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| STATE OF SOUTH CAROLINA<br>COUNTY OF ANDERSON | ) | IN THE COURT OF COMMON PLEAS<br>FOR THE TENTH JUDICIAL CIRCUIT |
| Jacob N. Lance #375653,<br><br>Applicant,<br><br>v.<br><br>State of South Carolina,<br><br>Respondent. | ) | CASE NO. 2019–CP–04–00512<br><br>**ORDER GRANTING BELATED APPELLATE REVIEW PURSUANT TO WHITE V. STATE AND DISMISSING ALL OTHER ALLEGATIONS WITH PREJUDICE** |

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| Presiding Judge: | Hon. Perry H. Gravely |
| Applicant's Attorney: | Linda Vallar Whisenhunt, Esq. |
| Respondent's Attorney: | C. Whitney O'Kelly, Esq. |
| Trial Counsel: | Kurt Tavernier, Esq. |
| Date of Hearing: | March 1, 2023 |
| Court Reporter: | Lisa Scott |

This matter comes before this Court by way of Jacob N. Lance's (Applicant) application for Post-Conviction Relief (PCR) commenced on March 14, 2019. Respondent, the State of South Carolina, filed its Return and Motion for More Definite Statement on November 12, 2019, requesting an evidentiary hearing to resolve the claims set forth in the application.

On March 1, 2023, an evidentiary hearing was held at the Anderson County Courthouse before the Honorable Perry H. Gravely. Applicant was present and represented by Linda Vallar Whisenhunt, Esquire. Assistant Attorney General C. Whitney O'Kelly, represented Respondent. Applicant proceeded with the allegations within his original PCR application. In support of these claims, Applicant testified on his behalf and called Kurt Tavernier, Esquire, to testify. Respondent presented testimony from Assistant Solicitor Lauren Davis Price. At the conclusion of the hearing, this Court denied PCR.

On March 24, 2023, a conference call was held with Respondent and Applicant's attorney, Ms. Whisenhunt. Applicant was not present on the conference call. By consent of the parties, Judge Gravely granted Applicant's request for a belated appeal pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974).

Following a thorough review of the record in its entirety, along with the testimony and evidence presented at the evidentiary hearing, this Court finds Applicant has failed to establish any constitutional violations or deprivations entitling him to any form of relief, except for Plea Counsel's failure to timely file his direct appeal. Accordingly, this Court grants a belated appellate review pursuant to White and denies and dismisses all other allegations with prejudice.

## PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to the orders of commitment of the Anderson County Clerk of Court. During its May 2016 term, the Anderson County Grand Jury indicted Applicant for Murder (2016-GS-04-862), Burglary, First Degree (2016-GS-04-860), and two counts of Arson, Third Degree (2016-GS-04-861, -863). Kurt Tavernier, Esquire (Plea Counsel) represented Applicant. Assistant Solicitor Lauren Davis Price (Solicitor Price) of the Tenth Circuit Solicitor's Office prosecuted the case.

On March 14, 2018, Applicant appeared before the Honorable R. Lawton McIntosh and pled guilty to the lesser-included offense of Voluntary Manslaughter and as indicted to the remaining three charges without recommendation from the State as to sentencing. Judge McIntosh sentenced Applicant to concurrent sentences of fifteen (15) years imprisonment for Burglary, thirty (30) years imprisonment for Voluntary Manslaughter, and fifteen years (15) imprisonment for each count of Arson.

Applicant filed a timely Notice of Appeal on Applicant's behalf. By Order dated April 15, 2018, the South Carolina Court of Appeals dismissed the case for failure to timely serve the notice of appeal pursuant to Rule 203(b), SCACR. State v. Lance (S.C. Ct. App. filed August 10, 2018). The Remittitur was returned to the circuit court on April 25, 2018.

## FACTS GIVING RISE TO CONVICTION

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

> On November 13, 2015, the defendants went to the victim's home. The victim in this case is Todd Cantlay. Once there, they struck the victim in the head with a baseball bat several times and stabbed him in the neck with a knife. And then postmortem, they set his body on fire. The defendants then took items from the home with them including two guitars, an Xbox 360, a television set, and a 22 caliber rifle. The victim's 17 year old son Brooks Cantlay said he was upstairs at the time of this killing. He told law enforcement he heard three loud bangs but thought it was his father banging the TV remote on a table in the home which he sometimes did. Brooks said he woke up to the smell of smoke and discovered his father, doused him out with bowls of water and then dialed 9-1-1. When the Anderson County Sheriff's Office arrived, Brooks told them he believed that Jacob Lance might be responsible for the incident. He said that Jacob was his drug dealer and that the victim, Todd, and Jacob had recently been texting each other and that his father was angry and had called Jacob complaining that the defendant was quote "shorting Brooks" by not giving him enough drugs for the money he was paying Jacob. Brooks told law enforcement that they would find texts on his phone between the two and phone calls, which they did. After taking the victim's belongings from the house, the defendants also took the victim's car, which was a black BMW and they drove it to a wooded area where they attempted to burn it. At the time of this incident, Jacob was seeing the mother of his child, Alissa Martin. After the killing, he called her and told her he had killed a man, this victim, by hitting him with a baseball bat and that his brother, Oscar, had stabbed the man in the neck. Then they had stolen items, including a car, and set the car on fire. Alissa Martin

called law enforcement after hearing this. Search warrants were executed at the homes of the defendants at 101 and 106 Saddle Trial. Both the defendants were apprehended at that time. This is all in a 24 hour period. In Jacob's vehicle, the two stolen guitars were found. Behind Oscar's home, law enforcement found a bloody baseball bat and the missing 22 caliber rifle. In Oscar's home, they found the TV and Xbox. That Xbox had been hidden inside a recliner in the home where they had removed the cushion and put the fabric over top of it. Both of the defendants, after being apprehended, gave statements to law enforcement. First Jacob gave a statement to law enforcement implicating his brother in the killing. Second Oscar gave a statement to law enforcement implicating Jacob as the killer. Before this killing took place, the son of the victim told law enforcement he had given his home address to a mutual acquaintance, and that is at least the belief of the son how they came about figuring out where the father was. Alissa Martin, who was the mother of Jacob's child, also told law enforcement she was aware of the threatening phone calls made by the victim to Jacob Lance before this incident. The autopsy report in this case said the cause of death was blunt force trauma injury with resultant cerebral lacerations, contusions and diffused axonal injury. Law enforcement found the victim's vehicle. And when they discovered it, there was a burn rag in the gas tank where the vehicle had been set on fire. At the scene, a steak knife was found next to the victim's body, along with a can of Zippo Lighter Fluid that had been punctured.

(Plea Tr. pp. 12–16).

## CURRENT ACTION BEFORE THIS COURT

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

1. Ineffective Assistance of Counsel
   a. "Counsel was ineffective for failure to inform client of plea agreement."

Applicant requests relief in the form of a new trial and to vacate the convictions/sentences.

On January 22, 2021, Applicant filed a Supplemental Application in response to Respondent's Return and Motion for More Definite Statement, asserting the following additional allegations:

> 1. Ineffective Assistance of Counsel
>    b. "Counsel was ineffective for failing to file a timely direct appeal."

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

## STANDARD OF REVIEW

The Uniform Post-Conviction Procedure Act[1] (the Act) provides that any person who has been convicted of a crime may seek post-conviction relief based on the following types of allegations:

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

S.C. Code Ann. § 17-27-20(A).

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

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).

***INEFFECTIVE ASSISTANCE OF COUNSEL, GENERALLY***

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. Strickland v. Washington, 466 U.S. 668 at 687 (1984). To obtain relief, a PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness, and (2) the applicant sustained prejudice as a result of counsel's deficient performance. Id. at 687-88; Cherry v. State, 300 S.C. 115, 117—18, 386 S.E.2d 624, 625 (1989). Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. Strickland, 466 U.S. at 700; see also Bell v. Cone, 535 U.S. 685, 695 (2002) (explaining that "[without proof of both deficient performance and prejudice to the defense... it could not be said that the sentence or conviction resulted from a breakdown in the adversary process that rendered the result of the proceeding unreliable" (citation and internal quotation marks omitted)).

Because the Sixth Amendment right to counsel also applies to a defendant entering a guilty plea. Hill v. Lockhart, 474 U.S. 52 (1985), extended the two-part Strickland test to challenge

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

An applicant alleging his guilty plea was induced by ineffective assistance of counsel must prove counsel's advice to plead guilty was not "within the range of competence demanded of attorneys in criminal cases." Hill, 474 U.S. at 56. The second, or "prejudice" prong, however, "focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process." Id. at 58-59. Specifically, when an applicant claims counsel's deficient performance caused him to accept a plea, the applicant "must show that there is a reasonable 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, 367 (2017). However, an applicant must convince the court that a decision to reject the plea bargain would have been rational under the circumstances. Padilla, 559 U.S. at 372. The question here is whether the applicant, if correctly informed of circumstances surrounding the plea, would have pleaded guilty—**not** whether counsel would have still advised him or her to plead guilty. Turner v. State, 335 S.C. 382, 385, 517 S.E.2d 442, 444 (1999) (emphasis added).

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

Applicant has alleged and elected to pursue various claims of ineffective assistance of counsel through the post-conviction relief action presently before this Court. In analyzing these claims, this Court has considered the legal arguments by counsel and thoroughly reviewed the record in its entirety. This Court additionally heard the testimony presented at the evidentiary hearing and observed 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 Plea Counsel's testimony at the evidentiary hearing **credible** and **persuasive**, where he presented well-recollected testimony of relevant background, facts, and discussions leading up to and during the plea hearing. This Court further finds applicable the strong presumption that at all stages of Plea Counsel's representation

of Applicant, he rendered adequate assistance and exercised reasonable professional judgment in his representation. Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007) (citing Strickland, *supra*). The United States Supreme Court has cautioned that "every effort be made to eliminate the distorting effects of hindsight" and evaluate counsel's decisions at the time they were made. Strickland, 466 U.S. at 689; see Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992).

From the record, this Court makes the following findings: 1. Applicant was duly sworn (Plea Tr. p. 4); 2. Applicant graduated from high school and had worked several jobs thereafter (Plea Tr. pp. 4–5); 3. Applicant indicated he understood the charges he was pleading to and the possible sentencing range for each charge (Plea Tr. p. 6); 4. Applicant understood he the plea judge could impose a life sentence, and knowing this, still wished to plead (Plea Tr. p. 6); 5. Applicant was not under the influence of any medication, drugs, or alcohol (Plea Tr. p. 7); 6. Plea Counsel was satisfied Applicant was competent to plead guilty (Plea Tr. p. 7); 7. Applicant was not coerced, threatened, or promised anything to get him to plead, and he pled of his own free will (Plea Tr. p. 7); 8. Applicant understood he had a right to a jury trial, the burden of proof at trial, and that he would be presumed innocent at trial, and knowing this, waived his rights (Plea Tr. pp. 7–8); 9. Applicant understood he had a right to cross-examine the witnesses against him at trial, present evidence in his own defense, testify, remain silent, and waived his constitutional rights in order to plead guilty (Plea Tr. pp. 8–10); 10. Applicant stated he pled guilty because he was, in fact, guilty (Plea Tr. p. 10); 11. Applicant was satisfied with his Plea Counsel's services, and Plea Counsel had reasonably done all he had asked him to do (Plea Tr. pp. 10–11); 12. Plea Counsel explained the elements of the charges, the minimum and maximum sentence Applicant faced, and the possible defenses Applicant had to those charges to Applicant prior to his plea (Plea Tr. pp. 11; 21); 13. Plea Counsel agreed with Applicant's decision to plea and stated there was a substantial factual

basis for the plea (Plea Tr. p. 11); 14. Plea Counsel represented Applicant approximately a year prior to his plea (Plea Tr. p. 19); 15. Plea Counsel met with Applicant about a dozen times prior to his plea (Plea Tr. p. 20); 16. Plea Counsel engaged in thorough investigations, engaging the services of Investigator Brad Baxter (Plea Tr. p. 20); 18. Plea Counsel engaged in extensive plea negotiations with the State, obtaining a stand-up plea with a reduction when Applicant faced thirty years (Plea Tr. p. 20); 19. Plea Counsel advised Applicant of his right to appeal, the time to appeal, and explained PCR (Plea Tr. p. 20); 20. Applicant agreed Plea Counsel's representations to the plea court concerning services rendered to Applicant throughout his representation and agreed Plea Counsel had conducted a complete investigation of his case (Plea Tr. p. 22); 21. Applicant made a statement expressing his remorse and guilt to the plea court (Plea Tr. pp. 23-24).

***INEFFECTIVE ASSISTANCE OF PLEA COUNSEL ALLEGATIONS ON THE MERITS***

**Allegation 1a: Plea Counsel failed to inform Applicant of the plea agreement.**

Applicant alleges Plea Counsel was constitutionally ineffective for failing to advise Applicant concerning a plea agreement. This Cout finds this allegation is without merit.

The United States Supreme Court has "long recognized that the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel." Padilla v. Kentucky, 559 U.S. 356, 373 (2010) (citations omitted); see Hill v. Lockhart, 474 U.S. 52 (1985) (extending the two-part Strickland test to challenge guilty pleas based on ineffective assistance of counsel). In the context of plea negotiations, an attorney's failure to communicate a formal plea offer to a criminal defendant falls below an objective standard of reasonableness under Strickland. Missouri v. Frye, 566 U.S. 134 (2012); Lafler v. Cooper, 566 U.S. 156 (2012); see Strickland, 466 U.S. at 688 (explaining that counsel has a duty "to consult with the defendant on important decisions and to keep the defendant informed of important developments

in the course of the prosecution."). In Lafler and its companion case, Frye, the Court recognized that "the right to adequate assistance of counsel cannot be defined or enforced without taking account of the central role plea bargaining plays in securing convictions and determining sentences." Lafler, 566 U.S. at 170 (citing Frye, 566 U.S. at 143–44).

Thus, the critical question in Lafler was "how to apply Strickland's prejudice test where ineffective assistance results in a rejection of the plea offer and the defendant is convicted at the ensuing trial." Id. at 163. Unlike Hill, the ineffective advice in Lafler "led not to an offer's acceptance but to its rejection." Id. In other words, "[h]aving to stand trial, not choosing to waive it, is the prejudice alleged." Id. at 163–64; see id. at 169 (explaining that "the question is not the fairness or reliability of the trial but the fairness and regularity of the processes that preceded it, which caused the defendant to lose benefits he would have received in the ordinary course but for counsel's ineffective assistance").

The Court ultimately held that, to show prejudice, the defendant must demonstrate a reasonable probability that (1) he would have accepted the plea offer; (2) the prosecution would not have withdrawn the offer in light of intervening circumstances; (3) the court would have accepted its terms; and (4) the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed. Lafler, 566 U.S. at 164; accord. Collins v. State, 422 S.C. 250, 262, 810 S.E.2d 871, 877 (2018).

At the evidentiary hearing on direct examination, Applicant testified he discussed the pros and cons with Plea Counsel about going to trial, and he told Plea Counsel several times he wished to go to trial. (PCR Tr. p. 12). Applicant testified Plea Counsel discussed pleas and plea terms. Id. Applicant testified that Plea Counsel showed him an email from the solicitor with two plea deals, offering either a thirty-year mandatory minimum for murder or voluntary manslaughter with

an open plea with a possible sentence of zero to thirty. (PCR Tr. pp. 12–13). Applicant testified he discussed the possibility of pleading with his father, John Day (Day), as well. (PCR Tr. p. 13). Applicant testified he visited with Plea Counsel and his father, and after seeing the evidence, his father persuaded him to plea. (PCR Tr. pp. 13–14). Applicant testified he felt like Plea Counsel set up the meeting to pressure Applicant to plea. (PCR Tr. p. 14). Applicant testified he understood that he had an open plea but that he had expected to get a better deal of fifteen to twenty because he had no prior record. (PCR Tr. pp. 14–15).

On cross-examination, Applicant testified that he discussed the two pleas with Plea Counsel offered by the State. (PCR Tr. pp. 17–18). Applicant testified no one had forced him or coerced him to take the plea. (PCR Tr. p. 18). Applicant testified he said several times he wanted to go to trial, and he desired to go to trial because he was not guilty. Id.

On direct examination, Plea Counsel testified his notes reflect he discussed the possibility of going to trial with Applicant, and trial was an option but it was not a good option, in Plea Counsel's opinion. (PCR Tr. p. 24). Plea Counsel testified Applicant's brother and co-defendant had already pled and would have testified against him at trial, and Applicant's girlfriend could have testified concerning incriminating statements Applicant had made to her. (PCR Tr. pp. 24–25). Plea Counsel testified that, in his opinion, a plea was the best course of action for Applicant as he was facing life at trial. (PCR Tr. p. 25). Plea Counsel testified he recommended Applicant take an open plea because the judge could be more lenient based on his age and lack of a prior record. Id. Plea Counsel testified he was not surprised the plea judge sentenced him to thirty years. Id.

Plea Counsel referenced his CYA letter that he gives to his most serious clients, advising them of their rights and options, and evidences his discussions with his clients. (PCR Tr. p. 26). Plea Counsel testified he provided Applicant with a CYA after their meeting with Day. Id. Plea

Counsel testified he, Applicant, and Day met for a couple of hours and went over everything, and Applicant indicated during that meeting that he was ready to change his mind about going to trial. Id. Plea Counsel testified that prior to this meeting, Applicant provided him with a letter allegedly written by his brother wherein his brother accepted responsibility. Id. Plea Counsel testified he verified that this letter was not written by his brother but was likely authored by Applicant. (PCR Tr. pp. 26–27).

On cross-examination, Plea Counsel testified that after his initial interview with Applicant, Applicant asked him how good of a plea deal Plea Counsel could get him. (PCR Tr. p. 30). Plea Counsel testified that after he had finished his second interview with Applicant, he advised him it was not in his best interest to go to trial. (PCR Tr. pp. 30–31). Plea Counsel testified the evidence against Applicant was overwhelming, and his main focus was negotiating a favorable deal for Applicant. (PCR Tr. p. 31). Plea Counsel testified he had at least three discussions with the solicitor about a plea offer after it became a viable option and that Applicant wished to plea at that point. (PCR Tr. pp. 31–32). Plea Counsel testified he advised Applicant he would not be able to get him the deal Applicant wanted and what the options were. (PCR Tr. p. 32; State's Exhibit 1). Plea Counsel testified the offers made to Applicant were a cap of thirty years for murder or a reduction to voluntary manslaughter with a cap of thirty years. (PCR Tr. p. 33). Plea Counsel testified no offers were withheld from Applicant. (PCR tr. p. 35).

On direct examination, Solicitor Price testified that she and Plea Counsel engaged in rigorous discussions about the viability of a plea offer in Applicant's case. (PCR Tr. p. 39). Solicitor Price testified she was disinclined to make an offer because of the brutality of the facts. Id. Solicitor Price testified that she made an offer to Applicant in consideration of one of the witnesses, the minor son of the victim, who was traumatized by the events. (PCR Tr. p. 41).

This Court finds Plea Counsel was not deficient, and Applicant cannot show resulting prejudice from Plea Counsel's actions. Applicant's contention is not that Plea Counsel failed to communicate the State's plea offer to him but that he felt coerced in pleading and felt as if he should have received a better offer based on his lack of a prior record. However, Applicant also testified, and the record establishes, that Applicant was not coerced or forced to plea, and he pled of his own free will. Additionally, Plea Counsel **credibly** testified he advised Applicant of all the plea offers, the possible outcomes, and that Applicant desired to plead.

Further, Applicant stated he desired to go to trial because he was not guilty. However, Applicant stated his remorse and guilt before the plea court, contradicting his testimony at the evidentiary hearing. See Blackledge v. Allison, 431 U.S. 63, 73-74 (1977) (Because a guilty plea is a solemn, judicial admission of the truth of the charges against an individual, the PCR applicant's right to contest the validity of such a plea is usually, but not invariably, foreclosed); See Crawford v. U.S., 519 F.2d 347, 350 (4th Cir. 1975), overruled on other grounds by U.S. v. Whitley, 759 F.2d 327 (4th Cir.1985) (Statements made during a guilty plea should be considered conclusive unless an Applicant presents valid reasons why he should be allowed to depart from the truth of his statements.)).

Moreover, this Court finds Applicant received a favorable plea offer considering the nature of the crime, the overwhelming evidence against him, and the sentence he was facing if he had proceeded to trial. Plea Counsel and Solicitor Price **credibly** testified that there was strong evidence against Applicant, including his own incriminating statements.

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

**Allegation 1b: Failure to timely file Applicant's appeal.**

Applicant alleged Plea Counsel was constitutionally ineffective for failing to file a timely direct appeal. This Court finds Applicant has met his burden in establishing Plea Counsel failed to timely file his direct appeal, and grants Applicant's request for belated appellate review pursuant to White, supra.

"Following a trial, counsel must make certain the defendant is made fully aware of the right to appeal." Simuel v. State, 390 S.C. 267, 270, 701 S.E.2d 738, 739 (2010). "However, the standard for a guilty plea differs." Turner v. State, 380 S.C. 223, 224, 670 S.E.2d 373, 374 (2008). "Absent extraordinary circumstances, such as when there is reason to think a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal) or when the defendant reasonably demonstrated an interest in appealing, there is no constitutional requirement that a defendant be informed of the right to a direct appeal from a guilty plea." Id.; Roe, 528 U.S. 470 (2000); Weathers v. State, 319 S.C. 59, 459 S.E.2d 838 (1995) ("bare assertion that a defendant was not advised of appellate rights is insufficient to grant relief").

To show prejudice where applicant claims counsel was ineffective for failing to file or advise him of his direct appeal, applicant must show that, but for, counsel's deficient conduct, applicant would have appealed. Roe v. Flores-Ortega, 528 U.S. 470, 484 (2000); Cf. Peguero v. United States, 526 U.S. 23 (1999) (defendant not prejudiced by court's failure to advise him of his appeal rights, where he had full knowledge of his right to appeal and chose not to do so)).

At the evidentiary hearing on direct examination, Applicant testified he discussed filing an appeal with Plea Counsel and informed Plea Counsel that he desired to appeal. (PCR Tr. p. 16). Applicant testified he communicated his desire to appeal to Plea Counsel before the ten days to file his appeal had run. Id. Applicant testified Plea Counsel failed to timely file his appeal. Id.

On cross-examination, Applicant testified he recalled being advised of his right to appeal and the time to appeal at his plea hearing. (PCR Tr. pp. 18–19). Applicant testified he told Plea Counsel he desired to appeal after his plea hearing and had his family contact Plea Counsel about his desire to appeal, as well. (PCR Tr. p. 19). Applicant testified he decided to appeal once he was advised of his right to do so. (PCR Tr. p. 20).

On direct examination, Plea Counsel testified he was notified by Applicant that he desired to appeal, but he was out of the office when he received it. (PCR Tr. p. 27). Plea Counsel testified he filed the appeal once he was back in the office, but the timing did not allow him to accomplish it in a timely manner. (PCR Tr. p. 28).

On cross-examination, Plea Counsel testified he did not contemplate an appeal because he felt like Applicant received a favorable deal. (PCR Tr. p. 36). Plea Counsel testified he was surprised when he received a last second request from Applicant that he desired to appeal. (PCR Tr. p. 36).

This Court finds Trial Counsel failed to timely file Applicant's direct appeal, and therefore, Applicant was denied his right to appeal and is entitled to belated review pursuant to White. Applicant's and Plea Counsel's testimony was consistent in that Applicant requested Plea Counsel file an appeal of his guilty plea, but Plea Counsel failed to timely file the appeal. Accordingly, this allegation is **GRANTED**.

***ALLEGATIONS RAISED DURING THE EVIDENTIARY HEARING***

**Allegation: Failure to review discovery.**

At the evidentiary hearing on direct examination, Applicant testified he went over discovery with first attorney, Hervery B. Young, but Plea Counsel did not review discovery with him. (PCR Tr. pp. 10–11). Applicant testified Plea Counsel and Mr. Baxter, the

investigator, met with him prior to his plea. (PCR Tr. p. 11). Applicant testified he asked Plea Counsel to follow up on an alibi and get the tape recording from a gas station. Id. Applicant testified Plea Counsel told him he did the things he asked. Id. Applicant testified that as far as he knew, Plea Counsel told him they did not want anything to do "with it." Applicant testified that Plea Counsel informed him the tape recording was not available because the gas station re-runs the tapes every thirty days. (PCR Tr. p. 12).

In order to prevail upon a claim that counsel did not adequately prepare or investigate a case, an applicant must present evidence of what counsel could have discovered or what other defenses applicant could have requested counsel develop and present had counsel been more prepared. Harris v. State, 377 S.C. 66, 75-76, 659 S.E.2d 140, 145-46 (2008) (citing Jackson v. State, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998)). Furthermore, an applicant must also present evidence to show how the discoverable matters or defenses would have resulted in a different outcome. Id. (citing Davis v. State, 326 S.C. 283, 288, 486 S.E.2d 747, 749 (1997); Skeen v. State, 325 S.C 210, 214, 481 S.E.2d 129, 132 (1997)). Mere speculation as to how the alleged lack of preparation prejudiced an applicant is not sufficient to support a grant of relief. Id., 377 S.C. at 75, 659 S.E.2d at 145 (citing Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995)).

On direct examination, Plea Counsel testified he reviewed some of the discovery with Applicant, but not all of it, as he had honed in on various issues after his initial meeting with Applicant. (PCR Tr. p. 22). Plea Counsel testified he and Mr. Baxter met with Applicant six times. Id. Plea Counsel testified Applicant gave him information on several witnesses, including Katy Blanding as an alibi witness, and he was able to locate her. (PCR Tr. pp. 22–23). Plea Counsel testified that after speaking with Katy Blanding, they did not take her

statement because it would not have benefited Applicant, and they were under a reciprocal discovery requirement. (PCR Tr. p. 23). Concerning the tape recordings from the gas station, Plea Counsel testified Mr. Baxter attempted to get video recordings from "Stop-A-Mint," "High Volume," and "Rite Aid." Id. Plea Counsel testified they spoke with the manager and verified that the videos were unavailable as they were only kept for thirty days. (PCR Tr. pp. 23–24).

This Court finds Plea Counsel was not deficient and Applicant failed to establish resulting prejudice from Plea Counsel's performance. As an initial matter, the record and Plea Counsel's **credible** testimony provide that he conducted a thorough investigation of Applicant's case and determined, based on those investigations, that it would be in Applicant's best interest to plead guilty. Specifically, Plea Counsel **credibly** testified the gas station recordings no longer existed, so he cannot be deficient for failing to investigate them further. Additionally, Plea Counsel **credibly** testified he investigated the alibi Applicant provided and determined her statement would only serve to damage Applicant's case. Notably. Applicant failed to present the testimony of the alleged alibi witness, thus Applicant has failed to meet his burden. See Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992) (prejudice from trial counsel's failure to interview or call witnesses could not be shown where witnesses did not testify at PCR hearing); Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995) (finding that counsel was not deficient by failing to call alibi witnesses when two witnesses who testified did not establish the alibi).

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

**Allegation:** **Failure to file a motion to reconsider the sentence.**

At the *evidentiary* hearing on direct examination, Applicant testified that Plea Counsel did not file a motion to reconsider his sentence, and he never discussed the possibility with Applicant. (PCR Tr. pp. 15–16).

On direct examination, Plea Counsel testified he did not consider a motion to reconsider the sentence because he felt that Applicant receiving a concurrent rather than consecutive sentence was a good outcome. (PCR Tr. p. 27).

On cross-examination, Plea Counsel testified that he would file a motion to reconsider if the judge failed to consider something that may have occurred. (PCR Tr. p. 37). Plea Counsel testified that under the plea judge had stated he would treat Applicant and his co-defendant, his brother, the same. Id. Plea Counsel testified that he believed Applicant received a favorable deal considering he was the most culpable. (PCR Tr. pp. 37–38).

This Court finds Plea Counsel was not deficient and Applicant failed to show resulting prejudice from his performance. Plea Counsel **credibly** testified he did not consider filing a motion to reconsider as Applicant had received a very favorable sentence, and he did not believe the plea judge had failed to take everything into consideration. This Court further finds Applicant has failed to meet his burden in proving that a motion to reconsider the sentence would have been successful. Based on the record before this Court, Applicant knowingly and intelligently entered his guilty plea with the knowledge of the maximum sentences the plea court could impose. Lastly, Plea Counsel has no control over sentencing, as that lies solely in the discretion of the sentencing judge.

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

**|CONCLUSION PAGE FOLLOWS|**

## 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** 6th **day of** May, 2024, ~~2023.~~

THE HONORABLE PERRY H. GRAVELY
Presiding Judge
Tenth Judicial Circuit

Pickens, South Carolina