

STATE OF SOUTH CAROLINA
COUNTY OF MARION

Kendell A. Gamble #377230,

Applicant,

v.

State of South Carolina,

Respondent.

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

) CASE NO. 2019-CP-33-00653

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**ORDER OF DISMISSALS.C. SUPREME COURT
WITH PREJUDICE**

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Presiding Judge: Hon. Debra R. McCaslin
Applicant's Attorney: Joshua A. Bailey, Esq.
Respondent's Attorney: D. Russell Barlow, II, Esq.
Trial Counsel: Jonathan M. Hiller, Esq.
Date of Hearing: June 12, 2023
Court Reporter: Julie A. Kevish

This matter comes before this Court by way of Kendell A. Gamble's (Applicant) application for Post-Conviction Relief (PCR) timely commenced on September 18, 2019. Respondent, the State of South Carolina, filed its Return on February 6, 2020, requesting an evidentiary hearing to resolve the claims set forth in the application.

On June 12, 2023, an evidentiary hearing was held at the Florence County Courthouse before the Honorable Debra R. McCaslin. Applicant was present and represented by Joshua A. Bailey, Esquire. Assistant Attorney General D. Russell Barlow, II, represented Respondent. Applicant proceeded on the allegations within his original PCR application except for ineffective assistance of counsel for failing to move to dismiss the attempted armed robbery count. In support of these claims, Applicant testified on his own behalf, and Respondent presented testimony from Jonathan M. Hiller, Esquire (Plea Counsel).

Following a thorough review of the record in its entirety, along with the testimony and evidence presented at the evidentiary hearing, this Court finds Applicant has failed to establish any constitutional violations or deprivations entitling him to any form of relief. Accordingly, this Court denies relief and dismisses this action with prejudice.

PROCEDURAL HISTORY

The records before this Court establish Applicant is presently confined in the South Carolina Department of Corrections (SCDC). Applicant was indicted at the February 2018 term of the Marion County Grand Jury on a twenty-four count indictment for: one count of first-degree burglary; seven counts of attempted armed robbery; seven counts of kidnapping; five counts of attempted murder; one count of discharging a firearm into a vehicle; one count of conspiracy; one count of possession of a stolen handgun; and one count of possession of a weapon during the commission of a violent crime (2018-GS-33-0121). Applicant was represented by Jonathan M. Hiller, Esquire. Assistant Solicitor Patti M. Parker prosecuted the case.

On August 1, 2018, Applicant appeared before the Honorable William H. Seals, Jr. and pleaded guilty to one count of first-degree burglary, one count of attempted armed robbery, one count of kidnapping, three counts of attempted murder, and one count of possession of a weapon during the commission of a violent crime.¹ The State recommended that Applicant receive concurrent sentences. Additionally, in exchange for Applicant's guilty plea, the State dropped Applicant's seventeen remaining charges. Judge Seals accepted Applicant's guilty plea and sentenced him to serve concurrent terms of fifty years for first-degree burglary, twenty years for

¹ Applicant's codefendant and brother, Jayme Gamble, pleaded guilty at the same time as Applicant before Judge Seals. Jayme Gamble was represented by Laura Hiller, Esquire.

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attempted armed robbery, thirty years for kidnapping, thirty years for each attempted murder, and five years for the weapons charge.

Applicant filed a timely Notice of Appeal and a statement pursuant to Rule 203(d)(1)(B)(iv), SCACR, with the Court of Appeals on August 9, 2018. The Court of Appeals dismissed the appeal on October 12, 2018. State v. Gamble, S.C. Ct. App. Order filed October 12, 2018. The Remittitur was returned to the circuit court on October 30, 2018.

FACTS GIVING RISE TO CONVICTION

The facts giving rise to Applicant's conviction were articulated by the State at Applicant's plea hearing, as follows:

This incident occurred on a Friday morning July 21st 2017 at 12 approximately -- it was a little before 7:30 in the morning. Ms. Hattie [REDACTED] who resides on at [REDACTED] in the Mullins area of Marion County. Ms. Hattie [REDACTED] was up that morning getting ready for work about to iron clothes and she heard what sounded like a loud knock on the door. She looked out the window and did not recognize the truck in the driveway, looked out the peephole and did not recognize these individuals that were knocking at her door. She went and woke up a Ms. Lawanda [REDACTED] that was asleep in the residence, that is her grandchild's mother that was there. There were also children in the home. And got Lawanda up and Lawanda also said I don't recognize this truck I don't know who they. Something didn't seem right to Ms. Hattie and she picked up her cell phone and dialed 9-1-1 and about that time the door was busted up. These individuals busted in Ms. Hattie's home. They had guns. They had weapons. They started hollering for them to get down on the floor, pulled the guns on these women and children that were in the home. She had dialed 9-1-1 and press send, but when he hollered put down your phone, of course, these individuals didn't realize that the call to 9-1-1 already gone through. And so she placed the phone down and so a dispatcher here in Marion County thought that something wasn't right, could hear the commotion in the background, could hear hollering and screaming where's the money, get down on the floor, where's the money and women screaming in the background. And so this dispatcher did a very good job that day with this call and

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thought that she needed to send deputies out to this residence and so deputies did respond to the residence. Before I get to what happened after deputies responded, I'll talk about what they did in the house. They demanded money from these women and children. There were four children total in the residence a ten year old by the name of [REDACTED], a 16 year old [REDACTED], 24 year old Dennis who was Ms. Lawanda's son and five year old [REDACTED] (sic). Three of the children were Ms. Hattie's grandchildren. They were all woken by this incident and two of the women were slapped. They had guns put to their head. And even when they kept demanding money, Ms. Hattie and the ladies in the house didn't know what they were talking about. These individuals were corresponding with somebody on the cell phone on the other end of the phone. And one of the ladies heard from the other end of the phone just kill them all and so they were terrified for their life. At one point they grabbed [REDACTED], who is five years old, and put a knife to his throat trying to up the intimidation, up the threats because they thought there was some money there that they could get and threaten this child, threaten to cut his fingers off if these women didn't produce the money. So when law enforcement responded to the residence, they did get there rather quickly. Deputy Causey was the first. Deputy Causey along with Deputy Herring were the first two to arrive. And Deputy Causey kind of parked his car kind of by the driveway. Deputy Herring a little further back. And they were waiting on backup to get there, but Deputy Tracy Causey wanted to go ahead and clear the backyard, kind of clear the back portion of the residence. So he had his county issued shotgun that he retrieved from his patrol car and went around the back of the residence. Deputy Causey did not realize that these two individuals just prior to him walking around the backside of the house, they had ran out of the side door of the house and actually were hiding behind what looks like a storage barn, like a storage building. And you'll see shortly hear in the video when they decided to make a run for it, they did fire three shots at Deputy Causey. One of the shots actually got so close to him that it struck his shotgun and actually knocked the shotgun out of his hand. And he then later grabbed it and tried to, you know, to use it to fire some shots, but it was disabled because, you know, that -- one of the shots had actually hit his shotgun. These two individuals run, jump in the Dodge Durango that they were driving. It was a rental car that they had. They had carefully planned this out. The rental car had a North Carolina license plate. They had put a South Carolina license plate on top of the North Carolina plate. They proceeded to

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back out of the driveway and they're going to run from the police and they're not going to stop. So you have Deputy Herring along with Deputy Cribb and Trooper Jimmy King also hears what's going on on the radio. You have several law enforcement officers responding and this chase ensues throughout the county at some instances well in excess of 100 miles an hour. And eventually you'll see here shortly on the video ends with a crash right here outside of the City of Marion. There was a civilian vehicle that was struck and then when deputy excuse me -- when Trooper King follows after them when they lose control of the vehicle and go into like a grassy area off like the main highway, he's able to disable their vehicle by hitting it in the side and then he jumps out and runs. Jayme Gamble was the driver of that vehicle. He ran from the vehicle and Trooper King was able to catch him and apprehend him and he was arrested there on site. The passenger, I believe, surrendered and put his hands up and never tried to run from the car. So, Your Honor, I guess, to try to sum this up from the time they run from the house through some of the home surveillance video we have and then through various dash cam videos we have, we have sight on them. We have our eyes on them throughout these videos up until the point they're both apprehended. And so no question at all in the State's case that it was them. While they were driving and during part of the chase and the video's going to touch on this, but I want to point out because it's not -- doesn't jump out at you when you're watching the video. One of the accounts of attempted murder --of course, they're pleading to one count to attempted murder for Deputy Causey for firing those three shots at him. You'll hear that on the video. Constable Glen Turner had heard what was going on on the radio and he was responding. And you'll see when they're on one of our roads here in Marion County they -- during the chase, they take a right at the first stop sign and go down that road and deputy constable excuse me -- Constable Glen Turner was just coming from the opposite direction and they fire a shot into his windshield, two shots. Fired two shots at him. One shot I had a picture. One shot goes in the front of the windshield right there at his rear view mirror, so would have been inches from his head and he pose no threat to them. He was just literally just responding to the call and was coming in the opposite direction. He was not in pursuit of them. And also I have a picture of the shotgun that shows, you know, where it was hit. It was actually very close to Deputy Causey's body when that bullet struck the shotgun. They also right before this chase ends that you see there at the intersection coming

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into the City of Marion and Trooper King makes reference to this in the video there were shots fired from the passenger side of the vehicle at him right before the chase ended. They were firing shots out the car at him. Certainly they were indicted for, I think, two additional counts of attempted murder, but in consideration of this plea, the State did try to pair it down. It was two rather large indictments paired down. And they're pleading to about eight or nine counts each. I'm trying to think if I'm leaving anything out other than I want to play the video. And at the appropriate time, I know Deputy Causey wants to speak and Ms. [REDACTED] may want to speak also and also the sheriff. Obviously, you know, we indicted the burglary first degree because they entered the house with the weapons and immediately pulled them on the ladies that were in the home.

THE COURT: All right. Go ahead and play it.

Your Honor, I prepared three pieces of video. This first video is the homeowner's surveillance footage and has no sound. And then immediately after this you'll see a clip from Deputy Herring's dash cam and kind of what happened when he arrived at the house. You can kind of -- by seeing this video and then listening to and seeing the second one, you can kind of see when the shots were fired at Deputy Causey. And then the final video I'm not going to show the whole chase, but we edited to just show the last few moments of the chase. It was a very high speed chase and you can see how there were several civilian cars that were put in danger and one that actually hit.

(WHEREUPON, videos played for the Court.)

Your Honor, that last video was Trooper Jimmy King. And right after he crashed his vehicle into the defendant's vehicle, he did a foot chase and eventually apprehended Jayme Gamble, but you saw on the video when his car hit the curve, you kind of see it kind of knocked his camera loose. He did suffer a concussion to the head where his head hit the top of his patrol car. And not long after this, you know, suffering from headaches eventually he's now on medical retirement and he's not here today. He was willing to come, you know, had this gone to trial and would have been available as a witness for us.

(Plea Tr. pp. 10-17).

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CURRENT ACTION BEFORE THIS COURT

In his application for post-conviction relief filed on September 18, 2019, Applicant alleged he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel:
 - a. "For representing [Applicant] under a conflict of interest."
 - b. "For failing to move to dismiss the armed robbery count."
 - c. "For failing to move to dismiss the attempted murder counts involving Constable Glen Turner, and Deputies Jonathan Herring and Daniel Cribb."
 - d. "For failing to investigate the facts of the case."
 - e. "For failing to explain the consequences of a negotiated plea agreement versus an open plea."
 - f. "For failing to ensue that the Court explained the nature of each offense and elements that had to be proven for each offense."
 - g. "For failing to move to reduce the Burglary 1st degree count to Burglary 2nd degree."

Attached to Applicant's PCR application was a "Memorandum of Supporting Facts" for all claims of ineffective assistance of counsel. Applicant requests relief in the form of a new trial and to vacate the convictions/sentences.

Before this Court is the Marion County Clerk of Court records regarding the subject's convictions and sentences, Applicant's records from the South Carolina Department of Corrections, Applicant's guilty plea transcript, Applicant's appellate records, and the records of Applicant's current PCR action.

STANDARD OF REVIEW

The Uniform Post-Conviction Procedure Act² (the Act) provides that any person who has been convicted of a crime may seek post-conviction relief based on the following types of allegations:

² S.C. Code Ann. §§ 17-27-10 to -160.

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1. That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;
2. That the court was without jurisdiction to impose sentence;
3. That the sentence exceeds the maximum authorized by law;
4. That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
5. That his sentence has expired, his probation, parole or conditional release unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or
6. That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy[.]

S.C. Code Ann. § 17-27-20(A).

Ordinarily, PCR allegations are centered upon an allegation that the applicant did not receive effective assistance of counsel guaranteed by the Sixth Amendment. See generally S.C. Code Ann. § 17-27-20(A) (enumerating allegations cognizable in PCR actions). The allegation of denial of such representation sets forth a *prima facie* violation of this constitutional right and raises a question of fact that can only be determined by an evidentiary hearing. Rogers v. State, 261 S.C. 288, 291, 199 S.E.2d 761, 762 (1973).

In a post-conviction relief action, the applicant bears the burden of proving the allegations by a preponderance of the evidence—a mere allegation of ineffective assistance is not sufficient to warrant granting relief. Rule 71.1(c), SCRCP; Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The reviewing court applies the two-part test outlined in Strickland to determine whether counsel's conduct "was so [ineffective] as to require reversal" of the applicant's conviction. Strickland v. Washington, 466 U.S. 668 at 687 (1984). To obtain relief, a PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness, and (2) the applicant sustained prejudice as a result of counsel's deficient

performance. Id. at 687-88; Cherry v. State, 300 S.C. 115, 117—18, 386 S.E.2d 624, 625 (1989). Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. Strickland, 466 U.S. at 700; see also Bell v. Cone, 535 U.S. 685, 695 (2002) (explaining that "[without proof of both deficient performance and prejudice to the defense... it could not be said that the sentence or conviction resulted from a breakdown in the adversary process that rendered the result of the proceeding unreliable" (citation and internal quotation marks omitted)).

Because the Sixth Amendment right to counsel also applies to a defendant entering a guilty plea. Hill v. Lockhart, 474 U.S. 52 (1985), extended the two-part Strickland test to challenge guilty pleas based on ineffective assistance of counsel. See Padilla v. Kentucky, 559 U.S. 356, 373 (2010) (recognizing that the guilty plea process is a "critical phase of litigation" for purposes of the Sixth Amendment right to effective assistance of counsel). The analysis of counsel's performance under the first prong of Strickland remains unchanged, the applicant must show that counsel's representation fell below an objective standard of reasonableness demanded of attorneys in criminal cases. Hill, 474 U.S. at 58-59; accord Thompson v. State, 340 S.C. 112, 115, 531 S.E.2d 294, 296 (2000).

An applicant alleging his guilty plea was induced by ineffective assistance of counsel must prove counsel's advice to plead guilty was not "within the range of competence demanded of attorneys in criminal cases." Hill, 474 U.S. at 56. The second, or "prejudice" prong, however, "focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process." Id. at 58-59. Specifically, when an applicant claims counsel's deficient performance caused him to accept a plea, the applicant "must show that there is a reasonable

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probability that, but for [plea] counsel's [alleged] errors, he would not have pleaded guilty and would have insisted on going to trial." Id. at 59.

This inquiry "focuses on a defendant's decisionmaking" and does not turn on the outcome of a defendant's actual criminal proceeding or potential outcome had a defendant chosen to proceed to trial. Lee v. United States, 582 U.S. 357, 367 (2017). However, an applicant must convince the court that a decision to reject the plea bargain would have been rational under the circumstances. Padilla, 559 U.S. at 372. The question here is whether the applicant, if correctly informed of circumstances surrounding the plea, would have pleaded guilty—not whether counsel would have still advised him or her to plead guilty. Turner v. State, 335 S.C. 382, 385, 517 S.E.2d 442, 444 (1999) (emphasis added).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Applicant has alleged and elected to pursue various claims of ineffective assistance of counsel through the post-conviction relief action presently before this Court. In analyzing these claims, this Court has considered the legal arguments by counsel and thoroughly reviewed the record in its entirety. This Court additionally heard the testimony presented at the evidentiary hearing and was able to observe the witnesses, which allowed the Court to evaluate and scrutinize their credibility.

Upon conducting and completing its analysis, this Court finds that Applicant has failed to establish any constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. See Rule 71.1(e), SCRPC (stating that in a post-conviction relief action, "[t]he applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence."); Lucero v. State, 414 S.C. 238, 244, 777 S.E.2d 409, 412 (S.C. App. 2015) ("In a PCR proceeding, the applicant bears the burden of establishing that he or she

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is entitled to relief."); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) ("The burden of proof is on the Applicant in post-conviction proceedings to prove the allegations in his application.").

Accordingly, set forth below are the relevant findings of facts and conclusions of law as required by § 17-27-80 of the South Carolina Code:

INITIAL FINDINGS

As a matter of general impression, this Court finds Plea Counsel's testimony at the evidentiary hearing **credible and persuasive**, where he presented well-recollected testimony of relevant background, facts, and discussions leading up to and during the plea hearing. This Court finds Applicant's testimony at the evidentiary hearing generally **not credible and not persuasive**. This Court further finds applicable the strong presumption that at all stages of Plea Counsel's representation of Applicant, he rendered adequate assistance and exercised reasonable professional judgment in his representation. Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007) (citing Strickland, *supra*). The United States Supreme Court has cautioned that "every effort be made to eliminate the distorting effects of hindsight" and evaluate counsel's decisions at the time they were made. Strickland, 466 U.S. at 689, 104 S.Ct. 2052; *see* Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992).

From the record, this Court makes the following findings: 1. Applicant understood the charges and sentences he faced at his plea hearing (Plea Tr. pp. 5-10); 2. Applicant understood the details and circumstances of a straight-up plea (Plea Tr. pp. 3-4); 3. Applicant clearly indicated he was satisfied with his attorneys (Plea Tr. pp. 8-9); 4. Applicant understood his right to a jury trial and that he waived those rights by pleading guilty (Plea Tr. pp. 6-8); 5. Applicant indicated he had enough time with his attorneys (Plea Tr. p. 9); 6. Applicant indicated his attorneys answered all of his questions, and he had no more questions for them (Plea Tr. pp. 10-11).

Applicant indicated no promises were made to him, and his decision to plead guilty was voluntary (Plea Tr. pp. 9-10); 8. Applicant was not under the influence of drugs or alcohol, which may affect his ability to understand the plea proceedings (Plea Tr. p. 9); 9. Applicant understood the range of sentencing (Plea Tr. pp. 5-7); 10. Applicant was clearly advised of his right to appeal (Plea Tr. p. 8); 11. Applicant did not disagree with the facts surrounding the State's case against him, and apologized (Plea Tr. pp. 10-27); 12. Applicant's plea was qualified as freely, knowingly, and voluntarily entered into (Plea Tr. p.29).

INEFFECTIVE ASSISTANCE OF PLEA COUNSEL ALLEGATIONS ON THE MERITS

Allegation 1a: Plea Counsel Represented Applicant Under a Conflict of Interest.

Applicant alleges Plea Counsel was constitutionally ineffective and represented him under conflict because Plea Counsel is married to co-defendant's defense counsel. This Court finds this allegation is without merit.

"The mere possibility defense counsel may have a conflict of interest is insufficient to impugn a criminal conviction." Jordan v. State, 406 S.C. 443, 449, 752 S.E.2d 538, 541 (2013) (quoting Lomax v. State, 379 S.C. 93, 101, 665 S.E.2d 164, 168 (2008)). An actual conflict of interest occurs:

when a defense attorney places himself in a situation inherently conducive to divided loyalties. . . . If a defense attorney owes duties to a party whose interests are adverse to those of the defendant, then an actual conflict exists. The interests of the other client and the defendant are sufficiently adverse if it is shown that the attorney owes a duty to the defendant to take some action that could be detrimental to his other client.

Lomax, 379 S.C. at 101, 665 S.E.2d at 168 (quoting Duncan v. State, 281 S.C. 435, 438, 315 S.E.2d 809, 811 (1984)). "[U]ntil a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of

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ineffective assistance." Id. "However, a defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice to obtain relief." Id. (quoting Staggs v. State, 372 S.C. 549, 551-52, 643 S.E.2d 690, 692 (2007)). Conflicts of interest may be waived so long as such waiver is done knowingly, intelligently, and voluntarily. Thomas v. State, 346 S.C. 140, 551 S.E.2d 254 (2001).

At the evidentiary hearing on direct examination, Applicant testified he met with Plea Counsel about two or three times, including the initial meeting. There were several times Mrs. Hiller spoke in his interest rather than his co-defendant. Applicant testified that there was one meeting where he, Plea Counsel, and Mrs. Hiller appeared without his co-defendant. However, Applicant testified there were certain questions he believed she answered for him when Plea Counsel should have answered. Additionally, Applicant emphasized that both counsels spoke simultaneously on either his or co-defendants' behalf when they should not have done so. Applicant clarified that during his representation, he was not under the impression that Mrs. Hiller provided more representation than his Plea Counsel.

On cross-examination, Applicant testified his co-defendant retained Mrs. Hiller, who worked for Axelrod & Associates, a well-known firm, and understood that he could not have the same attorney because it would be a conflict of interest. Applicant further testified that both counsels were husband and wife and lived together, resulting in a conflict of interest. Applicant stated that he and his co-defendant were in a conflict of interest and that if one went down the wrong road, the other would follow. Notwithstanding, Applicant testified he retained Plea Counsel, pleaded guilty of his own free will, and was conscious that he could have withdrawn his guilty plea, but chose not to. Applicant testified he could not have fired Plea Counsel and hired other counsel because he had already pleaded guilty.

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On direct examination, Plea Counsel testified that there was no conflict of interest in his professional opinion.

On cross-examination, Plea Counsel testified that they never met with Applicant's co-defendant without his attorney.

This Court finds the combination of the record and Plea Counsel's **credible** testimony that there was no conflict of interest. Applicant has the burden to prove every allegation in his application. See Butler, 286 S.C. at 441, 334 S.E.2d at 814. This Court further finds Applicant has failed to prove that Plea Counsel actively represented conflicting interests. Applicant chose to plead guilty and chose not to withdraw guilty plea. Therefore, this Court finds Plea Counsel's representation of Applicant was not ineffective, and Applicant cannot demonstrate any prejudice flowing from Plea Counsel's performance in this matter.

Accordingly, this Court finds Applicant has failed to establish any deficiency by Plea Counsel, or any prejudice flowing therefrom. Thus, this allegation must be **DENIED** and **DISMISSED**.

Allegation 1b: Failure to Move to Dismiss the Armed Robbery Count.

Applicant alleges Plea Counsel was constitutionally ineffective for failing to move to dismiss the armed robbery charge. However, at the evidentiary hearing on direct examination, Applicant testified that he agreed with Plea Counsel about withdrawing Count 2 from his PCR application. (PCR Tr. pp. 9-10).

Therefore, the Court deems it abandoned. "When a party provides no legal authority regarding a particular argument, the argument is abandoned, and the court will not address the merits of the issue." Palmer v. State, 427 S.C. 36, 47, 829 S.E.2d 255, 261 (Ct. App. 2019) (citing State v. Lindsey, 394 S.C. 354, 363, 714 S.E.2d 554, 558 (Ct. App. 2011)).

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Allegation 1c: Failure to Move to Dismiss the Three Counts of Attempted Murder and He Should Have Been Charged With ABWIK.

Applicant alleges Plea Counsel was constitutionally ineffective for failing to dismiss the three counts of attempted murder. This Court finds this allegation is without merit.

At the evidentiary hearing on direct examination, Applicant testified that the attempted murder charges against him involved Constable Glenn Turner, Deputy Jonathan Herring, and Deputy Daniel Cribb. Applicant testified that a paralegal informed him there were no grounds to prove attempted murder.

On cross-examination, Applicant testified that Plea Counsel should have moved to have the attempted murder charges dismissed because the bullets hit no one.

On direct examination, Plea Counsel testified he did not file a motion to reduce the attempted murder charges because that is not standard practice in South Carolina. Plea Counsel testified that ABWIK was retired at the time Applicant was charged. Plea Counsel testified that without a doubt, he explained the offenses for which Applicant was charged and the elements of those offenses.

This Court finds Plea Counsel was not deficient in his performance with regard to this allegation because there was no meritorious motion Plea Counsel could have made. Applicant has the burden to prove every allegation in his application. See Butler, 286 S.C. at 441, 334 S.E.2d at 814. Moreover, to whatever extent Applicant was not entirely satisfied with Plea Counsel not moving to dismiss the attempted murder charges, he was presented an opportunity to express his dissatisfaction to the plea court, knowingly opted not to do so, and instead chose to proceed with his guilty plea.

Accordingly, this Court finds Plea Counsel's representation of Applicant was not

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deficient, nor did Applicant demonstrate any prejudice flowing from Plea Counsel's performance in this matter. Applicant's request for relief by way of this allegation is **DENIED** and **DISMISSED**.

Allegation 1d: Failure to Investigate the Facts Surrounding the Case.

Applicant alleges Plea Counsel was constitutionally ineffective for failing to investigate the facts surrounding the case. Specifically, Plea Counsel should have investigated the following: 1. The bullet that hit Officer Causey's shotgun; and 2. The bullet that hit Constable Turner's windshield. This Court finds these allegations are without merit.

"A criminal defense attorney has the duty to conduct a reasonable investigation to discover all reasonably available mitigation evidence and all reasonably available evidence tending to rebut any aggravating evidence introduced by the State." McKnight v. State, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008). "[W]hile the scope of a reasonable investigation depends upon a number of issues, at a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case." Ard, 372 S.C. at 331– 32, 642 S.E.2d at 597 (internal quotation marks omitted) (emphasis omitted). However, counsel need only interview potential witnesses "when it is reasonable to do so." Edwards v. State, 392 S.C. 449, 457, 710 S.E.2d 60, 65 (2011); see id. at 457, 710 S.E.2d at 64– 65 ("While our case law does provide that defense counsel must, at a minimum, interview potential witnesses, a strict adherence to that rule loses sight of the controlling standard for counsel's duty to investigate: reasonableness. Indeed, it would be an absurdity to require criminal defense lawyers to interview *every* potential witness when they can articulate reasonable grounds not to. When counsel makes such a reasonable decision, he will have fulfilled the duty he owes to his client.").

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"In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Strickland, 466 U.S. at 691; cf. Green v. French, 143 F.3d 865, 892 (4th Cir. 1998) ("Although counsel should conduct a reasonable investigation into potential defenses, Strickland does not impose a constitutional requirement that counsel uncover every scrap of evidence that could conceivably help their client."), abrogated on other grounds by Williams v. Taylor, 529 U.S. 362 (2000).

Our Supreme Court has cautioned reviewing courts not to lose sight of the reasonableness standard regarding counsel's duty to investigate. See Ard, 372 S.C. at 331, 642 S.E.2d at 597 ("Without a doubt, [a] criminal defense attorney has a duty to investigate, but this duty is limited to reasonable investigation."). "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." Strickland, 466 U.S. at 690–91; see id. ("In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary."). Thus, in applying the Strickland standard to a claim of failure to investigate, counsel's decision not to undertake a particular investigation must be evaluated with heavy deference to counsel's judgment. Bagwell v. State, 410 S.C. 259, 265, 763 S.E.2d 630, 63 (Ct. App. 2014).

"The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." Id. "Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant." Id. "In particular, what investigation decisions are reasonable depends critically on such information." Id.

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At the evidentiary hearing on direct examination, Applicant testified Plea Counsel never discussed the bullet casings found at the house with him. Applicant testified that Plea Counsel did not discuss anything regarding the gunshot that hit the Constable's windshield.

On cross-examination, Applicant testified that Plea Counsel could not have investigated anything because without him there telling the Court what he was, Plea Counsel could not have told the Court what happened. Applicant testified that he pleaded guilty because he did not want to endure a trial and receive a life sentence. Applicant testified he was not upset about the fifty years he got; rather, he was upset that Plea Counsel's job led him to getting the fifty years. Applicant testified that he did not realize the entire fifty years came from the burglary.

On direct examination, Plea Counsel testified to the following regarding failure to investigate:

The shotgun that was struck, just to paint the picture a little bit, the officer approaches from the right side of the house if you're facing the front door, turns the corner where he comes on camera, he's just looking around, he has no idea that in the shed directly in front of the tree line are two people hiding behind it, you can actually see them on surveillance but the officer can't see them. So he was holding a shotgun almost like a Century at a 45 degree angle across his chest, as my former client and his brother break for it he reacts, there's no audio but just kind of grainy black and white surveillance, he reacts almost as if he had been stung by a bee, and that was actually the bullet striking right around the trigger guard, center mass had the shotgun not impeded the path of the bullet. He drops to one knee and does get off one shot, I believe there was some damage to the door across the street. So we did have that gun into evidence, we had closeups showing the actual damage which was clearly done by a bullet. It almost defies reason that an officer who basically is shooting past two individuals hits another officer and doesn't continue to shoot. I mean, that defies reason that that would have been the factual pattern, but, no, you cannot tell who shot. I do believe we have an omission as to who shot now, but since it happened on camera, since there was nobody else given hand of one hand of all, given the fact there was no fragment recovered from the scene to even have tested, there was really nothing else to investigate.

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(PCR Tr. pp. 42-43).

On cross-examination, Plea Counsel testified that not having a ballistic report went to his trial strategy of going after the co-defendant. Plea Counsel testified to the following regarding the bullet that hit the constable's windshield:

- Q. One of the attempted murder charges was Constable Glenn Turner who was the vehicle coming towards the pursuit. Did you observe any evidence from his vehicle in your preparation for trial?
- A. Other than photographs, no. You mean did I go actually physically look at the constable's vehicle? No.
- Q. What about the bullets that were recovered from his vehicle?
- A. No. I never did a physical evidence view in this case. The photographs were very, very detailed to include the hole through the windshield. It was clearly a bullet hole. To add a little color there were some -- the cars did get up to a pretty high rate of speed, eventually, but there were a lot of turns to get out of the neighborhood. The constable in a much older model Crown Victoria unequipped with Dash Cam, unequipped with even a light bar was coming head-on. The actual shooting of that vehicle is not on Dash Cam, if memory serves. They had rounded the bend. By the time the first pursuing officer rounds the bend in pursuit Constable Glenn's car is already swerved off, obviously -- well, not obviously, perhaps, but when the bullet struck his windshield he lost a bit of control over the vehicle, swerved off the road, was able to get the car to a stop, but that ended his participation in the case. So given that there was no vehicle -- given that's what the lead vehicle captured in the chase on Dash Cam was the immediate aftermath. There was no -- there was no cop, officer bullet bending a 45 degree angle on potentially striking the vehicle. It was clear that the only vehicle that could have done the shooting was the fleeing Dodge, whether that was Mr. Gamble shooting or the driver shooting, obviously, that could have been a question for trial. I do not really see how the trial would have gone well either way, though, given hand of one hand of all.

(PCR Tr. pp. 49-50).

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Based on the record before this Court and Plea Counsel's credible testimony, this Court finds that Plea Counsel's investigation was reasonable. See Taylor, 404 S.C. at 364, 745 S.E.2d at 104 (citing Wiggins v. Smith, 539 U.S. 510, 522–23 (2003)). Notably, Applicant testified that he never wanted to go to trial. This Court will not credit Applicant's present claim that he would have gone to trial absent Plea Counsel's alleged failure to investigate, as Applicant has failed to present evidence of any discoverable matters or defenses Plea Counsel would have discovered had he been more prepared. This Court further finds Applicant has offered little more than mere speculation, and speculation does not meet Applicant's burden. Therefore, the Court finds Applicant failed to adequately show that he would have opted to go to trial but for Plea Counsel's lack of investigation.

Moreover, to whatever extent Applicant was not entirely satisfied with Plea Counsel's investigation, he was presented an opportunity to express his dissatisfaction to the plea court, knowingly opted not to do so, and instead chose to proceed with his guilty plea.

Accordingly, this Court finds Plea Counsel's representation of Applicant was not deficient, and he performed a reasonable investigation. Therefore, Applicant's request for relief by way of this allegation is **DENIED** and **DISMISSED**.

Allegation 1e: Failure to Explain the Consequences Between a Negotiated and Open Plea.

Applicant alleges Plea Counsel was constitutionally ineffective for failing to explain the difference between a negotiated and open plea. This Court finds this allegation is without merit.

The 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." Harres Leeke, 282 S.C. 131, 133, 318 S.E.2d 360, 361 (1984). In evaluating an allegation of PER

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guilty plea was based on inaccurate advice of counsel; the transcript of the guilty plea hearing will be considered to determine whether any possible error by counsel was cured by the information conveyed at the plea hearing. Wolfe v. State, 326 S.C. 158, 165, 485 S.E.2d 367, 370 (1997); cf. Rayford v. State, 314 S.C. 46, 443 S.E.2d 805 (1994) (finding that where the transcript of the guilty plea proceeding refuted applicant's claim that he did not understand the terms of a plea bargain, granting PCR was inappropriate notwithstanding applicant's claim his lawyer misadvised him).

At Applicant's plea hearing, the following colloquy between Applicant and the plea court occurred:

- Q: All right. And, Mr. Kendell Gamble, you are pleading guilty to burglary first degree which carries a minimum of 15 and a maximum of life; is that correct?
- A: Yes, sir.
- Q: And you are pleading guilty to attempted armed robbery which carries up to 20?
- A: Yes, sir.
- Q: You are pleading guilty to kidnapping which carries up to 30 years?
- A: Yes, sir.
- Q: And you are pleading guilty to attempted murder. You are pleading guilty to three counts of that. Each count carrying up to 30 years in jail; is that correct?
- A: Yes, sir.
- Q: And you are pleading guilty to possession of a weapon during the commission of a violent crime which carries up to five years; is that correct.
- A: Yes, sir.

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(Plea Tr. pp. 5-6)

At the evidentiary hearing on direct examination, Applicant testified he did know how much time he would get ahead of his guilty plea. Applicant testified Plea Counsel did not discuss the plea process with him. Applicant testified that Plea Counsel did explain that he would have to admit guilt before he would know the sentence the judge would render. Applicant

testified he thought the maximum he would get would be thirty years.

On cross-examination, Applicant testified he thought thirty years was the max and did not know how he got fifty years.³

On direct examination, Plea Counsel **credibly** testified he explained to Applicant the difference between a negotiated and open plea when he presented the State's plea offer. Plea Counsel **credibly** testified that he explained that Applicant could receive more time than the offer the State presented. Plea Counsel **credibly** testified the State offered a last-minute viable plea offer conveyed to Applicant of thirty years at eighty-five percent. Applicant chose not to accept the negotiated plea and chose to go with an open plea instead. Plea Counsel noted in his testimony that Applicant testified that he asked Plea Counsel a question of whether he had to plead guilty before the judge would impose the sentence, and Plea Counsel answered Applicant in the affirmative.

This Court finds the combination of the record and Plea Counsel's **credible** testimony at the evidentiary hearing provides Applicant knew the nature of the charges against him, the terms of the plea agreement, and the consequences of pleading guilty pursuant to the requirements of Boykin. See Boykin supra. Moreover, the plea colloquy cured any alleged deficiency regarding Plea Counsel's alleged erroneous advice. The plea transcript reflects that Applicant entered his plea knowingly and voluntarily, engaged in an intelligent colloquy with the plea court, and gave appropriate responses to the plea court's questions. Applicant has presented no valid reason why he should be able to depart from the statements made during his guilty plea as provided *supra*. See Crawford v. United States, 519 F.2d 347, 350 (4th Cir. 1975), overruled on other grounds by

³ Contrary to this testimony, Applicant previously testified on direct examination that he did not want to go to trial and face a life sentence, so he discussed with his mother whether to take the plea deal, or to go to trial and ended up rejecting the plea deal and receiving a higher sentence. (PCR Tr. p. 14-15)

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United States v. Whitley, 759 F.2d 327 (4th Cir. 1985) (finding that the accuracy and truth of an accused's statements at a guilty plea proceeding are "conclusively" established unless he makes some reasonable allegation why this should not be so).

Accordingly, this Court finds Applicant has failed to establish any deficiency by Plea Counsel or any prejudice flowing therefrom. Thus, this allegation must be **DENIED** and **DISMISSED**.

Allegation 1f: Failure to Ensure That the Plea Court Explained the Nature of Each Offense and Elements That Had to be Proven for Each Charged Offense.

Applicant alleges Plea Counsel was constitutionally ineffective for failing to ensure the plea court explained the nature of the charges and elements for each offense. This Court finds this allegation is without merit.

At the evidentiary hearing on direct examination, Applicant testified Plea Counsel did not explain the elements of attempted murder, nor what the State would be required to prove or any evidence that would support the charge.

On direct examination, Plea Counsel **credibly** testified that he explained the elements of the charges and what the State would have to prove to convict Applicant. Plea Counsel **credibly** testified that it is his standard practice to review the charges, the elements, the State's evidence, and potential collateral consequences.

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 (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

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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 the 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).

This Court finds Plea Counsel's testimony that he explained to Applicant the elements of the charges and what the State had to prove to convict Applicant credible. Further, this Court finds Applicant has failed to show that, but for Plea Counsel's performance, he would have proceeded to trial. See Roddy supra.

Accordingly, this Court finds Plea Counsel's representation of Applicant was not deficient, nor did Applicant demonstrate any prejudice flowing from Plea Counsel's performance in this matter. Therefore, Applicant's request for relief by way of this allegation is **DENIED** and **DISMISSED**.

Allegation 1g: Failure to Move for the First-Degree Burglary Charge to be Reduced to Second-Degree Burglary.

Applicant alleges Plea Counsel provided constitutionally ineffective assistance of counsel because he failed to move to reduce the first-degree burglary charge to second-degree burglary.

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This Court finds this allegation is without merit.

At the evidentiary hearing on direct examination, Applicant testified that a paralegal helped them prepare the memorandum attached to the application for PCR and told him that the criteria did not meet first-degree burglary. Applicant testified that he did not have any prior burglary convictions, nor did the incident occur at nighttime. However, Applicant testified that he, in fact, entered a home with a weapon with the intent to commit a crime. As well, Applicant testified that he did not recall pleading guilty to first-degree burglary that carried a minimum of 15 years to a maximum of life.

On direct examination, Plea Counsel credibly testified that, in his professional opinion, Applicant's actions met the requirements of first-degree burglary. Plea Counsel testified that Applicant entered the home with guns and knives strapped to their thighs. Plea Counsel credibly testified that any negotiation to reduce the charge would be up to the Solicitor and they had no interest in reducing the charges.

This Court finds Plea Counsel's representation with regard to this allegation was not deficient. This Court finds the record is without any evidence that Applicant's charge of first-degree burglary was not appropriate and that second-degree burglary would have been a more appropriate charge. The record provides Applicant and his co-defendant entered a home with guns and knives to commit a crime. Thus, this satisfies the statutory requirements for a charge of first-degree burglary.

Accordingly, this Court finds Plea Counsel's representation of Applicant was not deficient, nor did Applicant demonstrate any prejudice flowing from Plea Counsel's performance in this matter. Therefore, Applicant's request for relief by way of this allegation is **DENIED** and **DISMISSED**.

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

Kendell A. Gamble, #377230

Applicant,

v.

State of South Carolina,

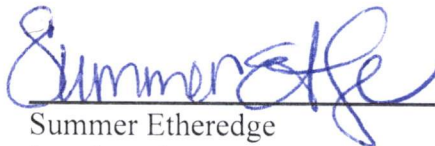
Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Order of Dismissal with Prejudice has been served upon the applicant by mailing one copy in the United States mail, postage prepaid, addressed to:

**Joshua A. Bailey, Esquire
Snow & Bailey Law Firm, P.A.
Post Office Box 555
Florence, SC 29503**

This 16th day of February, 2024.



Summer Etheredge
Legal Assistant for Respondent