THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas
Edward W. Miller, Circuit Court Judge

Case No. 2015-CP-32-01888

Thomas Stafford,.....Petitioner,

v.

State of South Carolina, ...Respondent.

Notice of Appeal

Thomas Stafford appeals the order of the Honorable Edward W. Miller, dated January 19, 2024, dismissing his application for post-conviction relief. This appeal is taken from the order of Judge Miller, dated May 22, 2024, filed on May 28, 2024, denying Mr. Stafford's Rule 59(e), SCRCP motion.

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STATE OF SOUTH CAROLINA COUNTY OF LEXINGTON	)	IN THE COURT OF COMMON PLEAS FOR THE ELEVENTH JUDICIAL CIRCUIT
Thomas Stafford, S.C.D.C. No. 357279, Applicant, v. State of South Carolina, Respondent.	)	Case No. 2015-CP-32-1888 ORDER DENYING THOMAS STAFFORD'S RULE 59(e) MOTION

This matter came before this Court by a Rule 59 Motion by Applicant Thomas Stafford, through retained counsel E. Charles Grose dated February 8, 2024 and filed March 7, 2024. This motion arises from the Order dated January 19, 2024 and filed January 31, 2024. A Reply was made on filed at the April 26, 2024 request of this Court under Rule 59.

This Court has reviewed the materials and denies the Rule 59 motion for the following reasons.

I.

In his Motion before this Court, the Applicant asserts the following reasons for Relief.

- THRESHOLD MATTER: VIOLATION OF SECTION 17-27-80 AND THE SEPARATION OF POWERS. (Motion, p. 1-3).
- Grounds for Relief
  - **Failure to Move to Withdraw the Guilty Plea.** (Motion p. 3-5)
    - "(1) ineffective assistance of trial counsel for allowing the guilty plea to move forward and/or failing to withdraw the guilty plea when the prosecutor changed the plea negotiations as the last moment and
    - (2) ineffective assistance of counsel for not moving to withdraw the guilty plea wen the State breeched the agreement to remain silent on sentencing."
  - **Failure to Investigate.** (Motion, p. 5-9)
    - (1) failure to investigate, discover and present evidence that would have provided a defense to the charges, and
    - (2) failing to investigate, discover, evidence that would have mitigated or reduced the sentence imposed.

This Court concludes the Applicant's motion should be denied for the reasons set forth below:

A. VIOLATION OF SECTION 17-27-80 AND THE SEPARATION OF POWERS. (Motion, p. 1-3).

In the first section, The Applicant claims he is entitled to Rule 59 and claims he was denied the right to have the matter adjudicated by a judicial officer. He claims that the responsibility was delegated to the Attorney General's Office and that such delegation violated the separation of powers required by S.C. Const. Art. I, §8. His basis is that this Court signed the proposed order presented by the Attorney General's Office, making only minor formatting changes. He references *Hall v. Catoe*, 360 S.C. 353, 601 S.E.2d 335, 341(2004) and *Fishburne v State*, 427 S.C. 505, 832 S.E.2d 584 (2019) in support of his position.

It is the Applicant's position that no judge should request proposed orders prepared by the parties in any case and that it is state constitutional error for this Court to sign and adopt the order as a violation of their duty to adjudicate decisions. The Applicant misreads both the intent and effect of *Hall* and *Fishburne*.

In *Hall*, the Court was faced with the preparation of orders in capital PCR matters. The Court there noted that "[I]t is common practice for judges to ask a party to draft a proposed order for the sake of efficiency." Importantly, the *Hall* court noted the following important factors as it relates to the Applicant's case:

> The commentary to South Carolina Appellate Court Rule 501, Canon 3 B(7)(e) provides that "[a] judge may request a party to submit proposed findings of fact and conclusions of law, so long as the other parties are apprised of the request and are given an opportunity to respond to the proposed findings and conclusions." Further, in Pruitt v. State, this Court directed that:
>
> > [c]ounsel preparing a proposed order should be meticulous in doing so, opposing counsel should call any omissions to the attention of the PCR judge prior to issuance of the order, and the

> PCR judge should carefully review the order prior to signing it. Moreover, after an order is filed, counsel has an obligation to review the order and file a Rule 59(e), SCRCP, motion to alter or amend if the order fails to set forth the findings and the reasons for those findings as required by § 17-27-80 and Rule 52(a), SCRCP....
>
> 310 S.C. 254, 256, 423 S.E.2d 127, 128 (1992).

Hall v. Catoe, 360 S.C. 353, 364–65, 601 S.E.2d 335, 341 (2004).

In addition the *Hall* court concluded :

> Although we strongly encourage PCR judges to draft their own findings of fact and conclusions of law in death penalty cases, **we also acknowledge that in all other cases, it is common practice for judges to ask a party to draft a proposed order for the sake of efficiency.** ***In the present case, the evidence sufficiently indicates that the PCR judge spent an adequate amount of time reviewing the order before adopting it.*** Further, Hall waived his right to make this challenge when he failed to file a motion to alter or amend the order. Id.

Hall v. Catoe, 360 S.C. 353, 365, 601 S.E.2d 335, 341 (2004) (emphasis added).

In *Fishburne*, the Court faced with an Order that the Court deemed insufficient in its fact-finding and conclusions of law on issues that were actually raised and presented. The *Fishburne* court endorsed the procedure taken in the present case, contrary to the implication of Applicant:

> We do not place the blame on a single party below for an insufficient PCR order. The preparation and finalization of a PCR order is often a collaborative effort. We recognize the prevailing party often prepares a proposed order for the PCR court. *See Hall v. Catoe*, 360 S.C. 353, 365, 601 S.E.2d 335, 341 (2004) ("[I]t is common practice for judges to ask a party to draft a proposed order for the sake of efficiency."). ***When counsel for either side prepares the proposed order, the order must include findings of fact and conclusions of law as to all issues raised by an applicant. 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. Because the PCR judge will ultimately be signing the order, the PCR judge must carefully review the proposed order to ensure it includes appropriate findings of fact and conclusions of law as to all issues raised.*** Once a proposed order is finalized, signed by the PCR judge, filed, and served upon the parties, the parties should thoroughly review the final order to make sure all issues raised were adequately addressed as required by section 17-27-80 and Rule 52(a); if they were not, a timely Rule 59(e) motion should be filed, requesting the PCR court to address

> the appropriate issues. When these steps are ignored on the front end, we find ourselves having to remand a case, as we do today.

Fishburne v. State, 427 S.C. 505, 516, 832 S.E.2d 584, 589–90 (2019). *See also Pruitt v. State*, 310 S.C. 254, 423 S.E.2d 127 (1992)

Like in *Hall*, adequate steps were taken in the matter. On July 25, 2023, after reviewing the Applicant's pos-hearing brief, the Court emailed both counsel and requested a proposed order reflecting the court's ruling. On December 29, 2023, the Respondents emailed a copy of Respondent's proposed order with the following email:

> Judge Miller, et al.
>
> Attached is Respondent's Proposed Order in the above-captioned case heard by Judge Mille on June 22, 2023. **I am providing a copy simultaneously to Applicant's retained counsel Charles Grose for his initial review as well.**
>
> If further information or transcripts are required, please advise me. My apologies to the Court, Mr. Grose, and his client for my delay in getting this matter and request completed.

December 29, 2023 Email.

There was no opposition to the preparation of a proposed order by the State nor to the Court's request from July 25, 2023 through December 29, 2023 until the proposed order was submitted to this Court nor from December 29 through January 19, 2024 when the Order was signed by this Court. This is contrary to the demands upon Applicant's counsel with procedures set out in *Fishburne*.

This Court did not abdicate its role in judicial adjudication as Applicant suggests. After reviewing the Applicant's brief, this Court requested the State to submit a proposed order finding that Applicant's counsel did not fall below the objective standard of reasonableness and that he was not prejudiced by the conduct. *July 25, 2023 email.* Next, after receipt of the proposed order on December 29, 2023 until this Court signed an Order of Dismissal, the Applicant was silent

about his current contention that the State was not authorized to prepare a proposed order nor that the Court acted in violation of Article I. Section 8 or §17-27-80 in the mere request for a proposed order from a prevailing party. In addition, like the setting in *Hall*,

> In the present case, the evidence sufficiently indicates that the PCR judge spent an adequate amount of time reviewing the order before adopting it.

The request to have the Court withdraw its order its January 19, 2024 is denied.

The process of submitting proposed orders is built into our rules, (see Rule 5(b)(3), SCRCP), and custom, *Hall,* 360 S.C. at 365, 601 S.E.2d at 341. Further, a long line of precedent, state and federal, allows the acceptance of proposed order language where the court independently reviews and adopts the language as its own. *See, e.g., Jefferson v. Upton*, 560 U.S. 284, 293-94 (2010) (acknowledging prior holdings that "verbatim adoption of findings of fact prepared by prevailing parties" should be treated as findings of the court though recognizing it had "also criticized that practice.") (citing *Anderson v. Bessemer City*, 470 U.S. 564, 572 (1985))[1]; *State v. Holmes*, 832 S.E.2d 777, 781 (Ga. 2019) ("It is well established that a trial court may request and then adopt a proposed order from one party. Doing so does not itself demonstrate an absence of cautious discretion.") (internal citations omitted); *McGahee v. State,* 885 So.2d 191, 229–30 (Ala.Crim.App.2003) ("even when a trial court adopts verbatim a party's proposed order, the findings of fact and conclusions of law are those of the trial court and they may be reversed only if they are clearly erroneous."). *See also Bryant v. Stirling*, No. 9:16-cv-1423-DCN-MHC, 2022 WL 10686835 *12 n. 6 (D.S.C. April 19, 2022) ("As this court and others have recognized on many occasions, it is disfavored for courts to wholesale adopt proposed findings and conclusion

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[1] Though the Supreme Court in *Anderson* noted the criticism, the Court ultimately resolved "that even when the trial judge adopts proposed findings verbatim, the findings are those of the court and may be reversed only if clearly erroneous." *Anderson*, 470 U.S. at 572.

by one party; "[n]onetheless, the disposition of a petitioner's constitutional claims in such a manner is unquestionably and 'adjudication' by the state court.").[2]

This Court denies this portion of the Rule 59 motion.

REMAINING ISSUES OF THE RULE 59 MOTION

This Court finds that the remainder of the Rule 59 motion should be denied. The Applicant has failed to show that this Court misunderstood, failed to fully consider, or failed to rule on an argument or issue or an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review. Our rules contemplate two basic situations in which a party should consider filing a Rule 59(e) motion:(1) a party may wish to file such a motion when he believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider to rule on it; and (2) a party must file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review. *Elam v. South Carolina Dept. of Transp.*, 361 S.C. 9, 602 S.E.2d 772 (2004). As set forth below, the Motion is denied.

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[2] Other cases similarly allow adoption of such language. *See, e.g., United States v. El Paso Nat. Gas Co.,* 376 U.S. 651, 656 (1964) (in reviewing order from district court adoption of entirety of proposed order, "Those findings, though not the product of the workings of the district judge's mind, are formally his; they are not to be rejected out-of-hand, and they will stand if supported by evidence."); *Tennille v. W. Union Co.*, 785 F.3d 422, 440 (10th Cir. 2015) ("the fact that the district court adopted the order drafted by the parties, alone, does not establish that the district court failed to exercise its judgment independently"); *Lansford-Coaldale Joint Water Auth. v. Tonolli Corp.*, 4 F.3d 1209, 1215 (3d Cir. 1993) ("While we cannot dispute that a district court's verbatim adoption of many of a party's proposed findings does not always represent a desirable practice, we are satisfied that the district court's findings here satisfy Rule 52(a) and should be upheld unless they are not supported by the evidence in the record."); *Patton v. State,*784 So. 2d 380, 388 (Fla. 2000) (rejecting challenge to verbatim adoption noting,"[t]he court chose to adopt the State's arguments as an accurate and well-documented reflection of the facts and law pertaining to the issues.").

A.

Failure to Move to Withdraw the Guilty Plea. (Motion p. 3-5).

In his motion, the Applicant contends that the Court erred in failing to make adequate fat findings related to the nature of the plea negotiations and the alleged change and that the plea should have been withdrawn by defense counsel based upon an alleged breach of the agreement when law enforcement made a request for a sentence after the solicitor had previously agreed to remain silent as to sentencing. This Court finds it adequately addressed the facts within its Order and made appropriate legal conclusions based upon the facts.

The Applicant's initial focus is the assertion that that Solicitor agreed to remain silent on the sentence imposed. Applicant contends that the Court's findings supported the existence of the agreement but stopped short of the ultimate finding. This Court disagrees and concludes it did address those necessary and specific findings in its order:

> "The Applicant contends that the State did not honor the plea agreement, relying upon email correspondence that predated the day of the plea and the testimony of family members present at the plea who asserted Applicant was confused at the time of the plea. This Court concludes that there was no unkept plea bargain agreed between the parties and no basis for counsel to either object or move to withdraw the guilty pleas."

Order, p. 12-13.

> "This Court must conclude that the plea bargain entered at the time of the entry of the guilty plea was satisfied by the actions of the Applicant, defense counsel and the prosecutor. On the day the plea was entered and the time it was entered the relevant parties were aware of and accepted the terms of the plea offer. This Court finds that the actual plea offer that was accepted at the entry of the plea was that the Applicant would plead guilty to felony DUI resulting in death and plead guilty under *North Carolina v. Alford* to leaving the scene of an accident resulting in death without a negotiated sentence, without a sentence recommendation by the prosecution and the defense was free to argue whatever sentence it deemed appropriate. In return the prosecutor agreed to dismiss the pending DUI second offense. This Court further finds that the 17 year concurrent sentences the Applicant received were consistent with the agreed negotiation."

Order, p. 14-15.

> "Unlike *Thompson* and *Jordan*, at the time the plea was entered the defense counsel, the Applicant and the prosecution were aware that the agreed negotiation included the entry of the Alford plea to leaving the scene of the accident. This is supported by the testimony of defense counsel, the prosecutor and Applicant. The fact that the Applicant's family may have been surprised at the time of the plea by the inclusion of the second charge does not bind the Court or the prosecution. The Applicant was aware at the time of the entry of the plea of its inclusion during the plea with the understanding that he was pleading under *Alford*. Tr.p. 6, l. 12-p. 9, l 2. In addition to this testimony, the defense counsel was credible in her assertion that she was aware that the removal of the pending leaving the scene charge would only occur if there was agreement by the victim's family which did not occur on the eve of the plea. Applicant's Exhibit 14 is contemporaneous and consistent with this understanding. Further, the prosecutor credibly stated that the removal of the leaving the scene charge throughout the negotiation was contingent upon the victim's approval.
>
> Unlike, *Thompson*, *Jordan*, and *Smith*, **the understanding of the negotiations as Applicant entered the plea was consistent with what occurred.** The prior hopes and expectations of the defense counsel and his family that the charge would be dropped did not occur and was not part of the plea bargain. Unlike Thompson and Jordan, the prosecutor also complied with his agreement that he would not seek a particular sentence or consecutive sentences. As counsel stated clearly in Applicant's Exhibit 14, "**the deal with the prosecution was that they were not going to put a number on the record and would not take a position on sentencing. We always knew the victims were going to ask for something very high due to their emotions.**" Further, the prosecutor had indicated to the judge in chambers that **he had no position on sentencing**. The Applicant's reliance upon earlier emails between counsel with the mother and father, which predated that day of the plea and admittedly before the firm and final offer was made by the State is not persuasive after the credible explanation by defense counsel."

Order, p. 16-17 (**emphasis added**).

The Applicant suggests that the sentencing request of State Highway Patrol First Sgt. Chris Sheldon was a violation of the plea agreement with the Solicitor and was not addressed in the Order. However, this Court addressed that assertion in the order at page 17, footnote 3 where the Court concluded:

> The Court notes that consistent with the expectations and negotiation during the plea the victim's mother made a victim impact statement on behalf of the family

> asked for the maximum allowed sentence. Tr.p. 26. Similarly, on behalf of the State Highway Patrol First Sgt. Chris Shelton and supervisor of at the scene also speaking on behalf of the victim's family asked for the maximum sentence. Tr.p. 27. **These presentations were also consistent with the expectations of defense counsel and did not suggest that reasonable counsel should have either objected or moved to withdraw the plea at that time as a violation of the plea agreement.**

Order, p. 17, n. 3.(**emphasis added**).[3]

The Applicant also requested this Court to reconsider the findings in light of the PCR testimony from the Applicant and his family members. *Motion, p. 4-5.* As Applicant acknowledges, this Court did not ignore the PCR testimony of Applicant and his family. *Motion, p. 4, citing Order, p. 7-8.* However, the Applicant places undue emphasis upon the Applicant's parsed response to the plea court's inquiry about the legal meaning of *Alford*, as undermining the knowing and voluntary plea. *Motion p. 5.* However, Applicant ignores the follow-up questioning of the Applicant by Judge Hood about the *Alford* concept, and Stafford's ultimate affirmance of his understanding of that concept. *Plea Tr.p. 7-8.* This issue was also addressed in the Court's Order, p. 16-17. Also, *Order, p. 16, n. 2.* As noted there, the Applicant has failed to present a cogent reason as to why he should not be held to the truth of his statements at the plea. *See Blackledge v. Allison*, 431 U.S. 63, 74, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977) (holding that solemn declarations in open court "carry a strong presumption of verity").

This portion of the Rule 59 motion should be denied after reconsideration was given by this Court. Counsel was not ineffective under *Strickland v. Washington*, 466 U.S. 668 (1984) in failing to move to withdraw the guilty plea.

FAILURE TO INVESTIGATE

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[3] First Sgt. Shelton's plea testimony is located in the plea transcript at page 27 where he stated " he's done this once, he's done it twice, and there's a point in time obviously we ask that the maximum sentence be given. And I appreciate you giving me the opportunity to speak on behalf of the Johnson family." Plea Tr.p. 27,m l. 16-17.

In his remaining assertion in his motion, Applicant asserts that the Court's order was inadequate in addressing counsel's failure to adequately investigate evidence which he claims would have presented a defense to the charge or mitigated the sentence. He claims that the Court's conclusions are contradicted by the record. Motion, p. 5-8. This Court finds it appropriately addressed the Applicant's concerns within its Order at pages 19-24, albeit not to the conclusion that Applicant now seeks. The Applicant complains that the Court deferred to the credible and uncontradicted testimony about defense retained psychiatrist Dr. Donna Maddox's expressed unwillingness to continue her evaluation prior to the plea due to the Applicant's malingering of mental symptoms. He fails to acknowledge that counsel was acting reasonably in his retention of the expert which was thwarted by the actions of the Applicant. Applicant emphasizes various additional steps that Dr. Maddox, prior to removing herself from the case, recommended to counsel Browder to do. He then speculates that if counsel would have completed the steps that it may have led to Dr. Maddox to return to the defense team in the investigation. Motion, p. 6.

The Court addressed or rejected the Applicant's concerns in its Order. Concerning whether counsel in preparing the defense, but was precluded by the Applicant's uncontested malingering:

> This Court must find that counsel performed a reasonable investigation related to the Applicant's mental status by retaining Dr. Maddox, Dr. Brawley, and Dr. Morton to assess the Applicant's mental state and the impact of his drugs injection on his performance. The critical problem was that the Applicant was determined to be malingering by Dr. Brawley, the neuropsychologist, during her neuropsychological testing of the Applicant. This critical finding at that time precluded further assessment by Dr. Brawley and Dr. Maddox at that time. It is uncontested that counsel attempted to get Dr. Maddox to continue to complete an examination of the Applicant after the malingering assessment, but she refused to do so due to the Applicant's malingering. This is not a situation where there was no investigation into the Applicant's mental health, but an investigation was attempted but impacted by the Applicant's malingering of his mental symptoms.

Order, p. 20.

The evidence that supported the conclusions was from both counsel Browder and Dr. Maddox who both confirmed at the PCR hearing that Dr. Maddox refused every request to become involved after the malingering conclusion.

The Applicant also ignores in his assertion this Court's earlier findings related to the mitigation presentation actually made by defense counsel before Judge Hood. *Order, p. 21-22.* This Court had before it the significant mitigation presentation materials shown to Judge Hood revealing evidence of Applicant's methadone treatments, the prescriptions for Klonopin for anxiety and Vybrid for depression. *PCR , State Exhibit 2.* Counsel Browder described to the sentencing court Applicant's 2011 accident that caused a compressed disc in his back which led to his addiction to pain medication. *Tr.p. 31.* She presented that as a result of the accident he began methadone treatments which he had been faithful to since October 2011 for a year prior to this incident. She further noted the impact of having lost a child a couple months before led to a tailspin prior to the accident and a period of depression and extreme anxiety with the added medications. *Tr.p. 32.* The basis for the *Alford* plea as to why he pled to leaving the scene was set out as follows in the Order:

> First, she indicated that there was no doubt he was under the influence and overmedicating himself in excess of what it should have been and the accident occurred as a result of the overmedication. Tr.p. 32. However, she asserted that there was a factual issue with how the accident happened, but he was still under the influence and could have been avoided if he had not been. She sought to mitigate the prior DUI charge and the pending DUI 2nd that was dismissed because there was no evidence about his medications on that day and claimed he was unaware that his driver's license was suspended on the day of the incident. As to the leaving the scene Alford basis, she asserted that Applicant had contended to her since her representation that he had no intent to flee at the time of the incident and stopped a half a mile down the road. She claimed that his position would have been he could have managed to avoid Mr. Blanks and Mr. Bishop to get away from them if he was really trying to leave the scene. She suggested that if he was actually fleeing he would have been three miles or more down the road, but he was only stopped one half mile. Tr.p. 35. Counsel further claimed he was not taking drugs for recreational purposes, but that this was prescribed medication that just got out of

control while he was trying to help his family. Tr.p. 42. The Applicant stated his remorse for the accident.

Order, p. 21-22.

Concerning his claim that the Court ignored his assertion that the investigation was deficient in failing to find an alleged defense to the accident, under S.C. Code §56-5-1210(A), this Court did address whether his PCR presentation would have resulted in a defense to the crime in the following manner:

> The Applicant suggests that the failure to further investigate would have provided a defense to the leaving the scene of the accident. However, in Dr. Maddox's testimony, she opined that there was no evidence to support either a defense of insanity or guilty but mentally ill. **Although Applicant suggests that it was defense to leaving the scene because some of his memory deficits would have caused him to take a longer amount of time to process that he committed the accident.** The law requires an immediate stop or as close as possible, not a stop one-half mile down the road. However, it was the Applicant's malingering, not counsel's deficiency that prevented this additional information from Dr. Maddox from being presented in mitigation at the plea.
>
> Under these discrete circumstances, the Court must conclude that counsel was not deficient in her investigation in the matter. She acted as reasonable counsel in seeking mental health expert assistance in her representation. It was not performance, but the Applicant's own actions that thwarted the additional investigation. He failed in his burden of proof.

Order, p. 22-23 **(emphasis added)**. It the Order, at p. 22, n.6, this Court addressed that "[A]lthough the plea information did not include a diagnosis of Post-Traumatic Stress Disorder, the genesis of such a diagnosis was presented to the sentencing authority who acknowledged he had read the material. Tr.p. 29, ll. 6-9. ("I have reviewed it in full. I've read every page."). However, as Dr. Maddox acknowledged the diagnosis she recently rendered does not support a plea of guilty but mentally ill (lacked sufficient capacity, due to mental illness to conform his conduct to the requirements of law, S.C. Code Ann. § 17-24-20(A))." The Court included that finding and conclusion in its Order. Order, p. 22, n. 6.

This Court finds that it fully considered Dr. Maddox's PCR testimony in its review and included a summary of the testimony within its Order. Order, p. 4-6, as well as the exhibits introduced through Dr. Maddox, Applicant's exhibits 1, 2, 3. The Applicant's suggestion otherwise is denied.

More importantly, the Court addressed the prejudice prong of *Strickland* related to the mental health assertion of potential testimony from Dr. Maddox as it related to PTSD or memory deficits as follows:

> This Court also must conclude that Sixth Amendment prejudice has not been shown, assuming arguendo that deficient performance was found. The prejudice prong issue is initially whether to a reasonable probability the Applicant would have gone to trial on all charges with this information rather than plead guilty or reject the plea agreement to plead under *Alford*. This claim by the Applicant does not address issues with Felony DUI charge but is focused on the presentation of the leaving the scene of the accident charge. Although the Applicant asserted in the PCR proceeding he would have gone to trial on the hit and run charge, **this Court viewing all the circumstances finds that this is not credible as related to the prior Alford plea entry and the plea agreement.** This additional information did not undermine confidence in the earlier acceptance of the negotiated plea and did not provide a legal defense to the leaving the scene which the Applicant was allowed to plead under *Alford*. He has failed in his burden of proof.
>
> This Court must further find that prejudice is not shown related to the mitigation or sentencing of the Applicant. **The sentencing court was presented with significant information about the impact of the drugs on the Applicant's action as and his history of being a victim of child abuse, the basis for the later diagnosis of Post-Traumatic Stress Disorder by Dr. Maddox.** The sentencing court also learned that it was the Applicant's position under *Alford*, that being stopped one-half mile from the scene of the accident under his condition was a short distance and not supportive of an intent to leave the scene. **The additional information that he suffered under some memory deficits which may have led to some processing issues may have explained a delay but does not undermine confidence in the plea court's sentencing to two concurrent 17 year sentences when the victims were asking for a maximum sentence on the charges.** He had failed in his proof to show a reasonable probability that the sentence would have been different.

Order, p.23-24 (emphasis added).

This Court concludes that the Rule 59 motion related to this claim must be denied as to this portion. The Applicant has failed to show that the Court misunderstood, failed to fully consider, or failed to rule on an argument or issue or an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review.

CONCLUSION

IT IS THEREFORE ORDERED:

1. That the Applicant Thomas Stafford's Rule 59 Motion is denied.

AND IT IS SO ORDERED this 22 **day of** May, 2024.

EDWARD W. MILLER
Presiding Judge
Eleventh Judicial Circuit

Greenville, South Carolina

STATE OF SOUTH CAROLINA COUNTY OF LEXINGTON	)	IN THE COURT OF COMMON PLEAS FOR THE ELEVENTH JUDICIAL CIRCUIT
Thomas Stafford, S.C.D.C. No. 357279, Applicant, v. State of South Carolina, Respondent.	)	C.A. No. 2015-CP-32-1888 ORDER OF DISMISSAL

This matter comes before this Court by an Application for Post-Conviction Relief filed May 22, 2015, filed by Thomas Stafford, through his retained counsel E. Charles Grose, Esq. The Respondent made a Return on December 1, 2016. On June 22, 2023, an evidentiary hearing was convened before this Court. The Applicant was present and represented by his counsel. The Respondent was represented by Deputy Attorney General Donald J. Zelenka. Testimony was received from the Appliocant, Dr. Donna Schwartz Maddox, Lisa Kornmeyer, Jim Kornmeyer, Lillian Williford, Tina Orlowski, Anna Browder, and Rick Collins. Subsequent to the hearing, The Applicant made a Post-Hearing Brief dated July 3, 2023. On July 25, 2023, the Court indicated its intention to deny post-conviction relief. This Order follows:

PRIOR PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Lexington County Clerk of Court. In February 2013, the Lexington County Grand Jury indicted Applicant for leaving the scene of an accident with death (2013-GS-32-0392) and felony driving under the influence (DUI) resulting in death (2013-GS-32-0393). He was represented by Anna Good, Esquire. On October 3, 2013, Applicant pleaded

guilty as indicted on the charge of felony DUI resulting in death and entered an Alford[1] plea to leaving the scene of an accident with death. The Honorable Robert E. Hood sentenced Applicant to a term of imprisonment for seventeen (17) years for each charge. These sentences were to be served concurrently.

A timely notice of appeal was filed. Current counsel Charles Grose, Esq. represented Applicant on appeal. In an Order filed September 11, 2014, the Appeal was dismissed, noting Applicant voluntarily withdrew and dismissed his appeal. The Remittitur was issued on September 30, 2014.

FACTUAL BASIS OF THE PLEAS

The factual basis of the plea was set out by then Assistant Solicitor Rick Collins on the charge of felony DUI resulting in death and leaving the scene of an accident with death:

> On December 3, 2012, at 1:33 p.m., the defendant was operating a 2003 Nissan Pathfinder westbound on 1-20 near the 62 mile marker in Lexington County. At that same time the Department of Transportation had deployed a cleaning crew on the overpass, one of the employees of which was Mr. Nicholas Johnson. . . parked in the emergency lane up against the barrier of the overpass were three Department of Transportation vehicles. . .. You could see that picture would depict a Department of Transportation vehicle in the far right-hand lane. You would see that attached to the dump truck is a trailer. On the back of the trailer is black and yellow reflective paint. Also you see trailer lights and reflectors. The sole purpose of that trailer is to act as a crash barrier. Attached to the truck are its lights and its reflectors, and on the top of the vehicle were orange lights, which were working and illuminated at the time. There were two other vehicles in front of that Department of Transportation vehicle.
>
> Mr. Stafford passed that particular vehicle with all the warning signals and the other two vehicles, swerved over to the right-hand side of the road and near simultaneously struck the barrier and Mr. Johnson, who was then shoveling debris off the side of the roadway. Your Honor, that collision resulted in the nearly instantaneous death of Mr. Nicholas Johnson, who then was only 21 years old. . .

[1] North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160 (1970).

[He is in lane three] The far right lane. And he passes that vehicle, two other vehicles in the emergency lane, and then approximately another 300 feet where he veers into the emergency lane striking the barrier and Mr. Johnson. . . .

Your Honor, at that time in lane number two, the middle lane, were two witnesses, Mr. Charlie Bishop and Mr. Brett Blanks, who are in the courtroom here today. They would likely testify that Mr. Blanks saw the collision and Mr. Bishop saw the effects immediately after the collision. . . They're also continuing toward 378 exit, see the incident, and see that Mr. Stafford is continuing behind them. Your Honor, they would likely testify that they made an effort in an attempt to stop Mr. Stafford. They would further testify that Mr. Stafford changed lanes in an effort to get around them and then they in turn changed lanes as well, ultimately bringing him to a stop approximately one half mile up the road right before the Highway 378 exit. There they exited the vehicle, and confronted Mr. Stafford. They would testify as to his condition of being lethargic, slow, slurred speech, at one point making an attempt to get back into the vehicle, at which point they took the keys from the car, would not give him the keys back, contacted law enforcement. Approximately 20 minutes later the law enforcement officers did show up. . .

Your Honor, their conversation with Mr. Stafford at that point would reveal that they had inquired of Mr. Stafford if he realized what happened. His responses to them would have been no, that he did not know what happened. He couldn't understand why they were stopping him at that point. As the conversation progressed, that he began, well, I realized I hit something, I didn't know what it was.

Your Honor, in layman's terms as we believe that they would describe it, they would describe him as being on something at that point.

Your Honor, as I stated before the Highway Patrol and other emergency services were contacted. Trooper Blaylock of the Highway Patrol did respond to the scene approximately 20 minutes later. Once he arrived, emergency services were already on scene, and according to their report, again, resuscitative efforts were deemed futile at that point, given the nature of the collision.

Your Honor, Trooper Blaylock began to interview Mr. Stafford. There he noticed that his pupils were constricted, that he seemed to sway, that he seemed disoriented. Based on that, asked him a series of questions and performed a series of standardized field sobriety tests to which, according to Trooper Blaylock, he performed poorly on. He was subsequently arrested. He was transported to the Lexington ER where a blood draw was performed. The blood was analyzed by SLED, and that analysis revealed methadone and generic Xanax.

Your Honor, in statements taken from the defendant by the Highway Patrol MAIT team, Mr. Stafford would admit at that current time he was undergoing treatment from a methadone clinic. That on a daily effort at

approximately 4:30 to 5 o'clock in the morning, he would attend the clinic, receive a dose of about 120 milligrams of methadone, continue on about the day.

Your Honor, the levels according to the forensic toxicologist from SLED, the levels of methadone that were revealed in the analysis would tend to suggest that they were of therapeutic levels.

Your Honor, however, the Xanax that was indicated, we believe the toxicologist would testify that those levels were approximately three to four times what could conceivably be a therapeutic level of the Xanax. Moreover, it would be beyond comprehension in the toxicologist's opinion that the two would ever be prescribed together due to the additive or the synergistic effect of both the medications being combined at once and never would it be recommended that anyone drive after consuming both of those medications. . .

Your Honor, as you may very well already know, methadone is commonly used to, I think, wean people off of an opioid based pain killer or heroin...

And at the time I think Mr. Stafford would admit that there was such an addiction.

Your Honor, it's again our contention that Mr. Johnson's death was proximately caused by the driving due to the ingestion of those substances, and the basic facts of the case at issue. I believe what is more concerning in this case is that approximately 15 days before that, Mr. Stafford had been arrested for a DUI 2nd offense under circumstances which are strikingly similar to the facts in this case. It was about the same time in the afternoon, 1:30, 1:40 p.m., based on conversation with Officer Parker of the Pine Ridge Police Department, the conversation with Mr. Stafford would seem similar, that on that same day he had received a dose of methadone. On the DUI 2nd, he refused to submit a sample. However, in his vehicle that day was a prescription for 60 generic Xanax, Your Honor, only nine of those pills remained of a 60-day prescription of having — getting it filled seven days earlier.

Your Honor, that charge was pending obviously two weeks prior to this incident. This charge is being consumed in this plea. In exchange for his plea to these charges, this DUI 2nd is being dismissed. . . .

Plea Tr.p. 10-19.

SUMMARY OF PCR TESTIMONY

Dr. Donna Schwartz Maddox, a forensic psychiatrist, testified that she was retained in 2013 to assist in the defense of the Applicant. She indicated that she met with the Applicant on January 13, 2013 and he claimed he could not remember the incident. She was concerned that

there could be brain damage and sought neuropsychological testing, an evaluation by a neurologist, and an electroencephalogram to rule out a seizure disorder. She also wanted his blood tested. She indicated they obtained a forensic psychologist, Dr. Tora Brawley. Dr. Maddox indicated that Dr. Brawley attempted to evaluate him but determined that Stafford was not giving good effort in the testing and malingering or faking symptoms and did not issue a report. Dr. Maddox indicated that counsel Good still wanted her to continue to see Stafford, although Dr. Brawley did not complete a report. However, Dr. Maddox refused to do so.

Dr. Maddox indicated that she was again retained for this proceeding and issued an initial report in February 11, 2018 and a follow-up report April 7, 2022. Subsequent to the plea, in 2019, Dr. Brawley saw the Applicant again in preparation for this PCR hearing. Dr. Maddox opined that Dr. Brawley's testing confirmed her own earlier 2013 diagnostic impression of memory deficits, noting particular deficits in immediate verbal learning (4%), immediate verbal learning for prose (1%) and delayed memory for prose (1%). His visual memory was found by Dr. Brawley to be excellent at 67%. He was found to have other deficits in mental tracking (7%), manual speed of right hand (6%) and manual dexterity of his right hand (7%). Applicant's Exhibit 3, p.5.

Dr. Maddox testified that she had Dr. Pritchard, a neurologist, complete a neurological report in 2019 and an EEG. She indicated that Dr. Pritchard found he had difficulty with delayed recall. He further noted that Applicant had back pain.

Dr. Maddox further indicated medical and social history are important to determine behavior. Dr. Maddox reported that the Applicant's childhood was very disruptive and unstable. She also reported that the Applicant was a victim of sex abuse. The Applicant suffered from back pain after he hurt his back working construction. As a result, Applicant became addicted to

opiates, although he also took other medications. These included Klonopin and Xanax which were prescribed by the same doctor.

Dr. Maddox noted that there were times in 2017 when there was an issue concerning his competency. She saw him in initially July 2017 and noted the Applicant had gained weight and was working off medications. On September 21, 2018, he had been threatened by inmates and feared threats to his family. He was moved to Tyger River Correctional Institution. Dr. Maddox confirmed that he was stabilized now, and she had no issues about his competency, although he still had some paranoia. She had reviewed his EEG which was in normal range and not indicative of a seizure. She opined that he presently has a diagnosis of Post-Traumatic Stress Disorder and Opiate use disorder, in a controlled environment.

Concerning her involvement before the plea, Dr. Maddox stated she spoke with counsel Good in 2013 about the role of Dr. Brawley and a neurologist (Dr. Pritchard) in the mental health preparation which was to confirm or rule out reasons for the memory issues she experienced with the Applicant and matters related to criminal responsibility. She opined that the Applicant did not meet the definition of either insanity or guilty but mentally ill. However, she also stated the memory issues may have explained why he did not stop immediately at the accident site. She also asked counsel Good to retain Dr. Alexander Morton, a toxicologist, to assist the defense related to the drug issues presented in the case.

Dr. Maddox indicated that after she received the informal report from Dr. Brawley in 2013 about malingering, she could not go forward with the evaluation or report because of her belief in Applicant's lack of credibility at the time. She stated counsel Good begged her to stay involved, but she declined to do so at that time.

Lisa Kornmeyer, the Applicant's mother testified she was interviewed for the evaluation. She confirmed that she was aware of the sexual abuse her son received because she noted his behavioral changes. She was also aware of the impact of the medications Applicant took. She described Applicant as tired and sleepy, but that he worked a lot. She described him as having a good relationship with his daughters and took care of them every other weekend.

Ms. Kornmeyer stated she assisted in the representation by Anna Good of her son. She claimed that Anna went through her and they emailed each other numerous times. Applicant Exhibits 4-15. Concerning plea negotiations, Mrs. Kornmeyer claimed the State had agreed to drop the "leaving the scene of the accident" charge if he pled guilty to felony DUI. She said she was surprised on the day of the plea that it was included in the plea. She later learned that the prosecutor was not going to drop the charge. Mrs. Kornmeyer claimed Anna should have come to her before the plea to explain it to her and the family. She emailed counsel after the plea for an explanation. As noted in Applicant's Exhibit 14, she learned from counsel that the victims would not agree to dropping the leaving scene of the accident charge and counsel advised that the defense would only agree to plead if the prosecutor agreed the charges would run concurrent and that the Applicant could plead under N.C. v. Alford. Counsel indicated to her that the witnesses who stopped the vehicle would be the evidence on the charge and that there were reasons why the Applicant would not be able to testify if it went to trial. Applicant Exhibit 14. In that email, counsel also indicated to her that she and Tom discussed the decision related to the DUI 2nd charge. She also learned in the email that the prosecutor had agreed that he was not going to ask for a specific sentence and would not have a position at sentencing, but that they were always aware the victims were going to ask for something high. Applicant's Exhibit 14. Mrs. Kornmeyer complained that counsel did not object to anything during the plea.

Jim Kommeyer testified that he observed the effects of drugs on the Applicant. He described the Applicant as having a strong work ethic and a good relationship with his children. She stated that he understood prior to the plea that the leaving the scene of the accident charge had been dropped, but on the day of the plea learned it had been changed and included in the plea. During the plea, he thought the Applicant appeared to be confused.

Lillian Williford, the Applicant's aunt, was at the plea. She stated she did not have a complete understanding of the plea. She thought the Applicant appeared confused and had a blank look on his face.

Tina Orlowski, an aunt, was at the plea, but did not address the court. She testified Applicant appeared confused when he turned around and looked at the family.

The Applicant testified that he was originally willing to plead to felony DUI, but not leaving the scene. He claimed he felt bad about the accident. As to plea negotiations, he thought he was guilty of felony DUI, but not guilty of leaving the scene. He stated that he wanted 5-9 years that Ms. Good advised him was a possible range. However, at some point prior to the plea, he learned leaving the scene (hit and run) was to be included. He stated that there was a period during the plea that he was confused. He thought everything happened so fast. He also thought N.C. v. Alford was not adequately explained to him by counsel.

Anna Browder (Anna Good) testified that she represented the Applicant as retained counsel. She indicated that she had numerous meetings with the Applicant prior to the plea. She retained Dr. Maddox to review his competency and criminal responsibility. Dr. Brawley was also retained but had determined that the Applicant was malingering and did not do a report. Counsel testified confirmed that Dr. Maddox confirmed to her some neurological deficits. State Exhibit 1. At Dr. Maddox's suggestion, she also retained Dr. Alexander Morton, a toxicologist, who

reviewed the SLED toxicology report and noted that SLED missed some drugs that were also reflected in the report. Counsel also retained David Mathers a MAIT accident expert to review the MAIT report and opined to her MAIT used the wrong method, but conclusion was not helpful to the defense case. She compiled a Plea Notebook (State's Exhibit 2) that she provided to Judge Hood prior to the plea and sentencing. This included a letter of remorse to the victim's family from the Applicant, support letters expressing remorse from Lisa Kornmeyer, stepfather Mark Rushton, Amye Rushing, Marie Kennedy (mother of Applicant's daughter), Jim Kornmeyer, Lillian Williford, John Keenan (friend), Britt Bodie (friend), John Bolos (friend and employer), daughters Leah and Marisa, family photographs, work records and photographs of projects, methadone patient records, and x-ray of compressed disc.

Counsel testified that they wanted to avoid maximum exposure in their negotiations. She stated that the state's initial offer was contingent on the victim's family agreeing to drop the leaving the scene charge, which they ultimately did not agree to do. She stated she thought this was made clear to the Applicant prior to the entry of the plea. She also indicated that there was never an agreed sentence, but that the prosecutor agreed to not oppose concurrent sentences and take no position on sentence requests, which she believe the prosecutor complied with in his representation to the judge in chambers. She further indicated that the Alford plea was done on the hit and run charge because the Applicant believed he was not guilty of leaving the scene, but the state was prepared to prove it.

Counsel stated that she tried to get Dr. Maddox to meet with the Applicant again, but she declared she could not do so based upon Dr. Brawley's assessment.

Counsel further testified about the series of emails which revealed the communication between counsel and the Applicant's family about the status of negotiations and information

about the Applicant's background. These emails included information about the sexual abuse (Applicant's Exhibit 5), Applicant's high stress level (Applicant's Exhibits 11 and 12), and the potential if he does not plead to one charge of felony DUI death, there was a risk the prosecutor would seek other charges such as reckless homicide and others and push for a trial over a plea. (Applicant's Exhibit 12) (August 14, 2013). She confirmed at that August 2013 time, she was still talking about just felony DUI. Similarly, referring to Applicant's Exhibit 13, counsel acknowledged in the August 20, 2013 email that she advised Applicant's mother the plea offer would be a plea to one charge of felony DUI (1-25 years) and the state would dismiss the leaving scene of death and DUI 2nd. However, counsel clarified that at that time of her email it was not a firm offer. Counsel confirmed that she did not recall discussing the change with the mother prior to the actual plea including the leaving the scene charge but did discuss it with the Applicant who agreed to go forward with the plea prior to its entry.

Rick Collins, the prosecutor in the case, testified that he was involved in the preparation for trial in the case. Collins indicated that it was his impression that the leaving the scene charge would bever go away because he thought the victims would not say yes. Collins stated that in his discussions with Browder he indicated the possibilities during these periods of negotiations. However, Collins stated he never conveyed to counsel that Applicant could plead only to felony DUI and the rest would go away. Collins stated it was always up to victims. He stated there was never a firm offer until the final time when it was taken to victims. Collins recalled the meeting in chambers with the judge prior to plea noting the plea would be straight up with the Alford plea on leaving the scene, but he was not recommending anything as the solicitor. However, he indicated he was aware the victims would be making a request as well as Sgt. Shelton of the S.C.

Highway Patrol. Tr. p.23-28. Collins did not think the presentation violated any terms of the plea agreement.

On reply, the Applicant recalled counsel Browder. She indicated that she was never told during the plea negotiations that the leaving the scene charge would never go away. However, she understood that it could potentially go away, but that Collins would have to talk with the victims. She further understood that the prosecutor would not be opposing the sentence request and understood it to be a concurrent sentence.

ALLEGATIONS BEFORE THE COURT

In his current Application, Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel
   a. "Trial counsel failed to investigate, discover, and/or present information that would have provided a defense to the charges"
   b. "Trial counsel failed to investigate, discover, and/or present information that would have led to the suppression of Applicant's statements"
   c. "Trial counsel allowed the guilty plea to go forward and/or otherwise failed to withdraw the guilty plea when the prosecution changed the plea negotiations at the last moment"
   d. "Trial counsel failed to investigate, discover, and/or present information that would have mitigated and reduced the sentence imposed"

Prior to the outset of the hearing, the Applicant, through counsel, withdrew allegations (a) and (b). However, as set out in his post-hearing memorandum, the Applicant proceeded on the following issues, as amended at the hearing:

Ineffective Assistance of Counsel:

(1) Failure to investigate, discover and present evidence that would have provided a defense to the charges,

(2) Allowing the guilty plea to move forward and/or failing to withdraw the guilty plea when the prosecutor changed the plea negotiations as the last moment.

(3) Failing to investigate, discover, evidence that would have mitigated or reduced the sentence imposed.

(4) Not moving to withdraw the guilty plea when the State breached the agreement to remain silent on sentencing.

FINDINGS AND CONCLUSIONS

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, and weighed the testimony accordingly. Before the Court are Applicant's records from the South Carolina Department of Corrections, the transcript of Applicant' s trial, the records of the Lexington County Clerk of Court regarding the subject convictions, Applicant' s appellate records, and the original application for post-conviction relief, the Respondent's Return, and the Applicant's Post-Hearing Memorandum. This Court has reviewed the records submitted to it by the parties, the legal arguments made by the attorneys, and the pleadings. Pursuant to S.C. Code Ann. § 17-27-80, this Court makes the following findings based upon all of the probative evidence presented during the guilty plea and this evidentiary hearing.

FAILURE TO MOVE TO WITHDRAW PLEA.

This Court must find that the Applicant failed in his burden of proof on his first allegation. In his first argument before this Court in his post-hearing memorandum, the Applicant asserts that counsel should have moved to withdraw the guilty plea because the plea was inconsistent with counsel's understanding of the charges Stafford was going to face because it was the understanding of the family members that the hit and run (leaving the scene) charge would be dismissed as a result of the plea bargain. *Stafford's Post-Hearing Memo*, p. 6-7. The Applicant contends that the State did not honor the plea agreement, relying upon email

correspondence that predated the day of the plea and the testimony of family members present at the plea who asserted Applicant was confused at the time of the plea. This Court concludes that there was no unkept plea bargain agreed between the parties and no basis for counsel to either object or move to withdraw the guilty pleas.

Trial counsel must provide reasonably effective assistance under "prevailing professional norms." Strickland v. Washington, 466 U.S. 668, 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Reviewing courts presume counsel was effective. Id. at 690, 104 S.Ct. 2052. Therefore, to receive relief, a PCR applicant must prove: (1) counsel failed to render reasonably effective assistance under prevailing professional norms and was deficient; and (2) the deficient performance prejudiced the applicant's case. Id. at 687, 104 S.Ct. 2052.

First, Applicant must prove plea counsel's performance was deficient. 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 reasonably professional assistance." Butler v. State, 286 S.C. at 445, 334 S.E.2d at 816. "The burden of rebutting this presumption 'rests squarely on the defendant,' and '[i]t should go without saying that the absence of evidence cannot overcome [i]t.'" Dunn v. Reeves, 141 S. Ct. 2405, 2410 (2021) (alteration in original) (quoting Burt v. Titlow, 571 U.S. 12, 22–23 (2013)). In fact, "even if there is reason to think that counsel's conduct 'was far from exemplary,' a court still may not grant relief if '[t]he record does not reveal' that counsel took an approach that *no competent lawyer would have chosen.*" Id. (alteration in original) (emphasis added) (quoting Titlow, 571 U.S. at 23–24).

Prejudice is defined as a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Id. at 694, 104 S.Ct. 2052. A

reasonable probability is a probability sufficient to undermine confidence in the outcome. Id. With respect to guilty plea counsel, Applicant must show there is a reasonable probability that, but for counsel's alleged errors, he would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 59 (1985). "Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim." Id. at 700, 104 S.Ct. 2052. 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, 369, 137 S. Ct. 1958, 1966 (2017). 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. Lee v. United States, 582 U.S. 357, 369, 137 S. Ct. 1958, 1967, 198 L. Ed. 2d 476 (2017)

Judges must "look to contemporaneous evidence to substantiate a defendant's expressed preferences." Lee, 582 U.S. at 369, 137 S. Ct. at 1967. 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 guilty plea and the evidence presented at the PCR hearing. Harres v. Leeke, 282 S.C. 131, 134, 318 S.E.2d 360, 361 (1984). 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).

This Court must conclude that the plea bargain entered at the time of the entry of the guilty plea was satisfied by the actions of the Applicant, defense counsel and the prosecutor. On the day the plea was entered and the time it was entered the relevant parties were aware of and accepted the terms of the plea offer. This Court finds that the actual plea offer that was accepted

at the entry of the plea was that the Applicant would plead guilty to felony DUI resulting in death and plead guilty under North Carolina v. Alford to leaving the scene of an accident resulting in death without a negotiated sentence, without a sentence recommendation by the prosecution and the defense was free to argue whatever sentence it deemed appropriate. In return the prosecutor agreed to dismiss the pending DUI second offense. This Court further finds that the 17 year concurrent sentences the Applicant received were consistent with the agreed negotiation.

The Applicant relies upon two prior South Carolina cases that are distinguishable in the present setting. He relies upon Thompson v. State, 340 S.C. 112, 116, 531 S.E.2d 294, 296 (2000), to support our conclusion. In Thompson, plea counsel failed to object after the solicitor recommended the maximum sentence in violation of the earlier plea agreement. 340 S.C. at 115, 531 S.E.2d at 296. Thompson was indicted for murder and pleaded guilty to voluntary manslaughter. Id. at 113, 531 S.E.2d at 295. Thompson testified at the PCR hearing that he chose to plead guilty because he was under the assumption the solicitor was not going to make a sentencing request or recommendation. Id. at 114, 531 S.E.2d at 295. In addition, Thompson's attorney testified she told him prior to the plea the solicitor was not going to make a sentencing recommendation. Id. Thompson's attorney also confirmed to the plea court that the solicitor had correctly and completely stated the plea agreement and there was nothing further that needed to be added regarding the plea negotiations. Id. at 116, 531 S.E.2d at 296. Our supreme court found there was a reasonable probability that Thompson would not have pled guilty but for his attorney's ineffective assistance because he entered his guilty plea in reliance on the sentencing range and the solicitor's agreement not to make any sentencing recommendations. Id. at 117, 531 S.E.2d at 297.

The Applicant also relies upon Jordan v. State, 297 S.C. 52, 374 S.E.2d 683 (1988). In Jordan, the defendant agreed to plead guilty because he believed the solicitor would neither oppose nor recommend probation. Id. at 54, 374 S.E.2d at 685. When the solicitor in Jordan reneged on the plea agreement and recommended against probation, Jordan's attorney failed to draw the plea judge's attention to the plea bargain and then failed to move to withdraw Jordan's guilty plea. Id. Therein, the Supreme Court held that "the conduct of Jordan's counsel in not protecting Jordan's right to enforce the plea agreement with the Solicitor's office fell below prevailing professional norms." Id. (citing Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). Like the attorney in Jordan, Thompson's attorney's failure to object fell below prevailing professional norms. See also Smith v. South Carolina, 775 S.E.2d 696 (S.C. 2015) (the supreme court found deficient performance when trial counsel failed to object to the solicitor's recommendation that the defendant receive maximum punishment after the solicitor promised to remain silent during sentencing).

This case is distinguishable from both cases. Unlike Thompson and Jordan, at the time the plea was entered the defense counsel, the Applicant and the prosecution were aware that the agreed negotiation included the entry of the Alford plea to leaving the scene of the accident. This is supported by the testimony of defense counsel, the prosecutor and Applicant. The fact that the Applicant's family may have been surprised at the time of the plea by the inclusion of the second charge does not bind the Court or the prosecution. The Applicant was aware at the time of the entry of the plea of its inclusion during the plea with the understanding that he was pleading under Alford. Tr.p. 6, l. 12-p. 9, l 2.[2] In addition to this testimony, the defense counsel was

[2] The colloquy by the Applicant, his counsel, and the Court about his understanding about the entry of the plea pursuant to Alford carries a presumption of verity. The Applicant has failed to present a cogent reason as to why he should not be held to the truth of his statements. See

credible in her assertion that she was aware that the removal of the pending leaving the scene charge would only occur if there was agreement by the victim's family which did not occur on the eve of the plea. Applicant's Exhibit 14 is contemporaneous and consistent with this understanding. Further, the prosecutor credibly stated that the removal of the leaving the scene charge throughout the negotiation was contingent upon the victim's approval.

Unlike, Thompson, Jordan, and Smith, the understanding of the negotiations as Applicant entered the plea was consistent with what occurred. The prior hopes and expectations of the defense counsel and his family that the charge would be dropped did not occur and was not part of the plea bargain. Unlike Thompson and Jordan, the prosecutor also complied with his agreement that he would not seek a particular sentence or consecutive sentences. As counsel stated clearly in Applicant's Exhibit 14, "the deal with the prosecution was that they were not going to put a number on the record and would not take a position on sentencing. We always knew the victims were going to ask for something very high due to their emotions."[3] Further, the prosecutor had indicated to the judge in chambers that he had no position on sentencing. The Applicant's reliance upon earlier emails between counsel with the mother and father, which predated that day of the plea and admittedly before the firm and final offer was made by the State is not persuasive after the credible explanation by defense counsel.

Blackledge v. Allison, 431 U.S. 63, 74, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977) (holding that solemn declarations in open court "carry a strong presumption of verity"). see also State v. Thrift, 312 S.C. 282, 295, 440 S.E.2d 341, 348 (1994) ("[A]ll plea agreements must be on the record and must recite the scope, offenses, and individuals involved in the agreement.").

[3] The Court notes that consistent with the expectations and negotiation during the plea the victim's mother made a victim impact statement on behalf of the family asked for the maximum allowed sentence. Tr.p. 26. Similarly, on behalf of the State Highway Patrol First Sgt. Chris Shelton and supervisor of at the scene also speaking on behalf of the victim's family asked for the maximum sentence. Tr.p. 27. These presentations were also consistent with the expectations of defense counsel and did not suggest that reasonable counsel should have either objected or moved to withdraw the plea at that time as a violation of the plea agreement.

The Applicant questions whether the alleged potential for a trial was imminent as pushing the entry of the plea. He points out trial counsel's testimony that if a plea was not entered, the case would have proceeded to trial either that week or the next week. Applicant questions these statements because the date of the guilty plea was on a Thursday and that there was no General Sessions term the next week. Although the Applicant appears to be correct that there was no scheduled term the next week, he has not shown that if the plea was not entered that a trial would not have been held during the next available General Sessions term. Further, although in an August 13, 2013 and August 20, 2013 emails indicated that the State may proceed on other available charges if he did not enter a plea to felony DUI (Applicant's Exhibits 12, 13), the Applicant is correct that the State had not yet indicted on other charges at the time the plea was entered. However, the prosecutor confirmed that in their discussions, he had spoken with counsel about possible outcomes and possibilities. Although additional charges by indictment could not be made that week, there remained a possibility of a direct indictment by the grand jury at the next term, if that remained the course the prosecutor chose to pursue. As revealed in the factual basis of the plea, there was a further factual basis to do so.

The Applicant also asserts the comment by the prosecutor that the State had a strong case regarding leaving the scene of the accident should not be considered because it is not the relevant test in assessing the prejudice prong from a guilty plea after deficient performance is shown. The strength of the case was reflected in the factual basis set forth in the plea as set out above. The representation was made by defense counsel that the basis for the Alford plea on that charge was set out and asserted that he was not trying to leave the scene although he stopped a half a mile from the actual scene. Tr.p. 34-35. Here, the comment at the PCR hearing by the prosecutor was based to support the entry of the Alford plea and counsel's reasonable advice and assessment that

that there was a basis to enter the Alford plea and was not deficient in the recommendation. The Applicant is correct that mere strength of the State's case does not alone satisfy the prejudice prong which is related to what the Applicant would do if there was deficient performance proven. See Turner v. State, 335 S.C. 382, 385, 517 S.E.2d 442, 444 (1999).

Since the representations at the time of the plea were consistent with the negotiations actually agreed upon by all parties, there was no basis that reasonable counsel would have moved to withdraw the plea or object to anything the prosecutor stated. Counsel did not misinform the Applicant concerning the agreed plea negotiation. Counsel cannot be deemed to be deficient under the circumstances. The assertion to the contrary is dismissed.

FAILURE TO INVESTIGATE

The Applicant contends that counsel failed to adequately investigate the case, in particular in failing to follow Dr. Maddox's recommendations for neurological testing and did not develop an adequate rapport with the Applicant prior to the testing. Applicant claims that had this been followed up, the Applicant would have had an opinion from Dr. Maddox about the Applicant suffering from Post-Traumatic Stress Disorder and Opiate Use Disorder, in a Controlled Environment. This Court must conclude that the Applicant has failed to show deficient performance or prejudice.

"[C]riminal defense attorneys have a duty to conduct a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case." Walker v. State, 397 S.C. 226,235, 723 S.E.2d 610,615 (Ct. App. 2012), overruled on other grounds, Walker v. State, 407 S.C. 400, 756 S.E.2d 144 (2014). "Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to result."

Porter v. State, 368 S.C. 378, 385-86, 629 S.E.2d 353, 357 (2006) (citing Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998)). "In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." Wiggins v. Smith, 539 U.S. 510, 521-22, 123 S. Ct. 2527, 2535 (2003).

This Court must find that counsel performed a reasonable investigation related to the Applicant's mental status by retaining Dr. Maddox, Dr. Brawley, and Dr. Morton to assess the Applicant's mental state and the impact of his drugs injection on his performance. The critical problem was that the Applicant was determined to be malingering by Dr. Brawley, the neuropsychologist, during her neuropsychological testing of the Applicant. This critical finding at that time precluded further assessment by Dr. Brawley and Dr. Maddox at that time. It is uncontested that counsel attempted to get Dr. Maddox to continue to complete an examination of the Applicant after the malingering assessment, but she refused to do so due to the Applicant's malingering. This is not a situation where there was no investigation into the Applicant's mental health, but an investigation was attempted but impacted by the Applicant's malingering of his mental symptoms.

An assessment of counsel's performance must be viewed from the perspective at the time of counsel's conduct when the Applicant was malingering and preventing a further assessment. As stated earlier, judicial scrutiny of counsel's performance must be highly deferential, and a fair assessment of attorney performance requires that 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. Strickland v. Washington, 466 U.S. 668, 669, 104 S. Ct. 2052, 2055, 80 L. Ed. 2d 674 (1984).

In the plea in mitigation, counsel expressed the Applicant's remorse for the accident. Tr.p. 28. As stated above, she presented a packet of materials to the sentencing judge which included evidence of Applicant's methadone treatments, the prescriptions for Klonopin for anxiety and Vybrid for depression.[4] She described to the sentencing court his 2011 accident that caused a compressed disc in his back that led to his addiction to pain medication. Tr.p. 31. She presented as a result he began methadone treatments which he had been faithful to since October 2011 for a year prior to this incident. She further noted the impact of having lost a child a couple months before led to a tailspin prior to the accident and a period of depression and extreme anxiety with the added medications. Tr.p. 32. [5]

She also addressed in the mitigation presentation the basis as to why he pled to leaving the scene under Alford. First, she indicated that there was no doubt he was under the influence and overmedicating himself in excess of what it should have been and the accident occurred as a result of the overmedication. Tr.p. 32. However, she asserted that there was a factual issue with how the accident happened, but he was still under the influence and could have been avoided if he had not been. She sought to mitigate the prior DUI charge and the pending DUI 2nd that was dismissed because there was no evidence about his medications on that day and claimed he was unaware that his driver's license was suspended on the day of the incident. As to the leaving the scene Alford basis, she asserted that Applicant had contended to her since her representation that he had no intent to flee at he time of the incident and stopped a half a mile down the road. She claimed that his position would have been he could have managed to avoid Mr. Blanks and Mr.

[4] During the State's presentation at the plea, information was provided that the levels of methadone were at therapeutic levels, but the Xanax was at three to four times of a therapeutic level. It was further reported that no one should be recommended to drive with the synergistic effect of the combination of those prescribed drugs. Tr.p. 17, ll. 3-16.

[5] Counsel did not bring negative details she learned from Dr. Morton's assessment of the SLED toxicology report that benzodiazepines were also in his system at the time of the incident.

Bishop to get away from them if he was really trying to leave the scene. She suggested that if he was actually fleeing he would have been three miles or more down the road, but he was only stopped one half mile. Tr.p. 35. Counsel further claimed he was not taking drugs for recreational purposes, but that this was prescribed medication that just got out of control while he was trying to help his family. Tr.p. 42. The Applicant stated his remorse for the accident. [6]

The Applicant suggests that the failure to further investigate would have provided a defense to the leaving the scene of the accident. However, in Dr. Maddox's testimony, she opined that there was no evidence to support either a defense of insanity or guilty but mentally ill. Although Applicant suggests that it was defense to leaving the scene because some of his memory deficits would have caused him to take a longer amount of time to process that he committed the accident.[7] The law requires an immediate stop or as close as possible, not a stop

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[6] In the materials provided to the sentencing court in counsel's plea packet, it included references from Lisa Kornmeyer that the Applicant was sexually abused at age 5 and age 7 by two different men, at age 11 or 12 by a mother of a friend, and subsequently she reported on a neighbor who had molested the Applicant time and his friend. State Exhibit 2, page 4-5. Although the information did not include a diagnosis of Post-Traumatic Stress Disorder, the genesis of such a diagnosis was presented to the sentencing authority who acknowledged he had read the material. Tr.p. 29, ll. 6-9. ("I have reviewed it in full. I've read every page."). However, as Dr. Maddox acknowledged the diagnosis she recently rendered does not support a plea of guilty but mentally ill (lacked sufficient capacity, due to mental illness to conform his conduct to the requirements of law, S.C. Code Ann. § 17-24-20(A)).

[7] S.C. Code Ann. § 56-5-1210 (A) involving the "Duties of drivers involved in accident resulting in death or personal injury; moving or removing vehicles" states as follows:

> (A) The driver of a vehicle involved in an accident resulting in injury to or the death of a person immediately shall stop the vehicle at the scene of the accident or as close to it as possible. He then shall return to and in every event shall remain at the scene of the accident until he has fulfilled the requirements of Section 56-5-1230. However, he may temporarily leave the scene to report the accident to the proper authorities. The stop must be made without obstructing traffic more than is necessary.

one-half mile down the road. However, it was the Applicant's malingering, not counsel's deficiency that prevented this additional information from Dr. Maddox from being presented in mitigation at the plea.

Under these discrete circumstances, the Court must conclude that counsel was not deficient in her investigation in the matter. She acted as reasonable counsel in seeking mental health expert assistance in her representation. It was not performance, but the Applicant's own actions that thwarted the additional investigation. He failed in his burden of proof.

This Court also must conclude that Sixth Amendment prejudice has not been shown, assuming *arguendo* that deficient performance was found. The prejudice prong issue is initially whether *to a reasonable probability* the Applicant would have gone to trial on all charges with this information rather than plead guilty or reject the plea agreement to plead under Alford. This claim by the Applicant does not address issues with Felony DUI charge but is focused on the presentation of the leaving the scene of the accident charge. Although the Applicant asserted in the PCR proceeding he would have gone to trial on the hit and run charge, this Court viewing all the circumstances finds that this is not credible as related to the prior Alford plea entry and the plea agreement. This additional information did not undermine confidence in the earlier acceptance of the negotiated plea and did not provide a legal defense to the leaving the scene which the Applicant was allowed to plead under Alford. He has failed in his burden of proof.

This Court must further find that prejudice is not shown related to the mitigation or sentencing of the Applicant. The sentencing court was presented with significant information about the impact of the drugs on the Applicant's action as and his history of being a victim of child abuse, the basis for the later diagnosis of Post-Traumatic Stress Disorder by Dr. Maddox. The sentencing court also learned that it was the Applicant's position under Alford, that being

stopped one-half mile from the scene of the accident under his condition was a short distance and not supportive of an intent to leave the scene. The additional information that he suffered under some memory deficits which may have led to some processing issues may have explained a delay but does not undermine confidence in the plea court's sentencing to two concurrent 17 year sentences when the victims were asking for a maximum sentence on the charges. He had failed in his proof to show a reasonable probability that the sentence would have been different.

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), 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 if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant's attention is directed to Rule 243, SCACR, for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

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

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

AND IT IS SO ORDERED this 19 **day of** January, 2024.

EDWARD W. MILLER
Presiding Judge
Eleventh Judicial Circuit

Greenville, South Carolina