AMENDED NOTICE OF APPEAL FROM COMMON PLEAS REGARDING A

POST CONVICTION RELIEF

RECEIVED

Nov 22 2024

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA

In the Supreme Court

AMENDED APPEAL FROM LEXINGTON COUNTY

Court of Common Pleas

Perry H. Gravely, Circuit Court Judge

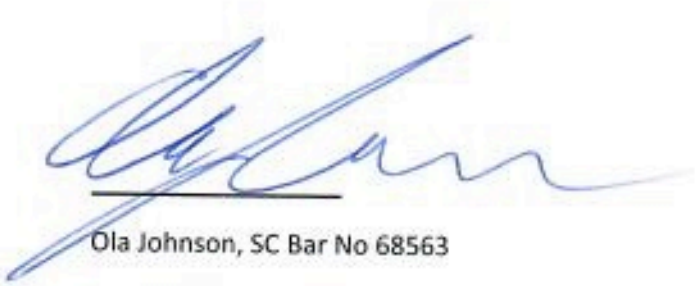
Case No. 2020-CP-32-03906

The State,.....Respondent,

Kashawn Shell,.....Appellant,

Amended Notice of Appeal

Kashawn Shell appeals the Amended Order of Dismissal of the Honorable Perry H. Gravely, dated November 18th, 2024, which denied his application for Post-Conviction Relief with prejudice. Appellant received written notice of the amended order on November 19th, 2024.



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STATE OF SOUTH CAROLINA COUNTY OF LEXINGTON	)	IN THE COURT OF COMMON PLEAS FOR THE ELEVENTH JUDICIAL CIRCUIT
Kashawn A Shell, SCDC #382844, Applicant, v. State of South Carolina, Respondent.	)	Case No. 2020-CP-32-03906 **AMENDED**[1] **ORDER OF DISMISSAL**

This matter comes before this Court by a *pro se* application for post-conviction relief filed on November 20, 2020 by Kashawn Shell. The State made an initial Return on June 14, 2021. Ola Johnson was appointed to represent the Applicant on December 15, 2020. The Applicant filed an Amendment to the Application for Post-Conviction Relief dated September 22, 2022.

On December 18, 2023, an evidentiary hearing was heard before this Court. The Applicant was present and represented by his counsel, Ola Johnson. The Respondent was represented by Deputy Attorney General Donald J. Zelenka. Testimony was received from the Applicant, LaShonda Shell (the Applicant's mother), Aimee Zmroczek, and Jason Chehoski. At the outset of the hearing, this Court denied applicant's motion for continuance because the Applicant's mother was not present. The State opposed the motion. This Court initially denied the motion to continue. After the mother arrived, counsel for the Applicant advised the Court that the mother wanted to retain counsel and keep the matter open so that they could do that. Since no other counsel had been

[1] The Order of October 7, 2024 is amended to delete the reference to the Victim's name and correct several grammatical errors. The previous Order will be sealed as provided at the end of this Order.

retained at that time and the matter had been pending since 2020 without other counsel retained, the State opposed it. The Court denied the request.[2] At the conclusion of the hearing, the Court took the matter under advisement. After consideration of the record the Court issues as follows:

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Lexington and Richland County Clerks of Court.[3] Applicant was arrested on December 11, 2017, following an investigation into a series of sexual assaults and armed robbery incidents occurring in West Columbia and Columbia. During its July 2018 term, the Lexington County Grand Jury Indicted Applicant for armed robbery (2018-GS-32-1633) and first-degree criminal sexual conduct (2018-GS-32-1634).

On November 20, 2019, Applicant appeared before the Honorable Frank R. Addy, Jr., and pleaded guilty to lesser-included offenses of attempted armed robbery and second-degree criminal sexual conduct. Applicant also waived jurisdiction and presentment to the grand jury and pleaded guilty to Richland County indictments for first-degree criminal sexual conduct (2019-GS-40-7852) and armed robbery (2019-GS-40-7853). The State dropped Lexington County charges for kidnapping, possession of a weapon during the commission of a violent crime, and criminal conspiracy charges and Richland County charges for kidnapping, possession of a weapon during the commission of a violent crime, first-degree assault and battery, and first-degree burglary in exchange for Applicant's plea.

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[2] During LaShonda Shell's PCR testimony, she indicated that she had not retained a lawyer and she indicated that she had two possibilities. One possibility she named was Todd Rutherford and another was not specifically named.

[3] Because Applicant pleaded guilty to the Lexington and Richland charges at the same time and the events giving rise to the charges occurred on the same night, the Court finds Applicant's PCR claims should be litigated in a single action.

Jason Chehoski, Esquire, represented Applicant on the Lexington charges and Aimee Zmroczek, Esquire, represented him on the Richland charges. Assistant Solicitor Rhonda Patterson of the Eleventh Circuit Solicitor's Office and Assistant Solicitor Bethany Miles of the Fifth Circuit Solicitor's Office prosecuted the case. In addition to the *nolle prossed* charges, the State agreed to run the Richland and Lexington sentences concurrent. Judge Addy ultimately accepted Applicant's plea and sentenced him to concurrent terms of eighteen years imprisonment on all charges.

Applicant filed a timely notice of appeal. Counsel Chehoski on the Lexington County matter stated in his Rule 203(d)(1)(B)(iv) explanation that he did not have a good faith basis to believe any issues were properly before the Court of Appeals, citing Frazer v. South Carolina, 430 F.3d 696, 706 (4th Cir. 2005) ("A defendant has a right to pursue a direct appeal, even if frivolous, which counsel must assist as 'an active advocate on behalf of his client.'") (quoting Anders v. California, 386 U.S. 738, 744 (1967)). On February 5, 2020, the Court of Appeals dismissed Applicant's appeal pursuant to Rule 203(d)(1)(B)(iv), SCACR, for failure to provide a sufficient explanation as to why an appeal from his guilty plea should proceed. Shell *v.* State, (S.C. Ct. App. filed Feb. 5, 2020). The case was remitted back to the Lexington County circuit court on February 21, 2020.

Applicant also appealed his Richland County convictions. Counsel Zmroczek stated in her Rule 203(d)(1)(B)(iv) explanation that Applicant's family felt the eighteen-year sentence was excessive due to Applicant's intellectual disability. On February 25, 2020, the Court of Appeals dismissed Applicant's appeal pursuant to Rule 203(d)(1)(B)(iv), SCACR, for failure to provide a sufficient explanation as to why an appeal from his guilty plea should proceed. Shell *v.* State, (S.C. Ct. App. filed Feb. 25, 2020). The remittitur was issued on March 12, 2020.

Applicant commenced this PCR action on November 20, 2020.[4]

II. FACTUAL BASIS OF THE PLEA

The events giving rise to the Lexington County charges began on December 6, 2017, at approximately 4:46 PM. (Plea Tr. 10). The victims were twenty-three-year-old Ginger and twenty-four-year-old Courtney. (Plea Tr. 10). Ginger was messaged on a social media app called Black Page by Applicant. (Plea Tr. 10). They agreed to meet at the Quality Inn located at 2516 Augusta Road in the West Columbia area of Lexington County to have sex. (Plea Tr. 10). Applicant arrived at the hotel with his Lexington County co-defendant, Charles Gallart. (Plea Tr. 10). Upon their arrival, Gallart and Courtney went to Gallart's vehicle to smoke marijuana while Applicant stayed behind with Ginger. (Plea Tr. 10). Once they were alone, Applicant pulled out a revolver and ordered Ginger to lie on the bed. (Plea Tr. 10–11).

Ginger stated to law enforcement that Applicant made her have sex with him while presenting the gun the entire time. (Plea Tr. 11). After he had sex with her, he used her phone to call Courtney back up to the room. (Plea Tr. 11). When Courtney and Gallart came back to the room, Applicant pointed the gun at her. (Plea Tr. 11). He then ordered Courtney and Ginger to lie on the floor while he and Gallart searched the room. (Plea Tr. 11). They took both woman's cell phone and approximately $200.00 in cash. (Plea Tr. 11). Applicant recorded the entire incident on his cell phone. (Plea Tr. 11). After law enforcement arrived, Ginger was taken to the hospital where a SANE kit was completed. (Plea Tr. 11).

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[4] It appears Applicant's mother filed the application on his behalf. The plea transcript indicated Applicant's mother has also initiated probate proceedings on Applicant's behalf due to his mental health issues. (Plea Tr. 22, 28–30).

The events giving rise to the Richland County charges occurred that same night at a hotel in Columbia. (Plea Tr. 12–13). The circumstances were different in that the victim did not know Applicant or have any arrangements to meet up with him. (Plea Tr. 13). She was simply staying in a hotel room. (Plea Tr. 13).

The victim, M[redacted] L[redacted], told law enforcement Applicant knocked on her door. (Plea Tr. 13). When she answered, Applicant apologized, telling her he had the wrong room. (Plea Tr. 13). Applicant left and returned to the room approximately five minutes later. (Plea Tr. 13). This time he knocked on her door, he had a gun in his hand. (Plea Tr. 13).

Applicant identified himself as a police officer and told M[redacted] to let her in. (Plea Tr. 13). She stated the gun appeared to be of the type carried by law enforcement. (Plea Tr. 13). Applicant then held her at gunpoint while three co-defendants entered the room. (Plea Tr. 13). Applicant then grabbed her by her shirt, pushed her into the bathroom, and sexually assaulted her. (Plea Tr. 13). Another one co-defendant sexually assaulted her and forced oral sex on the victim. (Plea Tr. 13). Applicant stole forty dollars and marijuana. (Plea Tr. 13). M[redacted] was twenty-years old and was unknown to Applicant. (Plea Tr. 13).

On December 11, 2017, Applicant and Gallart were arrested by the Lexington County Sheriff's Department at the Red Roof Inn located off Berryhill Road in Lexington. (Plea Tr. 11). The hotel is known as a hot spot for drugs and prostitution. (Plea Tr. 11). Applicant and Gallart fit the descriptions of the perpetrators described by Ginger and Courtney. (Plea Tr. 11). The men were questioned by West Columbia Investigator Chris Morris and Sergeant Voss with the Richland County Sheriff's Department regarding the armed robbery and sexual assault incidents. (Plea Tr. 12). Both confessed, but Applicant admitted to most of the same facts reported by the victims. (Plea Tr. 12, 14).

Applicant stated that he and Gallart split the money, and that he used his share to pay his rent. (Plea Tr. 12). Applicant told law enforcement he knew the victims were very scared and that he knew what he was doing was wrong. (Plea Tr. 12). Applicant apparently confessed to his brother as well. (Plea Tr. 12). He also told law enforcement he wanted to be caught so he would stop. (Plea Tr. 12). DNA found on vaginal and rectal swabs taken from Ginger matched DNA taken from Applicant. (Plea Tr. 12).

III. CURRENT APPLICATION

In his initial application for post-conviction relief, Applicant alleges he is being held in custody unlawfully based on the following (verbatim):

> (10) State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
>
> (a) "Ineffective assistance of plea counsel – failure to inadequately[*sic*] investigate the facts and circumstances surrounding the alleged sexual conduct and robbery and defendant's history of mental illness before advising him to plead guilty"
>
> (b) "Allege objection to sentence"
>
> (c) "Advise defendant of answers to judge. Alleged error available under and common law, statutory or other writ, motion, petition, proceeding or remedy may institute without paying filing fee"
>
> (d) "Discovery of exonerating after plea; issue raised regarding insufficient evidence to support a conviction could not have been raised originally; pleas were not knowingly and intelligently entered"
>
> (11) State concisely and in the same order the facts which support each of the grounds set out in (10):
>
> (a) "Alleged victim erroneously identified defendant as sexual aggressor when she had consensual sex with him before rape by at least one other co-defendant"

(b) "Alleged victim mistakenly identified defendant in room when robbery occurred"

(16) If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) "Ineffective assistance – defendant was not advise[*sic*] of the right to switch lawyers"

(b) "Pleas were not intelligently entered – defendant did not have capacity to raise"

(c) "Issue was not raised until after a hearing regarding new evidence"

Applicant requests relief as follows:

> "Dismissal of state case. Alternatively, proper advisement of plea and additional plea hearing, sentence reduction/hearing." [5]

In his amended application, the Applicant,. Through counsel, alleged the following:

> 1. Failed to Meet Sufficiently: "Applicants counsel Jason Chehoski and Aimee Zmroczek failed to meet with the Applicant a sufficient number of times to review the evidence."
>
> 2. Failed to Provide Discovery. "Applicants counsel Jason Chehoski and Aimee Zmroczek failed to provide discovery to applicant."
>
> 3. Failed to Investigate. "Applicants counsel Jason Chehoski and Aimee Zmroczek failed to properly investigate these cases to provide a defense for Applicant."
>
> 4. Filed to call witnesses. "Applicants counsel Jason Chehoski and Aimee Zmroczek failed to call witnesses Tiffany and Patrick Folks."
>
> 5. Promised 10 years incarceration. "Applicants counsel Jason Chehoski and Aimee Zmroczek coerced the Applicant into entering a guilty plea by statements they made including Mr. Chehoski stating he had to enter the guilty plea and both attorneys slated he would receive a sentence of 10 years' incarceration."

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[5] The relief Applicant seeks is not available on post-conviction relief—the only relief available would be a new trial on the original indictments. *See* S.C. Code Ann. § 17-27-20(b); Singleton v. State, 313 S.C. 75, 85–86, 437 S.E.2d 53, 59 (1993) (discussing section 17-27-20(b) and the appropriate relief in PCR cases); *Gilstrap v. State*, 252 S.C. 625, 628, 168 S.E.2d 88, 89 (1969) (stating that even under the assumption that all the allegations were true, the relief to be granted on PCR is remand for a new trial); *Smith v. State*, 413 S.C. 194, 195, 775 S.E.2d 696, 696 (2015) ("We now clarify the proper remedy is a new trial.").

This Court has before it the Lexington and Richland County Clerks of Court records regarding the subject convictions; Applicant's records from the South Carolina Department of Corrections; a full and complete record of Applicant's direct appeals, the guilty plea transcript; the records of Applicant's initial PCR action; and the records of the current PCR action.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

Burden of Proof

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). In a post-conviction relief action, the applicant bears the burden of proving the allegations by a preponderance of the evidence—a mere allegation of ineffective assistance is not sufficient to warrant granting relief. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

Ineffective Assistance of Counsel

When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal

cases. "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). Judicial scrutiny of counsel's performance must be highly deferential, as it is all too tempting for a defendant to second guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. Strickland, 466 U.S. at 689. "[W]hen counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing Caprood, 338 S.C. at 110, 525 S.E.2d at 517.

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. 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. 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. Strickland, 466 U.S. 668.

Because the Sixth Amendment right to counsel also applies to a defendant entering a guilty plea, Hill v. Lockhart, 474 U.S. 52 (1985), extended the two-part Strickland test to challenge guilty pleas based on ineffective assistance of counsel. See Padilla v. Kentucky, 559 U.S. 356, 373 (2010) (recognizing that the guilty plea process is a "critical phase of litigation" for purposes of the Sixth Amendment right to effective assistance of counsel). When reviewing a guilty plea, the analysis of counsel's performance under the first prong of Strickland remains unchanged—the applicant must show that counsel's representation fell below an objective standard of reasonableness demanded of attorneys in criminal cases. Hill, 474 U.S. at 58–59; accord Thompson v. State, 340 S.C. 112, 115, 531 S.E.2d 294, 296 (2000). An applicant alleging his guilty plea was induced by ineffective assistance of counsel must prove counsel's advice to plead guilty was not "within the competence demanded of attorneys in criminal cases." Hill, 474 U.S. at 56. The second, or "prejudice" prong, however, "focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process." Id. at 58–59. Specifically, when an applicant claims counsel's deficient performance caused him to accept a plea, the applicant "must show that there is a reasonable probability that, but for [plea] counsel's [alleged] errors, he would not have pleaded guilty and would have insisted on going to trial." Id. at 59.

This inquiry "focuses on a defendant's decisionmaking" and does not turn on the outcome of a defendant's actual criminal proceeding or potential outcome had a defendant chosen to proceed to trial. Lee v. United States, 137 S. Ct. 1958, 1966 (2017). However, an applicant must convince the court that a decision to reject the plea bargain would have been rational under the circumstances. Padilla, 559 U.S. at 372. The question here is whether the applicant, if correctly informed of circumstances surrounding the plea, would have pleaded guilty—not whether counsel would have still advised him or her to plead guilty. Turner v. State, 335 S.C. 382, 385, 517 S.E.2d

442, 444 (1999).

After careful review of the entire record, including the testimony and exhibits presented at the evidentiary hearing, and based on the standard discussed above, this Court finds that Applicant has failed to carry his burden in this action. Below are this Court's rulings in regard to each of Applicant's specific allegations of ineffective assistance of counsel:

1. Failed to Meet Sufficiently: "Applicants counsel Jason Chehoski and Aimee Zmroczek failed to meet with the Applicant a sufficient number of times to review the evidence."

Federal case law holds that there is no constitutional minimum number of meetings between attorneys and their clients to satisfy competency. Campbell v. Polk, 447 F.3d 270, 279 fn.2 (4th Cir. 2006) (no constitutional minimum number of meetings to satisfy competency); United States v. Olson, 846 F.2d 1103, 1108 (7th Cir. 1988) (reciting that there is no constitutional minimum number of meetings between attorney and client and observing that an experienced attorney may get more out of a single meeting than a neophyte). "Brevity of time spent in consultation, without more, does not establish that counsel was ineffective." Easter v. Estelle, 609 F.2d 756, 759 (5th Cir. 1980) (holding it is not enough to merely show that counsel only met with his client twice before trial as long as counsel devoted sufficient time to insure an adequate defense and to become thoroughly familiar with the facts of the case and the law applicable to the case, and holding the record revealed that counsel was so prepared.).

South Carolina case law has established that even if trial counsel only met with his client very briefly, that alone does not establish that he was unprepared or ineffective at trial. See Harris v. State, 377 S.C. 66, 75, 659 S.E.2d 140, 145 (2008) (citing *Easter*) ("First, there is no question that counsel met with [Applicant] on several occasions prior to the first trial. Even if the meetings were brief, this fact alone is not indicative of inadequate trial preparation.") Mere speculation and

conjecture is insufficient to substantiate allegation that counsel's deficient performance was prejudicial. See Harris v. State, 377 S.C. 66, 659 S.E.2d 140 (2008), *abrogated by Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018).

At the time of the guilty plea, Judge Addy stated he had been advised that an evaluation had been conducted by the Department of Mental Health of the Applicant. The April 2, 2019 evaluation found that Shell suffers from mild mental retardation. Judge Addy noted that there were additional mental health diagnosis, but Applicant's primary problem was mild intellectual disability. Tr.p. 6. The Court then inquired of Richland County defense counsel Zmroczek and Lexington County defense counsel Chehoski about whether they were able to communicate intelligently with Applicant about the charges and explain it to him in a way he understood exactly what is involved in this. Tr.p. 6. Each counsel confirmed that they had and that they were comfortable in going forward with the plea.

During the plea, the court inquired of the Applicant about the medications that he was taking - Haldol and Zyprexa- and Applicant confirmed that the Haldol was for the voices he sometimes heard and the Zyprexa was a mood stabilizer. Tr.p. 9. Shell was then asked by the court concerning his psychiatric and special needs issues, to describe in his own words why he was here. He stated that he was in court based upon his charges and for a plea. Tr.p. 9, l. 12-24. Shell when asked confirmed that he was guilty of the charges. Tr.p. 10, l. 1-3. After the factual basis was presented by Assistant Solicitor Patterson and Assistant Solicitor Miles, Applicant confirmed that he heard what the solicitors said about the case, that what they said is what happened, that he did not disagree with what was said, and that it was true. Tr.p. 14.

At that point, Judge Addy went through the Applicant's constitutional rights he was waiving by entering the guilty plea, including that he could have a trial and did not have to plead

guilty, that a trial was where other people determine his guilt, that there would be 12 people on the jury, the state would bring in witnesses and his lawyers could ask them questions, that he could bring witnesses that could be questioned, that he did not have to prove anything at trial that he could subpoena witnesses to court, that he would be able to testify, and if he wanted or not testify and the jury would be told not to hold the failure to testify against him. Judge Addy advised the Applicant that at the trial, he would be presumed innocent and the jury would be told in the eyes of the law he hadn't done anything. He advised Judge Addy that he wanted to waive those rights and plead guilty. Tr.p 18.

Judge Addy then inquired with Shell on whether he was happy with the way Mr. Chehoski and Ms. Zmroczek had tried to help him, and he affirmed that he was. Tr.p. 18, l. 18-21. He declared that he had talked with them enough, which he affirmed he had. When asked if he wanted to spend more time to talk with them, Shell declared he did. At that point the court gave a recess to allow them to talk. Tr.p. 18-19.

After the break, Shell confirmed with the Court that his counsel had answered his questions. Tr.p. 20, l. 1-5. Counsel advised the court that they had no concerns. Shell advised the judge that he did not need any more time to talk with them and he declared that he was good. He confirmed that he was totally happy with the help his lawyers had given him and that he had no complaints to make against them. Tr.p. 20, l. 11-25.[6]

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[6] In his *pro se* applicant, he makes a claim that he was not advised of his right to switch lawyers. The genesis of this confusing allegation is not clear. It was not raised in the amendment to the original application. However, there is no constitutional requirement that an applicant must be advised of his right to switch lawyers by his current lawyer. The right of an accused to effective assistance of counsel, however, does not extend to the appointment of counsel of choice, or to special rapport or even a meaningful relationship with appointed counsel. Morris v. Slappy, 461 U.S. 1, 13-14, 103 S.Ct. 1610, 1617-18, 75 L.Ed.2d 610 (1983). See State v. Boykin, 324 S.C. 552, 555, 478 S.E.2d 689, 690 (Ct. App. 1996).

Shell confirmed that he had not received any promise of anything in terms of the kind of sentence he would receive. Tr.p. 20, l. 25-p. 24, l. 4.

At the plea, Lexington County counsel Chehoski advised the Court that the Applicant completed the 12th grade and has been on a disability. Tr.p. 22, l. 5-7. He had full cooperation with the police. Tr.p. 22. He confirmed that in his meetings with Shell he had indicated that he did not want a jury trial and wanted to accept responsibility from as early as March 2018 when Solicitor Patterson made her offer. The situation was delayed because there was transfer with the Richland County prosecutors prior to Solicitor Miles involvement. Tr.p. 22-23. He asked for leniency and the 10-year minimum sentence. Tr.p. 23.

Richland County counsel Zmroczek confirmed that the recommended sentence was to run concurrently. She acknowledged that there had also been transfer of counsel and solicitors on the Richland County charges that added to the slowness. Counsel Zmroczek like Chehoski emphasized his disability and mental health needs and a request for treatment in the correctional facilities. Tr.p. 25-26. She noted that he would be subject to lifetime GPS monitoring and faced a possibility of civil commitment (Sexually Violent Predator proceedings). Tr.p. 26. She described the 24-year-old that she had net as a gentle and kind person. As with Chehoski, Zmroczek pointed out that the minimum of 10 years is a very long time for someone with Applicant's mental and intellectual disabilities. Tr.p. 27.[7]

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[7] During the plea, the defense in mitigation presented his mother, Lashonda Shell who described that at birth, it was recognized that the Applicant suffered from disabilities. Tr.p. 28. She blamed his nephew and their friends for leading him astray and led to his eviction from where he was staying. Tr.p. 29. She complained that even after he was locked up on these charges, the others used his credit card and social security benefits. Tr.p. 30. His father Cassius Colwell made a plea also. Tr.p. 31. He resided in Charlotte and learned from Applicant's mother that someone was talking about pulling a gun on him and shooting the Applicant. Tr.p. 31-32. He advised the Court that she and the Applicant had struggled, but he wanted to be doing things like fishing with his

During the PCR hearing, counsel Aimee Zmroczek testified that her notes reflected that there were seven meetings with the Applicant and that most of the meetings were with her investigators Brian Setree. Counsel Jason Chehoski testified that he met with the Applicant at least every 60 days after his appointment. The Applicant testified that that Mr. Chehoski came to the county jail a few times, but he did not keep count. He knows that Chehoski came and met with him more that Ms. Zmroczek.

This Court finds that the Applicant has failed in his burden of proof that there was a Sixth Amendment violation related to the number of meetings with the Applicant. During the plea, the Applicant indicated under oath that he was happy with the way counsel had tried to help him, and he affirmed that he was. Tr.p. 18, l. 18-21. In addition, he stated that he had talked with them enough which he affirmed he had. Tr.p. 18. When asked if he wanted to spend more time to talk with them, Shell declared he did. At that point the court gave a recess to allow them to talk. Tr.p. 18-19. After the recess, the Applicant confirmed that he did not need any more time with the Applicant.

These statements by the Applicant under oath at the plea carry a presumption of verity. 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 v State, 376 S.C. 130 at 137–38, 654 S.E.2d 870, at 874 (Ct. App. 2007) (internal citations and

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son. He asked the court to be lenient. He recognized what the Applicant did was wrong, but 10 years is a long time. He apologized for not spending enough time with his son, but stated the judge ordered that he stay in S.C where his mother was. Tr.p. 32-33. Lashonda Colwell, his aunt, stated that both families were god-fearing. She described the Applicant as one who when growing up would step up and do things. She felt the Applicant, though, did not understand the consequences of his actions. As an officer of the court herself, she was hoping the court was listening and taking all the facts into consideration. Tr.p. 34. Judge Addy inquired of the Applicant who chose not to say anything. Tr.p. 37, l. 4-8.

quotation marks omitted); cf. Blackledge v. Allison, 431 U.S. 63, at 73–74 (1977) (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"). The Applicant has failed to prove any cogent reason why he should not be held to the truth of the statements made before Judge Addy on the need for further consultation.

This Court also finds credible Mr. Chehoski's testimony about meeting with the Applicant at least every 60 days for the two-year period that he was representing him and around 13 to 14 times prior to the plea. Similarly, this Court finds credible that Ms. Zmroczek and/or her investigator met with him at least seven times prior to the plea.

This Court finds credible evidence to find that both counsels devoted sufficient time to insure an adequate defense and to become thoroughly familiar with the facts of the case and the law applicable to the case, and holding the record revealed that counsel was so prepared. As additionally set forth below related to investigation and discovery, counsel were aware of the Applicant's position of any possible defense to the charges and desired to plead guilty, the facts of the state's version of the case as well as the discovery. Further, this Court finds that they were both aware of the Applicant's mental status and had him evaluated by the Department of Mental Health who reported that he was competent to stand trial although he suffered from a mild intellectual disability.

This Court finds that counsel was not deficient in the number of meeting and adequacy of the meeting prior to the guilty plea which fell within the standards of competence of lawyers practicing criminal law. In addition, the Applicant has failed to show the existence of any prejudice under Hill v. Lockhart. He has failed in his burden to prove in showing that had there been

additional meetings with the Applicant by counsel, that there was a reasonable likelihood that the Applicant would have gone to trial on all the charges rather than plead guilty. His allegation must be denied.

2. Failed to Provide Discovery. "Applicant's counsel Jason Chehoski and Aimee Zmroczek failed to provide discovery to applicant."

In this allegation, the Applicant contends that he failed to receive the discovery from either counsel. This Court must conclude that he failed in his burden of proof factually and legally. During the PCR hearing the Applicant testified that Chehoski came to the county and discussed things with him. He stated that Chehoski did bring papers with him. However, he claimed he was never shown any evidence. Counsel Chehoski testified that he met with Applicant on April 3, 2018 and brought a copy of the discovery that he had received. He had the Applicant sign a receipt for it and provided a waiver to explain that there was sensitive information and that he understood the risks that came with receiving the discovery. Chehoski stated that Shell kept the paperwork and never returned it to him. In addition, Chehoski stated that he did not use an investigator in the case because he did not see any witnesses outside of the discovery that he needed to talk to or would likely talk to. The April 3 discovery was just written paperwork. Counsel Chehoski stated that he met with Shell on a later date with the audio statement he had given to law enforcement and they reviewed it together at that time. Counsel Zmroczek stated that after she received the Richland County discovery from the State that she had her investigator show it to the Applicant. However, when this was done, the Applicant indicated that he did not want to keep a copy of it at the jail and gave it back to them. She testified that she also went over the discovery with the Applicant at a later date.

This Court finds as a fact that both counsels provided access to the state's discovery to Shell. The Court finds that each counsel's testimony was credible on this issue. The Applicant's

factual allegation is without factual merit since was provided with access to both discoveries and retained a copy of the Lexington County discovery. Counsel Chehoski also went over the audio statement of his admissions to law enforcement. He has failed to prove deficient performance or prejudice.

3. Failed to Investigate. "Applicants counsel Jason Chehoski and Aimee Zmroczek failed to properly investigate these cases to provide a defense for Applicant."

The Court finds that the Applicant failed in his burden of proof on this issue related to the investigation. In his testimony, the Applicant made conclusory and conflicting statements on whether his counsels investigate their cases. As noted in the next allegation, he claimed that he wanted his defense team to call Tiffany and Patrick Folks, who were not at the scene of the incident, but whom he claimed he called the night of the incident and were there when he was on the telephone. He claimed he did not recall what he said because of his medicine. He acknowledged that Zmroczek had an investigator.

Counsel Zmroczek testified that in their meetings with the Applicant he was unable to present information that deveoped any legal defese to the charges. She noted that his biggest concern was the status of the victims. She noted that the facts she received were consistent with the state's version of the facts. Concerning Tiffanty and Patrick Folks, counsel claimed that she did not recall any discussion about them from the testimony she heard at the PCR hearing.

Counsel Chehoski testified that in his meetings with the Applicant he gave many versions that were inconsistent, including that he could not have committed the rape because he was gay. At one point, he suggested a mental health defense to counsel to assert that his confession was coerced two years after he began representing him. Chehoski stated he pushed back against this because he felt the Applicant was not being truthful. At that point, Applicant dropped that line of defense related to the confession. He had stated that it was coerced and that he did not want to

plead to something that he did not do, meaning to counsel that because his statement was false, it was coerced.He did not want to go to trial but to plead guilty. Counsel stated that he heard the comments from the Applicant at this PCR hearing about the Folks and their possible testimony for the first time. He stated that he was not familiar with them and from what the Applicant said, he did not know how they would have been helpful to the defense. Counsel Chehoski stated that he requested a mental health evaluation after meeting with the Applicant's mother. She provided some medical records with matters related to intellectual disability. He stated he received the 2019 evaluation (State Exhibit 1) and reviewed it with the Applicant and gave him a copy on May 17, 2019. Upon his review of the report, he did not request a second evaluation.[8] Counsel Chehoski stated that he did not have difficulty communicating with the Applicant. He described his demeanor as consistent and soft spoken, polite and easy to converse with. Chehoski stated that he

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[8] To establish *Strickland* prejudice in the context of plea counsel's failure to fully investigate the applicant's mental capacity, the applicant "need only show a 'reasonable probability' that he was either insane at the time [the crime was committed] or incompetent at the time of the plea." *Matthews v. State*, 358 S.C. 456, 459, 596 S.E.2d 49, 51 (2004) (alterations in original) (quoting *Jeter*, 308 S.C. at 233, 417 S.E.2d at 596); *see id.* at 458–60, 596 S.E.2d 49, 50–51 (expanding the reasonable probability standard as the burden for proving both the deficiency of counsel and the prejudice prongs). As is the case with any other allegation that a defense attorney failed to adequately investigate some matter, an applicant must present some proof of identifiable mental health issues which undermine his or her competency; mere speculation and conjecture by the applicant is insufficient to establish prejudice. *Garren v. State*, 423 S.C. 1, 13–14, 813 S.E.2d 704, 711 (2018).

"The test of competency to enter a plea is the same as required to stand trial"—the accused "must have sufficient capability to consult with his lawyer with a reasonable degree of rational understanding and have a rational as well as factual understanding of the proceedings against him." *Jeter*, 308 S.C. at 232, 417 S.E.2d at 596. Here, Applicant received an evaluation from the Department of Mental Health. (Plea Tr. 6). The DMH examiner found Applicant suffers from mild intellectual disability; however, he was found competent. (Plea Tr. 6). The Court further conducted an extensive colloquy with Applicant regarding his understanding of the plea proceedings. Accordingly, the Court finds that Applicant's allegations regarding his competency to enter the plea are without merit.

did not seek to interview the victims in the case and did not have the information to locate them and did not ask an investigator to interview them.

In order to prevail upon a claim that counsel did not adequately prepare or investigate a case, an applicant must present evidence of what counsel could have discovered or what other defenses applicant could have requested counsel develop and present had counsel been more prepared. Harris v. State, 377 S.C. 66, 75–76, 659 S.E.2d 140, 145–46 (2008) (citing Jackson v. State, 329 S.C. 345, 353–54, 495 S.E.2d 768, 772 (1998)), *abrogated on other grounds by* Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). The applicant must further present evidence demonstrating how the discoverable matters or defenses would have resulted in a different outcome. *Id.* Mere speculation as to how the alleged lack of preparation prejudiced an applicant is not sufficient to support a grant of relief. *Id.* at 75, 659 S.E.2d at 145 (citing Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995)). To establish prejudice based on failure to investigate or prepare for trial when the applicant enters a guilty plea, he must ordinarily present some evidence "that would have affected counsel's advice to [him] to accept the plea bargain offered or that would have caused [him] to decline to accept it." Stalk v. State, 383 S.C. 559, 563, 681 S.E.2d 592, 594 (2009).

Our Supreme Court has cautioned reviewing courts not to lose sight of the reasonableness standard regarding counsel's duty to investigate. Ard v. Catoe, 372 S.C. at 331, 642 S.E.2d at 597 ("this duty is limited to a reasonable investigation"). The United States Supreme Court also instructed reviewing courts to "keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case." *Strickland*, 466 U.S. at 690. Thus, in applying the *Strickland* standard to a claim of failure to investigate, counsel's decision not to undertake a particular investigation must be evaluated with

heavy deference to counsel's judgment. Bagwell v. State, 410 S.C. 259, 265, 763 S.E.2d 630, 633 (Ct. App. 2014).

This Court must find based upon the credible evidence of counsel that the Applicant failed in his burden of proof in showing any deficient performance related to the investigation. As found previously, each counsel had an adequate number on personal meetings with the Applicant to go over the nature of the state's version of the case which were essentially consistent with the Applicant's version. In seeking to consider any available defenses, the counsel were unable to find factual or legal support for a defense. Counsel considered the existence of a mental health issue and were reasonable in seeking a mental health evaluation in assisting in the determination.

The Applicant failed to provide credible present evidence to show any deficiency in the case preparation. Although counsel failed to attempt to interview the victims in this case, it is understood that the victim's statements were included in the discovery provided to the defense which allowed him to become well-versed in the nature of the state's case within the standard of competence demanded of lawyers in criminal practice. See Moorehead v. State, 329 S.C. 329, 496 S.E.2d 415 (1998) (Defense counsel's failure, prior to advising defendant to plead guilty on charges of criminal sexual conduct to interview victims did not constitute ineffective assistance of counsel, as nothing in record indicated that interviewing victims would have led to different result there was nothing to indicate that victim of sexual conduct would have retracted her version).

The only item he suggested was a claimed desire that Tiffany and Patrick Folks be contacted about being witnesses. However, this Court must find that Applicant has failed to credibly prove that they had any evidence to provide that was material to the defense or an investigative lead to further reliable evidence. In addition, neither testified before this court. This Court initially finds credible counsels' testimonies that the Folks names were not provided to the

defense as to being material witnesses. This Court can only speculate about the value of any further investigation which is inadequate. Moorehead, supra. (failure to conduct independent investigation does not constitute ineffective assistance of counsel when allegation is supported only by mere speculation as to result). This Court further noted that the Applicant stated under oath at the time of the plea that he agreed with the State's version of the facts. Tr.p. 14. See Blackledge v. Allison; Dalton v. State, supra.

This Court concludes that the Applicant has failed to prove deficient performance in the investigation prior to the entry of the guilty pleas by either of his counsel. Similarly, other than mere speculation, the Court must find that Applicant failed to meet his burden in showing the existence of any investigative failure, "that there is a reasonable probability that, but for [plea] counsel's [alleged] errors, he would not have pleaded guilty and would have insisted on going to trial." The allegation must be denied.

4. Failed to call witnesses. "Applicants counsel Jason Chehoski and Aimee Zmroczek failed to call witnesses Tiffany and Patrick Folks."

The alleged failure to investigate the Folks as potential witnesses is addressed above. The Applicant failed in his burden of proof in showing either deficient performance or prejudice under Strickland and Hill v. Lockhart.[9] However, counsel need only interview potential witnesses "when it is reasonable to do so." Edwards v. State, 392 S.C. 449, 457, 710 S.E.2d 60, 65 (2011). "In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Strickland, 466 U.S. at 691. The Applicant failed in

[9] In his *pro se* application he claims that there was a discovery of exonerating evidence after the plea and a claim that the victim allegedly erroneously identified the Applicant. No evidence was presented concerning this allegation in this proceeding. It must be considered abandoned as a claim of newly discovered evidence. It was not included in the amended application.

his burden of proof.

5. Promised 10 years incarceration. "Applicants counsel Jason Chehoski and Aimee Zmroczek coerced the Applicant into entering a guilty plea by statements they made including Mr. Chehoski stating he had to enter the guilty plea and both attorneys stated he would receive a sentence of 10 years' incarceration."

The Court must find that the Applicant failed in his burden of proof to show that either counsel advised the Applicant that he would receive a 10-year sentence. The record shows that he was facing a mandatory minimum sentence of 10 years and maximum of 30 years on armed robbery and on criminal sexual conduct first degree on the Richland County charges. Tr.p. 4, l. 6-13. On the sentencing sheets for each of the offenses, it stated that the plea was "without Negotiation or Recommendation" checked. During the plea proceeding, there was no reference that this was an agreed sentence of 10 years by any party. The Lexington Solicitor indicated the limitations of the negotiations related to the Lexington charges which included dismissals of several charges and pleading down from the criminal sexual conduct with a first charge to a criminal sexual conduct second charge. As to Richland County, there was an agreement expressed that the Richland County criminal sexual conduct charge and armed robbery charge would run concurrent with the Lexington County charges.

Importantly, the Applicant confirmed under oath at the plea when asked "aside from the dismissal of some cases, has anyone promised you anything in terms of the kind of sentence you're going to receive" he answered "no, sir." Tr.p. 21, l. 1-4. In his plea mitigation, counsel Chehoski requested the mandatory minimum sentence of 10 years with credit for time served. Tr.p. 23, l. 19-23. Counsel Zmroczek requested similarly 10 years mandatory minimum. Tr.p. 28, l. 1-4. She had already asserted that 10 years is still a very long time for a person with his disabilities. Tr.p. 27, l. 9-114. His father Cassius Colwell asked the Court to be lenient. Tr.p. 32, l. 17-18.

Judge Addy sentenced the Applicant to 18 years. In making his sentence, Judge Addy noted that he considered as relevant factors that Applicant had no real prior record, a functional IQ of 48, and probably under the influence of others. However, he also considered this to be a very serious incident that took place over two hours in two counties, which was terrifying to the women involved. He asserted "so it's not a situation where I'm able to simply say it's okay, you get the minimum on this kind of 0ffense because it is very serious." Judge Addy further found mitigating his acceptance of responsibility the moment he met with law enforcement. Tr.p. 38-39.

During the PCR hearing, the Applicant claimed that counsel Chehoski initially told him 20 to 30 years to plead. Then later Applicant claimed that both counsel asserted that he would get ten (10) years to run concurrently and told him that on plea day when he was signing the sentencing sheet. LaShonda Shell claimed that when they came to court she thought he would receive 5 to 10 years. She claimed what counsel told her was false. She claimed counsel told her the plea was a better course because it would be shorter time, but it was longer. She also claimed that she did not see any paperwork that this would be a 10-year sentence.

Counsel Zmroczek stated she spoke with Solicitor Miles about making this case a global resolution with the Lexington charges. Zmroczek testified that there was never any indication on the part of the State that it was agreeing to a 10-year sentence. Counsel asserted that there was no confusion but the hope was to get 10 years, but it was not a guarantee or promise.

Counsel Chehoski testified that there was no plea sentencing agreement for a specific sentence. He said that he mentioned to the Applicant that his expectation would be somewhere between 10 and 15 years, but it was never a promise. On the Lexington charges he was facing a minimum of 10 years and a maximum of 20 years. He stated when he spoke with the mother that the defense was asking for the minimum sentence but there were no other negotiations.

This Court finds the Applicant has not met his burden of proof. This Court finds that the Applicant was advised that they were requesting the minimum sentence but that he was advised that he was facing the possibility of 20 years on the Lexington charges and thirty years on the Richland charges. Both lawyers testified that they never told Applicant or his mother that Applicant was going to receive a sentence of 10 years. Further, the Applicant, under oath at the time of the plea, admitted that there had been no promises given to him by counsel or anyone else that he would receive any particular sentence. His suggestion otherwise is not credible. The factual basis for this claim was not proven to this Court by credible evidence. Since the Applicant failed to prove the factual predicate, the allegation must be denied. The Applicant has failed to prove either deficient performance in each of his counsel's advice to the Applicant about the punishment he was facing and the consequences of any of the negotiations. Because the advice given was correct, he has failed to prove prejudice under Hill v. Lockhart. supra.[10]

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[10] In his *pro se* application he asserts that his counsel should have objected to the sentence of 18 years but does not declare what the objection should have been. If the underlying assertion is that there was a plea bargain for a 10-year sentence between the state and defense, as not within this allegation he has failed in his proof. If the objection was that the sentence was too long, the sentence given was within the statutory mandates for each of the crimes He has failed to meet the prejudice prong under Strickland v. Washington that there was a reasonable probability that had an objection been made to the 18 year sentence the result of the proceeding would have been different when he was facing up to thirty years on the criminal sexual conduct and armed robbery charges.

Applicant received an aggregate eighteen-year sentence for multiple counts of armed robbery and criminal sexual conduct arising from two separate violent attacks. All for charges to which he pled are classified as violent under S.C. Code Ann. § 16-1-60 and most serious felony offenses under S.C. Code Ann. § 17-25-45, thereby were considered 85% crimes. Tr.p. 4, l. 18-22. The eighteen-year sentence he received falls well within the statutory range, and applicant has not alleged in any way that this was an illegal sentence. See State v. Sidell, 262 S.C. 397, 205 S.E.2d 2d 2 (1974) (a judge has discretion in sentencing within statutory limits); see also Cummings v. State, 274 S.C. 26, 260 S.E.2d 187 (1979) (a sentence in not excessive if within statutory limitations and not the result of partiality, prejudice, or corrupt motive); Wood v. State, 257 S.C. 179, 184 S.E.2d 702 (1971). Accordingly, and because Applicant has failed to indicate on what basis Counsels could have objected, this allegation is without merit.

B. Involuntary Guilty Plea

In his initial *pro se* application, the applicant claimed that his guilty plea was not intelligently entered for the many of the reasons set forth in the earlier allegations addressed above. "[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). Accordingly, 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); *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 also Wolfe, 326 S.C. 158, 485 S.E.2d 367 (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).

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.

Nonetheless, 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"). 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").

The voluntariness of a guilty plea, however, "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). 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, 485 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).

Surmounting Strickland's high bar is never an easy task, and the strong societal interest in finality has "special force with respect to convictions based on guilty pleas." Lee, 137 S. Ct. at 1967 (internal citations and quotation marks omitted); *cf.* Hill, 474 U.S. at 58 ("[R]equiring a 'prejudice' showing from defendants who seek to challenge the validity of their guilty pleas on the ground of ineffective assistance of counsel 'will serve the fundamental interest in the finality of guilty pleas.' "). Reviewing "[c]ourts should not upset a plea solely because of *post hoc* assertions from a defendant about how he would have pleaded but for his attorney's deficiencies." *Lee*, 137 S. Ct. at 1967. Rather, judges should "look to contemporaneous evidence to substantiate a defendant's expressed preferences." *Id.* In determining whether a guilty plea was taken in accordance with constitutional standards, the reviewing judge must analyze and consider the entire record, including the transcript of the guilty plea and the evidence presented at the PCR hearing. Harres, 282 S.C. at 134, 318 S.E.2d at 361.

This Court finds that the Applicant has failed in his burden of proving that the guilty plea was not voluntarily and knowingly entered. The Court incorporates herein by reference the findings and conclusions set for above. During the guilty plea Judge Addy thoroughly advised him of his understanding of the constitutional rights he was waiving by entry of his guilty plea, the possible punishment he was facing, his understand of the factual basis of the charges and his satisfaction of the performance he has received from his two counsel. Judge Addy was also aware of the mental disabilities of the Applicant based upon the competency to stand trial evaluation he had received from the Department of Mental Health. In addition, the Applicant and plea judge learned about the extent and limitations of the negotiations and the fact that he had no promised expectation of any particular sentence other than the fact that he was facing a mandatory minimum of ten years on two of the Richland charges and a maximum of thirty years on those charges, as

well as the possible punishments on the other charges that he was pleading guilty. The sentence he received was within the statutory mandates for each of the crimes. He has failed to show that his guilty plea was involuntary. As stated above there was no promise or offer from the State that he would receive a ten-year sentence. This claim must be denied where the guilty plea was knowingly and voluntarily entered.

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 conviction. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. *See* Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant's attention is directed to Rule 243, SCACR, for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief be denied and dismissed with prejudice; and
2. The Applicant is returned to the South Carolina Department of Corrections.

AND IT IS SO ORDERED.

November 18, 2024

PERRY H. GRAVELY
Presiding Judge
Eleventh Judicial Circuit

Lexington, South Carolina

Order to Seal Previous Order

This Amended Order shall replace the Order filed on October 7, 2024. Since the previous order contained the name of the victim, it shall be sealed and only reviewable upon Order of the Court.

PERRY H. GRAVELY
Presiding Judge
Eleventh Judicial Circuit