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Dec 27 2024

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable B. Alex Hyman, Circuit Court Judge

Case No. 2020-CP-23-0736

Braxton Hare #373172,

Petitioner,

v.

State of South Carolina,

Respondent.

NOTICE OF APPEAL

Petitioner Braxton Hare appeals the Honorable B. Alex Hyman's Order of Dismissal filed on **December 19, 2024**.



Dayne C. Phillips, Esq.
1614 Taylor Street, Suite D.
Columbia, SC 29201

ATTORNEY FOR PETITIONER

December 27, 2024

Other Counsel of Record:

Melody Brown, Senior Assistant Deputy Attorney General
South Carolina Attorney General's Office
1000 Assembly Street, Room 519
Columbia, SC 29201

cc:

Brice Garrett, Greenville County Clerk of Court



Dayne Phillips <dayne@pricebenowitz.com>

RE: Rulings on May 13 Greenville PCR Term - Braxton Hare - 2020-CP-23-0736

Hyman, B. Alex Law Clerk (Taylor Langston) <bhymanlc@sccourts.org>

Thu, Dec 19, 2024 at 4:43 PM

To: Dayne Phillips <dayne@pricebenowitz.com>

Cc: Melody Brown <MBrown@scag.gov>, "Zelenka, Don" <dzelenka@scag.gov>, Kaylee Kemp <kayleekemp@scag.gov>, "Hyman, B. Alex Secretary (Allison Pogue)" <bhymanlc@sccourts.org>, Courtney Powers <courtney@pricebenowitz.com>, "Clio Maildrop Braxton.Hare.2020.01.00001" <800ca9c17+matter1202768809@maildrop.clio.com>, Angela Brown <abennett@scag.gov>

Good afternoon all,

Please see the attached signed order. As to the Motion to Alter or Amend, Judge Hyman has carefully considered but respectfully denies the motion. Please let me know if there are any questions or concerns. Thank you all and have a Merry Christmas!

Taylor L. Langston

Law Clerk for The Honorable B. Alex Hyman

15th Circuit

Office: 843-915-6697

bhymanlc@sccourts.org

From: Hyman, B. Alex Law Clerk (Taylor Langston)**Sent:** Monday, December 16, 2024 3:48 PM**To:** 'Dayne Phillips' <dayne@pricebenowitz.com>**Cc:** Melody Brown <MBrown@scag.gov>; Zelenka, Don <dzelenka@scag.gov>; Kaylee Kemp <kayleekemp@scag.gov>; Hyman, B. Alex Secretary (Allison Pogue) <bhymanlc@sccourts.org>; Courtney Powers <courtney@pricebenowitz.com>; Clio Maildrop Braxton.Hare.2020.01.00001 <800ca9c17+matter1202768809@maildrop.clio.com>; Angela Brown <abennett@scag.gov>**Subject:** RE: Rulings on May 13 Greenville PCR Term - Braxton Hare - 2020-CP-23-0736

Good afternoon,

Judge Hyman and I will be in touch by the end of the week. Thank you!

Taylor L. Langston

Law Clerk for The Honorable B. Alex Hyman

15th Circuit

Office: 843-915-6697

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From: Dayne Phillips <dayne@pricebenowitz.com>**Sent:** Monday, December 16, 2024 3:34 PM**To:** Hyman, B. Alex Law Clerk (Taylor Langston) <bhymanlc@sccourts.org>**Cc:** Melody Brown <MBrown@scag.gov>; Zelenka, Don <dzelenka@scag.gov>; Kaylee Kemp <kayleekemp@scag.gov>; Hyman, B. Alex Secretary (Allison Pogue) <bhymanlc@sccourts.org>; Courtney Powers <courtney@pricebenowitz.com>; Clio Maildrop Braxton.Hare.2020.01.00001 <800ca9c17+matter1202768809@maildrop.clio.com>; Angela Brown <abennett@scag.gov>**Subject:** Re: Rulings on May 13 Greenville PCR Term - Braxton Hare - 2020-CP-23-0736

prosecutor of the 13th Circuit Solicitor's Office L. Mark Moyer. At the conclusion of the hearing, this Court took the matter under advisement,

After consideration of the testimony given at the hearing, reviewing and considering the record, the arguments presented by counsel, and the controlling case law, this Court finds that Applicant failed to carry his burden of proof to show either deficiency in representation or that any purported deficiency supported a reasonable probability of a different result. This Court requested that counsel for the State prepared a proposed order.² This Court now **DENIES** relief for the specific reasons set out in this order.

PROCEDURAL HISTORY

Applicant is presently incarcerated by the South Carolina Department of Corrections in Perry Correctional Institution.³ During its May of 2016 term, the Greenville County grand jury indicted Applicant for carjacking (2015-GS-23-11000). Applicant was represented by Ernest Hamilton Esq., and Assistant Solicitor L. Mark Moyer of the 13th Circuit Solicitor's Office prosecuted the case. On October 2, 2017, Applicant appeared before the Honorable Edward W. Miller and pleaded guilty to carjacking. Former Assistant Solicitor Moyer presented the following facts:

The incident happened on August 31st of 2015. The victim, Mr. Abimile Cruz, was driving at -- near the intersection of Fronage Road -- Frontage Road and Staunton Bridge Road. He slowed down to -- make a turn when he -- he was approached by a group of three to four men, one of whom was this Defendant.

² The proposed order was provided to counsel for Applicant prior to this Court's acceptance. Applicant's counsel was allowed sufficient time to review the proposed order while this Court made its own detailed review. See *Fishburne v. State*, 427 S.C. 505, 516, 832 S.E.2d 584, 589 (2019) (providing a "proposed order should be transmitted to opposing counsel" for review and that counsel "should ... alert preparing counsel and the PCR court as to any deficiencies in the proposed order.").

³ Applicant was incarcerated at McCormick Correctional Institution at the time of the filing of his PCR application. (PCR App. at 1).

Two of the men pulled pistols and got the victim to get out of the vehicle. He did so. When he got out of the vehicle, his cell phone was taken.

The men then got into the car and drove it away. The car was recovered a couple of days later when a co-defendant's ankle monitor was left at the scene where the vehicle was found that led to the arrest of that person. And then a subsequent investigation led to the arrest of this Defendant as well.

(Guilty Plea Tr. at 9).

In accordance with the State's recommendation, Judge Miller sentenced Applicant to imprisonment for 20 years, to be served concurrently with his previous trial conviction and sentence from July of 2017, with 649 days credit for time served. (Guilty Plea Tr. at 11). The State dismissed an indictment for attempted murder (2016-GS-23-6478) and armed robbery (2015-GS-23-10999). (Guilty Plea Tr. at 4).

Applicant did not appeal his conviction and sentence.

ALLEGATIONS

In his application for post-conviction relief, Applicant argues he is entitled to relief based upon the following claims:

- (1) Applicant did not knowingly and voluntarily waive his right to direct appellate review of his conviction and sentence;
- (2) Applicant's guilty plea was not knowingly and voluntarily entered because plea counsel rendered erroneous advice;
- (3) plea counsel was constitutionally ineffective for failing to have Applicant evaluated by a qualified medical professional in order to determine mental competency and criminal responsibility;
- (4) plea counsel was constitutionally ineffective for failing to move for a hearing before trial, pursuant to State v. Blair, 275 S.C. 529, 273 S.E.2d 536 (1981), in order to determine whether Applicant was competent to plead guilty;
- (5) plea counsel was constitutionally ineffective for failing to

present all reasonable and necessary evidence during sentencing in mitigation, and

- (6) plea counsel was constitutionally ineffective for failing to conduct a reasonable investigation and to develop all available, relevant, and admissible or mitigating evidence in preparation of Applicant's defense.

(PCR App. at 2-3). Applicant prays the Court would grant post-conviction relief and allow him to seek belated appellate review of his conviction and sentence, vacate his conviction and sentence, and remand for a new trial. (PCR App. at 6).

On March 15, 2023, Applicant, through counsel, amended the application as to the following:

Plea Counsel denied Applicant's right to effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 3 and 14 of the South Carolina Constitution. See S.C. Code § 17-27-20(A)(1), (4), and (6). Plea Counsel's unreasonably deficient performance prejudiced Applicant because there is a reasonable probability that, but for Plea Counsel's errors, Applicant would not have pled guilty and went to trial. See *Hill v. Lockhart*, 414 U.S. 52 (1985) (applying the *Strickland v. Washington*, 466 U.S. 668 (1984) standard to guilty plea challenges of ineffective assistance of counsel).

Plea Counsel's acts or omissions of ineffective assistance of counsel include but are not limited to the following allegations:

- (I) Plea Counsel failed to file a Notice of Appeal as requested by Applicant of his guilty plea and sentence, thereby denying Applicant belated review of direct appeal issues. Specifically, Applicant did not knowingly, intelligently, and voluntarily waive his right to file an appeal of his guilty plea and sentence. See *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974); *Wilson v. State*, 348 S.C. 215, 559 S.E.2d 581 (2002); *Davis v. State*, 288 S.C. 290, 342 S.E.2d 60 (1986).
- (II) Applicant did not voluntarily, knowingly, or intelligently plead guilty based on Plea Counsel's erroneous advice. See *Boykin v. Alabama*, 395 U.S. 238 (1969).

- (III) Plea Counsel failed to have Applicant evaluated by a qualified medical professional for criminal responsibility and competency to stand trial. *See Jeter v. State*, 308 S.C. 230, 417 S.E.2d 594 (1992).
- (IV) Plea Counsel failed to move for a *Blair* hearing prior to the plea hearing to determine Applicant's competency to stand trial. *See State v. Blair*, 275 S.C. 529, 273 S.E.2d 536 (1981); *Matthews v. State*, 358 S.C. 456, 596 S.E.2d 49 (2004); S.C. Code §§ 44-23-410 and 430.
- (V) Plea Counsel failed to present all reasonable and necessary evidence to the Court during the sentencing phase in mitigation of Applicant's potential sentence.
- (VI) Trial Counsel failed to provide the Trial Court with evidence regarding Applicant's intellectual deficits, documented closed head injury, and associated cognitive deficits as noted in Dr. Donna Maddox's reports.
- (VII) Plea Counsel provided erroneous advice to Applicant to accept this guilty plea based on his conviction after the guilty verdict in a separate trial.
- (VIII) Plea Counsel failed to conduct a reasonable investigation and to develop all available, relevant, and admissible or mitigating evidence in preparation of Applicant's defense. *See Wiggins v. Smith*, 539 U.S. 510 (2003); *Lounds v. State*, 380 S.C. 454, 670 S.E.2d 646 (2008); *McKnight v. State*, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008); *Von Dohen v. State*, 360 S.C. 598, 607, 602 S.E.2d 738, 743 (2004); *Reeves v. State*, 415 S.C. 366, 782 S.E.2d 747 (Ct. App. 2015).

(Amended PCR App. at 2-4). Applicant seeks a belated appeal of his guilty plea and sentence and Applicant also seeks Post-Conviction Relief by vacating his conviction and sentence and remanding the indictment for a new trial based on ineffective assistance of plea counsel. (Amended PCR App. at 6).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In addition to carefully considering the record and the arguments presented by counsel, this Court has also had the opportunity to consider the testimony presented at the PCR evidentiary hearings and has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. §17-27-80 (2003).

Ineffective Assistance Claims

For claims that trial counsel provided ineffective assistance, this Court is guided by the familiar test: To show a violation of the Sixth Amendment, an applicant must show that counsel's representation fell below an objective standard of reasonableness, and but for counsel's error, there is a reasonable probability that the outcome of the trial would have been different. *Strickland v. Washington*, 466 U.S. 668, 694 (1984); *Simpson v. Moore*, 367 S.C. 587, 595-96, 627 S.E.2d 701, 706 (2006). "A reasonable probability is a probability sufficient to undermine confidence in the outcome" of the trial. *Strickland*, at 694. Relief will not be granted on a showing of mere error—prejudice must also be shown. *Id.*

"A PCR applicant who pleads guilty on the advice of counsel may collaterally attack the plea only by showing that (1) counsel was ineffective and (2) there is a reasonable probability that but for counsel's errors, the applicant would not have pled guilty and would have insisted on going to trial." *Dalton v. State*, 376 S.C. 130, 654 S.E.2d 870 (Ct. App. 2007) (citing *Roscoe v. State*, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001)). "When alleging that his guilty plea was induced by ineffective assistance of counsel, an applicant must prove that counsel's advice was not 'within the competence demanded of attorneys in criminal cases.'" *Hill v. Lockhart*, 474 U.S. 52, 56, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985).

"The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases." *Dalton v. State*, 376 S.C. 130, 654 S.E.2d 870 (Ct. App. 2007). To conduct a fair review of counsel's performance, a reviewing court must "eliminate the distorting effects of hindsight" and attempt "to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689. Further, it is presumed that counsel made all decisions in exercise of reasonable judgment. *Strickland*, at 689. It is the applicant's burden to prove, by a preponderance of the evidence, that he is entitled to relief. Rule 71.1 (e), SCRPC. See also *Speaks v. State*, 377 S.C. 396, 399, 660 S.E.2d 512, 514 (2008) ("the burden of proof is on the applicant to prove the allegations in his application").

Allegation I: Failure to File a Notice of Appeal

Applicant alleges plea counsel failed to file a notice of appeal though he requested counsel to do so. Applicant requests relief pursuant to *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974), alleging that he did not knowingly, intelligently, and voluntarily waive his right to file an appeal of his guilty plea and sentence.

"Following a trial, counsel is required to make certain the defendant is made fully aware of the right to appeal." *Turner v. State*, 380 S.C. 223, 224, 670 S.E.2d 373, 374 (2008) (citing *White v. State*, *supra*). "In the absence of an intelligent waiver by the defendant, counsel must either initiate an appeal or comply with the procedure in *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967)." *Id.* However, the standard for a guilty plea differs.

"Absent extraordinary circumstances, such as when there is reason to think a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal) or when the defendant reasonably demonstrated an interest in appealing, there is no constitutional requirement that a defendant be informed of the right to a direct appeal from a guilty plea." *Id.*

(citing *Roe v. Flores-Ortega*, 528 U.S. 470, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000); *Weathers v. State*, 319 S.C. 59, 459 S.E.2d 838 (1995)).

The standard again differs when an applicant alleges that he did request counsel to file an appeal, but counsel failed to do so. Regardless of whether the appeal would have had merit, “[a] lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable.” *Kinard v. State*, 418 S.C. 478, 481, 795 S.E.2d 15, 16 (2016) (citing *Roe v. Flores-Ortega*, 528 U.S. at 477, 120 S.Ct. at 1029). “[W]hen counsel’s constitutionally deficient performance deprives a defendant of an appeal that he otherwise would have taken, the defendant has made out a successful ineffective assistance of counsel claim entitling him to an appeal.” *Roe v. Flores-Ortega*, 528 U.S. at 484, 120 S.Ct. at 1029. “The defendant need not show that his hypothetical appeal might have had merit, only that but for counsel’s deficient conduct, the defendant would have appealed.” *Id.*, at 486, 120 S.Ct. 1029.

However, an applicant is not simply relieved of his burden of proof and must rely on evidence that he sufficiently demonstrated to counsel his interest in an appeal. *See Roe v. Flores-Ortega*, 528 U.S. at 485-486, 120 S.Ct. at 1039 (“evidence that there were nonfrivolous grounds for appeal or that the defendant in question promptly expressed a desire to appeal will often be highly relevant in making this determination”). “[I]t is proper to consider the guilty plea transcript as well as evidence at the PCR hearing.” *Suber v. State*, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007).

This Court looks to the testimony presented at the evidentiary hearing and finds Applicant has failed to provide testimony alleging that he asked counsel to file an appeal, nor is there testimony from plea counsel conceding that he did not file an appeal despite Applicant’s request. As such, Applicant has not established that counsel acted deficiently. Further, Applicant received

a 20-year sentence due to his convictions at trial, and plea counsel negotiated with the prosecution for a 20-year sentence to be served concurrently with his trial sentence. In addition, the State dismissed an armed robbery and attempted murder charge – an aggregate of 60 years if Applicant was sentenced to the maximum. As such, Applicant has not shown any resulting prejudice as to counsel's alleged deficiency.

Even if Applicant had established that he requested plea counsel to file an appeal, Applicant has not presented a direct appeal issue for this Court to review. *See Kinard v. State*, 418 S.C. 478, 481, 795 S.E.2d 15, 16 (2016) (The proper standard in evaluating a claim where Applicant requested plea counsel to appeal and he failed to do so, is a review of Applicant's direct appeal issue.).

Considering the lack of testimony and evidence as to this allegation, Applicant has failed to show that he requested plea counsel to file a direct appeal, and that he was prejudiced as a result. Therefore, this allegation is denied and dismissed with prejudice.

Allegations II & VII: Involuntary Guilty Plea

Applicant alleges that his plea was involuntary due to counsel's erroneous advice to accept the guilty plea based on his conviction in a separate trial.

"A defendant who pleads guilty on the advice of counsel may only attack the voluntary and intelligent character of the plea by showing (1) that counsel's representation fell below an objective standard of reasonableness and (2) that there is a reasonable probability that but for counsel's errors, the defendant would not have pleaded guilty but would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 56-57, 106 S.Ct. 366, 369, 88 L.Ed.2d 203, 208-09 (1985).

Upon review of the record, plea counsel indicated to the court that he was unsure if Applicant understood the consequences of not accepting the offer of serving concurrent time.

(Guilty Plea Tr. at 3). Plea counsel relayed that Applicant wanted 10-15 years; however, he was unsure if Applicant understood he would be serving the 20-year sentence from his trial convictions regardless of the sentence as to the carjacking. (Guilty Plea Tr. at 4). Prior to Applicant entering the plea, the court informed Applicant that he would accept the State's recommendation, and if Applicant proceeded to trial, the fact that Applicant had not taken responsibility would be taken into consideration. (Guilty Plea Tr. at 4-5). Looking objectively at the State's plea offer and considering Applicant was convicted under a similar set of circumstances at his prior trial, counsel's advice appears to be well within reason.

Notably, there is no evidence in the record or testimony presented at the PCR hearing, that Applicant wanted or considered proceeding to trial on the carjacking indictment. In fact, the record shows that Applicant merely wanted to plead to less time. Further, even if Applicant did not fully understand the consequences of his plea – though the record suggests otherwise – he suffered no prejudice. If Applicant had declined the State's plea offer and proceeded to trial on the carjacking charge, he would have faced a 20-year sentence to potentially run consecutively with his trial charges and could have faced time for the unrelated armed robbery, carrying a maximum sentence of 20 years, and the attempted murder, carrying a maximum sentence of 30 years imprisonment. *See Rollison v. State*, 346 S.C. 506, 511, 552 S.E.2d 290, 293 (2001) (“[Applicant] received the benefit of the agreement for which he bargained and cannot now complain.”)

Applicant presented no testimony concerning counsel's advice as to pleading guilty to the carjacking indictment and offered no explanation as to how counsel's advice was erroneous. Applicant must show that counsel's performance falls below an “objective standard of reasonableness” and that counsel's advice “was not within the range of competence demanded of attorneys in criminal cases.” *Bennett v. State*, 371 S.C. 198, 203-204, 638 S.E.2d 673, 675 (2006).

There is no evidence in the record to support the allegation that plea counsel erroneously advised Applicant to accept the State's plea offer. Further, there is no supporting facts suggesting that Applicant wanted to proceed to trial. Considering Applicant received the benefit of the bargain, Applicant has failed to show plea counsel acted deficiently, and that he was prejudiced from plea counsel's advice. Therefore, this allegation is denied and dismissed with prejudice.

Allegations: III & IV: Failure to Request Competency Evaluation

Applicant alleges that counsel failed to move for a hearing pursuant to *State v. Blair*, 275 S.C. 529, 273 S.E.2d 536 (1981) to have Applicant evaluated by a medical professional to determine Applicant's competency to stand trial and criminal responsibility.

"The test of competency to enter a plea is the same as required to stand trial." *Jeter v. State*, 308 S.C. 230, 232, 417 S.E.2d 594, 596 (1992). "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," *Id.* "[W]hen establishing *Strickland* prejudice in the context of plea counsel's failure to request a mental competency evaluation, the applicant need only show a reasonable probability that he was incompetent at the time of the plea." *Ramirez v. State*, 419 S.C. 14, 21, 795 S.E.2d 841, 845 (2017) (internal marks omitted) (quoting *Jeter v. State*, 308 S.C. 230, 233, 417 S.E.2d 594, 596 (1992)).

Plea counsel discussed Applicant's case and his options with him on several occasions prior to his trial. (PCR Tr. at 35). Plea counsel was retained by Applicant's mother, and there was no testimony to indicate that she, Applicant, or any other family member raised concern as to Applicant's competency. (PCR Tr. at 55). Plea counsel was familiar with Applicant as he had represented him in his prior trial, and did not indicate that there were any communication issues regarding discussing the facts of Applicant's case with him. *Compare Jeter*, 308 S.C. at 232-33,

417 S.E.2d at 596 (finding counsel acted reasonably in relying on his own perceptions of a defendant's competency), with *Ramirez*, 419 S.C. at 22–23, 795 S.E.2d at 845–46 (finding plea counsel was deficient in failing to seek an independent competency evaluation where plea counsel was “clearly on notice” the defendant had mental health issues based on his own personal interactions with the defendant, as well as a previous psychological evaluation identifying several mental health issues). Plea counsel further testified that he was aware of Applicant’s DJJ records from his trial, however there was no information presented to him that indicated he needed to present evidence of intellectual deficits. (PCR App. at 61-62 and 121). The transcript shows that Applicant clearly understood the questions that were asked of him at his guilty plea, and his responses to those questions were appropriate.

Applicant presented the testimony of Dr. Donna Maddox who performed a psychiatric evaluation on Applicant on July 21, 2020, and November 4, 2020. *See* Applicant’s Exhibit 1 and 2; *see also* PCR Tr. at 9-10. While Dr. Maddox concludes that Applicant suffers from intellectual deficits, she testified that Applicant does have the capacity to understand, it just may take him longer to process the information. (PCR Tr. at 28). She testified, in her opinion, Applicant had the ability to consult with his lawyer with a rational degree of reasonable understanding, and that he understood the proceedings against him. (PCR Tr. at 21 and 22). Ultimately, Dr. Maddox concluded that Applicant was competent at the time he entered the plea. (PCR Tr. at 15). *See Hall v. Catoe*, 360 S.C. 353, 601 S.E.2d 335 (2004) (“[Our Supreme] Court has held that the PCR judge erred in granting relief on the basis that the defendant was not competent to stand trial when (1) counsel testified at the PCR hearing that he had no trouble communicating with the defendant; (2) the trial transcript showed that the defendant clearly understood the questions asked and responded in an

appropriate manner; and (3) a forensic psychiatrist evaluated the defendant prior to trial and found the defendant's medical conditions did not affect his mental state").

Applicant has not presented supporting evidence to show that he was incompetent at the time of the plea, in fact, the evidence presented shows that Applicant was competent. As such, Applicant has failed to show plea counsel acted deficiently by failing to move for a *Blair* hearing to have Applicant evaluated for competency to stand trial and criminal responsibility. Further, Applicant cannot prove resulting prejudice. Therefore, this allegation is denied and dismissed with prejudice.

Allegations V & VI: Failure to Present Mitigating Evidence

Applicant alleges plea counsel failed to present all reasonable and necessary evidence to the Court during the sentencing phase in mitigation of Applicant's potential sentence which would include Applicant's intellectual deficits, a documented closed head injury, and associated cognitive deficits as noted in Dr. Donna Maddox's reports.

However, as this is not a capital matter, no fact-finding is required that could reduce or increase the sentencing range. The sentencing range is set by statute as a result of the plea. Further, Applicant admitted the facts of the crime by virtue of the plea. It is nearly impossible to show the required *Strickland* prejudice. *Strickland, supra*.

As previously stated, this Court finds that plea counsel was not deficient for failing to acquire and present evidence to the plea court regarding Applicant's intellectual deficits. There is no evidence to suggest plea counsel acted objectively unreasonable by failing to do so. The circumstances of the negotiated plea as well as plea counsel's testimony that he had no issues communicating with Applicant; or concern as to his competency by his own perception or from Applicant and family members negate *Strickland* deficiency as to mental state.

At any rate, Dr. Maddox's testimony appears to suggest that Applicant may be immature or impulsive, but her assessment does not assist Applicant in meeting his burden of proof in accordance with *Strickland*. Dr. Maddox testified that Applicant had history of a significant closed-head injury which resulted from a moped accident likely contributing to his cognitive deficits. (PCR Tr. at 14). Applicant was diagnosed with borderline intellectual functioning, so his IQ was lower than the typical 17-year-old and more consistent with that of a 16-year-old. (PCR Tr. at 14-16 and 30). Dr. Maddox opined that Applicant is more likely to be influenced, and considering that one co-defendant was 16 years old and the other was older and physically outweighed Applicant, his cognitive defects could have contributed to his decision making in committing the crime. (PCR Tr. at 16).

Even if Dr. Maddox's testimony or information of the like from plea counsel was presented to Judge Miller, the information in summary, would be that Applicant had average grades of no concern from 2011-2015; Applicant may take longer to process things – especially if he is anxious; Applicant has a sub 80 IQ but above 69; an unspecified neurocognitive disorder and a history of ADHD, and a head injury that could have affected his judgement at the time of the crime. (PCR Tr. at 19 and 23-29). Though mitigation efforts as to guilty plea sentencing are not statutorily warranted in non-capital cases, this Court's assessment of Dr. Maddox's testimony concludes that the information presented at the PCR hearing does not support a reasonable probability of a different outcome. *Strickland, supra*.

Therefore, this Court finds plea counsel did not act deficiently in failing to present mitigation evidence as exemplified by Dr. Maddox's testimony, and that Applicant cannot prove resulting prejudice for his failure to do so. This allegation is denied and dismissed with prejudice.

Allegation VIII: Failure to Investigate

Lastly, Applicant alleges plea counsel failed to conduct a reasonable investigation and to develop all available, relevant, and admissible or mitigating evidence in preparation of his defense.

“Counsel has a duty to undertake reasonable investigations or to make a decision that renders a particular investigation unnecessary.” *Taylor v. State*, 404 S.C. 350, 363, 745 S.E.2d 97, 104 (2013) (citing *Strickland*, 466 U.S. at 691, 104 S.Ct. 2052. Thus, “[a] criminal defense attorney has the duty to conduct a reasonable investigation to discover all reasonably available mitigation evidence and all reasonably available evidence tending to rebut any aggravating evidence introduced by the State.” *Id.* (citing *McKnight v. State*, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008) (citation omitted).

“In reviewing a claim that defense counsel failed to properly investigate a defense to a crime, a court's principle concern is whether the investigation ‘was itself reasonable.’” *Taylor*, 404 S.C. at 364, 745 S.E.2d at 104 (citing *Wiggins v. Smith*, 539 U.S. 510, 522–23, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) (emphasis in original) (citation omitted)). “Moreover, counsel's decision not to investigate should be assessed for reasonableness under all the circumstances with heavy deference to counsel's judgment.” *Id.* (citing *Simpson v. Moore*, 367 S.C. 587, 597, 627 S.E.2d 701, 706 (2006).

This court construes this allegation in reference to Applicant's guilty plea only and emphasizes “[a] guilty plea is a solemn, judicial admission of the truth of the charges against an individual; thus, 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, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977)). When the plea is voluntarily and understandingly made, as is the case here, the plea “constitutes a waiver of

nonjurisdictional defects and defenses, including claims of violation of constitutional rights prior to the plea." *Rivers v. Strickland*, 264 S.C. 121, 124, 213 S.E.2d 97, 98 (1975).

Specifically, as to the circumstances surrounding the plea, it appears from review of the record that Applicant did not want to proceed to trial for the carjacking indictment and wished for a lesser sentence than the 20 years that was recommended by the State. There is no testimony from the PCR hearing to suggest the alternative. There is no evidence to suggest plea counsel was concerned or notified of Applicant's intellectual deficits prior to Dr. Maddox's testimony. Considering counsel advocated for Applicant to accept the negotiated plea deal, and the court explicitly confirmed that it would accept the State's recommendation, any mitigation efforts would be futile and are now judged under the *Strickland* lense of reasonableness.

As such, Applicant has failed to show counsel acted deficiently and that he suffered resulting prejudice. He has not met his burden of proof. Therefore, this allegation is denied and dismissed with prejudice.

CONCLUSION

Based upon review of the records, pleadings, and the arguments of counsel in this matter, this Court finds the Applicant has failed carry his burden of proof on any of the allegations in his application and **DENIES** and **DISMISSES** the allegations within the application with prejudice.

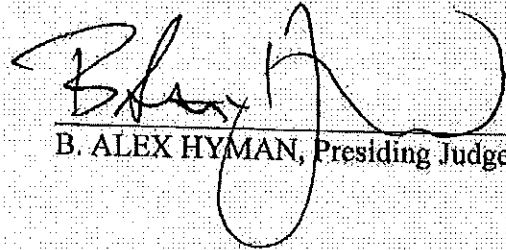
This Court advises the Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order if he wants to secure appropriate appellate review. His attention is also directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely filed.

IT IS THEREFORE ORDERED:

1. Applicant's application for post-conviction relief is denied and dismissed with prejudice; and

2. Applicant is remanded to the custody of Respondent for the completion of his sentence.

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



B. ALEX HYMAN, Presiding Judge

S.C. Code Ann. § 17-27-80 . . . , the PCR Judge must make specific findings of fact and state expressly the conclusions of law relating to each issue presented.”).

(4) On July 29, 2024, via email, the Court identified the specific allegations for granting (737):

(a) “I apologize for the delay, but with regard to your request for specific findings of error in the PCR application of Braxton Hare for his trial—2020-CP-23-0737—Judge Hyman has identified the following grounds in Mr. Hare’s Amended PCR Application that warrant the granting of his application: 13, 24, and 41.”

(5) On July 31, 2024, via email, Applicant’s Counsel requested reconsideration of the Court denial of (736):

(a) “I am respectfully requesting reconsideration of Judge Hyman’s denial of PCR application (2020-CP-23-0736), based on allegation #6 mirroring allegation #41 in (2020-CP-23-0737) and allegation #5 (Plea Counsel failed to present all reasonable and necessary evidence to the Court during the sentencing phase in mitigation of Applicant’s potential sentence). Specifically, Trial Counsel failed to present that critical mitigation evidence during the sentencing hearing, and therefore, provided ineffective assistance of counsel during the sentencing phase.”

(b) “Allegations #6 and 41 in the PCR applications: (Trial Counsel failed to provide the Trial Court with evidence regarding Applicant’s intellectual deficits, documented closed head injury, and associated cognitive deficits as noted in Dr. Donna Maddox’s report).”

- (6) On September 12, 2024, via email, the Court provided the following response to the request for reconsideration:
 - (a) "Judge Hyman is granting PCR application 2020CP230737 as to the following allegations: 13, 23, 24, 28, 29, 31, 32, 33, 34, and 37. Allegation 41 is denied. PCR application 2020CP230736 is denied."
- (7) The Court failed to properly address the inconsistent rulings because of the Court's original decision to grant Applicant's other PCR action (2020-CP-23-0737).
 - (a) Specifically, in that PCR action (737 – Allegation #41), this Court found that Trial Counsel provided ineffective assistance of counsel by failing to provide the Trial Court with evidence regarding Applicant's intellectual deficits, documented closed head injury, and associated cognitive deficits as noted in Dr. Donna Maddox's report.
 - (b) In this PCR action (736 – Allegation #6), mirrors the above allegation.
- (8) The Court failed to properly address Plea Counsel's failure to present all reasonable and necessary evidence to the Court during the sentencing phase in mitigation of Applicant's potential sentence. (Allegation #5).
- (9) The Court failed to properly address Plea Counsel's failure to provide the Plea Court with evidence regarding Applicant's intellectual deficits, documented closed head injury, and associated cognitive deficits as noted in Dr. Donna Maddox's report and Dr. Maddox's testimony at the evidentiary hearing.
- (10) The Court failed to properly address Plea Counsel's failure to present that critical mitigation evidence during sentencing, and therefore, provided ineffective assistance of counsel.

Based on the testimony and evidence presented at the evidentiary hearing, Applicant has established constitutional violations and deprivations that would require post-conviction relief. Specifically, Plea Counsel's unreasonably deficient performance prejudiced Applicant because there is a reasonable probability that, but for Counsel's errors, Applicant would have received a reduced sentence due to the compelling mitigation not presented to the Plea Court during sentencing.. See *Hill v. Lockhart*, 474 U.S. 52 (1985) (applying the *Strickland v. Washington*, 466 U.S. 668 (1984) standard to guilty plea challenges of ineffective assistance of counsel) (quoting *Strickland*, 466 U.S. at 692). Therefore, the Court should reconsider the denial of this PCR action and enter an Order Granting Applicant Post-Conviction Relief.

CONCLUSION

Based on the foregoing reasons, the Applicant respectfully requests this Court reconsider the denial of this application, enter an Order Granting Applicant Post-Conviction Relief authorizing a new trial.

IT IS SO MOVED.

Respectfully submitted,

s/ Dayne Phillips

Dayne C. Phillips, Esq.

Price Benowitz LLP
1614 Taylor Street, Suite D.
Columbia, SC 29201
O: 803-272-4503
C: 803-807-0234
F: 803-380-8035
dayne@pricebenowitz.com

ATTORNEY FOR THE APPLICANT

September 23, 2024

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)
)
Braxton Hare,)
)
Applicant,)
)
v.)
)
State of South Carolina,)
)
Defendant.)
_____)

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT
Case No. 2020-CP-23-0736

CERTIFICATE OF SERVICE

24 OCT 1 PM 3:49
Service Server: OOC.BUL.SC

I hereby certify that I have this date served the within and foregoing Motion to Alter or Amend pursuant to Rule 59(e), SCRPC, by depositing a true and correct copy of the same via first-class mail, postage prepaid, upon all parties as follows:

Melody Brown, Esq.
SC Attorney General's Office
P.O. Box 11549
Columbia, SC 29211

Brice Garrett
Greenville Clerk of Court
305 E North St.
Greenville, SC 29601

The Honorable B. Alex Hyman
1301 2nd Avenue, Suite 3A30
Conway, SC 29526

By: Courtney Powers
Courtney Powers
Paralegal for Dayne C. Phillips, Esq.

1614 Taylor Street, Suite D.
Columbia, SC 29201
(803) 216-5561
courtney@pricebenowitz.com

September 23, 2024



Dayne Phillips <dayne@pricebenowitz.com>

Re: Rulings on May 13 Greenville PCR Term

Hyman, B. Alex Law Clerk (Payne Hoy) <bhymanlc@sccourts.org> Mon, Jul 29, 2024 at 3:02 PM
To: Julianna Battenfield <JuliannaBattenfield@scag.gov>, Dayne Phillips <dayne@pricebenowitz.com>
Cc: "Hyman, B. Alex Secretary (Allison Pogue)" <bhymansc@sccourts.org>, Courtney Powers <courtney@pricebenowitz.com>

Good afternoon Ms. Battenfield and Mr. Phillips,

I apologize for the delay, but with regard to your request for specific findings of error in the PCR application of Braxton Hare for his trial—2020-CP-23-0737—Judge Hyman has identified the following grounds in Mr. Hare's Amended PCR Application that warrant the granting of his application: 13, 24, and 41.

Please let me know if either of you have any questions or concerns.

Thank you,

Payne Hoy

From: Julianna Battenfield <JuliannaBattenfield@scag.gov>
Sent: Wednesday, June 26, 2024 2:23 PM
To: Dayne Phillips <dayne@pricebenowitz.com>; Hyman, B. Alex Law Clerk (Payne Hoy) <bhymanlc@sccourts.org>
Cc: Hyman, B. Alex Secretary (Allison Pogue) <bhymansc@sccourts.org>; Courtney Powers <courtney@pricebenowitz.com>
Subject: RE: Rulings on May 13 Greenville PCR Term

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Dayne Phillips <dayne@pricebenowitz.com>

Re: Rulings on May 13 Greenville PCR Term

Dayne Phillips <dayne@pricebenowitz.com>

Wed, Jul 31, 2024 at 2:52 PM

To: "Hyman, B. Alex Law Clerk (Payne Hoy)" <bhymanlc@sccourts.org>

Cc: Julianna Battenfield <JuliannaBattenfield@scag.gov>, "Hyman, B. Alex Secretary (Allison Pogue)" <bhymanlc@sccourts.org>,

Courtney Powers <courtney@pricebenowitz.com>, "Clio Maildrop Braxton.Hare.2020.01.00001"

<800ca9c17+matter1202768809@maildrop.clio.com>

Thank you so much for the clarification on Judge Hyman's findings (allegations 13, 24, and 41).

I am respectfully requesting reconsideration of Judge Hyman's denial of PCR application (2020-CP-23-0736), based on allegation #6 mirroring allegation #41 in (2020-CP-23-0737) and allegation #5 (Plea Counsel failed to present all reasonable and necessary evidence to the Court during the sentencing phase in mitigation of Applicant's potential sentence). Specifically, Trial Counsel failed to present that critical mitigation evidence during the sentencing hearing, and therefore, provided ineffective assistance of counsel during the sentencing phase.

Allegations #6 and 41 in the PCR applications: (Trial Counsel failed to provide the Trial Court with evidence regarding Applicant's intellectual deficits, documented closed head injury, and associated cognitive deficits as noted in Dr. Donna Maddox's report).

Please let me know if you or Judge Hyman have any additional questions or concerns.

Thank you,



PRICE BENOWITZ LLP

Dayne Phillips

Attorney at Law

**Criminal Defense | Appeals |
Professional License Defense**

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Former President and Board Member, South Carolina Association of Criminal Defense Lawyers (SCACDL)

Chairman, SCACDL Educational Foundation

Attorney Profile

11/14/24, 5:30 PM

Price Benowitz LLP Mail - Re: Rulings on May 13 Greenville PCR Term

[Quoted text hidden]



Dayne Phillips <dayne@pricebenowitz.com>

Re: Rulings on May 13 Greenville PCR Term

Dayne Phillips <dayne@pricebenowitz.com>

Wed, Aug 21, 2024 at 11:41 AM

To: "Hyman, B. Alex Law Clerk (Payne Hoy)" <bhymanlc@sccourts.org>

Cc: Julianna Battenfield <JuliannaBattenfield@scag.gov>, "Hyman, B. Alex Secretary (Allison Pogue)" <bhymanlc@sccourts.org>, Courtney Powers <courtney@pricebenowitz.com>, "Clio Maildrop Braxton.Hare.2020.01.00001" <800ca9c17+matter1202768809@maildrop.clio.com>

Good morning,

I hope all is well. I am following up on my request for reconsideration of Judge Hyman's denial of PCR application (2020-CP-23-0736), based on allegation #6 mirroring allegation #41 in (2020-CP-23-0737) and allegation #5 (Plea Counsel failed to present all reasonable and necessary evidence to the Court during the sentencing phase in mitigation of Applicant's potential sentence).

Specifically, Trial Counsel failed to present that critical mitigation evidence during the sentencing hearing, and therefore, provided ineffective assistance of counsel during the sentencing phase.

Allegations #6 and 41 in the PCR applications: (Trial Counsel failed to provide the Trial Court with evidence regarding Applicant's intellectual deficits, documented closed head injury, and associated cognitive deficits as noted in Dr. Donna Maddox's report).

Please let me know if you or Judge Hyman have any additional questions or concerns.

Thank you,

Dayne Phillips
Attorney at Law

PRICE BENOWITZ LLP
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Columbia, SC 29201

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Cell: 803.807.0234
Paralegal: 803-216-5561
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SCCriminalLaws.com
PriceBenowitz.com

Licensed in SC

*Sent from my cell phone
[Quoted text hidden]



Dayne Phillips <dayne@pricebenowitz.com>

Re: Rulings on May 13 Greenville PCR Term

Hyman, B. Alex Law Clerk (Taylor Langston) <bhymanlc@sccourts.org>

Thu, Sep 12, 2024 at 1:35 PM

To: Dayne Phillips <dayne@pricebenowitz.com>

Cc: "Hyman, B. Alex Secretary (Allison Pogue)" <bhymansc@sccourts.org>, Courtney Powers <courtney@pricebenowitz.com>, "Clio Maildrop Braxton.Hare.2020.01.00001" <800ca9c17+matter1202768809@maildrop.clio.com>, "Zelenka, Don" <dzelenka@scag.gov>

Good afternoon,

Judge Hyman is granting PCR application 2020CP230737 as to the following allegations: 13, 23, 24, 28, 29, 31, 32, 33, 34, and 37. Allegation 41 is denied. PCR application 2020CP230736 is denied.

Please let me know if you have any questions or concerns.

Thanks,

Taylor L. Langston

Law Clerk for The Honorable B. Alex Hyman

bhymanlc@sccourts.org

From: Dayne Phillips <dayne@pricebenowitz.com>

Sent: Monday, September 9, 2024 8:00 AM

To: Hyman, B. Alex Law Clerk (Taylor Langston) <bhymanlc@sccourts.org>

Cc: Hyman, B. Alex Secretary (Allison Pogue) <bhymansc@sccourts.org>; Courtney Powers <courtney@pricebenowitz.com>; Clio Maildrop Braxton.Hare.2020.01.00001 <800ca9c17+matter1202768809@maildrop.clio.com>; Zelenka, Don <dzelenka@scag.gov>

Subject: Re: Rulings on May 13 Greenville PCR Term

***** EXTERNAL EMAIL:** This email originated from outside the organization. Please exercise caution before clicking any links or opening attachments. ***

Good morning,

I hope all is well. I am following up on my request for reconsideration of Judge Hyman's denial of PCR application (2020-CP-23-0736), based on allegation #6 mirroring allegation #41 in (2020-CP-23-0737) and allegation #5 (Plea Counsel failed to present all reasonable and necessary evidence to the Court during the sentencing phase in mitigation of Applicant's potential sentence).

Specifically, Trial Counsel failed to present that critical mitigation evidence during the sentencing hearing, and therefore, provided ineffective assistance of counsel during the sentencing phase.

Allegations #6 and 41 in the PCR applications: (Trial Counsel failed to provide the Trial Court with evidence regarding Applicant's intellectual deficits, documented closed head injury, and associated cognitive deficits as noted in Dr. Donna Maddox's report).

Please let me know if you or Judge Hyman have any additional questions or concerns.

Thank you,

Dayne Phillips
Attorney at Law

**Criminal Defense | Appeals |
Professional License Defense**

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Former President and Board Member, South Carolina Association of Criminal Defense Lawyers (SCACDL)

Chairman, SCACDL Educational Foundation

Attorney Profile

On Wed, Aug 21, 2024 at 11:41 AM Dayne Phillips <dayne@pricebenowitz.com> wrote:

[Quoted text hidden]
[Quoted text hidden]

[Quoted text hidden]
[Quoted text hidden]

Thank you,

Dayne Phillips
Attorney at Law

**Criminal Defense | Appeals |
Professional License Defense**

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