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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. 2019-CP-32-02210

Joshua Thomas Brown, #286520, ... Petitioner,

v.

State of South Carolina, ... Respondent.

NOTICE OF APPEAL

Applicant, Joshua Thomas Brown, appeals the order of the Honorable David P. Caraker, Jr., filed on or about November 10, 2025, and received by the undersigned on November 10, 2025.

November 20, 2025

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November 3, 2025

The Honorable David P. Caraker, Jr.
S.C. Judicial Branch
1301 Second Avenue
Conway, SC 29526

Re: Joshua T. Brown, #286520 v. State of South Carolina
2019-CP-32-02210

Dear Judge Caraker:

Enclosed please find the proposed Order of Dismissal in the above-captioned case. If this Order meets your approval, please sign and forward to the Lexington County Clerk of Court with the enclosed envelope. If you have any questions regarding this matter, please do not hesitate to contact me at (803) 734-3737.

Sincerely,

Donald J. Zelenka
Deputy Attorney General

DZ/wjc
Enclosure(s)

cc: Ashley A. McMahan (with enclosures)

STATE OF SOUTH CAROLINA COUNTY OF LEXINGTON	)	IN THE COURT OF COMMON PLEAS IN THE ELEVENTH JUDICIAL CIRCUIT
Joshua Thomas Brown, SCDC #286520, Applicant, v. State of South Carolina, Respondent.	)	Case No. 2019-CP-32-02210 **ORDER OF DISMISSAL**

This matter comes before this Court by way of a *pro se* application for post-conviction relief filed by Joshua Thomas Brown (Applicant) on June 4, 2019. The Applicant was initially appointed Overture Walker to represent him in this matter on July 10, 2019. On October 4, 2019, the Respondent made a Return and Motion for a More Definite Statement. On November 18, 2020, appointed counsel Walker was replaced by Ashley A. McMahan to represent him. On August 24, 2024, counsel McMahan served the Respondent with an Amended Post-conviction Relief Application.

This matter was convened for an evidentiary hearing on August 26, 2024. The Applicant was present and represented by appointed counsel McMahan. The Respondent was represented by Deputy Attorney General Donald J. Zelenka of the Attorney General's Office. Testimony was received from the Applicant, Stephen Story and Jael Gilreath. Subsequent to the hearing this Court made an initial indication of an intent to dismiss that application. This Order of Dismissal follows.

I. PROCEDURAL HISTORY

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

11, 2015, following a stabbing incident involving Applicant's wife. During its March 2016 term, the Lexington County Grand Jury indicted the Applicant for attempted murder (2016-GS-32-00873).

On June 18, 2018, Applicant proceeded to a jury trial before the Honorable R. Knox McMahon. Assistant Public Defenders Stephen Story, Jason Turnblad, and Jael Gilreath represented Applicant. Deputy Solicitor Suzanne Mayes and Assistant Solicitor Kate Usry of the Eleventh Circuit Solicitors Office prosecuted the case. On June 22, 2018, before the trial concluded, Applicant pleaded guilty as indicted.

At the outset of the plea hearing, Mr. Story advised the Court that Applicant understood the elements of the charge against him, the possible punishment he could receive, and his constitutional rights as they have been explained to him. (Tr.p. 713-714; Plea Tr. 4–5). Judge McMahon thereafter explained the offense to Applicant in greater detail, and advised Applicant that he could receive the maximum of thirty years' imprisonment. (Tr.p. 715; Plea Tr. 7). Judge McMahon reiterated to Applicant that by pleading guilty he would waive important constitutional rights, including his right to proceed forward with his trial by jury, his right to confront the witnesses against him, and his right to remain silent. (Tr.p. 715-716; Plea Tr. 7–8). Judge McMahon further informed Applicant that if he did proceed with his trial, the burden of proof would not be upon him, but rather would be upon the State to prove every element of every charge against him, and that they would have to convince every member of the jury of his guilt. (Tr.p. 716-717; Plea Tr. 8). Applicant indicated he understood, and wished to waive these rights in order to plead guilty. (Tr.p. 717; Plea Tr. 7–8).

The solicitor then advised the Court of the terms of the negotiated plea agreement; that Applicant would receive a sentence of twenty to thirty years' imprisonment and the State would

withdraw its notice of intent to seek life without parole.[1] Tr.p. 718; (Plea Tr. 10). Upon inquiry by the Court, Applicant indicated he was completely satisfied with his lawyers, that they had done everything they reasonably could have to properly represent him, and that he had no complaints about his lawyers, the solicitors, or any of the police officers involved in his case. (Tr.p. 719-720; Plea Tr. 12). Judge McMahon accepted Applicant's plea as being freely knowingly, and voluntarily made. (Tr.p. 721; Plea Tr. 15). Pursuant to the negotiated plea agreement, Judge McMahon sentenced Applicant to twenty-three years' imprisonment (Tr.p. 736-737; Plea Tr. 28). Applicant did not appeal his guilty plea or sentence.

II. Brief Statement of Facts

On August 11, 2015, Applicant was arrested after he stabbed his wife numerous times in the neck and back, causing serious bodily injury that required emergency medical surgery. The victim reported to law enforcement that her husband stabbed her after making statements about killing her just prior to the attack.

III. Allegations Before the Court

In his initial application for post-conviction relief, Applicant alleged he was being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel
    a. Counsel failed to seek the opinion of any expert

The Applicant, with the assistance of counsel, filed an amended application in the matter on August 26, 2024, which alleged the following:

1. Ineffective Assistance of Counsel of Stephen R. Story, Jr. –

[1] The State previously served Applicant with its notice of intent to seek life without parole pursuant to S.C. Code § 17-25-45(A)(1)(a) based on a 2002 conviction for armed robbery in Richland County (2002-GS-40-1258).

a. During Applicant's trial, Mr. Story enraged the judge to the point the judge threatened contempt. It was at this point the Applicant felt he had no choice but to plead guilty. See Transcript at page 684, line 20 - page 690, line 24. And in fact, move to have his attorneys relieved because he no longer felt comfortable with them. See Transcript, page 699, line 15 – page __.

b. The guilty plea offer was actually relayed to Mr. Story a day before he actually told the Applicant about it.

c. There were videos and photos retrieved off the Applicant's phone that would have shown that the Applicant was essentially a "battered spouse" however, by the time the trial started, Applicant's attorneys could no longer locate the digital evidence needed to defend the Applicant.

d. Because Mr. Story made the judge angry, Applicant did not have the chance to testify in his own defense (after the judge ruled his prior record would not be able to come in) and had he been able to, the outcome of the trial may have gone in his favor.

In the amended application, PCR counsel also included handwritten pleadings from the Applicant which essentially included the following assertions:

e. I was charged with the crime of attempted murder. However, my attorney never advised me that attempted murder is not a crime in South Carolina. The Applicant contended that he never denied the altercation with the victim, but I always claimed it was self-defense. The Applicant contends that if he knew it was not a crime in South Carolina he would have wanted a jury trial.. When the Solicitor informed the Applicant that he was seeking life without parole that put more pressure on me.

f. When the solicitor and defense counsel approached the Applicant mid-trial with the offer to accept the plea in exchange for a sentence if 20 to 30 years and drop the state's request for life without parole, it was a collaboration to obtain a conviction for something the solicitor knew would be overturned on appeal. Under this pressure , the Applicant take the plea. When questioned by the trial judge, the Applicant admitted he only had a 10th grade education and was therefore not capable of making the decision to any of the court's questions. When asked if he had been threatened or coerced he said no, but he had no idea that he had already been coerced by the plea offer. , Similarly when asked about if he understood his rights, with only a 10th grade education he could not have understood the complexities , particularly when his counsel failed to tell him that he was pleading guilty to a crime that did not exist.

FINDINGS AND CONCLUSIONS OF LAW

This Court has before it the records of the Lexington County Clerk of Court records regarding the subject convictions, the transcript of the trial and guilty plea from June 18-22, 2018, the Applicant's records from the South Carolina Department of Corrections, the records of the current PCR action, and the plea transcript. This Court has also reviewed the records submitted to it by the parties, the legal arguments made by the attorneys, and the pleadings. Pursuant to S.C. Code Ann. § 17-27-80, this Court makes the following findings based upon all of the probative evidence presented during the trial, the guilty plea and this evidentiary hearing.

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.

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

JOSHUA BROWN

The Applicant testified that Stephen Story was his main attorney, but he was also represented by Jason Turnblad and Jael Gilreath. The Applicant stated that he pled guilty after about five days of trial.

The Applicant testified that he was incarcerated for three years prior to the trial. He claimed he saw Story six or seven times in person and about seven times additional times over the telephone. He claimed that they went over some evidence, but not all the evidence.

Brown testified that the victim was out on bond for Domestic Violence at the time of the incident. However, he learned that the charges were expunged prior to this trial. He claimed that there were photographs of the Applicant's injuries related to the earlier incident that he wanted to use.

The Applicant complained that during the trial, the trial judge got upset with counsel Story and threatened him with contempt. As a result, the Applicant testified that the next morning he filed a motion asking for a new lawyer.

The Applicant also complained that he did not get to testify at his trial. He stated that he planned on testifying. He felt that he could have enlightened the jury with his side of the story. He stated that he would have testified that his wife had a bond condition on her pending charges to have no contact with the Applicant. However, he stated that they discussed in text messages where to have a meeting. Brown claimed that they met at a private spot to discuss their joint infidelity and custody issues in their marriage. He stated that her story in court was different. He stated that he was working on the marriage, but they talked about the infidelity and got into an argument. He stated that he would have advised the jury about her cheating. He claimed that she wanted to meet there.

Brown testified that he spoke to Story about this incident. He stated that they discussed Battered Spouse Syndrome with Story. He stated that they had a conversation about videos that he claimed he had on his phone. He asked his lawyer to locate the videos.

He stated that there was a plea offer before Friday but that he was not aware of it then. He claimed that Story was aware of the plea offer earlier because Brown claimed his sister heard about it on Thursday. Brown claimed he was very upset with the judge's treatment of Story.

Brown claimed his statements to the investigator and to the Court were always that he acted in self-defense.

On cross-examination, Brown stated that he pled guilty because of ineffective assistance of counsel and that he did not want to continue with him. Brown asserted that he wanted to call witnesses, including his step-father, his cousin Clarence Smith and himself. He admitted that none of the witnesses saw the stabbing incident, except him.

Brown stated that he gotten another woman pregnant and did not want to tell his wife because "she is violent." He claimed that he stabbed his wife in self-defense because she had stabbed him first. Brown stated that Story tried to get the missing video information into court to explain information that Brown wanted to address related to her violence toward him.

Brown acknowledged that he had two other lawyers. He stated that one primarily did writing and research and had no involvement in the plea. The other had no plea involvement. He stated that only Story spoke with him about the plea. Brown claimed that the video was recovered, but that it was not shown to Brown. He stated the text messages were not admitted into court.

Brown stated that his wife had domestic violence charges in 2014 and 2015. Brown stated he told the victim he was sorry, but did not attempt to murder her.

On re-direct, he claimed that he had no option except to plead guilty due to counsel Story's behavior with the judge.

STEVEN STORY

Counsel Steven Stoney testified that he was an Assistant Public Defender and had practiced since 2013. He indicated that he had handled major felonies since he started and the majority are serious or most serious crimes. He stated he had handled ten to fifteen murder cases. He was assigned this case in 2017 from Sally Henry.

He met with his client six to seven times and had spoken with him many times by telephone. Story recalled that Brown got written discovery before the case was re-assigned to Story. Story said he went over all written discovery with Brown.

Story stated that there was a cellphone extraction done by Cayce that showed that some videos were deleted off the phone. Brown claimed the missing video he sought allegedly showed an earlier incident when his wife attacked Brown with a pair of scissors.

Story stated that this attempted murder incident involved Brown allegedly stabbing his wife around seventeen (17) times. Story did not recall Brown having any stab wounds.[2] He claimed it was in self-defense.

Story indicated that he was prepared to call the witnesses that Brown wanted including his step-father. Story noted that Clarence Smith had testified by the time the plea was entered. He indicated that he saw two instances of violence by the wife towards Brown, including the stabbing with scissors and smacking the hand with a hammer. Smith claimed he had seen the video Brown recorded and saw Brown right after the hammer incident. [Story noted that there was a hearsay

[2] Evidence at trial revealed that the Applicant had a superficial laceration of 4 centimeters on his right hand. Tr.p. 435-438.

and excited utterance argument]. Story noted that the judge indicated that seeing a video is not personal knowledge.

Story indicated the offer was made during a recess during the trial on Friday. Story stated the state made a plea offer of 20 to 30 years for attempted murder, as compared to life without parole. He stated he discussed the offer with his client who agreed to go forward with it. Story indicated that he encouraged his client to accept the offer. He indicated that the state had a strong case, including the number of stab wounds, the fact the victim was found in the river and Brown's own conduct after the crime.

As to assertions related to battered spouse syndrome and expert witness, Story did not think that Brown met the criteria for battered spouse syndrome. He noted that Brown was separated at the time of this incident and was living with someone else. Story indicated he initially did not see a need to consult an expert.

Story indicated that he revised his plan and attempted to consult with potential experts on battered spouse syndrome (or flight or fight response) the week before the trial after discussions with other lawyers. He attempted to contact Dr. Lois Veronen, Dr. Donna Maddox, and Dr. Amanda Salas. He did contact Dr. Maddox, but she was not available to do it under the time of the request. Counsel filed a motion for a continuance related to this. (Trial Tr. 39-41, 54-56, 69-72).

Concerning a cellphone expert witness, Story stated he learned that there was new software that could get deleted information of the Applicant's phone. He retained cellphone expert Chris Watkins in an attempt to determine the existence of the videos and in seeking a new extraction. Counsel asserted he raised this issue in a continuance request. (Trial Tr. 55-68).

As to the incident at trial with Judge McMahon, Story testified that the judge was upset with him related to the arguments he made relating to whether Clarence Smith had observed acts of violence by reviewing the video (Tr. 687-690).

Story stated that after the threat by the court, his client moved to have him relieved as counsel, which was denied. Story denied that the threat to hold himself in contempt lead to the recommendation of the guilty plea by Story.

During cross-examination, Story indicated that Judge McMahon was increasingly upset during the trial. He indicated he made a motion to poll the jury on whether they had heard the yelling.

Story said an issue raised at trial related to the expungement of the victim's prior arrest for domestic violence. The defense made a motion for continuance and motion to compel for evidence of the expungement records at the outset of the trial.

The defense decided that the judge should get a self-defense instruction in the case(if the case had gone to a jury). The trial judge also ruled in the Applicant's that the prior armed robbery conviction would not be admitted if the Applicant testified, upon the defense request.

JAEL GILREATH

Prior counsel Jael Gilreath testified about her role. She stated she was sworn in as a lawyer in 2011 and worked as a Public Defender from 2013 to 2021. She shared a paralegal with Steven Story. She discussed her role in dealing with the cellphone extradition. She stated she met with Chris Watkins, the cellphone expert, a number of times and handled the issue at the trial. Upon Watkins's review of the Applicant's phone extraction, he indicated that the requested video showing an assault with a pair of scissors was not there. They had conversations about newly available software and the potential for extracting the now deleted video. She indicated the original

extraction by the Secret Service agent was not a physical extraction, but only a logical extraction. She stated that she learned a newer physical extraction could pull more deleted data off the phone.

Gilreath stated that she also spoke with Suzanne Mayes about the new software because the defense team was initially not aware of its possibility. This information led to the continuance request. She testified that videos were recovered, but not the video Brown was seeking.

Concerning the plea offer, Gilreath testified that she also spoke to Brown with Story. She stated Brown's reason were to take life without parole off the table and that he was not confident in the outcome with issues with Story and the judge.

FAILURE TO ADEQUATELY INVESTIGATE OR RETAIN EXPERTS

In his first amended allegation, he claims his counsel was ineffective in failing to retain experts. Although he does not specify what kind of expert, if the court reads the Brown's initial application to mean any expert, it certainly seems, according to the PCR testimony, that defense sought experts in the areas of cell phone extraction and battered spouse syndrome. There was no continuance given by the court to pursue these avenues, but Mr. Brown obviated the need for them when he decided to plead guilty. Technology seemed to be the limiting factor for the cell phone information, while defense counsel did not think he met the criteria for battered spouse syndrome. It should not be forgotten that Brown himself is the one who erased that information from his phone. Story listed reasons for that as the number of stab wounds inflicted on victim, Brown did not report to law enforcement, the fact that he left victim there and she was found quite some time later by kayakers, and the fact that Brown had searched on his phone for information about her, after the incident. This Court finds that he failed in his burden of proving deficient performance or prejudice under *Strickland.*

"A criminal defense attorney has a duty to perform a reasonable investigation." *Lounds v. State,* 380 S.C. 454, 460, 670 S.E.2d 646, 649 (2008). "[S]trategic choices made by counsel after an incomplete investigation are reasonable 'only to the extent that reasonable professional judgment supports the limitations on the investigation.' " *McKnight v. State*, 378 S.C. 33, 45, 661 S.E.2d 354, 360 (2008) (*quoting Van Dohlen v. State*, 360 S.C. 598, 607, 602 S.E.2d 738, 743 (2004)).

"[C]riminal defense attorneys have a duty to conduct a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case." *Walker v. State*, 397 S.C. 226,235, 723 S.E.2d 610,615 (Ct. App. 2012), overruled on other grounds, *Walker v. State*, 407 S.C. 400, 756 S.E.2d 144 (2014). "Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to result." *Porter v. State*, 368 S.C. 378, 385-86, 629 S.E.2d 353, 357 (2006) (*citing Moorehead v. State*, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998)). "In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Wiggins v. Smith,* 539 U.S. 510, 521-22, 123 S. Ct. 2527, 2535 (2003).

Our Courts have repeatedly held a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial. *Bannister v. State,* 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) (*citing Pauling v. State*, 31 S.C. 606, 503 S.E.2d 468 (1998); *Glover v. State*, 318 S.C. 496,458 S.E.2d 538 (1995); *Underwood v. State*, 309 S.C. 560, 495 S.E.2d 20 (1992)). The Applicant's mere speculation as to what a witness' testimony

would have been by itself cannot satisfy the Applicant's burden of showing prejudice. *Id.* (citing *Glover*, 318 S.C. at 498-99, 458 S.E.2d at 540). *See Edwards*, 392 S.C. at 457, 710 S.E.2d at 65 ("So long as a defendant's attorney conducts a reasonable investigation, including interviewing potential witnesses when it is reasonable to do so, his performance will not be deficient."); *Simpson v. Moore*, 367 S.C. 587, 597, 627 S.E.2d 701, 706 (2006) (*citing Strickland*, 466 U.S. at 691, 104 S. Ct. at 2066) ("Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.").

Battered Spouse Syndrome Matter

This Court finds that the Applicant failed to satisfy his burden of proof in showing that counsel was deficient in failing to investigate or present a witness on the battered spouse syndrome and how it relates to the Applicant's actions related to the stabbing of his wife on August 11, 2015. This Court must find that in this PCR proceeding the Applicant failed to present any expert witness before this Court to show the possible relevant testimony that plea counsel failed to present or develop in their investigation. Further, the Applicant failed to show that counsel's assessment was below the standard of competence demanded of lawyers practicing criminal law as it relates to the investigation of this syndrome.

Our supreme court "first recognized the battered woman's syndrome as relevant to a claim of self defense in *State v. Hill*, 287 S.C. 398, 339 S.E.2d 121 (1986)." *Robinson v. State*, 308 S.C. 74, 78, 417 S.E.2d 88, 90 (1992). In *Robinson*, our supreme court gave an overview of battered woman's syndrome and determined "the unique perceptions of a defendant suffering from battered woman's syndrome are generally compatible with ... self-defense." *Id.* at 76-78, 417 S.E.2d at 90-91. "Self-defense is a complete defense; if established, a jury must find that the defendant is not guilty." Id. at 79, 417 S.E.2d at 91.

In 1995, the General Assembly enacted legislation providing "[e]vidence that the actor was suffering from the battered spouse syndrome is admissible in a criminal action on the issue of whether the actor lawfully acted in self defense ...." S.C. Code Ann. § 17-23-170 (2014).

In *Robinson,* the Court set forth an understanding of the syndrome as it relates to the elements of self-defense to aid the bench and the bar.

> Self-defense is comprised of four elements:
>
> > First, the defendant must be without fault in bringing on the difficulty. Second, the defendant must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger. Third, if his defense is based upon his belief of imminent danger, a reasonably prudent [person] of ordinary firmness and courage would have entertained the same belief. If the defendant actually was in imminent danger, the circumstances were such as would warrant a [person] of ordinary prudence, firmness and courage to strike the fatal blow in order to save himself from serious bodily harm or losing his own life. Fourth, the defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance. If, however, the defendant was on his own premises he had no duty to retreat before acting in self-defense.
>
> *State v. Davis,* 282 S.C. 45, 317 S.E.2d 452 (1984). Self-defense is a complete defense; if established, a jury must find that the defendant is not guilty. *Id.*
>
> The first element of self-defense requires evidence that a defendant not be at fault in bringing about the difficulty. **Often a battered woman will kill an abuser during a confrontation when the man clearly is the aggressor, so that this element is satisfied. However, it may be possible to characterize a battered woman as the victim of a continuing assault at the hands of her batterer. When this is the case, the first element of self-defense may be satisfied even though the battered woman acts at a time when the batterer is not physically abusing her.**
>
> The second element of self-defense requires a defendant to actually have been in imminent danger, or to have believed that, at the time she acted, she was in imminent danger of death or serious bodily harm. At times, a battered woman actually is in imminent danger of violence when she acts. Depending upon the facts of each case, **the second element of self-defense also may be satisfied when a battered woman believes she is in imminent danger of death or serious bodily**

harm even though her batterer is not physically abusing her when she acts. This is because battered women can experience a heightened sense of imminent danger arising from the perpetual terror of physical and mental abuse. Often the terror does not wane, even when the batterer is absent or asleep. *State v. Norman,* 324 N.C. 253, 378 S.E.2d 8 (1989) (Martin, J., dissenting) (citing Comment, *The Admissibility of Expert Testimony on the Battered Woman Syndrome in Support of a Claim of Self-Defense,* 15 Conn.L.Rev. 121 (1982)).

The third element of self-defense requires a defendant to show that a reasonable, prudent person in the same or similar circumstances would have acted as the defendant did in order to save herself. **Where torture appears interminable and escape impossible, the belief that only the death of the batterer can provide relief may be reasonable in the mind of a person of ordinary firmness.** *See Norman,* 324 N.C. at 270, 378 S.E.2d at 18. (Martin, Jr., dissenting).

Under the fourth element of self-defense, a defendant must show that she had no other means of avoiding the danger than to act as she did. **A battered woman who is held hostage by her batterer may have no other means of avoiding a battering than to kill her batterer in self-defense. Moreover, a battered woman often may be able to claim the inapplicability of this element of self-defense because she acts while on her own premises, and has no duty to retreat.**

Our interpretation of the relationship between the battered woman's syndrome and self-defense is cursory, at best, and should not be construed as this Court's last word on the subject. Our law will continue to evolve as the scientific community's understanding of the battered woman's syndrome develops and society's comprehension of the condition becomes more sophisticated.

Robinson v. State, 308 S.C. 74, 78–80, 417 S.E.2d 88, 91–92 (1992)(emphasis added).

The Applicant complains that his counsel did not adequately investigate or secure an expert witness concerning battered spouse syndrome. The trial record shows that counsel made a motion for a continuance prior to trial based upon a request to retain an expert in battered spouse syndrome to evaluate the Applicant. The Applicant had claimed that he had two incidents of violence by the accuser, Anne Brown, when law enforcement had been called. Trial Tr.p. 13.-15. Counsel advised the trial court that a basis for the continuance was that they were pursuing a mental health expert on battered spouse syndrome or fight-or-flight response based upon information related to the prior

incidents when the Applicant was a victim. At the time counsel had not had the Applicant examined . Counsel explained that he had tried to have contact with four different psychologists but without success. Trial Tr.p. 39, l. 5-10.[3] The Solicitor took no position in the matter, leaving it to the court's discretion. Trial Tr.p. 40. Judge McMahon deferred ruling on the motion until there was a follow up report. Trial Tr.p. 40-41. Later, counsel advised the Court that Dr. Maddox indicated that she would be available to examine the Applicant the next week, but would not be available to testify at the second term in July. Trial Tr.p. 54-55, p. 68.. Counsel Story indicated to the Court that he began contacting the potential expert witnesses on June 7 after they received notice for the trial. Trial Tr.p. 69-70. Upon review of the matter, Judge McMahon denied the motion for continuance concluding the request as a part of gamesmanship, concluding under the facts of the assault with parties in a relationship that counsel would not have considered self defense or battered spouse syndrome earlier. Trial Tr.p. 71-72.

Counsel Story testified in this PCR action that he did not believe that the Applicant suffered under battered spouse syndrome. As initially found by this Court, Story listed reasons for that as the number of stab wounds inflicted on victim, Brown did not report to law enforcement, the fact that he left victim there and she was found quite some time later by kayakers, and the fact that Brown had searched on his phone for information about her, after the incident. Evidence in the trial record supported these reasons.

Trial Testimony of the Victim

[3] Counsel Story indicated that that Dr. Amanda Salas had not gotten back to him, Dr. Vicki Bolus no longer does this type of work, Dr. Lois Veronen was on vacation in Alaska and would not return until this date, Dr. Donna Maddox was unavailable due to a trial in Winnsboro. Trial Tr.p. 39-40. Counsel also indicated the possibility of another expert, Dr. Catherine Ross from Sistercare, but thought there may be a conflict if the victim had attended classes there. Trial Tr.p. 40.

The victim's testimony described the joint decision to meet that day on the Riverwalk, which was supported by her text messages. Tr.p. 234-236. When she arrived, the Applicant was already there. Tr.p. 237.She described that during their conversation while walking along the path he told her that he intended to kill her and then kill himself. Tr.p. 239. At that point, he began to stab her in various parts of her body leading to her falling on the ground. He continued to stab her while she was on the ground as she attempted to feign death. She described that he then started to drag her by her hair up a hill. She said he then put branches over her while he continued to stab her. Tr.p. 240-242. At that point, he left her. She then tried to move down the embankment to get into the water to avoid him if he came back because he could not swim. Tr.p. 242. She began to float down the river and was seen by people on a dock who rescued her. Tr.p. 244.

On cross-examination, the defense stressed that it was a mutual agreement that they met that day. Tr.p. 302.She did not deny texting the Applicant asking to meet that day in a face to face meeting and calling him numerous times that day. Tr.p. 302-308.

Evidence of Injuries on Brown and the Victim

After the incident, when Joshua Brown checked into Providence Hospital on August 11 at 12:53 for a superficial laceration on his right hand, he indicated that he was washing dishes and he cut his hand. Tr.p. 436, 439.

The trauma doctor from Palmetto Health described the injuries to the victim as a level one trauma unit response which was the highest level. He described that she had multiple stab wounds throughout her body and blood loss that could have led to her death. Tr.p. 508. He also found the existence of defensive wounds. Tr.p. 497- 507. Of significance, he described the back injuries. Tr.p. 508. He described them to suggest that more forceful injuries would have occurred if a body was lying on the ground. This was because all the force from the weapon would be directed at the

body if it was up against an immobile object, as opposed to running away which would mitigate the force. Tr.p. 508.[4]

Evidence of Texts and Search History by Brown

Evidence about the texts between the victim and the Applicant was presented in the trial in a summary fashion, concerning the day of the incident. Tr.p. 607. The information also revealed a search history from the Applicant's phone subsequent to the incident of a 2:26 search of the Cayce Police Department, searches on Facebook for the victim and Javon Jones, address searches, , WIS, among others. It also showed a number of matters being deleted. Tr.p. 620-625. This suggests to this Court that the Applicant was searching for any information about the victim's status and whether her body had been located or whether he had been charged.

On cross-examination, the defense developed that the date of the extraction of the phone was on August 15 2015. Tr.p. 634. The officer assigned to the Secret Service indicated that they used Cellebrite software in the original extraction. Tr.p. 635. He stated since then the software was updated in 2018 and allowed a deeper extraction ability to do a physical extraction as compared with the original logical type and file system extraction in 2015. He stated that when preparing for the trial after receipt of a subpoena, he indicated to the solicitor's office that he could do a physical extraction. Tr.p. 637. He stated that he performed the extraction 3 days before on June 18, 2018. He noted that there were additional audio and video files found that were not located in the 2015 extraction. Tr.p. 639.He determined that some of the videos were labeled secret. Tr.p. 640. The witness indicated that he made the 2018 extraction available to the defense expert, Chris Watkins. Tr.p. 644.

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[4] On cross-examination, defense counsel Gilreath pointed out that there was no evidence of debris or foreign objects in her hair, no trauma to her head. Dr. Watson testified that there were 20 wounds on her body. Tr.p. 515.

Evidence of Brown's Behavior after the Incident

The State also presented evidence of his lack of cooperation with police after the incident. Cayce lead investigator Cal Thomas indicated on August 11 2015 at around 2:30 was contacted by the Applicant and agreed to come to the police department in one-half hour, but he did not show. Tr.p. 657-659, 675. Investigator Thomas contacted him again by phone at 3:30, however he did not hear back from him after that call. Tr.p. 660. In order to locate him, the police made a bulletin for law enforcement in the area. He was arrested the next day at April Carter's residence. Tr.p. 663-664.

Directed Verdict Denied

The Applicant made a motion for a directed verdict. The State responded that the Applicant had been identified as the assailant by the victim. A physician and EMS personnel testified about the extent of her injuries, which supports attempted murder. There were in the vicinity of 20 stab wounds resulting in massive blood loss. Tr.p., 679. The trial Judge denied a motion for directed verdict, finding a specific intent to kill. Tr.p. 679.

Defense Case Begins

The defense case began with testimony from the Applicant's second cousin Clarence Smith. Tr.p. 683. As noted below, it was during the testimony about Smith's alleged viewing of a lost video of an alleged scissors attack by the victim upon the Applicant that developed Judge McMahon's comments about counsel Story. *This will be more fully addressed by the Court in a later section.*

After argument related to the evidentiary motion about Smith's evidence about the videoed confrontation, the Applicant then sought to have his public defenders removed from his case because he no longer felt comfortable with them. Tr.p. 699. He asserted it was based upon the

animosity that had been presented between the Court and his counsel the previous day. Tr.p. 699. Judge McMahon declared that he had no animosity toward the Applicant or his attorneys and the jury was not in the courtroom. Tr.p. 700. After hearing from the Applicant, the court denied the motion. Tr.p. 704.

Counsel Story made a motion to poll the jury to see if they had heard anything yesterday related to Judge McMahon's discussion with counsel Story. The counsel called Lisa Williams, the public defender's paralegal, who counsel claimed was in the "back room" and contended that she had heard everything clearly that was said. Tr.p. 705-712. However, Williams testified *in camera* that she was initially in the courtroom when witness Smith began testifying. After the first question and a matter of law was made, she left to go to the restroom. She indicated that she did not hear anything in the restroom, but when she entered the hallway she heard the judge speaking very loudly and was startled by the loudness of his voice which increased while she was outside. On cross-examination, she indicated that the jury was in the jury room throughout this period. Tr.p. 707.

Judge McMahon called the foreperson of the jury under oath as a court witness. He inquired if she recalled when the jury was sent out the evening before they were excused for the night. Tr.p. 708. She indicated that they were straight to the jury room. Importantly, the foreperson indicated that during that period they did not hear any activity or voices coming from the courtroom. Tr.p. 709. In light of the questioning, counsel Turnblad indicated that they did not need to poll the jury. Tr.p. 710. The judge ultimately denied the motion. Tr.p. 711-12.

Guilty Plea to Attempted Murder is Entered with a Negotiated Range.

After a brief recess, the Applicant entered a guilty plea to attempted murder. Tr.p. 712-740. Judge McMahon initially questioned counsel Story that he, Turnblad and Gilreath represented the

Applicant. Judge McMahon confirmed that counsel had explained to the Applicant the charge of attempted murder , the elements, the possible punishments, and his rights, including his right to a jury trial. Counsel Story indicated that the Applicant understood his rights and indicated to them his desire to plead to attempted murder. Tr.p. 713.

The trial court next addressed the Applicant. The Applicant indicated he was 32 years old at the time with a 10th grade education. He indicated prior to his incarceration that he was employed at McDonalds for 20 months. Tr.p. 714. The applicant denied he was under the influence of any drugs or alcohol and understood what he was doing that day. He indicated he was not aware of any physical, emotional or nervous problem that could impact his understanding. The Applicant confirmed to Judge McMahon that his counsel had explained to him the charge, the possible punishments, , and his rights, including his right to a jury trial, and that he understood those rights. Tr.p. 715.

Judge McMahon next went over the indictment for attempted murder with him, including stabbing the victim multiple times with a knifelike object. Tr.p. 715. Judge McMahon next went over the constitutional rights that the Applicant was waiving, including his right to remain silent, his right against self-incrimination, and his right to say nothing at all. He also advised him that he was giving up his right to have a jury prove him guilty beyond a reasonable doubt as their decision based upon the evidence. He stated that the Applicant was presumed innocent and the State would have to present evidence to convince 12 members of the jury that he was guilty beyond a reasonable doubt. In addition, the Court advised him that he was waiving his right to confront the witnesses against him, with the right to see, hear, and cross-examine that may be called against him at trial and the right to subpoena and call witnesses. The Applicant asserted that he

understood. Tr.p. 716. The Applicant denied that he had any questions to ask the Court about these rights. Importantly the following inquiry occurred between the Court and the Applicant:

> THE COURT: And, as you well know, you've been in a jury trial since Monday, I believe. It is now Friday and the jury is present, available to continue with your jury trial. You understand that will end? You will not continue with your jury trial. Do you understand that?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Is that what you want to do?
>
> THE DEFENDANT: I'd like to accept the plea. I don't want to go forward with the trial.
>
> THE COURT: You'd like to what?
>
> THE DEFENDANT: I'd like to take the plea. I no longer want to go through with the trial.
>
> THE COURT: You'd like to no longer go forward with the jury trial?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Okay. Understanding, then, the nature of the charge against you and the consequences of the guilty plea, how do you wish to plead to this charge of attempted murder, guilty or not guilty?
>
> THE DEFENDANT: I plead guilty, sir.
>
> THE COURT: You understand that when you plead guilty, you admit the truth of the charge that is made against you?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Did you commit this offense?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Plea negotiations, Solicitor?
>
> MS. MAYES: Yes, sir, Your Honor. In negotiations that have taken -- that have gone forward today, the State is withdrawing -- or has withdrawn notice of life without parole. The recommendation or negotiated sentencing range, Your Honor, would be 20 to 30 years on this charge.

THE COURT: Is that the full and complete plea negotiations, Mr. Story?

MR. STORY: Yes, Your Honor.

THE COURT: Is that your understanding, Mr. Brown?

THE DEFENDANT: Yes, sir.

THE COURT: Is there anything more to that understanding, the plea negotiations, in your mind, Mr. Brown?

THE DEFENDANT: No, sir.

THE COURT: Do you still wish to plead guilty?

THE DEFENDANT: Yes, sir.

THE COURT: Has anyone promised you anything or held out any hope of reward to get you to plead guilty?

THE DEFENDANT: No, sir.

THE COURT: Has anyone threatened you or used force to get you to plead guilty?

THE DEFENDANT: No, sir.

THE COURT: Has anyone used any pressure or intimidation to cause you to plead guilty?

THE DEFENDANT: No, sir.

THE COURT: Have you had enough time to make up your mind as to whether or not you want to plead guilty?

THE DEFENDANT: Yes, sir.

THE COURT: Are you pleading guilty of your own free will and accord?

THE DEFENDANT: Yes, sir.

THE COURT: I want to ask you about your attorneys now. Are you satisfied with the manner in which your attorneys have advised you and represented you?

THE DEFENDANT: Yes, sir.

THE COURT: Have you talked with your lawyers as often and for as long as you feel necessary for them to represent you properly?

THE DEFENDANT: Yes, sir.

THE COURT: Do you need any more time to talk with your lawyers?

THE DEFENDANT: No, sir.

THE COURT: Have you understood your talks with your lawyers?

THE DEFENDANT: Yes, sir.

THE COURT: Have your lawyers done everything for you that you feel like they could have done or should have done?

THE DEFENDANT: Yes, sir.

THE COURT: Have your lawyers done anything in this case that you feel like they should not have done?

THE DEFENDANT: No, sir.

THE COURT: Are you totally and completely satisfied with your lawyers' services?

THE DEFENDANT: Yes, sir.

THE COURT: Do you have any complaints you want to make about any of your lawyers, the solicitors, or any police officers involved in your case?

THE DEFENDANT: No, sir.

THE COURT: Have you understood my questions?

THE DEFENDANT: Yes, sir.

THE COURT: Is there anything you'd like to ask me about what we've just been over?

THE DEFENDANT: No, sir.

THE COURT: You understand you have a right to appeal your guilty plea and the sentence of the Court and that you or your lawyer must do this within ten days?

THE DEFENDANT: Yes, sir.

THE COURT: Solicitor, I have heard the State's case, which lays a factual foundation for me in regard to the taking of the plea. However, if there's anything you'd like to add to the facts of the case, I'll be glad to hear it.

MS. MAYES: Yes, sir, Your Honor. The prior record is armed robbery of 2002. That conviction was out of Richland County. Also, the victim, Ann James, Your Honor, has testified in court; however, she has not addressed the Court regarding victim impact testimony and does wish to do so at this time.

THE COURT: And next I was going to ask does Ms. James wish to address the Court at this time.

MS. MAYES: Yes, sir, Your Honor.

THE COURT: All right. I'll be glad to hear from Ms. James. If you'd come around to the podium, please. Yes, ma'am?

THE WITNESS: Your Honor -- THE COURT: And speak -- as I tell everybody, speak up for me so I can hear you, please.

MS. JAMES: Yes, sir. Your Honor, I just want to thank you for the time, thank everybody that's been here. It's been a long process. It's been a process that's been overdue. It's almost been three years. The amount of pain and agony and emotional distress that I encountered and endured through this is undescribable. Having an eight-week baby -- nine-week-old baby when this happened, I could never imagine that. It changed my life in so many different ways. My kids wouldn't have never had a mother. I would have never had an opportunity to go on and pursue my life and career as I have done. I have my daughter sitting here now that is now -- that will be 20 next month –

THE COURT: This is your daughter to my front right?

MS. JAMES: Yes, sir. And it has impacted my children. You know, every day, I see these scars. My three-year-old asks, Mom, what happened? Are you hurt? What's that? I'm always going to be reminded of this. I feel like there's no amount of time that you could give Mr. Brown that could ever take back the pain and the suffering that I went through. And I'm just asking Your Honor, if you could please just give him the maximum of this sentence. And that would -- it would not satisfy me, but it would be satisfaction for what he's done.

THE COURT: Thank you, Ms. Brown. Anything further, Solicitor?

MS. MAYES: No, sir Your Honor.

> THE COURT: Thank you. I find that there's a factual basis for this guilty plea to attempted murder. I find that the defendant's decision to enter this plea of guilty is freely, voluntarily, knowingly, and intelligently made; that he has had the advice and counsel of very competent attorneys, experienced, with whom he says he's well and totally satisfied. His plea of guilty is, therefore, accepted. . . .

Tr. 717, l. 9 – p. 723, l.. 24.

Defense Case in Mitigation

At that point, counsel for the defense was called upon to make it plea in mitigation after the trial court's acceptance of the guilty plea. Defense counsel Gilreath presented the case in mitigation. She emphasized that the Applicant had a 10th grade education and was 32 years old. She stated that he was a truck stocker at McDonalds which was his only job. Counsel pointed out that his prior record was presented to the court earlier and happened when he was very young 16 tears before.[5] She noted that the majority of his time since childhood was spent in prison, which the court was aware can have a profound impact on how one perceives the world around him. She asserted that after his release from prison, he attempted to do the right thing. He got married, began working at McDonalds and tried to support his family. However, his relationship was volatile for a long time which led to the separation and trying to work things out. Tr.p. 724-725.

Gilreath pointed out that that the text messages indicate that after the divorce they were still telling each other that they loved them. Gilreath speculated that if the divorce had happened sooner this event would likely not have occurred. Although his family had recommended to him to get counseling, but he was to prove upon release from prison that he could be a normal person and take care of himself and his family. She asserted that he approached the facility but had been turned down. After that, Gilreath contended that he was embarrassed and did not want to be

[5] During the decision on whether to testify, the trial judge concluded that the Applicant's prior armed robbery conviction from 16 years before could not be used to impeach the Applicant if he testified. Tr.p. 483-488.

perceived as begging for help, but there was not a cutoff with his relationship which turned toxic. The Applicant at some point tried to get a CDL license, though about writing books and wanted to start a restaurant. Tr.p. 725-726.

Gilreath indicated that her relationship with the Applicant was nothing but polite and respectful with the other attorneys. She indicated that the Applicant had two 3 year old girls and he has consistently indicated that he loves them, misses them and wants to be part of their lives. She noted that they had just been born when all this happened so he really was unable to spend much time with them, which weighed heavily on him for the decision he made today (which removed the LWOP possibility). Tr.p. 727-727.

Gilreath further indicated that the Applicant indicated that he did not go to this location with any intention to commit something like this. And claimed "he just snapped." He claims to not be sure when this happened, but it is the result of this volatile relationship. Tr.p. 727.

Gilreath stated that the Applicant had family support and a cousin is present to make a statement and she indicated that they did not anticipate a plea today so other family members would have wanted to appear. Tr.p. 727. She stated that they were asking for mercy. She claimed he had sincere regret and would have wanted to go back and change everything. She sought a sentence at the lower end of the range. Tr.p. 727.

Counsel Story added that he had known the Applicant since he began working in the Public Defender's Office in February 2017. He recognized that he would do a significant portion of time but he always brought up how much he loved his children. Counsel Turnblad echoed the same, although he had only been involved about two weeks. Tr.p. 728.

The defense presented in mitigation cousin Rayneisha Smith. She advised that court that he is the Applicant's cousin who grew up with him. She stated that he did not have any siblings.

She found him to be a loving man who owns up for his actions and does not put the blame on anyone else. Tr.p. 729. She also found him to be an honest man and he "loves hard." Tr.p. 729.

Cousin Clarence Smith also spoke on the Applicant's behalf. Tr.p. 730. He contended that the Applicant was not a violent person, but found that he had a toxic relationship with his former wife. He felt that the Applicant "probably had a snapping moment in kind from being abused, but I can't really speak about that. Only God would know that." Tr.p. 730, l. 13-16.He stated that the Applicant did not deserve the maximum penalty because he had been through so much abuse. "If I could show the pictures and videos and all this, I would be able to do that, but I can't." He stated that he felt that the Applicant was a good guy who had been out for only 18 months. He was 15 when he began his prior sentence. Smith indicated that the Applicant raised him and he has not been in prison yet and that he looks up to the Applicant. Tr.p. 731. Smith pointed out that the Applicant in his earlier armed robbery sentence was just the driver who got blamed under hand of one, hand of all. He ended with stating he did not deserve the maximum.

The Applicant then made his own plea in mitigation:

> THE DEFENDANT: Your Honor, I'd like to say I'm sorry for my actions. I allowed my emotions to take over me mentally. I can't remember every detail of that day, but I know it hurt me truly and immensely into my heart to hurt somebody that I truly love. I love this woman with all my heart. And I'm here to take responsibility for what I've done that day.
>
> Like I said, I allowed my emotions to take over me mentally that day. And to this point, you'll never know how hard and deepfully hurt I am for that action. This is a person that I will always love. And I will always miss that little girl. And I'm here to take responsibility for my actions. And, like I said, I love hard. I love hard.
>
> And I'm a young man who came off a straight path and went sideways for that couple hours. I just want you to know that I'm not that person that was portrayed in those pictures. That was just a bad hour, bad moment in my life. I would just like to take responsibility and say that I'm truly sorry for that day. And, if I can, I would like to apologize to the victim.

THE COURT: You may.

THE DEFENDANT: Ms. Ann James, I would like to apologize for what I've done. I hope some day you can forgive me for what I done. I would ask the kids -- I hope the kids can forgive me also, maybe one day. I know you don't understand, but I truly would like to apologize to you.

Tr.p. 732-733.

Judge McMahon began his sentencing of the Applicant by commending the attorneys for their resolution of the case. Tr.p. 733. Judge McMahon initially indicated that he did not think this case was a life without parole case based upon his experience. Tr.p. 734.He noted that he was impressed with the victim, her testimony and her demeanor throughout the trial. He determined that he was also impressed with the Applicant who had been very respectful to the court , supported by the comments of his lawyers. Tr.p. 734.

Judge McMahon then advised the Applicant that he does not judge defendants as good or bad people, but judges behavior. He pointed out that the lawyers had used the word "toxic" as describing the relation with the victim. their relationship and the facts speak for themselves. Judge McMahon indicated that he was impressed that family members spoke on the Applicant's behalf. Judge McMahon noted that he can deal with the truth, but be cannot deal with untruths. Judge McMahon also spoke to the victim about how these types of wounds never heal.

Judge McMahon questioned why some people asserted that he did not have a heart, because he takes no joy in taking away a person's freedom, which he has to do because it is his responsibility. He indicated that it was with a heavy heart that he sentences the Applicant to prison. He opined that his attorneys had done an excellent job for him in his observations. He then sentenced the Applicant to 23 years in prison. Tr.p. 736.

In speaking to the jury after the sentence, Judge McMahon indicated that it was the last person he will sentence to prison because of his retirement. Tr.p. 739.

Findings Related to the Allegation

This Court concludes that the Applicant has failed to meet his burden of proof. The initial issue is whether counsel was ineffective in failing to seek the opinion of an expert on battered spouse syndrome. The Court finds that the Applicant has failed to present an expert in battered spouse syndrome to support the claim that counsel was ineffective. This Court cannot speculate that there was evidence to show that his investigation related to the claim was ineffective. The Court is aware that the Applicant claims he was in a volatile relationship with the victim. However, they had separated at the time and the Applicant was living elsewhere. The record further reflects that counsel Story did not think it met the strict definition of battered spouse syndrome, but was still seeking an expert opinion once the trial date was set, however without success due to the unavailability and the Court's refusal to grant the continuance. This Court is aware from the trial record that the Applicant claimed in his statement to law enforcement that it was self-defense. At the PCR he claimed that his wife had stabbed him first and he responded. The record contained evidence that the Applicant went to the hospital later that day with a superficial wound which he claimed to the doctor was from a wound washing dishes, not claiming that it occurred from a violent assault when he was acting in self-defense. Tr.p. 436, 439. The record also includes information that he was an alleged victim in incidents in 2014 and 2015 when the victim was charged, but that they were resolved in *nol prossed* charges and expunged records. Tr.p. 15-54. In those discussions, Judge McMahon noted that the Applicant could testify about those incidents if he testified. Tr.p. 47.[6] In addition, during her testimony the victim was asked about the incident

[6] The State made a *motion in limine* prior to the victim's testimony to limit the type of testimony under *State v Clinkscales*, 231S.C. 650, 99 99 S.E.2d 663 (1957). Tr.p. 98. The State also made a motion under that if there is testimony that gets into primary aggressor under Rule 404(a), that the State has witnesses in terms of showing that the Applicant was the primary aggressor. Tr.p. 165. The State asserted that it had no information about the 2014 incident. However as to the

in 2015 when the Applicant was hit with a cellphone that she claimed occurred when they struggled over the cellphone. However, the victim also denied ever trying to stab the Applicant with scissors. Tr.p. 295.

Since the Applicant failed to present an expert on battered spouse syndrome in these proceedings, it is too speculative to assume that the opinion would be favorable or unfavorable to the defense. What the Court has before it is one added incident that was noll prossed that the evidence was a struggle over a cellphone , an unknown *noll prossed* incident and a denied incident where the Applicant claimed apparently that he was stabbed with scissors at some unidentified time. This Court must concluded that counsel was not deficient in failing to pursue these matter more fully with an expert when the Applicant has failed to present in these proceedings an expert opinion that the Applicant's assault was the product of battered spousal syndrome.

2015 incident report where the Applicant alleged he was struck by a phone. The State was also aware of an incident prior to the stabbing incident where the Applicant pushed Ms. James to the ground while she was pregnant with his child as an example of what would potentially come into play if he claimed that she was the primary aggressor. Tr.p. 164. Prior to the cross-examination of the victim, counsel Story brought up the State's prior objection to potential examination about prior incidents. Tr.p. 269. Counsel Story intended to ask the victim about the cellphone incident when the Applicant was allegedly struck in the eye. The trial court noted that in homicide cases prior difficulties between parties is admissible, but general details are inadmissible. Tr.p. The court opined that the defense could ask if the victim had struck the Applicant with a cellphone and if Brown had injuries from it, but nothing further. Tr.p. 274-276.

During the cross-examination of the victim, the defense asked the victim if during the marriage whether there was an incident when the victim tried to stab the Applicant with scissors that she denied. Tr.p. 295, l. 1-4. The defense claimed that this was a different incident and that the factual basis would be developed in the defense case. Judge McMahon noted that if he failed to present it the evidence would be stricken from the record. Tr.p. 295. (The defense sought to present this information during the testimony of Clarence Smith prior to the entry of the plea. Tr.p. 684-695).

When asked about the incident with the cell phone, the victim stated that she and the Applicant were struggling over the cellphone and he ended up getting hit. Tr.p. 296. She stated that she filed for divorce in March 2016 which was pending at the time of the charged incident. Tr.p.297.

More significantly, the Applicant has failed to prove, assuming deficiency, in failing to more timely seek and acquire an expert, that the Applicant would not have pled guilty and continued with the trial. As noted above, there is no indication how the expert witness would have testified. Further, as it relates to the introduction of evidence, at the time of the plea, counsel had already put in evidence through cross-examination of the victim about the cellphone incident and the denied scissors incident. In addition, the defense had prepared an argument to allow further information to be presented by Clarence Smith and ultimately the Applicant if he had not plead guilty. This information did not *per se* create a conclusion of battered spouse syndrome as noted above because the isolated incidents do not present that he was the victim of a continuing assault at the hands of the victim nor from perpetual terror of physical or mental abuse of the victim when he arranged the meeting and its location.

As noted above, at the time of the plea, the Applicant was aware of this information and chose to avoid the possibility of life without parole and submit himself to the negotiated range of punishment. The Applicant made statements to the plea judge that carry a presumption of verity that he wanted to plead guilty and particularly that his lawyers had done everything they could have done and he was satisfied with counsel. The Court finds that the Applicant has failed to show a reasonable probability that had the counsel secured an expert on battered spouse syndrome the Applicant would have continue with the trial, rejected the plea offer and risk life without parole. This portion of his allegation must be denied.

Failed to Retain or Use Cellphone Expert

In his second specification, the Applicant contends that counsel was ineffective in failing to utilize a cellphone or digital forensic expert. The focus of this argument surrounds the Applicant's attempt to locate what he contended was a video of an earlier incident when the victim

attempted to stab him with scissors resulting in an injury. The records support that the defense retained digital forensic expert Chris Watkins. Tr.p. 644. Counsel appeared diligent in addressing matter on his client's behalf. The Applicant indicated to him that there was a video of the incident and possibly photographs related to incidents he had with the victim. When the first extraction was done in 2015 from his cellphone, those suggested matters were not located in the extraction. In preparation for the trial his expert reviewed the extraction and learned that it was done using Cellebrite with the available software at that time which only did a logical type extraction. He learned that Cellebrite had been updated since 2015 and in 2018 allowed for a physical extraction which created an enhanced study of the phone's data and include information about deletions. This was an initial basis of the continuance motion at the outset of the trial to allow for the newer software to be used. Tr.p. 28-30. Counsel complained that only the original extraction from 2015 had been turned over. Counsel acknowledged that that had been turned over to his expert (Watkins) but the defense wanted a greater extraction done using the 2018 available software from the Applicant's and victim's phones. Tr.p. 31-35. The Applicant's counsel confirmed that a larger time frame extraction was done by his expert on the Applicant's phone, but not the victim's phone. Tr.p. 32. The State asserted that the raw data from the phone was still in law enforcement custody, but the original results from the 2015 extraction had been turned over and allow the defense to do a second extraction. The State indicated that the defense can do a second extraction. Tr.p. 37. Judge McMahon deferred ruling on the enhanced extractions and request for continuance until it was done. Tr.p. 41-43.

Subsequently counsel Gilreath advised the Court that she had learned from their expert that they had learned that the new software should be able to recover the greater information. According to Gilreath, the state's expert told the defense expert this had been reported to the solicitor's office

and that they would be able to do a new extraction with the new software and obtain additional information. Tr.p. 55-56.

The Solicitor's Office responded that it did not seek a new extraction when it learned of the new software. She noted that since the victim did not have the phone with her during the incident, but left it in the car, it would not have that much value. Further, the Applicant's phone was still active from date of the incident until the time of his arrest. Tr.p. 63.

The record also showed that a second extraction was done by the State during the week of court using the updated Cellebrite software. Tr.p. 636.This physical extraction revealed more information. This extraction developed the presence of a number of audio and video files that were not located in the first extraction. Tr.p. 639. The state digital witness indicated that he reviewed the videos they recovered. He noted that the app used to create some of the videos identified them as secret. Tr.p. 639-640. The evidence at trial did not specifically indicate that the video the Applicant was seeking that allegedly showed the scissors incident was ever recovered in the second extraction.

This Court finds that the Applicant failed to prove deficient performance related to the investigation and retention of expert Watkins. The Applicant has failed to show that either Story or Gilreath erred in their preparation or presentation during the trial related to the investigation of the Applicant's and victim's cellphone. Further the Applicant has not presented any new or relevant data that was not presented to the Applicant prior to his decision to plead guilty or subsequent to the plea that reasonable counsel should have presented. He failed in his burden of showing deficient performance.

This Court further must find that Sixth Amendment prejudice has not be proven. As stated above, the information that the Applicant had prior to the entry of the plea is the same information

that is presently before this Court. The continued representation about the possible existence of a video or other digital material has not been proven to this Court. The Court has concluded that the guilty plea was freely, voluntarily and intelligently entered at the time of its entry. The Applicant has not presented any reasonable probability that would have caused him to have continued with the trial rather than have pled guilty. Under *Strickland* and *Hill v. Lockhart*, he had failed to show 6th Amendment prejudice.

Comments by Trial Judge

This Court finds that the allegations related to the interaction between the trial judge and counsel Story do not require post-conviction relief. The claim is raised as a claim of ineffective assistance of counsel. In light of the entry of the voluntary guilty plea, this ground is without merit.

The record shows that during the examination of defense witness Clarence Smith, Smith was asked whether he had ever witnessed any violence that the victim had committed against the Applicant. The State immediately objected claiming that the witness had given a statement that he denied having any specific knowledge of incidents between the parties. Tr.p. 685.Counsel Story then indicated that the witness was going to assert to seeing injuries from a confrontation on the Applicant in a video on a cellphone that was shown to him. Tr.p. 685. Counsel claimed it was not hearsay because he saw the video and recognized the parties.. Counsel confirmed to Judge McMahon that the witness did not observe the incident, but contended it was not hearsay. The State urged, relying on Clinkscales,[7] that it did not allow evidence of prior difficulties to come in

[7] *State v. Clinkscales*, 231 S.C. 650, 99 S.E.2d 663 (1957) (finding testimony about prior difficulties between a husband and wife was admissible against husband in a murder case as long as specific details were not revealed; stating it is well settled that in assault and battery and homicide cases, evidence that the accused and prosecuting witness or the deceased had a previous difficulty is admissible, but the details of such difficulty are inadmissible; evidence of a previous difficulty being competent only to show the animus of the parties, and thus aid the jury

and argued that a prior video taken by somebody is hearsay. Tr.p. 686. Judge McMahan question whether somebody just watches a video can come in and talk about what they saw. Tr.p. 687.The State asserted that the witnesses information comes from conversations with the Applicant so it is hearsay.

Judge McMahon sought to clarify the source of the witness's knowledge. Counsel Story claimed it was from the video he alleged that he watched. Counsel Story claimed that the witness saw the injuries on the Applicant, but did not see the victim inflict those on the Applicant. Tr.p. 688. The judge then complained to the counsel about why he was being made to cross-examine counsel and claimed it was disrespectful. Tr.p. 689, l. 1-6. Counsel confirmed that the witness had not observed any acts of violence. Tr.p. 689.

The following then occurred:

> THE COURT: Well, why don't you tell me that to start with instead of me having to have this type of dance and this type of gamesmanship? Why?
>
> MR. STORY: Your Honor, I answered your questions.
>
> THE COURT: No, you did not. You were not truthful with me. You said he saw the injuries. I said inflicted? No. I had even prefaced my remarks by saying he saw the injuries, somebody else told him that they came from her.
>
> Sheriff -- I'm not taking you into custody, but just have him sit in the courtroom. Because you cannot talk to anybody during this brief recess. Don't think I'm talking you into custody. Okay? . . .
>
> . . . I want briefs from both parties by 8:00 in the morning on this issue. And if I find one thing untowards in it, bring a lawyer, because there's going to be a contempt hearing.

Tr.p. 689, l. 10-p. 690, l. 4. The Court then released the jury. The Court asked the Court Reporter to prepare a transcript of the colloquy.

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in reaching the conclusion as to who probably was the aggressor, and what demeanor each party had reason to expect from the other when they met and the fatal difficulty occurred)

The next morning, the trial judge took up the issue as to the objection raised against Clarence Smith's testimony. Counsel Story indicated they submitted a brief the night before by email, as well as the State. He asserted the incident with a hammer under Rule 803(2) was an excited utterance and an exception to hearsay. He asserted that the defendant made statements shortly after the occurrence. Concerning the video, the defense contended it was nonassertive conduct and would not be hearsay. Tr.p. 691, l. 8-25. Counsel contended in a second incident, the witness said he saw the alleged victim running toward the Applicant who was recording a video while backing up. Counsel Story contended that conduct would be a violent act that he saw on the cellphone and is nonassertive conduct. Counsel asserted these were two separate acts. Tr.p. 692. Counsel Story indicated the time frame of these acts is not clear, but it is during the marriage. Counsel confirmed that the witness did not observe the hammer incident. As far as the running incident, counsel stated that he did not observe it directly, but saw it on the cellphone video that the Applicant showed him.

Assistant Solicitor Usry asserted that neither incident should be admitted. She contended that they did not know when they occurred but the particular case being tried happened on August 11, 2015. She claimed that those incidents would have no bearing on the Applicant's state of mind that day. She further asserted that theses incidents were hearsay. Concerning the hammer incident, when Clarence Smith, the alleged witness, was interviewed by an investigator on February 24, 2016, he indicated he learned about it after it happened, so Solicitor Usry claimed he had not witnessed the incident. Solicitor Usry stated that they had no idea when the video was taken. She claimed it would have been shown and the act described within the video does not appear to be an act of violence to even be considered. In the interview Smith described it as a recording of them arguing and that she is in the background trying to charge. Usry asserted that the witness's

recollection is not consistent and he is not 100% sure what he saw. Tr.p. 694-695. Solicitor Usry claimed that the State has never seen this video so that we have no idea what we are arguing about or whether it exists. Tr.p. 695.

Judge McMahon then indicated that a witness can testify under Rule 602 if he has personal knowledge. Although prior difficulties are admissible, the specific details are not. The Court pointed out to counsel Story that he was familiar with the cases. He referred to *State v. Williams*,[8] and *State v. Taylor*.[9] The Court indicated that if his whole knowledge comes from information that he has been shown then he cannot testify about it because he lacks personal knowledge. However, the court indicated that he could not rule until he understands what the testimony would be. He then asked counsel Story if he wanted to call the witness.

Counsel Story indicated he wanted to call the witness *in camera*. Tr.p. 696. He stated that he had his investigator have him and other witnesses who would testify similarly to be at court at 9:00. Tr.p. 696. However, they were not present yet.

At that point, the Applicant wanted to address the Court. Joshua Brown indicated that he no longer felt comfortable with his counsel and wanted them to be relieved. Tr.p. 699.He based it upon the animosity that had been presented between the Court and his lawyers. The Applicant questioned whether he could receive a fair trial. He claimed the yesterday the Court yelled at his counsel and he believed the jury heard it. Tr.p. 700.

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[8] *State v. Williams*, 321 S.C. 327, 468 S.E.2d 626 (1996) (evidence of controversial telephone calls and loud altercations between victim and defendant were admissible to establish strained nature of parties' relationship).

[9] *State v. Taylor*, 333 S.C. 159, 168, 508 S.E.2d 870, 874 (1998) ("In homicide cases, evidence that the accused and the decedent had previous difficulty is admissible. The evidence is admissible to show the animus of the parties and to aid the jury in deciding who was the probable aggressor.")

Judge McMahon responded that he had no animosity toward the Applicant or his lawyers. Tr.p. 700. He noted that the jury was not present during the discussion. He also indicated he like to be told directly the motions and indicated that he was not pleased with the solicitor or the attorneys when these issues were not discussed before the trial. The judge further noted that he had allowed the defense to go into the incident with the telephone and she was questioned about it. , noting that if he hears the testimony he can rule on it. Tr.p. 701 Judge McMahon noted that he had been represented by the public defender's office since he was incarcerated and Mr. Story had represented him since Ms. Henry was transferred in February the prior year. Judge McMahon opined that the defense had professionally and competently cross-examined the witnesses. He denied any animosity toward him or his counsel which Judge McMahon asserted was supported by his ruling on precluding the armed robbery conviction was being used if he testified. Tr.p. 702.He noted this case comes down to who the jury will believe from the parties involved in the difficulty. Judge McMahon further indicated how he thought counsel Gilreath had also handled a significant part of the case with the expert witnesses and some officers. Tr.p. 703.

Although the trial judge indicated his belief that the jury had not heard the discussion between counsel and the court the day before, the Applicant disagreed. Tr.p. 703. As noted previously in this Order the court held an *in camera* hearing with the defense calling their paralegal and the trial court calling the foreperson. Tr.p. 705-712. The earlier portion of this Order on that issue is incorporated by reference.

Findings

This Court finds that counsel was not constitutionally deficient in the manner that he presented the testimony of Clarence Smith. Although the admissibility of the evidence related to the video review was never resolved by the trial court due to the guilty plea, this Court finds

counsel Story's actions were not a violation of the Sixth Amendment and this Court cannot state that no reasonable counsel would have handled the matter similarly.

Rule 602 provides, in relevant part, "A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." The personal knowledge requirement in Rule 602 has similarly been described as requiring "firsthand knowledge -- that which comes to the witness through his own senses, mostly sight and hearing." Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence*, § 6.5 (4th ed., July 2022 update); see also id. § 6.6 ("[P]ersonal knowledge means seeing directly the acts, events, or conditions in question"; "hearing them"; or getting sensory input from "the other senses of touch, smell, or taste."). The threshold showing "is low, requiring only enough 'to support a finding' by some rational juror of personal knowledge." Paul F. Rothstein, *Federal Rules of Evidence*, Rule 602 (2023). Several courts have concluded that a lay witness's careful review of a video recording before trial satisfies the "perception" or "personal knowledge" requirements embodied in Rules 701 and 602. Other courts have similarly held that watching a recording of an event can satisfy the "perception" or "personal knowledge" requirements of Rules 701 and 602. See, e.g., *McRae v. Commonwealth*, 635 S.W.3d 60, 68, 70-71 (Ky. 2021) (citing Kentucky's version of Rules 701 and 602 and upholding a detective's narration of videos, including "events he was not personally familiar with"); *State v. Small*, 351 Wis.2d 46, 839 N.W.2d 160, 165 (Ct. App. 2013) (finding an officer could provide a lay opinion about the contents of a video he had watched 50 to 100 times "because it was 'rationally based' on his 'perception' "); *People v. Fomby*, 300 Mich.App. 46, 831 N.W.2d 887, 890-91 (2013) (finding that an officer's identification of individuals depicted in still photos taken from a surveillance video was "rationally based on his ... perception of the video" under the equivalent of Rule 701, even though he "did not observe firsthand the events depicted

on the video"); *State v. Walker*, 135 N.E.3d 444, 460 (Ohio Ct. App. 2019) (finding that the lead investigator who reviewed surveillance footage he had seized from a home "had personal knowledge of the contents of the video" under the equivalent of Rule 602, even though he "did not personally make or appear in the ... video"), rev'd on other grounds sub nom., *State v. Dent,* 163 Ohio St.3d 390, 170 N.E.3d 816 (2020); see also *Guay v. Sig Sauer, Inc.*, 615 F. Supp. 3d 66, 72 (D.N.H. 2022) (finding that an employee's deposition testimony about the contents of a video, based on "personal knowledge" from having watched the video, could be introduced under Fed. R. Evid. 602, without reference to Fed. R. Evid. 701); *State v. Holley*, 327 Conn. 576, 175 A.3d 514, 538-39 (2018) (noting in dicta that, although courts are divided, "there is significant authority under [R]ule 701 of the Federal Rules of Evidence to support the proposition that a lay witness narrating a video to a jury may state his or her impressions of what is depicted in the video, even if he or she did not observe those events firsthand," and concluding, without deciding whether there was error, that "any error" in the case was harmless).

Some courts, however, have barred lay witnesses from narrating a recording unless they were present at the event depicted. *See Callaham v. United States*, 268 A.3d 833, 848 (D.C. 2022) (rejecting the argument that detectives "obtained personal knowledge" of events "solely by watching recorded surveillance footage"); *Boyd v. Commonwealth*, 439 S.W.3d 126, 131-32 (Ky. 2014) (finding that lay witnesses could narrate segments of a recording depicting events they "perceived in real time," but not parts of the video "they did not perceive in real time"); *Wells v. State*, 604 So. 2d 271, 279 (Miss. 1992) (finding that a lay witness's narration testimony was improper because he did not have "first-hand knowledge of the events depicted on the tape"); *Nadeau v. Hunter Lawn Care, LLC*, 585 F. Supp. 3d 158, 161 (D. Mass. 2022) (barring a witness

from testifying "as to what he saw on [a] surveillance video because he did not perceive those events as they happened").

Plainly there appears to be a split in authority in the country over this similar matter that was not resolved in the Applicant's trial Story credibly stated that he had researched the law surrounding testimony from watching a video, and was prepared to argue that Brown's witness could has testified as to what he claimed to see on the video. The parties also presented a brief on the issue to the trial court before the Friday session. Importantly, this speaks to the favorably diligence of counsel in his attempt to introduce this issue into the case. Again, that need was obviated due to the guilty plea. This Court notes that there is evidence that Brown himself erased matters the phone. He can hardly complain of the inability to locate the videos on it. This Court the obvious – the purpose of erasing the data or placing items in "secret" is so they will not be found.

Nevertheless, the Applicant's concerns about the relationship between Judge McMahon and his defense counsel were resolved during the entry of the free and voluntary guilty plea with the negotiation that removed the possibility of life without parole after the discussion between the Court and the counsel Story. At the time before the plea was offered , the trial judge had indicated that there was no animosity toward the defendant or counsel, that he had ruled favorably to the Applicant related to whether his prior armed robbery conviction could be used to impeach him if he testified, and that he had considered the defense counsel to have acted professionally and competently when they had cross-examined the witnesses.

This Court rejects the assertion that counsel's actions during the discussion with Judge McMahon forced him to enter his guilty plea. As stated above, the Applicant's statements at the guilty plea carry a presumption of verity. 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. *Blackledge v. Allison*, 431 U.S. 63, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977). Therefore, statements made during a guilty plea should be considered conclusive unless a criminal inmate presents valid reasons why he should be allowed to depart from the truth of his statements. *Crawford v. United States*, 519 F.2d 347 (4th Cir.1975); *Edmonds v. Lewis*, 546 F.2d 566 (4th Cir.1976). An applicant may attack the voluntary, knowing, and intelligent character of a guilty plea entered on the advice of counsel by demonstrating that counsel's representation was below an objective standard of reasonableness.

This Court finds that the Applicant abandoned his request to have counsel relieved at the time he entered his guilty plea freely and intelligently. Contrary to the Applicant's assertions before this Court, during his guilty plea, while under oath, the Applicant stated that he wanted to plead guilty rather than proceed with the jury trial, that he had not been threatened, intimidated, or coerced to cause him to plead guilty. Tr.p. 717-720. Further, he indicated that he was satisfied with his lawyers and that they had spoked with him enough and had done everything that they needed to do. Tr.p. 720-721. Importantly, the Applicant cogently responded as follows:

> THE COURT: Do you have any complaints you want to make about any of your lawyers, the solicitors, or any police officers involved in your case?
>
> THE DEFENDANT: No, sir.
>
> THE COURT: Have you understood my questions?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Is there anything you'd like to ask me about what we've just been over?
>
> THE DEFENDANT: No, sir.

Tr.p. 720, l. 23 – p. 721, l. 7.

This Court finds that Brown has failed to present a credible reason to not be held to the truth of the statements. Prior to the entry of the plea, this Court finds that counsel Story , Gilreath and Turnblad met with the Applicant to discuss the plea offer according to the credible testimony of Story and Gilreath before this Court. This Court further rejects the Applicant's assertion that the plea offer was made to his counsel the previous day. According to Mr. Story's testimony, which the Court finds to be very credible, the guilty plea offer was given to him on the day that Brown decided to plead guilty. Both Story and Ms. Gilreath, who the Court also finds to be very credible, testified that all three of Brown's lawyers met with him to discuss the guilty plea after it was offered during the recess that day.

The Applicant also complains that he was not able to testify which he blames on the interaction of his counsel with the trial judge. This Court finds that the Applicant made a knowing choice in waiving the right to testify to the jury when he knowing decided to enter his guilty and remove the risk of a life sentence. He knew he was giving up his trial rights to a jury, as well as his right to testify and present a defense. His lawyers had indicated the effect of the plea with him prior to its entry. Further, in this proceeding, Brown testified that he knew that he could continue with the trial, but chose not to. He also knew that he was facing a possible life without parole sentence, and that was another factor in his decision to plead, once taken off the table. Story testified that it was Brown's decision to plead once LWOP was taken away.

This Court finds that as related to his guilty plea, the Applicant has failed to show the existence of deficient performance. To the contrary, this Court finds that the defense team was performing within thy standards of competence demanded of lawyers practicing criminal law in their advice leading up to the guilty plea. The Applicant's statements at the time of the entry of the plea and counsel's credible testimony in this proceeding support that conclusion that the first prong

of *Strickland* and *Hill v. Lockhart* have not been met by the Applicant. Further, he told the court, under oath, that he was happy with his lawyer, and they had done all they could to help him. He also said he had no complaints. He has failed to meet his burden as to any of his allegations.

This Court also must conclude that the Applicant has failed to meet his burden of proof in showing sixth Amendment prejudice under *Strickland* and *Hill v. Lockhart*. The Applicant has failed to show any omission on the part of the defense team that was deficient. It follows that the Applicant has failed to 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." This Court finds that the Applicant has failed his burden and finds that confidence in the outcome of the guilty plea has not been undermine. The claims must be dismissed.

GUILTY PLEA NOT INVOLUNTARY DUE TO FEAR OF LIFE WITHOUT PAROLE

The Applicant has also asserted the threat of a life without parole sentence coerced his guilty plea. The sentence of life without parole was an authorized sentence for attempted murder since the Applicant had a prior conviction for armed robbery, a most serious offense under S.C. Code § 17-25-45. The Applicant's fear of a more severe punishment did not render his guilty plea involuntary. *Brady v. United States*, 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970) (fear of a potential death sentence does not make a plea involuntary). This Court finds that the Applicant's guilty plea was freely and voluntary entered. The Applicant was aware of the potential sentence of life without parole that was taken off the table with the entry of the guilty plea and the range of punishment he was facing. The sentence he received was also in the range of the negotiation. His allegations must be dismissed. .

ATTEMPTED MURDER AND HIS *PRO SE* AMENDED APPLICATION

The Applicant attached to appointed counsel's amended application on August 21, 2024, a handwritten amendment alleging that his counsel was ineffective as a matter of law because they allowed his to plead guilty to a crime that did not exist allegedly "attempted murder." The Applicant in his *pro se* pleading cites to *State v. Sutton*, 340 S.C. 393, 532 S.E.2d 283 (2000), which held that the offense of attempted murder is not recognized in South Carolina. However, the General Assembly, subsequent to Sutton, passed a statute creating anew the substantive statutory crime of attempted murder in 2010. The Applicant's crime occurred on August 11, 2015. Since S.C. Code Section 16-3-29 exited at the time of the crime, counsel was not deficient in failing to make a frivolous motion that had no basis in the current law. Deficient performance and prejudice has not been shown. This additional allegation must be denied.

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 6th **day of** November **, 2025.**

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

Lexington, South Carolina