STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
Floyd G. Owen, #339771, Applicant, v. State of South Carolina, Respondent.	)	CASE NO. 2020–CP–40–5454 **ORDER OF DISMISSAL**

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed by Applicant Floyd G. Owen on November 18, 2020. Respondent made its Return and Motion for a More Definite Statement on May 6, 2021. Applicant, through counsel, amended his application on May 17, 2022. An evidentiary hearing was held on May 25, 2022, at the Richland County Courthouse before the Honorable George M. McFaddin, Jr. Applicant was present and represented by Ola A. Johnson, Esquire. Assistant Attorney General D. Russell Barlow, II, represented Respondent. Applicant and his Plea Counsel, J. Rhodes Bailey, Esquire, testified at the hearing. Following a thorough review of the plea transcript 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

Applicant is presently confined in the South Carolina Department of Corrections, serving a forty-eight-year sentence. In December 2017, the Richland County Grand Jury indicted Applicant for murder (2017-GS-40-7153), first-degree burglary (2017-GS-40-7155), criminal conspiracy (2017-GS-40-7157), and possession of a weapon during the commission of a violent

crime (2017-GS-40-7156). Assistant Public Defender J. Rhodes Bailey represented Applicant. Assistant Solicitor Richard V. Eaton of the Fifth Circuit Solicitor's Office prosecuted the case.

Applicant pleaded guilty as indicted on August 20, 2019, before the Honorable DeAndrea G. Benjamin. After deferring sentencing to November 18, 2019, Judge Benjamin, without negotiations or recommendation, sentenced Applicant to forty-eight years imprisonment for murder, forty-eight years for first-degree burglary, and five years each for criminal conspiracy and possession of a weapon, to be served concurrently. Applicant filed a motion for reconsideration of his sentence, which was denied on November 26, 2019.

FACTS GIVING RISE TO THE CONVICTION

The incident giving rise to the charges occurred on December 6, 2017 (Plea Tr. p. 5). At the guilty plea proceeding, Assistant Solicitor Eaton gave the following factual recitation in support of the pleas:

> In the wee morning hours of December 6, 2017, Mr. Owen and his codefendant, Charles Brandon Barham, devised a plan to murder the victim, Charles Kusko, in his home on Budon Court. The State alleges that Mr. Barham gave Mr. Owen a gun, drove him to Budon Court; that the two went up to the house; that Mr. Owen broke into the house and shot Mr. Kusko in his bed. Mr. Barham then drove Mr. Owen away. This case went somewhat cold until it was revived by CPD's cold case with some leads from some witnesses that ultimately led to Mr. Owen's confession to the murder of Mr. Kusko.

(Plea Tr. pp. 4-5)

CURRENT ACTION BEFORE THIS COURT

Applicant *timely* commenced this PCR action on November 18, 2020, alleging he is being held in custody unlawfully for the following reasons:

1. "Unefective Assiata of Counsole"[1]

[1] Respondent interpreted Applicant's claim as ineffective assistance of counsel.

On May 17, 2022, Applicant amended his application to allege the following:

1. Ineffective Assistance of Plea Counsel
   a. Prior to the guilty plea, Applicant's counsel failed to explain the details of the Applicant's plea.
   b. The Applicant believed he would be eligible for parole in 85% of his sentence based on statements made by counsel and by the court describing a Murder sentence as non-parolable (p. 7).
   c. Applicant's counsel, failed to file an appeal after the applicant requested this.
   d. Applicant's counsel gave the court a sentencing report right before the sentencing and the court did not have time to review it (p. 10).
   e. Applicant was informed by counsel that he would receive a negotiated sentence of 30 years.
   f. Applicant's counsel, failed to meet with the applicant a sufficient number of times to properly review the evidence and discuss this case with applicant.
   g. Applicant's counsel, failed to properly investigate this case.
   h. Furthermore, the Applicant requests that he be permitted to Amend his PCR application to conform to the evidence presented at the PCR hearing should any new or unaddressed issues arise during the course of the hearing that have not been specifically addressed in the Application. *See* Simpson v. Moore, 367 S.C. 587, 627 S.E.2d 701 (2006).

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

SUMMARY OF EVIDENTIARY HEARING TESTIMONY

APPLICANT'S TESTIMONY

On direct examination, Applicant testified that he recalled the conversation with Plea Counsel about the guilty plea. Applicant testified that he thought Plea Counsel did a sufficient job in some ways. When asked whether or not Plea Counsel explained parole was a day for day, Applicant responded that many things were explained to him. Applicant testified that he was due to testify against his codefendant, and State promised him one thing. Applicant testified that some things he understood and some things he did not. Applicant testified that he agreed that he knew it was 85% and that it was explained to him afterward that it was day for day. Applicant testified

that when he asked Plea Counsel about filing an appeal that Plea Counsel told him it was not an appealable defense. Applicant testified that he thought he was pleading guilty to thirty years.

Applicant testified that the prosecutors approached him, asked him to testify against his codefendant, and told him that they thought he would get less time than Brandon. Applicant testified, "see how that turned out." Applicant testified that he was told the sentencing range was thirty years to life and that he could get life if he went to trial, so he kept his mouth shut. Applicant testified that he and Plea Counsel really didn't go over anything. Applicant testified that he knew what he did and deserved to go to prison for it. Applicant testified that Plea Counsel did not give him discovery and did not review the videos with him. Applicant testified that he and Plea Counsel met five to six times.

Applicant testified that he did not ask for discovery and that Plea Counsel told him to sit and relax. Applicant testified that he did not go for bond because Plea Counsel told him it was unlikely he would get one. Applicant testified that he was willing to take responsibility and replied, "Let's just do whatever with it." Applicant testified that there was no investigation or investigator. Applicant testified that his attorney informed him about PCR, but Applicant did not know what that was. Applicant was asked whether or not he wanted to appeal, and Applicant replied he did not know what he wanted. Then Applicant testified that he asked Plea Counsel to appeal, and Plea Counsel told Applicant to file a PCR. Applicant testified that he did not feel like he was coerced because he knew what he did was wrong and wanted to do what was right. Applicant testified that he felt awful about what he did. However, Applicant testified he did not feel like he got to tell his side.

Applicant testified that Plea Counsel explained his right to a jury trial, but he was so scared of getting life. Applicant testified that he basically got a life sentence with the sentence the judge gave him.

On cross-examination, Applicant testified that he understood PCR relief and he understood that he could be retried on all charges and face life. Applicant testified that he and Plea Counsel met about five times. Applicant testified that he believes that Plea Counsel discussed the elements of his charges. Applicant testified that he did not think there was a defense; they were more interested in getting his codefendant since he had already provided a statement on himself. Applicant was asked whether he provided any leads, and Applicant replied, "I confessed, and I left it in his hands."

Applicant testified that he did not recall telling the judge he understood that it was a non-parolable violent, and serious offense. Applicant testified that he did not remember telling the judge that he was satisfied with Plea Counsel's representation nor that he had met with Plea Counsel enough for proper representation and that he did not have any questions for Plea Counsel. Applicant testified that he did recall discussing the two-strike law and that he gave up his right to a jury trial. Then contrary to Applicant's prior testimony Applicant testified that he remembered telling the judge that he did not need more time with Plea Counsel. Applicant then testified that he really did not remember much from that day.

Applicant testified that he recalled telling the judge that no one forced him to plead guilty, that that he was freely and voluntarily pleading guilty, that there was no threat or coercion, and he was pleading guilty because he was guilty. Applicant testified that he understood he was pleading guilty and that he was just sitting there thinking "thirty years, thirty years, thirty years." Applicant testified that he did not recall telling the judge he understood his right to appeal. Applicant testified

that he did not tell Plea Counsel that he wanted to go to trial because he was too scared. Applicant testified that it was most definitely his decision to plead guilty. Applicant testified that he did not ask for an appeal contrary to his prior testimony on direct examination and that maybe he remembered Plea Counsel told him to file for PCR.

PLEA COUNSEL J. RHODES BAILEY'S TESTIMONY

On direct examination, Plea Counsel testified that he met with Applicant ten to twelve times. Plea Counsel testified that he discussed the elements of the charges with Applicant. Plea Counsel testified that the evidence was a video confession and a signed confession. Plea Counsel testified that it was a cold case. Plea Counsel testified that Applicant was arrested for armed robbery and law enforcement questioned him about the murder. Plea Counsel testified that law enforcement also spoke with Applicant's girlfriend and Applicant's girlfriend told law enforcement that Applicant confessed to her. When law enforcement informed Applicant of what his girlfriend said, Applicant then confessed to law enforcement.

Plea Counsel testified that he reviewed the discovery with Applicant but did not review every audio clip. Plea Counsel told Applicant that he could get up to life. Plea Counsel testified that Applicant never requested a jury trial. Plea Counsel testified that Applicant usually seemed to understand. Plea Counsel testified that there was extensive mitigation research and that he hired an expert. Plea Counsel testified that he tried really hard in plea negotiations and tried to get manslaughter, but it was unlikely because the prosecution said murder. Plea Counsel testified that Applicant was forthcoming and remorseful.

Plea Counsel testified that the State believed that his codefendant was the principal, and if he testified against his codefendant, it would help. However, Plea Counsel testified that Richland County prosecutors don't promise sentences. Plea Counsel testified State which just interested in

his cooperation. Plea Counsel testified that he informed Applicant of the details and consequences regarding a plea. Plea Counsel testified that there was no reason he would tell Applicant he could get parole. Plea Counsel testified that Applicant was disappointed in his sentence. Plea Counsel testified that he was competent. Plea Counsel would not say that Applicant would serve 85%, but that he may have told Applicant that he could get 85% on manslaughter, and that might have hung in his head.

Plea Counsel testified that Applicant was not interested in a trial. Plea Counsel testified that he stands by his representation and advice. Plea Counsel testified that he did get a psychiatric evaluation and that Applicant was damaged as a child. Plea Counsel testified that he did not highlight specific parts of the report due to sensitive information regarding the victim. Plea Counsel stated in hindsight, he would have put more in the record. Plea Counsel testified that Applicant did not ask for an appeal; however, he filed a motion to reconsider the sentence, and it was denied without a hearing. Plea Counsel testified that he always advises his clients of their PCR rights. Plea Counsel testified that he recalls giving the sentencing report before sentencing.

On cross-examination, Plea Counsel testified that he was sure he would have said murder is day for day, especially regarding the parts of the conversation where he explained murder v. manslaughter. Plea Counsel testified that he has a checklist that he goes through with his clients because he wants to make sure that they understand the concept regarding a plea before the client pleads. Plea Counsel testified that he sent Applicant a letter informing him of the denial of the reconsideration of his sentence, and he also thinks that he wrote on the letter that he can still file a PCR.

Plea Counsel was asked if he explained the tolling of appeal, and he responded that he thought he would have and that he always tells clients. I think I would have; that is what I always

tell clients. Plea Counsel testified that he told Applicant that his hope was close to thirty but not over forty years. Plea Counsel testified that they met possibly more than 10 to 12 times at the detention center. Plea Counsel testified that he did not think there was a competency issue. Plea Counsel testified that he got a psychological report on Applicant for mitigation purposes.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the plea transcript in its entirety and heard the testimony at the PCR hearing. This Court had the opportunity to observe the witnesses and evaluate their credibility, and this Court has weighed their testimony accordingly. This Court finds the plea transcript, and the testimony and evidence presented at the evidentiary hearing establish Applicant received effective assistance of Plea 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 alleges that he received ineffective assistance from his Plea Counsel. The Sixth and Fourteenth Amendments to the United States Constitution guarantee Applicant, like all other defendants, the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984); Taylor v. State, 404 S.C. 350, 359, 745 S.E.2d 97, 101 (2013). Ordinarily, PCR allegations are centered upon an allegation that the applicant did not receive effective assistance of counsel guaranteed by the Sixth Amendment. See generally S.C. Code Ann. § 17-27-20(A) (enumerating allegations cognizable in PCR actions). The allegation of denial of such representation sets forth a *prima facie* violation of this constitutional right and raises a question of fact that an evidentiary hearing can only determine. Rogers v. State, 261 S.C. 288, 291, 199 S.E.2d 761, 762 (1973).

In a post-conviction relief action, the applicant bears the burden of proving the allegations

by a preponderance of the evidence—a mere allegation of ineffective assistance is insufficient to warrant granting relief. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). 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 or sentence. 466 U.S. at 687. First, the applicant must show that counsel's performance was deficient; and second, that the deficient performance prejudiced the applicant. Id. at 668; Butler, 286 S.C. at 442, 334 S.E.2d at 814.

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). In order to prove deficient performance, the applicant must show counsel's representation fell below an objective standard of "reasonableness under prevailing professional norms." Cherry v. State, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). 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.

Strickland, however, "does not guarantee perfect representation[—]only a 'reasonably competent attorney.'" Harrington v. Richter, 562 U.S. 86, 110 (2011) (quoting Strickland, 466 U.S. at 687). 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. Just as there is "no expectation that competent counsel will be a flawless strategist or tactician, an attorney may not be faulted for a reasonable miscalculation or lack of foresight or for failing to prepare for what appear to be remote possibilities." Harrington, 562 U.S. at 110.

Accordingly, "[j]udicial scrutiny of counsel's performance must be highly deferential[, as] [i]t is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Strickland, 466 U.S. at 689; see also Yarborough v. Gentry, 540 U.S. 1, 8 (2003) ("The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight."). Unlike a later reviewing court, the attorney observed the relevant proceedings; knew of materials outside the record; and interacted with the client, opposing counsel, and the judge. Thus, the question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom. Id. (quoting Strickland, 466 U.S. at 690).

Thus, a fair assessment of attorney performance requires every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Id. 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 reasonable professional assistance." Butler, 286 S.C. at 445, 334 S.E.2d at 816. The applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625.

Reviewing courts "must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed [at] the time of counsel's conduct." Strickland, 466 U.S. at 690. An applicant making a claim of ineffective assistance "must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." Id. The

reviewing court must then "determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." Id.

The Strickland standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. 466 U.S. at 689-690; see also Harrington, 562 U.S. at 105 (cautioning that an ineffective assistance of counsel claim could potentially function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial). Even under *de novo* review, the standard for judging counsel's representation is a most deferential one. Harrington, 562 U.S. at 105. Unlike a later reviewing court, the attorney observed the relevant proceedings; knew of materials outside the record; and interacted with the client, opposing counsel, and the judge. Thus, the question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," **not** whether it deviated from best practices or most common custom. Id. (quoting Strickland, 466 U.S. at 690) (emphasis added).

The second, or "prejudice" prong of Strickland is rooted in the very purpose of the Sixth Amendment guarantee of counsel—to ensure a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. Id. at 691–92. In order to prove prejudice, an applicant must demonstrate counsel's deficient performance prejudiced the 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. A reasonable probability is a probability "sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. Thus, it is not enough "to show that the errors had some conceivable effect" on the outcome of the proceeding—counsel's errors must be "so serious as to deprive the defendant of a fair trial." Id. at 693 (emphasis added).

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 range of 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 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 (internal citations and quotation marks omitted); cf. Hill, 474 U.S. at 58 ("[R]equiring a showing of prejudice 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. Harres v. Leeke, 282 S.C. 131, 134, 318 S.E.2d 360, 361 (1984).

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 Plea Counsel. The specific claims are addressed below:

Allegation 1(a): Failure to Explain a Guilty Plea

Applicant alleges Plea Counsel was constitutionally ineffective for failing to explain the details of his guilty plea. This Court finds this allegation is without merit.

On direct-examination, Applicant testified that he recalled the conversation with Plea Counsel about the guilty plea. Applicant testified that he thought Plea Counsel did a sufficient job in some ways. Applicant testified that some things he understood and some things he did not.

On cross-examination, Applicant testified that he and Plea Counsel met about five times. Applicant testified that he believes that Plea Counsel discussed the elements of his charges. Applicant testified that he did not remember telling the judge that he was satisfied with Plea Counsel's representation nor that he had met with Plea Counsel enough for proper representation and that he did not have any questions for Plea Counsel. Then contrary to Applicant's prior testimony Applicant testified that he remembered telling the judge that he did not need more time with Plea Counsel. Applicant then testified that he really did not remember much from that day.

On direct-examination, Plea Counsel testified that he informed Applicant of the details and consequences regarding a plea. Plea Counsel testified that he has a checklist that he goes through with his clients because he wants to make sure that they understand the concept regarding a plea before the client pleads.

This Court finds Plea Counsel credibly testified that he reviewed the details of the plea by

completing a checklist with Applicant. This Court also finds that any alleged deficiency was cured by the plea court's thorough colloquy. Therefore, whether any further explanation of a guilty plea would have changed the Applicant's decision to plead and instead go to trial is mere speculation. However, speculation cannot satisfy Applicant's burden of proving prejudice. See Clark v. State, 315 S.C. 385, 388, 434 S.E.2d 266, 267 (1993) (concluding pure conjecture fails to establish prejudice).

Accordingly, this Court finds Applicant has failed to establish Plea Counsel's deficiency or prejudice. Thus, this allegation must be denied and dismissed with prejudice.

Allegation 1(b): Failure to Explain Non-Parolable Offense

Applicant alleges Plea Counsel was constitutionally ineffective for failing to explain that he was pleading guilty to a non-parolable offense. This Court finds this allegation is without merit.

On direct-examination, Applicant was asked whether or not Plea Counsel explained parole was a day for day, Applicant responded that many things were explained to him. Applicant testified that he agreed that he knew it was 85% and that it was explained to him afterward that it was day for day.

On cross-examination, Applicant testified that he did not recall telling the judge he understood that it was a non-parolable violent, and serious offense.

On direct-examination, Plea Counsel testified that he would not say that Applicant would serve 85%, but that he may have told Applicant that he could get 85% on manslaughter, and that might have hung in Applicant's head. Plea Counsel testified that Applicant was not interested in a trial.

On cross-examination, Plea Counsel testified that he was sure he would have said murder is day for day, especially regarding the parts of the conversation where he explained murder versus

manslaughter. Plea Counsel testified that he has a checklist that he goes through with his clients because he wants to make sure that they understand the concept regarding a plea before the client pleads.

Based on the foregoing, the record contradicts Applicant's assertion that he was under a misunderstanding due to Plea Counsel's failure to explain that his offense was non-parolable. See Rayford v. State, 314 S.C. 46, 48, 443 S.E.2d 805, 806 (1994) (holding that the record of the plea proceeding, including applicant's answers to the trial judge's questions, clearly established that applicant understood the possible sentences and the terms of the plea agreement and therefore could not have had misconceptions regarding sentencing).

For the foregoing reasons, the Court finds Plea Counsel was not deficient, nor did Applicant suffer any prejudice resulting therefrom. Accordingly, Applicant's request for relief by way of this allegation is denied and dismissed with prejudice.

Allegation 1(c): Failure to File an Appeal

Applicant alleges Plea Counsel was constitutionally ineffective for failing to file an appeal following his guilty plea. This Court finds this allegation is without merit.

Counsel has a constitutionally imposed duty to consult with a defendant about an appeal when there is reason to think either: (1) that a rational defendant would want to appeal or (2) that this particular defendant reasonably demonstrated to counsel that she was interested in appealing. Roe v. Flores-Ortega, 528 U.S. 470, 120 S. Ct. 1029, 145, L. Ed. 2d 985 (2000). When counsel has consulted with the defendant regarding the right to appeal, "Counsel performs in a professionally unreasonable manner *only* by failing to follow the defendant's express instructions with respect to an appeal." Id. at 478 (emphasis added). In order to establish he was prejudiced by counsel's failure to file an appeal, Applicant must show he would have appealed absent counsel's

deficient performance. Id. at 484. "Acts inconsistent with the continued assertion of a right, such as a failure to insist upon the right, may constitute waiver." Bonnette v. State, 277 S.C. 17, 18, 282, S.E.2d 597, 598 (1981).

In determining whether counsel has a duty to consult, "[one] highly relevant factor [. . .] will be whether the conviction follows a trial or a guilty plea, both because a guilty plea reduces the scope of potentially appealable issues and because such a plea may indicate that the defendant seeks an end to judicial proceedings." Flores-Ortega, 528 U.S. at 480. As such, though counsel is required to make certain that a defendant is made fully aware of his or her right to appeal after a *trial*, a different standard applies to a guilty plea:

> Absent extraordinary circumstances, such as when there is reason to think a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal) or when the defendant reasonably demonstrated an interest in appealing, there is no constitutional requirement that a defendant be informed of the right to a direct appeal from a guilty plea.

Turner v. State, 380 S.C. 223, 224, 670 S.E.2d 373, 374 (2008) (citations omitted); see also Flores-Ortega, 528 U.S. at 480 (imposing the duty to consult when there is reason to think either that a rational defendant would want to appeal or that the particular defendant reasonably demonstrated interest in doing so): But see Frazer v. South Carolina, 430 F.3d 696 (4th Cir. 2005) (reading Flores-Ortega to mean counsel generally has a duty to consult with his client regarding whether to pursue an appeal). Therefore, in a collateral action attacking a guilty plea, the "bare assertion that a defendant was not advised of appellate rights is insufficient to grant relief." Jones v. State, 382 S.C. 589, 596, 677, S.E.2d 20, 23-24 (2009) (citation omitted).

On direct-examination, Applicant was asked whether or not he wanted to appeal, and Applicant replied that he didn't know what he wanted. Then Applicant testified that he asked Plea Counsel to appeal, and Plea Counsel told Applicant to file a PCR.

On cross-examination, Applicant testified that he did not recall telling the judge he understood his right to appeal. Applicant testified that he did *not* ask for an appeal contrary to his prior testimony on direct examination and that maybe he remembered Plea Counsel told him to file for PCR.

On direct-examination, Plea Counsel testified that Applicant did not ask for an appeal; however, he filed a motion to reconsider the sentence, and it was denied without a hearing.

On cross-examination, Plea Counsel was asked if he explained the tolling of an appeal, and he responded I think I would have; that is what I always tell clients.

This Court finds Applicant's testimony regarding his request for Plea Counsel to file a direct appeal on his behalf was not credible. Even if Plea Counsel did not inform Applicant of the right to appeal, Applicant has failed to show that there was an appealable basis in this case or that extraordinary circumstances warranting an appeal existed.

For the foregoing reasons, the Court finds Plea Counsel was not deficient, nor did Applicant suffer any prejudice resulting therefrom. Accordingly, Applicant's request for relief by way of this allegation is denied and dismissed with prejudice.

Allegation 1(d): Failure to Provide the Court with Sentencing Report Prior to Sentencing

Applicant alleges Plea Counsel was constitutionally ineffective for failing to provide the court with the sentencing report prior to sentencing, and the court did not have time to review it. This Court finds this allegation is without merit.

Initially, this Court finds Applicant has failed to meet his burden proving Plea Counsel's alleged deficiency prejudiced him. Applicant presented no evidence or testimony as to how providing the sentencing court with the sentencing report prior to sentencing prejudiced him or how Plea Counsel was deficient. Therefore, whether the sentencing court having the sentencing

report well in advance of the hearing would have changed the sentencing outcome is mere speculation. See Clark, 315 S.C. at 388, 434 S.E.2d at 267 (concluding pure conjecture fails to establish prejudice).

For the foregoing reasons, the Court finds Plea Counsel was not deficient, nor did Applicant suffer any prejudice resulting therefrom. Accordingly, Applicant's request for relief by way of this allegation is denied and dismissed with prejudice.

Allegation 1(e): Improperly Advising Applicant He Would Receive Thirty Year Negotiated Sentence

Applicant alleges Plea Counsel was constitutionally ineffective for advising Applicant he would receive a thirty-year negotiated sentence. This Court finds this allegation is without merit.

On direct-examination, Applicant testified that he thought he was pleading guilty to thirty years.

On cross-examination, Applicant testified that he understood he was pleading guilty and that he was just sitting there thinking "thirty years, thirty years, thirty years."

On direct-examination, Plea Counsel testified that he told Applicant that he could get up to life in prison.

On cross-examination, Plea Counsel testified that he told Applicant that his hope was close to thirty but not over forty years imprisonment.

Based on the foregoing, the record contradicts Applicant's assertion that he was under the impression that he was pleading to a thirty-year negotiated sentence. See Rayford v. State, 314 S.C. 46, 48, 443 S.E.2d 805, 806 (1994) (holding that the record of the plea proceeding, including applicant's answers to the trial judge's questions, clearly established that applicant understood the possible sentences and the terms of the plea agreement and therefore could not have had misconceptions regarding sentencing).

For the foregoing reasons, the Court finds Plea Counsel was not deficient, nor did Applicant suffer any prejudice resulting therefrom. Accordingly, Applicant's request for relief by way of this allegation is denied and dismissed with prejudice.

Allegation 1(f): Failure to Meet with Applicant a Sufficient Number of Times to Properly Review the Evidence and Discuss the Case

Applicant alleges Plea Counsel was constitutionally ineffective for failing to meet with Applicant a sufficient number of times to properly review the evidence and discuss the case. This Court finds this allegation is without merit.

On direct-examination, Applicant testified that he and Plea Counsel met 5 to 6 times.

On direct-examination, Plea Counsel testified that he met with Applicant 10 to 12 times. Plea Counsel testified that he discussed the elements of the charges with Applicant. Plea Counsel testified that the evidence was a video confession and a signed confession. Plea Counsel testified that he reviewed the discovery with Applicant but did not review every audio clip.

The Court finds Applicant 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 the evidence. See Smith v. State, 404 S.C. 493, 500–501, 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); see also Moody v. Polk, 408 F.3d 141, 148 (4th Cir. 2005) (citing United States v. Olson, 846 F.2d 1103 (7th Cir. 1988)) ("[T]here is no established 'minimum number of meetings between counsel and client prior to trial necessary to prepare an attorney to provide effective assistance of counsel.'").

The Court further points to Applicant's representation to the plea judge that he was

completely satisfied with Plea Counsel and that Plea Counsel had answered all his questions. (Plea Tr. pp. 8 – 9); see Dalton v. State, 376 S.C. 130, 137–38, 654 S.E.2d 870, 874 (Ct. App. 2007) ("[S]tatements made during a guilty plea should be considered conclusive unless a criminal inmate presents valid reasons why he should be allowed to depart from the truth of his statements.").

For the foregoing reasons, the Court finds Plea Counsel was not deficient, nor did Applicant suffer any prejudice resulting therefrom. Accordingly, Applicant's request for relief by way of this allegation is denied and dismissed with prejudice.

Allegation 1(g): Failure to Adequately Investigate

Applicant alleges Plea Counsel was constitutionally ineffective for failing to investigate his case. This Court finds this allegation is without merit.

"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 v. Catoe, 372 S.C. 318, 331–32, 642 S.E.2d 590, 597 (2007) (internal quotation marks omitted) (emphasis omitted). However, this duty is limited to a reasonable investigation. Id. at 331, 642 S.E.2d at 597. Further, to prevail on a claim of ineffective assistance based on failure to investigate, a PCR applicant must ordinarily present some probative evidence.

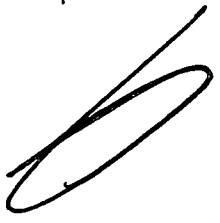
On cross-examination, Applicant was asked whether he provided any leads, and Applicant replied, "I confessed, and I left it in his hands."

On direct-examination, Plea Counsel testified that the evidence was a video confession and a signed confession. Plea Counsel testified that it was a cold case. Plea Counsel testified that Applicant was arrested for armed robbery and law enforcement questioned him about the murder. Plea Counsel testified that law enforcement also spoke with Applicant's girlfriend and Applicant's girlfriend told law enforcement that Applicant confessed to her. When law enforcement informed Applicant of what his girlfriend said, Applicant then confessed to law enforcement.

This Court finds Applicant has failed to show Plea Counsel was ineffective for not further investigating his case. Further—and importantly—Applicant has produced no evidence of what Plea Counsel would have discovered by further investigating his case. 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").

For the foregoing reasons, the Court finds Plea Counsel was not deficient, nor did Applicant suffer any prejudice resulting therefrom. Accordingly, Applicant's request for relief by way of this allegation is denied and dismissed with prejudice.

{PAGE LEFT INTENTIONALLY BLANK | SIGNATURE PAGE FOLLOWS}



CONCLUSION

Based on the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant relief. This Court finds Plea Counsel provided effective representation. Therefore, this application for post-conviction relief **must be DENIED** and **DISMISSED WITH PREJUDICE.**

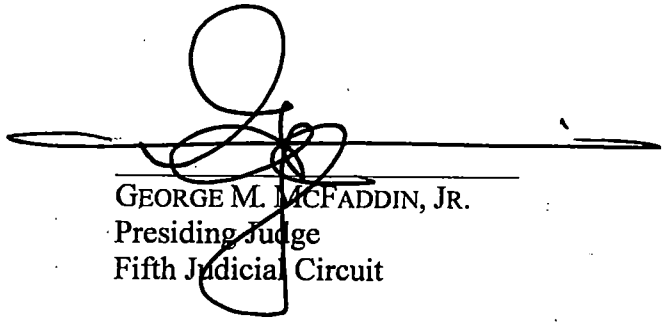
Should Applicant wish to appeal, he must file and serve a notice of appeal within thirty days from PCR counsel's receipt of written notice of entry of judgment. Applicant has a right to appellate counsel's assistance in seeking review of the denial of PCR. Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). Pursuant to Rule 71.1(g), SCRCP, 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 3rd day of October, 2022.



GEORGE M. MCFADDIN, JR.
Presiding Judge
Fifth Judicial Circuit