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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

Appeal from Dorchester County Court of Common Pleas
The Honorable Heath P. Taylor, Circuit Court Judge

Case No. 2019-CP-18-064

Justen Lee Wilkes, # 00375739 .....Petitioner,

v.

The State of South Carolina.....Respondent

NOTICE OF APPEAL

The Applicant-Petitioner, Justen Lee Wilkes, hereby appeals the Order of Dismissal issued by the Honorable Heath P. Taylor. The Order of Dismissal was filed with the Dorchester County Clerk of Court on March 27, 2023. Undersigned Counsel received notice of its filing the same day via email. A copy of the Order of Dismissal is attached to this Notice. This Notice has also been forwarded to the Honorable Cheryl Graham, Clerk of Court for Dorchester County and the Appellate Division of SCCID.

Respectfully submitted,

William G. Yarborough, III
Lauren Carole Hobbis
By: /s/ Lauren C. Hobbis, #103190
William G. Yarborough III, Attorney at Law, LLC

308 West Stone Avenue
Greenville, South Carolina 29609
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FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF DORCHESTER
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2019CP1800064

Justen Lee Wilkes		**South Carolina State Of**	
PLAINTIFF(S)		**DEFENDANT(S)**	
Submitted by:		**Attorney for:** ☐ Plaintiff ☐ Defendant ☐ Self-Represented Litigant	

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED (*CHECK REASON*):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.
Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.
Note: Title abstractors and researchers should refer to the official court order for judgment details.
E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

Heath Taylor	2775	3/27/2023
Circuit Court Judge	**Judge Code**	**Date**

For Clerk of Court Office Use Only

This judgment was entered on **3/27/2023**, and a copy mailed first class or placed in the appropriate attorney's box on **3/27/2023**, to attorneys of record or to parties (when appearing pro se) as follows:

William G. Yarborough III 308 W. Stone Ave. Greenville, SC 29609
Justen Lee Wilkes Turbeville Corr. Inst #00375739 1578 Clarence Coker Hwy Turbeville, SC 29162

Megan Harrigan Jameson PO Box 11549 Columbia, SC 29211
~~**Samantha W. Hancock** 1332 Main Street, Suite 225 Columbia, SC 29201~~

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter

Cheryl Graham - Clerk of Court

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF DORCHESTER	)	FOR THE FIRST JUDICIAL CIRCUIT
	)	
Justen Lee Wilkes, #375739	)	
	)	Case No.: 2019-CP-18-064
Applicant,	)	
	)	
v.	)	
	)	**ORDER OF DISMISSAL**
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

This matter comes before this Court by way of post-conviction relief (PCR) application filed by Justen Wilkes (Applicant) on January 11, 2019. Respondent made its return on December 2, 2020, requesting an evidentiary hearing. An evidentiary hearing was held on January 25, 2023, at the Orangeburg County Courthouse. William G. Yarborough III, Esquire, represented Applicant. Assistant Attorney General C. Whitney O'Kelly represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant's stepfather, Robert Turner, and Plea Counsel, Timothy Kulp, Esquire, also testified. Before this Court is the transcript from the plea hearing, the PCR application, the State's return, the South Carolina Department of Corrections records, and the Clerk of Court's records from the underlying convictions. After reviewing all records and evidence before this Court, this Court finds Applicant did not meet his requisite burden of proof of establishing he is entitled to post-conviction relief and denies and dismisses this application with prejudice. Findings of fact and conclusions of law are set forth below.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Dorchester County Clerk of Court. Applicant is completing a forty year term. During its May 2017 term, the Dorchester County Grand Jury indicted Applicant for one count felony driving under the influence (DUI), resulting in death (2016-GS-18-1961), and one count burglary in the first degree (2016-GS-18-1962). Applicant subsequently waived presentment to the Charleston County Grand Jury for an additional count of burglary in the first degree (2018-GS-10-1816). All three charges were alleged to have occurred during a five-to-six-hour period across Charleston and Dorchester counties.

On March 19, 2018, Applicant appeared before the Honorable Thomas W. Cooper and plead guilty as indicted.[1] Timothy Kulp, Esquire represented Applicant. Assistant Solicitor Donald Sorenson represented the State. Judge Cooper sentenced Applicant to consecutive terms of twenty-five years for felony DUI with death and fifteen years on the burglary charges to run concurrently. Applicant did not appeal his plea or sentence.

SUMMARY OF RELEVANT FACTS

Danywell Criswell and David Wise reported their residence was broken into sometime between midnight and 5:00AM on or about October 20, 2016. The rear balcony sliding door was identified as the point of entry into the apartment. Victims told law enforcement that $150 in cash, and keys to a 2010 black Ford Fusion registered to Victim's mother, were missing from the residence. Law enforcement officers responding to the scene located a grey backpack below

[1] At the plea hearing, Applicant waived his right to have indictment 2018-GS-10-1816 disposed of in Charleston County, and proceeded to have all three pleas before Judge Cooper.

Victim's balcony that contained an October 11, 2016, uniform traffic ticket for DUI belonging to Applicant.

At 3:41 A.M. that morning, officers from the Summerville Police Department responded to a call-in reference to an abandoned over-turned vehicle. The vehicle was identified as the 2010 Ford Fusion, and a search of the vehicle resulted in the discovery of a wallet that contained Applicant's driver's license and $86.00.

At or around 4:15 A.M., a security camera located two blocks away from the over-turned Fusion recorded Applicant attempting to break-in to the residence through a sliding glass door. Applicant ultimately entered the residence through a kitchen window, where he proceeded to steal a watch and the keys to Victim's 2010 Ford F-250 pickup truck. The security camera recorded Applicant backing the stolen vehicle out of the driveway at 5:12 A.M.

At or around 5:31 A.M., a deputy with the Dorchester County Sheriff's Department began pursuit of the 2010 Ford F-250 after he clocked it going 66 m.ph. in a 45 m.ph. zone. The driver accelerated away from the deputy, at which time the deputy abandoned pursuit but continued in the same direction as the fleeing pickup truck. Within a minute, the deputy discovered a multi-vehicle accident. The Ford F-250 veered across the center median, clipping a GMC pickup truck and a Volvo SUV, before striking a Porsche SUV, killing the driver.[2]

Applicant escaped on foot from the wreckage by the time deputies arrived on scene. Around 7:30 A.M., deputies located and arrested Applicant a few miles away from the scene of the accident. Applicant then admitted to stealing the Ford F-250 and driving it at the time of the collision. Deputies administered field sobriety tests, which Applicant failed. Applicant's blood

[2] The driver of the GMC pickup truck was Taryn Sigman, her husband was driving separately in the Porsche SUV and was the sole fatality from the accident. When the deputy arrived on scene, Mrs. Sigman had gotten out of her vehicle and found her husband deceased.

alcohol came back negative. However, Applicant indicated to law enforcement that he had taken two Xanax bars. His toxicology report returned positive for methamphetamines and Xanax. Applicant later admitted that he smoked methamphetamines and took Xanax throughout the day prior to the burglaries and the felony DUI.

CURRENT ACTION BEFORE THE COURT

In his application for PCR, Applicant alleges he is being held in custody unlawfully (as to indictments 2016-GS-18-1961; -1962) for the following reasons:

1. Ineffective assistance of counsel
    a. Failure to advise
    b. Failure to investigate
    c. Failure to investigate and present mitigating circumstances

At the evidentiary hearing Applicant proceeded on the allegations set forth in his application.

SUMMARY OF EVIDENTIARY HEARING TESTIMONY

APPLICANT'S TESTIMONY

Applicant testified he is currently twenty-seven years old but was twenty-one at the time of the incident. Applicant asserted he never saw discovery. Applicant stated he was given his "charges when he woke up the day of court." Applicant claimed he thought he may be sentenced under the Youth Offender Act (YOA). Applicant also stated that Counsel told him his sentence would be "ten years or under fifteen years." Applicant told the Court that Counsel instructed him to "just sign" the sentencing sheet and not to pay attention to what it stated.

Applicant asserted Counsel "lied to him" and only "just took our money." Applicant stated Counsel never told him that he had a trial defense. Applicant attested to not being "stupid" but to having had a ninth-grade education in "special classes," and challenges, such as a drug problem that did not help his impulsiveness.

Applicant also stated that he wished he had more time with Counsel, and not to have been "rushed into the court room once [Counsel] took his money." Applicant stated he thought he should have had an "insanity plea" because he heard voices. Applicant stated that the voices were worse when he was arrested but that they have "gotten better" since medication and treatment for substance abuse.

ROBERT TURNER TESTIMONY

Robert Turner testified that he is Applicant's stepfather. He testified that he has been his stepfather since 1998. Turner stated that Applicant has lived with him and Applicant's mother since the age of thirteen. Turner testified that Applicant had mental issues and had taken Adderall and Ritalin in the past, while growing up, but neither medication granted positive results. Turner stated he tried to get mental help for Applicant but "couldn't get anyone to help." Turner stated that he hired Counsel and paid him. Turner stated that Counsel discussed the case with him. Turner said two years after the initial meeting with Counsel, he was asked to pay for a mental evaluation.

Turner testified Applicant was "a lot different than he was when he got in jail." Turner stated he was able to tell that Applicant didn't understand anything at his plea hearing. Turner asserted that at the time he thought everything had been discussed with Counsel but does not feel the same way now. Turner said he was surprised that Applicant received forty years. Turner stated "he deserves time, but he didn't deserve forty years." Turner said now that he knows Applicant's sentence, he would have told Applicant that he should go to a jury trial rather than plead guilty. Turner testified that he did meet with Counsel before sentencing. Turner asserted that he told Counsel to file a motion to suppress Applicant's confession because Applicant "will just say things."

PLEA COUNSEL'S TESTIMONY

Counsel testified he has been an attorney for forty-five years and has practiced mostly criminal defense. Counsel recalled he became Applicant's lawyer in October of 2016. Counsel testified he first met with Applicant on October 8, 2016. Counsel stated he met with Applicant about seven or eight times. Counsel stated he discussed all the State's evidence with Applicant. Counsel recalled some of the most damaging evidence was the video tapes of Applicant committing the burglary, speeding past the deputy's dash cam, and the recorded footage of Applicant's confession immediately after apprehension.

Counsel testified he had Applicant evaluated for psychological and mental health issues by Dr. McKee. Counsel stated that Applicant was found to be competent. Counsel told the Court that the professional said that Applicant was in a position to testify to useful information. Counsel asserted that Applicant participated in preparation of his case. Counsel remembered Applicant being candid and truthful with him. Counsel stated that during sessions of explaining discovery, elements of charges, and proof against Applicant, Applicant seemed to be able to follow. Counsel recalled drawing pictures to help explain some concepts to ensure Applicant's understanding. Counsel testified that it would be hard to argue Applicant's presentation on the video evidence was due to mental health or anything other than the substances he admitted he ingested.

Counsel stated he doesn't think the video indicated that Applicant did not understand *Miranda*[3] rights or was incapable of understanding *Miranda* rights. Counsel didn't believe Applicant was more mentally challenged than "most clients." Counsel stated the questions Applicant asked were meaningful and relevant to the defense. Counsel stated he employed Dr.

[3] *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (2966).

McKee to see if Applicant's ingestion of drugs was to the degree that rendered him incapable of knowing what he was doing.

Counsel said that if Applicant had elected to go to trial, then he would have filed a motion to suppress evidence and would have challenged the blood evidence that the State had obtained. Counsel stated he would have been compelled to argue that the State could not prove intoxication but that it would not have been successful due to the overwhelming amount of evidence to the contrary. Counsel stated he challenged the intoxication factor and developed argument for it with the Solicitor, but the issue of impairment came from Applicant's admission to drugs ingested and how he appeared. Counsel stated that when he tries a case, he argues any issue that is legally and ethically permissible and does everything to attack the State's case in any way.

Counsel stated that Applicant's focus was to prevent life in prison without the possibility of parole. Counsel testified that Applicant said he would be happy with receiving a ten-to-fifteen-year sentence. Counsel stated he carefully explained that there was no agreement as to what the judge would impose other than no life without parole sentence, and judge would not commit to any sentences being concurrent. Counsel stated Applicant understood this. Counsel stated he submitted a sentencing memo and mitigation presentation in hopes of obtaining a twenty-five- and fifteen-year concurrent sentence but that didn't happen. Counsel stated that he had never heard a victim use the word "consecutive" in a victim impact statement.

Counsel also noted that the widow of the deceased had civil counsel. Counsel believed that the most damaging information for sentencing was the telephone call Applicant made from jail, despite having been told by Counsel on many occasions not to discuss the case in jail calls. Counsel stated that during this call Applicant told his grandmother that he was looking forward to getting a "tattoo of a tear under his eye but not blacked in because he didn't intend to kill the guy." Counsel

stated that he believed Applicant could understand the impact of the audio segment that was played because he said it to his grandmother.

Counsel testified he didn't believe that the Applicant's lack of a violent history would be mitigating to a sentencing judge. Counsel asserted that Applicant's stepfather kept stressing that no one was hurt in the burglary, but that is not an element to the charge of burglary. Counsel did not believe that ninety-nine percent of first-degree burglaries are pled down, explaining each case is always fact specific. Counsel admitted that he was aware of how judges sentence and that he did everything he could to avoid to plea before a judge that "would be known to throw the hammer at him," but Judge Cooper wasn't known to do that. Counsel stated he spoke with other bar members about Judge Cooper, and they said he was fair. Counsel asserted that he mentioned Applicant's youth and that the death was unintentional, and he used every tactic and approach to receive the best result.

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

The Court has reviewed the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court further had the opportunity to observe the witnesses at the evidentiary hearing and evaluate their credibility, and the Court has weighed their testimony accordingly. This Court finds the combined record of the plea transcript and the testimony and evidence presented at the evidentiary hearing establish that Applicant received effective assistance of counsel. Accordingly, this Court denies relief and dismisses this application with prejudice. Set forth are the relevant findings of facts and conclusions of law as required by section 17-27-80 of the South Carolina Code.

INEFFECTIVE ASSISTANCE OF COUNSEL

Applicant's allegations of ineffective assistance of counsel are without merit. In a post-conviction relief action, an applicant bears the burden of proving allegations in the application. Rule 71.1(e),SCRCP; *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). Applicant must prove that "Counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *Butler*, 286 S.C. at 442, 334 S.E.2d at 814.

The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgement. *Butler*, 286 S.C. 441, 334 S.E.2d 813. An applicant must overcome this presumption for relief to be granted. *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts apply the two-pronged test outlined in *Strickland* when evaluating ineffective assistance of counsel. First, the applicant must prove counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms". *Cherry*, 300 S.C. at 117, 385 S.E.2d at 625 (citing *Strickland*). Second, counsel's deficient performance must have 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 117-118, 385 S.E.2d at 625. With respect to a guilty plea, the applicant must show there is a reasonable probability that, but for counsel's alleged errors, he would not have plead guilty and would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52 (1985).

A defendant who enters a guilty plea on the advice of counsel may only attack the voluntary and intelligent character of a plea by showing that counsel's representation fell below the objective

standard of reasonableness and that there was a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty, but would have insisted on going to trial. *Holden v. State*, 393 S.C. 565, 572, 713 S.E.2d 611, 615 (2011), (citing *Rolen v. State*, 384 S.C. 409,413, 683 S.E.2d 471,474 (2009)). After careful review based on the standard discussed above, this Court finds Applicant has failed to carry his burden in this action. Therefore, this Court must deny and dismiss this application with prejudice.

Counsel's Failure to Advise

Applicant alleges that Counsel failed to sufficiently advise him about his discovery, the nature of his charges, implications of any potential sentence, and the consequences of his plea deal. The credible testimony before this Court is that Counsel not only reviewed all discovery with Applicant but also reviewed it with his stepfather. Applicant's stepfather testified that Counsel discussed the case with them and at the time of the plea hearing he believed they had discussed everything with Counsel. Counsel's credible testimony reveals, and the record reflects, Counsel advised Applicant on his discovery and the elements of his crimes and drew pictures to ensure Applicant's understanding. Counsel testified that Applicant was candid and truthful with him during the seven or eight meetings they had to explain discovery, the elements of the charge and discuss the proof against Applicant. This Court finds Counsel's testimony was credible and his performance was reasonable in light of the circumstances of this case and finds that he performed competently in accordance with professional standards.

Furthermore, this Court finds that Applicant has failed to meet his burden of establishing any resulting prejudice from any alleged deficiency. Applicant was informed before pleading of his potential sentence and the consequences of his plea. Applicant testified that he was aware of the right to trial, what the Youthful Offender Act (YOA) is, and that he was hoping for a 10-to-15-

year sentence, but ultimately decided to plea. Counsel credibly testified that he informed Applicant of the implications of his sentence when discussing the elements of the crimes, as well as the consequences of the decision to plead guilty, well in advance of Applicant's hearing. Applicant has failed to satisfy his burden of establishing that his actions would have been any different from any of the actions taken by Counsel over the course of his defense. Therefore, this allegation must be dismissed with prejudice.

Counsel's Failure to Investigate

Applicant's allegation that Counsel was ineffective for failure to investigate evidence, witnesses, potential defenses and potential dispositive pretrial motions is without merit. Counsel has a duty to undertake reasonable investigations or to make a decision that renders a particular investigation unnecessary. *Strickland v. Washington*, 466 U.S. 668, 691, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Thus, "[a] criminal defense attorney has the duty to conduct a reasonable investigation to discover all reasonably available mitigation evidence and all reasonably available evidence tending to rebut any aggravating evidence introduced by the State." *McKnight v. State*, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008). Moreover, counsel's decision not to investigate should be assessed for reasonableness under all the circumstances with heavy deference to counsel's judgment. *Simpson v. Moore*, 367 S.C. 587, 597, 627 S.E.2d 701, 706 (2006). "[A]t 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). "[C]ounsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions...." *Strickland*, 466 U.S. at 691, 104 S.Ct. 2052. "[A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts

of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690, 104 S.Ct. 2052. *Bagwell v. State*, 410 S.C. 259, 265, 763 S.E.2d 630, 633-34 (Ct. App. 2014). Further, the Court in *Glover* found because other alleged witnesses that Applicant claimed may have provided an alibi defense "did not testify at the PCR hearing, respondent could not establish prejudice from counsel's failure to contact these witnesses". *Glover v. State*, 318 S.C. 496, 458 S.E.2d 538 (1995).

At the evidentiary hearing, Counsel presented many investigatory measures that were taken in order to provide a defense for Applicant. Counsel testified he met with Applicant's family members and reviewed discovery with Applicant, his mother and stepfather after investigating all the evidence. Counsel credibly testified that the reason he did not challenge the intoxication of Applicant at the time was due to Applicant's own confession to law enforcement as well as the body cam and dash cam footage that clearly displayed his intoxicated demeanor. This Court finds Counsel's foregoing testimony regarding his investigation to be credible. Further, the evidence does not show that Counsel's investigation falls beneath the standard of reasonableness for legal professionals. Finally, Applicant did not prove prejudice because there was no evidence presented showing that further investigation would have revealed anything other than the outcome that was rendered. *See Glover v. State,* 318 S.C. 496, 458 S.E.2d 538 (1995) (quoting *Underwood v. State*, 309S.C. 560, 425 S.E.2d 20 (1992) pure conjecture as to what a witness's testimony would have been is not sufficient to show a reasonable probability the result at trial would have been different*)*. Therefore, in light of this testimony evidence, and the evidentiary hearing record as a whole, this Court finds this allegation to be without merit and must be denied as the remaining ground for relief.

Counsel's Failure to Mitigate

Applicant claims Counsel was ineffective for failing to mitigate the sentence. Counsel may

be found deficient for failing to sufficiently investigate and present mitigating evidence. *See Council v. State*, 380 S.C. 159, 172, 670 S.E.2d 356, 363 (2008) (finding it unreasonable for counsel not to further investigate the defendant's background and present even minimal mitigating evidence obtained); *Wiggins v. Smith*, 539 U.S. 510, 521 (2003) (finding it unreasonable when Counsel failed to investigate mitigating evidence beyond a couple retained records, including the presentence investigation report and social service records); *Williams v. Taylor*, 529 U.S. 362, 398 (2000) (finding that Counsel was unreasonable for failing to evaluate the totality of available mitigation evidence). An applicant is prejudiced by this deficiency if there is a reasonable probability that a different sentence would have been imposed but for Counsel's failure to investigate and present mitigating evidence. *Council v. State*, 380 S.C. 159, 171, 670 S.E.2d 356, 362 (2008).

The record before this Court reflects that Counsel mitigated at sentencing before Judge Cooper. Counsel credibly testified, and the plea transcript supports, that Counsel reviewed Applicant's age, lack of an extensive prior record, and absence of a violent history at the time of his plea hearing. Counsel also testified that he submitted a sentencing memo and mitigation presentation in hopes of obtaining a shorter sentence for Applicant. Counsel testified that he made arrangements with a psychiatric professional, Dr. McKee, in order to obtain a mental evaluation for Applicant, for the purposes of mitigation. Finally, this Court finds the foregoing testimony by Counsel to be credible. Further, this Court finds Applicant did not show Counsel's conduct fell below prevailing professional norms and thus did not prove deficiency. Applicant provided no evidence of any mitigating factors that were not considered or included at the plea hearing by Counsel and thus failed to prove prejudice. *See Glover v. State*, 318 S.C. 496, 458 S.E.2d 538 (1995). As Applicant has failed to prove deficiency and prejudice, this Court finds that this

allegation must be denied and dismissed with prejudice.

INVOLUNTARY GUILTY PLEA

Applicant also alleges that his plea was invalid. For a guilty plea to be valid, the record must establish the defendant had a full understanding of the consequences of their plea and the charges against them. *Dalton v. State*, 376 S.C. 130, 138, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing *Boykin v. Alabama*, 395 U.S. 238, 242 (1969)). Further, an applicant can attack the voluntary, knowing and intelligent character of a guilty plea entered on advice of counsel by showing counsel's advice in taking the plea fell below an objective standard of reasonableness. *Porter v. State*, 368 S.C. 378, 629 S.E.2d 353 (2006). "That 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 v. Richardson*, 397 U.S. 759, 770 (1970). Rather, "whether a plea of guilty is unintelligent . . . depends as an initial matter, not on whether a court would retrospectively consider counsel's advice to be right or wrong, but on whether that advice was within the range of competence demanded of attorneys in criminal cases." *Id.* at 771.

Applicant's testimony at the evidentiary hearing supports the Plea Court's finding that he knowingly entered his plea. Applicant testified that he had spoken to Counsel about his option to plea, the likelihood of success at trial being very low, and the possible sentences. Counsel further testified to the voluntariness of this plea in that Applicant's focus in his decision to enter a guilty plea was to prevent life in prison without the possibility of parole. Counsel stated that he carefully explained that there was no agreement as to what sentence the judge would impose other than no life without parole sentence, and the judge would not commit to any sentences being concurrent. Counsel stated that Applicant understood this.

The plea record also reflects Applicant's meaningful understanding of voluntarily, knowingly and intelligently entering his plea. Judge Thomas W. Cooper thoroughly discussed his charges and the implications of each, including the respective sentences of each and the State's strikes law. (Tr. 7,8,10,12). Applicant also testified at his plea hearing that he understood he was waiving constitutional rights, such as his right to remain silent, right to a jury trial, and the burdens of the State to prove his guilt beyond a reasonable doubt. (Tr. 8, 11). Based on the testimony from the evidentiary hearing as well as the plea hearing record, this Court finds that Applicant did enter his plea of guilty voluntarily, knowingly and intelligently and therefore has no constitutional right to relief.

CONCLUSION

Based on all of the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this Court must deny and dismiss this post-conviction relief application with prejudice.

This Court notes that if Applicant wishes to secure appellate review, he must file and serve a notice of appeal within thirty days from the receipt by counsel of written notice of entry of judgment. *See* Rule 203, SCACR. Pursuant to *Austin v. State*, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on the Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That this application for post-conviction relief must be denied and dismissed with prejudice; and

2. The Applicant must be remanded to and remain in the custody of the State

AND IT IS SO ORDERED this 20th day of March, 2023.

HEATH P. TAYLOR
Presiding Judge
First Judicial Circuit

Orangeburg, South Carolina