

STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM RICHLAND COUNTY  
Roger E. Henderson, Circuit Court Judge

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2017-CP-40-1200

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Elijah Green, # 234770,

Appellant,

v.

STATE OF SOUTH CAROLINA,

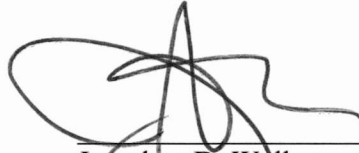
Respondent.

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NOTICE OF APPEAL

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Elijah Green, # 234770, appeals the Order of Dismissal denying his Application for Post-Conviction Relief filed June 15, 2022, issued by the Honorable Roger E. Henderson, Presiding Judge, Fifth Judicial Circuit.



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June 20, 2022

**RECEIVED**

**JUN 27 2022**

**S.C. SUPREME COURT**

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STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND

Elijah Green, #234770

Applicant,

v.

State of South Carolina,

Respondent.

) IN THE COURT OF COMMON PLEAS  
) FIFTH JUDICIAL CIRCUIT


) CASE NO. 2017-CP-40-1200

**ORDER OF DISMISSAL**

RICHLAND COUNTY  
FILED  
2022 JUN 15 AM 9:56  
JEROME E. HENDERSON  
CLERK, C.S., & H.C.

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed by Applicant Elijah Green on March 1, 2017. Respondent made its Return on November 7, 2017. Evidentiary hearings into the matter were convened on August 20 – 21, 2019, and December 8, 2021, at the Richland County Courthouse before the Honorable Roger E. Henderson. Applicant was present at the hearing and represented by Jonathan Waller, Esquire. Lindsey Ann McCallister and Yasmeen E. Klein, Esquires, of the South Carolina Attorney General's Office, represented Respondent.

On August 20, 2019, Applicant testified on his own behalf at the hearing, and testimony was additionally provided by Assistant Solicitor Joshua Golson of the Fifth Circuit Solicitor's Office. On August 21, 2019, testimony was provided by J. Rhodes Bailey, Esquire, of the Richland County Public Defender's Office. On December 8, 2021, testimony was provided by Assistant Solicitor Nicole Simpson of the Fifth Circuit Solicitor's Office. Following a thorough review of the record in its entirety and the testimony and evidence presented at the evidentiary hearing, this Court finds Applicant has failed to meet his requisite burden of proof, denies relief, and dismisses this application with prejudice.



### PROCEDURAL HISTORY

The records before this Court establish Applicant is presently confined in the South Carolina Department of Corrections (SCDC). Applicant was indicted at the August 2015 term of the Richland County Grand Jury for Felony Driving Under the Influence, Great Bodily Injury Results. (2015-GS-40-04340). Also, Applicant was indicted at the July 2016 term of the Florence County Grand Jury for Felony Driving Under the Influence, Great Bodily Injury Results. (2016-GS-40-04664). Applicant was represented by J. Rhodes Bailey, Esquire, of the Richland County Public Defender's Office. Assistant Solicitor Joshua Golson of the Fifth Circuit Solicitor's Office prosecuted the case.

Applicant pleaded guilty to two counts of Felony Driving Under the Influence, Great Bodily Injury Results, on December 7, 2016, before the Honorable Clifton Newman.<sup>1</sup> Judge Newman sentenced Applicant to twelve years imprisonment for each count to run concurrently. Applicant did not appeal.

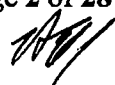
### FACTS

On April 25, 2015, at the intersection of Leesburg Road and Trotter Road, Applicant caused a multicar collision. (Plea Tr. pp. 9, l. 24 – 10, l. 1). Applicant sideswiped one vehicle causing property damage, and then collided with a Chevrolet truck head-on, causing significant injuries to the driver and passenger of the truck. (Plea Tr. p. 10, ll. 1 – 7). Solicitor Goldson provided the following:

After the collision occurred, [Applicant] got out of his vehicle and approached the victim and his passenger. [Applicant] approached the driver's side door and began hurling a slew of expletives at the victim, Mr. Edmonds. And in the course of yelling at him, accused him of hitting him --- him that [Applicant] was going to kill him, to put it in more mild terms. And the force of the collision pinned

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<sup>1</sup> The State dropped an unrelated criminal domestic violence charge.



Mr. Edmonds and his best friend, Ms. Elsie Jordon, in the vehicle, caused significant injuries to both individuals. Mr. Edmonds sustained a broken hip, multiple broken ribs, lost several teeth, multiple lacerations about his body. Ms. Jordan broke -- had compound fractures in both of her wrists, required surgeries to implant metal rods in her wrists and her hands, underwent several months of physical therapy. [Applicant], after the collision, was transported to the Richland ER for treatment of his own injuries. While he was there, Trooper Helen from the South Carolina Highway Patrol arrived, placed him under arrest. They offered him his implied consent rights, and he willingly submitted to a blood sample to test for presence of alcohol and/or drugs. That blood sample was submitted to SLED for testing, and it came back positive for ethanol at .139. That was the only indication of any substances in his bloodstream at the time.

(Plea Tr. pp. 10, l. 8 – 11, l. 15).

#### ISSUES RAISED

Applicant *timely* commenced this post-conviction relief action on March 1, 2017. In his application for post-conviction relief, Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel
  - a. "Counsel failed to investigate and failed to object to the solicitors."
  - b. "Counsel's deficient performance prejudiced [Applicant] making him ineffective assistance of counsel by the [officer] not reading his rights."
  - c. "Attorney failed to object to the Solicitor's statement about prior time conviction, [but for] the errors of counsel, the proceedings would have been different."
  - d. "By Applicant's mental illness or a fundamental misunderstanding of the attorney's role, the attorney fail[ed] to request a continuance [which] constituted deficient performance."
  - e. "Counsel's failure to request continuance prejudiced Applicant."
2. Involuntary Guilty Plea
  - a. "Second offense when I was pleading to one DUI and the solicitor was charging me again."



On July 11, 2018, Applicant's counsel filed amendments to his PCR application, adding the following allegations:

1. As to representation rendered by J. Rhodes Bailey, Esquire:
  - a. Counsel was ineffective for failing to properly investigate the facts and circumstances surrounding the allegations against Applicant, thus rendering Applicant's plea unknowingly and involuntarily entered into.
  - b. Counsel was ineffective for failing to properly investigate the injuries to the alleged victims in order to properly assess whether Applicant was properly charged.
  - c. Counsel was ineffective for failing to properly investigate the testing conducted of Applicant's blood and the facts and circumstances surrounding its taking.
  - d. Counsel was ineffective for failing to object to the Richland County Solicitor's Office prosecuting Applicant's case while Applicant was a victim in a crime being prosecuted by the same office.
  - e. Counsel was ineffective for failing to object to an improper recitation of Applicant's prior record during the sentencing portion of Applicant's plea.

At the evidentiary hearing, PCR counsel for Applicant proceeded on Applicant's allegations in his original application for post-conviction relief and counsel's amended allegations.

#### **SUMMARY OF RELEVANT TESTIMONY**

##### ***APPLICANT'S TESTIMONY***

On direct examination, Applicant testified that he was involved in a shooting where he was wounded in both legs around the time of the auto accident. Applicant testified that he was in contact with Assistant Solicitor Nicole Simpson<sup>2</sup> and a victim advocate from the Fifth Circuit Solicitor's Office regarding the case against Mr. Robert Gray, who shot Applicant. Applicant

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<sup>2</sup> Ms. Simpson was prosecuting Robert Gray's case and was not involved with Applicant's case.



testified that Mr. Gray's charges were pending when the vehicle accident occurred. Applicant testified that he was taken to the hospital after the wreck. Applicant testified that he was appointed counsel six to nine months after being arrested.

Applicant testified that Plea Counsel asked him to come to his office six to seven months after the accident. Applicant testified that he and Plea Counsel discussed that he was a victim of a crime the Solicitor's Office was prosecuting. Applicant testified that because he helped in the case against Mr. Gray, he felt like it would help him out on his felony DUI charges. Applicant testified that he thought this because of his conversations with the Solicitor. Applicant testified that Plea Counsel explained to him that he had one DUI charge, and the Solicitor wanted him to plead to the one DUI charge. Applicant testified that Plea Counsel never discussed the potential penalties of the DUI charge, and if he pleaded guilty to the one DUI, he would not be charged with the second DUI. Applicant testified that Plea Counsel never discussed the evidence against him in this case in full detail.

Applicant testified that Plea Counsel never discussed the elements in full detail of felony DUI with great bodily injury. Applicant testified that Plea Counsel asked if he was read his constitutional rights at the hospital, and he replied that the police did not read him his constitutional rights. Applicant testified Plea Counsel never discussed the hospital blood draw and subsequent testing. Applicant then testified that Plea Counsel told him that if he did not plead guilty to the one DUI, the Solicitor would bring the second DUI charge against him. Applicant testified that Plea Counsel never went into full detail of his blood-alcohol level investigation.

Applicant testified that he did not want to plead guilty because he did not fully understand what would happen with the charges. Applicant further provided that if there was a domestic violence charge, he was concerned they would have the judge thinking he was a bad person.



Applicant testified that he did not know whether it was a first-, second-, or third-degree domestic violence charge, and he did not know whether they were dropping it.

Applicant testified about the plea transcript issues that resulted in incorrect transcribing in the first plea transcript. Applicant testified that because there was a narcotics charge in the first transcript, this charge was already in the judge's mind and misleading. Applicant testified that the first transcript was inaccurate, but the second transcript was correct. Applicant testified that Plea Counsel told him and his wife since he helped the Solicitor, things should be in his favor, and the Solicitor should help him out. Applicant testified that he would not have pled and gone to trial if he knew he would get twelve years. Applicant testified that he was facing only three more years at trial than the twelve he got from pleading guilty.

Applicant testified that Plea Counsel did not discuss the circumstances surrounding how his blood was taken at the hospital. Applicant testified that Plea Counsel did not discuss the injuries that the victims sustained in the accident until the plea hearing. Applicant testified, again, that he really thought that the Solicitor's Office would help him out because he was a victim in an unrelated case. PCR Counsel asked Applicant if Plea Counsel ever said it was okay for the Solicitor's Office to represent him as a victim and prosecute him as a defendant, to which he replied he could not recall.

Applicant further provided that the plea court should have considered the whole mental evaluation because he was diagnosed with posttraumatic syndrome in 1996. Applicant testified that he was still under trauma and distress from being shot six months prior to the automobile accident. Applicant testified that he was kind of really messed up at the time of the trial.

On cross-examination, Applicant testified that Plea Counsel did not really discuss the elements of his charges, what the State would have to prove, and what evidence they had against



him. Applicant testified that Plea Counsel did not discuss in detail the blood test results and how that would affect the judgment in his case. Applicant testified that he could not recall if Plea Counsel discussed his blood test results. Applicant testified that Plea Counsel told him there were two witnesses against him, the ones involved, but did not discuss how long they were in the hospital or what injuries they sustained. Applicant testified that he asked Plea Counsel about the victims' injuries because the Solicitor's Office indicated they would add a second felony DUI charge.

Applicant testified that he felt like he was being forced to plead guilty to the one felony DUI charge because they had the other charge over his head, saying that if he did not plead guilty, they would add the second charge. Applicant testified that he did not know how many people were injured in the accident. Applicant testified that he was under the impression that he would get three to five years, and that is what Plea Counsel discussed with him.

Applicant testified that the plea transcript reflected that he went in front of Judge Clifton Newman for a plea, and the judge asked him questions about his case and the representation of Plea Counsel. Applicant agreed that Judge Newman told him that the sentencing range for his charges was anywhere from thirty days to fifteen years imprisonment. Applicant agreed that he told Judge Newman he understood the sentencing range. Applicant testified that he really did not understand the plea judge's question about whether he had been promised anything to enter the guilty plea. Applicant then added, again, Plea Counsel told him that he would only get three to five years. Applicant testified that he never informed Judge Newman of his expectation to get only three to five years.

Applicant testified that he did not answer some questions because he did not fully understand. Applicant testified that he tried to explain himself to the judge and apologize because



he did not plan to do it – it just happened. Applicant testified that at that time, he was still in trauma because of his gunshot wounds. Applicant testified that he wrote a letter for the court in the Gray case but did not testify at court on that case. Applicant testified that the State did drop the domestic violence charge for his guilty plea, but the judge was misled because he did not know the degree of the domestic violence charge.

***JOSHUA GOLSON'S TESTIMONY***

On direct examination, Joshua Golson (Golson) testified that he worked for the Richland County Solicitor's Office and was the prosecutor in Applicant's felony DUI case. Golson testified that he was not aware that Applicant was a victim of a crime when he was prosecuted. Golson testified that he found out about the gunshot case at the end. Golson testified that he did not recall ever speaking with Nicole Simpson about the Robert Gray case.

***PLEA COUNSEL J. RHODES BAILEY'S TESTIMONY***

On direct examination, J. Rhodes Bailey (Plea Counsel) testified that Applicant's case was transferred from Adam Ruffin to him in November 2015. Plea Counsel testified that by the time he first met Applicant, which was November 17, 2015, the Robert Gray case was not pending anymore. Plea Counsel provided a timeline as follows: (1) On November 7, 2014, Applicant was shot and a victim in a case involving a Defendant named Robert Gray, who was an older gentleman in a wheelchair who had gotten in a fight with him; (2) Approximately five months later, April 25, 2015, was the felony DUI accident that Applicant was involved in that a public defender was appointed; (3) On September 16, 2015, about a few months after that, Mr. Gray, the man in the wheelchair that was the Defendant, was sentenced to 15 years suspended on three years' probation. Mr. Gray's charge was pulled down to an ABHAN from attempted murder; and (4) Plea Counsel



met Applicant in November of 2015, so Mr. Gray's case was disposed of before Plea Counsel met Applicant.

Plea Counsel testified that he and Applicant discussed being a victim in the Gray case. Plea Counsel testified that Applicant would say he is the victim in this other case, so the Solicitor should give him a break on his charges because he is a cooperating witness against the man that shot him. Plea Counsel testified that Applicant would say the Solicitor needs to dismiss his charges or give him a better deal. Plea Counsel testified that he tried to talk to he attempted to reach out to Nicole Simpson to discuss the potential conflict with her office, but she never returned his calls. Plea Counsel testified that Applicant told him that Ms. Simpson would make sure he got a better deal in his DUI case because he helped in the Gray case. Plea Counsel testified that it did not seem logical that Applicant was cooperating in an unrelated case where he would get immunity from prosecution in another case just because he was the victim in the unrelated case.

Plea Counsel testified that the conflict if there was any, was over when he started representing Applicant because Mr. Gray was sentenced months before he came to represent Applicant. Plea Counsel testified that Applicant was always thinking that he was entitled to a better deal in his case because he had been a victim. Plea Counsel testified that he may have casually brought up Applicant wanted a lighter sentence because he was a victim with Mr. Golson, but he was not sure.

Plea Counsel testified that he did the typical investigation in a case like this and reviewed the discovery and the blood draw. Plea Counsel testified that he looked into the law regarding blood draws in felony DUI cases. Plea Counsel testified that if he had seen anything procedurally improper in the blood draw, he would have fixated on it, challenged it, and made it the brunt of his case. However, Plea Counsel testified that everything checked out legally, so he moved into



mitigation. Plea Counsel testified that he did not remember if he had medical records regarding the blood draw. Plea Counsel testified that he requested Applicant turn over his medical records to him multiple times, but Applicant would never give him those records. Plea Counsel said he finally got consent signed by Applicant, but Plea Counsel had real problems getting Applicant to help him get medical records.

Plea Counsel testified that he attempted to discuss the victims' injuries, but Applicant would frequently change the subject to something else. Plea Counsel testified that every time he met with Applicant, he would try to talk about the case, and Applicant was not interested in the facts. Plea Counsel testified that Applicant was interested in the fact that he thought the Solicitor's Office should be treating him better. Plea Counsel testified that Applicant would say, oh, you know, I'm really injured, so they can't put me in prison. Plea Counsel testified that most meetings with Applicant involved Applicant telling Plea Counsel more about Applicant's injuries. Plea Counsel testified that sometimes Applicant was in a good mood and others Applicant would start screaming at him and leaving and trying to fire him, which happened about half a dozen times.

Plea Counsel testified that the prosecutor wanted to call Applicant for a third appearance and plead or put the case on the trial docket. Plea Counsel testified that Applicant sometimes said he wanted to plead guilty, sometimes he didn't. Plea Counsel testified that one day the prosecutor said, all right, he's got to plead guilty, or I'm going to directly present another felony DUI charge to the grand jury. Plea Counsel testified that Applicant still did not want to plead guilty. Plea Counsel testified that the case was called for pleas in August of 2016, and the judge might be open to a sentence that would be pretty favorable to Applicant. Plea Counsel testified that Applicant did not want to plead guilty. Plea Counsel testified that he informed Applicant that the prosecutor threatened to add another charge and try him on both charges.



Plea Counsel testified that it was difficult to prepare for trial because Applicant would say he would hire somebody else and he would not talk to him. Plea Counsel testified that Applicant would call him and be pleasant after a few weeks, then he might start yelling at him and hanging up again. Plea Counsel testified that even though Applicant was not cooperating, he still prepared for trial, and then Applicant was arrested for domestic violence. Plea Counsel testified that there was not much he could do to prepare for trial, and Applicant just wanted assurance he would not go to prison. Plea Counsel testified that Applicant would tell him he has these problems and the judge should not send him to prison. Plea Counsel testified that he documented tirelessly that Applicant was not very helpful in attaining his medical records.

Plea Counsel testified that if Applicant asked him for any discovery, he would give it to him. Plea Counsel testified that the pill discrepancy in the blood draw did not really matter because he was over the limit, and the pills would not be relevant. Plea Counsel testified that once Applicant was arrested for the criminal domestic violence of a high and aggravated nature (CDVHAN), Applicant just wanted to get into court. At that point, Plea Counsel testified that the prosecutor decided to drop the CDVHAN in exchange for his plea to the felony DUI charges.

On cross-examination, Plea Counsel testified that the driver of the vehicle Applicant hit had a broken hip, multiple broken ribs, lost several teeth, and multiple lacerations on his body. Plea Counsel testified that the passenger in the vehicle Applicant hit had compound fractures in both of her wrists that required surgeries to implant metal rods in her wrists and her hands. Plea Counsel testified that the victims sustained serious injuries, and he was surprised that law enforcement did not charge him with two felony DUIs because they usually hit a person with as many as they can when they arrest them. Plea Counsel testified that he did not remember if he had the victim's medical records when he first met with Applicant.



Plea Counsel testified that Applicant never asserted that he was not under the influence at the time of the crash. Plea Counsel testified that in his twelve years of experience as a trial lawyer, the blood draw was procedurally clean. Plea Counsel testified that this case turned into a mitigation case, meaning he needed to make Applicant look as favorable as possible to receive a lighter sentence. Plea Counsel testified that Applicant never really said he wanted to go to trial or to plead, but when he was charged with CDVHAN, he became fixated on pleading and having that charge dropped. Plea Counsel testified that he explained to Applicant that the CDVHAN was a zero to twenty-year felony, and it was a big deal for them to drop it. Plea Counsel testified that they would be fighting a two-front war on the CDVHAN and felony DUI charges.

Plea Counsel testified that, on the day of the plea, Applicant chose to plead guilty and that no one could have made him do it. Plea Counsel testified that he was not concerned that Applicant was pleading guilty voluntarily. Plea Counsel testified that his concern was how Applicant would act in front of the judge and how he would act towards the victims. Plea Counsel testified that his concerns were based on the witness accounts of Applicant's demeanor at the accident scene. Plea Counsel testified that he had Applicant's wife there to provide mitigation.

On redirect examination, Plea Counsel testified that Applicant never specifically said he wanted to go to trial; rather, he wanted a better deal. Plea Counsel testified that Applicant did specifically say he did not want to plead at some point, so he requested Applicant meet with him to prepare for trial, and Applicant fired Plea Counsel.

***NICOLE SIMPSON'S TESTIMONY<sup>3</sup>***

On direct examination, Nicole Simpson (Simpson) testified that she did not recall the Robert Gray case. Simpson testified that she did not recall having conversations with Applicant,

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<sup>3</sup> Nicole Simpson was a former Assistant Solicitor at the Fifth Circuit Solicitor's Office.



who was a victim in a case that she prosecuted. Simpson testified that because she is no longer at the Solicitor's Office, she did not have a physical file or notes regarding any conversations that may have been had by herself or the victim advocate. Simpson testified that the victim advocate would have been the primary person, probably reaching out to Applicant during that time. Simpson testified that the Solicitor's Office has an individual whose job is to interact with victims of crimes, but she interacted with victims too.

Simpson testified that she had no recollection of interacting with Applicant. Simpson testified that she did not recall interacting with Mr. Robert Gray. Simpson testified that she had no recollection of the relationship between Mr. Gray and Mr. Green outside of the fact that Mr. Green was a victim of a crime. Simpson testified that she would absolutely not give anyone some sort of idea that they would receive favorable treatment from the Solicitor's Office because they were a victim of a separate crime. Simpson testified that the Solicitor's Office would have protocols in place where a person is a victim in one crime and the defendant in a separate crime.

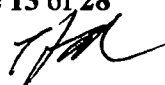
Simpson testified that she did not recall speaking to Joshua Golson about Applicant's case.

On cross-examination, Simpson testified that if there was an actual conflict in a case, there was a protocol in place to handle the situation, but it would depend on the situation. Simpson testified that her responsibility as a prosecutor to the victim was to make sure that she complied with the victim's bill of rights, which, of course, they had victim's advocates in the office.

On redirect examination, Simpson testified that if there had been any conflict, that conflict was cured when Applicant's case happened because Mr. Gray's case had already concluded.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

This Court has reviewed the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court further had the opportunity to observe the witnesses at the



evidentiary hearing and evaluate their credibility, and the Court has weighed their testimony accordingly in its discussion below. This Court finds the combined record of the trial transcript, and the testimony and evidence presented at the evidentiary hearing establishes Applicant received effective assistance of counsel. Accordingly, this Court denies relief and dismisses this application with prejudice. Set forth below are the relevant findings of facts and conclusions of law as required by § 17-27-80 of the South Carolina Code.

*INEFFECTIVE ASSISTANCE OF PLEA COUNSEL*

Applicant's allegations of ineffective assistance of counsel are without merit. In a PCR action, Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814.

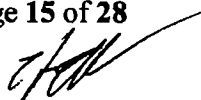
In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland. First, Applicant must prove that counsel's performance was deficient. Strickland, 466 U.S. at 686; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Applicant must so prove his factual allegations by a preponderance of the evidence. Rule 71.1(e), SCRPC. The first prong—constitutional deficiency—is "necessarily linked to the practice and expectations of the legal community." Padilla v. Kentucky, 559 U.S. 356, 366 (2010). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided



representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814.

"Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). "When counsel focuses on some issues to the exclusion of others, there is a strong presumption that he [or she] did so for tactical reasons rather than through sheer neglect." Yarborough v. Gentry, 540 U.S. 1, 5 (2003) (citing Strickland, 466 U.S. at 690). The Court, in determining deficiency, must affirmatively entertain the range of possible reasons counsel may have had for proceeding as they did. Cullen v. Pinholster, 563 U.S. 170, 196 (2011); Harrington v. Richter, 562 U.S. 86, 109-10 (2011). "[E]ven if an omission is inadvertent, relief is not automatic. The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." Yarborough, 540 U.S. at 6; see also Murphy v. Davis, 901 F.3d 578, 592 (5th Cir. 2018) ("[C]ounsel's performance need not be optimal to be reasonable."). 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 Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. "This does not require a showing that counsel's actions' more likely than not altered the outcome,' but the difference between Strickland's prejudice standard and a more-probable-than-not standard is slight and matters' only in the rarest case." Harrington, 562 U.S. at 111-12 (quoting Strickland, 466 U.S. at 697). "The likelihood of a different result must be substantial, not just conceivable." Id. at 112. "The prejudice analysis requires the court deciding the ineffectiveness claim to consider the totality of the evidence before the judge or jury." United States v. Basham, 789 F.3d 358, 371-72 (4th Cir.



2015) (quoting Elmore v. Ozmint, 661 F.3d 783, 858 (4th Cir. 2011)).

Because the Sixth Amendment right to counsel also applies to a defendant entering a guilty plea, Hill v. Lockhart extended the two-part Strickland test to challenge guilty pleas based on ineffective assistance of counsel." Hill, 474 U.S. 52; cf. Padilla, 559 U.S. at 373 (recognizing the guilty plea process is a "critical phase of litigation" for purposes of the Sixth Amendment right to effective assistance of counsel). A claim of ineffective assistance of guilty plea counsel requires the applicant present evidence satisfying two prongs: first, evidence that counsel's performance was deficient; and second, evidence that counsel's deficient performance prejudiced the defendant by causing him to plead guilty rather than go to trial. Hill, 474 U.S. 52.

The analysis of counsel's performance under the first prong of Strickland remains unchanged—the applicant must show counsel's representation fell below the objective standard of reasonableness demanded of attorneys in criminal cases. Hill, 474 U.S. at 58–59; accord Thompson v. State, 340 S.C. 112, 115, 531 S.E.2d 294, 296 (2000). An applicant alleging his plea was induced by ineffective assistance of counsel must prove counsel's advice to plead guilty was not "within the competence demanded of attorneys in criminal cases." Hill, 474 U.S. at 56.

The second, or "prejudice" prong, however, "focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process." Id. at 58–59. Specifically, when an applicant claims counsel's deficient performance caused him to accept a plea, the applicant "must show that there is a reasonable probability that, but for [plea] counsel's [alleged] errors, he would not have pleaded guilty and would have insisted on going to trial." Id. at 59. This inquiry "focuses on a defendant's decision making" and does not turn on the outcome of a defendant's actual criminal proceeding or potential outcome had a defendant chosen to proceed to trial. Lee v. United States, 582 U.S. \_\_\_, 137 S. Ct. 1958, 1966 (2017). However, an applicant must convince



the court that a decision to reject the plea bargain would have been rational under the circumstances. Padilla, 559 U.S. at 372. The question here is whether the applicant, if correctly informed of circumstances surrounding the plea, would have pleaded guilty—not whether counsel would have still advised him or her to plead guilty. Turner v. State, 335 S.C. 382, 385, 517 S.E.2d 442, 444 (1999).

Surmounting the high bar of Strickland is never an easy task, and the strong societal interest in finality has "special force with respect to convictions based on guilty pleas." Lee, 582 U.S. \_\_\_, 137 S. Ct. at 1967 (internal citations and quotation marks omitted); cf. Hill, 474 U.S. at 58 ("[R]equiring a 'prejudice' showing from defendants who seek to challenge the validity of their guilty pleas on the ground of ineffective assistance of counsel 'will serve the fundamental interest in the finality of guilty pleas.'"). Reviewing "[c]ourts should not upset a plea solely because of post hoc assertions from a defendant about how he would have pleaded but for his attorney's deficiencies. Lee, 582 U.S. \_\_\_, 137 S. Ct. at 1967. Rather, judges should "look to contemporaneous evidence to substantiate a defendant's expressed preferences. Id. In determining whether a guilty plea was taken in accordance with constitutional standards, the reviewing judge must analyze and consider the entire record, including the transcript of the plea and the evidence presented at the PCR hearing. Harris, 282 S.C. at 134, 318 S.E.2d at 361.

The performance and prejudice standards, however, "do not establish mechanical rules; [t]he ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." Id. at 696. Moreover, "there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one." Id. at 697. The court "need not determine whether counsel's performance was deficient before examining the prejudice



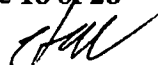
suffered by the defendant as a result of the alleged deficiencies. Id. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, the court may evaluate the prejudice prong only. Id.

This Court finds Applicant cannot meet his burden as to his claims of ineffective assistance of trial counsel. The specific claim is addressed below:

#### **Involuntary Guilty Plea**

Applicant alleges his plea was unknowingly and involuntarily entered into as a result of Counsel's ineffective assistance. Specifically, Applicant asserts Counsel failed to properly investigate the facts and circumstances surrounding the allegations against Applicant, thus rendering Applicant's plea unknowingly and involuntarily entered into. This Court disagrees and finds the combined record from the plea hearing and the PCR hearing establishes Applicant freely, knowingly, and voluntarily pleaded guilty.

In the context of a guilty plea, 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). Applicant's right to contest the validity of a plea is usually, but not invariably, foreclosed because of the inherent solemnity and truthfulness included in the guilty plea process. 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 previous judicial admissions made at the plea hearing, 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.

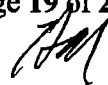


United States, 519 F.2d 347, 350 (4th Cir. 1975)).

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).

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).

At his evidentiary hearing, on direct examination, Applicant testified that Plea Counsel never discussed the potential penalties of the DUI charge. Applicant testified that Plea Counsel never discussed the evidence against him in this case in full detail. Applicant testified that Plea Counsel never discussed the elements in full detail of felony DUI with great bodily injury. Applicant testified that he did not want to plead guilty because he did not fully understand what would happen with the charges.



On cross-examination, Applicant testified that Plea Counsel did not really discuss the elements of his charges, what the State would have to prove, and what evidence they had against him. Applicant testified that the plea transcript reflected that he went in front of Judge Clifton Newman for a plea, and the judge asked him questions about his case and the representation of Plea Counsel. Applicant agreed that Judge Newman told him that the sentencing range for his charges was anywhere from thirty days to fifteen years imprisonment. Applicant agreed that he told Judge Newman he understood the sentencing range. Applicant testified that he really did not understand the plea judge's question about whether he had been promised anything to enter the guilty plea. Applicant then added, again, Plea Counsel told him that he would only get three to five years. Applicant testified that he never informed Judge Newman of his expectation to get only three to five years.

Applicant testified that he did not answer some questions because he did not fully understand. Applicant testified that he tried to explain himself to the judge and apologize because he did not plan to do it – it just happened. Applicant testified that at that time, he was still in trauma because of his gunshot wounds.

On direct examination, Plea Counsel testified that he did the typical investigation in a case like this and reviewed the discovery and the blood draw. Plea Counsel testified that he looked into the law regarding blood draws in felony DUI cases. Plea Counsel testified that if he had seen anything procedurally improper in the blood draw, he would have fixated on it, challenged it, and made it the brunt of his case. However, Plea Counsel testified that everything checked out legally, so he moved into mitigation. Plea Counsel testified that he did not remember if he had medical records regarding the blood draw. Plea Counsel testified that he requested Applicant turn over his medical records to him multiple times, but Applicant would never give him those records. Plea

Counsel said he finally got consent signed by Applicant, but Plea Counsel had real problems getting Applicant to help him get medical records.

Plea Counsel testified that Applicant was interested in the fact that he thought the Solicitor's Office should be treating him better. Plea Counsel testified that Applicant would say, "'oh, you know, I'm really injured, so they can't put me in prison.'" Plea Counsel testified that most meetings with Applicant involved Applicant telling Plea Counsel more about Applicant's injuries. Plea Counsel testified that sometimes Applicant was in a good mood and others Applicant would start screaming at him and leaving and trying to fire him, which happened about half a dozen times.

Plea Counsel testified that Applicant sometimes said he wanted to plead guilty, sometimes he didn't. Plea Counsel testified that the prosecutor informed him that Applicant either had to plead or he was going to directly present another felony DUI charge to the grand jury. Plea Counsel testified that Applicant still did not want to plead guilty. Plea Counsel testified that the case was called for pleas in August of 2016, and the judge might be open to a sentence that would be pretty favorable to Applicant. Plea Counsel testified that Applicant did not want to plead guilty. Plea Counsel testified that he informed Applicant that the prosecutor threatened to add another charge and then try him on both charges.

Plea Counsel testified that this case turned into a mitigation case, meaning he needed to make Applicant look as favorable as possible to receive a lighter sentence. Plea Counsel testified that Applicant never really said he wanted to go to trial or to plead, but when he was charged with CDVHAN, he became fixated on pleading and having that charge dropped. Plea Counsel testified that he explained to Applicant that the CDVHAN was a zero-to-twenty-year felony, and it was a big deal for them to drop it. Plea Counsel testified that they would be fighting a two-front war on the CDVHAN and felony DUI charges.



Plea Counsel testified that, on the day of the plea, Applicant chose to plead guilty and that no one could have made him do it. Plea Counsel testified that he was not concerned that Applicant was pleading guilty voluntarily. Plea Counsel testified that his concern was how Applicant would act in front of the judge and how he would act towards the victims. Plea Counsel testified that his concerns were based on the witness accounts of Applicant's demeanor at the accident scene. Plea Counsel testified that he had Applicant's wife there to provide mitigation.

On redirect examination, Plea Counsel testified that Applicant never specifically said he wanted to go to trial; rather, he wanted a better deal. Plea Counsel testified that Applicant did specifically say he did not want to plead at some point, so he requested Applicant meet with him to prepare for trial, and Applicant fired Plea Counsel.

This Court finds Applicant has failed to establish how his plea was not freely and voluntarily entered. During Applicant's guilty plea, Applicant's competency evaluation was read into the record, and Applicant was found to be competent to proceed with his guilty plea. (Plea Tr. pp. 4, l. 17 – 6, l. 2). Applicant was informed of his constitutional right to a jury trial. (Plea Tr. p. 4, ll. 5 – 7; p. 6, ll. 16 – 18). Applicant affirmed he was there to plead guilty to two counts of felony driving under the influence resulting in great bodily harm. (Plea Tr. pp. 3, l. 24 – 4, l. 2). Applicant stated he was guilty of those charges. (Plea Tr. p. 4, ll. 3 – 4). Applicant stated he understood the penalties he was facing with those charges. (Plea Tr. p. 6, ll. 3 – 12). Applicant stated no one had promised him anything to plead, and he waived his right to a jury trial. (Plea Tr. p. 6, ll. 13 – 18).

Applicant provided that he was under the influence of alcohol and Oxycontin at the time of the accident. (Plea Tr. p. 8, ll. 11 – 12; p. 9, ll. 4 - 6). Applicant stated he was taking more pills that he was prescribed to take at the time of the accident. (Plea Tr. p. 8, ll. 13 – 24). Applicant



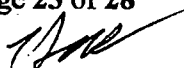
stated that he believed he was guilty of the crime of felony DUI. (Plea Tr. p. 9, ll. 15 – 17). Applicant agreed with the Solicitor's recitation of the facts and affirmed that those facts were true. (Plea Tr. pp. 9, l. 24 – 12, l. 3).

The record clearly shows that Applicant's plea was made voluntarily, and the testimony shows that Applicant decided to plead guilty after a thorough review of the case. Applicant has failed to show that, but for Plea Counsel's performance he would have proceeded to trial. Further, Applicant has failed to show that he was unaware of the charges he was pleading guilty to, the evidence the State was prepared to use against him at trial, or the possible penalties Applicant could receive if he went to trial or if he pleaded guilty. Therefore, Applicant has failed to show that his guilty plea was not freely, voluntarily, or intelligently entered. As such, this allegation must be **denied and dismissed with prejudice.**

#### **Failure to Investigate**

Applicant alleges Plea Counsel failed to properly investigate the facts and circumstances surrounding the allegations against Applicant. Specifically, Plea Counsel failed to: (1) properly investigate the injuries to the alleged victims in order to properly assess whether Applicant was properly charged; and (2) failed to properly investigate the testing conducted of Applicant's blood and the facts and circumstances surrounding its taking. This Court finds these allegations are without merit.

On direct examination, Applicant testified that Plea Counsel never discussed the elements in full detail of felony DUI with great bodily injury. Applicant testified that Plea Counsel asked if he was read his constitutional rights at the hospital, and he replied that the police did not read him his constitutional rights. Applicant testified Plea Counsel never discussed the hospital blood draw and subsequent testing. Applicant testified that Plea Counsel never went into full detail of



his blood-alcohol level investigation. Applicant testified that Plea Counsel did not discuss the circumstances surrounding how his blood was taken at the hospital. Applicant testified that Plea Counsel did not discuss the injuries that the victims sustained in the accident until the plea hearing.

On cross-examination, Applicant testified that Plea Counsel did not discuss in detail the blood test results and how that would affect the judgment in his case. Applicant testified that he could not recall if Plea Counsel discussed his blood test results. Applicant testified that Plea Counsel told him there were two witnesses against him, the ones involved, but did not discuss how long they were in the hospital or what injuries they sustained. Applicant testified that he asked Plea Counsel about the victims' injuries because the Solicitor's Office indicated they would add a second felony DUI charge. Applicant testified that he did not know how many people were injured in the accident.

On direct examination, Plea Counsel testified that he did the typical investigation in a case like this and reviewed the discovery and the blood draw. Plea Counsel testified that he investigated the law regarding blood draws in felony DUI cases. Plea Counsel testified that if he had seen anything procedurally improper in the blood draw, he would have fixated on it, challenged it, and made it the brunt of his case. However, Plea Counsel testified that everything checked out legally, so he moved into mitigation. Plea Counsel testified that he did not remember if he had medical records regarding the blood draw. Plea Counsel testified that he requested Applicant turn over his medical records to him multiple times, but Applicant would never give him those records. Plea Counsel said he finally got a medical records consent signed by Applicant, but Plea Counsel had genuine issues with Applicant not providing information to help him get medical records.

Plea Counsel testified that he attempted to discuss the victims' injuries, but Applicant would frequently change the subject to something else. Plea Counsel testified that every time he

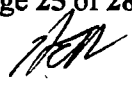


met with Applicant, he would try to talk about the case, and Applicant was not interested in the facts. Plea Counsel testified that Applicant was interested in the fact that he thought the Solicitor's Office should be treating him better. Plea Counsel testified that most meetings with Applicant involved Applicant telling Plea Counsel more about Applicant's injuries. Plea Counsel testified that he documented tirelessly that Applicant was not very helpful in attaining his medical records. Plea Counsel testified that the pill discrepancy in the blood draw did not really matter because he was over the limit, and the pills would not be relevant.

On cross-examination, Plea Counsel testified that he did not remember if he had the victim's medical records when he first met with Applicant. Plea Counsel testified that Applicant never asserted that he was not under the influence at the time of the crash. Plea Counsel testified that in his twelve years of experience as a trial lawyer, the blood draw was procedurally clean.

This Court finds Applicant failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007) (citing Strickland, 466 U.S. 668). "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). "[W]hile the scope of a reasonable investigation depends upon a number of issues, at a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case." Ard, 372 S.C. at 331–32, 642 S.E.2d at 597 (internal quotation marks omitted) (emphasis omitted).

However, our Supreme Court has cautioned reviewing courts not to lose sight of the



reasonableness standard regarding counsel's duty to investigate. See id. at 331, 642 S.E.2d at 597 ("Without a doubt, [a] criminal defense attorney has a duty to investigate, but this duty is limited to reasonable investigation."). "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." Strickland, 466 U.S. at 690–91; see id. ("In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary."). Thus, in applying the Strickland standard to a claim of failure to investigate, counsel's decision not to undertake a particular investigation must be evaluated with heavy deference to counsel's judgment. Bagwell v. State, 410 S.C. 259, 265, 763 S.E.2d 630, 63 (Ct. App. 2014).

To prevail on a claim of ineffective assistance based on failure to investigate or prepare for trial, a PCR applicant must ordinarily present some evidence "that would have affected counsel's advice to [him] to accept the plea bargain offered or that would have caused [him] to decline to accept it." Stalk v. State, 383 S.C. 559, 563, 681 S.E.2d 592, 594 (2009); see Jackson v. State, 329 S.C. 345, 353–54, 495 S.E.2d 768, 772 (1998) (reversing the PCR court's grant of relief where the applicant failed to "present any evidence of what counsel could have discovered or what other defenses he would have requested counsel pursue had counsel more fully prepared for the trial").

Applicant has not presented any evidence that would suggest Plea Counsel could have further prepared for Applicant's case. Plea Counsel discussed the discovery with Applicant prior to Applicant's plea hearing. Plea Counsel discussed all possible issues with Applicant, including the CDVHAN and the potential impact it would have on his case. Applicant has failed to present any evidence that Plea Counsel did not investigate, nor has Applicant presented any information



or rights that Plea Counsel failed to discuss with Applicant. As Applicant has failed to present any additional information or evidence that Plea Counsel could have discovered if he were to have prepared further, this Court finds Applicant has failed to show how Plea Counsel's performance was deficient, or how Applicant was prejudiced by Plea Counsel's performance. Therefore, this allegation is **denied and dismissed with prejudice.**

#### CONCLUSION

Based on all the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant relief. The Court finds Plea Counsel's representation was neither deficient nor prejudicial. Therefore, this application for post-conviction relief **must be denied and dismissed with prejudice.**


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



**IT IS THEREFORE ORDERED:**

1. Post-conviction relief is denied and the application for post-conviction relief be dismissed with prejudice; and
2. Applicant be remanded to the custody of the State.

AND IT IS SO ORDERED this 1<sup>st</sup> day of June, 2022.

  
ROGER E. HENDERSON  
Presiding Judge  
Fifth Judicial Circuit

**RECEIVED**

**JUN 27 2022**

**S.C. SUPREME COURT**