

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

S.C. SUPREME COURT

J. Derham Cole, Circuit Court Judge

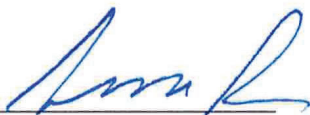
2019-CP-23-7167

Kevin Mark Willson, Appellant,
v.
The State, Respondent.

NOTICE OF APPEAL

Kevin Mark Willson appeals the Honorable J. Derham Cole's Order of Dismissal and Order Striking Affidavit from the Record received January 31, 2024.

This 6 day of February, 2024.



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STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

Kevin Mark Willson, #378378,)
)
Applicant,)
v.)
State of South Carolina,)
)
Respondent.)
_____)

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

Case No.: 2019-CP-23-7167

ORDER OF DISMISSAL

24 JAN 31 PM 2:57
CLERK OF COURT, 1300 OLE SC

This matter comes before the Court by way of an application for post-conviction relief filed by Applicant Kevin Mark Willson on December 11, 2019. An evidentiary hearing was held on July 24, 2023, in the Greenville County Courthouse. Applicant was present and represented by counsel, Susannah C. Ross, Esq. Senior Assistant Deputy Attorney General Melody J. Brown represented Respondent, the State.¹ At the close of the hearing, the undersigned took the matter under advisement. By a conditional Form 4 order issued on July 28, 2023, and filed August 8, 2023, this Court indicated it would deny relief and directed Respondent’s counsel to prepare and submit a proposed order.² After consideration of the testimony received, and after reviewing and considering the record, arguments presented by counsel, and the controlling case law, this Court finds that Applicant has failed to carry his burden of proof. Consequently, this Court DENIES relief for the specific reasons set out in this order.

¹ The State advised that it had a motion to strike and requested to be heard on the motion prior to the beginning of the evidentiary hearing. This Court granted the State’s motion to strike from the record a non-party filing submitted directly to the Clerk of Court. That matter is addressed by separate Order.

² The proposed order was circulated among counsel prior to this Court’s acceptance. *See Fishburne v. State*, 427 S.C. 505, 516, 832 S.E.2d 584, 589 (2019) (providing a “proposed order should be transmitted to opposing counsel” for review and that counsel “should ... alert preparing counsel and the PCR court as to any deficiencies in the proposed order.”).

General Procedural History

Applicant is no longer incarcerated, but filed while still serving an active sentence. The records before this Court show that Applicant was indicted in August 2017 for five counts of sexual exploitation of a minor, third degree, and two counts of sexual exploitation of a minor, second degree. (Return Attachment, Tr. 8-11). James W. Bannister, Esq., and Marcelo Torricos, III, Esq., represented Applicant on the charges. The charges were prosecuted by attorneys with the Internet Crimes Against Children (ICAC) Section of the South Carolina Attorney General's Office.

A jury was impaneled on December 3, 2018, and the trial on all seven charges began and continued into December 4, 2018. The Honorable Edward W. Miller presided. On the second day of trial, after both the State and Defense rested, but prior to charging the jury, Judge Miller was informed that there was an "offer on the table for a nine-year sentence to a nonviolent offense," and ordered a break in the proceedings for Applicant to consult with counsel. (Return Attachment, Tr. 242-243). Applicant opted to change his plea and accepted a negotiated agreement with the State to plead guilty to two counts of sexual exploitation of a minor, third degree, (2017-GS-23-7094 and 7095). The State placed on the record the following specifics of their negotiations:

... Mr. Willson is pleading guilty to two counts of sexual exploitation of minor in the third degree. These are mandatory sex offender registry offenses. Those indictment numbers are 2017-GS-23-07094-07095.

Pursuant to the plea agreement, we're going to dismiss two counts of sexual exploitation of a minor in the second degree and three counts of sexual exploitation of a minor in the third degree. Those indictment numbers are 2017-GS-23-07089-07093.

... we've agreed to a negotiated sentence of 20 years suspended to eight years incarceration and five years probation with conditions of probation to include no unsupervised contact with minors and no Internet access. Also, the defendant is going to waive any rights to appeal that he might have.

(Return Attachment, Tr. 245-246).

Judge Miller asked Applicant if the State's presentation constituted a "full and complete understanding of the negotiations" from his view, and Applicant responded, "It is, Your Honor."

(Return Attachment, Tr. 246).

Judge Miller also advised Applicant, for clarity, that "there is no offense here which I can give ... 20 years [on], so in order to effect that agreement, I will give you eight years on one [count] and ten years consecutive on the other suspended with probation," and asked if Applicant understood. (Return Attachment, Tr. 246). Applicant responded, "Yes, Your Honor." (Return Attachment, Tr. 246). In other words, one of the sentences would have to be ten years suspended to eight years, and ten on the other. Applicant, and his counsel, agreed. (Return Attachment, Tr. 247). As negotiated, Judge Miller sentenced Applicant to ten years, on service of eight, the balance suspended in favor of five years on probation, (2017-GS-23-0795), and ten years, consecutive, suspended during probation, (2017-GS-23-07094). (Return Attachment, Tr. 247-248 and sentencing sheets). Applicant did not appeal, as he agreed.

Post Conviction Relief Allegations and Relevant History

In his initial application, Applicant raised several claims as follows:

- 1) "the plea my attorney told me about was 8 years";
- 2) "there was NO mentioned from anyone regarding a suspended sentence or probation";
- 3) "The sentencing sheet displays a plea I DID NOT agree to";
- 4) "There was No evidence any file sharing software was ever present on my electronics as alleged";
- 5) "The sex offender registry for life that is being imposed is a putative restraint..."; and
- 6) "The terms of the probation are also unconstitutionally as they

forbid internet access ...”

(Application at 2-3).

The State initially moved to dismiss the application as untimely filed. By Order dated April 8, 2022, the Honorable Eugene C. Griffith resolved that Applicant was entitled to equitable tolling pursuant to *Mose v. State*, 420 S.C. 500, 803 S.E.2d 718 (2017), and ordered a full hearing on the claims be allowed. (Order, dated April 8, 2022, filed April 13, 2022).

By amendment dated and filed July 10, 2023, PCR counsel clarified the allegations as follows:

This matter comes before the Court by way of application of post conviction relief filed December 11, 2019, alleging his conviction and sentence were in violation of the Constitution of the United States and the Constitution of the laws of South Carolina due the failure to adhere to his plea negotiation, ineffective assistance of trial counsel, and imposition of conditions including the sex offender caseload and no internet access or use that are punitive and overbroad infringing on his right to free speech. See Packingham v. North Carolina, 137 S.Ct. 1 730, 198 L.Ed.2d 273 (2017) & United States v. Holena, 906 F.3d 288 (3rd Cir. 2018). Additionally, the record of his guilty plea shows that the Applicant was not made aware of the nature and crucial elements of the charge against him to his right to appeal violating due process guarantees of the State and U.S. Constitutions in that the plea was not knowingly, voluntarily, and intelligently made. See Pittman v. State, 337 S.C. 597, 524 S.E.2d 623 (SC 1999).

GENERAL STATEMENT OF FACTS OF THE CRIMES

As noted, Applicant ultimately pled guilty to two of the seven charges subject to trial; however, the trial transcript sets out the evidence offered in support of Applicant's guilt. This summary is taken from the testimony at trial. Judge Miller, at the plea, advised that he would consider the facts as presented during the trial proceedings for purposes of the guilty plea. (Return Attachment, Tr. 245).

Investigator Kevin Atkins with the South Carolina Attorney General's Office, Internet Crimes Against Children Section, testified that during a file-sharing investigation in June of 2015, he identified hash values which identified values in a data base known to be child pornography. (Return Attachment, Tr. 91-94 and 97). Investigator Atkins used a software program designed for law enforcement to connect to a single computer that connects to a downloaded video and further shows a view of that the video to confirm that it violates the statute. (Return Attachment, Tr. 94-95). After identifying the video as illegal and containing child pornography, Investigator Atkins identified the IP address and submitted a court order to the service provider to obtain subscriber information including a name and physical address. (Return Attachment, Tr. 94-97). During this investigation, Investigator Atkins generated downloads for five files that were labeled consistent with child pornography and received information from Charter that the IP address was associated with the account of Kevin Willson at his Watkins Circle address in Taylors, SC. (Return Attachment, Tr. 97-106). After corroborating that Willson lived at the residence, Investigator Atkins obtained and served a search warrant on August 18, 2015. (Return Attachment, Tr. 106).

Forensic Investigators Hal Harris and Chris Bomar assisted with the execution of the search warrant. (Return Attachment, Tr. 149, 151 and 157-159). They informed Investigator Atkins that there were "hundreds, if not thousands" of files containing child pornography on Willson's electronic devices. (Return Attachment, Tr. 107 and 151). Investigator Grubbs was then assigned to conduct the full forensic exam on the items seized from Willson's residence which consisted of two MacBook laptops, an external hard drive, and a DVD. (Return Attachment, Tr. 158 and 184). Investigator Grubbs confirmed Investigator Bromar's findings of video and picture files containing children engaged in sexual activity, but also confirmed information found that tied the devices to Willson including the username "Kevin Willson," work-related emails sent to and from Willson,

and a Skype account. (Return Attachment, Tr. 191-198). Investigator Grubbs also reported that the most recent creation date (the day the file was downloaded) was just *one* day before the search warrant was served. (Return Attachment, Tr. 197).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In addition to carefully considering the record and the arguments presented by counsel, this Court has also had the opportunity to consider the testimony presented at the PCR evidentiary hearings and has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. §17-27-80 (2003).

Allegation of Failure to Adhere to Plea Negotiations

Applicant contends his plea was for eight years; that he was not informed of a suspended sentence or probation; and that the sentencing sheet reflected terms he did not agree to during his plea. Applicant's allegations lack merit. The record fully and fairly sets out the terms of the plea; and, for that matter, Applicant's response confirming that he understood the terms. (See Return Attachment, Tr. 246-247). Further, the record shows that Judge Miller accepted and adhered to the negotiated terms in sentencing. (Return Attachment, Tr. 247-249). *See generally State v. Thrift*, 312 S.C. 282, 292, 440 S.E.2d 341, 347 (1994) ("The United States Supreme Court in *Santobello v. New York*, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971), held that where a guilty plea rests on a promise or agreement which can be said to be a part of the inducement or consideration, then the agreement must be fulfilled."). Moreover, the sentencing sheet reflects the terms as set out on the record during the plea. (Return Attachment, Sentencing Sheets for 2017-GS-23-0794 and 07095). There is no factual basis to support a failure to adhere to the negotiations.

Allegation of Ineffective Assistance of Counsel

Applicant contends that the evidence would not support the charges, specifically that

“[t]here was No evidence any file sharing software was ever present on my electronics as alleged” by the State. (Application at 2). As alleged, the claim is not cognizable.

Applicant began a trial to contest his guilt, but opted to plead guilty before the case went to the jury. “Few principles of South Carolina criminal law are as ingrained as the notion that a knowing, voluntary, and intelligent guilty plea ‘constitutes a waiver of nonjurisdictional defects and claims of violations of constitutional rights.’” *State v. Sims*, 423 S.C. 397, 400, 814 S.E.2d 632, 633 (2018) (quoting *State v. Rice*, 401 S.C. 330, 331-32, 737 S.E.2d 485, 485 (2013)). “[A] guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. He may only attack the voluntary and intelligent character of the plea” *Rice*, at 332, 737 S.E.2d at 486 (brackets in original) (quoting *Tollett v. Henderson*, 411 U.S. 258 (1973)). This claim is waived by entry of the plea. Further it is not cognizable in post-conviction relief. S.C. Code Ann. § 17-27-20 (A)(6) (“this section shall not be construed to permit collateral attack on the ground that the evidence was insufficient to support a conviction”).

However, at the PCR hearing, Applicant offered testimony indicating that he was also alleging ineffective assistance related to investigation and presentation of a defense. To the extent he intended to raise the instant ground as a claim of ineffective assistance, that claim would be cognizable, but it is without merit. *See Hill v. Lockhart*, 474 U.S. 52, 56 (1985) (“Where, as here, a defendant is represented by counsel during the plea process and enters [the] plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel’s advice ‘was within the range of competence demanded of attorneys in criminal cases.’”) (quoting *McMann v. Richardson*,

397 U.S. 759, 771 (1970)); *Al-Shabazz v. State*, 338 S.C. 354, 363, 527 S.E.2d 742, 747 (2000) (“In PCR, the focus usually is upon alleged errors made by trial or plea counsel. Therefore, when asserting the erroneous admission of evidence, a violation of a constitutional right, or other errors in a proceeding, the applicant generally must frame the issue as one of ineffective assistance of counsel.”).

Ineffective Assistance Claims Following A Guilty Plea

This Court is guided by the familiar test: To show a violation of the Sixth Amendment, an applicant must show that counsel’s representation fell below an objective standard of reasonableness, and but for counsel’s error, there is a reasonable probability that the outcome of the trial would have been different. *Strickland v. Washington*, 466 U.S. 668, 694 (1984); *Simpson v. Moore*, 367 S.C. 587, 595–96, 627 S.E.2d 701, 706 (2006). “A reasonable probability is a probability sufficient to undermine confidence in the outcome” of the trial. *Strickland*, at 694. The evaluation of an ineffective assistance of counsel claim after a guilty plea varies slightly.

“A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of the plea by showing that counsel’s representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel’s errors, the defendant would not have pled guilty, but would have insisted on going to trial.” *Kolle v. State*, 386 S.C. 578, 588, 690 S.E.2d 73, 78 (2010) (quoting *Rolen v. State*, 384 S.C. 409, 413, 683 S.E.2d 471, 474 (2009)); *Burket v. Angelone*, 208 F.3d 172, 189 (4th Cir. 2000) (same). This is the *Strickland* test as applied in the guilty plea context.

Ineffective Assistance Claim: Investigation and Necessity of an Expert

Applicant’s testimony at the hearing indicated his belief that counsel should have retained an expert for trial. Applicant offered a document purporting to be an affidavit from “Bonnie

Burkhardt,” but did not call the purported expert for qualification *voir dire*, and cross-examination. He testified that he thought the search and/or investigative techniques could be challenged. Applicant also testified that though he had turned down a pre-trial plea offer, he had asked his counsel to negotiate a reduced sentence for the plea during the trial; however, he testified that he took the plea under pressure from the trial judge. Applicant also testified that his bond had been revoked the first day of trial, and that he was already in custody at that time. He testified that he did not understand the terms of the agreement, did not understand the twenty-year sentence, did not understand the infringement on his rights that the “no-internet access” imposed, and thought he would receive an eight-year sentence. On cross-examination, Applicant admitted that he had been present throughout the trial and heard the testimony and also recalled that his attorney had made two motions to suppress evidence (related to his IP address and the copied images/files). Further, Applicant admitted that he had been an independent real estate agent for years and understood the contract concept. Applicant also admitted that he was then currently on probation and had a probation violation hearing on April 6, 2023. Part of the violation was having used a “Kev1970” address for internet access through an Apple app. He admitted being continued on “sex offender conditions” as part of his parole.

In contrast to Applicant’s testimony, counsel testified Applicant made the decision to plead himself. Counsel testified he had discussed the charges and elements with Applicant. Counsel testified at the PCR hearing that he had investigated possible defenses, though they were limited, and was prepared for trial. Counsel testified that the defense focused in large part on challenging the investigative techniques. Notably, the Court has the benefit of the entire trial transcript prior to the any jury instruction. The record supports that counsel thoroughly cross-examined the State’s expert witnesses, and specifically examined and challenged the State’s forensic team about the

investigation and file sharing. (See Return Attachment, Tr. 93, 98, 110-143, 174-180 and 198-226).

“Counsel has a duty to undertake reasonable investigations or to make a decision that renders a particular investigation unnecessary.” *Taylor v. State*, 404 S.C. 350, 363, 745 S.E.2d 97, 104 (2013) (citing *Strickland*, at 691). However, as our Supreme Court has resolved before, an applicant’s “belief that counsel was unprepared for trial ... is not evidence that counsel was, in fact, not prepared.” *Satterwhite v. State*, 325 S.C. 254, 259, 481 S.E.2d 709, 712 (1997). Additionally, “[i]n the context of a guilty plea,” it remains that “the deficiency prong inquiry turns on whether the plea was voluntarily, knowingly, and intelligently entered.” *Taylor v. State*, 404 S.C. 350, 360, 745 S.E.2d 97, 102 (2013). It is an applicant’s burden to prove, by a preponderance of the evidence, an entitlement to relief. Rule 71.1 (e), SCRPC. See also *Speaks v. State*, 377 S.C. 396, 399, 660 S.E.2d 512, 514 (2008) (“the burden of proof is on the applicant to prove the allegations in his application”). Applicant has failed in his burden of proof.

First, this Court finds that counsel was prepared to cross-examine the forensic experts regarding the evidence obtained from Applicant’s electronic devices. The record supports a robust cross-examination that challenged the investigation. (See Return Attachment, Tr. 93, 98, 110-143, 174-180 and 198-226).

Second, counsel is not required to hire an expert to avoid a finding of deficient performance. As the Supreme Court has noted, “*Strickland* does not enact Newton’s third law for the presentation of evidence, requiring for every prosecution expert an equal and opposite expert from the defense.” *Harrington v. Richter*, 562 U.S. 86, 111 (2011). Further, Applicant failed to present any basis for finding the cross-examination conducted was infirm in any way. Showing the possibility of a “fancier” case does not show deficient performance. See generally *Jones v.*

State, 332 S.C. 329, 339, 504 S.E.2d 822, 827 (1998) (where there was no detectable change in the evidence, the possibility of a “fancier” presentation does not allow for a “second chance” in new proceedings). *See also Strickland*, at 689 (“There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.”).

Third, Applicant has not shown an expert would have made any difference in his decision to plead guilty. To the extent he would contend that having an expert would have changed his decision not to accept the negotiated plea, he failed to produce any acceptable evidence to show such an expert was available, could be qualified, and would testify favorably. Our Supreme Court has “repeatedly held a PCR applicant *must produce the testimony* of a favorable witness *or otherwise offer the testimony in accordance with the rules of evidence* at the PCR hearing in order to establish prejudice from the witness’ failure to testify at trial.” *Bannister v. State*, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) (emphasis in original).

The Court rejected the document Applicant referenced as an “affidavit” from Bonnie Burkhardt. The document was not notarized and did not appear sufficient on its face to qualify as an actual affidavit. “An affidavit is a voluntary *ex parte* statement reduced to writing and sworn to or affirmed before some person legally authorized to administer an oath or affirmation.” *State v. McKnight*, 291 S.C. 110, 113, 352 S.E.2d 471, 472 (1987) (citing 3 Am.Jur.2d, *Affidavits*, Section 1). The document offered simply shows a signature on July 16, 2023. Even so, our Supreme Court has vested the decision whether to admit affidavits or other evidence to the sound discretion of the PCR judge. *Simpson v. Moore*, 367 S.C. 587, 607, 627 S.E.2d 701, 712 (2006) (citing *Beckett v. State*, 278 S.C. 223, 224, 294 S.E.2d 46, 47 (1982)). *See also* S.C. Code Ann. § S.C. Code Ann. § 17-27-80 (“The court *may* receive proof by affidavits, depositions, oral

testimony or other evidence and may order the applicant brought before it for hearing.”) (emphasis added). *Simpson* is instructive.

In *Simpson*, while apparently finding no abuse of discretion (or perhaps no reversible abuse of discretion) in allowing multiple affidavits in *Simpson*, our Supreme Court further resolved, in part, that there was “no prejudice to the State” given that “most of the relevant witnesses testified at the PCR hearing and were cross-examined by the State.” *Id.*, at 608, 627 S.E.2d at 712. That was not possible here. The State could not cross-examine a witness that Applicant failed to call. The statement also had additional infirmities.

The statement veered into a general disagreement with law enforcement (or the law itself) regarding computer searches, and contained legal opinions and conclusions that are wholly inappropriate. Rule 702, SCRE, limits an expert’s opinion to that which will assist the fact-finder. Nothing in the opinion expounded on fact but was apparently crafted to support a legal argument to undermine the criminal statute and investigatory techniques. This is improper. *See Green v. State*, 351 S.C. 184, 198, 569 S.E.2d 318, 325 (2002) (finding offered opinion not admissible under rule 702 when the testimony centered on legal argument).

Therefore, under the guidance of *Simpson*, this Court exercised its discretion to reject the submission. Thus, Applicant failed to show by acceptable offer of proof *any* evidence from a purported expert that would show a deficiency in counsel’s preparation, or, for that matter, the way in which he presented the defense. Moreover, Applicant failed to show prejudice.

The “prejudice prong ordinarily requires more than simply a defendant’s assertion that but for counsel’s deficient performance he would not have pled but would have gone to trial.” *Stalk v. State*, 383 S.C. 559, 563, 681 S.E.2d 592, 595 (2009). Notably, the Supreme Court has instructed: “Courts should not upset a plea solely because of *post hoc* assertions from a defendant

about how he would have pleaded but for his attorney's deficiencies. Judges should instead look to contemporaneous evidence to substantiate a defendant's expressed preferences." *Lee v. United States*, 582 U.S. 357, 369 (2017). Our Supreme Court has similarly found that "*Hill* makes clear that th[e] prejudice prong ordinarily requires more than simply a defendant's assertion that but for counsel's deficient performance he would not have pled but would have gone to trial." *Stalk*, at 563, 681 S.E.2d at 595; *see also Taylor v. State*, 404 S.C. 350, 362, 745 S.E.2d 97, 103 (2013) ("Despite Petitioner's assertions to the contrary, there is probative evidence in the Record before us that he would not have chosen to proceed to trial"); *Goins v. State*, 397 S.C. 568, 575, 726 S.E.2d 1, 4 (2012) ("Although Goins testified at the PCR hearing that he accepted the plea because of the erroneous advice on the suppression of the evidence, his testimony specifically was found not to be credible. We therefore find evidence to support the PCR court's finding that Goins failed to prove he was prejudiced by counsel's ineffective assistance because he has not demonstrated he would have gone to trial absent the erroneous advice."). This Court finds that Applicant's claim he would not have accepted the plea but for counsel's failure to retain an expert is not credible. Applicant's trial was nearly completed, and the State's evidence thoroughly challenged; Applicant, though, chose to waive his opportunity to have the jury consider the case as presented. There was nothing presented that demonstrates to this Court that critical evidence was omitted that affected Applicant's decision to plead guilty rather than to complete his trial. Applicant has failed in his burden of proof.

Further, despite Applicant's testimony challenging his plea, the record here supports that the plea was a voluntary choice among alternatives and that choice was guided by counsel.

"[T]he voluntariness of a guilty plea is not determined by an examination of a 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 also from the record of the PCR hearing.” *Roddy v. State*, 339 S.C. 29, 33, 528 S.E.2d 418, 420 (2000). “All that is required to knowingly and voluntarily enter a plea of guilty is that a defendant have a full understanding of the consequences of his plea and of the charges against him.” *Gustine v. State*, 325 S.C. 123, 128, 480 S.E.2d 444, 446 (1997).

This Court finds Applicant’s testimony that he did not understand the terms of the agreement is not credible. The recommendation was plainly placed on the record, specifically discussed as to the way the sentence would have to be shaped to adhere to the agreement, and there was no objection or challenge to the terms of the agreement at the time of the plea. Further, Applicant has shown no deficiency in counsel’s investigation or advice, and certainly none that would support a finding that but for the advice, Applicant would not have pled guilty. This Court credits counsel’s testimony that he had explained the charges and counseled Applicant on the defense(s). *See Dalton v. State*, 376 S.C. 130, 138, 654 S.E.2d 870, 874 (Ct. App. 2007) (“A defendant’s knowing and voluntary waiver of the constitutional rights which accompany a guilty plea may be accomplished by colloquy between the Court and the defendant, between the Court and defendant’s counsel, or both.”) (quoting *Pittman v. State*, 337 S.C. 597, 600, 524 S.E.2d 623, 625 (1999)). Simply, Applicant “received the benefit of the agreement for which he bargained and cannot now complain.” *Rollison v. State*, 346 S.C. 506, 511–12, 552 S.E.2d 290, 293 (2001). The Court rejects Applicant’s testimony that he did not understand the benefits for which he bargained.

Finally, this Court finds Applicant fails to show he was “pushed” into pleading guilty by the trial judge. This Court finds Applicant’s testimony regarding general “pressure” to make his decision to plead guilty is credible, but not sufficient to show a cognizable error at the plea proceedings. Applicant was at a critical point in the proceedings – the jury was going to receive the judge’s instructions then go into deliberations on seven charges. He had heard the evidence

presented, and he could weigh his options accordingly. But that is not the type of pressure that supports an involuntary plea. *See, e.g., Brady v. United States*, 397 U.S. 742, 751 (1970) (“We decline to hold, however, that a guilty plea is compelled and invalid under the Fifth Amendment whenever motivated by the defendant’s desire to accept the certainty or probability of a lesser penalty rather than face a wider range of possibilities extending from acquittal to conviction and a higher penalty authorized by law for the crime charged.”). Even accepting a plea to avoid the death penalty is not alone sufficient to render the plea “defective” constitutionally. *Wicker v. State*, 310 S.C. 8, 12, 425 S.E.2d 25, 27 (1992) (citing *North Carolina v. Alford*, 400 U.S. 25 (1970)); *see also Satterwhite v. State*, 325 S.C. 254, 259, 481 S.E.2d 709, 712 (1997) (“fact that respondent may have entered a guilty plea in order to obtain his release from lock-up does not render the plea involuntary”).

In sum, Applicant has failed to show ineffective assistance, and his plea stands as a valid knowing and intelligent plea. He has failed in his burden of proof.

Objection to Conditions: Sex Offender Caseload and Prohibition on Internet Access

It has long been established that “a plea bargain rests on contractual principles, and that each party should receive the benefit of the bargain.” *State v. Thrift*, 312 S.C. 282, 292, 440 S.E.2d 341, 347 (1994) (citing with favor Fourth Circuit precedent). It is uncontested that the “no access to the internet” provision was included in the negotiations. Applicant testified, however, that he later found out the restriction infringed upon his rights under the First Amendment, and was, therefore, an unconstitutional provision that should not be enforced. Further, the testimony at the PCR hearing established there were two lines of authority that led to Applicant’s restriction from the internet – from the plea agreement, and as a condition for probation. Consequently, Applicant has not shown that but for the terms of the sentencing order, that he would not have the restriction.

The evidence before the Court indicates that probation has independent requirements that would be enforced separate and apart from the sentencing provision. Even so, there is authority that allows such restriction. Consequently, Applicant has not shown that the provision is unenforceable.

Applicant's reliance on *Packingham v. North Carolina*, 582 U.S. 98 (2017), is misplaced. In *Packingham*, the Supreme Court considered the constitutionality of a state statute that broadly prohibited access and applied after completion of a sex offender sentence.³ *Packingham* did not address restrictions as part of sentencing, particularly for sentencing resulting from crimes where the internet was used. See *United States v. Carson*, 924 F.3d 467, 473 (8th Cir. 2019) (collecting cases supporting that "*Packingham* invalidated only a *post*-custodial restriction and expressed concern that the statute applied even" post-sentencing, concluding "*Packingham* does not render a district court's restriction on access to the internet during a term of supervised release plain error"); see also *United States v. Bobal*, 981 F.3d 971, 977 (11th Cir. 2020) (distinguishing *Packingham* as not only post-sentence but also because it "applied to all registered sex offenders, not only those who had used a computer or some other means of electronic communication to commit their offenses"). The Fourth Circuit has also considered a similar "ban on internet and computer use" while on *lifetime supervision* in *United States v. Arce*, 49 F.4th 382 (4th Cir. 2022). Though the Fourth Circuit considered restrictions imposed under the federal statute regarding supervised release,⁴ its logic is informative. Initially, the Court of Appeals noted that "a complete internet ban is almost always excessive for 'non-contact child pornography activity, or similar

³ Of course, "[s]pecific criminal acts are not protected speech even if speech is the means for their commission." *Packingham*, at 107.

⁴ That particular statute *requires* courts to consider "the least restrictive alternative" for the purpose. *United States v. Ellis*, 984 F.3d 1092, 1104 (4th Cir. 2021) (citing 18 U.S.C. § 3583 (d)(2)).

conduct’ where there was no actual contact with the victim.” *Id.*, at 396. The Court, however, still allowed “computer restrictions,” though it cautioned a federal district court “cannot impose a total ban absent exceptional circumstances the district court must explain in detail.” *Id.*, at 397. In other words, the Court of Appeals did not rule out, under the federal statute, imposition of a total ban for life under certain circumstances. *See also Bobal*, at 977 (“Nothing in *Packingham* undermines the settled principle that a district court may ‘impose reasonable conditions that deprive the offender of some freedoms enjoyed by law-abiding citizens’ during supervised release.”). In sum, this Court rejects Applicant’s argument that *Packingham* compels a finding that the restriction here is unconstitutional.

Applicant also relies upon the Third Circuit’s treatment of the issue in *United States v. Holena*, 906 F.3d 288 (3d Cir. 2018). *Holena* does not fully address the First Amendment argument that Applicant makes; rather, like the Fourth Circuit case cited above, the Third Circuit considered the restrictions in light of the federal statute providing that the district court “may not deprive the defendant of more liberty ‘than is reasonably necessary’ to deter crime, protect the public, and rehabilitate the defendant.” *Id.*, at 291. That statute, of course, is not applicable here. But the conclusion of the analysis in *Holena* is telling. Though the Third Circuit found a “lifetime ... blanket ban is presumptively excessive,” it still cautioned: “None of this is to say that the District Court may not impose sweeping restrictions. In appropriate cases, it may. We hold only that, on this record, the scope of the restrictions is too broad.” *Id.*, at 292-293.⁵ To the extent the

⁵ The district court in *Holena* also banned “other electronic communications ... devices” which apparently included use of a cellphone or other device even if not connected to the internet, which the Third Circuit considered “particularly draconian.” *Id.*, at 292. The Third Circuit recognized, however, a modification to the restriction that allowed *Holena* to “use the internet with his probation officer’s prior approval,” which it reasoned “move[d] the internet ban closer to the ‘comprehensive, reasonably tailored scheme’ that [it] require[s].” *Id.*, at 293.

Third Circuit referenced the First Amendment argument, it did so only generally and found that “blanket internet restrictions will rarely be tailored enough to pass constitutional muster.” *Id.*, at 295. Essentially, the Third Circuit found that even after *Packingham*, “[t]he District Court can limit [a convicted defendant’s] First Amendment rights with appropriately tailored conditions of supervised release. Defendants on supervised release enjoy less freedom than those who have finished serving their sentences.” *Id.*, at 294-295. It instead focused on “shaping” the restrictions for the most part, not forgoing the restrictions. *Id.* Even so, it does not appear that many circuits agree with the Third Circuit’s more favorable analysis of *Packingham*’s reach in *Holena*:

Holena read the opinions in *Packingham* too broadly. Both the majority opinion and the concurring opinion in *Packingham* agreed that the North Carolina law infringed the First Amendment rights of registered sex offenders, who would be committing an entirely new felony if they accessed certain websites. But neither opinion addressed whether the First Amendment is violated by a special condition of supervised release for a sex offender who is serving a sentence for an offense involving electronic communications sent to a minor.

Bobal, 981 F.3d at 978.

But for this Court’s purpose, it is clear that Applicant’s First Amendment argument must be rejected. The parties contracted to the provision, and the provision was prompted specifically because Applicant’s crimes were committed by using the internet. Further, factually, the ban does not reach the lifetime ban that causes ultimate concern in the above cited cases. Moreover, the restriction here is not complete. Testimony at the PCR hearing established that Applicant was allowed assistance to access the internet, but he could not personally touch the keyboard. And critically, the restriction falls when the sentence is complete.

For all these reasons, nothing prevents the imposition and application of the restriction in this case. Applicant has failed in his burden of proof.

*Involuntary Plea: Failure to Advise of Nature and Elements
of the Charges and Right to Appeal*

“It is beyond dispute that a guilty plea must be both knowing and voluntary.” *Parke v. Raley*, 506 U.S. 20, 29 (1992). It is also clear the record should reflect that voluntary choice. *Boykin v. Alabama*, 395 U.S. 238 (1969) (“a guilty plea should only be accepted where the record evidences ‘an affirmative showing that it was intelligent and voluntary.’”). Notably, statements made during a guilty plea should be considered true: “... accuracy and truth of an accused’s statements at ... his guilty plea ... are ‘conclusively’ established by that proceeding unless and until he makes some reasonable allegation why this should not be so.” *Crawford v. United States*, 519 F.2d 347, 350 (4th Cir. 1975), *overruled on other grounds by United States v. Whitley*, 759 F.2d 327 (4th Cir. 1985); *Dalton v. State*, 376 S.C. 130, 137–38, 654 S.E.2d 870, 874 (Ct. App. 2007) (same).

This Court finds that Applicant’s claims that he was not advised of the “nature and crucial elements of the charge” elevates form over substance. His argument, apparently, is that the judge did not recite the elements, but that simply is not required. Again, a voluntariness determination is not conditioned only upon the plea colloquy between the plea court and the defendant. *Roddy, supra*. Additionally, Applicant, expressed no misunderstanding or confusion at the time of the plea. Rather, Judge Miller referenced the two charges and stated, “I’m not going to review them with you because we have just finished trying the case. It is my understanding that you, at this time, wish to enter a guilty plea to these two indictments,” and Applicant responded, “That is correct.” (Return Attachment, Tr. 244). Further, Judge Miller asked if Applicant had any questions, either for the court or counsel, and Applicant responded, “I do not.” (Return Attachment, Tr. 244). His response should be afforded the presumption of truthfulness which Applicant has failed to undermine. *Crawford, supra*. And, in further support of this finding,

counsel indicated at the PCR hearing that he had reviewed the offenses with Applicant. This Court finds counsel’s testimony credible, especially in light of the discussions on the record about specific points on the elements as reflected in the directed verdict motion, and in the charge conference. (See Return Attachment, Tr. 229 and 235-241). It is not logical that Applicant – an educated and intelligent defendant – did not understand the basis for the charges, and, for that matter, the defense.

Lastly, as to being advised about direct appeal, the record shows that he voluntarily waived that right to obtain the favorable plea agreement. Consequently, he had to be aware of the right.⁶ Moreover, that particular term in the negotiation⁷ was reviewed by the State in placing the negotiations on the record, and Applicant personally consented to the waiver of the right to appeal upon questioning by Judge Miller. (Return Attachment, Tr. 246 and 249). Further, counsel testified at PCR hearing that he also reviewed with Applicant, at least to some extent, waiving the right to a direct appeal. This Court credits counsel’s testimony on this issue, especially when the appeal provision was referenced on the record expressly; the record shows a break in the proceedings specifically for consultation; and counsel added nothing in a separate request or separate presentation during the plea proceeding because, as counsel stated on the record, the terms were negotiated in full. (See Return Attachment, Tr. 243 and 247). Applicant has failed to show a factual basis for his claim.

⁶ *But see Weathers v. State*, 319 S.C. 59, 61, 459 S.E.2d 838, 839 (1995) (“absent extraordinary circumstances, there is no constitutional requirement that a defendant be informed of the right to a direct appeal from a guilty plea”).

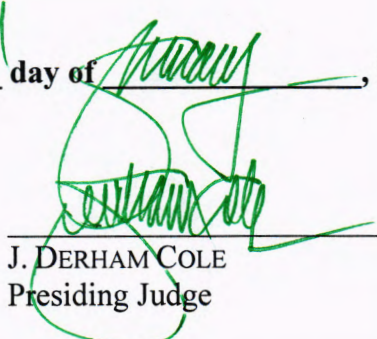
⁷ Waivers of the right to a direct appeal are not prohibited. “[N]umerous state jurisdictions have upheld waivers of appellate rights” including ours. *Spoone v. State*, 379 S.C. 138, 143, 665 S.E.2d 605, 607 (2008).

CONCLUSION

For the above stated reasons, this Court finds that Applicant failed to carry his burden of proof. Therefore, the application for post-conviction relief is DENIED and will be DISMISSED WITH PREJUDICE.

IT IS THEREFORE ORDERED that the application for post-conviction relief is DENIED and is DISMISS WITH PREJUDICE.

AND IT IS SO ORDERED this 22nd day of January, 2024.



J. DERHAM COLE
Presiding Judge


_____, South Carolina.

Copy mailed to
Attorney general / Susannah Ross
on 1 / 31 / 2024.

STATE OF SOUTH CAROLINA)
)
 COUNTY OF GREENVILLE)
)
 Kevin Mark Willson, #378378,)
)
 Applicant,)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 THIRTEENTH JUDICIAL CIRCUIT

Case No.: 2019-CP-23-7167

ORDER STRIKING AFFIDAVIT
 FROM THE RECORD

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This matter comes before the Court by way of an application for post-conviction relief filed by Applicant Kevin Mark Willson on December 11, 2019. An evidentiary hearing was set for July 24, 2023, in the Greenville County Courthouse. Applicant was present and represented by counsel, Susannah C. Ross, Esq. Senior Assistant Deputy Attorney General Melody J. Brown represented Respondent, the State. The State advised that it had a motion to strike and requested to be heard on the motion prior to the beginning of the evidentiary hearing.

The State explained that in advance of the hearing, an affidavit that appeared to be from an individual named “Bonnie Burkhardt” was filed in this PCR action with the Clerk of Court on July 20, 2023. The State moved to strike the affidavit, arguing that the affidavit had been submitted by a non-party with no connection to the case; that the affidavit contained irrelevant hearsay assertions and inappropriate legal conclusions; and, also contained spurious allegations of crimes in the investigation. The State argued that the affidavit was grossly inappropriate and should not be forced into the record by the filing of the document by a non-party.

Applicant’s counsel confirmed to the Court that the affidavit was not filed by Applicant but by a potential witness for Applicant’s case.

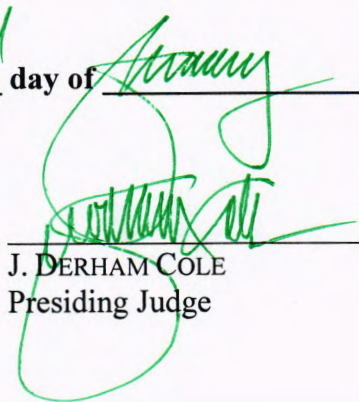
This Court agrees with the State. This Court finds that the affidavit was submitted by a

non-party with no connection to the case; that the affidavit contained irrelevant hearsay assertions and inappropriate legal conclusions; and, also contained spurious allegations of crimes in the investigation. The affidavit was inappropriate and not properly filed. It is a nullity, and it shall be stricken from the record.

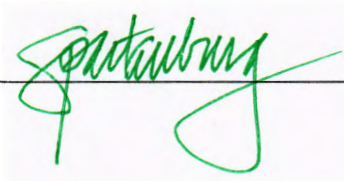
IT IS THEREFORE ORDERED:

1. This Court GRANTS the State's MOTION TO STRIKE; and,
2. The Clerk of Court shall remove the affidavit from the record and the original of this Order shall be filed in the record in place of the improperly filed affidavit.

AND IT IS SO ORDERED this 22nd day of January, 2024.



J. DERHAM COLE
Presiding Judge


_____, South Carolina.

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Attorney general / Susannah Ross
on 1 / 31 / 2024.

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STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

Robert Moore, #320303,)
)
Applicant,)
v.)
State of South Carolina,)
)
Respondent.)
_____)

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

Case No.: 2020-CP-23-0222

ORDER OF DISMISSAL

This matter comes before the Court by way of an application for post-conviction relief filed by filed by Applicant Robert Moore on January 14, 2020. A motions hearing was held on July 24, 2023, in the Greenville County Courthouse. Applicant was present and represented by counsel, Susannah C. Ross, Esq. Senior Assistant Deputy Attorney General Melody J. Brown represented Respondent, the State. At the close of the hearing, the undersigned took the matter under advisement. By a conditional Form 4 order issued on July 28, 2023, and filed August 8, 2023, this Court indicated it would grant the State’s motion to dismiss for failure to timely file the application and directed Respondent’s counsel to prepare and submit a proposed order.¹ This Court now issues the following order granting the state’s motion and DISMISSING the application WITH PREJUDICE for the specific reasons set out in this order.

General Procedural History

Applicant is presently confined in the South Carolina Department of Corrections in Lee Correctional Institution pursuant to orders of commitment of the Greenville County Clerk of Court.

¹ The proposed order was circulated among counsel prior to this Court’s acceptance of the order. *See Fishburne v. State*, 427 S.C. 505, 516, 832 S.E.2d 584, 589 (2019) (“preparation and finalization of a PCR order is often a collaborative effort. ... A copy of the proposed order should be transmitted to opposing counsel. Opposing counsel should promptly review the proposed order and alert preparing counsel and the PCR court as to any deficiencies in the proposed order.”).

While serving a prison sentence for attempted murder,² Applicant killed a fellow inmate by bludgeoning him with a metal table leg and stabbing him with a sharp object. Applicant was charged with murder. (*See* Return Attachment, Indictment 2018-GS-23-9345).

Applicant was represented by Lucas Craig Marchant, Esq. On December 12, 2018, Applicant appeared before the Honorable Letitia H. Verdin, waived presentment of the indictment, and pleaded guilty to murder. At the plea, the State presented the following summary of facts:

... On October 19, 2017, the defendant and the victim, Rafael Robertson, were housed in the same dorm at Perry Correctional Institute. Both were in a large common area with numerous other inmates, between 25 and 35. The common area is surrounded in a U[] shape by individual cells, with a top tier and a bottom tier.

At approximately 5:29 p.m., video surveillance shows the victim in a verbal dispute with another inmate. From the video, it appears as though the victim is trying to get away from — from this inmate, but the inmate continues to stalk the victim. The victim is chased up the stairs to the second tier. On the stairs, he is punched by another inmate and chased around the second tier.

² Applicant was indicted in Spartanburg County for the attempted murder of Travis Hall. A jury subsequently convicted him as indicted, and the Honorable R. Keith Kelly sentenced Applicant to thirty years imprisonment. Applicant timely appealed. The Supreme Court of South Carolina affirmed the conviction in *State v. Moore*, 429 S.C. 465, 839 S.E.2d 882 (2020). The Supreme Court referenced the facts summarily as follows: “Hall was shot in the head and left for dead in a vehicle in a Taco Bell parking lot following a drug deal gone wrong.” *Id.*, at 470, 839 S.E.2d at 884. The public records available on the Spartanburg County Public Index show that Applicant’s PCR action on that conviction was dismissed after a merits review on March 21, 2023, <https://publicindex.sccourts.org/Spartanburg/PublicIndex/PIImageDisplay.aspx?ctagency=42002&doctype=C&docid=606630&HKey=11397525587817247109885477651158610285105119875588505774885198881037543118876967541176697885199>. Further, the index shows that PCR counsel served and filed a notice of appeal on or about April 10, 2023, seeking further review. <https://publicindex.sccourts.org/Spartanburg/PublicIndex/PIImageDisplay.aspx?ctagency=42002&doctype=C&docid=607002&HKey=10249868011211311512199665670538676109101991029812010411111737652115117110109491145610654665510772115122103>.

At this point, the video shows the defendant run from his cell, armed with a metal table leg on the bottom tier, up the stairs to the top tier. The victim jumps over the railing to the bottom tier where the defendant runs to him. The defendant strikes him with the weapon and again chases him around the common area.

The victim is backed into a corner and [f]alls down. At this point, the defendant repeated - - repeatedly struck him with the table leg. He then pulls out another smaller weapon and stabs the victim numerous times.

The medical examiner found several defensive wounds to the victim's hands and arms. He found two large life-threatening chop injuries to the right side of the victim's upper torso which penetrated the chest cavity causing the fatal injury to his right lung.

(Return Attachment, Tr. 8-10).

The State also placed the negotiated recommendation on the record: "The recommendation is 36 years backdated to October 19, 2017. I guess with no credit for time served, just backdated. And then, the state is dismissing the possession of a weapon charge." (Return Attachment, Tr. 10).

Applicant pled guilty without contesting or qualifying any of the facts as presented by the State, or the recommendation as expressly set out on the record. (*See* Return Attachment, Tr. 10). Defense counsel requested the court accept the recommendation noting: "The prosecutor and I have worked for an extensive amount of time trying to resolve this one." (Return Attachment, Tr. 12).

Judge Verdin followed the recommendation and sentenced Applicant to imprisonment for thirty-six years, with a start date of October 19, 2017, concurrent to the sentence he was serving at the time of the murder. (Return Attachment, Tr. 12). The State also dismissed the possession of a weapon charge on December 13, 2018. *See* Case Number 2017A2310200084. Applicant did not appeal.

Post Conviction Relief Allegation

Applicant alleges he received ineffective assistance because plea counsel failed to move to withdraw Applicant's guilty plea when the State reneged on its plea agreement by recommending Applicant's sentence begin on the date of the murder instead of the start date of the sentence he was then serving. (Application at 3 and attachment).³

The State's Motion to Dismiss and Applicant's Response

The State moved to dismiss the action for failure to file within the one-year statute of limitations. (*See Return*, pp. 2-3). At the hearing, Applicant requested equitable tolling be applied to excuse the late filing. Applicant's explanation for failing to timely file was that he was simply unaware of the procedure for filing an application.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Uniform Post-Conviction Procedure Act requires "an application for relief ... be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision upon an appeal, whichever is later." S.C. Code Ann. § 17-27-45 (A). Our Supreme Court has held the statute of limitations shall apply to all applications filed after July 1, 1996. *Peloquin v. State*, 321 S.C. 468, 469 S.E.2d 606 (1996).

In this case, Applicant was sentenced on December 12, 2018. Applicant did not appeal his conviction or sentence. Therefore, for an action to be timely filed under the cited statutory

³ The State moved to amend the return at the hearing. The State moved to strike the reference to a second claim that Applicant did not knowingly and voluntarily waive his right to a direct appeal. The application shows that is not a claim raised. Therefore, this Court granted the State's motion.

provision, Applicant should have filed his application with the Clerk of Court on or before December 12, 2019. Applicant's application was not filed until January 14, 2020, a date which occurred after the statutory filing period had already expired. Applicant does not dispute these facts. Therefore, under a straightforward application of the statute, Applicant has not timely filed this action. Again, Applicant does not dispute that is the case; rather, he alleges that equitable tolling should excuse the late filing. Therefore, the undersigned has considered whether application of the doctrine is warranted in these circumstances. *See Mose v. State*, 420 S.C. 500, 511, 803 S.E.2d 718, 723 (2017) (requiring the PCR court to "make the fact-specific determination of whether equitable tolling is justified" when the doctrine is asserted).

Initially, this Court notes that the doctrine of "[e]quitable tolling is judicially created; it stems from the judiciary's inherent power to formulate rules of procedure where justice demands it." *Hooper v. Ebenezer Sr. Servs. & Rehab. Ctr.*, 386 S.C. 108, 115, 687 S.E.2d 29, 32 (2009). As such, while "[e]quitable tolling may be applied where it is justified under all the circumstances," it remains "a doctrine that should be used sparingly and only when the interests of justice compel its use." *Id.*, at 117, 687 S.E.2d at 33. Generally, the doctrine will be applied, if at all, where a party "was prevented from filing suit because of an extraordinary event beyond his or her control." *Id.*, at 116, 687 S.E.2d at 32 (quoting *Ocana v. Am. Furniture Co.*, 91 P.3d 58, 66 (2004)).

Acknowledging the rare circumstances that warrant equitable tolling, our Supreme Court has approved the application of the doctrine in context of post-conviction relief actions where "circumstances preventing a petitioner from making a timely filing [are] both beyond the [applicant]'s control and unavoidable despite due diligence." *Ferguson v. State*, 382 S.C. 615, 618, 677 S.E.2d 600, 602 (2009) (quoting *Commonwealth v. Carneal*, 274 S.W.3d 420, 429 (Ky.

2008)). In *Ferguson*, the tolling request was based upon an allegation of mental incompetency. *Id.*, at 618, 677 S.E.2d at 601-602. The Court resolved that “in circumstances in which an applicant demonstrates the failure to timely file for PCR was due to mental incompetency, the statute should be tolled.” *Id.*, at 619, 677 S.E.2d 600, 602 (2009).

Additionally, our Supreme Court, in acknowledging “the unique conditions of incarceration,” has also allowed consideration of equitable tolling where the delay in timely filing may be attributed to processing the application for filing and not an inmate’s diligence in attempting to timely file. *Mose*, at 511, 803 S.E.2d at 723 (“if the circumstances warrant, the statute of limitations shall be tolled from receipt of the document by the prison until formally filed with the clerk’s office, provided that the applicant can verify by competent evidence the date prison authorities received the document for mailing”). Notably, our Court also warned that providing for the possible application of the doctrine in such circumstances was not a signal that a blanket exception would be allowed to simply avoid timelines. *Id.*, at 510, 803 S.E.2d at 723. This is in keeping with the long-standing caution that equitable tolling should be applied “sparingly.” *See Hooper, supra.*

In the present matter, Applicant has failed to show that the untimely filing was due to circumstances beyond his control and was unavoidable despite his acting with due diligence. He does not assert anything at all *prevented* him from complying with the one-year statute of limitations. His only offered basis for invoking the doctrine was that he did not know to file. This Court finds that the doctrine of equitable tolling is not justified under the circumstances of this case, and the Court denies Applicant’s request to apply equitable tolling.

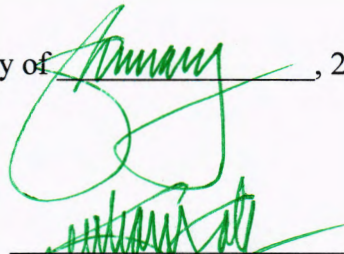
CONCLUSION

For the above stated reasons, this Court finds that Applicant's motion to toll the statute of limitations should be and is DENIED. The respondent's motion to dismiss the application as not timely filed is GRANTED. This action must be DISMISSED WITH PREJUDICE.

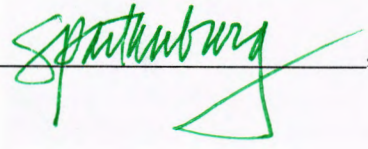
IT IS THEREFORE ORDERED:

1. Applicant's application for post-conviction relief is dismissed with prejudice; and
2. Applicant is remanded to the custody of Respondent for completion of his sentence.

AND IT IS SO ORDERED this 22nd day of January, 2024.



J. DERHAM COLE
Presiding Judge


_____, South Carolina.

Copy mailed to
Attorney general / Susannah Russ
on 1 / 31 / 2024.