

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

Francisco R. Rodriguez, #367766,

Applicant,

v.

State of South Carolina,

Respondent.

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

) Case No.: 2016-CP-42-4153

) **ORDER OF DISMISSAL**

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This matter comes before the Court by way of a post-conviction relief (hereafter "PCR") application filed by Francisco R. Rodriguez (hereafter "Applicant") on November 21, 2016. Respondent made its return on July 3, 2017. The Court convened an evidentiary hearing into the matter on October 10, 2019, at the Spartanburg County Courthouse. Applicant was present at the hearing and represented by Lydia A. Hernandez, Esquire. Assistant Attorney General Jacob A. Isenberg, Esquire, of the South Carolina Attorney General's Office, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant's plea counsel, Joseph Baldwin, Esquire (hereafter "Counsel") also testified. After a thorough review of all records and evidence before this Court, this Court finds Applicant has not met his requisite burden of proof in establishing he is entitled to post-conviction relief and denies and dismisses this application with prejudice. Specific findings of fact and conclusions of law are set forth below.

Procedural History

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. During the August 2015 term, the Spartanburg County Grand Jury indicted Applicant for one count of first-degree

criminal sexual conduct (hereafter "CSC") with a minor (2015-GS-42-03396) and one count of third-degree CSC with a minor (2015-GS-42-03397). Joseph R. Baldwin, Esquire, represented Applicant. Assistant Solicitor Lindsey H. Overby, Esquire, of the Seventh Circuit Solicitor's Office prosecuted the case. On April 12, 2016, Applicant appeared before the Honorable R. Keith Kelly and pled guilty as indicted to third-degree CSC with a minor, without recommendation from the State, pursuant to *North Carolina v. Alford*.¹ In exchange for the guilty plea, the State agreed to dismiss the count of first-degree CSC with a minor, *nolle prosequi*. Judge Kelly sentenced Applicant to fifteen years' imprisonment and required him to register as a sex offender. Applicant did not pursue a direct appeal.

Statement of Facts

In November 2014, the Spartanburg County Sheriff's Office received a report concerning alleged unlawful sexual conduct with a minor involving Applicant and a nine-year-old child his ex-wife babysat. (Plea Tr. 11). Months after the incident occurred, the victim came forward by writing a letter to her parents after attending a church program regarding inappropriate touching. (Plea Tr. 11). In the letter, the victim alleged the babysitter, Applicant's ex-wife, went to Walmart, and during that time, Applicant inappropriately touched the victim. (Plea Tr. 11). When the report was submitted, the victim disclosed the abuse to a responding officer, after which she was referred to the Children's Advocacy Center for a forensic interview. (Plea Tr. 11).

The victim disclosed there were multiple incidents of abuse. (Plea Tr. 12). She disclosed that at least one incident involved oral sex at the babysitter's home, where Applicant removed her pants and put a pillow over her eyes. (Plea Tr. 12). Additionally, the victim disclosed multiple incidents where Applicant fondled the victim's genitals and digitally penetrated her.

¹ *North Carolina v. Alford*, 400 U.S. 25 (1970).

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(Plea Tr. 12). During these instances, sometimes the babysitter was present but not paying attention and other times she was out of the house. (Plea Tr. 12). There was one other incident of oral sex that occurred at an unknown location probably in Greenville County. (Plea Tr. 12). The date range of these incidents remains unknown, but one incident occurred around the victim's seventh birthday and another incident allegedly occurred when the victim was in the second grade. (Plea Tr. 13). The victim reported she was pretty sure everything happened during the spring and summer months of 2014. (Plea Tr. 13).

A search warrant was executed at Applicant's residence and photographs of the outbuilding on property were taken upon the warrant's execution. (Plea Tr. 12). Law enforcement seized multiple movies and electronic devices, including cameras from a bedroom the victim described as the location of the abuse. (Plea Tr. 12). Although though no illegal material existed on these videos, they corroborated the victim's story, primarily through showing footage from the bedroom that was set up like the victim described and where she said the abuse occurred. (Plea Tr. 12-13). Applicant was interviewed by law enforcement and, in the interview, stated that his wife babysat the victim for a three-to-four month period. (Plea Tr. 13). However, Applicant consistently denied the abuse throughout the case proceedings.

Current Action before this Court

In his PCR application, Applicant alleges he is being held unlawfully for the following reasons:

1. Applicant alleges ineffective assistance of counsel rendering his guilty plea invalid because:
 - a. "Counsel's representation fell below an objective standard of reasonableness before and during the plea proceeding, which prejudiced Applicant. As a result, Applicant entered an unintelligent and involuntary plea, which if not induced by Counsel, Applicant would have insisted on going to trial."
 - b. "Applicant did not receive any disclosure from the prosecution, or his Counsel,

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and this caused the entering of an unintelligent and involuntary plea. If disclosure would have been provided, Applicant would have insisted on going to trial.”

- c. “The plea was induced by Applicant’s ignorance of the law, duress, and Counsel’s failure to advise Applicant of his defense, constitutional right to trial, or the nature of the charge.”
- d. “Applicant did not have an interpreter to explain the nature of the charge against him, his Constitutional right to a jury trial, a defense, or of the exposure of time and consequence of the plea. If Applicant had been advised in a manner that he could understand, he would have insisted on going to trial.”
- e. “Applicant’s state and federal Constitutional rights were violated as a result of the foregoing.”

Regarding relief sought, Applicant requested “vacation of the conviction and sentence.”

At the evidentiary hearing, Applicant proceeded on the following allegations: 1) failure to communicate details of the plea agreement; 2) failure to inform Applicant about immigration consequences; 3) failure to investigate key witnesses; and 4) failure to review discovery. To the extent any of the allegations contained in the application can be construed as separate and distinct allegations from those enumerated above, this Court finds those claims were waived and are hereby dismissed.

Summary of Testimony Presented at the Evidentiary Hearing

Applicant’s Testimony

Because Applicant’s primary language is Spanish, an interpreter was sworn into to translate between Spanish and English. (PCR Tr. 4, 9). Applicant confirmed he wanted to continue with the action after verifying he understood a new trial would occur if relief was granted. (PCR Tr. 8-9).

Applicant testified he met with Counsel five times, none of which included a translator. (PCR Tr. 11-12). Applicant testified three meetings occurred in the detention center in Spartanburg, and two meetings occurred after Applicant was transferred to the Annex facility. (PCR Tr. 14).

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According to Applicant, Counsel first visited him in prison to inform him of the representation about a week after Counsel was retained by Applicant's ex-wife. (PCR Tr. 9-10). At the meeting, Applicant stated, Counsel attempted to speak in Spanish to communicate with Applicant, though Counsel was not a fluent Spanish speaker. (PCR Tr. 10). Applicant stated he did not fully understand what Counsel said at the meeting because of the language barrier, but Counsel said he would visit Applicant a few minutes at a time, help him with the case, and represent him on the criminal charges. (PCR Tr. 10).

During the second meeting, Applicant testified, he intended to fire Counsel, but he ultimately chose not to because Counsel convinced Applicant he would work hard on the case. (PCR Tr. 12). After the first few meetings, Applicant testified he was transferred to the Annex facility and, while there, drafted a letter requesting a public defender. (PCR Tr. 14). Applicant explained he was under the impression Counsel no longer represented him until he received a letter back from the Public Defender's Office, informing him of the fact that Counsel was still retained. (PCR Tr. 14).

Applicant testified he never reviewed all of the evidence and discovery in his case with Counsel. (PCR Tr. 15). Applicant testified Counsel gave him several documents pertinent to his case that were in English, but did not explain what the documents meant, nor translate them into Spanish. (PCR Tr. 10-11). Additionally, Applicant testified Counsel arrived at one meeting with a discovery disc containing the victim's forensic interview, but Counsel never showed Applicant the disc's contents. (PCR Tr. 13). Additionally, Applicant stated Counsel never coordinated the return of electronic equipment seized when the police executed a search warrant, despite Applicant's request that he do so. (PCR Tr. 15-16).

Applicant further testified he requested Counsel investigate Applicant's ex-wife as a

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potential witness who babysat the victim, claiming she could testify he was never alone with the victim. (PCR Tr. 17). Applicant testified that he also requested Counsel investigate a friend of his, who would testify that when Applicant went to his house with the victim, he was never alone with the victim. (PCR Tr. 17). Applicant also testified he asked Counsel to investigate potential sources of familial stress within the victim's family that would cause her to fabricate the allegations. (PCR Tr. 17-18). Applicant testified, to the best of his knowledge, none of this was done. (PCR Tr. 17-18).

Applicant stated Counsel notified him that the solicitor had extended a plea offer, but testified that the details of the offer were only presented to Applicant in writing and in English. (PCR Tr. 18). Thus, Applicant claimed he could not understand the offer, and Counsel made no attempt to explain it to Applicant. (PCR Tr. 18). Applicant testified he discovered he was pleading to a third-degree offense through use of an English-to-Spanish dictionary. (PCR Tr. 19). According to Applicant, Counsel told Applicant the plea would result in a sentence of fifteen years, but Counsel promised to do what he could to reduce the time. (PCR Tr. 19). Applicant testified, on the day of the plea hearing, he thought he was proceeding to trial and asked witnesses to come, including his father in Mexico. (PCR Tr. 19). Applicant stated he was handed a paper containing the details of the *Alford* plea several minutes before the plea hearing, which he ultimately signed. (PCR Tr. 20-21).

According to Applicant, at the plea hearing, he was hesitant to surrender his constitutional rights and, thus, the plea judge recommended he talk to Counsel before continuing. (PCR Tr. 23-24). Applicant testified no translator was used while speaking with Counsel privately at the hearing. (PCR Tr. 24). Applicant testified Counsel did not explain the rights he was giving up, and instead told Applicant to say yes and continue, which Applicant did. (PCR

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Tr. 25). Applicant testified although he paused and conferred with his attorney regarding the meaning of *Alford* before accepting the plea, Counsel never explained what *Alford* meant and only told him that he should accept the plea. (PCR Tr. 21, 25). Applicant explained when the plea judge asked if Counsel did everything he could for Applicant, he stated Counsel failed to investigate after Applicant requested he do so. (PCR Tr. 26). Applicant further testified that the plea hearing was interrupted approximately eight times, but during every interruption Counsel stated that Applicant should say yes, continue with the hearing, accept the plea, and after that Counsel would present a defense for him. (PCR Tr. 27-28). Applicant testified he was confused about what was happening throughout the entire plea hearing. (PCR Tr. 29).

Applicant testified that Counsel communicated with him in broken Spanish and he understood parts of what Counsel stated, though not everything. (PCR Tr. 37). Applicant admitted he did not inform Counsel that he did not understand parts of what Counsel was saying. (PCR Tr. 38). Applicant further admitted he had an interpreter at the plea hearing, and he could understand everything the interpreter said throughout the hearing. (PCR Tr. 38). Applicant agreed he told the plea judge that he understood why he was at the hearing. (PCR Tr. 39).

Applicant testified that when the judge asked him if he thought the solicitor could prove the presented facts to a jury, Applicant said yes. (PCR Tr. 40). Additionally, Applicant agreed he stated at the plea hearing that no one threatened him into pleading pursuant to *Alford*, but he explained he thought a threat meant "threatened by death" into accepting, which did not happen. (PCR Tr. 41). Applicant testified he did, however, feel pressured and manipulated into pleading. (PCR Tr. 41). Applicant agreed he never raised the issue of Counsel's failure to review discovery or failure to explain paperwork during the plea hearing. (PCR Tr. 43-44). Applicant further testified he only informed the plea judge he was satisfied with Counsel's representation because

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Counsel told him he would present a defense thereafter. (PCR Tr. 42).

According to Applicant, Counsel told him the sentence may be less than fifteen years because the evidence against him was weak, but Counsel never promised that would happen. (PCR Tr. 30). Applicant testified Counsel never told Applicant he had to register as a sex offender. (PCR Tr. 30). Applicant also testified Counsel told Applicant of the possibility of deportation, but Counsel never told Applicant he was pleading to a crime of moral turpitude or that he could never claim legal status in the United States if he entered a guilty plea. (PCR Tr. 31). Applicant stated he did not listen to the judge when the judge said he could be sentenced to fifteen years, because he was distracted trying to clarify that the alleged abuse occurred over the course of three months, not two years. (PCR Tr. 46).

Further, Applicant testified, after the plea hearing, Counsel never filed a notice of appeal, visited him in jail, met with him, or contacted him again. (PCR Tr. 32-33). Applicant stated the next time he saw Counsel, Counsel was representing his ex-wife who wanted to remove Applicant's legal custody of his children. (PCR Tr. 33). Applicant stated Counsel represented Applicant's ex-wife in the first three Family Court hearings, until the judge directed Counsel to cease the representation because of the conflict of interest. (PCR Tr. 33-34).

Counsel's Testimony

Counsel stated he has practiced criminal law for seven or eight years, and handled one or two child sex crimes cases before handling Applicant's. (PCR Tr. 49).

Counsel explained that Applicant's ex-wife visited him and requested he represent Applicant, after which Counsel visited Applicant at the jail. (PCR Tr. 50). According to Counsel, at their first meeting, Counsel read the warrants against Applicant, asked him why he thought he had been accused of the crimes, told him he would request the discovery on the case and

schedule a preliminary hearing, and would contact him again after reviewing the materials. (PCR Tr. 50). Additionally, Counsel testified that Applicant told him the allegations were untrue, and the girl accusing him was somebody that his wife babysat. (PCR Tr. 51). Counsel further testified Applicant told him he was alone with the victim one time for a short period while his ex-wife went to Walmart, but thereafter Applicant clarified the story and stated he was never alone with the victim because there was always other children present. (PCR Tr. 51-52).

Counsel testified he spoke with Applicant's ex-wife, who said there were short periods of time where she was not watching closely, and Applicant was left alone with the victim. (PCR Tr. 52). Based upon this, Counsel explained he decided the testimony she would give would not be helpful in presenting a defense. (PCR Tr. 52). Counsel confirmed Applicant requested he speak to his friend, but Counsel also testified he understood the friend to be a character witness, not someone who could provide a factual defense. (PCR Tr. 52). Additionally, according to Counsel, the incident Applicant's friend had knowledge of did not have anything to do with the Spartanburg charge, and Counsel was concerned that the information relayed by the friend could lead to another charge against Applicant arising in Greenville County. (PCR Tr. 52-53). Counsel testified he believed Applicant was never indicted in Greenville County because the victim was not specific about where the incident occurred and could not give specific enough facts about what occurred, but that might change if the friend was involved. (PCR Tr. 53).

Counsel testified he received and reviewed the discovery personally and with Applicant on more than one occasion. (PCR Tr. 53-54). Counsel testified he and Applicant discussed which parts of the discovery weakened their case, including the body camera video and reports. (PCR Tr. 54). Counsel stated he gave Applicant a copy of all the reports in the discovery. (PCR Tr. 54). Counsel testified Applicant was engaged and cooperative throughout the meetings when

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they reviewed the discovery. (PCR Tr. 54-55).

Counsel agreed Applicant was not shown pertinent law enforcement videos, including the forensic interview, because it is logistically difficult to show a video to someone in the jail, but Counsel explained the contents of the videos to Applicant, which were also summarized in the reports given to Applicant. (PCR Tr. 54). Counsel conceded the written documents given to Applicant were in English. (PCR Tr. 76). However, Counsel testified that the reports were explained to Applicant in Spanish, and, because they were explained in Spanish, Counsel thought Applicant understood the contents. (PCR Tr. 54-55). Counsel explained that although he never showed the video of the victim's forensic interview to Applicant, Counsel reviewed it himself, explained to Applicant the contents in Spanish, and discussed the reports regarding the video with Applicant as well. (PCR Tr. 55).

Counsel testified he informed Applicant it would be difficult for Applicant to testify at trial because he had lied to the police about his identity when they first approached him, and this would, in Counsel's opinion, lead a jury to believe Applicant was a dishonest person. (PCR Tr. 55-56). Additionally, Counsel explained that when the police asked Applicant why the victim would make up the allegations, Applicant said he made her watch scary movies, which Counsel thought was an inadequate answer. (PCR Tr. 57). Counsel further explained he believed the State would use that answer to show that Applicant had a lot more access to the victim than he wanted to admit. (PCR Tr. 57). Thus, Counsel stated he told Applicant the State would impeach him if he testified. (PCR Tr. 56). Further, Counsel believed Applicant would be found guilty at trial, so he did not want Applicant to testify. (PCR Tr. 57-58). Counsel testified he addressed these issues with Applicant, and concluded that Applicant's chances of winning at trial were under fifty percent. (PCR Tr. 57).

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Additionally, Counsel testified he discussed with Applicant the trial strategy he would have used if Applicant did not accept the plea. Counsel stated he would have shown the jury that the State seized a lot of items from Applicant's house that were largely irrelevant to the case. (PCR Tr. 58). Further, Counsel testified that, in his opinion, the State's medical proof remained inconclusive, with no evidence definitively indicating that the incident occurred. (PCR Tr. 58). Counsel explained he also planned to impeach the State's case by arguing the victim's non-citizen parents could apply for a U-visa based on the victim's allegations and that it took the victim months to come forward to say what happened. (PCR Tr. 59).

Counsel testified he explained what an *Alford* plea was to Applicant a day or two before the plea hearing. (PCR Tr. 59-60). During this discussion, according to Counsel, Applicant was engaged and told Counsel he had talked to people in prison charged with similar offenses and alerted him that some people were getting much less time than what Applicant was facing. (PCR Tr. 60-61). Counsel testified he told Applicant that no two cases are alike, but often judges appreciate it when defendants agree to plead guilty and not require a victim to testify, which can sometimes leads to more lenient sentencing. (PCR Tr. 61).

Counsel further testified that Applicant told Counsel he did not want to proceed to trial because he did not want to risk the possibility of a twenty-five year sentence. (PCR Tr. 62). Counsel also stated he told Applicant that after service of the sentence, immigration officials would probably use the conviction to deport him from the country, regardless of whether he pled guilty or proceeded to trial. (PCR Tr. 62). Counsel stated he told Applicant that his conviction would be used against him as a reason to deport him. (PCR Tr. 62).

Counsel testified that the federal government put an immigration hold on Applicant when he was in Spartanburg County, meaning that the State will notify Immigration and Customs

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Enforcement after Applicant serves the sentence, so that Applicant can be deported. (PCR Tr. 62). Counsel testified he believed that, although it is within the government's discretion whether Applicant is deported, Applicant's conviction would certainly be used against him for deportation purposes. (PCR Tr. 63). Counsel further testified that after conviction it would be incredibly hard to show that Applicant should not be deported because of good moral character. (PCR Tr. 63). Counsel testified he talked about the immigration consequences with Applicant in Spanish.² (PCR Tr. 62-63).

During cross-examination, Counsel stated he knew Applicant only spoke Spanish and was not in the United States legally. (PCR Tr. 69-70). Though Spanish is not Counsel's primary language, Counsel testified his wife is from Mexico, and he communicates with her side of the family in Spanish. (PCR Tr. 72). Counsel explained he did not feel an interpreter was needed for informal meetings and discussions with Applicant because of Counsel's proficiency in Spanish, but he also admitted he cannot communicate in Spanish at a collegiate level. (PCR Tr. 78-79). Further, Counsel testified all discussions with Applicant at the plea hearing were conducted in Spanish. (PCR Tr. 63). Counsel testified that during these discussions he told Applicant that he should answer the judge's questions if he wanted to go forward with the plea. (PCR Tr. 65). Beyond that, Counsel testified he did not remember the conversations he had with Applicant during the breaks at the plea hearing. (PCR Tr. 64).

Counsel agreed Applicant appeared to be very confused about the rights he was giving up, and Counsel stated he did his best to respond to Applicant's confusion about the hearing.

² Although Counsel offered testimony at the evidentiary hearing about Applicant's immigration situation, he did not make it explicitly clear that was discussed with Applicant, beyond telling Applicant that immigration authorities would probably use his conviction against him and deport him from the country as soon as he served his sentence.

(PCR Tr. 64, 66, 82). Counsel testified he felt he should have spent more time confirming Applicant knew the hearing was not a trial, but Counsel stated he thought Applicant knew he was not going to trial, because the victim was not present. (PCR Tr. 65). Counsel testified he did not explain what rights Applicant was giving up by entering the plea, but he told him that the victim and police would not be present and no testimony would be given. (PCR Tr. 83). Counsel stated he never told Applicant it was a trial and based on his previous discussions with him, he believed Applicant wanted to plead pursuant to *Alford* because Applicant was concerned about facing twenty-five years' imprisonment if found guilty at trial. (PCR Tr. 65-66). Further, Counsel testified Applicant never indicated he wanted a trial while talking with Counsel at the hearing. (PCR Tr. 65). Additionally, Counsel testified, at no point during the hearing did he think he needed to postpone the plea so that he could confirm with Applicant that he still wanted to plead guilty. (PCR Tr. 83).

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Counsel explained the solicitor extended a plea offer a month or two before the plea hearing, which would involve Applicant pleading to the lesser included offense of lewd act on a minor³ with a maximum sentence of fifteen years' imprisonment. (PCR Tr. 77). Counsel testified he did not think Applicant would receive less than fifteen years, but he stated he did leave Applicant with the impression that it is rare to receive the maximum sentence after entering a plea. (PCR Tr. 77-78). Counsel testified he did not think this was a very favorable plea offer, but told Applicant the decision was up to him and if he decided to go to trial, he would face up to twenty-five years for first-degree CSC as opposed to fifteen for lewd act on a minor. (PCR Tr. 78). Counsel testified that he never discussed the sex offender registry with Applicant, thinking it

³ "CSC, third degree" was originally called "lewd act on a minor" under South Carolina law. S.C. Code Ann. § 16-3-655 (repealing S.C. Code Ann. § 16-15-140).

was unimportant because Applicant would be deported as soon as he is released from prison anyway. (PCR Tr. 84). Counsel testified he thought Applicant understood him regarding his analysis of the case and the plea agreement, including the strengths and weaknesses of the case and what an *Alford* plea is. (PCR Tr. 72-74). Counsel conceded he initially represented Applicant's ex-wife in family court proceedings after representation of Applicant concluded. (PCR Tr. 88).

Findings of Fact and Conclusions of Law

This Court has reviewed the pleadings, the records of the PCR action submitted to it by the parties, and the applicable law. Before this Court are the Spartanburg County Clerk of Court Records, Applicant's South Carolina Department of Corrections Records, the plea transcript, and the records for this PCR action. Pursuant to sections 17-27-70 and -80 of the South Carolina Code, this Court denies relief and dismisses the application based upon the following findings:

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Ineffective Assistance of Counsel

Applicant's allegations of ineffective assistance of counsel are rejected. In a PCR action, the applicant bears the burden of proving allegations contained in the application. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant asserts ineffective assistance of counsel as a ground for relief, the applicant must show "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. Ineffective assistance of counsel is governed by the Sixth Amendment, which the Supreme Court expanded upon through developing the two-pronged test outlined in *Strickland*.

Pursuant to the first prong of the *Strickland* analysis, the applicant must prove defense counsel's performance was deficient. *Id.* at 686; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d

624, 625 (1989). To show deficiency, the applicant must prove by the preponderance of the evidence that counsel's actions fell outside of the zone of "reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688. See also Rule 71.1(e), SCRPC ("The applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence."). Reasonableness is determined by the "variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how to best represent a criminal defendant" and the scope limited to facts counsel had available at the time of representation. *Id.* at 689. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003) (citing *Strickland*, 466 U.S. at 690). Judicial scrutiny of counsel's performance remains highly deferential towards defense counsel with a strong presumption that counsel acted competently because competent representation may be executed in virtually "countless" ways. *Strickland*, 466 U.S. at 688-89.

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Second, counsel's deficient performance must have prejudiced the applicant so that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 117-18. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. The court makes this determination based upon the totality of the evidence. *Id.* at 695. Realistically, this matters "only in the rarest case" because "[t]he likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 111-12 (2011) (quoting *Strickland*, 466 U.S. at 697).

Regarding guilty pleas, specifically, the applicant must show there is a reasonable probability that, but for ineffective assistance of counsel, he or she would not have pled guilty

but, instead, would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). The applicant’s right to contest the validity of a plea is usually, but not invariably, foreclosed because of the solemnity and truthfulness inherent in the plea proceeding. *See Blackledge v. Allison*, 431 U.S. 63, 73-74 (1977) (“Solemn declarations in open court carry a strong presumption of verity. The subsequent presentation of conclusory allegations unsupported by specifics is subject to summary dismissal, as are contentions that in the face of the record are wholly incredible.”). Absent valid reasons why the applicant is entitled to depart from admissions made at the plea hearing, sworn statements made during the original proceeding remain conclusive. *Dalton v. State*, 376 S.C. 130, 137-38, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing *Crawford v. United States*, 519 F.2d 347, 350 (4th Cir. 1975)).

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. *Strickland*, 466 U.S. at 696. A court need not first determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies, if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. *Id.* at 696-97.

Here, Applicant alleged ineffective assistance of counsel because Counsel failed to communicate the details of the plea, disclose immigration consequences of the plea, investigate and present witnesses, and show discovery to Applicant. This Court finds these allegations are without merit for the reasons outlined below.

Failure to Communicate Details of the Plea

Applicant alleges Counsel was ineffective for failing to adequately communicate the details of the plea offer with Applicant in Spanish – Applicant’s primary language. Applicant

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also alleges Counsel was ineffective for failing to inform Applicant of the waiver of constitutional rights inherent in the entry of a guilty plea.

Valid pleas are those which are knowingly and voluntarily entered into. *Dover v. State*, 304 S.C. 433, 434, 405 S.E.2d 391, 392 (1991) (citing *Boykin v. Alabama*, 395 U.S. 238 (1969)). A valid plea requires the applicant to have a full understanding of the charges against him and the consequences of accepting a plea bargain. *Boykin v. Alabama*, 395 U.S. 238 (1969); *Roddy v. State*, 339 S.C. 29 (2000). This involves awareness of “the privilege against self-incrimination, the right to a jury trial, and the right to confront one’s accusers” and “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 v. State*, 337 S.C. 597, 599, 524 S.E.2d 523, 524 (1999) (citing *Boykin v. Alabama*, 395 U.S. 238 (1969)).

A defendant’s knowing and voluntary waiver of statutory or constitutional rights must be established by a complete record, and “may be accomplished by colloquy between the court and defendant, between the court and defendant’s counsel, or both.” *Roddy v. State*, 339 S.C. at 34, 528 S.E.2d at 421 (citing *State v. Ray*, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993)). “[T]he voluntariness of a guilty plea is not determined by an examination of the specific inquiry made by the sentencing judge alone, but is determined from both the record made at the time of the entry of the guilty plea and the record of the post-conviction hearing.” *Dalton*, 376 S.C. at 138, 654 S.E.2d at 874 (quoting *Harres v. Leeke*, 282 S.C. 131, 133, 318 S.E.2d 360, 361 (1984)). Further, “guilty pleas, freely and voluntarily entered, act as a waiver of all non-jurisdictional defects and defenses, including claims of a violation of a constitutional right prior to the plea.” *Whetsell v. State*, 276 S.C. 295, 297, 277 S.E.2d 891, 892 (1981).

This Court finds Counsel adequately communicated the details of the plea to Applicant,

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and Applicant entered the plea voluntarily, knowingly, and intelligently. Though Applicant's primary language is Spanish, Counsel communicated with him in Spanish when discussing the discovery, evidence, and the details of the plea. (PCR Tr. 9-11). Further, although Counsel is not fully fluent in Spanish, he is comfortable with the language. (PCR Tr. 72). Though Applicant alleged that he did not understand everything Counsel told him, Applicant also admitted he never communicated to Counsel when he did not understand what Counsel was saying. (PCR Tr. 37-38). Additionally, an interpreter was used at the plea hearing, and Applicant testified at the PCR hearing that he understood everything the interpreter said and still went forward with the plea. (PCR Tr. 4). Counsel testified at the PCR hearing that he discussed Applicant's options and Applicant ultimately decided to plead because he did not want to face a twenty-five year sentence. (PCR Tr. 62). Applicant never disputed this. (PCR Tr. 18-19).

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At the plea hearing, where the interpreter translated everything being said on the record from English to Spanish, the plea judge advised Applicant he was waiving his right to remain silent, his right to a jury trial, and his right to call witnesses. (Plea Tr. 7-8). After briefly conferring with Counsel, Applicant unambiguously waived his right to remain silent. (Plea Tr. 7). When asked if he wanted to proceed to trial, Applicant, without prompting or conferring with Counsel, said, "No. I want an *Alford*." (Plea Tr. 7). He also waived his right to call and confront witnesses. (Plea Tr. 8). When asked if he wanted to enter an *Alford* plea, Applicant said he did. (Plea Tr. 8). When asked if he knew the plea would be treated like a guilty plea, Applicant said he did. (Plea Tr. 8). When the Judge asked if he was receiving a beneficial result by accepting the *Alford* plea, he conceded he was without conferring with Counsel. (Plea Tr. 8). He said no one forced him to plead, no one talked him into pleading, and that he had plenty of time to talk with his lawyer. (Plea Tr. 9). Though he initially voiced dissatisfaction with Counsel not

investigating witnesses, after conferring with Counsel, he stated that he thought Counsel did everything he could for him, and there was nothing else he thought that Counsel should have done but failed to. (Plea Tr. 10). When the solicitor read the facts, Applicant readily conceded that the solicitor could present those facts to a jury and the jury, based upon those facts, would likely convict him. (PCR Tr. 13). Applicant spoke to the judge himself at the plea hearing and, after having the entire hearing interpreted for him, never told the judge he did not want to plead. (Plea Tr. 8-10, 13-14).

Thus, this Court finds Applicant was aware of the details of the plea, including the rights he was giving up, the nature of the charge, the right to raise defenses, and what an *Alford* plea is. Additionally, based upon Counsel's credible testimony, this Court finds Applicant did not want to risk a possible conviction on the first-degree CSC charge and the twenty-five year maximum sentence that could result therefrom. (PCR Tr. 62). Thus, this Court finds Applicant would not have proceeded to trial. Accordingly, Applicant's request for relief on this issue is denied.

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Failure to Advise of Immigration Consequences

Applicant alleges Counsel was ineffective for failing to ensure Applicant was fully aware of the immigration consequences involved in entering the plea. Specifically, Applicant testified that Counsel did not tell him that he was pleading guilty to a crime of moral turpitude and this would result in legal status disqualification and deportation without opportunity to return.

In *Padilla v. Kentucky*, the United States Supreme Court held that effective assistance of counsel inherently requires communicating the risk of deportation upon conviction to a non-citizen defendant. 559 U.S. 356, 367 (2010). Ineffective assistance of counsel is easily found if counsel falsely assures the applicant he will not be deported by taking a plea. *Id.* at 368; *Lee v. United States*, ____ U.S. ____, 137 S.Ct. 1958, 1964 (2017). In *Padilla*, the Supreme Court also

held that there will “undoubtedly be numerous situations in which the deportation consequences of a plea are unclear.” *Padilla*, 559 U.S. at 367. When this is the case, the attorney only needs to “advise a noncitizen client that pending criminal charges may carry adverse immigration consequences.” *Id.* However, “when the deportation consequence is truly clear . . . the duty to give correct advice is equally clear.” *Id.* An applicant can establish prejudice if he shows that, if he knew about the deportation risk, he would not have accepted a plea bargain, but would have gone to trial. *Lee v. United States*, 137 S.Ct. at 1966-67.

However, “[c]ourts should not upset a plea solely because of *post hoc* assertions from a defendant about how he would have pleaded but for his attorney’s deficiencies. Rather, they should look to contemporaneous evidence to substantiate a defendant’s expressed preferences.” *Id.* at 1967. In *Lee*, the court granted applicant relief because counsel explicitly told Lee that he would not be deported if he pled guilty, and both Lee and counsel testified that deportation was the determinative factor in the decision-making process leading to the guilty plea in 1967.

Here, because Counsel failed to explicitly state Applicant would be deported if he pled, Counsel acted deficiently. However, there is no indication Applicant was prejudiced by this deficiency. Applicant made clear the determinative factor in taking the plea was the shortened sentence, not any potential deportation consequences. (PCR Tr. 62). Applicant never testified that if Counsel told him deportation was mandatory in his case he would have proceeded to trial. Applicant never stated he would not have pled but for this deficiency. Thus, Applicant has not met his burden of proof in showing he was prejudiced by any lack of information given to him regarding immigration consequences. *See Taylor v. State*, 404 S.C. 350, 362, 745 S.E.2d 97, 103 (2013) (stating that to show prejudice, the applicant must show that but for Counsel’s error

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Applicant would have proceeded to trial).

Thus, this Court finds, based on the entirety of Counsel's testimony, Applicant still would have taken the plea if Counsel provided a more concrete answer regarding immigration consequences of the plea. Thus, Applicant has not met his burden of proof as to prejudice, and, consequently, is not entitled to relief on this ground.

Failure to Review Discovery and Failure to Investigate

Applicant claims that Counsel was constitutionally ineffective because Counsel did not review the discovery with him and because Counsel failed to investigate key witnesses.

Applicant alleges Counsel never reviewed the discovery with him, never showed him the video of the victim's forensic interview, and never discussed the reports he gave Applicant, which Applicant could not understand on his own because they were in English. (PCR Tr. 10-15).

However, at the plea hearing, Applicant agreed that if the evidence against him was presented to a jury, he would likely be convicted. (Plea Tr. 8). Applicant also clearly and unambiguously waived his right to call witnesses. (Plea Tr. 7-8). Most importantly, Applicant further informed the plea court there was nothing Counsel could have done on the case that he failed to do. (Plea Tr. 10).

According to Counsel, he and Applicant discussed the charges and the discovery in Applicant's case several times. (PCR Tr. 54-55). Applicant disputed the allegations and gave explanations for his conduct that Counsel felt were inadequate. (PCR Tr. 57). Specifically, Counsel explained, when the police asked Applicant why the victim would make up the allegations, Applicant said he made her watch scary movies, which Counsel thought was an inadequate answer. (PCR Tr. 57). Counsel explained he believed the State would use that answer to show that Applicant had a lot more access to the victim than he wanted to admit. (PCR Tr.

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57). Additionally, Applicant lied to the police about his identity when they approached him, and this would, in Counsel's opinion, lead a jury to believe he was a dishonest person. (PCR Tr. 55-56). Thus, Counsel stated he told Applicant the State would impeach him if he testified. (PCR Tr. 56). Counsel testified he felt Applicant understood everything because was engaged and cooperative throughout the meetings when they reviewed the discovery. (PCR Tr. 54-55). He also stated that the discussions concerning the plea deal were two sided and Applicant appeared to understand everything and remained engaged throughout the discussion. (PCR Tr. 59-60).

Applicant gave Counsel the name of a friend to investigate, which Counsel did, along with Applicant's ex-wife. Counsel decided not to use Applicant's ex-wife's testimony because she said there were short periods of time where she was not watching closely, and he was alone with the victim, which would not have been helpful in presenting a defense. (PCR Tr. 52). Counsel confirmed Applicant requested he speak to his friend, but Counsel testified he understood the friend to be a character witness only, and that the incident the friend had knowledge of did not have anything to do with the Spartanburg charge, but a separate incident in Greenville County he was concerned Applicant would be charged for if he explored the witness further. (PCR Tr. 52-53).

This Court finds Applicant and Counsel discussed the case thoroughly and attempted to come up with a viable defense. Specifically, if the case went to trial, Counsel would have shown the jury that the State seized a lot of items from Applicant's house that were largely irrelevant to the case, that the State's medical proof remained inconclusive, and would have impeached the State's witnesses by arguing the victim's non-citizen parents could apply for a U visa based on the victim's allegations and that it took the victim months to come forward and say what happened. (PCR Tr. 58-59). However, Applicant still chose to plead guilty.

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This Court finds Counsel's testimony credible over Applicant's. When Applicant entered his guilty plea he waived any constitutional rights he had, including his right to remain silent, right to trial by jury, and right to call and confront witnesses. (Plea Tr. 7-8). This Court finds Applicant has failed to present a sufficient reason why this Court should disregard his sworn testimony and waiver given at the plea hearing. Further, to demonstrate prejudice, Applicant was required to present the evidence or witnesses he alleges Counsel did not properly investigate. *Glover v. State*, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995). Applicant failed to present any evidence or witnesses at the PCR hearing and, thus, this Court finds that Applicant has failed to meet his burden of proof. Therefore, because Applicant has failed to meet his burden of proving either deficiency or prejudice, relief is denied on this ground.

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 PCR application must be denied and dismissed with prejudice.

This Court notifies Applicant he must file and serve a notice of appeal, through counsel, within thirty days from the counsel's receipt 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 if the Applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. PCR counsel's attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

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1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. The Applicant must remain in the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 11 day of May, 2020.



G. THOMAS COOPER, JR.
 Presiding Judge
 Seventh Judicial Circuit

Camden

, South Carolina

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