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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT
APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas
The Honorable J. Cordell Maddox, PCR Action Judge
2023-CP-32-00992

ALONZA GIBSON,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

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**NOTICE OF APPEAL**

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Alonza Gibson appeals the denial of his post-conviction relief application. The post-conviction relief action was heard and denied by the Honorable J. Cordell Maddox, circuit court judge, on March 21, 2024, and was denied by written order issued filed on September 16, 2024. Applicant received notice of the judgement on September 19, 2024.

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CLERK OF COURT
LEXINGTON SC

STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS
COUNTY OF LEXINGTON ) FOR THE ELEVENTH JUDICIAL CIRCUIT

Alonzo Eric Victorlon GIBSON, ) Case No. 2023-CP-32-00992

Applicant,

v. ORDER OF DISMISSAL

State of South Carolina,

Respondent.

A TRUE COPY
Lex. Co. C.O.C.P., G.S., & F.C.

This matter comes before this Court by a *pro se* application for post-conviction relief filed March 6, 2023 by Alonzo Eric Victorlon Gibson. On March 21, 2024, an evidentiary hearing was held in this matter challenging his Lexington County conviction.. The Applicant was present with his court-appointed counsel, Chelsey Marto. The Respondent was represented by Deputy Attorney General Donald J. Zelenka. At the hearing, testimony was received from the Applicant, Sara Mauldin who was his plea attorney and the prosecutor, Ashley Wellman. At the conclusion of the hearing, this Court took the matter under advisement. This Order of Dismissal follows:

## I. FACTS & PROCEDURAL HISTORY

Applicant is not presently confined pursuant to the orders of commitment from Lexington County. On the Lexington County conviction, the Applicant maxed out of the sentence on or about February 10, 2023, prior to the filing of the current application for post-conviction relief.

The Applicant was arrested on June 21, 2022, following an investigation into/incident involving Domestic Violence of a High and Aggravated Nature which occurred on March 7, 2022. (2022A3221100111) and Criminal Sexual Conduct 1st degree (2022A3221100110). The Applicant waived grand jury presentment on November 30, 2022. State v. Gibson, 2022-GS-32-

04131, for the crime of Assault and Battery 2nd degree. He was present and represented in the matter by Sarah Hahn Mauldin at the guilty plea proceeding before the Honorable Debra McCaslin, Presiding Judge. The matter was prosecuted by Ashley E. Wellman of the 11th Circuit Solicitor Office. On November 30, 2022, Judge McCaslin after the guilty plea sentenced the Applicant to a determinate term of 18 months with credit for time served of 265 days. The arrest warrant for Criminal Sexual Conduct 1st degree (2022A3221100110) was *nolle prossed.*

Applicant is presently confined at the Clarendon County Detention Center pursuant to a petition by the Attorney General of South Carolina to determine if he is a sexually violent predator pursuant to the South Carolina Sexually Violent Predator Act, S.C. Code Ann. Sections 44-48-10 *et seq*. ("the Act"). In the Matter in Care and Treatment of Alonza Victorlan Gibson, Jr. aka Eric Victorlan Gibson Jr., 2022-CP-14-00547 (Clarendon County). In the SVP Petition dated December 14, 2022 and filed December 21, 2022, the State asserted the following was a qualifying conviction under the SVP Act as defined by S.C. Code Ann. Section 44-48-30(1):

A. Type of Conviction: Criminal Sexual Conduct Third Degree; Assault and Battery Second Degree; Threatening the life of a public official[1] - (**EXHIBIT C**).
B. Date of Conviction: On or about September 12, 2013 in Clarendon County.
C. Trial or Plea: Guilty Plea in Clarendon County
D. Sentence Received: Ten (10) Years, upon service of thirty (30) months balance suspended to three (3) years' probation.
E. Original Charge(s): Criminal Sexual Conduct First Degree; Kidnapping, Strong Armed Robbery; Assault and Battery First Degree.

Petition, p. 2.

The Petition also included the following, *but not as a Qualifying offense* but as part of the criminal history:

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[1] Assault and Battery – Second Degree and Threatening the life of a public official are not sexually violent offense but are placed with the CSC 3rd because the charges plead on the same day.

**PRIOR SEXUAL/VIOLENT CHARGES AND/OR CONVICTIONS:**

A. Type of Conviction: Assault and Battery Second Degree **(EXHIBIT D)**
B. Date of Conviction: On or about November 30, 2022 in Lexington County
C. Trial or Plea: Guilty Plea in Lexington County
D. Sentence Received: Eighteen (18) Months with 265 days' time served.
E. Original Charge(s): Criminal Sexual Conduct First Degree; Domestic Violence – ABHAN
F. Max-Out Date Currently set for February 10, 2023
G. Brief Facts:

**Victim 2: 41-Year-Old Female (Girlfriend)**

Law Enforcement responded to Lexington Medical Center in reference to a Domestic Violence ABHAN and Criminal Sexual Assault. Upon arrival, Victim 2 stated she was hiding from her live in boyfriend (Respondent). Victim 2 left her hiding place and proceeded to start walking on Sunset Blvd when Respondent came up behind her with a knife. Respondent forced Victim 2 into an auto dealers parking lot. Respondent presented the knife again and struck Victim 2 multiple times with a closed fist. Respondent threw Victim 2 on the ground and proceeded to sexually assault her and penetrated her vagina with his penis without a condom.

When Respondent finished he left, and Victim 2 walked to Lexington Medical Center. Victim 2 had a swollen face and a laceration under her left eye. Victim 2's left hand was swollen, and she complained of left arm pain.

Petition, p. 2-3.

The Honorable R. Ferrell Cothran, Jr. issued an Order dated January 13, 2023 authorizing the Applicant to be taken in custody pursuant to the Act. The Court is advised that the SVP matters are currently pending. The Lexington charges are unrelated to the SVP action. He is currently represented in that civil matter by appointed counsel Kindle K. Johnson.

## II. Current Application

In his application for post-conviction relief, Applicant alleges the following allegations related to his November 2022 guilty plea and conviction:

(9) …state reasons for not so appealing.

a. I didn't know at the time of the SVP civil action. I only had 2 months, after being given 265 days credit.

(10) State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(a) I wasn't given notice of the SVP Civil Action.
(b) Assault and battery 2nd is not a sex offense.
(c) SVP civil action was based on my conviction – assault and battery 2.

(11) State concisely and in the same order the facts which support each of the grounds set out in (10):

(a) I was unaware that my criminal history would prompt a civil action.
(b) Assault and Battery 2nd is not a sex offense.
(c) With knowledge I would have re-negotiated my plea

Applicant requests relief as follows:

I want to challenge the fact that an assault and battery is not a sex offense so I can be released from detainment at Clarendon County Detention Center.

There were no additional amended applications by the Applicant.

This Court has before it the following:

1. Lexington County Clerk of Court records regarding the subject conviction,

2. Applicant's records from the South Carolina Department of Corrections,

3. November 30, 2022 guilty plea transcript, and

4. the records of the current PCR action.

The Court also had before it the following records from the SVP action:

5. In the Matter in Care and Treatment of Alonza Victorlan Gibson, Jr. aka Eric Victorlan Gibson Jr., 2022-CP-14-00547 (Clarendon County), *Petition Pursuant to the Sexually Violent Predator Act*, dated December 14, 2022 and filed December 21, 2022 (without attachments)

6. Probable Cause Order, In the Matter in Care and Treatment of Alonza Victorlan Gibson, Jr. aka Eric Victorlan Gibson Jr., 2022-CP-14-00547 (January 13, 2023)(Cothran CAJ).

## FACTUAL BASIS OF THE GUILTY PLEA

During the guilty plea, Assistant Solicitor Ashley Wellman set forth the following as the factual basis for Gibson's plea to assault and battery second degree:

> This incident occurred on March 7th of this year. On that date, officers with the West Columbia Police Department responded to Lexington Medical Center in reference to a victim of domestic and sexual assault.
>
> Officers made contact with the victim in this case, Ms. I--- C---. (VICTIM) She stated that she was assaulted by her now ex-boyfriend. She claimed that she was currently pregnant and that her boyfriend was Eric (phonetic) or -- excuse me, Derrick (phonetic) or Eric. He was later identified as this defendant, Alonza Gibson. And I'll come to that -- how we made that connection in a few moments.
>
> She had significant bruising and cuts to her face. …
> …This photo was released in discovery. I don't actually know if (VICTIM) is pregnant or if she still is pregnant. They were only together for about a month and a half, so -- I'll leave it at that.
>
> She also had some pain in her arms, hands, and around her body. She said that she was walking from the Columbia side of West Columbia down 378 and she got into a verbal altercation with the defendant because the defendant accused her of sleeping with someone else.
>
> They went to a couple of different stores on 378. You can see them on surveillance video. There's some verbal arguments going on between the two, and she had claimed that the defendant then went to the front of a brown church located at 1500 Sunset Boulevard. He digitally penetrated her and then forcibly entered his penis into her vagina until ejaculation. He then struck her in the face with an open hand prior to leaving the church.
>
> They continued walking westbound down Sunset Boulevard past the Toyota Center –
>
> THE COURT: After that, they're both seen walking down the road?
>
> MS. WELLMAN: Yes, Your Honor. She claims that he later struck her in the face, head, stomach, back several times with a closed fist, kicking her while she was down on the ground. And then the defendant left her prior to arriving at Lexington Medical Center.

Your Honor, while at the hospital, (VICTIM) refused a sexual assault exam. There was nothing on the video evidence to suggest -- or I didn't see anything consistent with a sexual assault on the video.

(VICTIM) is homeless. We have made repeated attempts to try and locate her at different facilities and have been unsuccessful.

So this was going on -- or they had this story -- the case was assigned to a Det. Shubert (phonetic) at West Columbia Police Department. She heard of a similar incident involving this defendant, Alonza Gibson, who was in custody in Richland County for similar offenses. She went to talk to him. He did waive his Miranda rights. He did admit to being with (VICTIM). He admitted to engaging in sexual activity with her, though he said it was consensual. But he did also admit that he got into a fight with her and that he did strike her.

So that would be the basis for the plea in this case. . .

Plea Tr.p. 11-13.

When asked by the Court if he agreed with the facts, the Applicant declared: "No, They're not true, Not at all." Tr.p.13, l. 24. The Applicant's counsel, Sara Mauldin acknowledged the limited nature of Applicant's acknowledgement of guilt related to the factual basis: "he wholeheartedly admits doing the assault and battery and causing physical harm. He categorically denies any sort of sexual assault. So he admits the charge he is pleading to. He denies that charge that is being disposed." Plea Tr.p. 14, l. 3-7.

## SUMMARY OF PCR HEARING TESTIMONY

During the PCR hearing, the Applicant was the initial witness. He stated he was initially charged with a criminal sexual conduct charge but he pled guilty to assault and battery – second degree.[2] He was sentenced to a year, but has been detained due to SVP, but does not know if it related to an earlier offense. He stated that he completed service of his sentence and was being detained for a determination on whether he was a sexually violent predator. He claimed that he

[2] Counsel Mauldin was asking for time served at the plea. Assistant Solicitor Wellman indicated that the State was not offering time served and that there were no negotiations or recommendations. Tr.p. 6.

first learned about SVP when he was locked up at SCDC and was served with the paperwork. He first learned about SVP on the day of the plea. He stated that he was not able to talk with his attorney, Sara Mauldin, about SVP. Counsel did not warn his or investigate the chance of SVP commitment. He claimed that no one attempted to stop the plea ounce he learned about SVP. In hindsight, he wished he would have appealed. He stated that he was offered a simple plea agreement and then SVP came up at the plea.

On cross-examination, Gibson stated he expected time served when he entered his plea based upon what his counsel told him days before his trial date. Gibson stated he was told about SVP on the day of his plea. He initially claimed that there was no discussion of SVP during the plea.[3] He did not recall waiving presentment to assault and battery second degree at the plea. He stated that he advised the plea judge that that all the facts set out by the solicitor were not true, because some of the facts did not take place. He admitted to committing the assault and battery, that he did cause harm to the victim, and that he was the one who hit her. He did not recall the Assistant Attorney General speaking to the judge. He admitted that he had discussions with counsel Mauldin about the SVP program prior to the plea. He confirmed that she had advised him that she did not think that he should take the plea because she did not understand its impact on the SVP matter. She was willing to hold off the plea so that she could better inform him on the plea. He said that he wanted the plea to go forward on that day even though she was willing to wait for more information. He claimed he would appeal now but did not know anything about SVP at the

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[3] The record of the plea shows a discussion of the SVP program on pages 19—20. Senior Assistant Deputy Attorney General Deborah Shupe appeared at the guilty plea and advised the court and confirmed that a detainer had not been prepared in the matter yet, but that an SVP petition would be done in 10 days it would be done in 10 days, which could lead to probable cause warrant and a hearing at which point he would be picked up if he is released.

time.[4] He stated that he was appointed counsel for the SVP proceedings and had just finished his second evaluation with Dr. Gottfried after and an earlier one by the Department of Mental Health.

Public Defender Sara Mauldin testified that she represented Gibson on his 2022 charges. She stated that she felt sandbagged and learned about the SVP potential on the day of the plea. She also learned that the Attorney General's Office SVP person was there at the plea with an intent to file an SVP petition. Mauldin stated that she spoke with the Solicitor and that she thought the plea should be postponed. She thought the Attorney General was seeking to keep the Applicant in custody. However, she stated that Gibson wanted the plea to go forward. She stated that his admission at the plea was limited to the assault and battery and not the sexual allegation. She was aware that he had prior sex offense convictions but was not concerned about it before the plea because this was not a sex offense. She stated that she had not handled SVP related cases with her prior clients and did not know a thing about it. She stated that he did not ask for an appeal.

On cross-examination, Mauldin stated that she had not been in contact with the Attorney General SVP person previously and did not know about the SVP petition against him until that day. Maulding felt the Solicitor learned about the SVP possibility only recently. She stated that she asked the Solicitor to postpone the plea when she learned this. After learning about this she had a meeting with the Applicant and informed him about the SVP and the effect the charges would have on the SVP case. She said that Gibson wanted to get out of the Lexington County Detention Center as soon as possible. So he went through with it anyway. Mauldin stated that she advised Gibson that she could not guarantee time served by that it was a likely result. She stated that the solicitor had advised her that the recommendation by the state would be that they would

[4] The plea record reflected he had a prior criminal sexual conduct in the first and third degree convictions in 2013 which made him subject to the Sexually Violent Predator Act. Tr.p. 16.

not take a position on sentencing. She stated that state had a significant problem in proving that there was a sexual offense in this assault. She was worried that it would have been worse if she pled to a sexual offense in front of the judge. She said the client was firm about pleading guilty in spite of the what Mauldin wanted him to do. Based on that she followed her client's wishes.

On redirect, Mauldin stated that she did not tell him additional time could be indefinite and that she doubts he understood the SVP program because she did not.

Assistant Solicitor Ashley Wellman was the prosecutor in this case as assigned by Chief Deputy Solicitor Al Eargle. She stated that on the day of the plea she learned about the SVP proceedings. She does not know how the Attorney General became aware of the plea. She stated that Mauldin brought it to her attention about the SVP proceeding was coming. She learned that Sara agreed to postpone the plea because she was also not prepared to for it because of her lack of knowledge about SVP. She agreed to extend the plea offer in order to gather more information. Wellman stated the only thing she knew was that Gibson had a prior record of violence against woman including a sex offense. Wellman stated the assault and battery second that Gibson pled did not have anything to do with sexual conduct so she did not think it would be an issue. She made a specific point that it was physical injury in the report and did not say sexual. Wellman noted that while there had been a criminal sexual conduct allegation, the victim had refused an examination, so it was not treated as a criminal sexual offence.

On cross-examination, Wellman reviewed a copy of the assault and battery indictment noting that it referred to a moderate body injury to the body and head and excluded the section about a sexual assault which would be a separate section. This was for solely a physical injury, according to Wellman. She stated the appearance at the plea by the Assistant Attorney General surprised her, but she was not surprised when Judge McCaslin inquired about the SVP proceedings

because it was new information. She stated that SVP She stated that assault and battery 2nd degree are not usually subject to SVP consideration .

## FINDINGS OF FACT & CONCLUSIONS OF LAW

Pursuant to sections 17-27-70 and -17-27-80 of the South Carolina Code, this Court makes the following findings of facts and conclusions of law based upon the pleadings, records submitted by both parties, and the applicable law.

In order to establish a claim of ineffective assistance of counsel, a PCR applicant must prove counsel's performance was deficient and the deficient performance prejudiced the applicant's case. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). Where there has been a guilty plea, the applicant must prove counsel's representation fell below the standard of reasonableness and, but for counsel's unprofessional errors, there is a reasonable probability he would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985); Alexander v. State, 303 S.C. 539, 402 S.E.2d 484 (1991). In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing. Harres v. Leeke, 282 S.C. 131, 318 S.E.2d 360 (1984). See Page v. State, 364 S.C. 632, 635, 615 S.E.2d 740, 741 (2005)

Applicant's allegation is that he wants to challenge the fact that his assault and battery second degree is not a qualifying offense for sexual violent offender treatment and that he was unaware that the State was pursuing SVP treatment when he pled guilty should be denied. As stated above and below, prior to the plea, the Applicant, his counsel, and the prosecutor became aware that there was a potential SVP proceeding being prepared. In fact, counsel Mauldin was prepared to stop the plea from going forward in order to develop more understanding about the

SVP process. However, the Applicant, made the free and voluntary choice to go forward with a favorable plea rather than wait for further research to be done about the collateral SVP proceedings. Although there was no offer from the State by negotiations or recommendations, the Applicant's counsel requested time served as a disposition. Tr.p. 6.

In Page v. State, 364 S.C. 632, 636–37, 615 S.E.2d 740, 742 (2005), the Supreme Court concluded that counsel's failure to advise defendant of possible civil commitment as sexually violent predator did not render guilty plea involuntary. The Court determined that any possible civil commitment pursuant to the SVP Act does not flow directly from a defendant's guilty plea, but rather from a separate civil proceeding in which testing, evaluation, a probable cause hearing, and a trial by either the court or jury occurs. The Court stated:

> We conclude Petitioner's counsel had no duty to inform him about the civil commitment process under the SVPA. Although eligibility for civil commitment under the SVPA is triggered by conviction of a "sexually violent offense," civil commitment can be imposed only after testing, evaluation, a probable cause hearing, and a trial by either the court or jury. No one can be civilly committed as a "sexually violent predator" unless the State proves beyond a reasonable doubt the person suffers from a mental abnormality or personality disorder that makes the person likely to engage in sexual violence if not confined in a secure facility. Consequently, a person may be convicted of a predicate offense, and yet not be committed under the SVPA because the evidence is not sufficient to find that his or her present mental condition creates a likelihood of future sexually violent behavior. Thus, any possible civil commitment of Petitioner would not flow directly from his guilty plea, but rather from a separate civil proceeding as a collateral consequence.

Page v. State, 364 S.C. 632, 637, 615 S.E.2d 740, 742 (2005).

Subsequent to Page, the Court again addressed the SVP program and guilty pleas. In Hamm v. State, 403 S.C. 461, 464–65, 744 S.E.2d 503, 504–05 (2013), the Court addressed the ability to raise challenges to guilty pleas in SVP related matters. In Hamm, the state habeas applicant sought relief on the ground his plea judge and plea counsel were ineffective for failing to inform him that he was subject to the SVP Act as a direct consequence of pleading guilty. Hamm's claim was

different in that he felt he had to be advised that by pleading guilty to certain sex crimes it would subject him to the SVP Act and its potential implications, such as civil confinement.

> Hamm failed to file a PCR application raising any issue related to Padilla within one year of that decision, issued March 31, 2010, as required by section 17–27–45 of the South Carolina Code. S.C.Code Ann. § 17–27–45(B) (2003). Because Hamm failed to exhaust all other remedies, he is barred from habeas corpus relief on his Padilla-related grounds. Gibson, 329 S.C. at 40, 495 S.E.2d at 427–28 (stating a petition for habeas relief must, in addition to other requirements, allege petitioner has exhausted all other remedies in order to be entitled to a hearing).
>
> However, were we even to reach Hamm's Padilla claim, he is not entitled to relief. Commitment pursuant to the SVP Act does not automatically flow from the conviction, rather a civil proceeding occurs where the defendant is evaluated before confinement is certain; the USSC's rationale under Padilla does not extend to a person's civil commitment under the SVP Act; and Padilla does not apply retroactively.

Hamm v. State, 403 S.C. 461, 464–65, 744 S.E.2d 503, 504–05 (2013). [5]

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[5] In Padilla v Kentucky, 559 U.S. 356, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010), the United States Supreme Court (USSC) determined that as a matter of law, Padilla's plea counsel had an obligation to advise him that the offense to which he was pleading guilty would result in his deportation. *Padilla,* 130 S.Ct. at 1478. Although the Kentucky Supreme Court rejected Padilla's ineffectiveness claim on the ground that the risk of deportation was a collateral matter of which counsel did not have to advise him, the USSC stated "deportation as a consequence of criminal conviction is, because of its close connection to the criminal process, uniquely difficult to classify as either a direct or collateral consequence" and the "collateral versus direct distinction is thus ill-suited in evaluating a Strickland [v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) ] claim concerning the specific risk of deportation." *Id.* at 1481–82. The USSC further found that although deportation was not purely punitive, it was (1) of great importance; (2) virtually mandatory; (3) intimately related to the criminal process; and (4) a drastic measure. *Id.* at 1478–82. The USSC determined that "constitutionally competent counsel would have advised him that his conviction ... made him subject to automatic deportation." *Id.* at 1478. Additionally, the USSC held counsel must inform the defendant whether his plea carries a risk of deportation because it is a critical factor the defendant is likely to consider in deciding whether to enter a plea or proceed to trial. *Id.* at 1484–86. Accordingly, the Court held that in order for counsel's representation to be deemed reasonable under *Strickland,* he must advise the defendant about the possibility of deportation. *Id.* at 1486–87. Thus, the USSC ruled counsel was deficient for failing to inform his client when the plea carried the risk of deportation. *Id.* at 1483. Notably, the USSC stated that to be afforded relief a party still needs to demonstrate the prejudice required by Strickland. Id. at 1483–84.

In light of Hamm and Page, this Court cannot find that counsel Mauldin was either deficient or prejudicial under Strickland. This Court finds that just prior to the plea, she became aware of the possibility of pending SVP proceedings. She offered to have the matter postponed in order to learn more about the impact of the plea on the SVP proceedings. However, counsel, with that knowledge, did not want to defer the guilty plea and move forward and get sentenced. Counsel was not deficient in failing to advise her client about the potential SVP proceedings because under Page, she had no duty to advise. Further, once she learned of the potential, she discussed the potential with Gibson, but she wanted further time to assess the impact of the plea on the SVP proceedings. This was reasonable action and advice on counsel's part. However, the Applicant, not counsel, wanted to proceed forward without any additional information about SVP and without delay. The Applicant has failed to show either deficient performance or prejudice under Strickland.[6]

**B. Involuntary Guilty Plea**

Given an extraordinary liberal construction, it may be that his claim is that his guilty plea was unknowing because he is claiming he was unaware of the potential for sexually violent offender treatment. "[I]t is the prerogative of any person to waive his rights, confess, and plead guilty, under judicially defined safeguards, which are adequately enforced." *Reed v. Becka*, 333 S.C. 676, 685, 511 S.E.2d 396, 401 (Ct. App. 1999). Because a criminal defendant waives several constitutional rights by pleading guilty, the Due Process Clause requires that guilty pleas are entered into voluntarily, knowingly, and intelligently. Boykin v. Alabama, 395 U.S. 238 (1969);

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[6] However, unlike the guilty plea setting, the South Carolina Supreme Court has established the right to counsel afforded by the state and federal constitutions, and by the Sexually Violent Predator Act, to an offender sought to be civilly committed as SVP is necessarily a right to effective counsel. See Matter of Chapman, 419 S.C. 172, 796 S.E.2d 843 (2017) .

Pittman v. State, 337 S.C. 597, 524 S.E.2d 623 (1999). To be intelligent, a plea must be made by a mentally competent defendant who understands both the charges against him and the consequences of his plea. Brady v. United States, 397 U.S. 742, 748 (1970). To be voluntary, a plea must be free of threats or other coercion that would impermissibly distort the defendant's choice. *Id.* at 755; see also United States v. Smith, 440 F.2d 521, 528–529 (7th Cir. 1971) (Stevens, J., dissenting) (explaining that voluntariness relates to the trustworthiness of the admission of guilt and binding character of the waiver of the constitutional protections which would be available to the accused if he elected to stand trial).

Before a court can accept a guilty plea, the defendant must be advised of the constitutional rights he or she is waiving; the right to a jury trial, the right to confront one's accusers, and the privilege against self-incrimination. Boykin, 395 U.S. at 243. Additionally, the defendant "must be aware of the nature and crucial elements of the offense, the maximum and any mandatory minimum penalty, and the nature of the constitutional rights being waived." Pittman, 337 S.C. at 599, 524 S.E.2d at 624.

The defendant's knowing and voluntary waiver of statutory or constitutional rights must be established by a complete record, and "may be accomplished by colloquy between court and defendant, between court and defendant's counsel, or both." State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993); see generally Wolfe v. State, 326 S.C. 158, 485 S.E.2d 367 (1997) (guilty plea not involuntary where the colloquy demonstrated the trial judge asked defendant twice whether he understood there were no promises and that no sentencing recommendations were binding on the judge). To ensure the defendant understands the consequences of his guilty plea, the plea judge "usually questions the defendant about the facts surrounding the crime and punishment that could be imposed." Dover v. State, 304 S.C. 433, 434–35, 405 S.E.2d 391, 392

(1991). However, the plea judge "does not have to direct the defendant's attention to every consequence of his plea provided the record reveals affirmative awareness of the consequences of a guilty plea." Carter v. State, 329 S.C. 355, 362, 495 S.E.2d 773, 776 (1998).

An applicant who enters a plea on the advice of counsel may "only attack voluntary, knowing and intelligent character of the plea by showing that plea counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the [applicant] would not have pled guilty but would have insisted on going to trial." Roscoe, 345 S.C. at 20, 546 S.E.2d at 419. In evaluating an allegation on PCR that a guilty plea was based on inaccurate advice of counsel, the transcript of the guilty plea hearing will be considered to determine whether any possible error by counsel was cured by the information conveyed at the plea hearing. Wolfe, 326 S.C. at 165, 458 S.E.2d at 370; *cf. Rayford v. State*, 314 S.C. 46, 443 S.E.2d 805 (1994) (finding that, where the transcript of the guilty plea proceeding refuted applicant's claim that he did not understand the terms of a plea bargain, granting PCR was inappropriate notwithstanding applicant's claim his lawyer misadvised him). The voluntariness of a guilty plea "is not determined by an examination of the specific inquiry made by the sentencing judge alone, but is determined from both the record made at the time of the entry of the guilty plea and the record of the post-conviction hearing." Harres v. Leeke, 282 S.C. 131, 133, 318 S.E.2d 360, 361 (1984).

The test for determining the validity of a guilty plea is "whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." North Carolina v. Alford, 400 U.S. 25, 31 (1970). It is "well established that a guilty plea is not rendered invalid because it represents a compromise by defendant, thrusts a difficult judgment upon him, or is motivated by fear of greater punishment." United States v. Cox, 464 F.2d 937, 942

(6th Cir. 1972) (citing Brady, 397 U.S. 742). The State may properly encourage guilty pleas either by being more lenient to those who enter such pleas, Brady, 397 U.S. at 750–53, or by increasing the risks of punishment on those who do not. Alford, 400 U.S. at 37. Because a guilty plea is a solemn, judicial admission of the truth of the charges against an individual . . . , a criminal inmate's right to contest the validity of such a plea is usually, but not invariably, foreclosed." Dalton v. State, 376 S.C. 130, 137, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing Blackledge v. Allison, 431 U.S. 63, 74 (1977); see also Jamison v. State, 410 S.C. 456, 469–71, 765 S.E.2d 123, 129–30 (2014) (observing that "guilty plea[s] must be treated as final in the vast majority of cases" and instructing that caution must be exercised so as not to "undermine the solemn nature of a guilty plea and the finality that generally attaches to a guilty plea")

Of import here, a defendant is "bound," absent clear and convincing evidence to the contrary, "by the representations he made under oath during a plea colloquy." Fields v. Attorney Gen. of Md., 956 F.2d 1290, 1299 (4th Cir. 1992); *see* Blackledge v. Allison, 431 U.S. 63, 74-75, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977); United States v. Lemaster, 403 F.3d 216, 221 (4th Cir. 2005). Indeed, "a defendant's solemn declarations in open court affirming a [plea] agreement ... 'carry a strong presumption of verity.' " Lemaster, 403 F.3d at 221 (*quoting* Blackledge, 431 U.S. at 74, 97 S.Ct. 1621). In a similar setting, conclusory allegations in a § 2255 federal habeas petition that are contrary to testimony provided at a Rule 11 hearing are "palpably incredible and patently frivolous or false." Lemaster, 403 F.3d at 222. As the Fourth Circuit has explained, "courts must be able to rely on the defendant's statements made under oath during a properly conducted Rule 11 plea colloquy." *Id.*; *see also* Blackledge, 431 U.S. at 74, 97 S.Ct. 1621; White, 366 F.3d at 295-96; United States v. Bowman, 348 F.3d 408, 417 (4th Cir. 2003).

Indeed, admissions 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." Dalton, 376 S.C. at 137–38, 654 S.E.2d at 874 (internal citations and quotation marks omitted); *cf.* Blackledge, 431 U.S. at 73–74 (pointing out that representations made by a defendant, his lawyer, and the prosecutor at a guilty plea hearing, as well as any findings made by the judge accepting the plea, constitute a "formidable barrier in any subsequent collateral proceedings"). "What is at stake in this phase of the case is not the integrity of the state convictions obtained on guilty pleas, but whether, years later, defendants must be permitted to withdraw their pleas, which were perfectly valid when made, and be given another choice between admitting their guilt and putting the State to its proof." McMann v. Richardson, 397 U.S. 759, 773 (1970) (noting the compelling interests in maintaining the finality of guilty-plea convictions validly obtained).

The Applicant stated at the plea under oath that he was aware that he had a right to a jury trial, the right to cross-examine witnesses, the right to call witnesses, and the right to testify or not testify. Tr.p. 7-8.He admitted that he was not promised anything to get him to plead guilty, that he was not forced to plead guilty and that he was doing so freely and voluntarily. Tr.p. 8 -9.The plea court also had an oral waiver of presentment of the indictment. Tr.p. 10-11. The Applicant unequivocally admitted to the charges in the indictment and just as clearly claimed, as supported by counsel, the State and the Judge, these charges did not include any criminal sexual assault. Tr.p. 14-15. The plea court as noted more fully below there was a discussion about SVP at the plea hearing and the Applicant's position on wanting to proceed.

This Court must conclude that the Applicant has failed to meet his burden of proof in showing that the guilty plea to the charge of assault and battery second degree was entered unknowingly and involuntarily with ineffective assistance of counsel.

**The Offense of Assault and Battery Second Degree is not a Qualifying Offense for SVP Treatment and Is Not Viewed as Such in Applicant's Case.**

This Court further finds that the foundation of the Applicant's claim is a misunderstanding on his part that the crime he pleaded to on November 30, 2022 is the qualifying offense for the State's later claim to subject his to consideration as a "sexually violent predator pursuant to S.C. Code § 44-48-30." The Applicant is correct that "assault and battery second degree"[7] is not a defined qualifying offense and is not on the qualifying offense list in S.C. Code § 44-48-30.[8]

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[7] Assault and battery second degree is defined in S.C. Code Ann. § 16-3-600 as follows:

(D)(1) A person commits the offense of assault and battery in the second degree if the person unlawfully injures another person, or offers or attempts to injure another person with the present ability to do so, and:

(a) moderate bodily injury to another person results or moderate bodily injury to another person could have resulted; or

(b) the act involves the nonconsensual touching of the private parts of a person, either under or above clothing.

(2) A person who violates this subsection is guilty of a misdemeanor, and, upon conviction, must be fined not more than two thousand five hundred dollars, or imprisoned for not more than three years, or both.

(3) Assault and battery in the second degree is a lesser-included offense of assault and battery in the first degree, as defined in subsection (C)(1), assault and battery of a high and aggravated nature, as defined in subsection (B)(1), and attempted murder, as defined in Section 16-3-29.

S.C. Code Ann. § 16-3-600

[8] For purposes of this chapter:

(1) "Sexually violent predator" means a person who:

(a) has been convicted of a sexually violent offense; and

(b) suffers from a mental abnormality or personality disorder that makes the person likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care, and treatment.

(2) "Sexually violent offense" means:

(a) criminal sexual conduct in the first degree, as provided in Section 16-3-652;

(b) criminal sexual conduct in the second degree, as provided in Section 16-3-653;

(c) criminal sexual conduct in the third degree, as provided in Section 16-3-654;

(d) criminal sexual conduct with minors in the first degree, as provided in Section 16-3-655(A);

(e) criminal sexual conduct with minors in the second degree, as provided in Section 16-3-655(B);

Contrary to the inference the Applicant claims in his application, a discussion of whether Applicant was facing sexually violent predator treatment consideration was raised at the time of the guilty plea. During defense counsel's argument in mitigation and during this PCR hearing, counsel Mauldin credibly declared that she had discussed with Gibson holding off the guilty plea that date, after she had learned about the SVP Petition, to allow further discussion with someone who does SVP on a regular basis to determine if there was a chance the plea would have a negative effect on the SVP case. Plea Tr.p. 19, l. 17-25. Counsel Mauldin stated that Gibson did not want to hold off and wanted to get out of the Lexington County jail "one way or the other." Plea Tr.p. 19-10. She further continued to assert that Applicant's denial of any sexual assault related to the incident which was being dismissed, but admitted doing physical harm to the victim, including

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(f) criminal sexual conduct with minors in the third degree, as provided in Section 16-3-655(C);
(g) engaging a child for a sexual performance, as provided in Section 16-3-810;
(h) producing, directing, or promoting sexual performance by a child, as provided in Section 16-3-820;
(i) assault with intent to commit criminal sexual conduct, as provided in Section 16-3-656;
(j) incest, as provided in Section 16-15-20;
(k) buggery, as provided in Section 16-15-120;
(l) violations of Article 3, Chapter 15, Title 16 involving a minor when the violations are felonies;
(m) accessory before the fact to commit an offense enumerated in this item and as provided for in Section 16-1-40;
(n) attempt to commit an offense enumerated in this item as provided by Section 16-1-80;
**(o) any offense for which the judge makes a specific finding on the record that based on the circumstances of the case, the person's offense should be considered a sexually violent offense**; or
(p) criminal solicitation of a minor, as provided in Section 16-15-342, if the purpose or intent of the solicitation or attempted solicitation was to:
(i) persuade, induce, entice, or coerce the person solicited to engage or participate in sexual activity as defined in Section 16-15-375(5); or
(ii) perform a sexual activity in the presence of the person solicited.

S.C. Code Ann. § 44-48-30

bruising to her face and a cut on her back. Tr.p. 20. Counsel asked for a time served sentence. Id. Counsel Mauldin acknowledged that that if the state serves the petition, he knows he has to deal with it. Id.

Senior Deputy Attorney General Deborah Shupe was present at the plea and then briefly explained the SVP process. She indicated an intent to file the SVP petition within 10 days, then have a probable cause warrant and have a hearing which could result in a detainer. She stated if they get a detainer, it would result with Applicant being picked up if he is released on that detainer. Plea Tr.p. 21, l. 11-21.

More importantly, Judge McCaslin did not declare this offense conviction as a qualifying offense under S.C. Code Ann. § 44-48-30(o): "(o) any offense for which the judge makes a specific finding on the record that based on the circumstances of the case, the person's offense should be considered a sexually violent offense." To the contrary, Judge McCaslin unequivocally stated:

> THE COURT: Okay. All right. Mr. Gibson, I'm going to accept your plea; find it to be freely, voluntarily, intelligently made. I'm just going to tell you right now, I'm not even considering anything about a sexual assault in my mind, whatsoever, because there's no evidence of it.

Plea Tr.p. 14, l. 16-20. Judge McCaslin also noted that the solicitor had placed on the record at this plea that there was no evidence of a sexual assault on the offense that he was pleading. Plea Tr.p. 14, l. 22-23.

This Court finds that there is no basis for the Applicant to contend that his November 30, 2022 plea to assault and battery second degree was unknowing and therefore subject to being vacated. The crime he pled guilty to was not a qualifying offense and Judge McCaslin specifically did not consider the crime had any sexual implications.

This Court further finds that in the subsequent SVP Petition dated December 14, 2022 and filed December 21, 2022, the State asserted the following was the only qualifying conviction under

the SVP Act as defined by S.C. Code Ann. Section 44-48-30(1): "Criminal Sexual Conduct Third Degree," based upon a guilty plea on or about September 12, 2013 in Clarendon County. In the Matter in Care and Treatment of Alonza Victorlan Gibson, Jr. aka Eric Victorlan Gibson Jr., 2022-CP-14-00547 (Clarendon County), *Petition Pursuant to the Sexually Violent Predator Act*, dated December 14, 2022 and filed December 21, 2022.

His claims for relief must be denied since the record conclusively rejects his assertions for relief because the crime he pled to on November 2022 was not a qualifying offense conviction.

Alternately, the above determination is not properly before this Court. In his application, Gibson requests as follows: "I want to challenge the fact that an assault and battery is not a sex offense so I can be released from detainment at Clarendon County Detention Center." This is beyond the scope of PCR proceedings and should only be addressed in the pending civil commitment proceedings pending in Clarendon County as far as release from the facility. See, e.g., Drayton v. Evatt, 312 S.C. 4, 8, 430 S.E.2d 517, 520 (1993) ("[PCR] is not a substitute for appeal or a place for asserting errors for the first time which could have been reviewed on direct appeal."). An applicant may commence a post-conviction relief action on the following grounds:

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 [was] 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). Post-conviction relief "is a proper avenue of relief only when the applicant mounts a collateral attack challenging the validity of his conviction or sentence." Al-Shabazz v. State, 338 S.C. 354, 367, 527 S.E.2d. 367, 527 S.E.2d 742, 749 (2000). The Applicant is being detained in Clarendon County based upon a filing in a civil commitment proceeding under the SVP Act. It is not related to the validity of this guilty plea. This Court has no authority in this Lexington County PCR proceeding to address that detention. The allegation and request for relief must be dismissed.

**The Applicant Is Not Entitled to Belated Appellate Review of his Guilty Plea.**

In his application, Gibson stated that he did not appeal his guilty plea because he did not know at the time of the SVP action. As noted above, the Applicant was aware prior to the entry of the plea of the potential SVP action. However, the Applicant wanted to proceed forward on his guilty plea. The Applicant's sentence was within the mandates of the sentence for assault and battery second degree and no objection was made by counsel. Further, the factual basis for the crime met the elements for the crime. No objection was made to anything concerning the plea.

Following a trial, counsel is required to make certain the defendant is made fully aware of the right to appeal. White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974). In the absence of an intelligent waiver by the defendant, counsel must either initiate an appeal or comply with the procedure in Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). Id. However, the standard for a guilty plea differs. 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. Roe v. Flores- Ortega, 528 U.S. 470, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000); Weathers v. State, 319 S.C. 59, 459 S.E.2d 838 (1995). In determining whether a rational defendant would have desired an appeal, "the court must consider such factors as whether the defendant received the sentence bargained for as a part of the plea and whether the plea expressly reserved or waived some or all appeal rights." Flores-Ortega, supra.

Applicant pled guilty to the charges against him. On PCR, petitioner did not allege he asked counsel to file a direct appeal, he had viable issues for appeal, or there were other extraordinary circumstances which would require him to be advised of his right to a direct appeal from his guilty plea under Roe. No objections were made at the plea. There was no evidence at the PCR hearing that petitioner was entitled to be advised of his right to a direct appeal from his guilty plea and was not advised of that right, nor was there evidence petitioner requested counsel file an appeal.

Without evidence of extraordinary circumstances, Applicant is not entitled to a belated appellate review of his guilty plea nor of further advice by his lawyer at the time of his plea under Roe. His suggestion otherwise must be dismissed. Counsel was also not deficient in failing to advise Applicant so he has also failed to prove ineffective assistance of counsel related to this claim.

## 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 and vacate his free and voluntary guilty plea. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

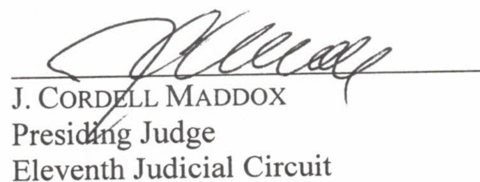
This Court notifies the Applicant that he must file and serve a notice of appeal within thirty

(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

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



J. CORDELL MADDOX
Presiding Judge
Eleventh Judicial Circuit

Anderson, South Carolina