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| STATE OF SOUTH CAROLINA<br>COUNTY OF GREENVILLE | ) | IN THE COURT OF COMMON PLEAS<br>FOR THE THIRTEENTH JUDICIAL CIRCUIT |
| Jaqwan L. Martin, SCDC #377480,<br><br>Applicant,<br><br>v.<br><br>State of South Carolina,<br><br>Respondent. | ) | Case No. 2019-CP-23-4598<br><br>**ORDER OF DISMISSAL** |

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## I. INTRODUCTION

This matter comes before the Court by way of a post-conviction relief (PCR) action commenced by Jaqwan L. Martin (Applicant) on August 8, 2019, alleging he is entitled to post-conviction relief based on constitutionally ineffective assistance of counsel and involuntary guilty plea. The State requested an evidentiary hearing through its return on January 29, 2020. A hearing into the matter convened before the undersigned on January 27, 2022, via Cisco WebEx Meetings. Applicant was present at the hearing and represented by Richard H. Warder. Assistant Attorney General Lillian L. Meadows represented the State. Applicant testified on his own behalf at the hearing, as did his plea counsel, G. David Seay, Jr. In addition to the pleadings in this action, this Court had before it a copy of the Greenville County Clerk of Court records regarding the subject conviction; Applicant's records from the South Carolina Department of Corrections; the plea transcript; and the records of the current PCR action.

Following a thorough review of the record in its entirety, along with the testimony and evidence presented at the evidentiary hearing, this Court finds Applicant has failed to establish



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any constitutional violations or deprivations entitling him to post-conviction relief. For the reasons discussed below, this Court denies relief and dismisses this action with prejudice.

## II. FACTS & PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Greenville County Clerk of Court. Applicant was arrested on December 6, 2017, after law enforcement seized 110.68 grams of methamphetamine from his vehicle following a hand-to-hand transaction between Applicant and Mario McCalister, an individual who was under surveillance by the Greenville County Sheriff's Department as part of an ongoing investigation. During its March 2018 term, the Greenville County Grand Jury indicted Applicant for trafficking in between one hundred and two hundred grams of methamphetamine (2018-GS-23-1857).

On August 23, 2018, Applicant appeared before the Honorable Alex Kinlaw, Jr., and pleaded guilty to the lesser-included offense of trafficking in twenty-eight to one-hundred grams of methamphetamine, first offense. G. David Seay, Jr., (Counsel) represented Applicant and Assistant Solicitor E. Walker Miller of the Thirteenth Circuit Solicitor's Office prosecuted the case. Pursuant to negotiations entered into between Applicant and the State, Judge Kinlaw sentenced Applicant to ten years' imprisonment. Applicant did not appeal his plea or sentence.

## III. ISSUES BEFORE THIS COURT

At the start of the hearing before this Court, PCR counsel indicated Applicant would be proceeding on the following claims of ineffective assistance of counsel and involuntary guilty plea as set forth in his amended application (verbatim):

1. "Pressured into pleading guilty and didn't have time to discuss the plea with my attorney or family. I didn't understand the law, possible defenses and rights I was waiving or advantages

to going to trial and how burden of proof would work for me[.] [M]y attorney did not review or go over evidence against me."

2. "I was not made aware of the significance of the offense being a crime classified as a serious offense, or a no parole offense. I had no knowledge that I was being given as[*sic*] sentence that my good behavior in prison wouldn't have considered in calculating my release date. I never knew this sentence would be a no parole offense, no work release, and no superv[ised] furlough. I never would have plead if the court o[r] my attorney had advised me of these consequences of the guilty plea."[1]

## IV. STANDARD OF REVIEW

The Uniform Post-Conviction Procedure Act[2] (the Act) provides that any person who has been convicted of a crime may seek post-conviction relief based upon the following types of allegations:

1. That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;

2. That the court was without jurisdiction to impose sentence;

3. That the sentence exceeds the maximum authorized by law;

4. That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;

5. That his sentence has expired, his probation, parole or conditional release unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or

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[1] Upon confirmation that Applicant was proceeding forward on these allegations, the State moved to dismiss the claims that Applicant (1) was not advised of the significance of the crime's classification as a serious, no parole offense; (2) did not know good behavior in prison would not be considered in calculating his release date; (3) did not know he would not be eligible for work release or supervised furlough. Specifically, the State argued these allegations pertain to collateral consequences of Applicant's conviction and sentence that do not support a cognizable claim of ineffective assistance of counsel or involuntary guilty plea. In response, Applicant stated he was misinformed by his attorney that he would be able to participate in sentence-reducing programs at SCDC, which was a factor he considered in deciding whether to plead guilty. This Court denied the State's motion.

[2] S.C. Code Ann. §§ 17-27-10 to -160.

> 6. That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy[.]

S.C. Code Ann. § 17-27-20(A).

The Sixth and Fourteenth Amendments to the United States Constitution guarantee all criminal defendants the right to "assistance by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair." *Strickland v. Washington*, 466 U.S. 668, 685 (1984). Ordinarily, PCR allegations are centered upon an allegation that the applicant did not receive *effective* assistance of counsel guaranteed by the Sixth Amendment. The allegation of denial of such representation sets forth a *prima facie* violation of this constitutional right, and raises a question of fact that can only be determined by an evidentiary hearing. *Rogers v. State*, 261 S.C. 288, 291, 199 S.E.2d 761, 762 (1973).

The reviewing court applies the two-part test outlined in *Strickland* to determine whether counsel's conduct "was so ineffective as to require reversal" of the applicant's conviction. 466 U.S. at 687. To obtain relief, a PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness; *and* (2) there is a reasonable probability the outcome of the proceeding would have been different but for counsel's deficient performance. *Williams v. State*, 363 S.C. 341, 343, 611 S.E.2d 232, 233 (2005) (citing *Strickland*, 466 U.S. 668). Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. *Strickland*, 466 U.S. at 700; *see also Bell v. Cone*, 535 U.S. 685, 695 (2002) (explaining that "[w]ithout proof of both deficient performance and prejudice to the defense, . . . it could not be said that the sentence or conviction resulted from a breakdown in the

adversary process that rendered the result of the proceeding unreliable" (citation and internal quotation marks omitted)).

The applicant bears the heavy burden of establishing both prongs of the *Strickland* standard by a preponderance of the evidence. *Hughes v. State*, 346 S.C. 554, 558, 552 S.E.2d 315, 317 (2001); Rule 71.1(e), SCRCP. To prove deficient performance, the applicant must establish that, in light of all the circumstances, the acts or omissions complained of "fell below an objective standard of reasonableness" as measured by "prevailing professional norms." *Strickland*, 466 U.S. at 688. Reviewing courts should be deferential in this inquiry, and apply "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689. With respect to prejudice, the applicant must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A reasonable probability is a probability "sufficient to undermine confidence in the outcome." *Id.* When evaluating this probability, the reviewing court "should consider the specific impact counsel's error had on the outcome of the trial" coupled with "the strength of the State's case in light of . . . the [totality of the] evidence presented to the jury." *Smalls v. State*, 422 S.C. 174, 188, 810 S.E.2d 836, 843 (2018). Significantly, "the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." *Strickland*, 466 U.S. at 696.

Because of the difficulties inherent in making such an evaluation, the reviewing court must indulge in a "strong presumption that counsel's conduct falls within the wide range of reasonably professional assistance." *Butler v. State*, 286 S.C. 441, 445, 334 S.E.2d 813, 816 (1985). "The burden of rebutting this presumption 'rests squarely on the defendant,' and '[i]t should go without saying that the absence of evidence cannot overcome [i]t.' "*Dunn v. Reeves*,

594 U.S. ___, ___, 141 S. Ct. 2405, 2410 (2021) (alteration in original) (quoting *Burt v. Titlow*, 571 U.S. 12, 22–23 (2013)). In fact, "even if there is reason to think that counsel's conduct 'was far from exemplary,' a court still may not grant relief if '[t]he record does not reveal' that counsel took an approach that *no competent lawyer would have chosen.*" *Id.* (alteration in original) (emphasis added) (quoting *Titlow*, 571 U.S. at 23–24). Representation is constitutionally ineffective only if counsel's conduct "so undermined the proper functioning of the adversarial process" that the defendant was denied a fair proceeding. *Strickland*, 466 U.S. at 686; *see Nix v. Whiteside*, 475 U.S. 157, 175 (1986) (noting that under *Strickland*, the "benchmark" of the right to counsel is the "fairness of the adversary proceeding").

Because the Sixth Amendment right to counsel also applies to a defendant entering a guilty plea, *Hill v. Lockhart*, 474 U.S. 52 (1985) extended the two-part *Strickland* test to challenge guilty pleas based on ineffective assistance of counsel. *See Padilla v. Kentucky*, 559 U.S. 356, 373 (2010) (recognizing that the guilty plea process is a "critical phase of litigation" for purposes of the Sixth Amendment right to effective assistance of counsel). When reviewing a guilty plea, the analysis of counsel's performance under the first prong of *Strickland* remains unchanged—the applicant must show that counsel's representation fell below an 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 guilty 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 decisionmaking" 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, the 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. Judges must "look to contemporaneous evidence to substantiate a defendant's expressed preferences." *Lee*, 582 U.S. at ___, 137 S. Ct. at 1967. 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 guilty plea and the evidence presented at the PCR hearing. *Harres v. Leeke*, 282 S.C. 131, 134, 318 S.E.2d 360, 361 (1984).

Surmounting *Strickland*'s high bar 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. at ____, 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. at ____, 137 S. Ct. at 1967. 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).

## V. FINDINGS OF FACT & CONCLUSIONS OF LAW

Applicant makes a series of claims alleging his plea was involuntary as a result of ineffective assistance of counsel. *See Hill*, 474 U.S. at 56 (holding that where "a defendant is represented by counsel during the plea process and enters his plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel's advice 'was within the range of competence demanded of attorneys in criminal cases' " (quoting *McMann v. Richardson*, 397 U.S. 759, 771 (1970)). Specifically, Applicant contends counsel was constitutionally ineffective for pressuring him to plead guilty; failing to review the State's evidence and discovery materials with him; failing to adequately confer with him about various aspects involved in going to trial, including possible benefits and potential defenses; failing to ensure he understood the law, the State's burden of proof, and his constitutional rights; and for misadvising him regarding the sentencing consequences of pleading guilty to a "no parole" offense.

This Court has reviewed the testimony presented at the PCR hearing, observed the witnesses, passed upon their credibility, and weighed their testimony accordingly. After hearing the testimony presented and considering the legal arguments by counsel, as well as the record in this action incorporated by way of the State's return, this Court proceeds to the claims of ineffective assistance of counsel and involuntary guilty plea and finds each to be without merit. Pursuant to S.C. Code Ann. § 17-27-80, this Court makes the following findings of facts and conclusions of law based upon all of the probative evidence presented.

**1. Failing to review discovery with Applicant**

Regarding Applicant's claim that Counsel never reviewed the discovery with him, this Court finds Applicant failed to establish counsel provided constitutionally ineffective assistance under either prong of *Hill*. This Court finds credible and persuasive Counsel's demonstrated recollection of the evidence produced by the State and his explanations to Applicant about how each piece of evidence would be used at trial. Specifically, Counsel recalled receiving multiple videos and body camera footage from the officer who initiated the traffic stop as well as footage of the hand-to-hand transaction between Applicant and McCalister. Counsel further stated he watched these videos in his office with Applicant on multiple occasions and reviewed any additional paper discovery.

Applicant even admitted at the PCR hearing that Counsel watched the videos with him that were provided in discovery. Rather, Applicant complained about Counsel allegedly telling him that the "evidence had no weight" and that the videos were not helpful to his case because Applicant disagreed with Counsel's assessment. Applicant otherwise failed to identify precisely what Counsel did not explain or disclose to him from materials provided in discovery, or what, if anything, could have been achieved had Counsel spent more time with him in consultation regarding the contents of his discovery. *See Smith v. State*, 404 S.C. 493, 500–01, 745 S.E.2d 378, 382 (Ct. App. 2012) (noting that an applicant must present evidence to show how additional time spent in consultation regarding discovery would have resulted in a different outcome; mere speculation as to how the alleged lack of preparation prejudiced an applicant is not sufficient to support a grant of relief).

Accordingly, Applicant's allegation pertaining to Counsel's failure to review discovery with him is **DENIED.**

**2. Failing to advise Applicant of possible defenses and potential advantages of going to trial**

Applicant next contends Counsel was constitutionally ineffective for failing to adequately confer with him about various aspects and potential advantages of going to trial before Applicant entered his guilty plea. This Court disagrees, and finds Applicant failed to establish counsel was constitutionally ineffective based on Applicant's representations to the plea court as well as Counsel's credible testimony he met with Applicant multiple times, discussed potential trials strategies, explained the charges and exposure he faced if convicted at trial, and advised him of the likelihood of success at trial. Applicant's own testimony, although predominantly incredible, establishes Counsel met with Applicant multiple times to discuss his case and options for resolving the charges. Applicant further failed to present evidence of any viable defense or trial strategy Counsel should have explored which would have helped Applicant's case or affected his decision to plead guilty. *See, e.g.*, *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").

A. PCR Testimony

At the PCR hearing, Applicant recalled meeting with Counsel four times to discuss his case. Although Applicant first testified Counsel never discussed any possible defenses or trial strategies, he later stated that they discussed potentially going to trial during their third meeting when his mother brought it up. Applicant recalled Counsel advising him at that time that he did not believe any of the videos would be helpful to his case if they went to trial, although Applicant disagreed with Counsel's assessment. However, Applicant later testified that Counsel told him some of the videos could have helped his case. In light of this testimony, Applicant

admitted that Counsel watched the videos with him and reviewed the other evidence provided in discovery.

When asked what he advised Applicant regarding accepting the plea versus going to trial, Counsel testified he advised Applicant that the jury would likely find him guilty, and that the judge would be legally required to sentence Applicant to at the very least twenty-five years due to the mandatory minimum. Counsel further testified he explained to Applicant that he would serve at least twenty-one years in prison because would be required to serve at least 85% of the actual term of imprisonment imposed. Counsel additionally informed Applicant that, if he accepted the plea offer, the reduced charge was also a "no parole offense," meaning he would serve at least 85% of the ten-year sentence.

Regarding trial strategy, Counsel testified he explained to Applicant that the case would hinge almost entirely on moving to suppress the drugs by challenging the reasonable suspicion alleged by the officer for the traffic stop. Counsel stated the officer claimed Applicant's headlights were off and that he failed to signal a lane change; however, the first time Applicant's vehicle appears in the video is after the officer activated his blue lights to initiate the traffic stop. Additionally, the body camera footage showed Applicant's turning signal was on when he pulled over. Counsel specifically recalled Applicant pointing out that there was no footage of him allegedly failing to signal before the officer initiated the stop. Counsel explained to Applicant that the officer would testify at trial about the events leading up to the stop, including the failure to signal. Thus, Counsel explained, he would have to essentially pit Applicant's word against the officer's at trial.

However, if his attempt to suppress the drugs by challenging the traffic stop was unsuccessful, Counsel testified he explained to Applicant that there was not much he could do

strategically considering the methamphetamine was found in Applicant's vehicle and he was the sole occupant. Counsel additionally did not see any basis to challenge the search based on probable cause. The officer who conducted the traffic stop stated he smelled marijuana as he was approaching Applicant's vehicle and a canine unit that was on scene immediately alerted to the presence of drugs after conducting a dog sniff around the exterior of Applicant's car.

B. Discussion

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). Counsel testified he believed it would be in Applicant's best interest to plead guilty, particularly given the strength of the evidence against Applicant and—crucially—the twenty-five year mandatory minimum sentence Applicant was facing at trial. *See Tollett v. Henderson*, 411 U.S. 258, 268 (1973) (explaining that the prospect of plea bargaining, the expectation or hope of a lesser sentence, or the convincing nature of the evidence against the accused are considerations that might well suggest the advisability of a guilty plea). Counsel's detailed testimony regarding how he would argue in favor of suppression the drugs nonetheless demonstrates he was prepared to go to trial had Applicant chosen to do so.

This Court does not find credible Applicant's testimony that Counsel never discussed any possible defenses or potential trial strategies with him, particularly in light of Applicant's contradictory testimony regarding what Counsel advised him about the evidentiary value of the videos provided in discovery. Further, Applicant presented no evidence of any issue Counsel missed in preparation of the case or any meritorious defense Applicant was unable to raise due to Counsel's allegedly deficient preparation. *See Davis v. State*, 326 S.C. 283, 288, 486 S.E.2d 747,

749 (1997) ("To establish applicant was prejudiced as a result of counsel's failure to prepare for trial, the applicant must present evidence to show how the discoverable matters or defenses would have resulted in a different outcome."); *cf. Green v. French*, 143 F.3d 865, 892 (4th Cir. 1998) ("Although counsel should conduct a reasonable investigation into potential defenses, *Strickland* does not impose a constitutional requirement that counsel uncover every scrap of evidence that could conceivably help their client."), *abrogated on other grounds by Williams v. Taylor*, 529 U.S. 362 (2000).

Even assuming Counsel was deficient in this regard, this Court finds Applicant failed to meet his burden. *Hill* makes clear the prejudice prong ordinarily requires "something more" than simply a defendant's assertion that but for counsel's deficient performance he would not have pleaded guilty but would have gone to trial. *Stalk v. State*, 383 S.C. 559, 563, 681 S.E.2d 592, 595 (2009) (*citing Hill*, 474 U.S. at 58–59). Here, the record indicates Applicant had incentive to plead guilty and substantially benefitted from Counsel's plea negotiations. *See Bright v. State*, 365 S.C. 355, 618 S.E.2d 296 (2005), (reversing PCR court's grant of relief when defense counsel negotiated favorable plea on respondent's behalf), *abrogated on other grounds by Smalls*, 422 S.C. 174, 810 S.E.2d 836.

This Court will not credit Applicant's present claim he would have gone to trial absent Counsel's allegedly deficient performance when he failed to present evidence showing that he reasonably would have risked facing a twenty-five-year mandatory minimum sentence rather than pleading guilty to a lesser charge and receiving a ten-year negotiated sentence. *See Padilla*, 559 U.S. at 372 ("[T]o obtain relief on this type of claim, a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances"). Accordingly, Applicant's request for relief by way of this allegation is **DENIED.**

### 3. Pressuring Applicant to plead guilty and failing to ensure Applicant understood the constitutional rights he was waiving by pleading guilty

Applicant next contends counsel was constitutionally ineffective for pressuring him to plead guilty while failing to ensure Applicant understood the law, the State's burden of proof, and the constitutional rights he was waiving by pleading guilty. This Court disagrees, and finds the combined record from the plea hearing and the PCR hearing establishes Applicant freely, knowingly, and voluntarily pleaded guilty.

A. PCR Testimony

At the PCR hearing, Applicant testified Counsel explained the terms of the negotiated plea offer. He recalled formally accepting the ten-year offer and signing the sentencing sheet during their fourth meeting. When asked specifically what Counsel did to convince him to plead guilty, Applicant stated he asked Counsel about the timeline, mandatory minimum of twenty-five years, and if Counsel could negotiate a sentence lower than ten years. According to Applicant, Counsel informed him that the solicitor would not offer anything lower than ten years, and that Applicant's only options were to accept the ten-year offer or go to trial.

Applicant specifically recalled speaking with Counsel approximately a week before he pleaded guilty. At that time, Counsel advised him he would be better off to accept the offer but that Applicant had less than a week to make up his mind. Applicant admitted that Counsel warned him that if he did not accept the offer, he would likely receive the twenty-five-year mandatory minimum. Applicant further recalled asking Counsel about his chances at trial, and Counsel estimated there was a 75% chance Applicant would get convicted. Applicant stated he ultimately accepted the offer because he felt it was the best deal.

On cross-examination, Applicant admitted at the PCR hearing that he told Judge Kinlaw he understood that by pleading guilty he would be waiving his right to a trial. However,

Applicant testified he could not recall Judge Kinlaw asking him if he needed more time to discuss his case with his attorney. Applicant further explained that he signed the sentencing sheet and therefore accepted the offer the day before his plea, which was the time limit imposed by the solicitor. He stated there was no more time to talk about the case once he accepted the offer.

Counsel recalled engaging in extensive plea negotiations with the solicitor's office in this case and stated he met with Assistant Solicitor Miller several times. By the time Counsel was retained in June of 2018, Assistant Solicitor Miller had already made an offer for Applicant to plead guilty to the lesser-included offense of trafficking in twenty-eight to one-hundred grams of methamphetamine with a negotiated eighteen-year sentence. Counsel testified he continued negotiating with Assistant Solicitor Miller, who made a twelve-year offer in July. By August, Counsel explained, Assistant Solicitor Miller had agreed to a ten-year negotiated sentence on the aforementioned lesser charge.

Counsel further testified that, once he negotiates what he believes is the best possible plea with the solicitor, his general practice is to sit down with the client and discuss all of the advantages and disadvantages of going to trial and pleading guilty. Counsel confirmed that he did so with Applicant when the Assistant Solicitor Miller made the ten-year offer. Specifically, Counsel recalled thoroughly explaining to Applicant the constitutional rights he would be afforded at trial and the effect of waiving those rights should he choose to plead guilty. Counsel testified he advised Applicant that, if he pleaded guilty, he would be waiving his ability to move to suppress the drugs. Counsel testified that Applicant never indicated to him that he did not understand their discussions about going to trial versus pleading guilty.

When asked what he advised Applicant regarding accepting the plea versus going to trial, Counsel testified he advised Applicant that the jury would likely find him guilty, and that the

judge would be legally required to sentence Applicant to at the very least twenty-five years due to the mandatory minimum. Counsel also recalled Applicant's family being involved in helping him decide whether to go to trial or plead guilty. As far as he knows, Applicant had enough time to discuss his options with his family. However, Counsel testified the deadline to accept the ten-year offer was August 31, 2018. When asked why Applicant pleaded guilty over a week before the deadline, Counsel stated he wanted to make sure Applicant made his decision sooner rather than later given the mandatory twenty-five years Applicant was facing on the original charge. Counsel believed Applicant's case was important to Assistant Solicitor Miller, who did not want to delay the matter any longer.

B. Discussion

"[I]t is the prerogative of any person to waive his rights, confess, and plead guilty, under judicially defined safeguards, which are adequately enforced." *Reed v. Becka*, 333 S.C. 676, 685, 511 S.E.2d 396, 401 (Ct. App. 1999). Because a criminal defendant waives several constitutional rights by pleading guilty, the Due Process Clause requires that guilty pleas are entered into voluntarily, knowingly, and intelligently. *Boykin v. Alabama*, 395 U.S. 238 (1969); *Pittman v. State*, 337 S.C. 597, 524 S.E.2d 623 (1999). To be intelligent, a plea must be made by a mentally competent defendant who understands both the charges against him and the consequences of his plea. *Brady v. United States*, 397 U.S. 742, 748 (1970). To be voluntary, a plea must be free of threats or other coercion that would impermissibly distort the defendant's choice. *Id.* at 755; *see also United States v. Smith*, 440 F.2d 521, 528–529 (7th Cir. 1971) (Stevens, J., dissenting) (explaining that voluntariness relates to the trustworthiness of the admission of guilt and binding character of the waiver of the constitutional protections which would be available to the accused if he elected to stand trial).

Before a court can accept a guilty plea, the defendant must be advised of the constitutional rights he or she is waiving; the right to a jury trial, the right to confront one's accusers, and the privilege against self-incrimination. *Boykin*, 395 U.S. at 243. Additionally, the defendant "must be aware of the nature and crucial elements of the offense, the maximum and any mandatory minimum penalty, and the nature of the constitutional rights being waived." *Pittman*, 337 S.C. at 599, 524 S.E.2d at 624. The defendant's knowing and voluntary waiver of statutory or constitutional rights must be established by a complete record, and "may be accomplished by colloquy between court and defendant, between court and defendant's counsel, or both." *State v. Ray*, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993); *see generally Wolfe v. State*, 326 S.C. 158, 485 S.E.2d 367 (1997) (guilty plea not involuntary where the colloquy demonstrated the trial judge asked defendant twice whether he understood there were no promises and that no sentencing recommendations were binding on the judge).

Moreover, "[t]hat a guilty plea must be intelligently made is not a requirement that all advice offered by the defendant's lawyer withstand retrospective examination in a post-conviction hearing." *McMann*, 397 U.S. at 770. An applicant who enters a plea on the advice of counsel may "only attack voluntary, knowing and intelligent character of the plea by showing that plea counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the [applicant] would not have pled guilty, but would have insisted on going to trial." *Roscoe v. State*, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001). In evaluating an allegation on PCR that a guilty plea was based on inaccurate advice of counsel, the transcript of the guilty plea hearing will be considered to determine whether any possible error by counsel was cured by the information conveyed at the plea hearing. *Wolfe*, 326 S.C. at 165, 458 S.E.2d at 370; *cf. Rayford v. State*, 314 S.C. 46, 443

S.E.2d 805 (1994) (finding that, where the transcript of the guilty plea proceeding refuted applicant's claim that he did not understand the terms of a plea bargain, granting PCR was inappropriate notwithstanding applicant's claim his lawyer misadvised him). The 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." *Harres*, 282 S.C. at 133, 318 S.E.2d at 361.

This Court finds Applicant knew the nature of the charges against him, the terms of the plea agreement, and the consequences of pleading guilty in accordance with the requirements of *Boykin* and *Pittman*. This Court further finds Applicant's claim that Counsel unduly pressured him to plead guilty while failing to ensure Applicant the constitutional rights he was waiving by pleading guilty is wholly without merit, particularly in light of the following exchange between Applicant and Judge Kinlaw that occurred at the beginning of the plea proceeding:

> JUDGE KINLAW: All right. You're represented by Mr. Seay?
>
> APPLICANT: Yes, sir.
>
> THE COURT: Are you satisfied with his services?
>
> APPLICANT: Yes, sir.
>
> THE COURT: You don't need to talk to him any more about this case?
>
> APPLICANT: No, sir.
>
> THE COURT: All right. Indictment 2018-GS-23-1857, the State charges you -- has you charged with trafficking in methamphetamine over 28 grams, but less than 100 grams. Are you tendering a plea of guilty to that offense?
>
> APPLICANT: Yes, sir
>
> THE COURT: Are you doing that freely and voluntarily?
>
> APPLICANT: Yes, sir.
>
> THE COURT: Anybody promise you anything or threaten you in any manner?

APPLICANT: No, sir.

THE COURT: Are you under the influence today of anything that may impact your judgment?

APPLICANT: No, sir.

JUDGE KINLAW: All right. You understand that once you decide to plead guilty, you give up certain constitutional rights. And that is the right to a trial, the right to remain silent, the right to assert any defenses, the right to confront any witnesses. You give up all those rights once you decide to plead guilty. Do you understand that?

APPLICANT: Yes, sir.

JUDGE KINLAW: And I'm assuming Mr. Seay went over with you the potential penalties involved in this offense, as well as the elements the State would have to prove; is that correct?

APPLICANT: Yes, sir.

(Plea Tr. 4–5).

Although Applicant testified at the PCR hearing that he only answered Judge Kinlaw's questions the way he did because he had already accepted the plea offer and believed there was no more time to discuss his case, he made it clear to the plea court that the decision to plead guilty was his own. *See North Carolina v. Alford*, 400 U.S. 25, 31 (1970) (explaining that the test for determining the validity of a guilty plea is "whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant"); *but see Brady*, 397 U.S. at 751 (declining to hold a guilty plea compelled and invalid "whenever motivated by the defendant's desire to accept the certainty or probability of a lesser penalty rather than face a wider range of possibilities extending from acquittal to conviction and a higher penalty authorized by law for the crime charged"); *United States v. Cox*, 464 F.2d 937, 942 (6th Cir. 1972) (noting that it is "well established that a guilty plea is not rendered invalid because it represents a compromise by defendant, thrusts a difficult judgment upon him, or is motivated by fear of greater punishment." (citation omitted)).

This Court finds the plea transcript reflects Applicant understood the proceedings, interacted intelligently with the plea court, and entered his guilty plea knowingly and voluntarily. *Cf. Wolfe*, 326 S.C. at 165, 485 S.E.2d at 371 (1997) (noting that counsel's statement to defendant that the plea court's "questions are 'routine' is not an invitation to answer them untruthfully, nor does it constitute a reason to believe the questions and statements of the judge during a guilty plea proceeding mean nothing"). Nonetheless, this Court finds that any possible deficiency or error by counsel was cured by the information conveyed at the plea hearing. *See Fields v. Gibson*, 277 F.3d 1203, 1214 (10th Cir. 2002) (In the course of emphasizing the importance of plea colloquies, the Court stated that "[t]his colloquy between a judge and a defendant before accepting a guilty plea is not *pro forma* and without legal significance. Rather, it is an important safeguard that protects defendants from incompetent counsel or misunderstandings").

This Court further finds Applicant failed to present any valid reason why he should be allowed to depart from the truth of the above statements made during his plea proceeding. *See Dalton v. State*, 376 S.C. 130, 137–38, 654 S.E.2d 870, 874 (Ct. App. 2007) (holding that "admissions made during a guilty plea should be considered conclusive unless an applicant presents valid reasons why he should be allowed to depart from the truth of his statements." (internal citations and quotation marks omitted)); *accord. Crawford v. United States*, 519 F.2d 347, 350 (4th Cir. 1975) (finding that the accuracy and truth of an accused's statements at a guilty plea proceeding are "conclusively" established unless he makes some reasonable allegation why this should not be so), *overruled on other grounds by United States v. Whitley*, 759 F.2d 327 (4th Cir. 1985); *cf. Blackledge v. Allison*, 431 U.S. 63, 73–74 (1977) (pointing out that representations made by a defendant, his lawyer, and the prosecutor at a guilty plea hearing,

as well as any findings made by the judge accepting the plea, constitute a "formidable barrier in any subsequent collateral proceedings"); *McMann*, 397 U.S. at 774 (noting the compelling interests in maintaining the finality of guilty-plea convictions validly obtained).

Surmounting *Strickland*'s high bar 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; *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.' "). Based on the evidence presented at the PCR hearing and the record of the plea proceeding, this Court finds Applicant's plea was freely, knowingly, and voluntarily entered into. Accordingly, Applicant's request for relief by way of this allegation is **DENIED.**

**4. Misadvising Applicant of the consequences of pleading guilty to a no parole offense**

Finally, Applicant contends Counsel was constitutionally ineffective for allegedly misadvising him regarding certain consequences of pleading guilty to trafficking in twenty-eight to one-hundred grams of methamphetamine. Specifically, Applicant claims Counsel did not advise him of the significance of the crime's classification as serious and "no parole." Applicant further claims he did not know he would not be eligible for extended work release, supervised furlough, or that good conduct credits would not be a factor in calculating his release date. This Court disagrees.

A. PCR Testimony

At the PCR hearing, Applicant testified Counsel advised him before he accepted the plea offer that he would serve 85% of the ten-year sentence. Counsel calculated that, with credit for time served, Applicant would serve approximately eight years. Applicant further testified

Counsel told him that he could effectively reduce his sentence by participating in programs in SCDC, which was a factor he considered in deciding whether to plead guilty. Applicant further testified that after he arrived at Kirkland Correctional Institution, he was told that neither good conduct credits nor participating in any special programs would result in him going home early.

On cross-examination, Applicant was asked specifically what programs Counsel told him to enroll in that would help reduce his sentence. Applicant stated that Counsel just told him to get into as many programs as possible and to stay out of trouble. He was then asked whether Counsel went reviewed the entire sentencing sheet with him, including the portion about classification of offenses. Applicant testified that he could not remember because he had to sign the sentencing sheet one day and get ready for court the next day.

Counsel testified that he thoroughly reviewed the sentencing sheet with Applicant, as he does with all of his clients. Specifically, Counsel testified he explained to Applicant what he was pleading to, what it meant to get a reduction in the charge, and each checked box on the sentencing sheet. He stated he made it clear to Applicant that he would serve 85% of the ten-year sentence and that he would not be eligible for parole. When asked whether he spoke with Applicant about community supervision, Counsel testified he could not recall whether they discussed it.

Counsel was then asked whether he recalled speaking with Applicant about the possibility of enrolling in programs in SCDC that would reduce his sentence. Counsel testified that is not something he would discuss in the normal course of his representation. Further, Counsel stated he never would have held out hope of anything other than Applicant serving 85% of his sentence.

On cross-examination, Counsel clarified that if he discussed any SCDC program with Applicant, it would not have been about reducing the sentence. If he discussed any program with

Applicant, Counsel explained, it would have been related to housing or re-entering the community after Applicant served his sentence. Counsel was adamant that he would never tell anyone pleading guilty to an 85% offense that there would be any programs available to them that would lower their sentence.

B. Discussion

In light of Counsel's credible testimony regarding his extensive discussions with Applicant about sentencing, coupled with his established practice, this Court finds Applicant failed to establish Counsel was constitutionally ineffective for allegedly misadvising him regarding these matters. This Court finds credible Counsel's testimony that he reiterated to Applicant that he would serve 85% of his sentence, that Applicant would not be eligible for parole, and that he never advised Applicant that participation in programs in SCDC would result in a reduced sentence.

Applicant, on the other hand, presented inconsistent and contradictory testimony regarding his understanding of these matters and what Counsel told him. For example, while Applicant first testified Counsel told him that he could effectively reduce his sentence by participating in programs in SCDC, he later stated on cross-examination that Counsel merely advised him to get into as many programs as possible and to stay out of trouble when asked specifically what programs Counsel told him to enroll in that would help reduce his sentence.

This Court further finds that eligibility for parole, extended work release, supervised furlough, and the application of good conduct credits all constitute collateral consequences of sentencing. "A guilty plea is not rendered involuntary if the defendant is not informed of the collateral consequences of his sentence." *Frasier v. State*, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002); *see also Page v. State*, 364 S.C. 632, 637, 615 S.E.2d 740, 742 (2005) (holding that

counsel cannot be held ineffective for failing to advise a defendant regarding indirect consequences that do not "flow directly from his guilty plea"). In *Brown v. State*, our Supreme Court explained:

> The imposition of a sentence may have a number of collateral consequences, however, and a plea of guilty is not rendered involuntary in a constitutional sense if the defendant is *not* informed of the collateral consequences. Parole eligibility typically is a collateral consequence of sentencing about which a defendant need not be specifically advised before entering a guilty plea. This is because parole eligibility is not a matter within the jurisdiction of the trial court, but falls within the province of the Board of Probation, Parole, and Pardon Services.

306 S.C. 381, 382–83, 412 S.E.2d 399, 400–01 (1991) (citations omitted).

Nonetheless, a defendant's guilty plea may be subject to collateral attack if he can show he was actively misinformed about parole eligibility and that he relied on this information in entering his plea. *See, e.g., Griffin v. Martin*, 278 S.C. 620, 300 S.E.2d 482 (1983); *Smith v. State*, 329 S.C. 280, 494 S.E.2d 626 (1997). Here, Applicant does not allege Counsel actively misinformed him about parole eligibility. Therefore, even had Counsel failed to advise Applicant that he would not be eligible for parole, Applicant's plea is nonetheless voluntary.

Specifically regarding Applicant's claim Counsel misadvised him about the significance of the crime's classification as a violent and serious offense, Counsel's credible testimony demonstrates he discussed the effect of these classifications with Applicant when he reviewed each checked box on the sentencing sheet. However, even had Counsel failed to advise Applicant of the meaning of these classifications, Applicant's plea is nonetheless voluntary. *See United States v. Brownlie*, 915 F.2d 527, 528 (9th Cir. 1990) ("The possibility that the defendant will be convicted of another offense in the future and will receive an enhanced sentence based on an instant conviction is not a direct consequence of a guilty plea."); *Appleby v. Warden, N. Reg'l*

*Jail & Corr. Facility*, 595 F.3d 532, 540–41 (4th Cir. 2010) (rejecting petitioner's claim of involuntary plea based on counsel's failure to advise that a guilty plea would expose him to recidivist sentencing proceedings); *Smith v. State*, 329 S.C. 280, 286, 494 S.E.2d 626, 629 (1997) (finding that classification of a crime as violent and non-violent is also a collateral consequence of sentencing and counsel is not ineffective for failure to inform a defendant of consequences of a violent crime conviction).

This Court finds Applicant failed to demonstrate Counsel was ineffective for failing to advise him of any of the aforementioned collateral consequences of pleading guilty. Accordingly, Applicant's request for relief by way of this allegation is **DENIED.**

## VIII. ALL OTHER ALLEGATIONS

As to any and all allegations raised in the application or at the hearing in this matter and not specifically addressed in this order, this Court finds Applicant failed to present any evidence regarding such allegations. Accordingly, this Court finds those claims were voluntarily waived and abandoned, and those claims are therefore denied and dismissed with prejudice. S.C. Code Ann. § 17-27-90.

## IX. CONCLUSION

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

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. Pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991),

Applicant has the right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, 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. The application for post-conviction relief be denied and dismissed with prejudice; and
2. Applicant be remanded to the custody of the State.

**AND IT IS SO ORDERED** this 19 day of August, 2022.

R. SCOTT SPROUSE
Presiding Circuit Court Judge
Thirteenth Judicial Circuit

Walhalla, South Carolina

Copy mailed to
Attorney General LM/D. Harder
on 8/24/2022.