

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

**RECEIVED**  
**Jan 08 2024**  
S.C. SUPREME COURT

\_\_\_\_\_

Certiorari to Horry County

Honorable Kristi F. Curtis, Circuit Court Judge

\_\_\_\_\_

WILLIAM H. FUNDERBURKE

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2023-001061

\_\_\_\_\_

APPENDIX

\_\_\_\_\_

LARA M. CAUDY  
Appellate Defender

ALAN WILSON  
Attorney General

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589  
(803) 734-1330

MARK R. FARTHING  
Senior Assistant Deputy Attorney General  
Rembert Dennis Building  
1000 Assembly Street, Room 519  
Columbia, SC 29201

ATTORNEY FOR PETITIONER

ATTORNEYS FOR RESPONDENT

INDEX

INDEX ..... i

TRIAL TRANSCRIPT DATED JUNE 11, 2018 ..... 1

APPLICATION FOR POST-CONVICTION RELIEF ..... 19

RETURN..... 27

CONDITIONAL ORDER OF DISMISSAL ..... 33

AMENDED RETURN..... 38

POST-CONVICTION RELIEF HEARING TRANSCRIPT DATED SEPTEMBER 6, 2022 ..... 46

ORDER OF DISMISSAL..... 72

INDICTMENT ..... 86

SENTENCE SHEET ..... 88

STATE OF SOUTH CAROLINA ) IN THE COURT OF GENERAL SESSIONS

COUNTY OF HORRY ) 2018-GS-26-03814

STATE OF SOUTH CAROLINA, )

Plaintiff, ) Transcript of Record

vs. )

June 11, 2018

WILLIAM HOWARD )

FUNDERBURKE, JR. )

Defendant. )

**B E F O R E:**

Honorable Benjamin H. Culbertson  
Horry County Courthouse  
Conway, South Carolina

**A P P E A R A N C E S:**

C. Leigh Andrew, Esquire  
**Attorney for State**

James D. Stanko, Esquire  
**Attorney for Defendant**

**TAKEN BY:**

Dixie C. Eubank  
**Retired Circuit Court Reporter**

**PREPARED BY:**

Kay H. Richardson  
**Circuit Court Reporter**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

I N D E X

JUNE 11, 2018

Pg.

By the Court .....	3
William Howard Funderburke, Jr.	
By the Court .....	4
Sentence of the Court .....	16
Certificate of Court Reporter .....	18

E X H I B I T S

No.

ID

EV

(No exhibits were marked or admitted.)

State v. Funderburke - 2018-GS-26-03814  
BY THE COURT

3

1 **JUNE 11, 2018**

2 MS. ANDREW: May it please the Court, Your Honor. This  
3 is State of South Carolina, County of Horry versus William  
4 Howard Funderburke, Jr. I believe this is Number 10 on the  
5 trial roster for this term.

6 THE COURT: All right.

7 MS. ANDREW: I may be mistaken about the number. The  
8 indictments on the trial roster are for criminal sexual  
9 conduct with a minor in the second degree, which is true-  
10 billed indictment 2017-GS-26-03592. And for criminal sexual  
11 conduct with a minor in the third degree, which is true-billed  
12 indictment 2018-GS-26-01659. The state has reached an  
13 agreement with the defendant. He is going to plead guilty  
14 under *North Carolina v. Alford* to a different charge. It  
15 carries less time than the charges for which he was on the  
16 trial roster. That charge is criminal solicitation of a  
17 minor. It's going to be waiver of indictment number 2018-GS-  
18 26-03814. He's doing that without recommendation from the  
19 state.

20 The victim is present and would like to speak.

21 THE COURT: All right.

22 WILLIAM HOWARD FUNDERBURKE, JR.,

23 HAVING BEEN DULY SWORN, TESTIFIED AS FOLLOWS:

24 BY THE COURT:

25 THE COURT: All right, Mr. Stanko, you represent William

State v. Funderburke - 2018-GS-26-03814  
BY THE COURT

4

1 Howard Funderburke, Jr. on the charge of criminal solicitation  
2 of a minor?

3 MR. STANKO: I do, Your Honor.

4 THE COURT: Have you discussed with your client the  
5 charge against him, his rights as a defendant and the  
6 consequences of being convicted of this crime?

7 MR. STANKO: I have, sir.

8 THE COURT: In your opinion, does your client understand  
9 the charge against him, his rights as a defendant and the  
10 consequences of being convicted of this crime?

11 MR. STANKO: He does, Your Honor.

12 THE COURT: And does he wish to plead guilty or not  
13 guilty?

14 MR. STANKO: Guilty, sir.

15 THE COURT: Do you agree with his decision to plead  
16 guilty to this charge?

17 MR. STANKO: I do, sir.

18 THE COURT: Based upon the information you have, if this  
19 case proceeded to trial, do you feel that the state could  
20 prove your client's guilt beyond a reasonable doubt?

21 MR. STANKO: I believe they could, sir.

22 THE COURT: Has your client received a competency  
23 evaluation?

24 MR. STANKO: He has not, but I do not believe one is  
25 necessary.

State v. Funderburke - 2018-GS-26-03814  
BY THE COURT

5

1 THE COURT: All right.

2 Sir, your name is William Howard Funderburke, Jr.?

3 MR. FUNDERBURKE: Yes, Your Honor.

4 THE COURT: All right. Mr. Funderburke, you have been  
5 charged with criminal solicitation of a minor and, according  
6 to your attorney, you wish to plead guilty pursuant to the  
7 Supreme Court case of *Alford v. North Carolina*, though it's  
8 commonly referred to as an *Alford* plea; is that correct?

9 MR. FUNDERBURKE: That is correct, Your Honor.

10 THE COURT: All right. Before I can accept your guilty  
11 plea, I've got to go over some questions with you to be sure  
12 that you understand the charge against you, that you  
13 understand your rights as a defendant, that you understand the  
14 consequences of pleading guilty, and I must be sure you're  
15 pleading guilty voluntarily.

16 During the past 72 hours, have you taken any medication,  
17 consumed any alcohol or drugs or been under any influence that  
18 would affect your ability to know why you're here?

19 MR. FUNDERBURKE: No, Your Honor.

20 THE COURT: Do you understand why you're here today?

21 MR. FUNDERBURKE: Yes, Your Honor.

22 THE COURT: Is there anything about this hearing that you  
23 want to ask your lawyer or ask me before we proceed?

24 MR. FUNDERBURKE: No, Your Honor.

25 THE COURT: All right. Now, there are two ways in which

1 you can plead guilty to a crime. Number one is under an  
2 admission that you committed the crime. The second guilty  
3 plea is a plea pursuant to the Supreme Court case of *Alford v.*  
4 *North Carolina*, or what's commonly referred to as *Alford* plea.  
5 Now, under an *Alford* plea, you are still admitting that you  
6 broke the law. However, you're doing so not necessarily  
7 because you admit that you committed a crime, but because  
8 you're accepting a concession made by the state. And in this  
9 case, I understand that rather than going to trial on criminal  
10 sexual conduct with a minor in the second degree and criminal  
11 sexual conduct with a minor in the third degree you're  
12 accepting the state's concession to let you plead guilty to  
13 solicitation of a minor and pleading guilty for that reason;  
14 is that correct?

15 MR. FUNDERBURKE: That's correct, Your Honor.

16 THE COURT: All right. Now, you understand that legally  
17 there is no distinction between an *Alford* plea and an  
18 admission of guilt. You're gonna be subject to the same  
19 sentence, you're gonna have the same record, you're gonna be  
20 subject to the same conditions as though you were pleading  
21 guilty under an admission you committed the crime; do you  
22 understand that?

23 MR. FUNDERBURKE: I understand, Your Honor.

24 THE COURT: And knowing that, do you still wish to plead  
25 guilty?

State v. Funderburke - 2018-GS-26-03814  
BY THE COURT

7

1 MR. FUNDERBURKE: Yes, sir.

2 THE COURT: All right. Now, one of your rights as a  
3 defendant is that you cannot be prosecuted for any crime  
4 unless and until you're indicted by the grand jury. What that  
5 means is when you're charged with a crime, the state has an  
6 obligation to present your case to a Grand Jury for review.  
7 The Grand Jury reviews your case to determine whether or not  
8 there's any evidence to indicate you committed the crime. If  
9 the Grand Jury finds there is evidence you committed the  
10 crime, the Grand Jury would indict you and the state could go  
11 to court and prosecute you on the charge. On the other hand,  
12 if the Grand Jury found that there was no evidence against you  
13 or that the evidence against you did not support the charge,  
14 then the Grand Jury would not indict you and the state could  
15 not prosecute you. At this point in time, you have not been  
16 indicted by the Grand Jury on this charge. Therefore, on this  
17 charge, the state could not prosecute you at this time and I  
18 could not accept your guilty plea unless you waive presentment  
19 to the Grand Jury. Waiving presentment to the Grand Jury  
20 means that you are relieving the state from its obligation to  
21 have the Grand Jury review your case and indict you before  
22 they prosecute you. Do you understand that?

23 MR. FUNDERBURKE: I do, Your Honor.

24 THE COURT: And do you waive presentment to the Grand  
25 Jury on this charge so that you can plead guilty to this

1 charge?

2 MR. FUNDERBURKE: I do, Your Honor.

3 THE COURT: All right. Even though you waive presentment  
4 to the Grand Jury, under the Constitution of the United  
5 States, you're presumed innocent of this crime and you have  
6 the right to have your guilt or innocence determined by a jury  
7 trial of your peers. The state bears the burden of proving  
8 your guilt beyond a reasonable doubt. You do not have to  
9 prove your innocence and you cannot be compelled to testify  
10 against yourself. You also have the right to confront and  
11 cross examine anybody who testifies against you. If you  
12 choose, you can present a defense to this charge, but when you  
13 plead guilty you give up all of those rights. Do you  
14 understand that?

15 MR. FUNDERBURKE: I do, Your Honor.

16 THE COURT: And do you want to give up those rights and  
17 plead guilty to this charge?

18 MR. FUNDERBURKE: Yes, Your Honor.

19 THE COURT: All right. You understand for this crime I  
20 can send you to prison for 10 years and fine you \$5,000; do  
21 you understand that?

22 MR. FUNDERBURKE: I do, Your Honor.

23 THE COURT: Do you also understand that you could be  
24 required to register as a sex offender for the rest of your  
25 life?

State v. Funderburke - 2018-GS-26-03814  
BY THE COURT

9

1 MR. FUNDERBURKE: Yes, sir.

2 THE COURT: And do you also understand that this is  
3 classified as a sexually violent crime, which means that the  
4 attorney general's office could bring a civil action against  
5 you to determine whether or not you are a sexually violent  
6 predator and, if in a civil action you were deemed to be a  
7 sexually violent predator, then you could be committed to the  
8 South Carolina Department of Mental Health for an indefinite  
9 period of time up to the rest of your life for treatment for  
10 that condition; do you understand that?

11 MR. FUNDERBURKE: I do, Your Honor.

12 THE COURT: Knowing your rights as a defendant, knowing  
13 the maximum sentence you could receive, knowing that you could  
14 be required to register as a sex offender and knowing that you  
15 were subject to being committed to the Department of Mental  
16 Health as a sexually violent predator, do you wish to plead  
17 guilty or not guilty to criminal solicitation of a minor?

18 MR. FUNDERBURKE: I'll plead guilty, Your Honor.

19 THE COURT: Has anybody promised you anything or  
20 threatened you in any way to get you to plead guilty?

21 MR. FUNDERBURKE: No, sir.

22 THE COURT: Are you pleading guilty voluntarily?

23 MR. FUNDERBURKE: I am, sir.

24 THE COURT: Are you satisfied with your lawyer?

25 MR. FUNDERBURKE: Yes, I am, sir.

State v. Funderburke - 2018-GS-26-03814  
BY THE COURT

10

1 THE COURT: Are you pleading guilty to this crime because  
2 you'd rather plead guilty to this crime than go to trial on  
3 criminal sexual conduct with a minor in the second degree and  
4 criminal sexual conduct with a minor in the third degree?

5 MR. FUNDERBURKE: Yes, Your Honor.

6 THE COURT: All right. I need you to listen carefully  
7 while the solicitor gives me the facts of your case. Okay?

8 All right?

9 MS. ANDREW: Your Honor, the victim is sitting behind me.  
10 She's now 32 years old. Mr. Funderburke was married to her  
11 mother; he was her stepfather. Between the dates of August  
12 8th, 1999 and August 7th, 2002, when the victim was then  
13 between the ages of 13 and 16 years old, the defendant  
14 committed a sexual battery or attempted to commit a sexual  
15 battery by performing oral sex on the victim and digitally  
16 penetrating her vagina. He made a post-Miranda statement to  
17 the police where he admitted to offering to perform oral sex  
18 on the victim who was then 15 years old. So, therefore, it's  
19 solicitation or an attempt to commit a CSC on a minor, Your  
20 Honor.

21 THE COURT: All right. All right, Mr. Funderburke, did  
22 you understand what the allegations are against you?

23 MR. FUNDERBURKE: I do, sir.

24 THE COURT: All right. Those are the facts that you are  
25 pleading guilty to?

State v. Funderburke - 2018-GS-26-03814  
BY THE COURT

11

1 MR. STANKO: Your Honor, this was a -- this is an *Alford*  
2 plea.

3 THE COURT: I know, but he's still got to plead guilty to  
4 the facts.

5 MR. STANKO: Yes, sir, absolutely.

6 THE COURT: I mean, I understand you still have to admit  
7 even though it's an *Alford* plea. Now, the reason you're  
8 admitting it is to avoid prosecution for the criminal sexual  
9 conduct with a minor in the second degree and criminal sexual  
10 conduct with a minor in the third degree.

11 MR. STANKO: Correct, sir.

12 THE COURT: But you still have to plead guilty to the set  
13 of facts that constitute breaking the law.

14 Do you understand that?

15 MR. FUNDERBURKE: Yes, sir.

16 THE COURT: And that's why I asked, rather than did you  
17 commit these acts, are those the facts that you're pleading  
18 guilty to?

19 MR. FUNDERBURKE: Yes, Your Honor.

20 THE COURT: All right.

21 All right, Mr. Stanko, anything in mitigation?

22 MR. STANKO: Yes, Your Honor. Mr. Funderburke is 61  
23 years old. He is married. He has three children, all of whom  
24 are already grown. They are between the ages of 34, 28, and  
25 21. Prior to all of this and even up to today, he's been

1 working at a Christian radio station. He is their general  
2 manager. He tells me that his bosses there at the radio  
3 station are fully aware of this situation and are hoping that  
4 he is able to continue working for them. He said they're  
5 keeping the job open for him.

6 Your Honor, way back 1974-1977, Mr. Funderburke served  
7 his country, he was in the U.S. Army for those three years.  
8 What's important about this case, it's -- all of this happened  
9 1999-2002, up to 16 years ago. Prior to that and since then,  
10 Mr. Funderburke has never been arrested, never been in any  
11 trouble before. Your Honor, what we are asking for in his  
12 case, based upon his situation, his record, his age, we're  
13 asking Your Honor to strongly consider a probationary sentence  
14 for him.

15 Additionally, Your Honor, Mr. Funderburke has told me  
16 that he would like to address the Court at the appropriate  
17 time.

18 THE COURT: Okay. Mr. Funderburke, I'll hear from you or  
19 anybody that wants to speak on your behalf, anything you want  
20 to say.

21 MR. FUNDERBURKE: I first wanted to apologize and tell  
22 the victim how sorry I am that all this happened. From my  
23 heart of hearts, sincerely and humbly, I apologize for the  
24 pain this has caused. And I pray some day you could forgive  
25 me.

State v. Funderburke - 2018-GS-26-03814  
BY THE COURT

13

1           To the Court, Your Honor, I would like to apologize as  
2 well.

3           THE COURT: All right.

4           MR. FUNDERBURKE: I have been a -- if I had been a better  
5 man who made better choices and not stupid choices, we  
6 wouldn't be here today.

7           THE COURT: All right. Thank you, sir.

8           Does the victims wish to say anything?

9           MS. ANDREW: They do, Your Honor.

10          THE COURT: All right. They need to come forward to the  
11 podium and give the court reporter their name.

12          Ma'am, your name?

13          MS. HERSHEY: My name is Tristan Hershey, H-E-R-S-H-E-Y.

14          THE COURT: All right, Ms. Hershey, what would you like  
15 to say?

16          MS. HERSHEY: For nearly 20 years I have lived with the  
17 abuse, shame, and fear installed in me by the person that I  
18 was taught to believe was my father. I tried to separate the  
19 man he presented to everyone and the molester that would force  
20 and coerce me to be an object for his sick desires of a child.  
21 But there is no separation, there was not two people. This  
22 person who forced me to be afraid of speaking up told me it  
23 was a secret and a special relationship and that no one would  
24 believe me, that I would destroy my family when in fact he was  
25 destroying me. I have spent countless of days and nights

1 worried, afraid, blaming myself. I would block it out and  
2 bury it deep inside until he would come and victimize me  
3 again. Trying to convince myself that as long as the  
4 attention was on me, I could save my sister, others, even my  
5 daughters. I am still discovering the damage that was done to  
6 me, how it had impact my choices, how it had tainted my  
7 friendships, it affected my ability to trust. The impact this  
8 has had on my physical and mental health are great. Even  
9 though we were finally at a point where I believe that he'll  
10 never do this to me again and my family is safe, the damage is  
11 done to me, and will involve a lifetime of healing. But not  
12 only has this impacted me, it has impacted my entire family  
13 down to its core. The betrayal shown by this man, the  
14 betrayal who is to all who trusted him. I am grateful for my  
15 husband who took all of this heartbreaking information in  
16 without wavering and at the same time holding me up when I  
17 felt like I was drowning. A man that stayed by my side the  
18 entire time and has shown me true love and kindness. And to  
19 my children who have had to -- a lot of things explained to  
20 them that they shouldn't have known or worried about. He  
21 deserves to be in prison. He admitted he was a monster and  
22 could not control himself in a recorded conversation with  
23 myself and the police. He told me I could set rules regarding  
24 this time spent around my three daughters. One of which is  
25 the age he started to molest me. These types of statements

State v. Funderburke - 2018-GS-26-03814  
BY THE COURT

15

1 are not made from someone that could be trusted amongst those  
2 weaker and vulnerable children. If he isn't off the street --  
3 if he wasn't off the streets and in prison, I would fear for  
4 my children, nieces, cousins, and any other children that  
5 would -- that he could manipulate and get close with. I have  
6 endured this for nearly 20 years. In the years to come, my  
7 family and myself need to heal and rebuild and move to a  
8 better life, a life that we can achieve knowing that he isn't  
9 around the corner.

10 Thank you.

11 THE COURT: Thank you.

12 Anyone else?

13 MS. ANDREW: Your Honor, I'd just like to say that the  
14 reason for this plea agreement, the state took into account  
15 the defendant's age and sparing the victim having a trial, but  
16 we are asking for the maximum on the ---

17 THE COURT: Well, I thought you said no recommendation.

18 MS. ANDREW: Oh, I'm sorry; I'm sorry, Your Honor. I'm  
19 not really -- there's no recommendation but even when I don't  
20 recommend, I typically still ask for ---

21 THE COURT: That's a recommendation. Are you giving a  
22 recommendation, I mean, I ---

23 MS. ANDREW: I won't give a recommendation because I said  
24 I wouldn't.

25 THE COURT: Okay.

State v. Funderburke - 2018-GS-26-03814  
SENTENCE OF THE COURT

16

1 MS. ANDREW: Sorry. I wasn't trying to ---

2 THE COURT: All right. Prior record?

3 MS. ANDREW: Your Honor, the defendant has no prior  
4 record.

5 THE COURT: All right.

6 SENTENCE OF THE COURT:

7 THE COURT: All right, Mr. Funderburke, I will accept  
8 your guilty plea. I find it is made knowingly, voluntarily,  
9 fully advised of your rights as a defendant, the nature of the  
10 charge against you, and the consequences of your guilty plea.  
11 I also find that there is a factual basis to support the  
12 charge against you.

13 Sentence of the Court is that you be confined to the  
14 State Department of Corrections for eight years, provided upon  
15 the service of two years, the balance to be suspended and  
16 you'll be placed on probation for five years. Special terms  
17 of probation are you are to have no contact with the victim,  
18 directly or indirectly. You're to pay a \$40 application fee  
19 for applying for the services of a public defender if you have  
20 not already done so. You're to be required to the clerk of  
21 court \$500 for Mr. Stanko's services as your attorney in this  
22 case. You'll receive credit for time served thus far. You  
23 will be required to register as a sex offender upon your  
24 release for incarceration.

25 All right?

State v. Funderburke - 2018-GS-26-03814  
SENTENCE OF THE COURT

17

1 MR. STANKO: Thank you, Your Honor.

2 THE COURT: Thank you.

3 **ADJOURNED.**

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

C E R T I F I C A T E

I, the undersigned, Kay H. Richardson, Official Court Reporter for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the hearing held in the case of State of South Carolina v. William Howard Funderburke, Jr., held in the Court of General Sessions for Horry County, Horry County Courthouse, Conway, South Carolina, on June 11, 2018, as reported by Dixie C. Eubank.

I do hereby certify that I am neither of kin, counsel, nor interest to any party hereto.

\_\_\_\_\_  
Kay H. Richardson  
Official Court Reporter

May 26, 2019.

FORM 5

STATE OF SOUTH CAROLINA )

IN THE COURT OF COMMON PLEAS

COUNTY OF HORRY )

William Howard Funderburke, Jr  
Full name and prison number (if any) of Applicant.  
SCDC# 376742

20 19 CP26 1664

v. )

APPLICATION FOR

State of South Carolina )

POST-CONVICTION RELIEF

RECEIVED  
CLERK OF COURT  
HORRY COUNTY  
29 MAR 18 PM 06  
SECURITY

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention MACDOUGALL CORRECTIONAL INSTITUTE
2. Name and location of Court which imposed sentence GEN. SESSIONS, HORRY COUNTY, S.C.
3. Name(s) of co-defendant(s) (if any) NONE
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
  - (a) 2018GS2603814
  - (b) N/A
  - (c) N/A
5. The date upon which sentence was imposed and the terms of the sentence:
  - (a) 6-18-11-18 - 8 YEARS SUSPENDED TO 2 YEARS WITH
  - (b) PROBATION FOR 5 YEARS. NO CONTACT W/ VICTIM, SEX

(c) OFFENDER REGISTRY. PAY COURT COSTS.

6. Check whether a finding of guilty was made:

(a) after a plea of guilty ALFORD PLEA

(b) after a plea of not guilty N/A

(c) after a plea of nolo contendere N/A

7. Did you appeal from the judgment of conviction or the imposition of sentence?

No

8. If you answered "yes" to (7), list:

(a) the name of each Court to which you appealed:

i. N/A

ii. N/A

iii. N/A

(b) the result in each such Court to which you appealed:

i. N/A

ii. N/A

iii. N/A

(c) the date of each such result:

i. N/A

ii. N/A

iii. N/A

(d) if known, citations of any written opinion or orders entered pursuant to such results:

i. N/A

ii. N/A

iii. N/A

9. If you answered "no" to (7), state your reasons for not so appealing:

(a) MY PUBLIC DEFENDER ATTORNEY FAILED TO NOTIFY

(b) ME I HAD THE RIGHT OR OPTION TO APPEAL THE

(c) IMPOSITION OF SENTENCE.

10. State concisely the grounds on which you base your allegation that you are being held in

custody unlawfully:

- (a) THE PLEA AGREEMENT WAS ACCEPTED BY APPLICANT
- (b) "WITHOUT NEGOTIATIONS OR RECOMMENDATIONS". THE SOLICITOR
- (c) BREACHED TH'S AGREEMENT BY RECOMMENDING JAIL TIME TO JUDGE.

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

- (a) THE FACTS WILL BE SUPPORTED BY THE TRIAL
- (b) TRANSCRIPT.
- (c) \_\_\_\_\_

12. Prior to this application have you filed with respect to this conviction:

- (a) any petition in a State Court under South Carolina Law? No
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? No
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No
- (d) any other petitions, motions or applications in this or any other Court? No

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

- (a) the specific nature thereof:
  - i. \_\_\_\_\_
  - ii. \_\_\_\_\_
  - iii. \_\_\_\_\_
  - iv. \_\_\_\_\_
- (b) the name and location of the Court in which each was filed:
  - i. \_\_\_\_\_
  - ii. \_\_\_\_\_
  - iii. \_\_\_\_\_
  - iv. \_\_\_\_\_
- (c) the disposition thereof:
  - i. \_\_\_\_\_
  - ii. \_\_\_\_\_
  - iii. \_\_\_\_\_

iv. NIA

(d) the date of each such disposition:

i. \_\_\_\_\_

ii. \_\_\_\_\_

iii. \_\_\_\_\_

iv. \_\_\_\_\_

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. \_\_\_\_\_

ii. \_\_\_\_\_

iii. \_\_\_\_\_

iv. \_\_\_\_\_

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

No

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

i. \_\_\_\_\_

ii. \_\_\_\_\_

iii. \_\_\_\_\_

(b) the proceedings in which each ground was raised:

i. \_\_\_\_\_

ii. \_\_\_\_\_

iii. \_\_\_\_\_

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) I DID NOT AND HAD NOT BEEN ADVISED THAT

(b) I HAD THE RIGHT TO FILE FOR POST CONVICTION

(c) RELIEF

17. Were you represented by an attorney at any time during the course of:

- (a) your arraignment and plea? yes
- (b) your trial, if any? yes
- (c) your sentencing? yes
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? No
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? No

18. If you answered "yes" to one or more parts of (17), list:

(a) the name and address of each attorney who represented you:

- i. JAMES STANKO
- ii. 203 LAUREL ST.
- iii. COWLEY, S.C. 29526

(b) the proceedings at which each such attorney represented you:

- i. ARRAIGNMENT
- ii. PLEA
- iii. SENTENCING

19. State clearly the relief you seek in filing this application:

I AM SEEKING TO HAVE THIS CONVICTION VACATED.

20. Are you now under sentence from any other court that you have not challenged?

No

STATE OF SOUTH CAROLINA )

County of Horry )

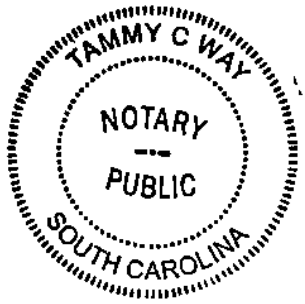
VERIFICATION  
20 19 CP26 11664

I, William Funderburk being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

[Signature]

SWORN to and subscribed before me this 14th  
day of March, 2019.

[Signature] (L.S.)  
Notary Public



My Commission Expires: 3/4/2024

HORRY COUNTY  
2019 MAR 18 PM 3:06  
CLERK OF COURT  
HORRY COUNTY, SC

APPLICATION TO PROCEED WITHOUT PAYMENT  
OF COSTS AND AFFIDAVIT  
IN SUPPORT THEREOF

20 19 CP26 11664

I, William Funderbake hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

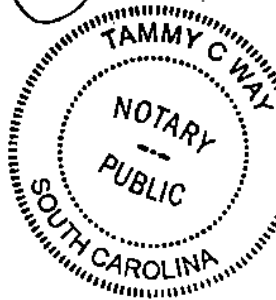
- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

*William Funderbake*  
Applicant

SWORN or affirmed to and subscribed before me this  
11th day of March, 2019.

*Jay CWG*  
Notary Public

My Commission Expires: 3/4/2024



CLERK OF COURT  
Horry County, SC  
2019 MAR 18 PM 3:06  
HORRY COUNTY

MARCH 14, 2019

20 19 GP26 1664

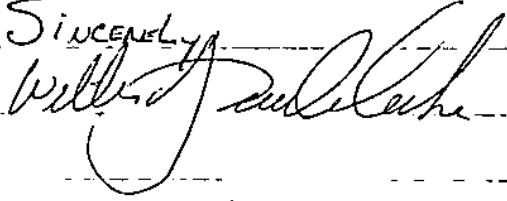
RENEE N. ELVIS  
Clerk OF COURT OF HORRY COUNTY  
P.O. Box 677  
CONWAY, S.C. 29528-0677

HORRY COUNTY  
CLERK OF COURT  
HORRY COUNTY, SC  
2019 MAR 18 PM 3:06

RE: POST CONVICTION RELIEF FORM

DEAR Ms. ELVIS;

ENCLOSED IS A COPY OF MY PCR APPLICATION.  
COULD YOU PLEASE STAMP, CLOCK, DATE AND RETURN  
A COPY TO ME, THANK YOU FOR YOUR HELP IN THIS  
MATTER.

Sincerely,  


WILLIAM FUNDERBURKE, SCDC # 376742  
MACDOUGALL CORRECTIONAL INSTITUTION  
1516 OLD GILLIARD RD.  
RIDGEBVILLE, S.C. 29472

STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS  
COUNTY OF HORRY ) FOR THE FIFTEENTH JUDICIAL CIRCUIT

William Howard Funderburke Jr., ) Case No.: 2019-CP-26-01664

Applicant,

v.

State of South Carolina,

Respondent.

RETURN AND MOTION TO DISMISS  
(Counsel Appointed)

RENEE N. GILYIS  
CLERK OF COURT  
HORRY COUNTY, SC

2019 JUN 28 PM 1:22

FILED

In response to the application for post-conviction relief filed by William Howard Funderburke Jr. (Applicant) on March 18, 2019, Respondent would show this Court:

**I. PROCEDURAL HISTORY**

Applicant was<sup>1</sup> confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. Applicant waived his right to presentment to the grand jury for and indictment for criminal solicitation of a minor (2018-GS-26-03814).<sup>2</sup> James D. Stanko, Esq. represented Applicant, and C. Leigh Andrew, Esq., of the Fifteenth Circuit Solicitor’s Office, prosecuted the case. On June 11, 2018, Applicant pled pursuant to North Carolina v. Alford to the above indictment. The Honorable Benjamin H. Culbertson sentenced Applicant to imprisonment for a term of eight years, provided that upon the service of two years, the balance would be suspended with probation for five years. Applicant did not appeal his plea or sentence.

<sup>1</sup> Applicant appears to have maxed out his sentence on June 23, 2019.

<sup>2</sup> Applicant was originally indicted for criminal sexual conduct with a minor, second degree (2017-GS-26-03592), and criminal sexual conduct with a minor, third degree (2018-GS-26-01659). Those indictments were dismissed *nolle prosequi* as part of the plea.

## II. STATEMENT OF THE FACTS

The underlying facts of the crime for which Applicant is incarcerated were articulated by the State during the plea proceeding as follows:

Your Honor, the victim is sitting behind me. She's now 32 years old. Mr. Funderburke was married to her mother, he was her stepfather. Between the dates of August 8<sup>th</sup>, 1999 and August 7<sup>th</sup>, 2002, when the victim was then between the ages of 13 and 16 years old, the defendant committed a sexual battery or attempted to commit a sexual battery by performing oral sex on the victim and digitally penetrating her vagina. He made a post-Miranda statement to the police where he admitted to offering to perform oral sex on the victim who was then 15 years old. So, therefore, it's solicitation or an attempt to commit a CSC on a minor, Your Honor.

(Tr. 10, ll. 9-20). Upon inquiry by the Court, Applicant confirmed he was pleading with respect to the above articulated facts. (Tr. 10-11).

At the call of the case, the State indicated the originally indicted charges, the new indictment to which Applicant was pleading under Alford, and that Applicant was doing so "without recommendation from the state." (Tr. 3, ll. 7-19). Near the end of the plea proceeding, after the victim addressed the plea court, the State began to make a recommendation, but was cut off by the plea court:

MS. ANDREW: Your Honor, I'd just like to say that the reason for this plea agreement, the state took into account the defendant's age and sparing the victim having a trial, but we are asking for the maximum on the ---

THE COURT: Well, I thought you said no recommendation.

MS. ANDREW: Oh, I'm sorry; I'm sorry, Your Honor. I'm not really -- there's no recommendation but even when I don't recommend, I typically still ask for ---

THE COURT: That's a recommendation. Are you giving a recommendation, I mean, I ---

MS. ANDREW: I won't give a recommendation because I said I wouldn't.

THE COURT: Okay.

(Tr. 15, ll. 13-25). The plea court thereafter promptly sentenced Applicant as previously noted to less than the maximum available for criminal solicitation of a minor.<sup>3</sup> (Tr. 16, ll. 1-24).

### III. CURRENT APPLICATION

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

1. "The plea agreement was accepted by Applicant 'without negotiations or recommendations.' The solicitor breached this agreement by recommending jail time to judge."
  - a. "The facts will be supported by the trial transcript."

Applicant requests relief as follows:

- "I am seeking to have this conviction vacated."

Attached to and incorporated herein are the records of the Horry County Clerk of Court regarding the subject conviction, Applicant's records from the South Carolina Department of Corrections, the plea transcript, and the current application for relief. Respondent reserves the right to amend this Return upon receipt of relevant information.

### IV. MOTION TO DISMISS

Respondent moves for summary dismissal pursuant to § 17-27-70 of the South Carolina Code of Laws on the basis that there is no genuine issue of material fact which would necessitate an evidentiary hearing. Because there is no question of law or fact to necessitate a hearing, Respondent requests the Court not appoint counsel in this matter, and instead issue a Conditional Order of Dismissal indicating the Court's intent to dismiss the application and its reasons for so doing.<sup>4</sup> See S.C. Code Ann. § 17-27-70(b) (establishing procedure for summary disposition of

---

<sup>3</sup> See S.C. Code Ann. § 16-15-342(E) (10 years or \$5,000 fine).

<sup>4</sup> A proposed Conditional Order of Dismissal consistent with this return and motion to dismiss is concurrently submitted for the Court's consideration.

PCR applications); Leamon v. State, 363 S.C. 432, 434, 611 S.E.2d 494, 495 (2005) (summary disposition appropriate when there is no need to develop facts and the applicant is not entitled to relief). Respondent moves for summary dismissal for the following reasons:

#### **Failure to State a Claim**

Applicant's allegation the State breached its plea agreement should be summarily dismissed. An application for post-conviction relief does not serve as a substitute for direct appeal, and an issue that could have been raised at applicant's trial or on appeal is not cognizable in an application for PCR. S.C. Code Ann. § 17-27-20(b); Drayton v. Evatt, 312 S.C. 4, 8-9, 430 S.E.2d 517, 520 (1993) (citing Hyman v. State, 278 S.C. 501, 299 S.E.2d 330 (1983)); Humbert v. State, 345 S.C. 332, 338, 548 S.E.2d 862, 866 (2001). Applicant's allegation could have been raised at the plea and thereafter on appeal. In any event, the State's fleeting "recommendation" to the plea court was immediately cut off by the plea court, rejected by the plea court, and withdrawn by the solicitor, as evidenced in the excerpt in Section II, above. Applicant's claim is explicitly refuted by the record. For these reasons, Applicant's allegations should be dismissed as not cognizable under the Uniform Post-Conviction Procedure Act.

#### **V. GENERAL DENIAL**

Respondent denies each allegation not expressly admitted, qualified, or explained.

*[Conclusion and signature on following page]*

VI. CONCLUSION

WHEREFORE, Respondent moves to summarily dismiss the application because it fails to state a claim upon which relief can be granted.

Respectfully submitted,

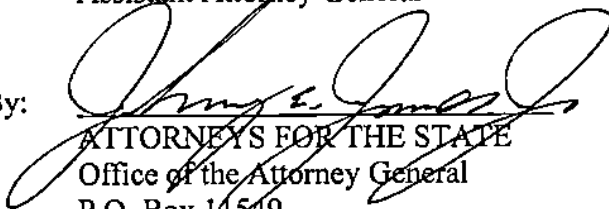
ALAN WILSON  
Attorney General

W. JEFFREY YOUNG  
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON  
Senior Assistant Deputy Attorney General

JOHNNY ELLIS JAMES JR.  
Assistant Attorney General

By:



ATTORNEYS FOR THE STATE  
Office of the Attorney General  
P.O. Box 11549  
Columbia, S.C. 29211

*25 June* 2019

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF HORRY )  
 )  
 )  
 WILLIAM H. FUNDERBURKE, JR. )  
 )  
 ) Applicant, )  
 )  
 ) vs )  
 )  
 STATE OF SOUTH CAROLINA, )  
 )  
 ) Respondent. )

IN THE COURT OF COMMON PLEAS

2019-CP-26-01664

AFFIDAVIT OF SERVICE BY MAIL

RENEE L. ELMIS  
 CLERK OF COURT  
 HORRY COUNTY, SC

2019 JUN 28 PM 1:22

FILED

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Return and Motion to Dismiss** on the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

**James K. Falk, Esquire**  
**Falk Law Firm, LLC**  
**Post Office Box 1058 ;**  
**Charleston, South Carolina 29402**

DATED this 25<sup>th</sup> Day of June, 2019.



\_\_\_\_\_  
 Eva Cook Legal Assistant  
 For Respondent

STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS  
 COUNTY OF HORRY ) FOR THE FIFTEENTH JUDICIAL CIRCUIT  
 William Howard Funderburke Jr., ) Case No.: 2019-CP-26-01664  
 Applicant, )  
 v. ) **CONDITIONAL ORDER OF DISMISSAL**  
 State of South Carolina, )  
 Respondent. )

2019 JUN 19 PM 12:12  
 Horry County, SC

This matter comes before the Court by way of an application for post-conviction relief filed by William Howard Funderburke Jr. (Applicant) on March 18, 2019. Respondent made its Return, requesting the application be summarily dismissed.

**I. PROCEDURAL HISTORY**

Applicant was<sup>1</sup> confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. Applicant waived his right to presentment to the grand jury for and indictment for criminal solicitation of a minor (2018-GS-26-03814).<sup>2</sup> James D. Stanko, Esq. represented Applicant, and C. Leigh Andrew, Esq., of the Fifteenth Circuit Solicitor’s Office, prosecuted the case. On June 11, 2018, Applicant pled pursuant to North Carolina v. Alford to the above indictment. The Honorable Benjamin H. Culbertson sentenced Applicant to imprisonment for a term of eight years, provided that upon the service of two years, the balance would be suspended with probation for five years. Applicant did not appeal his plea or sentence.

---

<sup>1</sup> Applicant appears to have maxed out his sentence on June 23, 2019.  
<sup>2</sup> Applicant was originally indicted for criminal sexual conduct with a minor, second degree (2017-GS-26-03592), and criminal sexual conduct with a minor, third degree (2018-GS-26-01659). Those indictments were dismissed *nolle prosequi* as part of the plea.

## II. STATEMENT OF THE FACTS

The underlying facts of the crime for which Applicant is incarcerated were articulated by the State during the plea proceeding as follows:

Your Honor, the victim is sitting behind me. She's now 32 years old. Mr. Funderburke was married to her mother, he was her stepfather. Between the dates of August 8<sup>th</sup>, 1999 and August 7<sup>th</sup>, 2002, when the victim was then between the ages of 13 and 16 years old, the defendant committed a sexual battery or attempted to commit a sexual battery by performing oral sex on the victim and digitally penetrating her vagina. He made a post-Miranda statement to the police where he admitted to offering to perform oral sex on the victim who was then 15 years old. So, therefore, it's solicitation or an attempt to commit a CSC on a minor, Your Honor.

(Tr. 10, ll. 9-20). Upon inquiry by the Court, Applicant confirmed he was pleading with respect to the above articulated facts. (Tr. 10-11).

At the call of the case, the State indicated the originally indicted charges, the new indictment to which Applicant was pleading under Alford, and that Applicant was doing so "without recommendation from the state." (Tr. 3, ll. 7-19). Near the end of the plea proceeding, after the victim addressed the plea court, the State began to make a recommendation, but was cut off by the plea court:

MS. ANDREW: Your Honor, I'd just like to say that the reason for this plea agreement, the state took into account the defendant's age and sparing the victim having a trial, but we are asking for the maximum on the ---

THE COURT: Well, I thought you said no recommendation.

MS. ANDREW: Oh, I'm sorry; I'm sorry, Your Honor. I'm not really -- there's no recommendation but even when I don't recommend, I typically still ask for ---

THE COURT: That's a recommendation. Are you giving a recommendation, I mean, I ---

MS. ANDREW: I won't give a recommendation because I said I wouldn't.

THE COURT: Okay.

(Tr. 15, ll. 13-25). The plea court thereafter promptly sentenced Applicant as previously noted to less than the maximum available for criminal solicitation of a minor.<sup>3</sup> (Tr. 16, ll. 1-24).

### III. CURRENT APPLICATION

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

1. "The plea agreement was accepted by Applicant 'without negotiations or recommendations.' The solicitor breached this agreement by recommending jail time to judge."
  - a. "The facts will be supported by the trial transcript."

Applicant requests relief as follows:

- "I am seeking to have this conviction vacated."

Before this Court are the records of the Horry County Clerk of Court regarding the subject conviction, Applicant's records from the South Carolina Department of Corrections, the plea transcript, and the current application for relief. Respondent reserves the right to amend this Return upon receipt of relevant information.

### IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the pleadings, the records submitted to it by the parties, and the applicable law. Pursuant to S.C. Code Ann. §§ 17-27-70 and -80, this Court informs the parties of its intent to dismiss the application based upon the following findings:

#### Failure to State a Claim

The Court finds Applicant's allegation the State breached its plea agreement should be summarily dismissed. An application for post-conviction relief does not serve as a substitute for

---

<sup>3</sup> See S.C. Code Ann. § 16-15-342(E) (10 years or \$5,000 fine).

direct appeal, and an issue that could have been raised at applicant's trial or on appeal is not cognizable in an application for PCR. S.C. Code Ann. § 17-27-20(b); Drayton v. Evatt, 312 S.C. 4, 8-9, 430 S.E.2d 517, 520 (1993) (citing Hyman v. State, 278 S.C. 501, 299 S.E.2d 330 (1983)); Humbert v. State, 345 S.C. 332, 338, 548 S.E.2d 862, 866 (2001). Applicant's allegation could have been raised at the plea and thereafter on appeal. In any event, the State's fleeting "recommendation" to the plea court was immediately cut off by the plea court, rejected by the plea court, and withdrawn by the solicitor, as evidenced in the excerpt in Section II, above. Applicant's claim is explicitly refuted by the record. For these reasons, the Court shall dismiss the application for failing to state a claim cognizable under the Uniform Post-Conviction Procedure Act.

*[Conclusion and signature on following page]*


### V. CONCLUSION

Pursuant to S.C. Code Ann. § 17-27-70(b), the Court intends to dismiss this application with prejudice unless Applicant provides specific reasons, factual or legal, why the application should not be dismissed in its entirety. Applicant is granted twenty (20) days from the date of service of this Order upon him to show why this Order should not become final. Applicant shall file any reasons he may have with the Horry County Clerk of Court and shall serve opposing counsel at the following address:

Office of the Attorney General  
 Johnny E. James, Jr., Esquire  
 PCR Division – 15<sup>th</sup> Circuit  
 P.O. Box 11549  
 Columbia, South Carolina 29211

Applicant is cautioned that his response to this order must be actually received by the Horry County Clerk of Court and opposing counsel within twenty (20) days from the date of the service of this Order, and that the Court will not consider any issues raised in his response if not so timely filed and served.

AND IT IS SO ORDERED this 14 day of Aug, 2019.

  
 LARRY B. HYMAN, JR.  
 Chief Judge for Common Pleas  
 Fifteenth Judicial Circuit

Cowan, South Carolina

STATE OF SOUTH CAROLINA  
COUNTY OF HORRY

William Funderburke, Jr., #376742,  
Applicant,

v.

State of South Carolina,  
Respondent.

IN THE COURT OF COMMON PLEAS  
FOR THE FIFTEENTH JUDICIAL CIRCUIT

Case No. 2019-CP-26-01664

AMENDED RETURN

FILED  
HORRY COUNTY  
2019 JUL 18 P 1:12  
RENEE N. EMMIS  
CLERK OF COURT  
HORRY COUNTY, SC

NOW COMES Respondent, making its return to the post-conviction relief (hereafter "PCR") application filed on March 18, 2019, by William Funderburke (hereafter "Applicant"). Respondent respectfully offers the following in support of its return:

**I. Procedural History**

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Horry County Clerk of Court. During its June 2018 term, the Horry County Grand Jury indicted Applicant for criminal solicitation of a minor (2018-GS-26-03814). Applicant was represented by James D. Stanko, Esquire. Assistant Solicitor C. Leigh Andrew, Esquire, of the Fifteenth Circuit Solicitor's Office prosecuted the case. On June 11, 2018, Applicant appeared before the Honorable Benjamin H. Culbertson, circuit court judge, and entered an *Alford* pled as indicted to all offenses without any negotiations or recommendations. Judge Culbertson sentenced Applicant to eight years, provided that upon the service of two years, the balance would be suspended with probation for five years. Applicant did not pursue a direct appeal.

**II. Statement of Facts**

Applicant was married to the victim's mother when between the dates of August 8, 1999,

When an applicant asserts ineffective assistance of counsel as a ground for relief, the applicant must show “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. Ineffective assistance of counsel is governed by the Sixth Amendment, as explained by the United States Supreme Court in *Strickland v. Washington*.

Pursuant to the first prong of the *Strickland* analysis, the applicant must prove defense counsel’s performance was deficient. *Id.* at 686; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). To show deficiency, the applicant must prove by a preponderance of the ... evidence that counsel’s actions fell outside of the zone of “reasonableness under prevailing professional norms.” *Strickland*, 466 U.S. at 688. See also Rule 71.1(e), S.C.R.P. “The applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence.” Reasonableness is determined by the “variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how to best represent a criminal defendant,” and the scope of the reasonableness inquiry is limited to facts counsel had available at the time of representation. *Id.* at 689. “Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003) (citing *Strickland*, 466 U.S. at 690); see *Dunn v. Reeves*, 141 S. Ct. 2405, 2410 (2021) (noting counsel’s strategic decisions are to be afforded “‘strong presumption’ of reasonableness that the defendant must overcome); *Cullen v. Pinholster*, 563 U.S. 170, 189 (2011) (explaining a defendant must show defense counsel failed to act reasonably considering all the circumstances in order to overcome the presumption of adequate representation). Judicial scrutiny of counsel’s performance remains highly deferential

towards defense counsel with a strong presumption that counsel acted competently, because competent representation may be executed in virtually “countless” ways. *Strickland*, 466 U.S. at 688-89.

Second, counsel’s deficient performance must have prejudiced the applicant so 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. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694. The court makes this determination based upon the totality of the evidence. Importantly, “[t]he likelihood of a different result must be *substantial*, not just conceivably *Harrington v. Richter*, 562 U.S. 86, 112 (2011).

FILED  
HARRIS COUNTY  
2019 JUN 18 PM 1:12  
GENE N. ELVIS  
CLERK OF COURT  
HARRIS COUNTY, SO

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. *Strickland*, 466 U.S. at 696. A court need not first determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies; if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. *Id.* at 696-97.

In the context of a guilty plea, the applicant must show there is a reasonable probability that, but for ineffective assistance of counsel, he or she would not have pled guilty but, instead, would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). Applicant’s right to contest the validity of a plea is usually, but not invariably, foreclosed because of the inherent solemnity and truthfulness included in the guilty plea process. *See Blackledge v. Allison*, 431 U.S. 63, 73-74 (1977) (“Solemn declarations in open court carry a strong presumption of verity. The subsequent presentation of conclusory allegations unsupported by specifics is subject to

summary dismissal, as are contentions that in the face of the record are wholly incredible.”).

Absent valid reasons why the applicant is entitled to depart from previous judicial admissions made at the plea hearing, statements made during the original proceeding remain conclusive.

*Dalton v. State*, 376 S.C. 130, 137-38, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing *Crawford v. United States*, 519 F.2d 347, 350 (4th Cir. 1975)).

For a plea to be valid, the applicant must have been aware of the nature and crucial elements of the offense the maximum and minimum penalties, and the rights he is waiving by

accepting the plea. *Boykin v. Alabama*, 395 U.S. 238 (1969); *Roddy v. State*, 339 S.C. 528, 528 S.E.2d at 421 (citing *State v. Ray*, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993)). “[T]he A plea is not knowing or voluntary if a defendant “lacks knowledge of material evidence in the prosecution’s possession.” *Gibson v. State*, 334 S.C. 515, 523, 514 S.E.2d 326, 324 (1999).

FILED  
HARRIS COUNTY  
CLERK OF COURT  
RENEE N. EAVIS  
2022 JUL 18 PM 1:52  
HARRIS COUNTY, TEXAS

A defendant’s knowing and voluntary waiver of statutory or constitutional rights must be established by a complete record, and “may be accomplished by colloquy between the court and defendant, between the court and defendant's counsel, or both.” *Roddy v. State*, 339 S.C. at 34, 528 S.E.2d at 421 (citing *State v. Ray*, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993)). “[T]he voluntariness of a guilty plea is not determined by an examination of the specific inquiry made by the sentencing judge alone, but is determined from both the record made at the time of the entry of the guilty plea and the record of the post-conviction hearing.” *Dalton*, 376 S.C. at 138, 654 S.E.2d at 874 (quoting *Harres v. Leeke*, 282 S.C. 131, 133, 318 S.E.2d 360, 361 (1984)). Further, “guilty pleas, freely and voluntarily entered, act as a waiver of all non-jurisdictional defects and defenses, including claims of a violation of a constitutional right prior to the plea.” *Whetsell v. State*, 276 S.C. 295, 297, 277 S.E.2d 891, 892 (1981).

Applicant stated that the State violated the plea agreement by recommending prison time. Respondent contends Applicant likely cannot meet his burden of proof on this ground. Still, the

ineffective assistance of counsel allegations probably raise questions of fact that the record does not conclusively refute. Accordingly, Respondent respectfully requests an evidentiary hearing to fully resolve this issue. *See Sharper v. State*, 279 S.C. 264, 265, 305 S.E.2d 247, 248 (1983) (“Where an application for post-conviction relief alleges specific instances of ineffective assistance of counsel which are not conclusively refuted by the record before the lower court, a question of fact is raised which can only be resolved by an evidentiary hearing.”).

**V. Other Allegations Denied**

Each and every other allegation in Applicant’s PCR application not explicitly admitted, qualified, or explain in this return is hereby denied by the Respondent.

**VI. Assertion of Rights to Notice of Amendments.**

Applicant should raise any claims he intends to raise at the PCR evidentiary hearing well in advance of the hearing. Here, Applicant’s court-appointed attorney is the only individual authorized to file amendments to this application, given his representative capacity, Rule 11(a), SCRPC and *pro se* filings will not be considered at the PCR hearing. *State v. Devore*, 416 S.C. 115, 123, 784 S.E.2d 690, 694 (Ct. App. 2016) (*Pro se* filing is a nullity where person was represented by counsel); *Miller v. State*, 388 S.C. 347, 697 S.E.2d 527 (2010) (“Since there is no right to ‘hybrid representation’ that is partially *pro se* and partially by counsel, substantive documents, with the exception of motions to relief counsel, filed *pro se* by a person represented by counsel are not to be accepted unless submitted by counsel.”).

Respondent reserves the right to request that any amendments withheld until the last minute be stricken because of undue prejudice to Respondent or, in the alternative, continue the matter to permit adequate time to investigate and address the claims. *See Mangal v. State*, 421 S.C. 85, 805 S.E.2d 568 (2017) (“In most PCR cases . . . we have refused to excuse the pleading

FILED  
HOBBS COUNTY  
2017 JUL 18 P 1:12  
PENEE N. EVANS  
CLERK OF COURT  
HOBBS COUNTY, S.C.

and issue-preservation requirements that apply in all civil cases.”); *Love v. State*, 428 S.C. 231, 242, 834 S.E.2d 196, 201 (2019) (“When analyzing the substance of a proposed amendment and any prejudice the State might suffer, a PCR court should consider all relevant circumstances, including, but not limited to, the timing of the motion, the complexity of the new issue, the degree of surprise to the State, the need for and availability of necessary witnesses to defend against the claim, and whether the substance of the proposed amendment is readily apparent from the underlying plea or trial record.”); *see also* Rules 15(a)-(b), SCRPC (explaining how to amend a pleading). Pursuant to Section 17-27-150 of the South Carolina Code of Laws, Applicant may not invoke formal discovery processes to issue subpoenas or otherwise obtain discovery materials unless the Court grants leave upon good cause shown. Furthermore, Respondent requests that all potential exhibits and materials used to produce potential expert witness testimony be sent to Respondent well in advance of the evidentiary hearing. Respondent reserves the right to request a continuance and oppose witness testimony and exhibits withheld until the last minute resulting in undue prejudice to Respondent.

FILED  
 HORRY COUNTY  
 2022 JUL 18 P 1:13  
 RENEE N. ELYS  
 CLERK OF COURT  
 HORRY COUNTY, SC

VII. Conclusion

WHEREFORE, Respondent requests that the Court hold an evidentiary hearing regarding Applicant's allegations.

Respectfully submitted,

ALAN WILSON  
Attorney General

W. JEFFREY YOUNG  
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON  
Senior Assistant Deputy Attorney General

CHELSEY F. MARTO  
Assistant Attorney General

By:   
ATTORNEYS FOR RESPONDENT

Office of the Attorney General  
Post Office Box 11549  
Columbia, South Carolina 29211  
Telephone: (803) 734-3386

July 14, 2022

FILED  
Horry County  
2022 JUL 18 P 1:13  
RENEE N. ELYS  
CLERK OF COURT  
HORRY COUNTY, SC

STATE OF SOUTH CAROLINA )

IN THE COURT OF COMMON PLEAS

COUNTY OF HORRY )

William Funderburke, Jr., #376742 )

2019-CP-26-01664

vs )

AFFIDAVIT OF SERVICE BY MAIL

State of South Carolina, )


Respondent, )

FILED  
HORRY COUNTY  
2022 JUL 18 P 1:12  
RENEE N. ELYS  
CLERK OF COURT  
HORRY COUNTY SC

1. I am an employee of the Respondent in the above-captioned act
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the Amended Return in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Mr. James Kristian Falk  
Falk Law Firm, LLC  
PO Box 1058  
Charleston, SC 29402

DATED this the 14<sup>th</sup> day of July, 2022.



Erik Marcusson, Legal Assistant  
for Respondent

1 State of South Carolina ) **TRANSCRIPT OF RECORD**  
 2 COUNTY OF HORRY ) CASE NO. : 2019-CP-26-1664

3 -----

4 September 6, 2022

5 **BEFORE:** The Honorable Kristi F. Curtis

6 -----

7

8 William H. Funderburke, Jr.,)

9 Applicant, )

10 vs. )

11 State of South Carolina, )

12 -----

13 APPEARANCES:

14 Chelsey F. Marto, Esquire  
 15 Attorney for the State of South Carolina

16 James K. Falk, Esquire  
 17 Attorney for the Applicant.

18 State's Witness

19 James D. Stanko, Esquire

20

21

22

23

24 Julie A. Kevish  
 25 Official Court Reporter

I-N-D-E-X

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

**APPLICANT WITNESS**

**PAGE**

William Funderburke

Direct by Mr. Falk

6

Cross by Ms. Marto

14

Redirect by Mr. Falk

24

**STATE'S WITNESS**

James Stanko

Direct by Mr. Falk

16

Cross by Mr. Cross

21

Redirect by Mr. Falk

24

1

September 6, 2022

2

3

**P-R-O-C-E-E-D-I-N-G-S**

4

MS. MARTO: Good morning, Your Honor.

5

THE COURT: Good morning.

6

MS. MARTO: May it please the Court? We are here

7

today in the case of William Funderburke versus the State of

8

South Carolina, Docket Number 2019-CP-26-01664. My name is

9

Chelsey Marto and on behalf of the Respondent, Mr. James Falk

10

represents the Applicant in this matter. During its June, 2018

11

term, the Horry Grand Jury indicted him for criminal

12

solicitation of a minor. He was represented by Mr. James

13

Stanko and Leigh Andrew prosecuted the case. On June 11, 2018

14

he appeared before the Honorable Judge Culbertson and entered

15

an Alford Plea. With that negotiation and recommendation he

16

was sentenced to eight years provided that upon service of two

17

years the balance would be suspended with probation for five.

18

He did not pursue a direct appeal. His application was filed

19

March 18, 2019, a return filed June 25, 2019, and then amended

20

July 14, 2022. With that, I'll turn it over to Mr. Falk.

21

MR. FALK: Your Honor, at this time we are prepared

22

to go forward. We're prepared to call our first witness at

23

that Court's convenience.

24

THE COURT: Mr. Funderburke, if I can just address

25

you for a moment, sir.

1           THE APPLICANT: Yes, ma'am.

2           THE COURT: Just so that I can make sure that you  
3 understand the consequences of going forward with your  
4 application today, do you understand this action I have on of  
5 two things that I can do. I can grant your PCR or I can deny  
6 your PCR. If I deny your PCR it just means that the sentence  
7 continues to be carried out. I understand in your case that  
8 you received a sentence of eight years provided upon service of  
9 two years, the balance would be suspended with probation for  
10 five years. I understand that you're still required to  
11 register, and that's an indefinite period of time, is my  
12 understanding.

13          THE APPLICANT: Yes, ma'am.

14          THE COURT: If I grant your PCR it means as if your  
15 guilty plea never took place, so the original indictments would  
16 come into play, and I'm showing that the original indictment  
17 for CSC with a minor second degree would carry up to 20 years.  
18 The indictment 1659 CSC with a minor third degree would carry  
19 up to 15 years. There is no guarantee that the State would  
20 enter into any negotiations with you on retrial. They would  
21 have no obligation to offer you the same deal. They would have  
22 no obligation to reduce the sentence -- or reduce the offense  
23 down to criminal solicitation, which I understand you entered a  
24 plea under Alford that carried up to ten years.

25          THE APPLICANT: Yes, ma'am.

1           THE COURT: So you have significant exposure on a  
2     retrial now up to 35 years, and so I want you to be aware of  
3     that, and then of course at this point, he's already been  
4     through the SVP procedure or is that still on the table?

5           MR. FALK: No. I mean, there would be the --  
6     everybody, that's a sentence, the case that they present to the  
7     NVT, apparently the NVT did not recommend, but I would think if  
8     he were convicted and went back and had to do one day at SCDC  
9     he would be eligible for another evaluation with another  
10    committee.

11          THE COURT: And so you understand that SVP  
12    proceeding, it's not part of your sentence, but it's a civil  
13    commitment proceeding that the State can seek to have you  
14    evaluated, and if they determine that you're a sexually violent  
15    predator then that spurs a whole another judicial proceeding  
16    that they can have you committed for an indefinite period of  
17    time past the date that you would be eligible to be released  
18    from prison, and you're aware of that?

19          THE APPLICANT: Yes, ma'am.

20          THE COURT: And you've discussed that with your  
21    attorney before coming to the courtroom today?

22          THE APPLICANT: Yes, ma'am.

23          THE COURT: And knowing all that is it still your  
24    decision to go forward with this application?

25          THE APPLICANT: Yes, Your Honor, it is.

1 THE COURT: Okay. Mr. Falk?

2 MR. FALK: I'll call Mr. Funderburke to the stand.

3 **WILLIAM HOWARD FUNDERBURKE WAS DULY SWORN AT THIS**  
4 **TIME AND TESTIFIED AS FOLLOWS:**

5 THE CLERK: Could you have a seat and state your name  
6 for the Court and spell your last name, please? Thank you.

7 **DIRECT EXAMINATION**

8 BY MR. FALK:

9 A. Good morning, William H. Funderburke. Last name is  
10 F-U-N-D-E-R-B-U-R-K-E.

11 Q. Let me just get kind of sort of general understanding of  
12 the criminal charges that were against you. So the accuser in  
13 your criminal case, how old was she when she made the  
14 accusations?

15 A. Thirty-two.

16 Q. And so this is, I guess, what we call a delayed  
17 reporting case. So she came forward and reported that this  
18 happened 20 years ago kind of thing?

19 A. Yes, sir.

20 Q. How did Mr. Stanko become your attorney in this case?

21 A. Mr. Stanko was appointed to me because I had requested a  
22 -- I couldn't afford a lawyer so Mr. Stanko was appointed to me  
23 through the Public Defenders.

24 Q. Okay. And so why don't you walk me through sort of, how  
25 did your conversations go with Mr. Stanko? What was going to

1 be your theory of defense in this case, had you not pled? I  
2 mean, let's go back. Your first meeting with Mr. Stanko, did  
3 you discuss with him whether or not you ultimately wanted to  
4 try to work this out or that you wanted to go to trial?

5 A. I indicated in the very first meeting that I wanted to  
6 go to trial. I wanted a jury trial.

7 Q. And why was that?

8 A. Because the alleged victim had manufactured this story  
9 of sexual contact.

10 Q. And so how long -- and were you in custody or out of  
11 custody at the time?

12 A. At the time Mr. Stanko was appointed?

13 Q. Yes.

14 A. I had just been released when I got notification that  
15 Mr. Stanko had been appointed my attorney.

16 Q. So how many days in did you have?

17 A. I'm sorry?

18 Q. How many days in jail were you before you were released?

19 A. Four days before I received a -- before I bonded out.

20 Q. So how many meetings did you have with Mr. Stanko, do  
21 you have a recollection?

22 A. Eight, including the court date.

23 Q. And can you kind of summarize? I mean, I don't really  
24 want, you know, necessarily, hearsay, but was Mr. Stanko on  
25 board with you going forward with the trial in this case?

1 A. In my opinion, no.

2 Q. Okay.

3 A. But let me -- he did say he would do whatever I wanted.

4 Q. Okay. And did he give you advice as to, you know, how  
5 best to deal with this case?

6 A. His advice was, when I posed the question of what do we  
7 have to do to win this case, and he said we have to prove that  
8 she's lying, which became my focus at that point, that we had  
9 to take to prove that she was not telling the truth.

10 Q. Now, you had sent me this e-mail and you had talked  
11 about -- did you have a discussion with Mr. Stanko that you  
12 wanted to have a polygraph test taken?

13 A. I wanted to have a polygraph, not because -- I  
14 understand it's not admissible in court, but I wanted to  
15 because I know polygraphs have been used to remove suspects  
16 from suspect lists if they pass a polygraph test, that was the  
17 motivation for that. I had asked the arresting officers for a  
18 polygraph, and to this moment I still have not had a polygraph.

19 Q. So what was Mr. Stanko's response about the polygraph?

20 A. He said he didn't believe in them.

21 Q. So did you all develop a plan on how to prove that your  
22 accuser was lying in this case?

23 A. No, sir, we did not. The only time we ever discussed  
24 the trial itself was four days before the trial started.

25 Q. So how close were you to trial when you pled guilty?

1       A.    I received this plea offer on Thursday, June 7th, and we  
2 were to be in court Monday morning on June 11th.

3       Q.    What made you change your mind in this case?

4       A.    Well, Mr. Stanko, when the meeting on the seventh of  
5 June began he had an associate in with him at that time.  I  
6 don't recall the gentleman's name, but he said that the  
7 District Attorney was also considering adding a criminal  
8 solicitation of a minor to the entire thing, and he played the  
9 clips from my interrogation with the arresting officers that  
10 were taken wholly out of context, but there was admission of  
11 the solicitation.

12      Q.    Because you've made apologies to your accuser; is that  
13 correct?

14      A.    Yes.  That is right.  I was counseled to do that.

15      Q.    Okay.  And is that the admission that was on the tape  
16 that you were just referring to, or were there other  
17 statements?

18      A.    I'm not sure I understand.

19      Q.    I'm sorry, you said Mr. Stanko played you clips of your  
20 interview where you admitted to the solicitation?

21      A.    Yes.

22      Q.    Was that admission to the solicitation, was that part of  
23 your apology?

24      A.    No, sir.  The admission of solicitation happened when I  
25 was 17 years old, but it was taken out of context and made to

1 apply to this situation that the District Attorney was going to  
2 use to add this to this, so at that point he offered me a plea  
3 deal that the prosecution, or the Solicitor's Office would drop  
4 the criminal sexual contact with a minor charge and just if I  
5 took a plea deal for solicitation of a minor they would not  
6 seek a penalty, they would leave it to the judge.

7 Q. So the Solicitor was offering not to indict on a charge  
8 that would have related to conduct of yours that occurred prior  
9 to your 18th birthday?

10 A. No.

11 Q. You said you were 17 at the time?

12 A. No. In the interrogation tape I admitted soliciting 16  
13 year olds, but I was 17 when I did that, not as an adult, but  
14 that's one of the clips that he played for me saying that I  
15 should take this plea deal, and when I questioned him about  
16 where is my defense, where is -- you know, where's the defense  
17 you were supposed to plan, there was none. He and his fellow  
18 public defender -- the public -- his fellow partner in the  
19 public affairs office, Public Defender's Office I believe was  
20 there to echo his sentiment that my best interest would be to  
21 take this plea deal.

22 Q. And you pled under Alford?

23 A. I did.

24 Q. And what was your understanding of what that meant?

25 A. That the Alford plea was not an admission of guilt. It

1 still entered as a guilty plea, but it was -- there was not an  
2 admission of guilt.

3 Q. And at the time, you didn't have a criminal record?

4 A. No, sir.

5 Q. And what kind of discussion did he have with you about  
6 what we call collateral consequences? Did you know that you  
7 were going to be on an ankle monitor, that if you pled guilty  
8 you'd be on an ankle monitor for life?

9 A. No, sir. No, sir. I discovered --

10 Q. I misspoke. I said ankle monitor, but you'd be on the  
11 sex offender registry?

12 A. I learned that I would be on the sex offender registry  
13 for life when the judge said it, said: Do you know, Mr.  
14 Funderburke -- you know, and I said I didn't know that.

15 Q. You were aware that there was such a thing called the  
16 sex offender registry, right?

17 A. Yes, sir, I was aware of that.

18 Q. And did you have any conversations with Mr. Stanko about  
19 that?

20 A. No, none that I recall.

21 Q. And you're not wearing an ankle monitor; is that  
22 correct?

23 A. No, sir.

24 Q. And you understand what could happen if the judge were  
25 to grant your relief today?

1 A. I understand completely, yes, sir.

2 Q. Okay. So why did you not go to trial? Why did you  
3 change your mind and plead guilty?

4 A. Mr. Stanko and his partner convinced me that I would  
5 stand a better chance of getting probation if I took the plea  
6 deal. In fact, I asked him a question, I said what are the  
7 chances of getting probation if I take this plea deal, and he  
8 said better than 50 percent. I said what's the percentage,  
9 what's the chance of us winning a jury trial Monday, and he  
10 said less than ten percent.

11 Q. And why did he tell you that it would be less than ten  
12 percent?

13 A. Because he didn't feel like he could win, I mean --

14 Q. Well, did you go over -- you had seen clips from your  
15 statement?

16 A. Yes, sir.

17 Q. Did you go over all of the discovery in this case with  
18 him?

19 A. Yes, sir. I mean, I knew -- I didn't understand why --  
20 well, I didn't understand why my attorney when we're there to  
21 plan a defense strategy was playing clips and telling me what  
22 the prosecution was going to do. There was no discussion of a  
23 defense strategy or a vigorous defense as I was promised. It's  
24 like there was times where I had given him three names to  
25 subpoena all with the goal of proving that the victim was not

1 telling the truth. I could bring people to the stand who would  
2 testify that she was not a truth teller.

3 Q. So those would be witnesses that could testify to her  
4 lack of truthfulness on other occasions?

5 A. Yes, sir.

6 Q. That she had lied in the past?

7 A. Yes, sir.

8 Q. Did you have any witnesses -- well, I guess that would  
9 be, that's not the case. Alright. The judge asked you is  
10 anyone forcing you to plead guilty in this case when you pled;  
11 is that correct?

12 A. That's correct, sir.

13 Q. Did you feel forced?

14 A. I was coached in what to say, not what I wanted. If  
15 that meeting with Mr. Stanko and his associate I asked what  
16 would the chance of getting a delay because, obviously, there  
17 had been no time at all spent on planning a defense strategy,  
18 and he said the judge wouldn't allow that, the judge wouldn't  
19 do that.

20 Q. So you felt as though you were going to go to trial  
21 without a defense strategy in place?

22 A. Absolutely.

23 Q. And you felt that trial was going to commence four days  
24 later?

25 A. Yes, sir. And it just seemed like taking the plea deal,

1 candidly, would give me the opportunity to live to fight  
2 another day.

3 Q. And where would the venue for that fight be, in your  
4 mind?

5 A. In the courtroom in front of a jury.

6 Q. So you're saying that you felt by pleading you'd still  
7 have the opportunity to go before a jury at another time?

8 A. That was my hope, sir, yes, sir.

9 MR. FALK: Your Honor, we have no more questions at  
10 this time. Please answer any questions the State has.

11 THE APPLICANT: Yes, sir.

12 **CROSS-EXAMINATION**

13 BY MS. MARTO:

14 Q. Good morning, sir.

15 A. Good morning, ma'am.

16 Q. So you stated that you entered the plea because you were  
17 afraid you would lose at trial, correct?

18 A. I'm sorry, say that one more time.

19 Q. Did you state that you were afraid you would lose that  
20 trial, and is that why you decided to plead?

21 A. Yes, ma'am. I was afraid I would lose that trial  
22 because Mr. Stanko had prepared no defense strategy.

23 Q. Are were you afraid that would face more time at trial  
24 or that you would receive a harsher sentence if you went to  
25 trial?

1 A. I would receive a much harsher sentence.

2 Q. Were you afraid that you would spend the rest of your  
3 life in prison if you went to trial?

4 A. Yes, ma'am, I was.

5 Q. Did you understand that you were waiving your right to  
6 trial?

7 A. I was made to understand that, yes, ma'am.

8 Q. And that was at the plea hearing, correct?

9 A. Yes, ma'am.

10 Q. Did the judge go over your rights with you and what you  
11 were waiving?

12 A. He certainly did, he certainly did.

13 Q. Did the judge explain to you the charges you were facing  
14 and pleading to?

15 A. Yes, ma'am.

16 Q. And you plead under Alford, correct?

17 A. Yes, ma'am.

18 Q. And again, at the time you thought that the plea was the  
19 best solution for you in that case, correct?

20 A. At the time in light of the circumstances, yes, ma'am.

21 Q. The only other option that may have been better was  
22 walking free?

23 A. Yes, ma'am, that would have been awesome.

24 Q. Okay.

25 MS. MARTO: One moment, Your Honor. No further

1 questions.

2 THE COURT: Anything further, Mr. Falk?

3 MR. FALK: No, Your Honor.

4 THE COURT: You can step down, sir.

5 THE APPLICANT: Thank you.

6 MR. FALK: At this time we'll call Mr. Stanko to the  
7 stand.

8 **JAMES STANKO WAS DULY SWORN AT THIS TIME AND**  
9 **TESTIFIED AS FOLLOWS:**

10 THE CLERK: Have a seat and state your name for the  
11 Court and spell your last name, please? Thank you.

12 THE WITNESS: James Stanko, last name is spelled  
13 S-t-a-n-k-o.

14 **DIRECT EXAMINATION**

15 BY MR. FALK:

16 Q. Mr. Stanko, was this a conflict, a 608 appointment that  
17 you came to represent?

18 A. No. I was working for the Public Defender's Office at  
19 the time. This was just, it was mine on rotation.

20 Q. And how many other sexual assault cases had you tried up  
21 to that time?

22 A. Actually, taken to trial at that point, none at that  
23 point.

24 Q. What was sort of the plan of attack in this case?

25 A. So as you heard from Mr. Funderburke, we met multiple

1 times, close to ten times. I had played him the videos that  
2 the police had provided. We had gone into lengthy discussion  
3 about how we could effectively attack her truthfulness. I do  
4 not recall him ever telling me about anybody who could be  
5 called to attack her, so honestly, the strategy in that was  
6 through cross-examination.

7 Q. Had you all hired a -- or did the Public Defender's  
8 Office hire a private investigator in this case?

9 A. No.

10 Q. Was there ever an effort to see if there would be  
11 information that could be admissible under the South Carolina  
12 rape shield statutes?

13 A. No.

14 Q. This was a delay before the case; is that correct?

15 A. It was.

16 Q. So there's absolutely no forensic evidence; is that  
17 correct?

18 A. To the best of my knowledge I don't recall seeing  
19 anything in the file forensic, no. This would essentially have  
20 been her word against his.

21 Q. And did you consider -- I mean, he had testified that he  
22 wanted to have a polygraph test, and why did he not get a  
23 polygraph test?

24 A. We had discussed that in my office early on in the  
25 proceedings, never really progressed to the point where I

1 believed it was a serious offer on his part. He said, well, I  
2 could take a polygraph. I said, well, if it comes to that  
3 we'll certainly look into it, but it was that one time early on  
4 and it was never brought up again. Nothing really seemed to  
5 come of it so we have moved beyond it.

6 Q. So you were four days from trial. Were you prepared to  
7 call any witnesses?

8 A. He had indicated he wanted to take the stand, and  
9 considering the circumstances, the fact that he didn't have a  
10 record I did feel that it was likely in his best interest to  
11 take the stand and explain for himself, so honestly, even more  
12 than cross-examination the pathway for it seemed to be to allow  
13 him to explain the whole situation to the jury.

14 Q. And he would never admit to these acts; is that correct?

15 A. Not to me, no.

16 Q. Okay. And you would agree that it's his decision  
17 whether or not to take the case to trial; is that right?

18 A. Absolutely.

19 Q. And so when did -- were you soliciting another plea  
20 offer on the Thursday before trial, or how did the plea offers  
21 discussions take place with the Solicitor's Office?

22 A. The Solicitor contacted me, probably about, I'd say a  
23 week before trial. She indicated that several of his  
24 statements in his post-miranda interview with police led her to  
25 believe that that solicitation charge was a much stronger

1 charge and she was prepared to offer a reduction to that  
2 dismissing the CSC charges for an open-ended plea. So when Mr.  
3 Funderburke came in that Thursday before trial I presented that  
4 to him along with my associate, Mr. Pinkerton with the Public  
5 Defender's Office to kind of explain, you know, what would go  
6 on that and whether or not it could be in his interest to do  
7 it.

8 Q. And what do you recall his reaction was?

9 A. He was certainly conflicted, as he was the morning of  
10 trial, the morning the trial was supposed to start. Myself and  
11 Mr. Pinkerton, as he said, we played the video for him. I  
12 believe it was close to an hour-long video. We did highlight  
13 certain clips, but start to finish, again, an hour-long video,  
14 played it, turned the monitor towards him so that he could  
15 watch himself on that video. The most important part in the  
16 video, there was a timestamp of 51 minutes into the video. He  
17 stated to officers: If it's illegal to offer oral sex to a  
18 16-year-old, then I'm guilty. When we presented that to him  
19 and explained that that would be played in front of a jury his  
20 demeanor certainly changed and he appeared to understand that  
21 it probably was in his best interest to consider the offer that  
22 the State had made.

23 Q. That clearly wasn't an admission of guilt with this  
24 particular accuser; is that correct?

25 A. Well, it was -- and again, I just have that -- have that

1 written down as a quote from that, the understanding being that  
2 when that was played for the jury it likely would not be  
3 received well.

4 Q. Now, when Mr. Funderburke was on the stand, he was  
5 testifying that it was his understanding, or it was his  
6 testimony that the other statements that were made during his  
7 interview related to conduct that occurred when he was under  
8 18, was that not your understanding?

9 A. That was not my understanding, and again, we had played  
10 that whole video, listened our way through it, and it was both  
11 my opinion and Mr. Pinkerton's opinion that the jury would  
12 latch onto, especially that statement, in considering his level  
13 of culpability here.

14 Q. Did you kind of explain to Mr. Funderburke how he had to  
15 answer before the judge as far as the plea colloquy would go?

16 A. With every client that I had back when I was a Public  
17 Defender, you know, we sit down typically in one of the rooms  
18 in the courtroom here and lay out how the procedure is going to  
19 go, often times telling him here's what the judge is going to  
20 ask, and honestly, for some clients more than others, kind of  
21 walk them through, like, if you say this here's what's going to  
22 happen, if you say this here's what's going to happen, because  
23 some of these questions, some of these answers have a lot more  
24 of meaning and importance behind them. So like if you tell the  
25 judge no on this here's what could happen, if you tell the

1 judge yes on this here's what could happen, and I do recall  
2 that the conversation that myself and Mr. Pinkerton had with  
3 him was a rather lengthy one. He wanted to know if he didn't  
4 like how the judge ruled, how he got sentenced, if he was able  
5 to appeal that, he wanted to know the chance of him getting  
6 probation. I don't recall an exact number. I don't recall  
7 saying he had 60 percent chance or greater than 50 percent  
8 chance. I do recall telling him that typically defendants who  
9 plead guilty rather than being found guilty by the jury are  
10 often held in higher favor when it comes to sentencing because  
11 they've admitted to what they've done.

12 MR. FALK: I have no further questions.

13 THE COURT: Ms. Marto?

14 **CROSS-EXAMINATION**

15 BY MS. MARTO:

16 Q. Morning, sir.

17 A. Morning.

18 Q. So this case was going to trial initially, correct?

19 A. Yes.

20 Q. And did you prepare a defense when it came to going to  
21 trial?

22 A. I did.

23 Q. Did you discuss that with Mr. Funderburke?

24 A. Many times. The most recent pretrial one being that  
25 Thursday before trial.

1 Q. What was that defense going to be?

2 A. Again, the bulk of that, because this was delayed  
3 reporting case and her word against his, a substantial portion  
4 of that would, honestly, have been him taking the stand and  
5 sort of explaining the circumstances surrounding that  
6 particular timeframe.

7 Q. Did you think it was more likely than not he would  
8 succeed at trial?

9 A. It was my opinion that it was a very, very close call.  
10 I did not have, you know, certainly I didn't have a crystal  
11 ball. I couldn't tell him, like, you're gonna be fine,  
12 anything like that. I told him it could come down to just  
13 whether they believed him, whether they believed her, and he  
14 had a fairly substantial amount of exposure considering the  
15 severity of the seriousness of the charge.

16 Q. So is it fair to say that the primary reason he  
17 ultimately pled was based upon the sentencing?

18 A. Yes.

19 Q. And did you inform him that he would likely face a  
20 higher and harsher sentence if he went to trial instead?

21 A. Yes. I believe the charge that he actually pled to, I'm  
22 pretty sure is a zero to ten, so it's a Class E.

23 Q. And did you talk to him about the rights he was waiving?

24 A. Yes.

25 Q. And the charges he was facing at the plea?

1 A. Yes.

2 Q. And again, ultimately, it came down to a fear of being  
3 sentenced to the upper end of the sentencing range on the  
4 charges, correct?

5 A. Yes. We let him know that in conjunction with his plea  
6 the more serious charges were going to be dismissed or nolle  
7 prossed.

8 Q. Would you deem this a favorable plea offer?

9 A. I believed it was considering the facts that we have.

10 Q. Did you tell him he would have to register as a sex  
11 offender, do you recall?

12 A. Yes, and the judge actually asked him that during the  
13 plea hearing, and he also indicated that he understand that.

14 Q. And I think you addressed this on direct, but you didn't  
15 think that the polygraph was something to pursue further beyond  
16 the initial question, correct?

17 A. I didn't believe so early on, and again, he brought it  
18 up early on, and then we didn't hear anything about it at that  
19 point. I know it wasn't going to be admissible at trial so by  
20 the time we got into that trial pipeline, just didn't consider  
21 it further.

22 MS. MARTO: One moment, Your Honor. No further  
23 questions.

24 MR. FALK: If I could just clarify.

25

1

2

**REDIRECT EXAMINATION**

3 BY MR. FALK:

4 Q. So the solicitation charge that the Solicitor -- there  
5 was a CSC charge that the Solicitor was saying was serious but  
6 she would drop?

7 A. Right.

8 Q. Who was the alleged victim of that? Was it the same  
9 person?

10 A. Yes, it was.

11 MR. FALK: No further questions.

12 MS. MARTO: Nothing further, Your Honor.

13 THE COURT: Thank you, sir. You can step down.

14 THE WITNESS: Thank you.

15 THE COURT: Any further witnesses, Mr. Falk?

16 MR. FALK: No, but I'd like to recall Mr.  
17 Funderburke.

18 THE COURT: Okay.

19

**REDIRECT EXAMINATION**

20 BY MR. FALK:

21 Q. Mr. Funderburke, I'm just trying to get an understanding  
22 of kind of the incentive you were given for this plea deal. So  
23 the Solicitor, your attorney testified that she was considering  
24 bringing a case of criminal sexual conduct, which is a more  
25 serious charge?

1       A.    Yes, sir, and in that conversation on June 7th he  
2       indicated that she was going to add the solicitation charge to  
3       that.

4       Q.    Okay.  And what was your understanding who the victim of  
5       those charges was, was it the same girl, the same woman?

6       A.    That was my understanding, yes.

7       Q.    Because you had talked before when I first had you up  
8       there that there was in your discussions with law enforcement  
9       you thought you were talking about conduct that occurred when  
10      you were 17 about 16 year old girls when you were 17; isn't  
11      that correct?

12      A.    Yes, sir, that's correct, but as it was portrayed to me  
13      the jury would indicate that, meaning, the victim.

14               MR. FALK:  No further questions.

15               MS. MARTO:  No questions, Your Honor.

16               THE COURT:  You can step down, sir.

17               THE APPLICANT:  Thank you.

18               THE COURT:  Any other witnesses, Mr. Falk?

19               MR. FALK:  No, Your Honor.

20               MS. MARTO:  No witnesses, Your Honor.

21               THE COURT:  Okay.  Thank you.  I'll take a careful  
22      look at it, and I'm going to take it under advisement.

23               MR. FALK:  Thank you.

24               MS. MARTO:  Thank you, Your Honor.

25

1 CERTIFICATE

2 STATE OF SOUTH CAROLINA

3 COUNTY OF HORRY

4 I, Julie A. Kevish, Official Court Reporter for the  
5 State of South Carolina, do hereby certify that the foregoing  
6 is a true, accurate and complete Transcript of Record of the  
7 proceedings had and evidence introduced in the Court of Common  
8 Pleas for Horry County, South Carolina, on the 6th of  
9 September, 2022.

10 I do further certify that I am neither of kin,  
11 counsel, nor interest to any party hereto.

12 September 6, 2022

13

14

  
\_\_\_\_\_

15

JULIE A. KEVISH  
OFFICIAL COURT REPORTER

16

17

18

19

20

21

22

23

24

25

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

**RECEIVED**

**Jul 03 2023**

APPEAL FROM HORRY COUNTY  
Court of Common Pleas

S.C. SUPREME COURT

Kristi F. Curtis, Circuit Court Judge

Case No. 2019-CP-26-01664

William Howard Funderburke, Jr.,

Appellant,

v.

State of South Carolina,

Respondent.

NOTICE OF APPEAL

William Howard Funderburke, Jr., appeals the Order of Dismissal of the Honorable Kristi F. Curtis signed on March 21, 2023, and filed on May 30, 2023, dismissing his post-conviction relief application. Original Counsel for Appellant was James K. Falk, who recently passed away. Undersigned Counsel was assigned on July 3, 2023, solely for the purpose of filing this Notice of Appeal on Appellant's behalf in light of the extraordinary circumstances of prior counsel's death.

July 3, 2023.

Appellate Defender  
Post Office Box 11589  
Columbia, South Carolina 29211  
(803) 734-1330

Other Counsel of Record:

William M. Blich, Jr.  
South Carolina Attorney General's Office  
Post Office Box 11549  
Columbia, South Carolina 29211  
(803) 734-3727  
Attorney for Respondent

STATE OF SOUTH CAROLINA )  
 COUNTY OF HORRY )  
 )  
 William Howard Funderburke, Jr., )  
 Applicant, )  
 )  
 v. )  
 )  
 State of South Carolina, )  
 Respondent. )

---

IN THE COURT OF COMMON PLEAS  
 FOR THE FIFTEENTH JUDICIAL CIRCUIT

Case No.: 2019-CP-26-01664

**ORDER OF DISMISSAL**

FILED  
 HORRY COUNTY  
 2023 MAY 30 P 3:33  
 RENE H. ELYS  
 CLERK OF COURT  
 HORRY COUNTY, SC

This matter comes before this Court by way of Applicant’s post-conviction relief application filed March 18, 2019. Respondent made its return on June 25, 2019, and amended on July 14, 2022, requesting an evidentiary hearing be convened. An evidentiary hearing was held on September 6, 2022, at the Horry County Courthouse. James K. Falk, Esquire, represented Applicant. Assistant Attorney General Chelsey F. Marto represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Counsel James D. Stanko, Esquire, also testified. After reviewing all records and evidence before this Court, this Court finds Applicant cannot meet his requisite burden of proof of establishing he is entitled to post-conviction relief and denies and dismisses this application with prejudice.

**Procedural History**

During its June 2018 term, the Horry County Grand Jury indicted Applicant for criminal solicitation of a minor (2018-GS-26-03814). Applicant was represented by James D. Stanko, Esquire. Assistant Solicitor C. Leigh Andrew, Esquire, of the Fifteenth Circuit Solicitor’s Office prosecuted the case. On June 11, 2018, Applicant appeared before the Honorable Benjamin H. Culbertson, circuit court judge, and entered an *Alford* plea as indicted without any negotiations or recommendations. Judge Culbertson sentenced Applicant to eight years, provided that upon the service of two years, the balance would be suspended with probation for five years.

Applicant did not pursue a direct appeal.

**Summary of Relevant Facts**

Applicant was married to the victim's mother. Between the dates of August 8, 1999, and August 7, 2002, Applicant began sexually abusing the victim. (Tr. 10). The victim was between thirteen and sixteen years old. (Tr. 10). Applicant performed oral sex on the victim and digitally penetrated her vagina. (Tr. 10). Applicant made a post-Miranda statement where he admitted to offering to perform oral sex on the victim when she was fifteen years old. (Tr. 10).

**Current Action Before this Court**

In his current PCR application, Applicant alleges he is being held in custody unlawfully because of ineffective assistance of counsel in that:

1. "The plea agreement was accepted by Applicant 'without negotiations or recommendations.' The solicitor breached this agreement by recommending jail time to judge."
  - a. "The facts will be supported by the trial transcript."

At the PCR hearing, Applicant proceeded forward on the following allegations:

1. Ineffective Assistance of Counsel.
  - a. Failure to discuss a plausible trial defense with Applicant.
  - b. Failure to pursue a polygraph test.
  - c. Brevity of time in consultation.
  - d. Failure to challenge video evidence.
  - e. Failure to contact witnesses.
2. Invalid Plea.
  - a. Applicant was afraid of receiving a harsher sentence if he proceeded to trial.
  - b. Applicant did not know he would have to register as a sex offender.

All other allegations raised in his initial application and amendments are deemed waived and abandoned and, accordingly, will not be addressed in this order.

## Summary of the Testimony

### *Applicant Testimony*

Applicant testified that his accuser was thirty-two years old when the offense was reported. He stated that he was appointed Counsel. He stated he wanted to proceed with a trial because the victim manufactured the story involving sexual conduct that occurred when she was a minor. He stated that he spent four days in jail and had eight meetings with Counsel. Applicant testified that he did not think Counsel wanted to proceed forward to trial but was willing to do whatever Applicant wanted him to do. Applicant stated Counsel advised him that if the case proceeded to trial, they would have to show the jury that the victim was lying. He stated they did not discuss getting a polygraph test done to exculpate him. Applicant testified that Counsel did not believe in polygraph tests. He stated that they did not discuss how they planned to prove the victim was lying and did not talk about trial until four days before the trial date.

Applicant stated that he decided to plead at his seventh meeting with Counsel, when Counsel informed him that the prosecutor was considering adding an additional criminal solicitation of a minor charge. Counsel played clips from his interrogation with arresting officers. Applicant stated that the statements were taken out of context. He stated that the comments made in the video were regarding actions he partook in at age seventeen but stated that he thought the jury would think it would be offered regarding actions he undertook with this victim. He stated he offered apologies to the victims because Counsel told him to. He stated that he did not intend for the apology to be an admission of guilty. He stated it happened when he was seventeen years old and that he did not have a defense to the crime. He stated that Counsel told him that pleading was in his best interest. He stated that he pled under *Alford* and understood that an *Alford* plea meant that he was not admitting guilt. He stated that he did not have a prior criminal record. He

stated that Counsel did not discuss with him the collateral consequences of the conviction or that he would have to register as a sex offender until the plea court informed him.

Applicant stated that he understood the relief available and consequences of proceeding forward in his PCR action. He stated he pled because Counsel told him he stood a stronger chance of getting probation if he pled. He stated that Counsel told him he had an over fifty-percent chance of receiving probation if he pled, but that he had a less than ten percent chance of winning a jury trial.

Applicant stated that he wanted Counsel to develop a defense strategy for trial. He stated he gave Counsel the names of three people to contact, and that those witnesses would have testified that the victim was not a truthful person. He stated he felt forced into pleading and coached into what to say at the plea. He stated he did not want to proceed forward to trial without a defense.

On cross-examination, Applicant stated that he pled because he thought he would lose at trial because Counsel did not adequately prepare. He stated he thought he would receive a much harsher sentence at trial if he did not plead. He stated he was afraid he would spend the rest of his life in prison. He stated he waived his rights at the plea and that he discussed his rights and charges with Counsel. He stated that he pled under *Alford*. He testified that he thought that the plea was the best solution, given the circumstances.

#### *Counsel Testimony*

Counsel testified that he had never tried a sexual assault case at the time he took on Applicant's case. He stated that he met with Applicant multiple times, where he played the videos provided by the police. He stated that the defense strategy was to attack the victim's truthfulness. He stated he did not recall Applicant ever giving him the names of people he could

call as witnesses, so the strategy boiled down to thorough cross-examinations of the State witnesses. He stated he did not recruit a private investigator, and he did not have any information or evidence that would be admissible under the rape shield statutes. He stated that there was no forensic evidence, but the case was the victim's word against Applicant's. He stated that a polygraph was brought up once during his conversations with Applicant but was never seriously considered. Counsel testified that Applicant wanted to testify if the case proceeded to trial. He stated that Applicant never admitted guilt. He stated that he talked to the prosecutor about a week before trial, where the prosecutor stated that Applicant could be re-indicted on a greater charge, based upon the post-Miranda interview. He stated that the most important part of the video was the fifty-one-minute mark where he said, "if it is illegal to offer oral sex to a sixteen-year-old, then I am guilty." He stated that based upon that statement, it was in Applicant's best interest to consider the plea offer. He stated he did not believe the jury would accept Applicant's explanation that his statement referred to behavior he engaged in prior to age eighteen. He stated he walked through the questions Applicant would be asked at the plea colloquy beforehand. He stated that Applicant wanted to know about an appeal. He stated that he thought Applicant would receive a more favorable sentence if he accepted responsibility.

On cross-examination, Counsel testified that the case was originally going to trial. He stated he prepared a defense and discussed it with Applicant many times. He stated the defense consisted of focusing on the delayed reporting, attacking the victim's credibility, and Applicant taking the stand. He stated that the trial would have been a close call and would have hinged on whether the jury believed Applicant or the victim. He stated he thought Applicant pled because he was afraid of receiving a harsher sentence at trial. He stated that the plea offer was favorable. He stated that Applicant understood the rights he was waiving, and that he told Applicant he

would have to register as a sex offender. The plea court informed him of this requirement as well.

### Findings of Fact and Conclusions of Law

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. Before this Court are the Horry County Clerk of Court Records, the plea transcript, and the recording pertaining to this PCR action. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusion of law as required by South Carolina Code Annotated Section 17-27-80 (2003).

#### *Ineffective Assistance of Counsel*

In a PCR action, the applicant bears the burden of proving allegations contained in the application. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant asserts ineffective assistance of counsel as a ground for relief, the applicant must show "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. Ineffective assistance of counsel is governed by the Sixth Amendment, as explained by the United States Supreme Court in *Strickland v. Washington*.

Pursuant to the first prong of the *Strickland* analysis, the applicant must prove defense counsel's performance was deficient. *Id.* at 686; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). To show deficiency, the applicant must prove by a preponderance of the evidence that counsel's actions fell outside of the zone of "reasonableness under prevailing

professional norms.” *Strickland*, 466 U.S. at 688. See also Rule 71.1(e), SCRPC (“The applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence.”).

Reasonableness is determined by the “variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how to best represent a criminal defendant,” and the scope of the reasonableness inquiry is limited to facts counsel had available at the time of representation. *Id.* at 689. “Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.”

*Yarborough v. Gentry*, 540 U.S. 1, 5 (2003) (citing *Strickland*, 466 U.S. at 690). Judicial scrutiny of counsel’s performance remains highly deferential towards defense counsel with a strong presumption that counsel acted competently, because competent representation may be executed in virtually “countless” ways. *Strickland*, 466 U.S. at 688-89.

Second, counsel’s deficient performance must have prejudiced the applicant so 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. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694. The court makes this determination based upon the totality of the evidence. *Id.* at 695. Realistically, this matters “only in the rarest case” because “[t]he likelihood of a different result must be substantial, not just conceivable.” *Harrington v. Richter*, 562 U.S. 86, 111-12 (2011) (quoting *Strickland*, 466 U.S. at 697).

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. *Strickland*, 466 U.S. at 696. A court need not first determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies; if it is

easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. *Id.* at 696-97.

### *Invalid Plea*

In the context of a guilty plea, the applicant must show there is a reasonable probability that, but for ineffective assistance of counsel, he or she would not have pled guilty but, instead, would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). Applicant's right to contest the validity of a plea is usually, but not invariably, foreclosed because of the inherent solemnity and truthfulness included in the guilty plea process. *See Blackledge v. Allison*, 431 U.S. 63, 73-74 (1977) ("Solemn declarations in open court carry a strong presumption of verity. The subsequent presentation of conclusory allegations unsupported by specifics is subject to summary dismissal, as are contentions that in the face of the record are wholly incredible."). Absent valid reasons why the applicant is entitled to depart from previous judicial admissions made at the plea hearing, statements made during the original proceeding remain conclusive. *Dalton v. State*, 376 S.C. 130, 137-38, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing *Crawford v. United States*, 519 F.2d 347, 350 (4th Cir. 1975)).

For a plea to be valid, the applicant must have been aware of the nature and crucial elements of the offense, the maximum and minimum penalties, and the rights he is waiving by accepting the plea. *Boykin v. Alabama*, 395 U.S. 238 (1969); *Roddy v. State*, 339 S.C. 29, 528 S.E.2d 418 (2000). A plea is not knowing or voluntary if a defendant "lacks knowledge of material evidence in the prosecution's possession." *Gibson v. State*, 334 S.C. 515, 523, 514 S.E.2d 320, 324 (1999).

A defendant's knowing and voluntary waiver of statutory or constitutional rights must be established by a complete record, and "may be accomplished by colloquy between the court and

defendant, between the court and defendant's counsel, or both." *Roddy v. State*, 339 S.C. at 34, 528 S.E.2d at 421 (citing *State v. Ray*, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993)). "[T]he voluntariness of a guilty plea is not determined by an examination of the specific inquiry made by the sentencing judge alone, but is determined from both the record made at the time of the entry of the guilty plea and the record of the post-conviction hearing." *Dalton*, 376 S.C. at 138, 654 S.E.2d at 874 (quoting *Harres v. Leeke*, 282 S.C. 131, 133, 318 S.E.2d 360, 361 (1984)). Further, "guilty pleas, freely and voluntarily entered, act as a waiver of all non-jurisdictional defects and defenses, including claims of a violation of a constitutional right prior to the plea." *Whetsell v. State*, 276 S.C. 295, 297, 277 S.E.2d 891, 892 (1981).

Applicant's plea was entered freely, knowingly, intelligently, and voluntarily. Applicant stated he understood he was entering an *Alford* plea and stated he understood the charge, his rights, and the consequences of his conviction. (Tr. 4). He stated he understood he was waiving his rights to trial, to call and confront witnesses, to remain silent, and to present a defense. (Tr. 8). He stated he understood he was required to register as a sex offender for life. (Tr. 8-9). He stated he understood the sentencing maximum and fine. (Tr. 8). He stated he was pleading voluntarily and was not made any promises or threats to induce the plea. (Tr. 9). He stated he was not on medication or drugs impacting his understanding of the plea colloquy. (Tr. 5). Thus, the plea colloquy supports this Court's finding that the plea was entered freely, knowingly, intelligently, and voluntarily and cannot be withdrawn now. This conclusion is further substantiated by Counsel's credible testimony that Applicant pled because he was afraid of a harsher sentence at trial and that Applicant seemingly understood what he was doing by pleading. Accordingly, this Court finds the plea valid and denies Applicant's request that it be vacated.

### *Trial Tax*

Applicant contends that he was essentially coerced into pleading because he was afraid of a harsher sentence if he went to trial. Being informed that if he went to trial, he would face more time in prison does not rise to the level of coercion and is not enough to render the plead invalid. Accordingly, relief is denied on this ground.

### *Sex Offender Registry*

Applicant claims Counsel was ineffective for failure to tell him he would have to register as a sex offender. This is a collateral consequence of sentencing and any alleged failure to advise of this consequence does not constitute ineffective assistance of counsel. *See Williams v. State*, 378 S.C. 511, 662 S.E.2d 615(2008) (finding that sex offender registry is a collateral consequence that has no effect on the punishment range and is not intended to punish and, therefore, any alleged failure to advise on this ground is not ineffectiveness). Applicant cannot seek relief based upon this claim.

Additionally, Counsel credibly testified he advised Applicant he would have to register as a sex offender. Further, the Court informed Applicant he would have to register at the plea hearing. Accordingly, relief is denied on this ground.

### *Defense*

Applicant claims Counsel was ineffective for failure to discuss a plausible trial defense with him. Applicant has failed to show what this defense would have consisted of or why it would have caused him to proceed to trial instead. Additionally, the right to assert a defense was waived with the entry of an otherwise valid plea. Accordingly, relief is denied on this ground.

### *Polygraph Test*

Applicant claims Counsel was ineffective for failure to pursue a polygraph test. However,

Counsel credibly testified that that the discussion of a polygraph test was brought up one time and not discussed again. This was not a tenable line of defense, was waived by Applicant when he entered the plea, and no prejudice was established. Further, Applicant has failed to show that the test would have produced a favorable outcome or otherwise been exculpatory. Accordingly, relief is denied on this ground.

#### *Brevity of Time*

Applicant alleges that Counsel was ineffective for brevity of time spent in consultation. “[B]revity of time spent in consultation with a defendant alone is not indicative of inadequate trial preparation.” *Smith v. State*, 404 S.C. 493, 500, 745 S.E.2d 378, 382 (2012). Applicant must show evidence indicating “how additional preparation or communication would have resulted in a different outcome.” *Id. See Jackson v. State*, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998) (where application failed to show ineffective assistance of counsel based on lack of preparation by neglecting to show evidence of what counsel failed to discover or what defenses counsel could have pursued had he more fully prepared for the case); *Skeen v. State*, 325 S.C. 210, 214-15, 481 S.E.2d 129, 132 (1997) (where applicant failed to show ineffective assistance of counsel when he did not present evidence showing how additional preparation would have impacted the trial).

Applicant claims that Counsel did not speak with him about the case enough. Applicant has failed to show how this brevity of time spent in consultation impacted Counsel’s representation of Applicant. There is also no indication that the results of the proceedings or the decision to plead would have been different had Counsel conferred with him more. Applicant has failed to establish ineffective assistance of counsel and this Court declines to grant relief accordingly.

### ***Challenge Video Evidence***

Applicant claims Counsel was ineffective for failure to challenge the video evidence. This defense was waived by entry of an otherwise valid plea. Accordingly, relief is denied on this ground.

### ***Failure to Contact Witnesses***

Applicant claims Counsel was ineffective in failing to contact the three witnesses that Applicant informed Counsel of. Counsel credibly testified he did not recall ever being informed of any witnesses in the case. Counsel is not deficient for failing to call witnesses he was not informed of. Additionally, Applicant has not met his burden of proof in proving prejudice. *Glover v. State*, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995). (To show counsel was ineffective by failing to call a witness, the witness(es) must be produced at the PCR evidentiary hearing or their testimony must otherwise be presented, consistent with the rules of evidence). Further, Applicant has failed to show why calling these witnesses would have caused him to proceed to trial instead. Accordingly, relief is denied.

### **Conclusion**

Based on all the foregoing, this Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this PCR application must be denied and dismissed with prejudice.

This Court notifies the Applicant that he must file and serve a notice of appeal within thirty days of receipt by counsel of the judgment entry's written notice to secure 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 PCR. Rule 71.1(g), SCRCP provides that if the Applicant wishes to seek appellate

review, PCR 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. The PCR application be denied and dismissed with prejudice.

AND IT IS SO ORDERED this 21st day of March, 2023.

*Kristi Curtis*

\_\_\_\_\_  
KRISTI F. CURTIS  
Presiding Judge  
Fifteenth Judicial Circuit

Spartanburg, South Carolina.

**WITNESSES**

3 Kluader Horry County Police Department

DOCKET NO. 2018GS2603814

C

**The State of South Carolina**

**County of Horry**

**FILED**  
**HORRY COUNTY**  
**2018 JUN 11 PM 4:49**  
**RENEE N. ELVIS**  
**CLERK OF COURT**  
**HORRY COUNTY, SC**

C. Leigh Andrew

17HD1178

**COURT OF GENERAL SESSIONS**

**JUNE, 2018 TERM**

**COURT DATE**  
**PLED GUILTY/TRIAL**

**ARREST WARRANT NUMBER**

2018DI2600317

CDR: 2999 16-15-0342

DOA: 2/8/2017

**THE STATE**

**vs.**

**ACTION OF GRAND JURY**

**William Howard Funderburke Jr**  
**W/ M**

**DOB:**

**SSN:**

**ATTORNEY: James Stanko**

*Foreperson of Grand Jury*  
Date:

**VERDICT**

**Indictment for**

**CRIMINAL SOLICITATION OF A MINOR**

**Jimmy A. Richardson, II, Solicitor**

*Foreperson of Petit Jury*  
Date:

**ORIGINAL**

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF HORRY )

INDICTMENT

At a Court of General Sessions, convened on \_\_\_\_\_, the Grand Jurors of Horry County present upon their oath:


CRIMINAL SOLICITATION OF A MINOR

CDR: 2999 16-15-342(A)(E)

That William Howard Funderburke Jr, a person eighteen years of age or older, did in Horry County on or between the dates of August 8, 1999 and August 7, 2002, knowingly contact or communicate with or attempt to contact or communicate with [REDACTED], a person under the age of eighteen, or a person reasonably believed to be under the age of eighteen, for the purpose of or with the intent of persuading, inducing, enticing, or coercing the person to engage in a violent crime as defined in Section 16-1-60, in violation of Section 16-15-342, S. C. Code of Laws, 1976, as amended.

ORIGINAL

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

  
\_\_\_\_\_  
JIMMY A. RICHARDSON, II  
FIFTEENTH CIRCUIT SOLICITOR

STATE OF SOUTH CAROLINA )  
 COUNTY OF Horry )  
 STATE VS. )  
William Howard Funderburke Jr )  
 AKA: )  
 Race: WHITE Sex: M Age: 61 )  
 DOB: 08-24-1956 SS#: 037-08-063 )  
 Address: \_\_\_\_\_ )  
 City, State, Zip: \_\_\_\_\_ )  
 DL#: \_\_\_\_\_ SID#: \_\_\_\_\_ )  
 \*CDL Yes  No  CMV Yes  No  Hazmat Yes  No

INDICTMENT/CASE#: 2018GS2603814  
 A/W#: 2018DI2600317  
 Date of Offense: 8/8/1999  
 S.C. Code §: 16-15-0342  
 CDR Code #: 2999

SENTENCE SHEET

CONVICTED OF or  Alford PLEADS

in violation of § 16-15-0342 of the S.C. Code of Laws, bearing CDR Code # 2999  
 NON-VIOLENT  VIOLENT  SERIOUS  MOST SERIOUS  Mandatory GPS  §17-25-45  
 (CSC w/minor 1st or CSC w/minor 3rd)

The charge is:  As Indicted,  Lesser Included Offense,  Defendant Waives Presentment to Grand Jury. (defendant's initials)  
 The plea is:  Without Negotiations or Recommendation,  Negotiated Sentence,  Recommendation by the State.

ATTEST: C. Light 72898 [Signature] [Signature] 10-276  
 Solicitor SC Bar# Defendant Attorney for Defendant SC Bar#

WHEREFORE, the Defendant is committed to the  State Department of Corrections,  County Detention Center,  
 for a determinate term of 8 days/months/years or  under the Youthful Offender Act not to exceed X years  
 and/or to pay a fine of \$ X; provided that upon the service of 2 days/months/years and/or payment  
 of \$ 4x; plus costs and assessments as applicable\*; the balance is suspended with probation for 5

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

CONCURRENT or  CONSECUTIVE to sentence on:  
 The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the SCDOC.

The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-13  
 Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 (Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

RESTITUTION:  Deferred  Def. Waives Hearing  Ordered  
 Total: \$ \_\_\_\_\_ plus 20% fee: \$ \_\_\_\_\_  
 Payment Terms: \_\_\_\_\_  
 Set by SCDPPPS \_\_\_\_\_

PTUP \_\_\_\_\_ days/hours Public Service/ Employment  
 Obtain GED   
 Attend Voc. Rehab. or Job Corp.   
 May serve W/E beginning \_\_\_\_\_  
 Substance Abuse Counseling   
 Random Drug/Alcohol testing   
 Fine may be pd. in equal, consecutive weekly/monthly  
 pmts. of \$ 25.00 beginning 7-11-2020  
 \$ 40.00 paid to Public Defender Fund  
 Other: - no contact w/ victim  
- Sex offender registry

Recipient: \_\_\_\_\_

*Fine:		\$
§ 14-1-206 (Assessments 107.5 %)		\$
§ 14-1-211(A)(1) (Conv. Surcharge)	\$100	\$ 100.00
§ 14-1-211(A)(2) (DUI Surcharge)	\$100	\$
§ 56-5-2995 (DUI Assessment)	\$12	\$
§ 56-1-286 (DUI Breath Test)	\$25	\$
Proviso (Public Def/Probation)	\$500	\$ 500.00
§ 14-1-212 (Law Enforce. Funding)	\$25	\$ 25.00
§ 14-1-213 (Drug Court Surcharge)	\$150	\$
§ 50-21-114 (BUI Breath Test Fee)	\$50	\$
§ 56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$
3% to County (if paid in installments)		\$ 18.95

TOTAL: \$ 1635.00

Clerk of Court/ Deputy Clerk Renee Elvis 643.75  
 Court Reporter: Dixie Eubank 683.75  
 SCCA/217 (04/2018)

Appointed PD or appointed other counsel,  
 Proviso requires \$500 be paid to Clerk during probation and shall be collected before any other fees.  
 Presiding Judge Mariann T. Culberson  
 Judge Code: 2148  
 Sentence Date: June 11, 2018

FILED  
 Horry County  
 2018 JUN 11 PM 4:19  
 RENEE N. ELVIS  
 CLERK OF COURT  
 Horry County, SC