

THE STATE OF SOUTH CAROLINA

In The Supreme Court

APPEAL FROM CHARLESTON COUNTY

Court of Common Pleas

Honorable R. Ferrell Cothran, Jr, Circuit Judge

Case No.: 2019-CP-10-3295

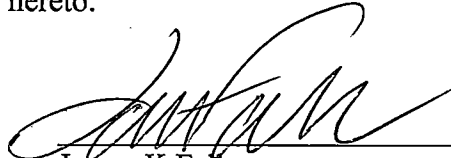
Sylvester Scott 296019.....PETITIONER

V.

State of South Carolina.....RESPONDENT

NOTICE OF APPEAL

The Petitioner Travis McFadden appeals the Honorable R. Ferrell Cothran, Jr's March 31, 2023 Order of Dismissal. Undersigned counsel received notice of entry of the order on April 10, 2023. A copy of the order on appeal is attached hereto.



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April 14, 2023

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S.C. SUPREME COURT

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STATE OF SOUTH CAROLINA )  
COUNTY OF CHARLESTON )

) IN THE COURT OF COMMON PLEAS  
) FOR THE NINTH JUDICIAL CIRCUIT

Silvester D. Scott, #296019, )

) CASE NO. 2019-CP-10-3295

) Applicant, )

) v. )

ORDER OF DISMISSAL

) State of South Carolina, )

) Respondent. )

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JULIE J. ARMSTRONG  
CLERK OF COURT

FILED

The matter comes before this Court by way of an application for post-conviction relief filed by Applicant Silvester D. Scott, asserting various allegations of ineffective assistance of counsel. Respondent the State of South Carolina made its return to the application and requested an evidentiary hearing to resolve the issues as set forth in the application.

An evidentiary hearing was convened on April 8, 2022, at the Charleston County Courthouse before this Court. Applicant was present and represented by James K. Falk, Esquire. Assistant Attorney General Samantha J. Weidauer of the South Carolina Attorney General's Office represented Respondent. Applicant proceeded forward on a sole allegation that his counsel was ineffective for failing to properly prepare a witness to testify. Following testimony from Applicant and his two plea counsels, this Court took the matter under advisement to further review the record and applicable law before making a ruling.

After a thorough review of the record in its entirety, along with the arguments presented at the evidentiary hearing, this Court finds Applicant has failed to establish any constitutional violations or deprivations entitling him to relief and, accordingly, denies and dismissed this action with prejudice. Specific findings of fact and conclusions of law as required pursuant to S.C. Code Ann. § 17-27-80 are set forth below:

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S.C. SUPREME COURT

## PROCEDURAL HISTORY

The records before this Court establish that Applicant is presently confined in the South Carolina Department of Corrections. During its August 2015 term, the Charleston County Grand Jury indicted Applicant for armed robbery (2015-GS-10-04002) and possession of a weapon during the commission of a violent crime (2015-GS-10-04003).

Assistant Public Defenders John J. Kozelski (“Plea Counsel”), Esquire, and Susannah R. Knox (“Ms. Knox”) of the Charleston County Public Defender’s Office represented Applicant. Assistant Solicitor Thomas R. Waring, II of the Ninth Circuit Solicitor’s Office prosecuted the case. Thereafter, the State served Applicant with its notice of intention to seek life without parole pursuant to S.C. Code Ann. § 1725-45 based on his prior record.

Applicant proceeded to trial on March 11, 2019, before the Honorable Roger M Young, Sr., and a jury. On March 14, 2019, after the State presented its case and after Applicant called several witnesses in his defense but before the conclusion of the trial, Applicant elected to forgo the right to trial and enter guilty pleas pursuant to Alford v. North Carolina<sup>1</sup> to armed robbery and the weapons charge pursuant to negotiations with the State for a determinate twenty-year term of imprisonment and the dismissal of unrelated, pending charges. Following a thorough plea colloquy with Applicant, Judge Young found Applicant’s plea was entered knowingly, intelligently, and voluntarily and accepted his plea pursuant to Alford. Pursuant to the plea negotiations, Judge Young sentenced Applicant to twenty years of imprisonment for armed robbery and to a concurrent term of five years of imprisonment for the possession of a weapon during the commission of a violent crime. Applicant did not appeal his convictions or sentences.

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<sup>1</sup> Alford v. North Carolina, 400 U.S. 25 (1970).

## SUMMARY OF RELEVANT FACTS LEADING TO CONVICTIONS

Assistance Solicitor Thomas R. Waring presented these facts at Applicant's trial in his opening statement to the Court:

On March 4, 2015, sometime around 1:00 in the afternoon, the defendant went over to his buddy's motel room at the Best Western in Charleston. He had two buddies there, two guys: Anthony Holsberg and Alonzo Green. Now, the defendant went over there because these guys wanted him to go get them some heroin. So he came over. He was wearing a red and white striped shirt, but rather than using his own vehicle to go get these drugs, he wanted to swap cars with Anthony Holsberg, and at that time, Mr. Holsberg was driving a silver or Dodge gray Charger, and you're going to hear about that. That vehicle has after-market additions to it. For example: It had a black top, some fancy rims; it also had tinted windows, a spoiler on the back things of that nature. You're going to hear all about that. So he took that vehicle. Fast forward a few hours, approximately 3:15 p.m. in the afternoon, and an individual can be seen driving a similar such type vehicle, again, a gray or silver Dodge Charger-type vehicle with aftermarket additions, flat top, fancy rims, pulls into the parking lot of the Family Dollar on Rivers Avenue. The individual gets out and walks into that Family Dollar location wearing dark blue coveralls covering his arms and legs, and wearing a red and white striped shirt similar in nature to what the defendant was wearing at his buddy's motel room. That individual purchased a sixpack of dust masks and received a receipt for it. It's time stamped approximately 3:17 p.m. that afternoon, and that individual then leaves the Family Dollar. Fast forward approximately 15 minutes later, around 3:30 in the afternoon, across town, over the Cosgrove Bridge and at the First Palmetto Bank, a similar such type vehicle, again, gray-ish, silver Dodge Charger vehicle, aftermarket additions, black top, spoiler on the back, fancy rims, et cetera, pulls into the parking lot of that First Palmetto Bank on Sumar Street. The individual then walks into that bank wearing dark blue coveralls covering his arms and legs, and a distinct red and white striped shirt similar to the one the defendant was wearing over at his buddy's house. Now, the robber walked in wearing Sperry boat-type shoes, gloves on his hands, dust mask over his face, clear glasses on, silver metallic circular type watch, and he's got a silver gun. He walks up to the victim who's sitting over there in the yellow, points the gun at her, demands money. He's waving the gun around, and he's walking around, and you're going to see this video. All this is on video. Takes the money and then leaves. As he's leaving, the victim, Jasmine Jenkins, looks out the window and sees a similar such vehicle peeling out of the parking lot. She called 911 almost immediately, and so around that time the police are looking for that type of vehicle. Later that night, they see such a vehicle that sounds similar in description to that in the parking lot of the Quality Inn motel, different motel, and it's determined that two individuals who are associated with that vehicle turn out to be the two buddies that the defendant had been hanging out with earlier, and it was

determined that the owner of the vehicle was Anthony Holsberg, and Alonzo Green, the other individual, has known the defendant for over 20 years and can identify him by sight and by name. Now, the police did a search warrant on that vehicle, and that's when things started getting interesting. Inside the vehicle, a Family Dollar bag was found. Inside of that Family Dollar bag, there was a receipt for the purchase of a sixpack of dust masks, and, in addition, there was the actual sixpack of the dust mask packing, minus a dust mask. So we got that in there. Now, the defendant's house was also searched on English Street in North Charleston, and at that house, there was some more interesting things found as well. There was a distinct red and white striped shirt that appeared to be similar to what the individual was wearing in the Family Dollar video who bought the dust masks and similar to what the individual -- robber who robbed the bank was wearing, so you got the red and white striped shirt. You had some Sperry shoes or boat shoes that were similar in nature to what the defendant was described -- the robber was described as wearing in the bank video. There was also some other interesting things. There was a Family Dollar bag indicating that the defendant had purchased items before at the Family Dollar. Now, he was apprehended a couple days later, and on the defendant there was about \$635 in cash and there were two phones found. Now, the police gave a search warrant for his cellphone records, and that's when things really got interesting because cell tower mapping, which is essentially technology that can take somebody's cellphone number and map it out and determine where you are, location-wise, based on which phone calls throughout the day. That cellphone tower mapping pinpointed the defendant's cellphone at specific locations throughout Charleston County at specific times, specifically Best Western before the robbery. Boom. His cellphone is in that area. Family Dollar, around 3:17, boom. His cellphone is in that area. Robbery location: What am I going to say next? Boom. He's in that area, and then, sure enough, later that day, he's back at Best Western in that area, around the area of the Best Western. Due to the evidence against him, the defendant was charged with two crimes: Armed robbery and possession of a weapon during the commission of a violent crime. As the judge has mentioned, it's our burden to prove the defendant guilty beyond a reasonable doubt, firmly convince you of his guilt. For armed robbery that means we have to prove he took and carried away personal property of another through the use of force, threats, or intimidation and with the intent to permanently deprive them of that property while armed with a deadly weapon. For the gun charge, we have to prove he possessed a deadly weapon, such as a gun, during the commission of a violent crime, such as armed robbery. I'm going to challenge you right now to focus on all this evidence that comes out like the judge said, what comes out up on the stand. That's the evidence. I'm going to challenge you to focus on that evidence as it applies to the elements of these charges, and I think if you do that, you'll determine that we've carried our burden, find the defendant guilty. You'll determine that we have removed the mask and identified him as the robber, and you'll find him guilty.

Trial Tr. Vol. II, P. 135-140.

## CURRENT PROCEEDING

In his application for post-conviction relief, Applicant alleged he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel
  - a. "Trial Counsel ineffective for giving Applicant bad advice."
  - b. "Trial Counsel was ineffective for not investigating an eyewitness."
  - c. "Trial Counsel was ineffective for not interviewing alibi witness."

At the start of the evidentiary hearing, Applicant informed this Court he was proceeding forward on a sole allegation that his counsel was ineffective for failing to properly prepare an alibi witness to testify.

### SUMMARY OF TESTIMONY AT EVIDENTIARY HEARING

Applicant testified first on his own behalf. On direct examination, Applicant testified the trial strategy of Plea Counsel was present an alibi witness ("Mc. Cordero") to refute the State's circumstantial evidence against Applicant. Evid. Hr. Tr. P. 6. Applicant testified there were plea negotiations with the State, and offered Applicant a ten-year plea, because they had no witnesses and Applicant has an "air-tight alibi witness". Evid. Hr. Tr. P. 6, line 18. Applicant was in North Charleston when the crime occurred, talking to a friend, and he testified Ms. Cordero's moped stalled in front of his driveway and he helped her. Evid. Hr. Tr. P. 7. Applicant testified he helped Ms. Cordero with her moped, working on the moped in his yard and giving the Ms. Cordero a ride home. Evid. Hr. Tr. P. 7. Ms. Cordero is old, Applicant testified as old as his grandmother, and people in the neighborhood generally look out for her. Evid. Hr. Tr. P. 7. Applicant testified the Ms. Cordero was in her seventies at the time. Evid. Hr. Tr. P. 8.

Applicant testified during a recess in Applicant's trial after Ms. Cordero testified, Plea Counsel advised Applicant to think about taking a plea because the State would be able to convict Applicant on the theory of "hand of one, hand of all". Evid. Hr. Tr. 8, line 16-23. Applicant testified

he was confused by this because the State had not introduced a co-defendant he could have conspired with anyone, and Applicant felt like he only had the choice of life in prison or a deal. Evid. Hr. Tr. P. 8-9. Applicant testified the suspect who owned the vehicle used in the crime passed away before Applicant's case went to trial, who could have been a witness against Applicant. Evid. Hr. Tr. P. 9. Applicant testified discussions about "hand of one, hand of all" had not been discussed before trial, hearing about it for the first time during the recess. Evid. Hr. Tr. P. 9-10.

Applicant testified he did not plead guilty because he was actually guilty, but "I plead guilty because that was the advice of my attorney". Evid. Hr. Tr. P. 10, line 15-16. Applicant stated Plea Counsel's advice changed during trial, and Plea Counsel had been optimistic about his case at beginning of trial, but changed once Ms. Cordero testified. Evid. Hr. Tr. P. 10-11. Applicant testified everyone was shocked of Ms. Cordero's mental condition on stand. Evid. Hr. Tr. P. 10-11.

On cross-examination, Applicant testified he plead guilty after three days of trial, and recalled the state dropping a couple pf charges as a result of the plea. Evid. Hr. Tr. P. 11. The State dropped two armed robbery charges and two possession of a weapon charges against Applicant as a result of his plea. Evid. Hr. Tr. P. 11, line 18-19. Applicant testified he understood that is he was granted this PCR he would be retried and possibly convicted on all charges dropped, with a possibility of life without parole. Evid. Hr. Tr. P. 11-12.

Applicant testified he could not recall how many times he met with Plea Counsel as it was a five-year span from arrest to trial and he had other charges that went to trial, and stated he believes he met with Plea Counsel frequently. Evid. Hr. Tr. P. 12. Applicant recalled discussing the State's circumstantial evidence against him, but recalls going over discovery for other charges more, because Plea Counsel believed those charges to be more of an issue. Evid. Hr. Tr. P. 12-13.

Applicant testified it was his understanding the State's case was one of circumstantial evidence. Evid. Hr. Tr. P. 13.

Applicant testified he informed Plea Counsel that Ms. Cordero could be an alibi witness. Evid. Hr. Tr. P. 13. Applicant testified he ultimately decided to plea, based on advice of his attorney, even though he told the plea court it was his decision alone to plead guilty. Evid. Hr. Tr. P. 13-14. After the testimony of Ms. Cordero, Applicant testified the discussions with Plea Counsel centered around Applicant taking a plea. Evid. Hr. Tr. P. 14. Applicant testified he was not told the State intended to call Investigator Verdell to combat his alibi. Evid. Hr. Tr. P. 14. Applicant testified he was aware he had the right to testify at trial and to remain silent, and he could have testified to the fact he had an alibi at trial. Evid. Hr. Tr. P. 14-15. Applicant stated he did not choose to testify at trial because he had a prior record and Plea Counsel advised him it was not a good idea. Evid. Hr. Tr. P. 15.

Applicant testified he does not recall the plea court asking if he believed "there was a good possibility [Applicant] would be convicted based on the evidence presented by the State". Evid. Hr. Tr. P. 15, line 15-18. Applicant testified he was "numb about the situation", and so he does not remember everything that took place at the guilty plea hearing. Plea Hr. Tr. P. 15, lines 19-23. Applicant testified he likes and respects Plea Counsel, and Plea Counsel made a mistake in this instance of Applicant's case. Evid. Hr. Tr. P. 16. As to the colloquy with plea court, Applicant testified he was in shock when questions were being asked of him, and he cannot remember exactly what judge asked him. Evid. Hr. Tr. P. 16. Applicant testified he was satisfied with Plea Counsel's services prior to the State cross-examining Ms. Cordero. Evid. Hr. Tr. P. 16. However, Applicant testified he does not believe Plea Counsel adequately investigated Ms. Cordero prior to trial. Evid. Hr. Tr. P. 17.

Plea Counsel Kozelski testified next. He testified he informed jury they would be hearing from an alibi witness in his opening statement of Applicant's case. Evid. Hr. Tr. P. 18. Plea Counsel testified he checked with investigator prior to trial to see if Ms. Cordero was still a good witness, and the investigator told him, "she remembers it like it was yesterday". Evid. Hr. Tr. P. 18, line 14-25. Plea Counsel testified because of this assurance he mentioned Ms. Cordero as an alibi witness and used the same language the investigator used to describe Ms. Cordero's memory, which he ultimately regrets. Evid. Hr. Tr. P. 19. Plea Counsel testified Ms. Cordero was in her seventies when he originally spoke with her and testified Ms. Cordero refused to speak with the Solicitor prosecuting the case before she testified. Evid. Hr. Tr. P. 19. Plea Counsel testified his trial strategy was to argue Applicant did not commit this crime, using Ms. Cordero as an alibi witness to prove he was not there at the time of the bank robbery. Evid, Hr. Tr. P. 19.

Plea Counsel testified he never spoke with Ms. Cordero directly, but he did get a statement from her through his investigator. Evid. Hr. Tr. P. 19-20. Applicant informed Plea Counsel about Ms. Cordero, the investigator contacted Ms. Cordero, got a statement from her, and Plea Counsel sent the statement to David Osborne, the solicitor prosecuting Applicant's case. Evid. Hr. Tr. P. 20. The original prosecutor assigned to the case was Chad Simpson, but later switched to David Osborne, who Plea Counsel objected to because he had been a detective and previously arrested Applicant for other charges. Evid. Hr. Tr. P. 20. The case was then assigned to Richard Waring. Evid. Hr. Tr. P. 20, line 18-19.

Applicant testified Verdell Young was an investigator with the public defender's office. Evid. Hr. Tr. P. 20. Plea Counsel testified the cross-examination Ms. Cordero was a problem, testifying the State made it appear as if Plea Counsel had put Ms. Cordero up to making the

statement. Evid. Hr. Tr. P. 21. PCR Counsel referenced page 521, line 18, of the trial transcript as the problematic part of Ms. Cordero's cross-examination. Evid. Hr. Tr. P. 21, line 7-9:

Q. I understand that, but I guess what I'm asking you is, two months after the incident, how did you know that that happened on March the 4th?

A. Because I was told.

Q. Because you were told?

A. Yes.

Q. You were told by the investigator?

A. Yes.

Trial Tr. P. 521, line 18-25. Plea Counsel testified it is normal on cross-examination of witnesses for witness to be asked how they remember an event that happened years earlier. Evid. Hr. Tr. P. 21. Plea Counsel testified he believes Ms. Cordero testified she remembered the day in question because her moped was running hot that day. Evid. Hr. Tr. P. 21. When the solicitor was cross-examining Ms. Cordero, she could not tell the solicitor exactly why she remembered that day, and so when the solicitor pressed her she said the investigator told her. Evid. Hr. Tr. P. 22.

Applicant testified the solicitor made it seem as if the investigator wrote down Ms. Cordero's statement:

Q. But she told you that?

A. No. She didn't tell me my moped ran hot.

Q. And she told you that happened on March the 4th, correct?

A. She told me when -- I don't know the exact date, but it was written down, though.

Q. It's written down?

A. Yes.

Q. By the investigator?

A. Yeah. I signed it.

Trial Tr. P. 522, line 4-13. Ms. Cordero's testimony was she remembered the date because her moped ran hot, and when the solicitor asked her how she remembered, she responded the

investigator told her. Evid. Hr. Tr. P. 23. Plea Counsel testified the cross-examination changed his opinion on the outcome of the case, because it made it look like their alibi was lying. Evid. Hr. Tr. P. 23. Plea Counsel testified he did not work with Ms. Cordero much, because he had given the task of dealing with Ms. Cordero to his second chair, Susannah Know. Evid. Hr. Tr. P. 23. Plea Counsel testified he was the one who advised Applicant to plea because their defense relied on Ms. Cordero, and that defense had fallen apart at trial. Evid. Hr. Tr. P. 23-24. Plea Counsel testified he believed up to that moment they were winning the trial. Evid. Hr. Tr. P. 24. Plea Counsel testified he does not recall discussing the “hand of one, hand of all” theory with Applicant, because there was no co-defendant, but it was a possibility. Evid. Hr. Tr. P. 24.

Plea Counsel testified the State’s case against Applicant was essentially circumstantial, tying him to vehicle used in the robbery, which the owner frequently lent to people to go get drugs. Evid. Hr. Tr. P. 25. The State had a witness, Alonzo Green, who testified Applicant has borrowed the vehicle at some point, was going to get drugs for Mr. Green, and was gone for several hours. Evid. Hr. Tr. P. 25.

On cross-examination, Plea Counsel testified he has been practicing criminal law for about eleven years, and he was appointed four or five years to Applicant’s case before his trial. Evid. Hr. Tr. P. 26. Plea Counsel testified he met with Applicant about forty times before his trial, and those meetings surrounded his earlier charges of trafficking heroin, but after a suppression hearing Plea Counsel testified he switched gears for the current case. Evid. Hr. Tr. P. 26-27. Plea Counsel testified he reviewed discovery with Applicant and made sure to go over nature of charges against Applicant and possible punishments. Evid. Hr. Tr. P. 27. Applicant received a plea offer of ten years, but Applicant rejected the plea because the case against him was not very strong. Evid. Hr. Tr. P. 27-28.

Most of the investigation for Applicant's case happened two weeks after Applicant was arrested, and Plea Counsel met with the investigator and sorted out what needed to be investigated. Evid. Hr. Tr. P. 28. Plea Counsel testified they spoke with Ms. Cordero shortly after the incident took place, but there were not other witnesses. Evid. Hr. Tr. P. 28. Plea Counsel testified he talked with the State's witness, Mr. Green. Evid. Hr. Tr. P. 28. Plea Counsel testified he took a statement from Ms. Cordero close to the date of the arrest, and had not spoken with her until a few weeks before trial, to make sure she remembered her statement. Evid. Hr. Tr. P. 28-29. Plea Counsel testified his strategy was to move for a directed verdict, and he did actually move for a directed verdict during the trial. Evid. Hr. Tr. P. 29. Plea Counsel testified he had no reason to believe Ms. Cordero would give unfavorable testimony at the trial. Evid. Hr. Tr. P. 29.

On direct examination of Ms. Cordero, she testified she knew Applicant. Described the day in question, and testified Applicant helped her with her moped during the time of the incident. Evid. Hr. Tr. P. 30. It was not until cross-examination Ms. Cordero's testimony faltered and showed her diminished capacity, which Plea Counsel testified happens at times on cross. Evid. Hr. Tr. P. 30. Prior to plea, Plea Counsel testified he advised Applicant to cut his losses, that the cross-examination had put them in a bad position, but Applicant did not want to plea. Evid. Hr. Tr. P. 31. Plea Counsel testified that it was ultimately Applicant's decision to plea, but he had urged him to plea because of the risk of a life sentence. Evid. Hr. Tr. P. 31. Plea Counsel testified he spoke with Applicant briefly about bringing Investigator Verdell Young to testify but did not believe it would make a difference. Evid. Hr. Tr. P. 32.

Plea Counsel testified he believed Applicant was competent to enter a voluntary and knowing guilty plea, he understood the consequences of his plea, and Plea Counsel agreed with Applicant's decision to plea. Evid. Hr. Tr. P. 32. Plea Counsel testified he would not have put up

any evidence to combat's State's case if he had not called Ms. Cordero but would have simply put the State's case to the test. Evid. Hr. Tr. P. 33.

Susannah Knox, who acted in a second chair capacity, testified next. On direct examination, Ms. Knox testified she was tasked with preparing Ms. Cordero to testify as an alibi witness, and she spoke with Ms. Cordero over the phone within the week prior to trial. Evid. Hr. Tr. P. 34. Ms. Knox testified she made sure Ms. Cordero remembered the same details given in her statement five years ago, and made sure the story made sense and no details had changed. Evid. Hr. Tr. P. 34-35. Ms. Knox testified she prepared Ms. Cordero for cross-examination, but does not recall preparing Ms. Cordero for questioning about how she knew the date. Evid. Hr. Tr. P. 35. Lastly, Ms. Knox testified she agreed with Plea Counsel's assessment of how cross-examination affected the trial. Evid. Hr. Tr. P. 35.

On cross-examination, Ms. Knox testified her role in representation of Applicant was limited to trial preparation, reviewing evidence, and preparing Ms. Cordero for her direct testimony. Evid. Hr. Tr. P. 36. Ms. Knox testified Ms. Cordero's testimony on direct was expected, and she did not expect Ms. Cordero to give unfavorable testimony or get confused as to the date of the incident. Evid. Hr. Tr. P. 36-37. Ms. Knox testified Ms. Cordero was a bit quirky during her direct examination, becoming very animated when questioned about her moped, but it did not cause her to think Ms. Cordero would give unfavorable testimony. Evid. Hr. Tr. P. 37.

Ms. Knox testified she did not personally inform Applicant about potentially calling Investigator Verdell to testify, but she was present when Applicant decided to plea. Evid. Hr. Tr. P. 37. Ms. Knox testified the discussions surrounding Applicant's decision to plea were exactly the way Plea Counsel described, briefly mentioning Investigator Verdell, and discussing the two options, between pleading and finishing trial. Evid. Hr. Tr. P. 37. Ms. Knox testified Applicant

deciding to plea was a strategic decision, because it was unlikely they would be able to combat impression they had instructed Ms. Cordero on what to say. Evid. Hr. Tr. P. 38. Ms. Knox testified sometimes this happens on cross-examination, and it is the purpose of cross-examination to pick at witnesses direct testimony. Evid. Hr. Tr. P. 38. Lastly, Ms. Knox testified she would not have out Ms. Cordero on the stand if she believed Ms. Cordero would give unfavorable testimony. Evid. Hr. Tr. P. 38.

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

Applicant has alleged he is entitled to post-conviction relief based on ineffective assistance of plea counsel. Following a thorough review of the entire record in this case (including the trial transcript, the plea transcript, the records from Applicant's underlying general sessions charges and convictions, and the records from this current action (including the PCR application and return to the application, as well as any other filed documents), this Court finds this claim to be without merit and that Applicant has failed to meet her burden of proof.

#### ***Standard of Review***

Under the Uniform Post-Conviction Procedures Act, an applicant may seek post-conviction relief 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
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).

In a post-conviction relief action, the applicant bears the burden of proving the allegations by a preponderance of the evidence. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985); Rule 71.1(e), SCRCP.

*Ineffective Assistance of Counsel and Involuntary Guilty Plea Standard*

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, post-conviction relief 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 post-conviction relief 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 can only be determined by an evidentiary hearing. 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 not sufficient 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 it is all too tempting for a defendant to second-guess counsel's assistance after conviction or an 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, 6 (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 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 687 (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 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, 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 ‘prejudice’ showing from defendants who seek to challenge the validity of their guilty pleas on the ground of ineffective assistance of counsel ‘will serve the fundamental interest in the finality of guilty pleas.’”). Reviewing “[c]ourts should not upset a plea solely because of post hoc assertions from a defendant about how he would have pleaded but for his attorney’s deficiencies. Lee, 582 U.S. \_\_\_, 137 S. Ct. at 1967. Rather, judges should “look to contemporaneous evidence to substantiate a defendant’s expressed preferences. Id. In determining whether a guilty plea was taken in accordance with constitutional standards, the reviewing judge must analyze and consider the entire record, including the transcript of the plea and the evidence presented at the PCR hearing. Harres, 282 S.C. at 134, 318 S.E.2d at 361.

The performance and prejudice standards, however, “do not establish mechanical rules; [t]he ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged.” Id. at 696. Moreover, “there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one.” Id. at 697. The court “need not determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. Id. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, the court may evaluate the prejudice prong only. Id.

***Allegation of Ineffective Assistance of Counsel Based on Advice of Plea Counsel to Plead Guilty***

Applicant alleged his guilty plea was not voluntary because he plead based on advice of Plea Counsel. To find a guilty plea voluntary and knowing, the record must establish applicant had a full understanding of the consequences of his plea and the charges against him. Boykin v.

Alabama, 385 U.S. 238, 89 S. Ct. 1709 (1969); Dover v. State, 304 S.C. 433, S.E.2d 391 (1991).

It is proper for the court to consider the guilty plea transcript as well as evidence at PCR hearing when determining guilty plea issues. Harris v. Leeke, 282 S.C. 131, 318 S.E.2d 360 (1984).

Applicant must present a valid reason to depart from the truth of his statements in guilty plea hearing, as a guilty plea is a solemn, judicial admission of the truth of the charges against an individual. Blackledge v. Allison, 431 U.S. 63, S. Ct. 1621 (1977); Crawford v. United States, 519 F.2d 447 (4th Cir. 1975) overruled on other grounds by U.S. v. Whitley, 459 F.2d 328 (4th Cir. 1985).

An applicant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of the plea by showing trial counsel's representation fell below an objective standard of reasonableness and there is a reasonable probability, but for trial's errors, defendant would not have plead guilty, but insisted on going to trial. Roscoe v. State, 345 S.C. 16, 546 S.E.2d 417 (2001). Therefore, a claim of involuntary plea is, in essence, a claim of ineffective assistance of counsel, and will likely be treated as such. The knowing and voluntary waiver of the constitutional rights "may be accomplished by colloquy with the Court and the defendant, between the Court and defendant's counsel, or both". Pittman v. State, 337 S.C. 597, 599, S.E.2d 623, 625 (1999) (quoting State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993)). Boykin requires defendant made aware of right to a jury trial, the privilege against self-incrimination, and right to confront one's accusers. Boykin, 385 U.S. 238, 89 S. Ct. 1709. Additionally, the South Carolina Supreme Court requires defendant made aware of nature and crucial elements of offense, the maximum and any minimum penalty, and the nature of the constitutional rights being waived. Pittman, 337 S.C. at 599, 524 S.E.2d at 624.

Applicant testified he plead guilty “because that was the advice of my attorney.” Evid. Hr. Tr. P. 10, line 15-16. However, Applicant has not presented any evidence of force or coercion to plea, only referencing a discussion during a recess at trial where Plea Counsel advised him it would be prudent to plea because of the effect of Ms. Cordero’s cross-examination. During this discussion, Plea Counsel urged Applicant to plea, but did not direct him to, letting Applicant know of his options, but making him fully aware of the risk of continuing with trial. Evid. Hr. Tr. P. 31, line 5-25—P. 32, line 1-14. Applicant understood the choice to plea was ultimately his.

Moreover, even if Plea Counsel did not apprise Applicant of all his options and constitutional rights, the Plea Judge accomplished this in his thorough colloquy with Applicant at his plea hearing. The Plea Judge apprised Applicant of his constitutional rights and made known the nature of the charges against Applicant and possible sentences that could be imposed on Applicant for these sentences. Plea Tr. P. 4-5. The Plea Judge even made reference to Ms. Cordero, informing Applicant he had the right to testify and present other witnesses or evidence, but Applicant affirmatively answered he did not want to exercise those rights. Plea. Tr. P. 6, line 9-20. Applicant stated he understood the decision to plea was his alone, and he wanted to give up his rights for the benefit he was receiving from the negotiated plea—a twenty-year sentence rather than life without parole, and dismissal of his other charges of armed robbery and possession of weapons. Plea Tr. P. 6, line 21-25—P. 7, line 1-17.

This Court finds testimony of Plea Counsel credible, and finds Applicant failed to prove Plea Counsel’s advise to plea made his plea involuntary. Applicant’s answers during his plea hearing indicate he voluntarily, knowingly, and intelligently plead guilty, and no evidence was presented to the contrary, effectively barring any claims he has of ineffective assistance of counsel. Plea Counsel’s advise was based on the precarious position Applicant after Ms. Cordero’s cross-

examination, but no where did Plea Counsel inform Applicant a plea was his only option. Applicant made the calculated decision to plea based on the risk of life without parole if he lost his trial, and knowingly gave up his rights without force or intimidation. Therefore, Applicant failed to show Plea Counsel was ineffective for advising Applicant to plea, and this court **DENIES** and **DIMISSES** his allegations with prejudice.

***Allegation of Ineffective Assistance of Counsel for Plea Counsel's Failure to Investigate and Prepare Alibi Witness for Trial***

Applicant alleged Plea Counsel was ineffective for failing to prepare Ms. Cordero, an alibi witness, for questioning at trial. Ineffectiveness claims based on counsel's failure to investigate or prepare for trial require applicant to present evidence of what counsel could have discovered or what other defenses could have been pursued had counsel more fully prepared. Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998); Moorehead v. State, 329 S.C. 329, 496 S.E.2d 415 (1998) (failure to conduct an independent investigation does not constitute ineffective assistance of counsel when allegation is supported only by mere speculation as to the result). Relief will be denied where applicant does not present evidence at PCR hearing showing how additional preparation would have had any possible effect on the result at trial. Skeen v. State, 325 S.C. 210, 481 S.E.2d 129 (1997). Counsel has a duty to conduct reasonable investigation, and at a minimum, interview potential witnesses, considering favorability of witness's testimony, and make an independent investigation of the facts and circumstances of the case. Ard v. Catoe, 772 S.C. 318, 642 S.E.2d 590 (2007); Thornes v. State, 310 S.C. 306, 426 S.E.2d 764 (1993), overruled on other grounds by Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999).

Regarding the allegation concerning investigation of eyewitnesses, Plea Counsel testified the State only had circumstantial evidence against Applicant, and Applicant had provided Plea Counsel with a credible alibi witness; the only witness Applicant informed Plea Counsel of. The

State had one witness, Mr. Green, who was not an eyewitness. Mr. Green would have testified to the fact Applicant had borrowed his vehicle, which was used in the robbery, and did not return with the vehicle for several hours. Plea Counsel was aware of the testimony, and was prepared to counter it with Ms. Cordero's testimony she had been with Applicant at the time of the crime. Applicant did not present testimony of a potential eyewitness with helpful testimony at evidentiary hearing, or any other specific evidence or testimony showing how additional investigation into an eyewitness would have affected his decision to plea or changed the outcome.

Regarding the allegation concerning preparation of Applicant's alibi witness, Plea Counsel testified Ms. Cordero was interviewed and her statement was taken close to the time of the crime (about two weeks after the incident), which was five years prior to trial. Additionally, prior to trial, Ms. Knox, second chair to Plea Counsel, spoke with Ms. Cordero to ensure her testimony was the same, and prepared her for cross-examination. Based on both of these conversations with Ms. Cordero, Ms. Knox and Plea Counsel had no reason to believe Ms. Cordero would give unfavorable testimony or was incompetent to testify. Ms. Knox testified she did not recall specifically preparing Ms. Cordero how to answer questions concerning her knowledge of the date, but she had no reason to believe Ms. Cordero would have been confused by this line of questioning.

Additionally, Plea Counsel testified cross-examination significantly changed the outcome of Applicant's case, and he strongly advised Applicant to take a plea. Strickland requires trial counsel must be given leeway to make strategic reasonable decisions, and where counsel articulates a valid reason for his action or inaction, counsel's performance is not found ineffective. Strickland at 688-89; Roseboro v. State. 317 S.C. 292, 454 S.E.2d 312 (1996). Plea counsel testified that prior to cross-examination he believed Applicant was winning his case. The State had only circumstantial evidence, no eyewitnesses, and Applicant had a strong alibi witness which had

been interviewed and prepared for trial. Ms. Cordero's testimony was unproblematic during direct examination but was problematic on cross-examination when she became frustrated and stated the defense investigator had told her the date of the incident, making it seem as if Plea Counsel and Ms. Knox had fed Ms. Cordero testimony. This was unexpected based in the defense team's prior interactions with Ms. Cordero, which did not given any inference that she would testify this way when challenged. It is expected on cross-examination that the opposing party will test a witness's credibility, or test the accuracy of the witness's testimony or recollection and extent of knowledge. Plea Counsel and Ms. Knox fulfilled their duty in investigating the facts and circumstances of Applicant's case, and interviewing Ms. Cordero, the only possible witness the could find. The cross-examination merely put Ms. Cordero to the test, a test she failed on her own.

This Court finds Applicant has failed to establish Plea Counsel was ineffective. Plea Counsel investigated witnesses to the extent they were available, and no eyewitnesses were available, as evidenced by fact the State had no eyewitnesses either. Plea Counsel made themselves aware of the facts and circumstances of Applicant's case, and were able to articulate strategic reasonable decisions, meaning Applicant cannot meet the first prong of Strickland.

Additionally, Applicant cannot show resulting prejudice. Plea Counsel interviewed Ms. Cordero near the time of incident, when it was fresh in her mind, and interviewed her a second time close to the time of trial, also preparing her for cross-examination. Applicant cannot claim prejudice as a result of Plea Counsel's performance when the State merely used cross-examination for its purpose with successful results. Therefore, this Court finds Applicant could not prove ineffective assistance of counsel, and **DENIES** and **DIMISSES** his claims with prejudice.

**CONCLUSION**

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

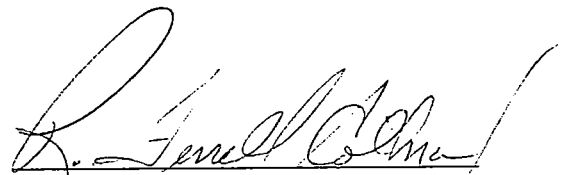
The Court notifies the Applicant that he must file and serve a notice of appeal within thirty days from post-conviction relief counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), an 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, post-conviction relief counsel must serve and file a notice of appeal on Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate appellate procedures.

**IT IS THEREFORE ORDERED:**

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

AND IT IS SO ORDERED this 31 day of March, 2023.

Manning, South Carolina

  
R. FERRELL COTHAN, JR.  
Presiding Judge  
Ninth Judicial Circuit