STATE OF SOUTH CAROLINA COUNTY RICHLAND	)	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
Lontre J. Wise, #382266, Applicant, v. State of South Carolina, Respondent.	)	CASE NO. 2023–CP–40–03256 **ORDER OF DISMISSAL**

Presiding Judge:	Hon. Maite Murphy
Applicant's Attorney:	Timothy L. Griffith, Esq.
Respondent's Attorney:	Talida Balaj, Esq.
Probation Counsel:	Jennie L. Rischbieter
Date of Hearing:	January 11, 2024
Court Reporter:	Lisa Carter

This matter comes before the Court by way of Lontre J. Wise's (Applicant) application for post-conviction relief (PCR) filed on June 23, 2023. Respondent, the State of South Carolina, filed its Return on August 22, 2023, requesting an evidentiary hearing to resolve the claims set forth in the application. On January 11, 2024, an evidentiary hearing convened at the Richland County Courthouse before the Honorable Maite Murphy. Assistant Attorney General Talida Balaj represented Respondent. Applicant was present and represented by Timothy L. Griffith, Esquire. At the hearing, Applicant proceeded forward on the claims set forth in his original application. In support of these claims, Applicant testified on his own behalf, and Respondent presented testimony from Fifth Circuit Public Defender Jennie L. Rischbieter, Esquire.

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 relief and, accordingly, denies 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. During its May 2019 term, the Richland County Grand Jury indicted Applicant for Trafficking Crack Cocaine—28g–100g—3rd Offense (2019–CP–40–2599) and Possession with Intent to Distribute (PWID) Marijuana—1st Offense (2019–CP–40–2594). During its June 2020 term, the Richland County Grand Jury indicted Applicant for Possession of 28g or Less of Marijuana—2nd Offense (2020–CP–40–1109), PWID THC—1st Offense (2020–CP–40–1110), PWID Schedule IV—Alprazolam—1st Offense (2020–CP–40–1113), Possession of Controlled Substance—THC—1st Offense (2020–CP–40–1115), PWID Crack Cocaine—3rd Offense (2020–CP–40–1116), Driving Under Suspension—1st Offense (2020–CP–40–1117), and PWID Schedule II—Oxycodone (2020–CP–40–1119). Justin M. Kata, Esquire, represented Applicant. Fifth Circuit Assistant Solicitor Stephanie M. Taylor prosecuted the case.

On June 24, 2021, Applicant appeared before the Honorable Robert J. Bonds and pled guilty to the lesser offense of PWID Crack Cocaine—2nd Offense. As part of the negotiations, the State *nolle prossed* all other charges. Judge Bonds accepted the negotiated plea and sentenced Applicant to ten years imprisonment suspended on the service of three years' probation.

On March 31, 2023, Applicant appeared before the Honorable Robert E. Hood for a probation revocation hearing. Applicant was represented by Fifth Circuit Assistant Public Defender Jennie L. Rischbieter (Probation Counsel). Probation Agent Desmond Bradley (Agent Bradley) represented the State. Judge Hood found there was sufficient evidence to revoke Applicant's probation. Judge Hood revoked Applicant's probation and sentenced Applicant to five years imprisonment. Applicant did not appeal his sentence or conviction.

FACTS GIVING RISE TO THE CONVICTION

The incident giving rise to the facts in support of the plea were articulated by the State at Applicant's plea hearing as follows:

> On July 3rd, 2018, police referenced complaints in reference to narcotics being distributed from various rooms at the Star Motel at 3727 Pinebelt Road. A search warrant was executed on various rooms at the motel. Police raided Room 114 where they found the defendant as the sole occupant. Police located two cigarette boxes with crack rocks in it on a table. The defendant claimed ownership of the drugs post Miranda.

(Plea Tr. pp. 23 – 24).

SUMMARY OF FACTS FROM PROBATION REVOCATION HEARING[1]

The facts for this indictment were articulated by the State at Applicant's probation revocation hearing as follows:

> Before you today is Lontre Wise who was sentenced in Richland County on indictment number 19-GS-40-0259 for manufacturing and distribution of cocaine base, second offense. He received a sentence of ten years, suspended sentence, and three-years probation, no prior violations. Mr. Wise is before you today for failing to follow the advice and instructions of his agent. He failed to refrain from violating federal, state or local laws. He is in position of a firearm by a convicted felon, possession of a weapon during a violent crime, possession of crack cocaine and possession with intent to distribute marijuana as evidenced by his arrest on 12/13/2022 by the Richland County Sheriff's Department while on active supervision. He failed to refrain from being in possession of a firearm by a convicted felon and possession of a weapon during a violent crime. Prior to this incident report, the Richland County Sheriff's Department case number 220030891 on December 13, 2022. During a search of the residence pursuant to a search warrant they found a black Century Arms 9-millimeter semiautomatic handgun with a 9-millimeter magazine with 15 bullets and an empty chamber and a Smith & Wesson 38-caliber revolver with five 38-caliber bullets all found in a black backpack on a couch in the living room. He failed to pay supervision fees being in arrears $375 which

[1] The facts are taken from the probation revocation transcript as provided by Agent Bradley.

> was $1,775 at the issuance of process, failure to pay Court fines by being in arrears $108 with a balance of $283.25 at the issuance of process, failure to pay a drug test fee of $20 at the issuance of process. Such actions constitute violations 4, 6, 7, 9 and ten for special conditions.

(Probation Revocation Tr. pp. 3 – 4).

CURRENT ACTION BEFORE THIS COURT

Applicant timely commenced this PCR action on June 23, 2023, in which he alleged he was being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel
   a. "Violation was done without conviction for reasons listed!"
   b. "Counsel failed to advise me of my rights of appeal!"

Before this Court are Richland County Clerk of Court records regarding the subject conviction; Applicant's records from the South Carolina Department of Corrections; the plea transcript; the probation revocation transcript; and the records of this current PCR action.

STANDARD OF REVIEW

The Uniform Post-Conviction Procedure Act[2] (the Act) provides that any person who has been convicted of a crime may seek post-conviction relief based upon the following types of allegations:

1. That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;
2. That the court was without jurisdiction to impose sentence;
3. That the sentence exceeds the maximum authorized by law;
4. That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;

[2] S.C. Code Ann. §§ 17-27-10 to -160.

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).

The Sixth and Fourteenth Amendments to the United States Constitution guarantee Applicant, like all other defendants, the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984); Taylor v. State, 404 S.C. 350, 359, 745 S.E.2d 97, 101 (2013). Ordinarily, 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(e), SCRCP; Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The reviewing court applies the two-part test outlined in Strickland to determine whether counsel's conduct "was so [ineffective] as to require reversal" of the applicant's conviction or sentence. 466 U.S. at 687. First, the applicant must show that counsel's performance was deficient; and second, that the deficient performance prejudiced the applicant. Id. at 668; Butler, 286 S.C. at 442, 334 S.E.2d at 814.

The first prong—constitutional deficiency—is "necessarily linked to the practice and expectations of the legal community." Padilla v. Kentucky, 559 U.S. 356, 366 (2010). In order to prove deficient performance, the applicant must show counsel's representation fell below an objective standard of "reasonableness under prevailing professional norms." Cherry v. State, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814.

Strickland, however, "does not guarantee perfect representation[—]only a 'reasonably competent attorney.'" Harrington v. Richter, 562 U.S. 86, 110 (2011) (quoting Strickland, 466 U.S. at 687). Representation is constitutionally ineffective only if counsel's conduct "so undermined the proper functioning of the adversarial process" that the defendant was denied a fair proceeding. Strickland, 466 U.S. at 686. Just as there is "no expectation that competent counsel will be a flawless strategist or tactician, an attorney may not be faulted for a reasonable miscalculation or lack of foresight or for failing to prepare for what appear to be remote possibilities." Harrington, 562 U.S. at 110.

Accordingly, "[j]udicial scrutiny of counsel's performance must be highly deferential[, as] it is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Strickland, 466 U.S. at 689; see also Yarborough v. Gentry, 540 U.S. 1, 8 (2003) ("The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight."). Unlike a later reviewing court, the attorney observed the relevant proceedings; knew of materials outside the record; and interacted with the client, opposing counsel, and the judge.

Thus, the question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom. Id. (quoting Strickland, 466 U.S. at 690).

Thus, a fair assessment of attorney performance requires every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Id. Because of the difficulties inherent in making such an evaluation, the reviewing court must indulge in a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Butler, 286 S.C. at 445, 334 S.E.2d at 816. The applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625.

Reviewing courts "must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 690. An applicant making a claim of ineffective assistance "must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." Id. The reviewing court must then "determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." Id.

The Strickland standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. 466 U.S. at 689-690; see also Harrington, 562 U.S. at 105 (cautioning that an ineffective assistance of counsel claim could potentially function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial). Even under *de novo* review, the standard for judging counsel's representation is a most deferential one. Harrington, 562 U.S. at 105. Unlike a later reviewing court, the attorney observed the relevant proceedings; knew of materials outside the record; and

interacted with the client, opposing counsel, and the judge. Thus, the question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," **not** whether it deviated from best practices or most common custom. Id. (quoting Strickland, 466 U.S. at 690) (emphasis added).

The second, or "prejudice" prong of Strickland is rooted in the very purpose of the Sixth Amendment guarantee of counsel—to ensure a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. Id. at 691–92. In order to prove prejudice, an applicant must demonstrate counsel's deficient performance prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. A reasonable probability is a probability "sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. Thus, it is not enough "to show that the errors had some conceivable effect" on the outcome of the proceeding—counsel's errors must be "so serious as to deprive the defendant of a fair trial." Id. at 687 (emphasis added).

Because the Sixth Amendment right to counsel also applies to a defendant entering a guilty plea, Hill v. Lockhart extended the two-part Strickland test to challenge guilty pleas based on ineffective assistance of counsel. 474 U.S. 52 (1985); cf. Padilla, 559 U.S. at 373 (recognizing the guilty plea process is a "critical phase of litigation" for purposes of the Sixth Amendment right to effective assistance of counsel). A claim of ineffective assistance of guilty plea counsel requires the applicant present evidence satisfying two prongs: first, evidence that counsel's performance was deficient; and second, evidence that counsel's deficient performance prejudiced the defendant by causing him to plead guilty rather than go to trial. Hill, 474 U.S. 52.

The analysis of counsel's performance under the first prong of Strickland remains

unchanged—the applicant must show counsel's representation fell below the objective standard of reasonableness demanded of attorneys in criminal cases. Hill, 474 U.S. at 58–59; accord Thompson v. State, 340 S.C. 112, 115, 531 S.E.2d 294, 296 (2000). An applicant alleging his plea was induced by ineffective assistance of counsel must prove counsel's advice to plead guilty was not "within the 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 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 decision making" 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 (2017). However, an applicant must convince the court that a decision to reject the plea bargain would have been rational under the circumstances. Padilla, 559 U.S. at 372. The question here is whether the applicant, if correctly informed of circumstances surrounding the plea, would have pleaded guilty—not whether counsel would have still advised him or her to plead guilty. Turner v. State, 335 S.C. 382, 385, 517 S.E.2d 442, 444 (1999).

Surmounting Strickland's high bar is never an easy task, and the strong societal interest in finality has "special force with respect to convictions based on guilty pleas." Lee, 582 U.S. at 368-369 (internal citations and quotation marks omitted); cf. Hill, 474 U.S. at 358 ("[R]equiring a showing of 'prejudice' from defendants who seek to challenge the validity of their guilty pleas on the ground of ineffective assistance of counsel 'will serve the fundamental interest in the finality

of guilty pleas.'"). Reviewing "[c]ourts should not upset a plea solely because of post hoc assertions from a defendant about how he would have pleaded but for his attorney's deficiencies." Lee, 582 U.S. at 369. "Rather, [judges] should instead look to contemporaneous evidence to substantiate a defendant's expressed preferences." Id. In determining whether a guilty plea was taken in accordance with constitutional standards, the reviewing judge must analyze and consider the entire record, including the transcript of the plea and the evidence presented at the PCR hearing. Harres v. Leek, 282 S.C. 131, 134, 318 S.E.2d 360, 361 (1984).

The performance and prejudice standards, however, "do not establish mechanical rules; [t]he ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." Strickland, 466 U.S. at 696. Moreover, "there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one." Id. at 697. The court "need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." Id. "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice," the court may evaluate the prejudice prong only. Id.

A probationer's right to counsel arises as a matter of due process rather than under the Sixth Amendment, but "the same analysis for [violations of the Sixth Amendment right to counsel] ... appl[ies] in PCR proceedings involving claims against probation counsel." Turner v. State, 384 S.C. 451, 455, 682 S.E.2d 792, 794 (2009). Under this analysis, the PCR applicant must prove "(1) counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) counsel's deficient performance prejudiced the applicant's case." Speaks v. State, 377 S.C. 396, 399, 660 S.E.2d 512, 514 (2008).

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), SCRCP (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 (Ct. App. 2015) ("In a PCR proceeding, the applicant bears the burden of establishing that he or she 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 Probation Counsel's testimony at the evidentiary hearing credible and persuasive, where she 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, she rendered adequate assistance and exercised reasonable professional judgment in her 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).

This Court makes the following findings from the record: 1. Applicant swore under oath to testify truthfully (Probation Revocation Tr. p. 3); 2. Agent Bradley, in the presence of Applicant, informed the probation court of each of Applicant's probation violations (Probation Revocation p. 3); 3. A recommendation of five years imprisonment was made (Probation Revocation p. 4); 4. Probation Counsel requested a sentence of three years be imposed (Probation Revocation p. 5); 5. Probation Counsel presented mitigating facts in support of Applicant's request for three years imprisonment (Probation Revocation p. 5); 6. Applicant made an admission of guilt before the probation court (Probation Revocation pp. 5, ll. 25 – 6, ll. 1-9); 7. Applicant did not contest he violated the conditions of his probation (Probation Revocation. p. 6); 8. The probation court found there was sufficient evidence Applicant violated his probation (Probation Revocation p. 6).

INEFFECTIVE ASSISTANCE OF PLEA COUNSEL ALLEGATIONS ON THE MERITS

Allegation 1: Probation Counsel Was Ineffective Because Applicant's Probation Was Unlawfully Revoked Based on Charges Applicant Had Not Been Convicted of

Applicant alleges Probation Counsel was ineffective because his probation was revoked based on charges he had not been convicted of. This Court finds these allegations are without merit.

On direct examination, Applicant testified that he is being held in SCDC despite not being convicted of a crime. (PCR Tr. p. 8). Applicant testified that the judge determined he violated probation based on what the officer said at his probation hearing and not based on the charges that he received. (PCR Tr. p. 8). Applicant testified there were no charges against him, only the officer's statement that he committed a crime. (PCR Tr. p. 8). Applicant testified he understood when he pled guilty, he was convicted of a crime. (PCR Tr. p. 9). Applicant testified that at his probation revocation hearing, the court informed him the hearing was based on the charges he received on December 12, 2022. (PCR Tr. p. 10). Applicant testified he understood he was facing criminal charges but that he was not found guilty of the charges, and the court merely wanted to revoke his probation regardless. (PCR Tr. p. 10).

Applicant testified he attempted to speak with Probation Counsel during the probation revocation hearing, but time was limited, and Probation Counsel is overworked and underpaid as a public defender and can only give so much of her time. (PCR Tr. p. 10). Applicant testified the judge revoked his probation based on the officer's word that Applicant had cocaine in his possession, but the officer never charged him with anything. (PCR Tr. p. 11). Applicant testified he understood that there are pending charges against him, but the judge specifically stated in the probation revocation transcript that he was revoking Applicant's probation based on the officer's word and not the pending charges. (PCR Tr. pp. 11 – 12). Applicant testified that he could not be punished if there was no finding of guilt, citing the South Carolina Rules of Court and South Carolina Rules of Regulation Section 17-10-25[3]. (PCR Tr. p. 12). Applicant testified Probation

[3] This Court notes Applicant is citing the South Carolina Code of Laws Unannotated Section 17-25-10, which states: "No person shall be punished until legally convicted." See S.C. Code § 17-25-10.

Counsel did not discuss the dynamics of his probation hearing in detail, but Probation Counsel explained to Applicant his new charges could be enough to violate his probation. (PCR Tr. p. 13).

On direct examination, Probation Counsel testified she has been practicing law for seven years, all in criminal, and had participated in many probation revocation hearings. (PCR Tr. p. 15). Probation Counsel testified that she was appointed to Applicant's case approximately three months before his probation revocation hearing. (PCR Tr. p. 16). Probation Counsel testified that prior to Applicant's probation revocation hearing, Applicant had an administrative hearing where Applicant learned what Agent Bradley would say at his probation revocation hearing. (PCR Tr. p. 16). Probation Counsel testified that based on what she and Applicant learned from the administrative hearing, they prepared for his probation revocation hearing. (PCR Tr. p. 16). Probation Counsel testified she explained to Applicant new arrests can be considered a violation of probation. (PCR Tr. p. 16).

At the probation revocation hearing, Agent Bradley presented Applicant's violations to the court, stating the following:

> Mr. Wise is before you today for failing to follow the advice and instructions of his agent. He failed to refrain from violating federal, state or local laws. He is in position of a firearm by a convicted felon, possession of a weapon during a violent crime, possession of crack cocaine and possession with intent to distribute marijuana as evidenced by his arrest on 12/13/2022 by the Richland County Sheriff's Department while on active supervision. He failed to refrain from being in possession of a firearm by a convicted felon and possession of a weapon during a violent crime. Prior to this incident report, the Richland County Sheriff's Department case number 220030891 on December 13, 2022. During a search of the residence pursuant to a search warrant they found a black Century Arms 9-millimeter semiautomatic handgun with a 9-millimeter magazine with 15 bullets and an empty chamber and a Smith & Wesson 38-caliber revolver with five 38-caliber bullets all found in a black backpack on a couch in the living room. He failed to pay supervision fees being in arrears $375 which was $1,775 at the issuance of process, failure to pay Court fines by being in arrears

> $108 with a balance of $283.25 at the issuance of process, failure to pay a drug test fee of $20 at the issuance of process. Such actions constitute violations 4, 6, 7, 9 and ten for special conditions.

(Probation Revocation Tr. pp. 3, ll. 16-25 – 4, ll. 1-17). In response, Applicant did not deny he violated probation, nor requested his probation not be revoked, but requested three years imprisonment rather than the recommended term of five years. (Probation Revocation Tr. pp. 4 – 6).

Importantly, Applicant made the following statements to the court:

The Court:	All right. Mr. Wise, is there anything you'd like to say?
The Defendant:	Yes, sir. I completely regret the situations that I did before the Court and all, and as agent Bradley can attest, I had no problem while out on probation. I was actually --
The Court:	You were doing good until you picked up these charges.
The Defendant:	Yes, sir. I have other issues that I've been dealing with before this, you know. I failed to get any kind of help or anything on it because of my own stupidity and stuff.
The Court:	Okay.
The Defendant:	But I would ask that Your Honor please take into consideration Ms. Rischbieter's recommendation and revoke me no more than three years and give me time for good credit, please, Your Honor

(Probation Revocation Tr. pp. 5, ll. 23-25 – 6, ll. 1-14).

This Court finds Probation Counsel was not deficient, and Applicant did not suffer any prejudice from Probation Counsel's performance. Applicant avers the court improperly considered his impending charges in determining Applicant violated his probation, completely disregarding the prior conviction that his probation stemmed from and other violations that led to his probation revocation hearing. Additionally, Applicant erroneously understands his probation revocation hearing as an adjudication of his pending charges, claiming he is being unlawfully imprisoned on

those charges even though he was never found guilty. State v. Hill, 368 S.C. 649, 630 S.E.2d 274 (2006) (While underlying probation violations may be criminal offenses, the probation-revocation proceeding is not a criminal trial of those charges.)). A probationer may be arrested for violating *any* conditions of their probation, and upon arrest, the court may institute proceedings and revoke their probation. See S.C. Code Ann. § 24-21-450 and -460. Probation Counsel cannot be deficient for Applicant's erroneous understanding, especially where Probation Counsel credibly testified that she advised Applicant his pending charges were considered violations of his probation conditions. Therefore, this allegation is **DENIED** and **DISMISSED WITH PREJUDICE.**

Allegation 2: Probation Counsel Failed to Advise Applicant of his Right to Appeal

Applicant alleged Probation Counsel was ineffective for failing to advise him of his right to appeal the revocation of his probation, denying Applicant his right to appeal. This Court finds these allegations are without merit.

At the evidentiary hearing, on direct examination, Probation Counsel testified she did not advise Applicant he had the right to appeal his probation revocation, but that Applicant did not advise her he wished to appeal. (PCR Tr. pp. 16 – 17). Probation Counsel testified she was not aware that appealing a probation revocation hearing was possible, and therefore, was unaware of any non-frivolous issues arising from Applicant's probation revocation. (PCR Tr. p. 17).

On cross-examination, Probation Counsel testified she failed to inform Applicant about his right to appeal, and the probation judge did not advise Applicant of his right to appeal. (PCR Tr. p. 18).

Generally, there is no constitutional deprivation in not being advised of the right to appeal from a guilty plea absent extraordinary circumstances, such as when there is a reason to think a rational defendant would want to appeal—where a non-frivolous ground exists to appeal—or

defendant reasonably demonstrated an interest in appealing. Roe v. Flores-Ortega, 528 U.S. 470, 120 S.Ct. 1029 (2000); Weathers v. State, 319 S.C. 59, 459 S.E.2d 838 (1995). Like a guilty plea, probation counsel is not required "to inform a probationer of his right to an appeal absent extraordinary circumstances." Turner v. State, 384 S.C. 451, 456–57, 682 S.E.2d 792, 795 (2009) (finding "probation counsel is not held to a higher performance standard than that imposed upon plea counsel.").

This Court finds Applicant has failed to meet his burden to show extraordinary circumstances existed that would have required Probation Counsel to appeal on his behalf, and thus, Probation Counsel was not deficient, and Applicant suffered no prejudice. Probation Counsel credibly testified Applicant did not advise her he wished to appeal his probation revocation. Additionally, a review of the record shows Applicant did not contest the revocation of his probation (Probation Revocation Tr. pp. 4-6), and there were no non-frivolous issues that would have prompted Probation Counsel to appeal on Applicant's behalf. Therefore, this allegation is **DENIED** and **DISMISSED WITH PREJUDICE**.

CONCLUSION

Based on all the foregoing, this Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be **DENIED and DISMISSED with PREJUDICE**.

This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), an Applicant has a right to an appellate counsel's assistance in seeking

review of the denial of PCR. Rule 71.1(g), SCRCP, provides that PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf if the Applicant wishes to seek appellate review. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and

2. The Applicant must be remanded to the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 6 **day of** March **, 2024.**

Maite Murphy

THE HONORABLE MAITE MURPHY
Presiding Judge
Fifth Judicial Circuit

Summerville, South Carolina