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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

The Honorable David P. Caraker, Jr., Circuit Court Judge

Case No. 2021-CP-32-02926

Michael M. Nowinski, #384171, ... Petitioner,

v.

State of South Carolina, ... Respondent.

NOTICE OF APPEAL

Applicant, Michael M. Nowinski, appeals the order of the Honorable David P. Caraker, Jr., filed on or about April 28, 2025, and received by the undersigned on June 2, 2025.

June 9, 2025

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STATE OF SOUTH CAROLINA COUNTY OF LEXINGTON	IN THE COURT OF COMMON PLEAS FOR THE ELEVENTH JUDICIAL CIRCUIT
Michael M. Nowinski, SCDC #384171; Applicant, v. State of South Carolina, Respondent.	Case No. 2021-CP-32-2926 ORDER OF DISMISSAL

This matter comes before this Court by a pro se application for post-conviction relief (PCR) action commenced by Michael M. Nowinski (Applicant) on September 3, 2021. On October 26, 2021, the Applicant was appointed Ashley A. McMahan to assist. On November 18, 2021, the State made a Return Partial Motion to Dismiss and Motion for More Definite Statement. On August 19, 2024, the Applicant through counsel McMahan made an Amended Application.

On August 27, 2024, this matter was heard before this Court. The Applicant was present and represented by court appointed counsel McMahan. The Respondent was represented by Deputy Attorney General Donald J. Zelenka. Testimony was received from the Applicant, and counsel J. Taylor Bell. At the conclusion of the hearing, this Court took the matter under advisement. This Court subsequently requested a proposed order from the State with consideration by opposing counsel. This Order of Dismissal follows:

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Lexington County Clerk of Court. Applicant was arrested on

August 19, 2019, following an investigation into a home invasion in West Columbia. During its July 2020 term, the Lexington County Grand Jury indicted Applicant for first-degree burglary (2020-GS-32-1411); armed robbery (2020-GS-32-1397); two counts of kidnapping (2020-GS-32-1414, -1415); and possession of a weapon during the commission of a violent crime (2020-GS-32-1421).

On October 15, 2020, Applicant appeared before the Honorable Walton J. McLeod, IV, and pleaded guilty to the lesser-included offense of second-degree burglary (violent) and as indicted to the remaining charges without formal negotiations or recommendations from the State as to sentencing. However, the State dismissed two additional kidnapping indictments (2020-GS-32-1419, 1420); three indictments for first-degree assault and battery (2020-GS-32-1404, -1409, -1410); and one indictment for criminal conspiracy (2020-GS-32-1413) in exchange for Applicant's plea. Jacob Taylor Bell, Esquire (Counsel) represented Applicant and Assistant Solicitor Sutania Fuller prosecuted the case. Judge McLeod accepted Applicant's plea and sentenced him to concurrent terms of twenty years' imprisonment for armed robbery, twenty years for each kidnapping charge, fifteen years for burglary, and five years for possession of a weapon during the commission of a violent crime.

Applicant filed a timely motion to reconsider,[1] to which the solicitor filed a response. On March 5, 2021, Judge McLeod issued an order denying Applicant's motion. Applicant did not appeal.

II. Factual Basis of the Guilty Plea

[1] Notably, Applicant's motion to reconsider was based on the issue he raises in the instant action—that the solicitor violated *Brady* by failing to turn over the victims' letter regarding Applicant's co-defendant.

On August 19, 2019, law enforcement responded to a mobile home on Greenwood Drive in Lexington County in reference to a home invasion. (Plea Tr. 11). The 9-1-1 caller informed the dispatcher that he was covered in blood and was assaulted by an intruder. (Plea Tr. 11). Upon arrival, deputies with the Lexington County Sheriff's Department observed that one of the victims, 72-year-old David Chase, had injuries to his head and his arm that were actively bleeding. (Plea Tr. 11). Officers then located James Chase, who was 73 years old at the time, with injuries to his face and head that were actively bleeding as well. (Plea Tr. 11). Two other individuals, Kenneth Jeffrey and Ashley Kirschner, were also present during the home invasion. (Plea Tr. 11). Kenneth suffered a minor injury to his back. (Plea Tr. 11).

James reported that, at approximately 6:00 in the morning, he heard his dock barking and knocking on the door. (Plea Tr. 13–14). Kenneth stated he told the person to go around to the other door because that door was not operable. (Plea Tr. 14). As soon as he opened the door, James was immediately struck in the head by the intruder, who was later identified as Applicant, and fell to the floor. (Plea Tr. 14). He then heard the intruder go into the living room and yell at Kenneth and Ashley not to move. (Plea Tr. 14). He also heard his brother, David, yelling. (Plea Tr. 14). David told law enforcement that he also heard yelling coming from the living room. (Plea Tr. 15). By the time he was able to get up and grab his walker, the intruder struck him in the head with a shotgun. (Plea Tr. 15). David reported that he tried to get his walking stick to get back up, but that the intruder hit him again and told him to stay down. (Plea Tr. 15–16). The intruder then asked David where the safe was located. (Plea Tr. 16).

Once James was able to regain his footing, he went into his bedroom, retrieved his Marlin 30-30 rifle, and loaded it. (Plea Tr. 14). Photographs taken by law enforcement show the blood

trail from James' injury going into his bedroom and to the side of the bed where he stored the rifle. (Plea Tr. 14).

After loading his rifle, James went back into the hallway, where he saw the individual who attacked him. (Plea Tr. 14). The man was exiting David's room carrying the same shotgun he observed earlier. (Plea Tr. 14–15). James fired the rifle, striking the intruder. (Plea Tr. 15). After a struggle ensued over possession of the rifle, the intruder took the rifle and left the residence. (Plea Tr. 15). He left the shotgun behind. (Plea Tr. 15). According to law enforcement, the way Applicant was holding the shotgun is probably the only reason he is alive today because it slowed the impact of the bullet from the rifle. (Plea Tr. 15).

Kenneth reported that he saw the intruder strike James with the shotgun. (Plea Tr. 16). He was forced down on the living room floor, and stayed there until he heard the shot and saw James and the intruder struggling. (Plea Tr. 16). Kenneth got up and exited the home to get help. (Plea Tr. 16). Once outside, he saw a small car sitting on the roadside that drove off as Kenneth was starting his truck. (Plea Tr. 16). He tried to leave to get help, but then realized he had a flat tire on his truck. (Plea Tr. 16). He then observed that all the vehicles in the yard had flat tires. (Plea Tr. 16). Law enforcement later located an orange-handled hunting knife they believe was used to slash the tires. (Plea Tr. 17).

Ashley was not injured, but heard David crying from his room and the intruder asking about a safe. (Plea Tr. 17). Ashley described the individual as decent size, face covered, and approximately six-one. (Plea Tr. 17). James also indicated that the intruder's face was covered, but he described the man as approximately six feet tall and weighed approximately two-hundred pounds. (Plea Tr. 15).

Shortly after the original 9-1-1 call, law enforcement was notified of an individual with a gunshot wound to the chest located near the corner of Greenwood Drive and Highway 302. (Plea Tr. 16). James' rifle was located nearby, along with the gloves and black face mask Applicant wore during the home invasion. (Plea Tr. 12). Applicant was taken to the hospital for treatment and later booked into the Lexington County Detention Center. (Plea Tr. 12).

The co-defendant in this case was identified as Joel Hendrix, who was a friend of Applicant's. (Plea Tr. 12). He admitted to driving Applicant to commit the home invasion and gave a statement to law enforcement implicating Applicant in the crime. (Plea Tr. 12). He indicated that Applicant discussed committing a "lick" and asked Hendrix to drive him. (Plea Tr. 20). Hendrix told law enforcement that he did not want to drive Applicant, but he decided to do so to avoid a physical fight. (Plea Tr. 20). He described Applicant as "not letting up," potentially on drugs at the time. (Plea Tr. 20). Hendrix stated he dropped Applicant off and parked outside for no longer than fifteen minutes. (Plea Tr. 20). He apparently drove off when he heard Applicant yelling. (Plea Tr. 20).

III. ALLEGATIONS BEFORE THIS COURT

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

1. "Prosecutorial misconduct"
    a. "Failure of the State to run over the undisclosed victim letter while framing its presentation at sentencing as the victims, whom were not present, wanting significant prison time violated Mr. Nowinski's due process rights under Brady. The information provided in this letter is significantly different than the way the states[*sic*] portrayal of how the victims felt. This letter was not provided for use during Mr. Nowinski's mitigation and would have been used to undermind[*sic*] the states[*sic*] presentation. The

states[*sic*] opening statement was in reference to Mr. Nowinski's juvenile record providing the presiding judge with these records for viewing. The state believed that this was a random act and Mr. Nowinski had no relationship with the victims. There is evidence and witness statements in the discovery providing information that the victims and Mr. Nowinski had a relationship based on drugs. The state mentioned to the court that the co-defendant did provided[*sic*] a written statement but questioned the integrity of this statement. The difference between Mr. Nowinski's and co-defendant[*sic*] sentencing is significant and unduly harsh. During the states[*sic*] presentation, at one point, the state mentioned that they did not care if the victims are drug dealers. The states[*sic*] tactics and statements were inflammatory and used to impose an unjust and harsh sentence."

2. "Involuntary plea agreement"
    a. "A Brady v. Maryland violation arising from the prosecutions[*sic*] failure to disclose material evidence in its possession is 'material' in the context of a guilty plea when there is reasonable probability that, but for the states[*sic*] failure to disclose Brady evidence Mr. Nowinski would have refused the guilty plea and gone to trial. When a defendant lacks knowledge of material evidence in the prosecutions[*sic*] possession, the waiver of constitutional rights cannot be deemed knowing and voluntary. Gibson v. State 334 SC 515 (1999). The states[*sic*] obligation to make disclosures of material under Brady v. Maryland is pertinent not only to the accused's preparation for trial but also to his determination of whether to plead guilty. The defendant is entitled to make that decision with all awareness of favorable material known to the state. The states[*sic*] failure to disclose the undisclosed victim letter violated Mr. Nowinski's constitutional right when agreeing to plead guilty."
3. "Ineffective assistance of counsel"
    a. "During Mr. Nowinski's pre trial detention he was deprived the opportunity to have in person visits with

> counsel in designated legal rooms at Lexington County detention center. The deprivation of adequate communication between Mr. Nowinski and counsel was the direct result of the 2020 COVID-19 pandemic. Mr. Nowinski was forced to have recorded virtual visitation with counsel. During these virtual visits, it was difficult hearing and understanding conversation between Mr. Nowinski and counsel due to a malfunctioned monitor, ongoing inmate recreation, and poor internet connection. These virtual visits invaded Mr. Nowinski's privacy with counsel causing tremendous misunderstandings and decrease in confidence for Mr. Nowinski in his counsels[*sic*] representation during plea negotiations."

On August 19, 2024, the Applicant filed an amended application raising the following ground:

1. Ineffective Assistance of Counsel of J. Taylor Bell.

A. Failure to present mitigating evidence during sentencing regarding the Applicant's mental health and background growing up and the issues the Applicant faced which would have ultimately led to a lesser sentence than the one the Applicant received.

MATTERS BEFORE THE COURT

This Court has the Lexington County Clerk of Court records regarding the subject convictions, Applicant's pertinent records from the South Carolina Department of Corrections, the plea transcript, pleadings related to the motion for reconsideration of the sentence and order denying reconsideration dated March 5, 2021, and the records of the current PCR action

FINDINGS OF FACT AND CONCLUSIONS OF LAW RELATED TO ALLEGATIONS OF PROSECUTORIAL MISCONDUCT AND INEFFECTIVE ASSISTANCE OF COUNSEL

Following a thorough review of the record in its entirety, along with the testimony and evidence presented at the evidentiary hearing, this Court finds Applicant failed to meet the high burden required for a grant of post-conviction relief pursuant to Rule 71.1, SCRCP, and the Uniform Post-Conviction Procedure Act (the Act). For the reasons discussed below, this Court denies relief and dismisses this action with prejudice.

BRADY VIOLATION CLAIM AND THE VICTIMS' LETTER ABOUT THE CO-DEFENDANT

This Court finds that Applicant's allegation of prosecutorial misconduct and "involuntary plea agreement" based on an alleged *Brady*[2] violation should be dismissed. The document Applicant claims is *Brady* material is a letter from two of the victims regarding the co-defendant. The letter states:

> We are the victims of an assault and burglary by Michael Nowinski. We are in favor of the bond that was granted Tripp Hendrix. We are not afraid of him. We believe a guilty plea by him to criminal conspiracy was more than enough.

A defendant who pleads guilty usually may not later raise independent claims of constitutional violations. *See Rivers v. Strickland,* 264 S.C. 121, 124, 213 S.E.2d 97, 98 (1975) (stating "[t]he general rule is that a plea of guilty, voluntarily and understandingly made, constitutes a waiver of nonjurisdictional defects and defenses, including claims of violation of constitutional rights prior to the plea"). However, "a defendant's decision whether or not to plead guilty is often heavily influenced by his appraisal of the prosecution's case." *Gibson v. State*, 334 S.C. 515, 523, 514 S.E.2d 320, 324 (1999) (quoting *Sanchez v. United States,* 50 F.3d 1448, 1453 (9th Cir.1995)); *accord Gustine v. State,* 325 S.C. 123, 127–28, 480 S.E.2d 444, 446 (1997)

[2] *Brady v. Maryland,* 373 U.S. 83 (1963). "*Brady* requires the State to disclose evidence in its possession favorable to the accused and material to guilt or punishment." *Clark v. State*, 315 S.C. 385, 388, 434 S.E.2d 266, 268 (1993).

("waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences").

A *Brady* violation occurs "when the government fails to disclose evidence materially favorable to the accused." *Youngblood v. West Virginia*, 547 U.S. 867, 869 (2006) (per curiam). In the context of a guilty plea, "[a] *Brady* violation is material when there is a reasonable probability that, but for the government's failure to disclose *Brady* evidence, the defendant would have refused to plead guilty and gone to trial." *Gibson*, 334 S.C. at 525, 514 S.E.2d at 325; *Riddle v. Ozmint*, 369 S.C. 39, 44–45, 631 S.E.2d 70, 73 (2006) ("Evidence is material under *Brady* if there is a 'reasonable probability' that the result of the proceeding would have been different had the information been disclosed."); *see United States v. Agurs*, 427 U.S. 97, 109–10 (1976) ("The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense."); *see also State v. Hutton*, 358 S.C. 622, 632, 595 S.E.2d 876, 882 (Ct. App. 2004) (noting that "exculpatory evidence is evidence which creates a reasonable doubt about the defendant's guilt"). An individual asserting a *Brady* violation in the context of PCR must demonstrate that evidence: (1) favorable to the accused; (2) in the possession of or known by the prosecution; (3) was suppressed by the State; and (4) was material to the accused's guilt or innocence or was impeaching. *Id.* (citing *Kyles v. Whitley,* 514 U.S. 419 (1995).

Here, the letter from two of the victims regarding Applicant's co-defendant, Tripp (Joel Hendrix), whose role in the home invasion was limited to driving the Applicant to the residence and his shotgun was used in the assault by the Applicant, is not *Brady* evidence because it is neither exculpatory nor material to Applicant's own guilt. Rather, it relates solely to the co-defendant. Applicant's claim that this letter could have been used in mitigation or to undermine the State's

presentation regarding sentencing is patently meritless. Moreover, as far as sentencing, Applicant cannot establish that the result of the proceeding would have been different had the letter been disclosed because Judge McLeod considered the letter and specifically found that "the sentence would not have been effected or otherwise altered by presenting the victim letter pertaining to the co-defendant in this matter" in his Order Denying Reconsideration of Sentence.

This Court finds, as did Judge McLeod in his March 5, 2021 Order, that the letter from the victims related solely to the co-defendant in this case. It referenced the victims' feeling as to the co-defendant, and what they believed may be appropriate charging decision and punishment for him. The letter never referenced Applicant or suggested any leniency for Applicant in any manner for his action against the victims. The victims never expressed anything as to punishment for Applicant. The defense attorney testified that he believed the letter to be *Brady* material and moved for a sentence reconsideration based upon that opinion. This was denied by the sentencing court. Applicant was not able to establish how the information in that letter would have helped him in either mitigation for his actions or in deciding whether or not to go to trial in the case.

This Court finds the letter did not meet the standard for a *Brady* violation. No evidence supports that the letter was exculpatory. See *Gibson*, 334 S.C. at 524, 514 S.E.2d at 324 (providing "the evidence [must be] favorable to the accused" for its nondisclosure to constitute a Brady violation). For purposes of the plea and sentencing, the Applicant failed to credibly show that he would have to a reasonable probability rejected the plea offer and gone to trial based upon the victims apparent satisfaction that they thought the lesser role of the co-defendant was deserving of a lesser offer than the Applicant's plea offer. For this reason, the ground must be dismissed.

Further, a review of the records of the motion for reconsideration after the guilty plea before Judge McLeod shows that this same issue was fully litigated there with a determination related no

change in the sentence. Issues which were litigated in those proceedings cannot be raised in a PCR action. Under the doctrine enunciated in *Simmons v. State*, 264 S.C. 417, 215 S.E.2d 883 (1975), errors which can be reviewed on direct appeal may not be asserted for the first time, or reasserted, in post-conviction proceedings. S. C. Code Ann. § 17-27-20(b) (1985) of the Uniform Post-Conviction Procedure Act provides that post-conviction relief "is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of direct review of the sentence or conviction." The *Simmons* rule gives effect to the Legislature's clear intent that the post-conviction relief procedure is not a substitute for a trial or appeal or a place for asserting errors for the first time which could have been reviewed on direct appeal. *Peeler v. State*, 277 S.C. 70, 283 S.E.2d 826 (1981); *see also Cummings v. State*, 274 S.C. 26, 260 S.E.2d 187 (1979); *Ashley v. State*, 260 S.C. 436, 196 S.E.2d 501 (1973); *Sellers v. Boone*, 261 S.C. 462, 200 S.E.2d 686 (1973). Issues that could have been raised at trial or on direct appeal cannot be asserted in an application for post-conviction relief absent a claim of ineffective assistance of counsel. *Hyman v. State*, 278 S.C. 501, 299 S.E.2d 330 (1983). *Drayton v. Evatt*, 312 S.C. 4, 8–9, 430 S.E.2d 517, 519–20 (1993). Since this *Brady* issue by the initial non-disclosure of the victims letter related to Tripp Hendrix, the ground must be denied for this additional reason.

A. Ineffective Assistance of Plea Counsel, Generally

This Court finds that Applicant's claims of ineffective assistance of counsel are without merit. The Sixth and Fourteenth Amendments to the United States Constitution guarantee Applicant—like all other defendants—the right to "assistance by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair." *Strickland v. Washington*, 466 U.S. 668, 685 (1984). Ordinarily, PCR allegations are centered upon an allegation that the applicant did not receive *effective* assistance of counsel guaranteed by the Sixth Amendment. *See*

generally S.C. Code Ann. § 17-27-20(A) (enumerating allegations cognizable in PCR actions). The allegation of denial of such representation sets forth a *prima facie* violation of this constitutional right, and raises a question of fact that can only be determined by an evidentiary hearing. *Rogers v. State*, 261 S.C. 288, 291, 199 S.E.2d 761, 762 (1973).

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. *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985); Rule 71.1(e), SCRCP. The reviewing court applies the two-part test outlined in *Strickland* to determine whether counsel's conduct "was so ineffective as to require reversal" of the applicant's conviction. 466 U.S. at 687. To obtain relief, a PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness, and (2) the applicant sustained prejudice as a result of counsel's deficient performance. *Id.* at 687–88; *Cherry v. State*, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. *Strickland*, 466 U.S. at 700; *see also Bell v. Cone*, 535 U.S. 685, 695 (2002) (explaining that "[w]ithout proof of both deficient performance and prejudice to the defense, . . . it could not be said that the sentence or conviction resulted from a breakdown in the adversary process that rendered the result of the proceeding unreliable" (citation and internal quotation marks omitted)).

The PCR applicant has the burden of establishing both deficiency and prejudice in order to be entitled to relief. *Hughes v. State*, 346 S.C. 554, 558, 552 S.E.2d 315, 317 (2001); Rule 71.1(e), SCRCP. To prove deficient performance, the applicant must establish that, in light of all the circumstances, the acts or omissions complained of "were outside the wide range of competence" demanded of attorneys in criminal cases. *Strickland*, 466 U.S. at 688. To prove prejudice, the

applicant must establish that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A reasonable probability is a probability "sufficient to undermine confidence in the outcome." *Id.* However, "the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." *Id.* at 696.

Because of the difficulties inherent in making such an evaluation, the reviewing court must indulge in a "strong presumption that counsel's conduct falls within the wide range of reasonably professional assistance." *Butler*, 286 S.C. at 445, 334 S.E.2d at 816. "The burden of rebutting this presumption 'rests squarely on the defendant,' and '[i]t should go without saying that the absence of evidence cannot overcome [i]t.' *Burt v. Titlow*, 571 U.S. 12, 22–23 (2013)). In fact, "even if there is reason to think that counsel's conduct 'was far from exemplary,' a court still may not grant relief if '[t]he record does not reveal' that counsel took an approach that *no competent lawyer would have chosen.*" *Id.* (alteration in original) (emphasis added) (quoting *Titlow*, 571 U.S. at 23–24). Representation is constitutionally ineffective only if counsel's conduct "so undermined the proper functioning of the adversarial process" that the defendant was denied a fair proceeding. *Strickland*, 466 U.S. at 686; *see Nix v. Whiteside*, 475 U.S. 157, 175 (1986) (noting that under *Strickland*, the "benchmark" of the right to counsel is the "fairness of the adversary proceeding");

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, 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." *Id.* 137 S. Ct. at 1967. Rather, judges should "look to contemporaneous evidence to substantiate a defendant's expressed preferences." *Id.*; *Padilla*, 559 U.S. at 372 (explaining that the applicant must convince the court that a decision to reject the plea bargain would have been rational under the circumstances. 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).

B. Involuntary Guilty Plea

"[I]t is the prerogative of any person to waive his rights, confess, and plead guilty, under judicially defined safeguards, which are adequately enforced." *Reed v. Becka*, 333 S.C. 676, 685, 511 S.E.2d 396, 401 (Ct. App. 1999). Because a criminal defendant waives several constitutional rights by pleading guilty, the Due Process Clause requires that guilty pleas are entered into voluntarily, knowingly, and intelligently. *Boykin v. Alabama*, 395 U.S. 238 (1969); *Pittman v. State*, 337 S.C. 597, 524 S.E.2d 623 (1999). To be intelligent, a plea must be made by a mentally competent defendant who understands both the charges against him and the consequences of his plea. *Brady v. United States*, 397 U.S. 742, 748 (1970). To be voluntary, a plea must be free of threats or other coercion that would impermissibly distort the defendant's choice. *Id.* at 755; *see also United States v. Smith*, 440 F.2d 521, 528–529 (7th Cir. 1971) (Stevens, J., dissenting) (explaining that voluntariness relates to the trustworthiness of the admission of guilt and binding character of the waiver of the constitutional protections which would be available to the accused if he elected to stand trial).

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

The defendant's knowing and voluntary waiver of statutory or constitutional rights must be established by a complete record, and "may be accomplished by colloquy between court and defendant, between court and defendant's counsel, or both." *State v. Ray*, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993); *see generally Wolfe v. State*, 326 S.C. 158, 485 S.E.2d 367 (1997) (guilty

plea not involuntary where the colloquy demonstrated the trial judge asked defendant twice whether he understood there were no promises and that no sentencing recommendations were binding on the judge). To ensure the defendant understands the consequences of his guilty plea, the plea judge "usually questions the defendant about the facts surrounding the crime and punishment that could be imposed." *Dover v. State*, 304 S.C. 433, 434–35, 405 S.E.2d 391, 392 (1991). However, the plea judge "does not have to direct the defendant's attention to every consequence of his plea provided the record reveals affirmative awareness of the consequences of a guilty plea." *Carter v. State*, 329 S.C. 355, 362, 495 S.E.2d 773, 776 (1998).

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

The test for determining the validity of a guilty plea is "whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." *North Carolina v. Alford*, 400 U.S. 25, 31 (1970). It is "well established that a guilty plea is not rendered invalid because it represents a compromise by defendant, thrusts a difficult judgment upon him, or is motivated by fear of greater punishment." *United States v. Cox*, 464 F.2d 937, 942 (6th Cir. 1972) (citing *Brady*, 397 U.S. 742). The State may properly encourage guilty pleas either by being more lenient to those who enter such pleas, *Brady*, 397 U.S. at 750–53, or by increasing the risks of punishment on those who do not. *Alford*, 400 U.S. at 37.

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.' "). 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"); *cf. United States v. Broce*, 488 U.S. 563, 569 (1989) ("A plea of guilty and the ensuing conviction comprehend all of the factual and legal elements necessary to sustain a binding, final judgment of guilty and a lawful sentence. Accordingly, when the judgment of conviction upon a

guilty plea has become final and the offender seeks to reopen the proceeding, the inquiry is ordinarily confined to whether the underlying plea was both counseled and voluntary. If the answer is in the affirmative then the conviction and the plea, as a general rule, foreclose the collateral attack.").

Indeed, admissions made during a guilty plea should be considered conclusive unless an applicant presents valid reasons why he should be allowed to depart from the truth of his statements." *Dalton*, 376 S.C. at 137–38, 654 S.E.2d at 874 (internal citations and quotation marks omitted); *cf. Blackledge*, 431 U.S. at 73--74 (pointing out that representations made by a defendant, his lawyer, and the prosecutor at a guilty plea hearing, as well as any findings made by the judge accepting the plea, constitute a "formidable barrier in any subsequent collateral proceedings"). "What is at stake in this phase of the case is not the integrity of the state convictions obtained on guilty pleas, but whether, years later, defendants must be permitted to withdraw their pleas, which were perfectly valid when made, and be given another choice between admitting their guilt and putting the State to its proof." *McMann v. Richardson,* 397 U.S. 759, 773 (1970) (noting the compelling interests in maintaining the finality of guilty-plea convictions validly obtained). "Furthermore, there must be some consequence attached to the decision to plead guilty." *People v. Schneider,* 25 P.3d 755, 761 (Colo. 2001) (*cited with approval in Jamison*, 410 S.C. at 469, 765 S.E.2d at 129) ("A defendant who voluntarily and knowingly enters a plea accepting responsibility for the charges is properly held to a higher burden in demonstrating to the court that newly discovered evidence should allow him to withdraw that plea.").

Testimony from the PCR Proceeding

Michael Nowinski, the Applicant

During the PCR hearing, the Applicant testified that he was in detention from his arrest until the plea 14 months later. He claimed he spoke with counsel only twice in person and possibly four (4) times virtually due to COVID restrictions. He felt this hindered the counseling he received in the matter because he felt that they did not talk much. Nowinski claimed that counsel Bell was adamant about not going to trial in this matter because he felt this was not a trial type of case. However, in hindsight, Nowinski felt that he should have gone to trial based upon evidence he discovered on his own accord over the past five years.

The Applicant testified that he had mental issues at the time because of his use of drugs and alcohol which he thought should have been presented better at his plea. He stated that he was "self-medicating." He stated he informed counsel of this matter. Nowinski stated that he had been hospitalized multiple times for his mental issues his entire life, although he did not fell the treatment was helpful because he just would go back to the same situation and people when he was released. He stated that he had received mental health treatment at Three Rivers, Baptist and William S. Hall hospitals. He felt this was inadequately presented at his sentencing by counsel Bell.

The Applicant testified that his life was burdensome because he was struggling to make ends meet and had recently been fired from his job as an electrician. He stated that he had two children and a wife, who also used drugs, to support. He felt that at that time his mind was unguided and dysfunctional, which he claimed was only briefly presented to the court.

Nowinski stated that first plea offer that he rejected was 15 to life with a 35 year cap which he rejected. He stated that the second offer was for 10 to 30 years which he initially rejected. However, after he discussed the offer with his mother, the Applicant claims that he accepted the plea offer after she convinced him to take it.

The Applicant claimed that there were issues with discovery, which involved the letter from the victims. Nowinski stated that he had a year's long relationship with the victims and felt that introducing the letter would have made a difference and felt mitigating circumstances should have been presented in full view. He regretted that he did not take the case to trial, but counsel Bell felt it was not a possibility. He noted that this case was not ever scheduled for trial.

On cross-examination, the Applicant stated that he pled because it was the only option and he knew he was guilty of something, but did not know what. He confirmed that he was present at the scene to purchase drugs, but did not purchase any, but tried to take the drugs. He admitted that he had a shotgun at the scene which was used to commit the crime to obtain drugs. He confirmed that the victims were attacked "by an intruder" and he confirmed that he knocked on the door and entered. He also confirmed that the victims had "minor injuries". The Applicant recalled that at the plea, the State went over the evidence that he claimed he did not agree with and told counsel, but he proceeded with the plea. He stated that they knew the Chases well and told counsel that they went to get drugs and entered the house with the intent to take the drugs. He claimed his co-defendant took the shotgun with him and leaned it against the house and Applicant took it inside. He disagreed that the victims were struck with the shotgun, instead claiming that they were struck with "brass knuckles" which Applicant stated that he had. Nowinski stated that he left after he was shot in the chest. He confirmed that his codefendant was outside when Applicant entered the house and he told counsel that he had no recollection if the codefendant entered the house.

Nowinski claimed that his counsel always maintained after he told him this version that he kept suggesting a plea. He claimed that he had an issue with the way matters were presented and the discovery. He noted that the safe was usually full of narcotic drugs, but this time it was

empty. He stated that the Chases did not make any representations at his bond hearing and they did not care to take a position on his case.

He complained that not much was said about his mental health issues at sentencing. He stated that he and counsel spoke a lot about it up to the sentencing date, but did not discuss it at the sentencing asserting that claiming it was because he was not allowed. He only recalled that counsel subtly made comments about his mental health and drug abuse issues. He recalled a discussion about his surgery leading to his drug abuse of heroin and meth. He stated that there was information about bipolar, depression, and schizophrenia that was available. He also testified that he had been molested during his childhood.

Nowinski acknowledged that his wife testified and spoke about his addiction and his mother spoke about his drug use and mental issues. He stated that he made a plea for leniency at his plea.

Nowinski stated that he had been evicted from his home by his mother and was living with his codefendant and was in a "dark place" at the time of the crime. He recalled telling the court that he took accountability for his actions, but blamed it on his addiction and mental health issues. He complained that counsel mentioned his abuse as a child issue only briefly. The Applicant complained that counsel did not do want he wanted him to do and put in evidence about the victims. He wanted more evidence to support his mitigating circumstances presented.

On re-direct, Nowinski admitted that he was shot in the center of his chest and was put in the detention center after his hospitalization. He also acknowledged that he did not tell his counsel initially about his mental issues.

Counsel Taylor Bell

Counsel Bell testified that 75-85% of his cases are criminal cases. He stated that he was sworn in as a lawyer in 2011 with 13 years of criminal experience. He admitted that he had handled a number of felonies. He was appointed on Nowinski's case by the Lexington County Public Defender's Office through Rule 608. He testified that he went and saw multiple times. He acknowledged the COVID resulted in limited meetings. Bell stated the he tried to meet with him monthly or every 90 days because you need to have a client trust you.

Bell stated that he shared the State's discovery with the Applicant. The most damaging fact he concluded was that the Applicant was shot in the chest inside the residence that was not his own and apprehended shortly thereafter in the hospital which was hard to defend before a jury. Counsel opined that they fully discussed his drug use and past traumas and mental history to help determine how and why this happened. He believed that he got the mental health history and records from the Applicant's mother and was aware of the conditions that led to the drug use after surgery . Counsel stated Nowinski's use started with opioids, then heroin, and then meth. He learned that the Applicant was taking strong medication. Counsel felt that the Applicant's non-compliance with prescriptions led to the illegal drug use.

Counsel Bell described the plea negotiations with the state prosecutor, Sutania Fuller, as difficult.. Counsel Bell stated that his goal was to try to get the State to agree to around 10 years rather than a trial which would have resulted in a minimum of 15 years. He stated the first offer had been a 35 year cap during the bond hearing. Counsel stated he advised his client not to accept that offer. He did not recall that the Chases were present at the bond hearing.

Counsel felt he did a pretty good job at mitigation during the plea. He felt that he had to explain what happened, but strategically tried to not victim-bash so he did not get into the Chases being drug dealers or that one of the victims was on the sex offender registry, although he was

aware and considered it. Counsel believed this would not have aided the Applicant in sentencing. He stated that they were going to trial if the first plea offer did not change, Counsel believed he would have gotten 20-30 years if he went to trial.

Counsel testified that he later learned that the State had a letter from the Chases related to codefendant Hendrix. He filed a motion to reconsider the sentence based upon the letter. This was denied by Judge McLeod, after the State objected.

Counsel stated that he did not recall if he got all the mental heath records. He stated that his office mailed the discovery to the Applicant.

Communication with Counsel during COVID-19 Pandemic

This Court finds that the Applicant has failed to prove counsel was ineffective in failing to adequately meet with his client prior to the guilty plea. Applicant contended in his initial *pro se* application that he was "depriv[ed] of adequate communication" with his attorney due to the COVID-19 pandemic but framed this allegation in the context of ineffective assistance of counsel. Specifically, he stated that the virtual visits conducted at the jail "invaded [his] privacy with counsel causing tremendous misunderstandings and decrease in confidence . . . in his counsel[']s representation during plea negotiations."

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).

During the PCR hearing, Nowinski testified that he only met with him twice in person and possibly four (4) times virtually. To the contrary, counsel Bell credibly testified that he met with the Applicant multiple times over the 14 month he was in the detention center. As importantly, the Applicant at the plea stated under oath that he met with his attorney prior to the plea who answered all of his questions and that he was satisfied with his services. Tr.p. 8, l. 4-11. These statements in open court and under oath carry a presumption of verity, absent a cogent reason to the contrary. *Blackledge v. Allison*, 431 U.S. 63, 74, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977).

The Applicant has failed to indicate anything that counsel was unaware of due to the meeting they had or failed to acquire to aid in his decision to plead guilty or to present in mitigation. This court finds that counsel was fully aware of the facts of the case and the lack of an available defense to the charges against counsel. Further, as noted below, counsel was reasonably

aware of mitigating factors that he used to mitigate the potential sentence with the prosecutor as well as the judge. He has failed to show deficient performance.

Moreover, the plea transcript reflects Applicant understood the proceedings, the nature of the charges against him, the terms of the plea agreement, and the consequences of pleading guilty in accordance with the requirements of *Boykin* and *Pittman*. *See Crawford v. United States*, 519 F.2d 347, 350 (4th Cir. 1975), *overruled on other grounds by United States v. Whitley*, 759 F.2d 327 (4th Cir. 1985) (finding that the accuracy and truth of an accused's statements at a guilty plea proceeding are "conclusively" established unless he makes some reasonable allegation why this should not be so). Thus, the Court finds that Applicant's claims of ineffective assistance of counsel based on communication issues due to the COVID-19 pandemic are without merit. The Applicant failed to show deficient performance or prejudice under *Hill v. Lockart*.

Failure to Present Mitigating Evidence During Sentencing

In his remaining claim, Nowinski contends that the Applicant failed to present information regarding the Applicant's mental health and background during the sentencing proceeding which he contends would have led to a lesser sentence. During the PCR proceeding, the Applicant testified that his counsel should have presented more thoroughly about his progression of drug use after his surgery, that he had received treatment at a number of mental heath treatment hospitals over his entire life and had been molested as a child.

The Applicant ignores the standard upon which this case was heard

> Judicial scrutiny of counsel's performance must be highly deferential. 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. **A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.**

> Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.

Strickland v. Washington, 446 U.S. at 689, 104 S.Ct. at 2065, 80 L.Ed.2d at 694-95 (emphasis added).

Here, the plea was entered with a negotiated range of a mandatory minimum of 10 years to 30 years. Tr.p. 23-24. Further, the Sheriff's Department asked for the maximum sentence. Tr.p. 26-27. Counsel Bell asked for a ten year sentence. Tr.p. 37. This was a case in which the Applicant admitted that he had committed the crime both at the plea and during this proceeding.

During the guilty plea counsel Bell argued in favor of a lesser sentence. He stated that his client was 27 years and an electrician. He presented that he had two children. He presented to the sentencing judge information that between age 9 and 10 he was molested by his brother. Tr.p. 28. He had been diagnosed with schizophrenia, bipolar and depression. As treatment for his schizophrenia, Nowinski had been treated with the powerful drugs of lithium and Risperdal.

Counsel Bell urged the court in mitigation that poverty, drug abuse and mental health come hand in hand with individuals with self-medicating and drug abuse to put away the voices in their head. Tr.p.28-29. He con tended that his client was not a bad human being, but a person with mental health conditions that exacerbated his drug use.

Counsel urged the court that his clint from day one admitted the crimes and that this was not a trial case, but contested how the crime happened., always admitted thar he went over there and that it was an armed robbery.

Counsel pointed out the crime scene was over an hour from the Applicant's home and the

reason they went over there was that this was a drug dealer's house. He stated though: "I'm not saying his actions are excused by that" and that he was admitting that he committed an armed robbery that carried ten years. Counsel qualified that this house, though, was not an old grandfather's house , but it all "surrounds drugs. It's Michael fault that he used drugs; that he went over there and robbed a drug dealer" but counsel put in context that it was not a random house that was broken into. Tr.p. 30.

Counsel also informed the sentencing court that Applicant's wife had given a statement to law enforcement that he had been kicked out of the family's house that night and was living with his codefendant with drug use going on the night of the incident. She had indicated that on that evening they were trying to figure out what they were going to do to pay the overdue bills, had no place to live, and the family was living on the codefendant's couch. Counsel stated that this was the context to what led to this crime. Counsel urged the context of the crime had to include his client's knowledge about the drugs and the safe and Applicant's knowledge of it and contested the innocent bystander assertion by the government to be a mischaracterization.

In the mitigation, counsel also apprised the court that in support in the courtroom were his mother, his wife, his stepfather, his aunt and his sister.

Counsel also developed the Applicant's evolution into his drug use. He advised the sentencer that in 2014 Applicant had a hip injury that resulted in surgery. As a result he was placed on numerous narcotic medications. Subsequently, the Applicant resorted to heroin, then to methamphetamine. Counsel asserted that this does not excuse his conduct, but puts it in context. Tr.p. 31.

Counsel next presented in mitigation that Applicant's wife. She stated that she and the Applicant both suffered from drug addiction. However, they had two children. She stated that "we

bought our drugs from David and his brother" but what happened that night was inexcusable, noting that they had been there several time . Tr.p. 32 -33 .She declared that Applicant was a good man and good father. She declared that she had been clean for a year now. She stated their addiction began with the Applicant's surgery, but that is no excuse for what occurred. She asked for mercy.

Counsel also presented the Applicant's mother who confirmed that the Applicant suffered mental illness which was diagnosed at 7 years old as "non-specific mood disorder and intermittent rage disorder which progressed to a diagnosis of cyclothymia, which she described as a is a rapid cycling bipolar disorder. His mother stated he had hip replacement surgery in 2014 with prescriptions for OxyContin and Percocet. She contended this led to his addiction to hardcore drugs. His mother noted that this led to his son's marital issues and a record of criminal domestic violence between his son and wife while they were high. His mother acknowledged that what occurred was not right, but it would not have happened if he was not high and made a bad choice. His mother stated that she knew the victims and had been to their home. She stated that she had told the detective and had predicted the home was the location of the robbery. She stated she had been to the home before and begged the victims to stop poisoning the community. She denied that this was a random act of violence. Tr.p. 34. She asked for mercy for her son who had changed since incarcerated and found God and studied theology. Tr.p. 35.

Counsel then had the Applicant make a personal plea in mitigation. He noted that a few days before his arrest his mother evicted his family from her home because of the drug use and dysfunction it caused. He stated it brought his to his codefendant's home in Camden. He admitted that he was "in a dark place emotionally, mentally, financially and had a tremendous burden that he did not know how to manage. He felt his wife was in depression and no longer wanted to live. However, he handled these issues with impulsivity and drug use. He stated on that day he got high

on crystal meth, drank a few beers and made a terrible decision to go to the drug dealer's house and attempt to rob them of his drugs and then getting shot. He declared his mental illness and drug addiction did not justify or excuse his actions. He opined that getting shot was a divine intervention. He stated he had never been to prison and found the prospect to be away from his family at this time to be scary. He expressed a desire to return from it as a law-abiding, contributing citizen and asked for mercy. Tr.p. 36.

Counsel Bell then returned to his own mitigation urging the minimum ten year sentence as appropriate. Counsel pointed out the lack of a prior record for a felony. Counsel opined that ten years was enough to teach a man who had never been to prison before. He renewed his client's admission to him at the outset of his representation. Counsel again noted the family and the fact that he was shot. Tr.p. 37-38.[3]

Judge McLeod, prior to his aggregate twenty year sentence, recognized this as a tragic case due to the drugs and mental illness as factors that led up to this day. It is surprising that no one is dead from the incident. He felt that if the case went to trial, the Applicant would be facing on burglary first degree, the Applicant could well have ended up with a life sentence. He stated that he will order drug treatment and mental health counseling and hope that Applicant will continue in his studies. Judge McLeod noted he did not find anything minimal about his conduct in light of all the consequences. Tr.p. 41-42.

Further, subsequent to the sentence, the Applicant, through counsel Bell sought reconsideration of the sentence, challenging the State's assertions at the plea that the victims were law abiding which evidence in discovery about locating two glass smoking devices in the residence and the fact that one was a registered sex offender. *Motion for Reconsideration of*

[3] The solicitor had also told the judge about the Applicant's drug issues and criminal record. Tr.p. 22-24.

Sentence, p. 2. In addition, counsel urged that the previously undisclosed victims letter related codefendant as challenging the State's presentation that the victims wanted significant time for the Applicant. *Motion for Reconsideration of Sentence*, p. 2. In rejected the motion, Judge McLeod stated : " in reviewing the materials provided by the parties, the Court has sought to evaluate newly provided documents and determine if reconsideration is appropriate and whether such reconsideration would still ensure that justice is appropriately rendered." *Order,* March 5, 202, p. 2.The sentencing court concluded that he found the original sentence appropriate "and that the sentence would not have been effected or altered by presenting the victim letter pertaining to the co-defendant in this matter." Order, p. 2.

The Applicant has wholly failed to show that counsel was deficient related to the presentation in mitigation of sentence. This Court also finds that prejudice has not been shown.

In *Glover v. United States*, 531 U.S. 198, 202–04, 121 S.Ct. 696, 148 L.Ed.2d 604 (2001), the United States Supreme Court applied *Strickland* to a noncapital sentencing proceeding. Glover presented the question whether "a showing of prejudice, in the context of a claim for ineffective assistance of counsel, requires a significant increase in a term of imprisonment." *Id.* at 204, 121 S.Ct. 696. The claim in *Glover* arose from noncapital sentencing proceedings governed by federal guidelines. Id. at 200, 121 S.Ct. 696. The Supreme Court reversed the Seventh Circuit for "supplant[ing] the *Strickland* analysis" in such a context. Id. at 203, 121 S.Ct. 696. In closing, *Glover* noted that "the ultimate merits of [petitioner's] claim" would turn on *Strickland*'s elements: "the question of deficient performance" and "prejudice flow[ing] from the asserted error in sentencing." Id. at 204, 121 S.Ct. 696.

To the extent that there was any doubt that *Glover* "clearly established" that *Strickland* applied to noncapital sentencing proceedings, that doubt was erased in *Lafler v. Cooper*, 132 S.Ct.

1376, 182 L.Ed.2d 398 (2012). In *Lafler*, the Supreme Court stated that Glover:

> establish[ed] that there exists a right to counsel during sentencing in ... noncapital ... cases. Even though sentencing does not concern the defendant's guilt or innocence, ineffective assistance of counsel during a sentencing hearing can result in *Strickland* prejudice because "any amount of [additional] jail time has Sixth Amendment significance."

Lafler, 132 S.Ct. at 1385–86 (second alteration in original) (citations omitted) (quoting *Glover*, 531 U.S. at 203, 121 S.Ct. 696).

Given *Glover* and *Lafler*, the Supreme Court has clearly established that *Strickland* governs claims for ineffective assistance of counsel in noncapital sentencing proceedings.1 *See also Premo v. Moore*, 562 U.S. 115, 126, 131 S.Ct. 733, 178 L.Ed.2d 649 (2011) ("Whether before, during, or after trial, when the Sixth Amendment applies, the formulation of the standard [for deficient performance, as an element of ineffective assistance of counsel] is the same: reasonable competence in representing the accused.") (quoting *Strickland*, 466 U.S. at 688, 104 S.Ct. 2052).

In his testimony before this Court, the Applicant presented examples of matters that he wished his mental issues, his hospitalization, his drug use, his molestation as a child, and his family background would have been presented more thoroughly. However, counsel presented through his mitigation presentation the same information that Applicant sought to present related to the each of the factors Applicant cited above.

How to present evidence and argument in noncapital mitigation is a matter of strategy. Decisions regarding the presentation of evidence are inherently matters of trial strategy. The United States Supreme Court has cautioned courts not to assess counsel's decisions concerning strategy through the distorting lens of hindsight; rather, courts are to employ a strong presumption that counsel's conduct falls within a wide range of reasonable assistance and, under the circumstances, might be considered sound trial strategy. *Strickland*, 466 U.S. at 689.

Counsel Bell credibly testified that that he thought he did a good job in mitigation, but chose not to victim bash in sentencing. This decision was credible because counsel Bell was an experienced criminal defense lawyer since 2011 with 85% of his practice dedicated to making these sentencing decisions. The only area he did not include at the plea mitigation for the Applicant was the fact that one of the victims was on the sex offender registry, suggesting additionally a prior criminal record whereas the state was contending the victims were law abiding citizens. He stated that he was aware of it at the time. Clearly this matter was one of reasonable and sound strategy. Counsel had already declared that the victims were drug dealers, which was relevant to the particular reason that they chose the victims to rob on that date. For counsel to have further brought out the fact that one of the victims was on the sex offender registry was not relevant to the incident and only portrayed that victim in a poorer light, unrelated to the incident. Based upon his experience Counsel reasonably believed that this could have backfired with the court, with whom he was seeking the minimum sentence. Further, counsel declared that he was aware and did consider the sex offender registry matter, so his decision was not the product of either neglect or ignorance. After the initial sentence was received, counsel did chose to present the information with the sentencing court in his reconsideration motion, to again undermine the state's portrayal of the victims. However, this Court finds that that later presentation does not suggest the initial strategy was not reasonable trial strategy. It only suggests that he was zealous in continuing to litigate on his client's behalf for a lesser sentence.

This Court find that counsel's sentencing presentation was thorough and properly addressed the items in mitigation in a persuasive fashion. The Applicant has failed to prove deficient performance. The Applicant has only implied that counsel could have presented the mitigation in a more thorough matter, suggesting in passing, with the use of records to support his

mental health and hospitalization records. However, the manner of the presentation was sound strategy that the Applicant has failed to prove otherwise.

This Court also finds that the Applicant has failed to prove prejudice under *Strickland* in the strategic decisions counsel made in sentencing. *See Jones v. State*, 332 S.C. 329, 339, 504 S.E.2d 822, 827 (1998) (finding that the absence of "fancier" mitigation evidence does not render the prior mitigation case constitutionally inadequate where such evidence would not have had any effect on the outcome of the trial). As noted above, it appears that all matters of suggested mitigation were presented, either in the initial plea proceeding or in the motion for reconsideration, to the sentencing court.

The test for prejudice in the sentencing is from *Strickland*, the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. This Court concludes that the Applicant has failed to satisfy that burden. He has failed to present any item in mitigation of sentence that undermines confidence in Judge McLeod's sentencing decisions. Judge McLeod all the items in his rejection of the motion for reconsideration, At most, though not actually presented here, his argument is that he wanted the counsel to present the same facts, but speculated only more persuasively. He ignores the fact that the sheriff's department was seeking 35 years, the state was pursuing its 30 cap and the trial judge was of the opinion that if the Applicant went to trial, he would likely been subject of a life sentence under the facts of the case presented to him. He further fails to recognize that he received a significant reduction by Judge McLeod in sentencing him to the mid-range of armed robbery for 20 years. This Court conclusively determines that he has not presented a reasonable probability that he would have received a lesser sentence under the circumstances he has suggested. The allegation must be dismissed.

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 this 22nd **day of** April **, 2025.**

DAVID P. CARAKER, JR.
Presiding Judge
Eleventh Judicial Circuit

Lexington, South Carolina