about the poor conditions in the jail. He testified he was not satisfied with the plea deal offered by the State.

On cross-examination, Applicant affirmed Judge Verdin informed him that he had the right to proceed to a jury trial instead of pleading guilty. He testified he waived his right to a trial because he did not think he would have had a good jury trial since plea counsel did not have any evidence to support his defense and challenge the victim's credibility. When asked if he informed Judge Verdin during his plea hearing that he was happy with plea counsel's performance, he affirmed that he did so an explained that he was referring only to the fact that plea counsel had given him printouts of case law and emailed the jail to complain about Applicant's limited access to the law library, and that he did not intend his statement to Judge Verdin to show that he was happy with plea counsel's performance as an attorney.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has thoroughly reviewed the record in its entirety, including the transcript from Applicant's plea hearing, which included discussion as to Applicant's motion to relieve plea counsel, and the hearing on Applicant's motion to relieve his PCR counsel, which was held

before the Honorable Alex Kinlaw, Jr. Additionally, this Court heard the testimony presented at the evidentiary hearing and was able to observe the witnesses, which allowed the Court to scrutinize their credibility. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

Applicant, like all other defendants, has a right to the assistance of effective counsel as provided by the Sixth Amendment to the United States Constitution. Strickland v. Washington, 466 U.S. 668 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008). Applicant has the burden of proving the allegations in his post-conviction relief action, and when alleging that trial counsel was constitutionally ineffective, he must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that it cannot be relied upon as having produced a just result." Strickland, 466 U.S. at 686

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668. First, Applicant must prove that counsel's performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). Applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, counsel's deficient performance must have prejudiced Petitioner such that "there is a reasonable

probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 58-59 (1985). The "prejudice prong ordinarily requires more than simply a defendant's assertion that but for counsel's deficient performance he would not have pled but would have gone to trial." Stalk v. State, 383 S.C. 559, 563, 681 S.E.2d 592, 595 (2009).

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. 668. Moreover, Strickland does not require a finding of ineffectiveness merely for deviation from some rigid rule of representation. Rather, Strickland requires the post-conviction relief applicant to prove "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. at 697. Therefore, the function of the post-conviction relief court is to determine if "in light of all the circumstances, the identified acts or omissions were outside the wide range of professional competent assistance" required of a criminal defense attorney. Id. at 690. "A guilty plea is a solemn, judicial admission of the truth of the charges against an individual; thus, a criminal inmate's right to contest the validity of such a plea is usually, but not invariably, foreclosed." Dalton v. State, 376 S.C. 130, 137, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing Blackledge v. Allison, 431 U.S. 63, 74 (1977)). "Indeed, where a thorough colloquy is

conducted, courts must exercise caution in setting aside the guilty plea." Garren v. State, 423 S.C. 1, 12, 813 S.E.2d 704, 712 (2018); see Jamison v. State, 410 S.C. 456, 469-71, 765 S.E.2d 123, 129-30 (2014) (observing that "guilty plea[s] must be treated as final in the vast majority of cases" and instructing that caution must be exercised so as not to "undermine the solemn nature of a guilty plea and the finality that generally attaches to a guilty plea").

Based on this standard set forth above, and the reasoning below, this Court finds Applicant has failed to meet his requisite burden of establishing any constitutional ineffectiveness of counsel. The allegations are addressed fully below:

***Applicant received an illegal sentence. Plea counsel was constitutionally ineffective for failing to object to the illegal sentence.***

Applicant argues he received an illegal sentence because he was sentenced to imprisonment for three years, suspended to probation for five years, and that the five-year probation term exceeds the maximum sentence of three years allowed for a conviction of second-degree criminal domestic violence, that plea counsel's performance was deficient due to his failure to object to the illegal sentence, and that he was prejudiced thereby.

However, even if the claim of an illegal sentence is properly before this Court, this Court finds Applicant was not subjected to an illegal sentence. A person convicted of second-degree domestic violence must be fined or "imprisoned for not more than three years, or both." S.C. Code Ann. § 16-25-20(C). The plea court had the authority to "suspend the imposition . . . and place the defendant on probation . . . ." S.C. Code Ann. § 24-21-410 (1976). "The period of probation or suspension of sentence shall not exceed a period of five years . . . ." S.C. Code Ann. § 24-21-440. Here, the plea court sentenced Applicant to imprisonment for three years and suspended the service of the sentence upon a term of probation. Applicant's reliance upon Thompson v. S.C. Dep't of Pub. Safety, 335 S.C. 52, 515 S.E.2d 761 (1999), is misplaced

because the case concerns an interpretation of the phrase "term of imprisonment" for the purpose of establishing the start date of the requirement that the Department of Public Safety suspend the driver's license of someone sentenced for felony DUI, not the legality of a sentence of probation that is longer that the maximum amount of active prison time allowed by a statute setting out the range of penalties for a criminal offense. As the sentence was lawful, there would have been no reason for plea counsel to object thereto, and this Court finds Applicant has failed to demonstrate any deficiency in plea counsel's performance.

This Court finds Applicant has failed to demonstrate his sentence was illegal, failed to demonstrate any deficiency in plea counsel's performance in failing to object to the sentence, and any resulting prejudice. As such, this allegation is denied and dismissed with prejudice.

***Applicant's probation officer required him to sign conditions of release that were not required by his sentence.***

Applicant asserted at the start of his PCR hearing that he wished to move forward on the allegation that he is entitled to post-conviction relief because his probation officer required him to sign conditions of release that were in excess of those required by Judge Verdin's sentence; however, Applicant did not mention this allegation again during the hearing and provided no testimony of evidence that would support this position or supply a legal basis for the claim. This Court finds Applicant has failed to meet his burden in demonstrating that he is entitled to relief and has abandoned this ground for relief. As such, this allegation is denied and dismissed with prejudice.

***Plea counsel was constitutionally ineffective for failing to conduct an adequate investigation.***

Applicant argues plea counsel performed an inadequate investigation, and that this deficiency left Applicant with no choice but to plead guilty so that he could get out of jail and then present his defense at a later time.

A defense attorney has a duty to undertake reasonable investigations or to make a decision that renders a particular investigation unnecessary. Strickland. at 691. Thus, "[a] criminal defense attorney has the duty to conduct a reasonable investigation to discover all reasonably available mitigation evidence and all reasonably available evidence tending to rebut any aggravating evidence introduced by the State." McKnight v. State, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008). A defense attorney's "[f]ailure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result." Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998) (citing Kibler v. State, 267 S.C. 250, 227 S.E.2d 199 (1976)). An applicant alleging that his attorney failed to prepare for the case must show how additional preparation would have resulted in a different outcome. Skeen v. State, 325 S.C. 210, 214, 481 S.E.2d 129, 132 (1997). Moreover, counsel's decision not to investigate should be assessed for reasonableness under all the circumstances with heavy deference to counsel's judgment. Simpson v. Moore, 367 S.C. 587, 597, 627 S.E.2d 701, 706 (2006). "[A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Id. at 690; Bagwell v. State, 410 S.C. 259, 265, 763 S.E.2d 630, 633-34 (Ct. App. 2014).

This Court finds plea counsel conducted a reasonable investigation in the underlying criminal case. The testimony of both plea counsel and Harvley indicated plea counsel did speak with Harvley, although the testimony diverged between the two as to the number of times of their conversations. Plea counsel's testimony that he spoke with Harvley on multiple occasions and met with her in person in order to receive information from her about the conflict between Applicant and the victim is more credible than her testimony in contradiction to the extent of

their interactions. Plea counsel testified he reviewed the documents presented to him by Harvley and shared his opinions about the value of them with Applicant before Applicant pleaded guilty. With regards to the audio recording that Applicant claims captures the victim recanting her allegations, plea counsel's conduct was likewise reasonable. Plea counsel testified he received the recording from the solicitor, whose testimony indicated he had received it directly from Applicant. Plea counsel testified he did not listen to the audio recording that was on the USB drive he received from the solicitor, whose testimony was that he had received it directly from Applicant. Plea counsel testified he attempted to open the file saved thereon, but was unable to do so because his computer did not have a computer program able to access the file. He testified he informed Applicant that he could not access the file, and this Court finds Applicant was aware of the fact plea counsel could not watch the recording before pleading guilty. Instead of sharing with plea counsel a desire that he do further investigation into the contents of the USB drive, Applicant decided to plead guilty, removing from counsel the obligation to conduct further investigation in the case.

This Court finds Applicant has failed to demonstrate he suffered prejudice from trial counsel's supposed failure to conduct an adequate investigation. The testimony of both Applicant and plea counsel indicates Applicant was not satisfied with plea counsel's representation of Applicant during the underlying criminal case. Applicant, plea counsel, and the solicitor appeared before Judge Verdin on December 1, 2017, so that Applicant could move to relieve plea counsel. The transcript from that hearing indicates Applicant abandoned his complaints of plea counsel and pleaded guilty in order to avail himself of a sentencing recommendation from the solicitor that Applicant viewed with favor at the time. While Judge Verdin was questioning Applicant regarding his wishes as to his representation, Applicant

mentioned the solicitor had made a plea offer that day. Applicant told Judge Verdin he would like to take a break in the hearing so that he could discuss the plea offer with plea counsel, and thanked the court for its suggestion that the proceedings resume once Applicant had decided whether to accept or reject the latest plea offer. After that break, Applicant affirmed to Judge Verdin that he was happy with everything plea counsel had done for him, that he understood he would be giving up his right to a jury trial by pleading guilty, and that he wanted to plead guilty.

Applicant played for this Court the audio recording in which he claims the victim recants her allegations against him. Even assuming that speaker on the recording was the victim and the person to whom she was referring therein was Applicant, Applicant failed to demonstrate that he would not have pleaded guilty of plea counsel had somehow listened to the recording. This is especially true since Applicant was aware of the recording's existence before he pleaded guilty; in fact, he provided the solicitor with the USB drive containing the recording. Applicant touted the supposed exculpatory value of the recording to plea counsel before pleading guilty, indicating he knew it would have been available as evidence should he have asserted his right to a trial instead of pleading guilty. Plea counsel's testimony at the hearing, after he listened to the recording, was that he did not consider it to have contained any exculpatory evidence that would have negated any of the elements of second-degree criminal domestic violence, for which Applicant pleaded guilty. Plea counsel also testified he would have taken the case to trial had Applicant not pleaded guilty or had Applicant not abandoned his motion to have counsel relieved, and that he would have called the victim as a witness and cross-examined her at trial. This Court finds Applicant wanted to abandon his motion to relieve counsel and decided to plead guilty on December 1, 2017, in order to take advantage of the solicitor's sentencing

recommendation, which would allowed him to be released from jail on that day, rather than out of a fear that plea counsel had not conducted an adequate investigation.

This Court finds Applicant has failed to demonstrate plea counsel was constitutionally ineffective with respect to his failure to conduct an adequate investigation because Applicant has failed to demonstrate any deficiency in plea counsel's performance and any resulting prejudice. As such, this allegation is denied and dismissed with prejudice.

***Plea counsel was constitutionally ineffective for failing to failing to move for a speedy trial.***

Applicant argues plea counsel was constitutionally ineffective for failing to assert Applicant's right to a speedy trial because Applicant was being housed in poor conditions at the detention center while awaiting trial and did not have access to legal resources, which forced him to plead guilty in order to escape the jail's conditions and have access to evidence and legal resources after being released following the entry of his guilty plea.

The South Carolina Court of Appeals has held that a reviewing court must consider four factors when determining whether a defendant's right to a speedy trial has been violated: 1) the length of the delay, 2) the reason for the delay, 3) the defendant's assertion of the right to a speedy trial, and 4) the prejudice suffered by the defendant. State v. Cooper, 386 S.C. 210, 687 S.E.2d 62 (S.C. Ct. App. 2009) (citations omitted). This Court finds Applicant has failed to show that plea counsel's performance was deficient due to his failure to move for a speedy trial. Applicant was arrested in May of 2017, and pleaded guilty in December of 2017, which was not an unreasonable period of time. See Cooper at 218, 687 S.E.2d at 67 (finding the trial court's denial of Cooper's motion to dismiss the charges against him when Cooper argued his right to a speedy trial was violated when his trial was delayed by 44 months). Plea counsel's testimony indicated he unsuccessfully moved for a bond reduction, but that the court would not give Applicant a personal recognizance bond as Applicant wanted. During this time, Applicant had

also been charged with first-degree criminal domestic violence, and the indication from testimony at the PCR hearing was that this pending case contributed to the length of time between Applicant's arrest and his plea hearing. The solicitor testified credibly that he did not take any actions to delay the disposition of Applicant's charge. Applicant's testimony was that he was unhappy with the conditions of the jail while he was awaiting trial, and he testified as to his having to share space with others at the detention center, but he has failed to demonstrate in any way that there was any impropriety in the tie between his arrest and the entry of his guilty plea. This Court finds Applicant has failed to establish plea counsel's performance was deficient when counsel failed to assert Applicant's right to a speedy trial because Applicant has not shown that the right was violated.

This Court finds Applicant has failed to establish any prejudice from plea counsel's failure to assert Applicant's right to a speedy trial. Applicant's testimony at the PCR hearing on this point concerned the allegedly dissatisfactory conditions at the detention center and his desire to conduct his own legal research after being released from jail after pleading guilty.

***Applicant's guilty plea was not knowingly and voluntarily given.***

Applicant argues his guilty plea was not knowingly and voluntarily given because plea counsel did not warn him that he could receive probation for five years, did not advise him of the elements of second-degree criminal domestic violence, did not make an effort to get the charge reduced, did not ask for Applicant to be released on his personal recognizance, and did not advocate for Applicant's right to represent himself, and because Applicant did not have access to a law library while he was in jail awaiting trial. Applicant has failed to show the plea was unknowing or involuntary for the reasons stated below.

Applicant argues his guilty plea was not knowingly and voluntarily given because plea counsel did not inform him that he could be sentenced to probation for five years if he pleaded

guilty. This Court finds Applicant has failed to show plea counsel was constitutionally ineffective for failing to advise Applicant that he could be sentenced to probation for five years if he pleaded guilty. Plea counsel credibly testified he made specific plea deal requests at Applicant's direction, and explained the final plea offer to Applicant. Plea counsel testified he informed Applicant that the recommendation would include the solicitor's request that Applicant receive probation for five years, that Applicant gave no indication that he did not understand this aspect of the recommendation the solicitor would give if Applicant pleaded guilty or Judge Verdin's authority to sentence Applicant to probation, and that Applicant indicated at the time that he approved of the deal so that he could be released from jail. In light of all the evidence, this Court finds plea counsel adequately informed Applicant of the potential sentence he could face, including probation for five years, and that Applicant accepted this sentencing recommendation when he pleaded guilty. This Court finds Applicant has failed to show plea counsel's actions with regards to explaining to Applicant the potential sentence he could face if he pleaded guilty caused Applicant's guilty plea to have been entered unknowingly or involuntarily.

Applicant argues his guilty plea was not knowingly and voluntarily given because plea counsel did not explain to him the elements of the offense charged. This Court finds Applicant has failed to show plea counsel was constitutionally ineffective for failing to advise of the elements of second-degree domestic violence. Plea counsel credibly testified at the PCR hearing that he discussed with Applicant the evidence in the case and the elements of the offense. Plea counsel further testified Applicant gave no indication that he did not understand the substance of that discussion. Applicant affirmed to Judge Verdin at the plea hearing that he understood that he was pleading guilty to second-degree criminal domestic violence and that he had discussed the

case with plea counsel. This Court finds Applicant has failed to show plea counsel's actions with regards to explaining to Applicant the elements of second-degree criminal domestic violence caused Applicant's guilty plea to have been entered unknowingly or involuntarily.

Applicant argues his guilty plea was not knowingly and voluntarily given because plea counsel did not make an effort to get his charge of second-degree criminal domestic violence reduced to a lesser offense. This Court finds Applicant has failed to show plea counsel was constitutionally ineffective for failing to engage in negotiations with the solicitor on his behalf. The testimony from plea counsel and from the solicitor indicates plea counsel engaged in negotiations with the solicitor in an attempt to secure a favorable plea deal for Applicant. Plea counsel's testimony shows he was able to secure progressively more favorable deals from the solicitor throughout his representation of Applicant, which culminated in the final plea offer that Applicant accepted when he pleaded guilty before Judge Verdin in December of 2017. Indeed, plea counsel testified he was able to get the solicitor to dismiss the charge for first-degree criminal domestic violence that was also pending against Applicant at the time. Applicant has failed to show that he was entitled to plead guilty to some lesser offense. Applicant waived his right to seek challenge the State's evidence by pleading guilty, affirmed to Judge Verdin that he understood that he was pleading guilty to the offense and wanted to plead guilty, and denied that anyone was forcing him to plead guilty. This Court finds Applicant has failed to show plea counsel's actions with regards to plea negotiations caused Applicant's guilty plea to have been entered unknowingly or involuntarily.

Applicant argues his guilty plea was not knowingly and voluntarily given because plea counsel did not seek to have Applicant released on his personal recognizance while awaiting trial. This Court finds plea counsel's performance was not deficient with respect to his actions

regarding Applicant's pre-trial detention. Plea counsel credibly testified at the PCR hearing that he made multiple attempts to gain a more favorable bond for Applicant, including his moving for a bond reduction and requesting that Applicant be released on his personal recognizance, but these efforts were not successful. Applicant has not explained any further efforts plea counsel could or should have made on Applicant's behalf. Applicant testified that he was not satisfied with the condition of his pre-trial confinement, but has failed to show that his discomfort entitles him to set aside his guilty plea and depart from his solemn declaration of guilty therein. See Satterwhite v. State, 325 S.C. 254, 259, 481 S.E.2d 709, 712 (1997) (instructing that the fact that an applicant for post-conviction relief may have pleaded guilty in order to obtain a release from administrative segregation does not render the guilty plea involuntary) (citing Wicker v. State, 310 S.C. 8, 425 S.E.2d 25 (1992)). This Court finds Applicant has failed to show plea counsel's actions with regards to Applicant's pre-trial detention caused Applicant's guilty plea to have been entered unknowingly or involuntarily.

Applicant argues his guilty plea was not knowingly and voluntarily given because plea counsel did not advocate for Applicant's right to represent himself in the underlying criminal case. This Court finds plea counsel's performance was not deficient with respect to his actions regarding Applicant's desire to relieve counsel. Plea counsel credibly testified he took Applicant before Judge Verdin in December of 2017 so that Applicant could move to relieve counsel. The transcript from that hearing shows Applicant informed Judge Verdin of his reservations about plea counsel's representation, but it also shows that Applicant abandoned his motion in order to accept a plea offer from the State. Plea counsel performed with reasonable diligence in taking Applicant before the court in order to inform the court of his desire to relieve counsel. At that time, Applicant could have persisted in his motion if he believed he or substitute counsel could

do something else in his defense or in plea negotiations that plea counsel had not done, but Applicant's decision to abandon that effort in order to accept the State's offer and plead guilty indicates that he was satisfied with plea counsel's work in plea negotiations, at least at the end. This Court finds Applicant has failed to show plea counsel's actions with regards to Applicant's request to relieve counsel caused Applicant's guilty plea to have been entered unknowingly or involuntarily.

Applicant argues his guilty plea was not knowingly and voluntarily given because he did not have adequate access to legal resources during his pre-trial detention. The transcript from Applicant's plea hearing on December 1, 2017, shows Applicant informed Judge Verdin of his dissatisfaction with the legal resources at his disposal at the detention center, and that Applicant expressed an opinion that he would not be able to adequately represent himself with those resources if he were to proceed in his criminal case as a pro se defendant. This Court does not need to consider the quality of the legal resources at the Pickens County Detention Center because it was not Applicant's responsibility to advocate on his own behalf in the criminal case as he was represented by plea counsel. Plea counsel credibly testified he conducted legal research, evaluated the evidence in the case, and discussed those matters with Applicant. Applicant's own testimony agrees that plea counsel shared case law with him. Plea counsel was not limited to the legal resources at the jail, and the responsibility for conducting legal research would have been his, and not Applicant's, as Applicant was not a pro se defendant and plea counsel was not engaging in a hybrid representation. See United States v. Lawrence, 161 F.3d 250 (4th Cir. 1998) ("[t]he Sixth Amendment does not require a court to grant advisory counsel to a criminal defendant who chooses to exercise his right to self-representation by proceeding pro se"), United States v. Mikolajczyk, 137 F.3d 237 (5th Cir. 1998) (holding that, as the defendant

"had no right to standby counsel, it seems unlikely that standby counsel's failure to assist could be a violation of his Sixth Amendment rights"), and United States v. Bova, 350 F.3d 224 (1st Cir. 2003) (nothing that the defendant did not have the right both to "represent himself and to enjoy the benefit of standby appointed counsel"). At any rate, Applicant waived his right to challenge the State's case by waiving his right to a trial by pleading guilty. This Court finds Applicant has failed to show that the quality of the legal resources at the detention center caused Applicant's guilty plea to have been entered unknowingly or involuntarily.

Applicant has failed to demonstrate that this Court should allow him to depart from the guilty plea he entered before Judge Verdin in December of 2017. He has failed to show any deficiencies in plea counsel's performance or an Applicant's circumstances at the time that caused Applicant to plead guilty rather than proceeding to trial. On the contrary, the evidence before this Court indicates Applicant desires to be released from incarceration on probation in accordance with the sentencing recommendation to which Applicant subjected himself by pleading guilty. Applicant has failed to show he did not understand and accept the consequences of pleading guilty to second-degree criminal domestic violence or plead guilty of his own free will. As such, these allegations are denied and dismissed with prejudice.

**CONCLUSION**

Based on all the foregoing, this Court finds Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. Therefore, this application is denied and dismissed with prejudice.

This Court notes Applicant must file and serve a notice of appeal within thirty days from the receipt of this Order to secure the appropriate appellate review. See Rule 203 and 243, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an applicant has a right to an appellate

counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides if the applicant wishes to seek appellate review and is represented by post-conviction relief counsel, that counsel must serve and file a Notice of Appeal on the Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

**IT IS THEREFORE ORDERED:**

1. This application for post-conviction relief is denied and dismissed with prejudice; and
2. Applicant shall remain in the custody of the State within the South Carolina Department of Corrections.

**AND IT IS SO ORDERED** this 22 day of January, 2020.

EDWARD W. MILLER
Presiding Judge

Greenville, South Carolina

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CLERK OF COURT
GREENS COUNTY
SOUTH CAROLINA