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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County

Honorable Walton J. McLeod, IV, Circuit Court Judge

FRANK GUNBY, JR.,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2026-001706

APPENDIX

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Appellate Defender

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Division of Appellate Defense
PO Box 11589
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ATTORNEYS FOR RESPONDENT

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STATE OF SOUTH CAROLINA)	
)	IN THE COURT OF GENERAL SESSIONS
COUNTY OF SPARTANBURG)	
The State,)	
)	TRANSCRIPT OF RECORD
-vs-)	2024-GS-42-4139;2024-GS-42-4255
)	
Frank Gunby, Jr.,)	
)	January 19, 2025
Defendant.)	Spartanburg, South Carolina

B E F O R E:

HONORABLE G.D. MORGAN, JR., JUDGE

A P P E A R A N C E S:

GRACE CALHOUN KERLEY, ESQUIRE
Attorney for the State

LOUEI CHRISTOPHER NMAIR, ESQUIRE
Attorney for the Defendant

Linda D. Moffitt
Circuit Court Reporter

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Defendants qualified -- page 3.
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Defendants sworn -- page 4.
No exhibits.

(Proceedings January 29, 2025)

THE COURT: All right. We're going to get you in order here. So I want -- all right. Let's put Mr. Gunby, number one, there.

And Ms. Carpenter.

Mr. Locke.

Mr. Stokes.

Mr. Travalas Smith.

Mr. Moore.

Ms. Hayes.

Is there a Ms. Hayes? Ms. Hayes, if you would, right up here.

All right. Mr. Schuman.

Mr. Gilliard.

Is there a Gilliard? Angelo Gilliard.

MR. HISENHIMER: He's coming, sir.

THE COURT: Oh, he is coming.

All right. And Mr. Suprunchik -- Suprunchik.

Who is the gentleman on the end? Who are you?

THE DEFENDANT: George. Michael George.

PROBATION AGENT SMITH: Your Honor, Gunby and George are also probation matters.

THE COURT: Oh, they are. Okay.

All right. George. And Mr. George.

MR. HISENHIMER: He is right here.

THE COURT: And a Mr. -- who is the last one there -- Gilliard? Okay. All right.

(Whereupon, the defendants were duly sworn.)

THE COURT: Ladies and gentlemen, I am going to be asking all of you a series of questions as a group, and then I'm going to ask each of you to respond back to me individually.

First of all, you are Frank Gunby.

THE DEFENDANT: Yes, sir.

THE COURT: Crystal Carpenter.

THE DEFENDANT: Yes, sir.

THE COURT: Paul Locke.

THE DEFENDANT: Yes, sir.

THE COURT: Jason Stokes.

THE DEFENDANT: Yes, sir.

THE COURT: Travalas Smith.

THE DEFENDANT: Yes, sir.

THE COURT: Ryne Moore.

THE DEFENDANT: Yes, sir.

THE COURT: Jill Hayes.

THE DEFENDANT: Yes, sir.

THE COURT: Dalton Schuman.

THE DEFENDANT: Yes, sir.

THE COURT: Michael George.

THE DEFENDANT: Yes, sir.

THE COURT: Angelo Gilliard.
THE DEFENDANT: Yes, sir.
THE COURT: And Sergey Suprunchik.
THE DEFENDANT: Yes, sir.
THE COURT: All right. Again, as I said, I'm going to be asking you a series of questions as a group and ask that you respond individually.
Are any of you under the influence of any drugs, alcohol or medication that would keep you from understanding what you're doing?
Mr. Gunby.
THE DEFENDANT: No, sir.
THE COURT: Ms. Carpenter.
THE DEFENDANT: No, sir.
THE COURT: Mr. Locke.
THE DEFENDANT: No, sir.
THE COURT: Mr. Stokes.
THE DEFENDANT: No, Your Honor.
THE COURT: Mr. Smith.
THE DEFENDANT: No, sir.
THE COURT: Mr. Moore.
THE DEFENDANT: No, sir.
THE COURT: Ms. Hayes.
THE DEFENDANT: No, sir.
THE COURT: Mr. Schuman.

THE DEFENDANT: No, sir.
THE COURT: Mr. George.
THE DEFENDANT: No, sir.
THE COURT: Mr. Gilliard.
THE DEFENDANT: No, Your Honor.
THE COURT: And Mr. Suprunchik. How do you pronounce that?
THE DEFENDANT: Suprunchik.
THE COURT: Suprunchik.
All right. Do any of you have any mental or physical disability that would keep you from understanding what you're doing here today?
Mr. Gunby.
THE DEFENDANT: No, sir.
THE COURT: Ms. Carpenter.
THE DEFENDANT: No, sir.
THE COURT: Mr. Locke.
THE DEFENDANT: No, sir.
THE COURT: Mr. Stokes.
THE DEFENDANT: No, sir.
THE COURT: Mr. Smith.
THE DEFENDANT: No, sir.
THE COURT: Mr. Moore.
THE DEFENDANT: No, sir.
THE COURT: Ms. Hayes.

THE DEFENDANT: No, sir.
THE COURT: Mr. Schuman.
THE DEFENDANT: No, sir.
THE COURT: Mr. George.
THE DEFENDANT: No, sir.
THE COURT: Mr. Gilliard.
THE DEFENDANT: No, Your Honor.
THE COURT: And Mr. Suprunchik.
THE DEFENDANT: No, sir.
THE COURT: By pleading guilty here today each one of you are waiving your constitutional rights. Those rights include the right to a jury trial, the right to confront your accusers, privilege against self-incrimination.
The state has the burden of proof to prove you guilty beyond a reasonable doubt, among other rights.
Are each of you waiving those rights here today freely, voluntarily, intelligently and pleading guilty?
Mr. Gunby.
THE DEFENDANT: Yes, sir.
THE COURT: Ms. Carpenter.
THE DEFENDANT: Yes, sir.
THE COURT: Mr. Locke.
THE DEFENDANT: Yes, sir.
THE COURT: Mr. Stokes.
THE DEFENDANT: Yes, sir.

THE COURT: Mr. Smith.
THE DEFENDANT: Yes, sir.
THE COURT: Mr. Moore.
THE DEFENDANT: Yes, sir.
THE COURT: Ms. Hayes.
THE DEFENDANT: Yes, sir.
THE COURT: Ms. Schuman.
THE DEFENDANT: Yes, sir.
THE COURT: Mr. George.
THE DEFENDANT: Yes, sir.
THE COURT: Mr. Gilliard.
THE DEFENDANT: Yes, Your Honor.
THE COURT: And Mr. Suprunchik.
THE DEFENDANT: Yes, sir.
THE COURT: All right. Mr. Gunby, you've got an indictment here for trafficking methamphetamine alleges to have occurred on May the 10th of 2024. You're pleading guilty to that trafficking second offense 10 to 28 grams.
Is that your understanding?
THE DEFENDANT: Yes, sir.
THE COURT: Well, actually got two indictments.
Another indictment, trafficking methamphetamine on August 1st of 2024. Again, pleading guilty under that indictment ending in 4139. Trafficking methamphetamine 10 to 28 grams second offense.

Is that your understanding of why you're here?
THE DEFENDANT: Yes, sir.
THE COURT: Is that right, Mr. Gunby?
THE DEFENDANT: Yes, sir.
THE COURT: All right. Who is representing you, Mr. Gunby?
THE DEFENDANT: It's Louei Nmair. I don't know where he is.
MR. NMAIR: Sorry, Your Honor.
THE COURT: Hold on. All right. I have gone -- were you in here when I went through the constitutional rights and everything with him?
MR. NMAIR: No, Your Honor.
THE COURT: All right. I'm going to do that again with him just because you weren't here.
All right. Mr. Gunby, are you under the influence of any drugs or alcohol, medication that would keep you from understanding what you're doing?
THE DEFENDANT: No, sir.
THE COURT: Do you have any mental or physical disability that would keep you from understanding what you're doing?
THE DEFENDANT: No, sir.
THE COURT: Do you understand you're waiving your constitutional rights including the right to a jury trial,

the right to confront your accusers, privilege against self-incrimination?

Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: And are you waiving those rights and pleading guilty here today freely, voluntarily and intelligently?

THE DEFENDANT: Yes, sir.

THE COURT: All right. We have two indictments for trafficking methamphetamine, one ending in Indictment No. 4255. It alleges to have occurred on May the 10th of 2024. And you are pleading guilty to that second offense.

Also, another indictment for trafficking methamphetamine ending in Indictment 4139. You're pleading guilty to that, 10 to 28 grams second offense.

Is that your understanding of why you're here?

THE DEFENDANT: Yes, sir.

THE COURT: Counsel, have you advised Mr. Gunby of the minimum and maximum range of sentence, the elements of the charges and the enhancement effect of the -- of these trafficking charges, as well as that it is a violent -- each of these are violent offenses, as well as serious offenses.

MR. NMAIR: Yes, Your Honor.

THE COURT: All right. Have you advised your client

on the effect of all of that? Is that correct?

MR. NMAIR: Yes, Your Honor.

THE COURT: Mr. Gunby, do you understand the minimum to maximum range of sentence you could receive here today?

THE DEFENDANT: Yes, sir.

THE COURT: Do you also understand the enhancement effect of it and that these are violent, considered violent, offenses and serious offenses?

Do you understand the effect of those, of this conviction?

THE DEFENDANT: Yes, sir.

THE COURT: Has that been explained to you?

THE DEFENDANT: Yes, Your Honor.

THE COURT: All right. Let me hear from the state.

MS. OVERBY: Thank you, Judge.

Mr. Gunby has 181 days of credit in the detention center.

The negotiation between the state and the defense is a concurrent 15 years on the trafficking indictments and a $50,000 fine.

The defendant was served with an LWOP notice based on his criminal history, and upon entering his plea the state will be withdrawing that notice.

The state will also be dismissing Indictments 24-4254 for trafficking meth and 28 -- or 28 to a hundred grams.

There is an additional warrant for trafficking that was recently served on the defendant. That will also be dismissed.

The state has also presented a firearms prohibition order to Your Honor.

As to the facts, Your Honor, on Indictment 24-4255, on May 10th of 2024 sheriff's office narcotics officers responded to a location on Glenn Springs Road in Spartanburg County.

The defendant was the subject of an ongoing narcotics investigation. He gave consent to search his residence. And from a shed by the residence law enforcement recovered 14.18 grams of meth.

Next, Your Honor, as to Indictment 24-4139, on August 1st of 2024 the defendant was booked into the detention center at California Avenue in Spartanburg County on two outstanding drug warrants from two prior incidents.

From his person 25.90 grams of meth was recovered.

I have his criminal history at the appropriate time.

THE COURT: All right. Tell me a little bit about his criminal history.

MS. OVERBY: 1997, burg second. That's out of the State of New York. And D.U.I.

2000, possession of cocaine, possession of drug paraphernalia out of Florida.

2002, possession of forced instrument, burglary second out of New York. He was paroled in 2007.

2008, he was placed on parole in South Carolina in the New York burglary. And he was also convicted of possession of burglary tools.

2009, giving false information, burglary second degree violent times four. He received a 15-year sentence suspended to ten years and five years probation, as well as a shoplifting.

2019, possession of meth and crack -- or crack, trafficking meth. And he received three years of home detention and a $25,000 fine. He violated that home detention sentence two times.

He also was convicted that year of obtaining property by false pretenses and a violation of probation.

2022, he was convicted of PWID meth second offense. He was sentenced to five years suspended to 14 months and three years of probation.

I do have noted from the prosecutor on this case that he has a pending possession of meth, Your Honor, from Cherokee County.

THE COURT: The recommendation on the fine, is that fifty thousand per indictment or $50,000 as a total of concurrent sentence on both? That's two trafficking. And defense counsel might want to chime in. $50,000 total?

One $50,000 total?

MR. NMAIR: I think each charge requires by statute $50,000.

THE COURT: I think it does. I just want to make sure for the record.

MS. KERLEY: Yes, Your Honor.

THE COURT: Needs to be fifty thousand per just in case it was a discussion otherwise.

All right. Mr. Gunby, you heard the solicitor lay out the facts.

Is that what happened?

THE DEFENDANT: Yes, sir.

THE COURT: Has anybody promised you anything, threatened you or forced you to come in here and plead guilty?

THE DEFENDANT: No, sir.

THE COURT: Have you had a chance to speak with your lawyer?

THE DEFENDANT: Yes, sir.

THE COURT: And have you understood everything he has told you?

THE DEFENDANT: Yes, sir.

THE COURT: And do you need any additional time to speak with him?

THE DEFENDANT: No.

THE COURT: And are you satisfied with his advice and representation?

THE DEFENDANT: Yes, sir.

THE COURT: And are pleading guilty here today because you are guilty?

THE DEFENDANT: Yes, sir.

THE COURT: All right. I accept the plea and find the defendant is freely, voluntarily and intelligently pleading guilty with the advice of his attorney. He is satisfied with that advice. And the state has the facts to support the plea.

All right. Let me hear from probation.

PROBATION AGENT SMITH: Thank you, Your Honor. Agent Smith, probation.

Mr. Gunby is currently on supervision under Indictment 2023-GS-42-0750 for drugs, PWID methamphetamine second offense, receiving an original sentence of five years suspended to 14 months and three years probation.

During that time, Your Honor, he received 14 days credit. That order was issued on April the 13th of 2023.

Your Honor, today's plea does violate his conditions six and ten, as well as Citation No. 42-24208. Your Honor request permission to place that on the record.

THE COURT: You may.

PROBATION AGENT SMITH: Failed to pay fines as

instructed; failure to pay court fines by being $77.25 in arrears at the date of the issuance of process; failure to pay supervision fees being $150 in arrears at the date of the issuance; failure to maintain lawful, full-time employment; failure to refrain from the use of controlled substance. Subject was drug tested on July 5th of 2024 and tested positive for methamphetamines and fentanyl.

Failure to provide a truthful report. Subject was -- subject advised agent he does not use drugs but failed his random drug test on July 5th of 2024. Agent asked subject to remove a device on his person that contained urine.

Failure to complete court-ordered substance abuse counseling. Subject was court ordered on April the 13th of 2023 to complete court-ordered substance abuse counseling. Subject has failed to provide any documentation of enrollment and/or completing substance abuse counseling.

Failure to follow the advice and instructions by the agent in spite of the agent's efforts to counsel the defendant regarding compliance with the rules of supervision defendant has wilfully chosen to disregard the agent's instructions. And such actions constitute violation of conditions one, three, five, seven, nine, ten and special conditions.

THE COURT: And what was the sentence on that? Was that five years?

PROBATION AGENT SMITH: That was five suspended to 14 months and three years probation.

THE COURT: Okay. All right. Let me hear from the defendant.

Yes, sir.

MR. NMAIR: Thank you, Your Honor.

Respectfully, what we're asking the Court is accept the negotiation. We are asking the Court to just terminate the probation. Even if ran concurrent that 15 years is going to hold him for about 12 with the minimum amount of time he has.

He is a drug addict. I've had conversations with him and I know one of his bigger points is I'm not selling drugs. And the trafficking statute doesn't care. The trafficking statute only cares if you're in possession of a certain amount.

There was a situation. It has been ultimately dismissed, but I think it's important Your Honor understands that on the case where the C.I. was dismissed, in my conversations with Mr. Gunby essentially he was acting as a mule for another individual who essentially ends up taking the brunt as he has here where the individual promises him, hey, you help me here, I'll give you drugs. And that's how he paid for it. He paid for it in work. And he's paying the price for it.

He was LWOP'd. This at least gives him an opportunity, obviously, to hope to still have a chance to get out of the Department of Corrections.

He is 55 years old. So that 12 years is a long time. He's looking at 67 if he's able to make it through and get out. As dark as that is, Judge, we are asking the Court to just terminate the probation and accept the negotiation.

THE COURT: First of all, I do find a violation of probation. So the probation is revoked in full and terminated. That sentence will run concurrent to the sentences I'm about to give in the pending charges.

Under 2024-GS-42-4139, the Sentence of the Court is 15 years in the Department of Corrections and a fine of $50,000. The defendant has that 181 days credit.

Under 2024-GS-42-4255, a concurrent sentence of 15 years with the Department of Corrections and an additional $50,000 fine under that indictment. Again, 181 days credit.

These are to run concurrent.

I have also executed a firearms prohibition order.

The defendant has 181 days of credit and ten days to appeal. Thank you.

MR. NMAIR: Thank you, Your Honor.

MS. KERLEY: Thank you, Judge.

END OF REQUESTED TRANSCRIPT OF RECORD

CERTIFICATE

I, the undersigned Linda D. Moffitt, Official Court Reporter for the Seventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of all the proceedings had and evidence introduced in the trial of the captioned cause, relative to appeal, in the Court of General Sessions for Spartanburg County, South Carolina, on the 29th day of January 2025.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

September 20, 2025

s/Linda D. Moffitt

Linda D. Moffitt
Circuit Court Reporter

WITNESSES

SCSO

Larry W. Powers

ARREST WARRANT NUMBER

2024A4210202349

ACTION OF GRAND JURY

SEP 06 2024

True Bill

Foreperson of Grand Jury
Date:

VERDICT

Foreperson of Petit Jury
Date:

DOCKET NO. 24-GS-42-4254

The State of South Carolina

County of Spartanburg

Barry J. Barnette, Solicitor

COURT OF GENERAL SESSIONS

SEP 09 2024

TERM

THE STATE
vs.

FRANK GUNBY, JR.

Indictment for
TRAFFICKING METHAMPHETAMINE

SC Code: **44-53-375**
CDR: 0349

STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG)

INDICTMENT

At a Court of General Sessions, convened on SEP 0 6 2024, the Grand Jurors of Spartanburg County present upon their oath:

TRAFFICKING IN METHAMPHETAMINE

That the Defendant Frank Gunby, Jr. did in Spartanburg County on or about April 2, 2024, knowingly sell, manufacture, deliver, purchase or bring into this State, or did provide financial assistance or did otherwise aid, abet, attempt, or conspire to sell, manufacture, deliver, purchase, or bring into this State, or was knowingly in actual or constructive possession or did knowingly attempt to become in actual or constructive possession of twenty-eight (28) grams or more but less than one hundred (100) grams of Methamphetamine, a schedule II controlled substance, in violation of § 44-53-375, *THE CODE OF LAWS OF SOUTH CAROLINA*, (1976), as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

Lindsey H. Arnold

ASSISTANT SOLICITOR

WITNESSES

SCSO

Larry G. Powers

ARREST WARRANT NUMBER

2024A4210203680

ACTION OF GRAND JURY

SEP 06 2024

True Bill

Foreperson of Grand Jury
Date:

VERDICT

Foreperson of Petit Jury
Date:

DOCKET NO. 24-GS-42-4255

The State of South Carolina

County of Spartanburg

Barry J. Barnette, Solicitor

COURT OF GENERAL SESSIONS

SEP 09 2024

TERM

THE STATE
vs.

FRANK GUNBY, JR.

Indictment for

TRAFFICKING IN METHAMPHETAMINE

SC Code: **44-53-375(C)**
CDR: 0452

FILED

2024 SEP -9 PM 2:09

CLERK OF COURT
SPARTANBURG, S.C.

22

STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG)

INDICTMENT

At a Court of General Sessions, convened on SEP 0 6 2024, the Grand Jurors of Spartanburg County present upon their oath:

TRAFFICKING IN METHAMPHETAMINE

That the Defendant Frank Gunby, Jr. did in Spartanburg County on or about May 10, 2024, knowingly sell, manufacture, deliver, purchase or bring into this State, or did provide financial assistance or did otherwise aid, abet, attempt, or conspire to sell, manufacture, deliver, purchase, or bring into this State, or did knowingly actually or constructively possess, or did knowingly attempt to become in actual or constructive possession of ten (10) grams or more but less than twenty-eight (28) grams of Methamphetamine, a schedule II controlled substance, in violation of § 44-53-375, *THE CODE OF LAWS OF SOUTH CAROLINA*, (1976), as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

Lindsey M-Healy
ASSISTANT SOLICITOR

24

STATE OF SOUTH CAROLINA | SENTENCE ORDER | IN THE COURT OF GENERAL SESSIONS

COUNTY OF SPARTANBURG

INDICTMENT/CASE#: 2024 -GS- 42 - 4255

STATE vs. Frank Gunby, Jr.

AW#: 2024A4210203680

Date of Offense: 05/10/2024

AKA: _____ SSN: [redacted]

S.C. Code §: 44-53-375(C)(1)(c)

RACE: White SEX: Male DOB: [redacted]/1969

CDR Code #: 0452

Range of Offense: 25-30 years & 50k fine

In disposition of the above indictment comes now the Defendant who was CONVICTED OF ☐ or ☑ PLEADS

TO: Trafficking Meth, 10-28 grams-2nd offense Range of Offense Pled 5-30 years & 50k fine

In violation of § 44-53-375(C)(1)(b) of the S.C. Code of Laws, bearing CDR Code # 0451

☐ NON-VIOLENT ☑ VIOLENT ☑ SERIOUS ☐ MOST SERIOUS ☐ MANDATORY GPS ☐ § 17-25-45 (CSC w/minor 1st or CSC w/minor 3rd)

The charge is: ☐ As indicted ☑ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.

The plea is: ☐ w/o Rec/Negotiations ☑ Negotiated 15 years & 50k fine, concurrent w/ Ind. 24-4139 ☐ Recommendation _____

Lindsey H. Oveby

s/ Lindsey Oveby 79869

Solicitor SC Bar # Attorney for Defendant SC Bar #

The Defendant is committed to the ☒ SCDC ☐ County Detention Center ☐ Home Incarceration Program for a determinate term of 15 days/months/years/Time Served ☐ YOA NTE _____ years and/or shall pay a fine of $ 50,000 ; provided that upon the service of _____ days/months/years/Time Served and or payment of $ _____ plus costs and assessments as applicable* ; balance is suspended with probation for _____ months/years and subject to SCDPPPS standard conditions of probation, which are incorporated by reference.

The sentence shall run ☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: _____

☐ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by SCDC.

181 days/months ☐ To include time spent on monitored house arrest prior to trial and sentencing.

SPECIAL CONDITIONS:

☐ PTUP _____

☐ No Contact with Victim ☐ Domestic Violence Intervention Program ☐ Hold for Inpatient Treatment

☐ Sex Offender Registry pursuant to S.C. Code § 23-3-430 ☐ SAC/MHC if necessary

☐ Central Registry of Child Abuse and Neglect pursuant to S.C. Code § 17-25-135.

☐ Other: _____

Restitution $ _____

☐ **RESTITUTION See Separate Order (20% per S.C. Code §24-21-490(B))**

Fine/Costs and Assessments are to be paid to the Clerk of Court within _____ days/months

§14-1-206 (Assessments 107.5%)	FINE:	$
§14-1-211 (A)(1) Conv. Surcharge)		$
§14-1-211 (A)(2)(DUI Surcharge)	$100	$
§56-5-1995 (DUI Assessment	$100	$
§56-1-286 (DUI Breath Test)	$12	$
§14-1-212 (Law Enforcement Funding)	$25	$
§14-1-213 (Drug Court Surcharge)	$25	$
§34-11-70(b)and(c), and 34-11-90(c)and(d) (Admin Fraud Check Court Costs)	$150	$
§50-21-114 (BUI Breath Test Fee)	$41	$
§56-5-2942(J) (Vehicle Assessment)	$50	$
3% to County (if paid in installments)	$40/ea	$
☐ Appointed PD or appointed other counsel. Provisio requires $500 to be paid to Clerk during probation and shall be collected before any other fees.	TBD	$
☐ §17-3-45(B) Unpaid Application Fee to be paid to the Public Defender Fund	$500	$
	$40	$
	TOTAL	107,145.25

J. Wooten
Clerk of Court/Deputy Clerk

L. Moffitt
Court Reporter

2773 Judge Code

1/29/25 Sentence Date

Presiding Judge

SCCA217B
01/27/2025

WITNESSES

SCSO

Larry W. Powers

ARREST WARRANT NUMBER

2024A4210203895

ACTION OF GRAND JURY

SEP 06 2024

True Bill

Foreperson of Grand Jury
Date:

VERDICT

Foreperson of Petit Jury
Date:

DOCKET NO. 24-GS-42-4139

The State of South Carolina

County of Spartanburg

Barry J. Barnette, Solicitor

COURT OF GENERAL SESSIONS

SEP 09 2024

TERM

THE STATE
vs.

FRANK GUNBY, JR.

Indictment for

TRAFFICKING IN METHAMPHETAMINE

SC Code: 44-53-375(C)
CDR: 0452

FILED

2024 SEP 10 PM 2:02

CLERK OF COURT
SPARTANBURG COUNTY

26

STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG)

INDICTMENT

At a Court of General Sessions, convened on SEP 0 6 2024 the Grand Jurors of Spartanburg County present upon their oath:

TRAFFICKING IN METHAMPHETAMINE

That the Defendant Frank Gunby, Jr. did in Spartanburg County on or about August 1, 2024, knowingly sell, manufacture, deliver, purchase or bring into this State, or did provide financial assistance or did otherwise aid, abet, attempt, or conspire to sell, manufacture, deliver, purchase, or bring into this State, or did knowingly actually or constructively possess, or did knowingly attempt to become in actual or constructive possession of ten (10) grams or more but less than twenty-eight (28) grams of Methamphetamine, a schedule II controlled substance, in violation of § 44-53-375, *THE CODE OF LAWS OF SOUTH CAROLINA*, (1976), as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

Lindsey H. Daly
ASSISTANT SOLICITOR

STATE OF SOUTH CAROLINA **SENTENCE ORDER** **IN THE COURT OF GENERAL SESSIONS** 27

COUNTY OF SPARTANBURG

INDICTMENT/CASE#: 2024 -GS- 42 - 4139

AW#: 2024A4210203895

STATE vs. Frank Gunby, Jr.

Date of Offense: 08/01/2024

S.C. Code §: 44-53-375(C)(1)(c)

AKA: _____ SSN: [redacted]

CDR Code #: 0452

RACE: White SEX: Male DOB: [redacted]/1969

Range of Offense: 25-30 years & 50k fine

In disposition of the above indictment comes now the Defendant who was CONVICTED OF ☐ or ☑ PLEADS

TO: Trafficking Meth, 10-28 grams-2nd offense Range of Offense Pled 5-30 years & 50k fine

In violation of § 44-53-375(C)(1)(b) of the S.C. Code of Laws, bearing CDR Code # 0451

☐ NON-VIOLENT ☑ VIOLENT ☑ SERIOUS ☐ MOST SERIOUS ☐ MANDATORY GPS ☐ § 17-25-45 (CSC w/minor 1st or CSC w/minor 3rd)

The charge is: ☐ As indicted ☑ Lesser Included Offense. ☐ Defendant Waives Presentment to Grand Jury.

The plea is: ☐ w/o Rec/Negotiations ☑ Negotiated 15 years & 50k fine, concurrent w/ Ind. 24-4255 ☐ Recommendation _____

Lindsey H. Oveby

s/ Lindsey Oveby 79869

Solicitor SC Bar # Attorney for Defendant SC Bar #

The Defendant is committed to the ☒ SCDC ☐ County Detention Center ☐ Home Incarceration Program for a determinate term of 15 days/months/years/Time Served ☐ YOA NTE _____ years and/or shall pay a fine of $ 50,000 ; provided that upon the service of _____ days/months/years/Time Served and or payment of $ _____ plus costs and assessments as applicable* ; balance is suspended with **probation** for _____ months/years and subject to SCDPPPS standard conditions of probation, which are incorporated by reference.

The sentence shall run ☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: _____

☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by SCDC.

181 days/months ☐ To include time spent on monitored house arrest prior to trial and sentencing.

SPECIAL CONDITIONS:

☐ PTUP _____

☐ No Contact with Victim ☐ Domestic Violence Intervention Program ☐ Hold for Inpatient Treatment

☐ Sex Offender Registry pursuant to S.C. Code § 23-3-430 ☐ SAC/MHC if necessary

☐ Central Registry of Child Abuse and Neglect pursuant to S.C. Code § 17-25-135.

☐ Other: _____

Restitution $ _____

☐ **RESTITUTION See Separate Order (20% per S.C. Code §24-21-490(B))**

Fine/Costs and Assessments are to be paid to the Clerk of Court within _____ days/months

§14-1-206 (Assessments 107.5%)	FINE:	$
		$
§14-1-211 (A)(1) Conv. Surcharge)	$100	$
§14-1-211 (A)(2)(DUI Surcharge)	$100	$
§56-5-1995 (DUI Assessment	$12	$
§56-1-286 (DUI Breath Test)	$25	$
§14-1-212 (Law Enforcement Funding)	$25	$
§14-1-213 (Drug Court Surcharge)	$150	$
§34-11-70(b)and(c), and 34-11-90(c)and(d) (Admin Fraud Check Court Costs)	$41	$
§50-21-114 (BUI Breath Test Fee)	$50	$
§56-5-2942(J) (Vehicle Assessment)	$40/ea	$
3% to County (if paid in installments)	TBD	$
☐ Appointed PD or appointed other counsel. Provisio requires $500 to be paid to Clerk during probation and shall be collected before any other fees.	$500	$
☐ §17-3-45(B) Unpaid Application Fee to be paid to the Public Defender Fund	$40	$
	TOTAL	107,145.26

J. Woods

Clerk of Court/Deputy Clerk

L. Moffitt 2773 1/25/25

Court Reporter Judge Code Sentence Date Presiding Judge

SCCA217B
01/27/2025

FORM 5

STATE OF SOUTH CAROLINA)
County of Spartanburg S.C)
Frank Gunby JR, 335999)
Full name and prison number (if any) of Applicant)
v.)
State of South Carolina)

IN THE COURT OF COMMON PLEAS

2025-CP-42-03777

APPLICATION FOR

POST-CONVICTION RELIEF

FILED
2025 JUL 22 PM 12
CLERK OF COURT
SPARTANBURG COUNTY

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Evan's CI

2. Name and location of Court which imposed sentence Spartanburg S.C
180 magnolia street spartanburg S.C

3. Name(s) of co-defendant(s) (if any) Johnnie Boyd

4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:

(a) 2024A4210202349, 2024A4210203680

(b) 2024A4210203895.

(c) _____

5. The date upon which sentence was imposed and the terms of the sentence:

(a) March 20-2025

(b) 15 years No probation's on prole when

(c) I get out first Offens. Drug trafficking

6. Check whether a finding of guilty was made:

(a) after a plea of guilty The public Defender told me to, plea guilty

(b) after a plea of not guilty _____

(c) after a plea of nolo contendere _____

7. Did you appeal from the judgment of conviction or the imposition of sentence?

_____

8. If you answered "yes" to (7), list:

(a) the name of each Court to which you appealed:

i. I Never did, I am trying know this set up

ii. _____

iii. _____

(b) the result in each such Court to which you appealed:

i. Never did it before

ii. Spartanburg SC. magnolia street 180

iii. _____

(c) the date of each such result:

i. The Cop Nicholas Nevar I gave

ii. Johnny Body The drugs To my House

iii. Johnny Sold The drugs to Dallas Ham

(d) if known, citations of any written opinion or orders entered pursuant to such results:

i. She gave me money I gave To

ii. Johnny Body he gave dallas Ham

iii. the Drugs when She got in The Jeep

9. If you answered "no" to (7), state your reasons for not so appealing:

(a) I Never Know I can

(b) _____

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2025 JUL 22 PM 1:38
CLERK OF COURT
SPARTANBURG COUNTY, SC

(c) _____

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(a) I was A Drug User Not A Sell help a so Called

(b) friend and he was A CI and Dalla's Ham

(c) was At Aforment we was friend's having sex get at H1

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

(a) I was Just A Drug User I never Sold Drugs

(b) Just use Them Looking for a free Hi! So

(c) I Got him Sell's So I get free Drugs

12. Prior to this application have you filed with respect to this conviction:

(a) any petition in a State Court under South Carolina Law? _____

(b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? _____

(c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? I Just Learned This So I am

(d) any other petitions, motions or applications in this or any other Court? NO

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

(a) the specific nature thereof:

i. _____

ii. _____

iii. _____

iv. _____

(b) the name and location of the Court in which each was filed:

i. _____

ii. _____

iii. _____

iv. _____

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CLERK OF COURT
SPARTANBURG COUNTY

(c) the disposition thereof:

i. I was put in the middle of all This

ii. can someone help me

iii. _____

iv. _____

(d) the date of each such disposition:

i. _____

ii. _____

iii. _____

iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. _____

ii. _____

iii. _____

iv. _____

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2025 JUL 22 PM 1:38
CLERK OF COURT
SPARTANBURG COUNTY

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

NO

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

i. "I was A Drug user Not A Seller

ii. _____

iii. _____

(b) the proceedings in which each ground was raised:

i. I know Johnny Body bring The drugs to

ii. me I was Just A User he said if I know

iii. Any one that wants to buy drugs I can get, them Sell so I would get Hi for free.

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

(a) PCR proper Remedy

(b) _____

(c) _____

17. Were you represented by an attorney at any time during the course of:

(a) your arraignment and plea? Yes

(b) your trial, if any? [redacted] NO

(c) your sentencing? Yes

(d) your appeal, if any, from the judgment of conviction or the imposition of sentence? NO

(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed?

NO

18. If you answered "yes" to one or more parts of (17), list:

(a) the name and address of each attorney who represented you:

i. Lowell Nmain 366 N. Church St Spartanburg S.C. 29303

ii. _____

iii. _____

(b) the proceedings at which each such attorney represented you:

i. arraignment and Sentencing

ii. _____

iii. _____

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2025 JUL 22 PM 2:38
CLERK OF COURT
SPARTANBURG COUNTY, SC

19. State clearly the relief you seek in filing this application:

Vacate sentence

20. Are you now under sentence from any other court that you have not challenged?

NO

STATE OF SOUTH CAROLINA)
) VERIFICATION
County of Spartanburg)

I, Frank Quinby JR, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

X

SWORN to and subscribed before me this 17 day of July, 2025

Sarah Quillo (L.S.)
Notary Public

My Commission Expires: 2/28/34

FILED
2025 JUL 22 PM 12:38
CLERK OF COURT
SPARTANBURG COUNTY

APPLICATION TO PROCEED WITHOUT PAYMENT OF COSTS AND AFFIDAVIT IN SUPPORT THEREOF

I, Frank Gunby JR, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

(1) I am the applicant in this action and I believe I am entitled to redress..

(2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

Frank Gunby JR
Applicant

SWORN or affirmed to and subscribed before me this 17 day of July, 2025

Sarah C Duke
Notary Public

My Commission Expires: 2/28/34

FILED
2025 JUL 22 PM 12:38
CLERK OF COURT
SPARTANBURG COUNTY

STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG	)	IN THE COURT OF COMMON PLEAS FOR THE SEVENTH JUDICIAL CIRCUIT
Frank Gunby, Jr., #335999, Applicant, v. State of South Carolina, Respondent.	)	Case No. 2025-CP-42-03777 **RETURN** (Counsel Appointed)

FILED
2025 FEB 11 P 4:09
CLERK OF COURT
SPARTANBURG COUNTY
AMY W. COX

In response to the application for post-conviction relief (PCR) filed by Frank Gunby, Jr. (Applicant) on July 22, 2025, Respondent, the State of South Carolina, makes the following Return[1]:

PROCEDURAL HISTORY

Applicant is presently confined within the South Carolina Department of Corrections (SCDC) pursuant to orders of commitment of the Spartanburg County Clerk of Court. During its September 2024 Term, the Spartanburg County Grand Jury indicted Applicant for trafficking methamphetamine, 28 to 100 grams (2024-GS-42-4254), trafficking methamphetamine, 10 to 28

[1] Respondent's return was due to be filed within 60 days of service. See Rule 12(a), SCRCP ("[T]he State of South Carolina shall answer or otherwise respond to an application for post-conviction relief within 60 days after service of the application, if it arises out of a guilty plea, and 90-days if it arises out of a trial."). Now, having completed the return and in light of no demonstrable prejudice to Applicant, Respondent respectfully asks this Court to accept this return as timely filed. See S.C. Code Ann. § 17-27-70(a) (establishing the Court may fix the time in which the State must respond); Guinyard v. State, 260 S.C. 220, 195 S.E.2d 392 (1973) (holding the time limit prescribed by the statute is not mandatory but discretionary with the circuit court, and the circuit court may extend the time for filing).

grams, 2nd offense (2024-GS-42-4255), and an additional indictment for trafficking methamphetamine 10 to 28 grams, 2nd offense (2024-GS-42-4139).

On January 29, 2025, Applicant appeared before the Honorable G.D. Morgan, Jr. at the Spartanburg County Courthouse. Applicant was represented by Louei C. Nmair, Esquire. Grace C. Kerley of the Seventh Circuit Solicitor's Office prosecuted the case. Applicant pled guilty pursuant to plea negotiations with the State. Applicant pled guilty as indicted to two charges of trafficking methamphetamine, 10 to 28 grams, 2nd offense. (2024-GS-42-4255; 2024-GS-42-4139).

Upon entering his guilty plea, the State dismissed the indictment for trafficking methamphetamine, 28 to 100 grams (2024-GS-42-4254), dismissed Applicant's LWOP notice based on his criminal history, and dismissed an additional warrant for possession of methamphetamine in Cherokee County that was served on Applicant shortly before the plea hearing date. There was also an order imposed prohibiting Applicant to possess firearms.

Applicant entering his guilty plea violated the conditions of his supervision for a previous conviction of PWID methamphetamine (2023-GS-42-0750), where Applicant was sentenced to five years' incarceration, suspended to 14 months and three years' probation. Judge Morgan revoked Applicant's probation in full and terminated it upon Applicant entering his guilty plea.

Judge Morgan sentenced Applicant to concurrent sentences of 15 years' imprisonment for each conviction of trafficking methamphetamine, 10 to 28 grams, 2nd offense, and imposed a fine of $50,000 for each conviction. Applicant was given credit for 181 days' time served.

FILED
2025 FEB 11 PM 4:29
CLERK OF COURT
SPARTANBURG COUNTY
AMY B. COX

Facts Giving Rise to Conviction

The facts of Applicant's case were articulated by the solicitor at Applicant's guilty plea hearing as follows:

> As to the facts, Your Honor, on Indictment 24-4255, on May 10th of 224 sheriff's office narcotics officers responded to a location on Glenn Springs Road in Spartanburg County. The defendant was the subject of an ongoing narcotics investigation. He gave consent to search his residence. And from a shed by the residence law enforcement recovered 14.18 grams of meth. Next, Your Honor, as to Indictment 24-4139, on August 1st of 2024 the defendant was booked in the detention center at California Avenue in Spartanburg County on two outstanding drug warrants from two prior incidents. From his person 25.90 grams of meth was recovered.

(GP Tr. p. 12).

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2025 FEB 11 PM 12:29
CLERK OF COURT
SPARTANBURG COUNTY
AMY W. COX

CURRENT APPLICATION

In his application for PCR, Applicant alleges he is being held in custody unlawfully on the following grounds (excerpts verbatim[2]):

I. Ineffective Assistance of Counsel
   a. Involuntary Guilty Plea
      i. "The public defender told me to plead guilty".
      ii. "I was a drug user not a sell[er], help a so called friend and he was a CI and Dallas Ham was an inform[a]nt. We was friends hav[ing] sex getting hi[gh]".
      iii. "I was just a drug user I have never sold drugs. Just use them looking for a free hi[gh] so I got him sell's so I get free drugs".
      iv. "I know Johnny Body brings the drugs to me I was just a user he said if I know anyone that wants to buy drugs I can [illegible] so I would get it for free".
      v. "The cop Nicholas Royal gave Johnny Body the drugs to my house Johnny [sold] the drugs to Dallas Ham".
      vi. "She gave me money I have to Johnny Body he gave Dallas Ham the drugs when she got in the Jeep".
   b. White[3] Claim

[2] Applicant's claims as currently written on his PCR application have been construed as claims of ineffective assistance of counsel resulting in an involuntary guilty plea, as well as ineffective assistance of counsel for failing to advise Applicant of his right to a direct appeal.
[3] White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974).

As relief, Applicant requests, "vacate sentence".

Attached to this Return and incorporated by reference are the Spartanburg County Clerk of Court records of the subject conviction, Applicant's SCDC records, the guilty plea transcript, and the records of this current PCR action. Respondent reserves the right to amend this Return upon receipt of any additional relevant materials.

RESPONSE TO ALLEGATION OF INEFFECTIVE ASSISTANCE OF PLEA COUNSEL

The Sixth and Fourteenth Amendments to the United States Constitution guarantee Applicant, like all other defendants, the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 685 (1984); Taylor v. State, 404 S.C. 350, 359, 745 S.E.2d 97, 101 (2013). 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. First, the applicant must show that counsel's performance was deficient; and second, that the deficient performance prejudiced the applicant. Id. at 668; Butler, 286 S.C. at 442, 334 S.E.2d at 814.

SPARTANBURG COUNTY CLERK OF COURT 2025 NOV 11 P 4:29

The first prong – constitutional deficiency – is "necessarily linked to the practice and expectations of the legal community." Padilla v. Kentucky, 559 U.S. 356, 366 (2010). In order to prove deficient performance, the applicant must show counsel's representation fell below an objective standard of "reasonableness under prevailing professional norms." Cherry v. State, 300 S.C. 115, 117 – 118, 386 S.E.2d 624, 625 (1989). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814.

Strickland, however, "does not guarantee perfect representation [--] only a reasonably competent attorney." Harrington v. Richter, 562 U.S. 86, 110 (2011) (quoting Strickland, 466 U.S. at 687). 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. Just as there is "no expectation that competent counsel will be a flawless strategist or tactician, an attorney may not be faulted for a reasonable miscalculation or lack of foresight or for failing to prepare for what appear to be remote possibilities." Harrington, 562 U.S. at 110.

Accordingly, "[j]udicial scrutiny of counsel's performance must be highly deferential [,as] it is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Strickland, 466 U.S. at 689; see also Yarborough v. Gentry, 540 U.S. 1, 8 (2003) ("The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight.") Unlike a later reviewing court, the attorney observed the relevant proceedings; knew the materials outside the record; and interacted with the client, opposing counsel, and the judge.

Thus, the question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom. Id. (quoting Strickland, 466 U.S. at 690).

Thus, a fair assessment of attorney performance requires every effort to be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Id. 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 reasonable professional assistance." Butler, 286 S.C. at 445, 334 S.E.2d at 816. The applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625.

Reviewing courts "must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 690. An applicant making a claim of ineffective assistance "must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." Id. The reviewing court must then "determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." Id.

The Strickland standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. 466 U.S. at 689-690; see also Harrington, 562 U.S. at 105 (cautioning that an ineffective assistance of counsel claim could potentially function as a way to escape rules of waiver or forfeiture and raise issues not presented at trial). Even under de novo review, the standard for judging counsel's representation is a most deferential one. Harrington, 562 U.S. at 105. Unlike a later reviewing court, the attorney observed the relevant proceedings; knew of the materials outside the record;

and interacted with the client, opposing counsel, and the judge. Thus, the question is whether an attorney's representation amounted to incompetence under "prevailing professional norms", **not** whether it deviated from the best practices or most common custom. Id. (quoting Strickland, 466 U.S. at 690) (emphasis added).

The second, or "prejudice" prong of Strickland is rooted in the very purpose of the Sixth Amendment guarantee of counsel—to ensure a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. Id. at 691–92. In order to prove prejudice, an applicant must demonstrate counsel's deficient performance prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. A reasonable probability is a probability "sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. Thus, it is not enough "to show the errors had some conceivable effect" on the outcome of the proceeding—counsel's errors must be "so serious as to deprive the defendant of a fair trial." Id. at 687 (emphasis added).

Because the Sixth Amendment right to counsel also applies to a defendant entering a guilty plea, Hill v. Lockhart extended the two-part Strickland test to challenge guilty pleas based on ineffective assistance of counsel. cf. Padilla, 559 U.S. at 373 (recognizing that the guilty plea process is a "critical phase of litigation" for purposes of the Sixth Amendment right to effective assistance of counsel). A claim of ineffective assistance of guilty plea counsel requires the applicant to present evidence satisfying two prongs: first, evidence that counsel's performance was deficient; and second, evidence that counsel's deficient performance prejudiced the defendant by causing him to plead guilty rather than go to trial. Hill, 474 U.S. at 52.

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CLERK OF COURT
SPARTANBURG COUNTY
FAMILY COURT

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 range of 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 decision making" 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, 582 U.S. 357, 367 (2017). However, the applicant must convince the court that a decision to reject the plea bargain would have been rational under the circumstances. Padilla, 559 U.S. at 372. The question here is whether the applicant, if correctly informed of circumstances surrounding the plea, would have pleaded guilty – not whether counsel would have still advised him or her to plead guilty. Turner v. State, 335 S.C. 382, 385, 517 S.E.2d 442, 444 (1999).

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, 582 U.S. at 368–369 (1967) (internal citations and quotation marks omitted); cf. Hill, 474 U.S. at 58 ("[R]equiring

a 'prejudice' showing from defendants who seek to challenge the validity of their guilty pleas on the ground of ineffective assistance of counsel 'will serve the fundamental interest in the finality of guilty pleas.'"). Reviewing "[c]ourts should not upset a plea solely because of post hoc assertions from a defendant about how he would have pleaded but for his attorney's deficiencies." Lee, 582 U.S. at 369. Rather, judges should "look to contemporaneous evidence to substantiate a defendant's expressed preferences. Id. In determining whether a guilty plea was taken in accordance with constitutional standards, the reviewing judge must analyze and consider the entire record, including the transcript of the plea and the evidence presented at the PCR hearing. Harres, 282 S.C. at 134, 318 S.E.2d at 361.

The performance and prejudice standards, however, "do not establish mechanical rules[;] ... [t]he ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." Id. at 696. Moreover, "there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one." Strickland, 466 U.S. at 697. The court "need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." Id. If it is easier to dispose of an ineffectiveness claim on the grounds of lack of sufficient prejudice, the court may evaluate the prejudice prong only. Id.

In the present case, Applicant has asserted that Plea Counsel provided ineffective assistance of counsel resulting in an involuntary guilty plea. Because the allegations likely raises questions of fact not conclusively refuted by the record, the State requests an evidentiary hearing to fully resolve the issues. Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983) ("Where an application for post-conviction relief alleges specific instances of ineffective assistance of counsel which are

not conclusively refuted by the record before the lower court, a question of fact is raised which can only be resolved by an evidentiary hearing.").

RESPONSE TO ALLEGATION OF INVOLUNTARY GUILTY PLEA

Because a guilty plea is a solemn, judicial admission of the truth of the charges against an individual, the PCR applicant's right to contest the validity of such a plea is usually, but not invariably, foreclosed. See Blackledge v. Allison, 431 U.S. 63, 73-74 (1977). Statements 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. See Crawford v. U.S., 519 F.2d 347, 350 (4th Cir. 1975) (overruled on other grounds by U.S. v. Whitley, 759 F.2d 327 (4th Cir. 1985)).

To establish that a guilty plea is voluntarily and knowingly entered into, the record must demonstrate that the applicant had a full understanding of the consequences of their plea and the charges against them. See Boykin v. Alabama, 395 U.S. 238, 243 (1969); Dover v. State, 304 S.C. 433, 434, 405 S.E.2d 391, 392 (1991). (Courts must make sure defendants have "a full understanding of what the plea connotes and of its consequences. When the judge discharges that function, he leaves a record adequate for any review that may be later sought ... and forestalls the spin-off of collateral proceedings that seek to probe murky memories.")

When determining guilty plea issues, it is proper to consider both the guilty plea transcript and the evidence presented at the PCR hearing. See Harres v. Leeke, 282 S.C. 131, 134, 318 S.E.2d 360, 361 (1984). An applicant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of the plea by showing that trial counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for trial counsel's errors, the defendant would not have pled guilty but would have insisted on

going to trial instead. See Roscoe v. State, 345 S.C.16, 20, 546 S.E.2d 417, 419 (2001); see also Richardson v. State, 310 S.C. 360, 362, 426 S.E.2d 795, 797 (1993).

In the present case, the record reflects that the guilty plea was knowingly, intelligently, and voluntarily entered by Applicant with a full understanding of the charges and consequences of the plea.

The following colloquy took place between Applicant and the Court at the guilty plea hearing:

THE COURT:	All right. Mr. Gunby, you heard the solicitor lay out the facts. Is that what happened?
APPLICANT:	Yes, sir.
THE COURT:	Has anybody promised you anything, threatened you or forced you to come in here and plead guilty?
APPLICANT:	No, sir.
THE COURT:	Have you had a chance to speak to your lawyer?
APPLICANT:	Yes, sir.
THE COURT:	And have you understood everything he has told you?
APPLICANT:	Yes, sir.
THE COURT:	And do you need any additional time to speak with him?
APPLICANT:	No.
THE COURT:	And are you satisfied with his advice and representation?
APPLICANT:	Yes, sir.
THE COURT:	And are you pleading guilty here today because you are guilty?
APPLICANT:	Yes, sir.
THE COURT:	All right. I accept the plea and find the defendant is freely, voluntarily and intelligently pleading guilty with the advice of his attorney. He is satisfied with that advice. And the state has facts to support the plea. …

(GP Tr. pp. 14 – 15).

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GREENVILLE COUNTY, SC

Accordingly, Respondent submits Applicant cannot satisfy the requirements of Strickland

or Hill. However, the record likely does not refute or disprove Applicant's allegations regarding Applicant's various claims of ineffective assistance of counsel. Therefore, the State requests an evidentiary hearing to fully resolve the issues. See Sharper, 279 S.C. at 265, 305 S.E.2d at 248 (providing an evidentiary hearing shall be held when a PCR application "alleges specific instances of ineffective assistance of counsel which are not conclusively refuted by the record before the lower court").

RESPONSE TO ALLEGATION OF WHITE[4] CLAIM

Applicant alleges Plea Counsel was ineffective for failing to advise him of his right to appeal his plea and sentence. Though counsel is required to make certain that a defendant is made fully aware of his or her right to appeal after a trial, a different standard applies to a guilty plea:

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

Turner v. State, 380 S.C. 223, 224-25, 670 S.E.2d 373, 374 (2008) (citations omitted); see also Roe v. Flores-Ortega, 528 U.S. 470, 480 (2000) (imposing the duty to consult when there is reason to think either that a rational defendant would want to appeal or that the particular defendant reasonably demonstrated interest in doing so); contra Frazer v. South Carolina, 430 F.3d 696 (4th Cir. 2005) (reading Flores-Ortega to mean counsel generally has a duty to consult with his client regarding whether to pursue an appeal). Therefore, in a collateral action attacking a guilty plea, the "bare assertion that a defendant was not advised of appellate rights is insufficient to grant relief." Jones v. State, 382 S.C. 589, 598, 677 S.E.2d 20, 23-24 (2009) (quoting Weathers v. State, 319 S.C. 59, 61, 459 S.E.2d 838, 839 (1995)).

[4] White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974).

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Where an Applicant reasonably demonstrates an interest in appealing, or where there is a reason to think a rational defendant would want to appeal, and where Counsel fails to either initiate that appeal or comply with Anders[5] procedure, "White permits consideration of the full trial record on [an] issue in conjunction with appellate review of the PCR proceeding under an exception to the prohibition against appellate courts considering appeals in the absence of notice of direct appeal given and timely served." Smith v. State, 309 S.C. 413, 415, 424 S.E.2d 480, 481 (1992) (citing Davis v. State, 288 S.C. 290, 342 S.E.2d 60 (1986)).

Here, the record reflects that Applicant was aware of his right to pursue a direct appeal, as the plea court informed him during sentencing by stating, "the defendant has 181 days of credit and ten days to appeal." (GP Tr. p. 18, l. 21).

Respondent submits Applicant's allegation is without merit. However, because this allegation likely raises questions of fact not conclusively refuted by the record, the State requests an evidentiary hearing to fully resolve the issue. See Sharper, 279 S.C. at 265, 305 S.E.2d at 248 (providing an evidentiary hearing shall be held when a PCR application "alleges specific instances of ineffective assistance of counsel which are not conclusively refuted by the record before the lower court").

REQUESTED RELIEF UNAVAILABLE IN PCR ACTIONS

In his prayer for relief, Applicant requests that the Court vacate his sentence. This relief is unavailable in a post-conviction relief action. If this Court finds a defect in the original proceedings, the appropriate relief would be a new trial on the original indictments. Gilstrap v. State, 252 S.C. 625, 168 S.E.2d 88 (1969); see also Smith v. State, 413 S.C. 194, 195, 775 S.E. 2d

[5] Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d. 493 (1967).

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696, 696 (2015) ("We now clarify the proper remedy is a new trial."); Grant v. MacDougall, 244 S.C. 387, 391 137 S.E.2d 270, 272 (1964) (relief of absolute release not available). Where an applicant seeks only relief to which he or she is not entitled, "it is not incumbent upon [the] court to pass upon what relief, if any, he [or she] might, perchance, be entitled to." Young v. State, 250 S.C. 476, 479, 158 S.E.2d 764, 765 (1968).

For these reasons, if the application is not otherwise amended before the evidentiary hearing to reflect a desire for appropriate relief, Respondent would respectfully request this Court engage in a thorough colloquy with Applicant to apprise him of the relief available in a PCR. If at the evidentiary hearing, Applicant indicates no desire for appropriate relief but a desire to proceed, Respondent will at that time move to dismiss the application.

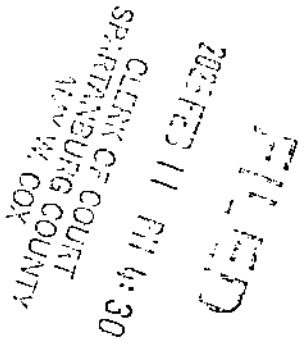
ANY FUTURE AMENDMENTS AND INVOCATION OF DISCOVERY PROCESS

Applicant must specify any claims he intends to raise at the PCR evidentiary hearing. All claims should be made well in advance of the evidentiary hearing. Because Applicant has an attorney, the attorney, and not Applicant, is the only individual authorized to file amendments to this application. See Rule 11, SCRCP. *Pro se* filings will not be considered at the PCR hearing. The State reserves the right to request that any amendments withheld until the last minute be stricken because of undue prejudice to the State pursuant to Love v. State, 428 S.C. 231, 834 S.E.2d 196 (2019), or, alternatively, the State will request a continuance in the matter. See Id. at 245, 834 S.E.2d at 203 (Kittredge, J., dissent) ("If, however, the proposed amendment . . . would truly prejudice the State, the better course of action would be to continue the matter and thus remove any possibility of prejudice resulting from the belated amendments.").

Pursuant to S.C. Code Ann. § 17-27-150, Applicant may not invoke formal discovery processes to issue subpoenas or otherwise obtain discovery materials unless granted leave from

the Court upon a showing of good cause. Furthermore, Respondent requests that all potential exhibits and materials used to produce potential expert witness testimony be sent to Respondent well in advance of the evidentiary hearing. Respondent reserves the right to request a continuance and oppose witness testimony and exhibits that are withheld until the last minute, resulting in undue prejudice against Respondent.

[CONCLUSION AND SIGNATURE PAGE FOLLOWS]



CONCLUSION

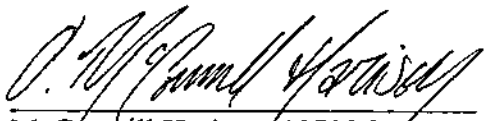
WHEREFORE, Respondent respectfully requests that an evidentiary hearing be held on Applicant's claims of ineffective assistance of Plea Counsel.

Respectfully Submitted,

ALAN WILSON
Attorney General

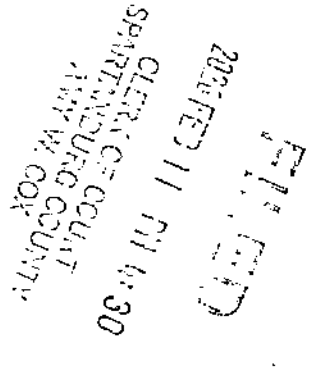
D. RUSSELL BARLOW, II
Senior Assistant Deputy Attorney General

O. MCCONNELL HARISON
Assistant Attorney General

By: 
McConnell Harison, 107326

ATTORNEYS FOR RESPONDENT
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211

February 6, 2026



STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG	)	IN THE COURT OF COMMON PLEAS FOR THE SEVENTH JUDICIAL CIRCUIT
FRANK GUNBY, JR., #335999, Applicant, v. STATE OF SOUTH CAROLINA Respondent.	)	CASE NO. 2025-CP-42-03777 **CERTIFICATE OF SERVICE BY MAIL**

1. I am an employee of the Respondent in the above-captioned action.

2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.

3. I have this day served a copy of the Return in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Ms. Susannah C. Ross
Ross & Enderlin, PA
330 East Coffee St.
Greenville, SC 29601

DATED this 6th day of February, 2026.

2026 FEB 11 PM 4:30
CLERK OF COURT
SPARTANBURG COUNTY
AMY M. COX
FILED

Leigh Ann Stone
Legal Assistant for Respondent

STATE OF SOUTH CAROLINA * COURT OF GENERAL SESSIONS
*
COUNTY OF SPARTANBURG * TRANSCRIPT OF RECORD

----------x
FRANK GUNBY, JR., #335999 *
*
Applicant, *
*
vs. * Case No. 2025-CP-42-03777
*
THE STATE OF SOUTH CAROLINA. *
*
----------x

March 3, 2026

B E F O R E:

The Honorable Walton J. McLeod, IV, Presiding Judge

A P P E A R A N C E S:

Susannah Conyers Ross, Esq.
Attorney for the Applicant

Ms. McConnell (ph) Harrison, Esq.
Attorney for the Respondent

Recorded by: TEC Courtroom Recording
Transcribed by: Bobbi Fisher, RPR
SC Official Court Reporter III

I N D E X

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E X H I B I T S

(None.)

COURT REPORTER/TRANSCRIBER LEGEND

Dash (--)	Indicates an interruption in speech
Ellipses (...)	Indicates trailing off in speech
(ph)	Indicates phonetic word/unclear word
[sic]	Indicates the word is written as said
(Indiscernible)	Indicates word(s) is not known due to poor audio recording quality

P R O C E E D I N G S

(The proceedings commenced as follows:)

MS. HARRISON: May it please the Court?

THE COURT: Yes, sir -- ma'am. Excuse me.

MS. HARRISON: You're fine.

McConnell (ph) Harrison on behalf of the State of South Carolina. This is the PCR matter of Frank Gunby, Jr., versus the State. Case No. 2025-CT -- CP -- excuse me -- 42-03777 out of Spartanburg County.

During its September 2024 term, the Spartanburg County Grand Jury indicted Applicant for trafficking methamphetamine 28 to 100 grams; trafficking methamphetamine 10 to 28 grams, second offense; and an additional indictment for trafficking methamphetamine 10 to 28 grams, second offense.

On January 29th, 2025, Applicant appeared before the Honorable G.D. Morgan, Jr. Applicant was represented by Louei Nmair, Esquire, and Grace Kerley of the Seventh Circuit Solicitor's Office prosecuted the case.

Applicant pled guilty pursuant to plea negotiations with the State. He pled guilty as indicted on two charges of trafficking methamphetamine 10 to 28 grams, second offense.

Upon entering his guilty plea, the State dismissed an indictment for trafficking methamphetamine 28 to 100 grams, dismissed Applicant's LWOP notice based on his criminal history, and dismissed an additional warrant for possession of

methamphetamine in Cherokee County that was served on the Applicant shortly before his plea hearing date.

There was also an Order imposing Applicant to not possess firearms.

Applicant, entering his guilty plea, violated the conditions of his supervision for a previous conviction of possession with the intent to distribute methamphetamine where Applicant was sentenced to five years' incarceration, suspended to 14 months, and three years' probation. Judge Morgan revoked Applicant's probation in full and terminated it upon Applicant entering his guilty plea.

Judge Morgan sentenced Applicant to -- pursuant to plea negotiations to concurrent sentences of 15 years' imprisonment for each conviction of trafficking methamphetamine 10 to 28 grams, second offense, and imposed a fine of $50,000 for each conviction. He was given credit for 181 days' time served.

He did not pursue a direct appeal. And in his initial PCR application, Applicant alleges he's being held in custody unlawfully for various grounds, which we have construed as claims of ineffective assistance of counsel to include the failure to file a direct appeal.

And then Applicant amended his PCR application to include an additional claim of ineffective assistance of counsel for failing to argue an accommodation defense and failing to present mitigating evidence. As relief, the Applicant

requests vacation of his sentence.

And, at this time, I'd ask Ms. Ross to state for the record which allegations she intends to move forward with.

MS. ROSS: Judge, I'd move forward with the allegations presented by the State and move to conform the pleadings to the evidence depending on what Mr. Gunby's testimony --

THE COURT: All right. You may call your first witness.

MS. ROSS: I'd call Frank Gunby.

THE COURT: Okay.

FRANK GUNBY,

after having been duly sworn, was examined and testified to as follows:

THE DEFENDANT: Afternoon, Judge.

THE COURT: Good afternoon sir.

THE DEFENDANT: Okay. First, I'd like to start with --

MS. ROSS: Wait, wait, wait.

THE COURT: I'm going to let her ask the questions.

DIRECT EXAMINATION

BY MS. ROSS:

Q Let me ask the questions real quick first. So you understand when you -- the relief you can get at PCR is to be put back in the position you were in before your plea, facing a life without parole sentence? Do you recognize that?

A Yeah. But I just don't understand how I got trafficking when I'm a user. I -- Johnny Boy brung me the dope. He said

if I help him find people that want to buy it, he would get me high. So people that call me up and say, "Hey, you know, where I get some?" "Yeah."

I call Johnny up. He come to my house. The person come to my house. He give them the dope. I get high for free, and that was it. How the hell did I get trafficking charges?

Q Okay. Well, first, you want to proceed with the PCR, even though you know you could --

A Sure. I don't understand. All right.

Q But is that what you want to do? Proceed with the PCR?

A Yes, because I -- because this is not right.

Q And I heard what you said. You have to speak slowly and clearly for the court reporter to get everything down.

A All right.

Q But you're saying that you were a user?

A I'm a user. I'm a user. I told Mr. Lamar that I was a user. Johnny Boy called me up and said, "Hey, if anybody wants any drugs, I got crack, I got fentanyl, I got meth, I got whatever you need. Call me up and I'll get you high."

"Hell, yeah. I smoke meth. I don't do fentanyl. I do meth."

So when you -- I call him up, say, "Hey, Johnny, I got a guy who wants to -- someone wants to buy an ounce."

He said, "All right. I'll meet you at your house."

He come to my house. They come to my house. They do the

exchange. I get high, and then I don't have to go nowhere.

All of a sudden, the next thing I know, I'm coming back -- they come with warrants saying that I'm selling drugs.

Q You're arranging where someone -- the buyer is coming to your house?

A Yeah, to buy --

Q And then the seller comes to your house?

A Yeah. I have them all meet at my house, so I didn't have to go nowhere, and I'd get high for free.

Q All right. So, in effect, you're just sort of kind of making the arrangement --

A So I can get high for free. That's all I was looking for is a free high because I didn't have money. I didn't have a vehicle. I couldn't go nowhere, so I couldn't go -- go anywhere.

Q Okay. So you're alleging your lawyer was ineffective for failing to get a possession charge for you?

A Yeah, exactly. Because I told him, "Look, I need help now." Now -- now I got a clear mind. I got a certificate for NA -- NA. I took courses in the facility I'm at now. I got my multiple-year chip on my shoulder of -- to me multiple years clean. I feel better about myself. I gotta clearer mind now.

But I'm like, wow, I'm doing all this damn time. So I -- someone told me to put a PCR on before the year was up. I did

that. And so I just -- you know, I understand -- yeah, I did a lot of wrong stuff. I'm not perfect. I got high. I was a drug addict, so I did whatever it means, whatever it took to get high, but I didn't have no money.

So what I did was people wanted drugs, I would find them and call Johnny up, and Johnny would them bring to my house. And then next thing you know, I find out in my PCR that Johnny's a CI, and the girl that was buying it was an informant. And next thing I know, I'm coming to prison for freaking trafficking, and he brung the drugs, and she left with the drugs. Why did I get -- I don't understand.

Q Right. And so did you tell the law enforcement this? Did you tell the police that?

A Yeah, I told them. And then -- then they had a warrant --

Q Did they try to have you work off your charges?

A I told them that, and here's what he told me. He said, "If anybody wants to buy anything, let me know. I'm looking for these people. Jerry -- Jerry --"

Q Okay. The court reporter has to understand what you're saying.

A Officer Nicholas -- Nicholas Royal said if anybody wants to buy any drugs, let us know, and you can work your time off.

I said, "Okay."

He told me who was looking for: Jerry Dawkins. This

other person.

I said, "Yeah, I know them." I said, "Okay, fine."

So the next thing I know, I found out they're all in jail. So I'm thinking things are fine.

So he came to my house, searched my house, didn't find no drugs. All of a sudden, he goes to my shed. Oh, someone went there by themselves -- because if there was drugs in my shed, I would have been smoking them. Okay?

So the lady comes out and says, "Oh, we found this in your shed."

I'm like, "How did you find them in my shed? If there was drugs in my shed, I would have been doing them."

So the next thing I know -- but nobody went to jail.

So Nicholas said, "Well, if anybody -- anybody (indiscernible) buys any drugs, let me know."

All right. I'll tell you. But you already got -- you already busted them. So what -- what do you want me to tell you? I don't know.

Q Okay. Well, let's talk about the plea.

A All right. Mr. -- Mr. -- Mr. Renault (ph) told me that if I -- if -- they want to give me life without parole. He said that the solicitor don't want to come off 20. I can give you 15 if you take it today.

I said, "Well" -- I was -- I was nervous. I was like, "Heck, yeah, 15 years." It's better than life. You know what

I'm saying?

But now that I've got a clear mind and I've been looking through the law work and stuff, there's a lot of imperfections, man. They can't charge you twice for (indiscernible) offense -- first offense. They can't charge twice for a second offense.

I mean -- so I'm like, "Well" -- I mean, I understand they were trying to help me, but I didn't understand what was going on because I'm a user. I was not -- I didn't have a clear mind.

I mean, now that I got -- I got knowledge on the drug use and doing drugs and all that where it gets you nowhere. You know what I mean? Stay in school, keeps you cool. You know what I mean?

But the drugs don't do nothing but bring you down and ruin your relationship, ruin your life. Because look at me now. I'm sitting here, and my dad's 80-some years old.

Q So you're saying, at the time of the plea, you didn't really know what you were doing because you were on drugs?

A I just come off the street doing drugs. I was high. I was high every day, 24/7 -- 24 hours a day. (Indiscernible) people telling me I'm driving -- I'm falling asleep while I'm driving. I don't notice because I'm thinking -- I'm thinking I'm in control. But I wasn't. I was out of control.

Q Now, what do you think your lawyer should have done for

you that they didn't do?

A Well, he just well -- he discussed it. He said he was going to do the best he can and get me ten years and five years' probation. I was like, "That's cool."

And then he said, "Well, if she don't -- the solicitor don't want to come off 20, but I can get you 15 if you take it now."

So I was nervous. I said, "Okay." I mean, I was like, "Okay, well, it's better than life." You know what I mean? I thought it was a good deal.

But then as I sit there and talk to people that kill people, shoot people and get five years, I'm like, God, you killed someone. I didn't kill nobody. God, I didn't -- you know what I mean? I mean, I wasn't meaning no harm. I was doing things to support my habit the best way I knew how because I didn't have no money.

So, now that I got a clear mind, because I'm clean and sober and I got -- I got certificates and I'm better in my life, my dad's getting old, so...

Q Okay. Now, did you -- I had down there, did you want an appeal after your plea? Did you ask your lawyer to appeal your case?

A I didn't really know what to ask him, so when I got back to Kirkland, someone said they got -- you got one year to put a PCR. And if you put a PCR in before one year, they'll get

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you back in court and try to -- try to change and ensure you better yourself.

I was like, "Okay."

Q Okay. Now, who told you about PCR?

A Another inmate that was going back to court for a murder charge that he had -- he had 18 years on a murder charge, and he was bringing it back to get 10 or 15 or something like that.

So I was like, "Oh." I was like, "(Indiscernible)." And he showed me how to write a PCR.

Q That was another inmate who showed you that?

A Yeah, because I know -- I went to the law library. Kept going to the law library, trying to learn.

Q Are there any other allegations of ineffective assistance of counsel that you'd like to make at this time?

A Never meant to hurt nobody -- hurt anybody. Never meant to hurt anybody. There was no guns involved.

I worked in the kitchen for a year and a half at Evans, and I can't even get any credits for it because I'm 85%. So I can't go to work release, I can't get anything to make my life better, to maybe get a job, and I can't help support my family because -- you know, and I can't get a job on the outside working and earning money, you know what I mean?

Sitting in prison, I work for free, and I can't even get work credits because I'm 85% and it's violent, and there was

nothing violent about it. I was just trying to get high. And that was my -- that was my thing. I didn't mean to hurt -- I don't --

Q Did your lawyer tell you that it was violent and explain that to you?

A He said, because of the weight. But I didn't understand that. I was -- no, I didn't know. If someone wanted something, I called Johnny, "Hey, I got this person got $500, person got 600 bucks." You know, I didn't even make any money. I just got a piece of -- piece of drugs to get high. Went in the house and got high and they left.

I didn't have a car because I couldn't afford a car. So I'd have him come to my house and have them come to my house, and they do the exchange, and the next thing I know, I'm getting trafficking charges.

And I'm like -- so I'm -- I just -- I was -- I was a bad user, I was a bad drug addict, and I didn't take responsibility.

Q Have you ever been accused of prior distribution or trafficking drugs?

A Never. Just, when I got pulled over, the cops said, "You got drugs in your vehicle?" And I'd be honest. I said, "Yes," because I -- you know, someone gave me money to go buy drugs, and I had to take the money, and I'd go meet up with the drug dealer and pick it up.

But if I got pulled over, guess what? I'm shit out of luck because now if the cop says, "Is there any drugs in your vehicle?" I'm not going to lie to him, because my dad always said, "Don't lie." So I give him the drugs, and the next thing I know, I go to jail for five years or ten years.

And they say it was trafficking, but --

Q Is it fair to say the investigators knew you as a drug user, that they could find you in possession of drugs?

A No, not that I know of. I never really was in trouble with the law. I worked for the Department of Public Works in New York -- in New York. I had a good job. I made $60,000 a year. I was doing good. I got hurt. I fell down a well, and everything went to shit from there.

Q Okay. Well, I have no further questions. Thank you.

THE COURT: Any cross?

MS. HARRISON: I have no questions, Your Honor.

EXAMINATION BY THE COURT

BY THE COURT:

Q I have one. Are you at MTU at this time?

A I'm at --

Q You were talking about you got your chip in prison, so I just wanted to know, are you doing a program right now?

A Yeah. I mean, at Allendale, it's a -- it's a -- they give you, like, go to take NA classes and AA classes. I took a GED course. I got that. I've been doing everything to do

to better myself.
Q And you're benefiting from the drug treatment program?
A Yes, yes.
Q That's good to hear.
A Thank you.
THE COURT: All right. That's all. You can have a seat.
Any witnesses from the State?
MS. HARRISON: The State would call Louei Nmair, Your Honor.

LOUEI NMAIR,

after having been duly sworn, was examined and testified to as follows:

DIRECT EXAMINATION

BY MS. HARRISON:
Q Hi, Mr. Nmair. How are you doing?
A I'm good. How are you?
Q Doing good. Thanks.
How long have you been practicing law?
A This is my seventh year. Criminal law for going on five years now. And I did a couple of months of real estate before I realized I didn't like that at all.
Q Gotcha.
Let's see. Were you appointed or retained in this case?
A I was appointed.
Q Okay. Do you recall how long before his plea you were

appointed?

A I was appointed in September of 2024, and his plea would have been in January 2025.

Q Okay. During that time, did you receive discovery pursuant to Rule 5 and Brady?

A Yes, ma'am.

Q Okay. Do you recall what was in that file?

A Yes, ma'am. So most of what we received was chain of custody, lab reports, the incident reports.

Essentially, what happened was, in April of 2024, they conducted a controlled buy where they went to Mr. Gunby's home, and the individual that was the CI, I believe Mr. Gunby actually knew who the CI was.

The individual that he spoke to, Johnny Boyd, actually arrives on-scene during the controlled buy after the confidential informant, as well as narcotics investigators had already arrived on the home.

According to the incident reports, the video camera that the CI had shows Mr. Gunby giving the narcotics to the confidential informant at the time.

I had discussed with the solicitor about receiving the confidential informant's information. She had indicated that that would be something that she would release to me. We ultimately never got it. I fully anticipated having to make the motion to do it, but she had indicated that she was

willing to release it.

They get a warrant for Mr. Gunby in May of that same year, and they never serve it on him. They actually wait to serve the warrant on him, but they use that warrant to then go to his home. Traffic officers or traffic deputies, road deputies arrived to his home. They actually detain him until Investigator Royal arrives, along with some other narcotics officers, where they ultimately release him from handcuffs.

And he speaks to officers. I believe he signs a consent form to allow them to search the property where they then find trafficking levels of narcotics again.

They then get a warrant on those charges I want to say around July before ultimately serving on -- serving those on him on August 1st, I believe, of 2024.

During the booking is when the third incident occurred where they ultimately say, during a search of Mr. Gunby's person, while he was being booked in, they found I want to say about 25 or 26 grams of methamphetamines in a shoe.

And those were the facts surrounding all three cases.

Q Did you review all of this discovery that you received with the Applicant?

A Yes, ma'am. And I also mailed him the discovery that we had as well.

Q Great. Okay. So you just went into the State's evidence pretty detailed.

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Do you feel that you had enough time preparing for Applicant's case to adequately represent him?

A Yes, ma'am. The biggest issue for him was the fact that he was served with life without the possibility of parole. That was served on -- on me on December 16th when they initially filed with the clerk's office, I believe. I think he might have been served the very next day on December 17th.

That was kind of the biggest issue that he had, not including the fact that I believe he actually might have been a third or subsequent. He pled guilty to a prior trafficking first as well as a possession with the intent to distribute as well, which is what he was on probation for.

He also had charges stemming from early -- I believe in around 2009, I think he pled guilty to a few burglary second violence, which also would have been a strike on his record.

But the solicitor I think pretty much had the pick of the litter in terms of which charge they wanted to go after trying to seek a life sentence with him. And we discussed that in our meetings. I met with him a few times. The first time I met with him was a virtual meeting that's available to us, and I just talked to him about the case and about the plea prior to his bond hearing in the beginning of January, as well as prior to the plea, at the end of January as well.

Q Okay. In your meetings with him, did you explain the strengths and weaknesses of the State's case?

A Yes, ma'am.
Q Okay. And just for the record, he does have prior convictions for trafficking; correct?
A Yes. I believe he has one prior.
Q And that's why he would have been served with the LWOP notice?
A Yeah. The possession with intent to distribute would have done it as well because it's also serious. It's just non-violent.
Q Right.
THE COURT: Mr. Gunby -- Mr. Gunby, I know you're talking with your lawyer, but I can hear you, so just try to keep it down.
Yes, sir. Thank you.
BY MS. HARRISON:
Q Okay. In your meetings with Mr. Gunby, did he seem to understand all of your discussions?
A I think so, yeah. His biggest problem was always just his -- as he said, his issue as a user as opposed to a being a -- what he believes is trafficking as in he has to have some type of, I guess, intent, whereas, unfortunately, the statute really doesn't care what your intent is as long as you're in possession of a certain weight that's trafficking.
Q So let's see here. Did the Applicant inform you that he wanted to plead guilty?

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A Originally, he wanted to go to trial. I did advise him that it was in his best interest to go to -- to take a plea. The solicitor had offered him to plead guilty to all three charges that he was charged with, which would have been a trafficking methamphetamine, 10 to 28; trafficking amphetamine 28 to 100, to a negotiated 15 years. We ultimately got her at least to take down the trafficking in 28 to 100. I do recall him asking about trying to get less than 15. The solicitor was not budging, however, on that at all.

Q Gotcha. Okay.

What would your trial strategy have been if you did proceed to trial?

A That's difficult to say. The confidential informant certainly would have been an issue, assuming that the officer's report on what is on the confidential informant's -- or what's in the report about what's on the video that the confidential informant had was certainly problematic.

In regards to what was found in the house, it's going to be a constructive possession issue. They didn't find it on him. They found it in the home. It was his home. It was the same home in the CI buy that the officers respond to in the May incident as well.

So that is where Mr. Gunby lived. It was also the address that I had, I believe, on file for him when I began my representation of him. So it would have been I think

certainly difficult to make the argument that he had no knowledge that there was drugs in the home.

I think, in part, one of the things that we spoke about it would essentially have been, I guess, muddying the waters a little bit to the jury about him having to get up there and testify, "I'm not a trafficker. I'm a user. I'm a drug addict. This is what I do." But then we come into the issue of, if he's getting up there saying "I'm not a trafficker," but then he has the prior conviction, then that blows the whole thing up.

Q Okay. Did you see any basis to raise an accommodation defense in this case?

A No. So the ultimate charge where I think he may have had even the opportunity was dismissed. He never alleged to -- the two traffickings that he actually pleads to, he never alleged that those were situations where he was in possession of those drugs for Johnny Boyd. In fact, he was adamant for the drugs found in his home that he would have never told the officers to search the home or gave them permission if he knew it was there.

And his position on the charges in August about the narcotics found in a shoe, his position was always, how do you have 20-something grams of methamphetamine in your shoe? Like it wouldn't fit; essentially, is that the officers are making this up, they just planted it on him.

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Q Okay. The applicant alleges that you failed to present mitigating evidence at his plea hearing. Do you recall presenting to the Court about his previous addiction problems?
A Yes, ma'am. That was -- that was always his biggest point, and that's what I wanted to address to the Court. I think the biggest thing was the fact that it was negotiated.

I believe that might have been the first time I actually would have been in front of Judge Morgan, but my understanding was that Judge Morgan generally goes along with the negotiations between the defense and -- the defendant and the State.

And so my biggest thing that I wanted to impress upon the Court was the fact that Mr. Gunby has been in acknowledgement that he has a drug issue and just kind of stressing his point, because that has always been, I think, his major point about his substance abuse.
Q Okay. Was there any other mitigating evidence that you were aware of that you could have presented at that time?
A I could have probably raised -- and I know I raised it during the bond motion about the fact that he was a high school graduate out in New York and that he did odd jobs. He had a career as -- in landscaping and construction, but I think ultimately, due to the fact that it was a negotiated sentence, there was not too much that that mitigation would have had, if any, because it couldn't have any since it was

negotiated.

Q Right. Okay.

Last few questions here: Did the applicant ever ask you to file a direct appeal on his behalf?

A Not that I recall, no, ma'am.

Q Okay. And did you know of any circumstances that would have made you pursue a direct appeal?

A No, ma'am. I was not present during the initial qualification. We had a trial week running that same week. I was the first case up. Ultimately, that case did not go through, but I recall Judge Morgan going back through the -- especially looking through the transcript, that Judge Morgan had gone back through the colloquy with him, but I don't recall anything that he would have as a basis for appeal.

MS. HARRISON: Beg the Court's indulgence.

I just want to state for the record, the re-questioning of the applicant at his guilty plea is on page 9 of his transcript.

BY MS. HARRISON:

Q And one last question: Do you stand by your representation of the applicant?

A Yes, ma'am.

Q Thank you so much. Please answer any questions Ms. Ross might have for you.

A Yes, ma'am. Thank you.

THE COURT: Cross-Examination.

CROSS-EXAMINATION

BY MS. ROSS:

Q Mr. Gunby is asking me about how many times he's been searched. You know, he's arrested, he's patted down on the way before drugs are found in his shoe allegedly.

Did you address that with him or discuss with him going to trial and arguing that they searched him at his house, searched him on the way to the bus, you know, numerous times before they allegedly found anything in his shoe?

A Yes, ma'am. That was a -- that was a discussion that we -- that we had, and that was in part kind of the defense that he was raising the issue, I think. And one thing that we talked about is the jury's role as a -- as the truth finder, the fact finder, and part of that obligation as the fact finder is to determine who do they believe more, and it's going to be his word against the officers and who does he think they would believe.

I mean, that's a conversation I have with most clients in these cases where I think they have to testify to get their side of it out, especially for these drug cases, considering how they are.

Q And you were saying, because he has a prior trafficking, even though it was a possession trafficking weight, not actually the distribution, that that would hurt him in the

eyes of the jury?

A Yeah. His -- because his words are always, "I'm not a trafficker, I'm a user," I thought that would open the door. I don't know that Mr. Gunby would be able to, on the stand, actually not kind of have that instinct to say, "I'm not a drug trafficker, I just use drugs."

And I think just kind of -- even -- maybe even the statement of that "I'm just a drug user" would kind of hurt him considering he has the distribution charge and the trafficking convictions.

Q All right. And did you discuss that with him in terms of entrapment or history of propensity to distribute or --

A Not that I recall.

Q All right. And did -- how was it a negotiated plea? Was that the solicitor's insistence for negotiation or, you know --

A We had -- we had discussed -- I do recall Mr. Gunby wanting less than the 15, certainly, and I understood that. He had always expressed his concern with his father's health.

I had reached out to the solicitor and tried to talk to her about coming down from the 15. She would not -- she would not budge on the 15. She said that the 15 was about as good as she was going to -- or as low as she was going to get.

And I had indicated to him that I think the risk was too great on the life without possibility of parole notice and

considering his history that going to trial or risking it, I don't -- I didn't think it was going to get much better than the 15 years.

Q Okay. And he didn't ask anything about having just an open plea where he'd be looking at -- or did she -- did the State want at least the 15?

A Not that I recall. I think he wanted a negotiated sentence, so, that way, he didn't have to face the kind of gambit in terms of the amount of time that he was looking at.

Q Okay. Thank you.

MS. ROSS: No further questions.

THE COURT: Redirect?

MS. HARRISON: Nothing further from the State.

THE COURT: All right. The witness may step down.

Any other witnesses?

MS. HARRISON: State rests, Your Honor.

THE COURT: Anything in closing? Just stand by the -- the grounds for relief?

MS. ROSS: Correct.

THE COURT: All right. It's under advisement. Thank you very much.

(The above hearing concluded.)

Certificate of Transcriber

CASE NAME: State v. Frank Gunby, Jr.

DATE OF HEARING: 3/3/26

RECORDING METHOD: TEC Courtroom

I, Bobbi Fisher, do hereby certify that the foregoing transcript is a true and correct record of the recorded proceedings; that I was not present for the live proceeding; and that said proceedings were transcribed to the best of my ability from the audio and/or video recording and supporting information; and that I am neither counsel for, related to, nor employed by any of the parties to this case; and I have no interest, financial or otherwise, in its outcome.

Bobbi Fisher

/s/ Bobbi Fisher_____

Bobbi Fisher, SC Official Court Reporter III, RPR

Transcript Prepared: 5/8/26

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STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG	)	IN THE COURT OF COMMON PLEAS FOR THE SEVENTH JUDICIAL CIRCUIT
Frank Gunby, Jr., #335999, Applicant, v. State of South Carolina, Respondent.	)	Case No. 2025-CP-42-03777 **ORDER OF DISMISSAL WITH PREJUDICE**

Presiding Judge:	Hon. Walton J. McLeod, IV.
Applicant's Attorney:	Susannah C. Ross, Esq.
Respondent's Attorney:	O. McConnell Harison, Esq.
Plea Counsel:	Louei C. Nmair, Esq.
Solicitor:	Grace C. Kerley, Esq.
Court Reporter:	Bobbi Fisher
Date of Hearing:	March 3, 2026

This matter comes before the Court by way of Frank Gunby Jr.'s (Applicant) application for post-conviction relief (PCR) filed on July 22, 2025. On February 11, 2026, Respondent filed its Return requesting an evidentiary hearing on Applicant's claims. Applicant subsequently amended his application through PCR Counsel to add additional claims of ineffective assistance of counsel.

On March 3, 2026, an evidentiary hearing was held at the Spartanburg County Courthouse before the Honorable Walton J. McLeod, IV. Applicant was present and represented by Susannah C. Ross, Esquire. Assistant Attorney General O. McConnell Harison represented Respondent. Applicant proceeded on the claims in his PCR application and amended application. In support of these claims, Applicant testified on his own behalf. Respondent presented testimony from Louei C. Nmair (Plea Counsel).

Following a thorough review of the record in its entirety, along with the testimony and evidence presented at the evidentiary hearing, this Court finds Applicant has failed to establish any constitutional violations or deprivations entitling him to relief and, accordingly, denies and dismisses this action with prejudice.

PROCEDURAL HISTORY

Applicant is presently confined within the South Carolina Department of Corrections (SCDC) pursuant to orders of commitment of the Spartanburg County Clerk of Court. During its September 2024 Term, the Spartanburg County Grand Jury indicted Applicant for trafficking methamphetamine, 28 to 100 grams (2024-GS-42-4254); trafficking methamphetamine, 10 to 28 grams, 2nd offense (2024-GS-42-4255); and trafficking methamphetamine, 10 to 28 grams, 2nd offense (2024-GS-42-4139).

On January 29, 2025, Applicant appeared before the Honorable G.D. Morgan, Jr. at the Spartanburg County Courthouse. Applicant was represented by Louei C. Nmair, Esquire. Grace C. Kerley of the Seventh Circuit Solicitor's Office prosecuted the case. Applicant pled guilty pursuaut to plea negotiations with the State. Applicant pled guilty as indicted to two charges of trafficking methamphetamine, 10 to 28 grams, 2nd offense. (2024-GS-42-4255; 2024-GS-42-4139).

Upon entering his guilty plea, the State dismissed the indictment for trafficking methamphetamine, 28 to 100 grams (2024-GS-42-4254), dismissed Applicant's LWOP notice based on his criminal history, and dismissed an additional warrant for possession of methamphetamine in Cherokee County that was served on Applicant shortly before the plea hearing date. There was also an order imposed prohibiting Applicant from possessing firearms.

Applicant entered his guilty plea, violating the conditions of his supervision for a previous conviction for PWID methamphetamine (2023-GS-42-0750), for which Applicant was sentenced

to five years' incarceration, suspended to 14 months, and three years' probation. Judge Morgan revoked Applicant's probation in full and terminated it upon Applicant's entry of a guilty plea.

Judge Morgan sentenced Applicant to concurrent sentences of 15 years' imprisonment for each conviction of trafficking methamphetamine, 10 to 28 grams, 2nd offense, and imposed a fine of $50,000 for each conviction. Applicant was given credit for 181 days' time served.

Facts Giving Rise to Conviction

The facts of Applicant's case were articulated by the solicitor at Applicant's guilty plea hearing as follows:

> As to the facts, Your Honor, on Indictment 24-4255, on May 10th of 224 sheriff's office narcotics officers responded to a location on Glenn Springs Road in Spartanburg County. The defendant was the subject of an ongoing narcotics investigation. He gave consent to search his residence. And from a shed by the residence law enforcement recovered 14.18 grams of meth. Next, Your Honor, as to Indictment 24-4139, on August 1st of 2024 the defendant was booked in the detention center at California Avenue in Spartanburg County on two outstanding drug warrants from two prior incidents. From his person 25.90 grams of meth was recovered.

(Plea Tr. p. 12).

CURRENT APPLICATION

In his application for PCR, Applicant alleges he is being held in custody unlawfully on the following grounds (excerpts verbatim[1]):

I. Ineffective Assistance of Counsel
   a. Involuntary Guilty Plea
      i. "The public defender told me to plead guilty".
      ii. "I was a drug user not a sell[er], help a so called friend and he was a CI and Dallas Ham was an inform[a]nt. We was friends hav[ing] sex getting hi[gh]".

[1] Applicant's claims as currently written on his PCR application have been construed as claims of ineffective assistance of counsel resulting in an involuntary guilty plea, as well as ineffective assistance of counsel for failing to advise Applicant of his right to a direct appeal.

iii. "I was just a drug user I have never sold drugs. Just use them looking for a free hi[gh] so I got him sell's so I get free drugs".
iv. "I know Johnny Body brings the drugs to me I was just a user he said if I know anyone that wants to buy drugs I can [illegible] so I would get it for free".
v. "The cop Nicholas Royal gave Johnny Body the drugs to my house Johnny [sold] the drugs to Dallas Ham".
vi. "She gave me money I have to Johnny Body he gave Dallas Ham the drugs when she got in the Jeep".

b. White[2] Claim

Applicant subsequently amended his PCR application through counsel to include the following claims:

I. Ineffective Assistance of Counsel
   a. Failing to argue an accommodation defense.
   b. Failing to present mitigating evidence.

Before this Court are the Spartanburg County Clerk of Court records regarding the subject convictions and sentences, Applicant's records from the South Carolina Department of Corrections, Applicant's guilty plea transcript, and the records of the current PCR action.

STANDARD OF REVIEW

The Uniform Post-Conviction Procedure Act[3] (the Act) provides that any person who has been convicted of a crime may seek post-conviction relief based on the following types of allegations:

1. That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;
2. That the court was without jurisdiction to impose sentence;
3. That the sentence exceeds the maximum authorized by law;
4. That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;

[2] White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974).
[3] S.C. Code Ann. §§ 17-27-10 to -160.

5. That his sentence has expired, his probation, parole or conditional release unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or
6. That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy[.]

S.C. Code Ann. § 17-27-20(A).

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. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). 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. Strickland v. Washington, 466 U.S. 668 at 687 (1984). 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 "[without proof of both deficient performance and prejudice to the defense ... it could not be

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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)).

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). 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 range of 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 decision making" 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, 582 U.S. 357, 367 (2017). However, an applicant must convince the court that a decision to reject the plea bargain would have been rational under the circumstances.

Padilla, 559 U.S. at 372. The question here is whether the applicant, if correctly informed of circumstances surrounding the plea, would have pleaded guilty—**not** whether counsel would have still advised him or her to plead guilty. Turner v. State, 335 S.C. 382, 385, 517 S.E.2d 442, 444 (1999) (emphasis added).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Applicant has alleged and elected to pursue various claims of ineffective assistance of counsel through the post-conviction relief action presently before this Court. In analyzing these claims, this Court has considered the legal arguments by counsel and thoroughly reviewed the record in its entirety. This Court additionally heard the testimony presented at the evidentiary hearing and was able to observe the witnesses, which allowed the Court to evaluate and scrutinize their credibility.

Upon conducting and completing its analysis, this Court finds that Applicant has failed to establish any constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. See Rule 71.1(e), SCRCP (stating that in a post-conviction relief action, "[t]he applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence."); Lucero v. State, 414 S.C. 238, 244, 777 S.E.2d 409, 412 (Ct. App. 2015) ("In a PCR proceeding, the applicant bears the burden of establishing that he or she is entitled to relief."); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) ("The burden of proof is on the Applicant in post-conviction proceedings to prove the allegations in his application.").

Accordingly, set forth below are the relevant findings of fact and conclusions of law as required by § 17-27-80 of the South Carolina Code:

INITIAL FINDINGS

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This Court further finds applicable the strong presumption that at all stages of Plea Counsel's representation of Applicant, he rendered adequate assistance and exercised reasonable professional judgment in his representation. Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007) (citing Strickland, *supra*). The United States Supreme Court has cautioned that "every effort be made to eliminate the distorting effects of hindsight" and evaluate counsel's decisions at the time they were made. Strickland, 466 U.S. at 689; see Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992); see, e.g., State v. Mercer, 381 S.C. 149, 166, 672 S.E.2d 556, 565 (2009) ("In this post-trial setting, our jurisprudence recognizes the gatekeeping role of the trial court in making a credibility assessment."); Clemons v. Mississippi, 494 U.S. 738, 766 (1990) (Blackmun, J., concurring in part and dissenting in part) ("The trial judge who hears the witnesses live, observes their demeanor and in general smells the smoke of the battle is by his very position far better equipped to make findings of fact which will have the reliability that we need and desire.").

This Court makes the following findings from the record: (1) Applicant was not under the influence of any drugs, alcohol, or medication that would affect his understanding of the proceedings. (Plea Tr. p. 5); (2) Applicant did not have any mental or physical disability that would affect his understanding of the proceedings. (Plea Tr. p. 6); (3) Applicant indicated he understood he was waiving constitutional rights by pleading guilty, including the right to a jury trial, the right to confront his accusers, and the privilege against self-incrimination. (Plea Tr. p. 7); (4) Applicant indicated that he was freely, voluntarily, and intelligently waiving those rights by pleading guilty. (Plea Tr. p. 7); (5) Applicant indicated he understood the charges against him and what he was pleading to. (Plea Tr. p. 7 – 8); (6) Applicant indicated that he understood the minimum to maximum range of sentencing he was facing for his charges. (Plea Tr. p. 11); (7) Applicant

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indicated that he understood the enhancement effect in regard to the charges being violent and serious offenses and the effect of that on his conviction. (Plea Tr. p. 11); (8) Applicant agreed with the solicitor's recitation of the facts supporting his conviction (Plea Tr. p. 14); (9) Applicant indicated that nobody had promised him anything, threatened him or forced him to plead guilty (Plea Tr. p. 14); (10) Applicant indicated that he had time to speak with Plea Counsel, understood everything Plea Counsel has told him and did not need additional time to speak with Plea Counsel. (Plea Tr. p. 14); (11) Applicant indicated that he was satisfied with Plea Counsel's representation and advice (Plea Tr. p. 15); (12) Applicant indicated that he is pleading guilty because he is guilty of the charges (Plea Tr. p. 15).

ALLEGATIONS OF INEFFECTIVE ASSISTANCE OF COUNSEL

Allegation: Involuntary Guilty Plea

Applicant alleges that his guilty plea was involuntarily entered due to Plea Counsel's constitutionally ineffective representation. This Court finds this allegation to be without merit.

Because a guilty plea is a solemn, judicial admission of the truth of the charges against an individual, the PCR applicant's right to contest the validity of such a plea is usually, but not invariably, foreclosed. See Blackledge v. Allison, 431 U.S. 63, 73-74 (1977). Statements 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. See Crawford v. U.S., 519 F.2d 347, 350 (4th Cir. 1975) (overruled on other grounds by U.S. v. Whitley, 759 F.2d 327 (4th Cir. 1985)). To establish that a guilty plea is voluntarily and knowingly entered into, the record must demonstrate that the applicant had a full understanding of the consequences of their plea and the charges against them. See Boykin v. Alabama, 395 U.S. 238, 243 (1969); Dover v. State, 304 S.C. 433, 434, 405 S.E.2d 391, 392 (1991). (Courts must make sure defendants have "a full

understanding of what the plea connotes and of its consequences. When the judge discharges that function, he leaves a record adequate for any review that may be later sought ... and forestalls the spin-off of collateral proceedings that seek to probe murky memories.")

When determining guilty plea issues, it is proper to consider both the guilty plea transcript and the evidence presented at the PCR hearing. See Harres v. Leeke, 282 S.C. 131, 134, 318 S.E.2d 360, 361 (1984). An applicant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of the plea by showing that trial counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for trial counsel's errors, the defendant would not have pled guilty but would have insisted on going to trial instead. See Roscoe v. State, 345 S.C.16, 20, 546 S.E.2d 417, 419 (2001); see also Richardson v. State, 310 S.C. 360, 362, 426 S.E.2d 795, 797 (1993).

A defendant has the right to effective assistance of counsel during the plea-bargaining process. Davie v. State, 381 S.C. 601, 675 S.E.2d 416 (2009) (abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018)). "The United States Supreme Court has held that 'defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused.'" Collins v. State, 422 S.C. 250, 261, 810 S.E.2d 871, 876 (2018) (quoting Missouri v. Frye, 566 U.S. 134, 145 (2012)); see also Lafler v. Cooper, 566 U.S. 156, 169–70 (2012) (rejecting proposition that a fair trial wipes clean any deficient performance by defense counsel during plea bargaining). Generally, defense counsel provides deficient performance when he or she does not communicate such an offer to the defendant. Frye, 566 U.S. at 145.

To show prejudice, an applicant for post-conviction relief "must demonstrate a reasonable probability that: (1) he [or she] 'would have accepted the earlier plea offer had [he or she] been

afforded effective assistance of counsel;' (2) 'the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it;' and (3) 'the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time.'" Collins, 422 S.C. at 262, 810 S.E.2d at 877 (quoting Frye, 566 U.S. at 147; citing Lafler, 566 U.S. at 164). An applicant must show actual prejudice, but depending on the facts of the case, an applicant's self-serving statement *may* be sufficient to establish actual prejudice. Davie, 381 S.C. at 613, 675 S.E.2d at 422.

Guilty Plea Hearing

At Applicant's guilty plea hearing, the following colloquy occurred between Applicant and the court:

THE COURT:	All right. Mr. Gunby, you heard the solicitor lay out the facts?
APPLICANT:	Yes, sir.
THE COURT:	Has anybody promised you anything, threatened you or forced you to come in here and plead guilty?
APPLICANT:	No, sir.
THE COURT:	Have you had a chance to speak with your lawyer?
APPLICANT:	Yes, sir.
THE COURT:	And have you understood everything he has told you?
APPLICANT:	Yes, sir.
THE COURT:	And do you need additional time to speak with him?
APPLICANT:	No.
THE COURT:	And are you satisfied with his advice and representation?
APPLICANT:	Yes, sir.
THE COURT:	And are you pleading guilty here today because you are guilty?
APPLICANT:	Yes, sir.
THE COURT:	All right. I accept the plea and find the defendant is freely, voluntarily and intelligently pleading guilty with the advice of his attorney. He is satisfied with that advice. And the state has the facts to support the plea.

(Plea Tr. pp. 14 – 15).

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PCR Evidentiary Hearing

On direct examination, Applicant testified that he was informed that the State was seeking to sentence Applicant to life without the possibility of parole for his charges. Applicant testified that the solicitor was unwilling to go any lower than twenty years for a sentence, but that he was approached with a fifteen-year offer if he accepted it that same day. Applicant testified that he accepted the fifteen-year offer because "it's better than life". (PCR Tr. p. 9). Applicant testified that he understood the solicitors were trying to help him with this plea offer, but that he didn't understand what was happening due to being a drug user. Applicant testified that at the time of his plea, he had just "come off the street doing drugs". Applicant testified that he was high every day at all hours of the day and would fall asleep while driving his vehicle. (PCR Tr. p. 10).

When asked what Plea Counsel should have done for him, Applicant testified, "Well, he just well – he discussed it. He said he was going to do the best he can and get me ten years and five years' probation. I was like, 'That's cool.' And then he said, 'Well, she don't – the solicitor don't want to come off 20, but I can get you 15 if you take it now.' So I was nervous. I said, 'Okay.' I mean, I was like, 'Okay, well, it's better than life.' You know what I mean? I thought it was a good deal." (PCR Tr. pp. 10 – 11).

On direct examination, Plea Counsel testified that Applicant initially wanted to proceed with trial. Plea Counsel testified that he advised Applicant that it was in his best interest to take a plea. Plea Counsel testified that the solicitor offered Applicant to plead guilty on all three charges to include trafficking methamphetamine, 10 to 28 grams, and trafficking amphetamine, 28 to 100 grams, to a negotiated plea deal with a fifteen-year sentence. Plea Counsel testified that he was ultimately able to get the larger trafficking charge down to trafficking 10 to 28 grams. Plea Counsel

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testified that he recalls asking the solicitor about a potential offer less than fifteen years, but the solicitor would not go any lower on the negotiated sentence. (PCR Tr. pp. 19 – 20).

Plea Counsel testified that he discussed the State's notice seeking LWOP with Applicant during their meetings. Plea Counsel testified that Applicant's prior convictions resulted in the strikes that led to the LWOP notice. Plea Counsel testified that Applicant seemed to understand all of the discussions that occurred between them, and that Applicant kept reiterating to him that he was a drug user and not a drug dealer or seller. Plea Counsel testified that Applicant believes there must be intent involved in order to be convicted of trafficking drugs, and that the statute regarding trafficking only concerns the possession of a certain weight and does not address intent. (PCR Tr. pp. 18 -19).

When asked what his strategy would have been if Applicant decided to proceed with trial, Plea Counsel testified that there were many issues they would have had to overcome. Plea Counsel testified that the confidential informant and related police reports would certainly be an issue, in addition to a constructive possession issue concerning the drugs found at Applicant's home. Plea Counsel testified that Applicant's address matched a confidential informant buy that officers ultimately responded to. Plea Counsel testified that with all of this evidence against them, it would have been difficult to argue that Applicant had no knowledge of the drugs in the home. (PCR Tr. pp. 20 -21). Plea Counsel testified that he would have attempted to "muddy the waters" a bit to the jury and had Applicant take the stand at trial to testify as to being a drug user and not a trafficker. Plea Counsel testified that they ran into the issue of Applicant planning to testify, considering he has a prior drug trafficking conviction, which "blows the whole thing up". (PCR Tr. p. 21).

On cross-examination, Plea Counsel testified that he and Applicant discussed the fact that the police searched Applicant multiple times prior to finding the drugs in his shoe. Plea Counsel

testified that the search would have been part of their defense at trial. Plea Counsel testified that he explained the jury's role to Applicant and their obligation as the fact finder, and additionally how the fact finder has to determine who is more credible at trial, highlighting to Applicant that it would be his words against the officer's words. Plea Counsel testified that he has this conversation with most clients, especially clients facing convictions for drug charges. (PCR Tr. pp. 24).

Plea Counsel testified that Applicant told him he wanted a sentence of less than fifteen years as part of the negotiated plea. Plea Counsel testified that he reached out to the solicitor to discuss a shorter negotiated sentence, but the solicitor would not budge, stating that fifteen was the lowest she would offer Applicant. Plea Counsel testified that he informed Applicant of the great risk they faced with LWOP at trial, especially considering his history and prior convictions. When asked if Applicant ever wanted an open plea, Plea Counsel testified that Applicant wanted a negotiated sentence so that he wouldn't have to gamble with a range of sentencing. (PCR Tr. pp. 25 – 26).

Findings

As an initial matter, this Court finds that the record refutes Applicant's allegations and reflects that Applicant's guilty plea was knowingly and voluntarily entered with a complete understanding of the potential sentence he could receive, which he knew was not capped at thirty years. Because a guilty plea is a solemn, judicial admission of the truth of the charges against an individual, the PCR applicant's right to contest the validity of such a plea is usually, but not invariably, foreclosed. See Blackledge v. Allison, 431 U.S. 63, 73–74 (1977). Statements 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. See Crawford v. U.S., 519

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F.2d 347, 350 (4th Cir. 1975) (overruled on other grounds by U.S. v. Whitley, 759 F.2d 327 (4th Cir. 1985)).

This Court finds Applicant has failed to show that Plea Counsel's representation fell below an objective standard of reasonableness, and that but for Plea Counsel's alleged errors, Applicant would not have pled guilty and proceeded to trial. See Roscoe v. State, 345 S.C.16, 20, 546 S.E.2d 417, 419 (2001); see also Richardson v. State, 310 S.C. 360, 362, 426 S.E.2d 795, 797 (1993). Plea Counsel credibly testified that, while Applicant initially wanted to proceed to trial, he informed Applicant that it would be in his best interest to plead guilty and get the negotiated sentence of fifteen years. Plea Counsel further credibly testified that he engaged in plea negotiations with the State, attempting to get an offer for a sentence of less than fifteen years at Applicant's request. However, the solicitor was unwilling to go below a negotiated fifteen years.

Plea Counsel testified that he informed Applicant that it would be the police officers' word against Applicant's at trial, and that they would have many issues to overcome in crafting a defense. Plea Counsel testified that while Applicant asserted that he was only a drug user and not a drug trafficker, this would not be a successful defense at trial, considering the trafficking statute considers weight and amount, not intent to traffic or distribute. Plea Counsel also testified to the issue of Applicant's prior convictions for trafficking. Further, Applicant testified that they accepted the offer of a negotiated fifteen-year sentence because that outcome was preferable to a life sentence. Thus, based on the evidence presented at the plea proceeding and the evidentiary hearing, this Court finds Applicant freely, knowingly, and voluntarily pled guilty.

Based on the foregoing, this Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that Plea Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has

failed to present specific and compelling evidence that Plea Counsel committed either errors or omissions to prove the second prong of Strickland—that he was prejudiced by Plea Counsel's performance.

This Court finds through the combination of the record and Plea Counsel's testimony that Applicant has failed to meet the burden of showing Plea Counsel was constitutionally ineffective. Accordingly, this Court finds Applicant has failed to establish any deficiency by Plea Counsel or any prejudice flowing therefrom. Thus, this allegation must be **DENIED** and **DISMISSED.**

Allegation: White Claim / Failure to File Direct Appeal

Applicant alleges that Plea Counsel was constitutionally ineffective for failing to file a direct appeal on his behalf following his guilty plea. This Court finds this allegation to be without merit.

Though counsel is required to make certain that a defendant is made fully aware of his or her right to appeal after a trial, a different standard applies to a guilty plea:

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

Turner v. State, 380 S.C. 223, 224-25, 670 S.E.2d 373, 374 (2008) (citations omitted); see also Roe v. Flores-Ortega, 528 U.S. 470, 480 (2000) (imposing the duty to consult when there is reason to think either that a rational defendant would want to appeal or that the particular defendant reasonably demonstrated interest in doing so); contra Frazer v. South Carolina, 430 F.3d 696 (4th Cir. 2005) (reading Flores-Ortega to mean counsel generally has a duty to consult with his client regarding whether to pursue an appeal). Therefore, in a collateral action attacking a guilty plea, the "bare assertion that a defendant was not advised of appellate rights is insufficient to grant

relief." Jones v. State, 382 S.C. 589, 598, 677 S.E.2d 20, 23-24 (2009) (quoting Weathers v. State, 319 S.C. 59, 61, 459 S.E.2d 838, 839 (1995)).

Where an Applicant reasonably demonstrates an interest in appealing, or where there is a reason to think a rational defendant would want to appeal, and where Counsel fails to either initiate that appeal or comply with Anders[4] procedure, "White permits consideration of the full trial record on [an] issue in conjunction with appellate review of the PCR proceeding under an exception to the prohibition against appellate courts considering appeals in the absence of notice of direct appeal given and timely served." Smith v. State, 309 S.C. 413, 415, 424 S.E.2d 480, 481 (1992) (citing Davis v. State, 288 S.C. 290, 342 S.E.2d 60 (1986)).

Guilty Plea Hearing

At the end of Applicant's plea hearing, the Court informed Applicant and Plea Counsel that Applicant was given 181 days' time served credit and that he has ten days to file a direct appeal. (Plea Tr. p. 18).

PCR Evidentiary Hearing

On direct examination, when asked whether he had requested that Plea Counsel file a direct appeal following his guilty plea, Applicant testified that he didn't really know what to ask Plea Counsel. Applicant testified that, when he got to prison, an inmate informed him about post-conviction relief applications and taught him how to fill out the application. Applicant testified that he had done so by spending time in the law library at Kirkland Correctional. (PCR Tr. pp. 11 – 12).

[4] Anders v. California, 386 U.S. 738 (1967).

On direct examination, Plea Counsel testified that he does not recall Applicant ever requesting a direct appeal be filed on his behalf. Plea Counsel testified that he did not know of any circumstances that would have caused him to pursue a direct appeal. Plea Counsel testified that he was not present during the initial qualification of Applicant at Applicant's guilty plea hearing because he was first up in a separate trial that morning. Plea Counsel testified that he recalls Judge Morgan going back through the colloquy again with Applicant with Plea Counsel present. Plea Counsel reiterated that he does not recall anything in Applicant's case that would be a basis for a direct appeal. (PCR Tr. p. 23).

Findings

This Court finds Applicant failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007) (citing Strickland). This Court additionally finds that Applicant has failed to overcome her burden in proving Plea Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. See Butler, *supra*. Based upon the record before this Court, it is undoubtedly clear that Plea Counsel provided representation that satisfies the Strickland deferential standard. See Mazzell v. Evatt, 88 F.3d 263, 269 (4th Cir. 1996) (declining "to allow an ineffective assistance of counsel claim to create a situation where post-conviction attorneys stroll in with the full benefit of hindsight to second-guess trial lawyers who professionally discharge their duties to their clients under the manifold pressures of a state trial").

Plea Counsel credibly testified that he does not recall Applicant ever requesting that he file a direct appeal on his behalf, and that he does not recall anything with Applicant's guilty plea that would have made Plea Counsel pursue a direct appeal. A combination of the record and Plea

Counsel's testimony establishes that Applicant did not request a direct appeal be filed on his behalf, and that Plea Counsel did not see any appealable issues to raise concerning Applicant's guilty plea. In a collateral action attacking a guilty plea, the "bare assertion that a defendant was not advised of appellate rights is insufficient to grant relief." Jones v. State, 382 S.C. 589, 598, 677 S.E.2d 20, 23-24 (2009) (quoting Weathers v. State, 319 S.C. 59, 61, 459 S.E.2d 838, 839 (1995)). Therefore, Applicant cannot establish that Plea Counsel was constitutionally ineffective for failing to file a direct appeal on his behalf following a guilty plea.

Based on the foregoing, this Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that Plea Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Plea Counsel committed either errors or omissions to prove the second prong of Strickland—that he was prejudiced by Plea Counsel's performance.

This Court finds through the combination of the record and Plea Counsel's testimony that Applicant has failed to meet the burden of showing Plea Counsel was constitutionally ineffective. Accordingly, this Court finds Applicant has failed to establish any deficiency by Plea Counsel or any prejudice flowing therefrom. Thus, this allegation must be **DENIED** and **DISMISSED**.

Allegation: Failure to argue accommodation defense

Applicant alleges that Plea Counsel was constitutionally ineffective for failing to present an accommodation defense. This Court finds this allegation to be without merit.

South Carolina Code § 44-53-460 states:

> Any person who enters a plea of guilty to or is found guilty of a violation of Section 44-53-370(a) or (c) may move for and the court shall grant a further hearing at which evidence may be presented by the person, and by the prosecution if it so desires, relating to the nature of the act on the basis of which the person has been

> convicted. If the convicted person establishes by clear and convincing evidence that he delivered or possessed with intent to deliver a controlled substance, except a controlled substance classified in Schedule I (B) and (C) which is a narcotic drug or lysergic acid diethylamide (LSD) and in Schedule II which is a narcotic drug, only as an accommodation to another individual and not with intent to profit thereby nor to induce the recipient or intended recipient of the controlled or counterfeit substance to use or become addicted to or dependent upon the substance, the court shall sentence the person as if he had been convicted of a violation of Section 44-53-370(c).

PCR Evidentiary Hearing

On direct examination, Plea Counsel testified that he saw no basis to raise an accommodation defense in Applicant's case. Plea Counsel testified that the charge, where Applicant may have had the opportunity to raise an accommodation defense, was ultimately dismissed. Plea Counsel testified that regarding the two trafficking charges Applicant pled to, Applicant never alleged that he was in possession of those drugs for Johnny Boyd. Plea Counsel testified that Applicant was adamant that he would not have told the officers to search his home or given them permission to do so if he was aware the drugs were present at the home. Plea Counsel testified that Applicant's position regarding the drugs found in his shoe was that twenty-something grams of meth would not fit inside somebody's shoe, and that the officers planted the drugs on Applicant. (PCR Tr. p. 21).

Findings

This Court finds Applicant failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007) (citing Strickland). This Court additionally finds that Applicant has failed to overcome her burden in proving Plea Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. See Butler, *supra*. Based upon the record before this Court, it is undoubtedly

clear that Plea Counsel provided representation that satisfies the Strickland deferential standard. See Mazzell v. Evatt, 88 F.3d 263, 269 (4th Cir. 1996) (declining "to allow an ineffective assistance of counsel claim to create a situation where post-conviction attorneys stroll in with the full benefit of hindsight to second-guess trial lawyers who professionally discharge their duties to their clients under the manifold pressures of a state trial").

Plea Counsel credibly testified that raising an accommodation defense would not have been helpful in Applicant's case, as the case they had the opportunity to raise this defense for was ultimately dismissed. Plea Counsel credibly testified that Applicant's position was that he was unaware of being in possession of the drugs he was charged with, which were found in his home. Plea Counsel credibly testified that Applicant informed him the police planted the other drugs in his shoe. Applicant did not offer any testimony regarding this claim.

An accommodation defense would not have been proper for Applicant's case, considering Applicant cannot have the intent to accommodate another individual with drugs if he contends that he was unaware of the drugs being in his possession. A combination of the record and Plea Counsel's testimony establishes that Plea Counsel did explore the possibility of an accommodation defense for Applicant's other charge that was ultimately dismissed and determined that the defense would not be applicable to Applicant's other charges. Therefore, Applicant cannot establish that Plea Counsel was constitutionally ineffective for failing to raise an accommodation defense. Applicant also cannot establish that, but for this alleged deficiency, he would have proceeded to trial, as he testified to the court that he took the plea to avoid a life sentence.

Based on the foregoing, this Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that Plea Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has

failed to present specific and compelling evidence that Plea Counsel committed either errors or omissions to prove the second prong of Strickland—that he was prejudiced by Plea Counsel's performance.

This Court finds through the combination of the record and Plea Counsel's testimony that Applicant has failed to meet the burden of showing Plea Counsel was constitutionally ineffective. Accordingly, this Court finds Applicant has failed to establish any deficiency by Plea Counsel or any prejudice flowing therefrom. Thus, this allegation must be **DENIED** and **DISMISSED**.

Allegation: Failure to present mitigating evidence

Applicant alleges that Plea Counsel was constitutionally ineffective for failing to present mitigating evidence following his guilty plea. This Court finds this allegation to be without merit.

Guilty Plea Hearing

At Applicant's guilty plea hearing, Plea Counsel stated the following during mitigation:

> Thank you, Your Honor. Respectfully, what we're asking the Court is accept the negotiation. We are asking the Court to just terminate the probation. Even if ran concurrent that 15 years is going to hold him for about 12 with the minimum amount of time he has. He is a drug addict. I've had conversations with him and I know one of his bigger points is I'm not selling drugs. And the trafficking statute doesn't care. The trafficking statute only cares if you're in possession of a certain amount. There was a situation. It has been ultimately dismissed, but I think it's important Your Honor understands that on the case where the C.I. was dismissed, in my conversations with Mr. Gunby essentially he was acting as a mule for another individual who essentially ends up taking the brunt as he has here where the individual promises him, hey, you help me here, I'll give you drugs. And that's how he paid for it. He paid for it in work. And he's paying the price for it. He was LWOP'd. This at least gives him an opportunity, obviously, to hope to still have a chance to get out of the Department of Corrections. He is 55 years old. So that makes 12 years a long time. He's looking at 67 if he's able to make it through and get out. As dark as that is, Judge, we are asking the Court to just terminate the probation and accept the negotiation.

(Plea Tr. pp. 17 – 18).

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PCR Evidentiary Hearing

On direct examination, Plea Counsel testified that the biggest point Applicant always made to him was the assertion that Applicant is a drug user and not a drug dealer or seller. Plea Counsel testified that he highlighted this to the court and wanted to impress upon the court that Applicant acknowledges his drug addiction problems. When asked if there was any additional mitigation evidence he could have presented, Plea Counsel testified that there was not much mitigation that could have been done considering Applicant's guilty plea was negotiated. Plea Counsel testified that he did raise other mitigating factors at Applicant's bond hearing, including the fact that Applicant is a high school graduate and had a career in landscaping and construction. (PCR Tr. pp. 22 – 23).

Findings

This Court finds Applicant failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007) (citing Strickland). This Court additionally finds that Applicant has failed to overcome her burden in proving Plea Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. See Butler, *supra*. Based upon the record before this Court, it is undoubtedly clear that Plea Counsel provided representation that satisfies the Strickland deferential standard. See Mazzell v. Evatt, 88 F.3d 263, 269 (4th Cir. 1996) (declining "to allow an ineffective assistance of counsel claim to create a situation where post-conviction attorneys stroll in with the full benefit of hindsight to second-guess trial lawyers who professionally discharge their duties to their clients under the manifold pressures of a state trial").

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The record and Plea Counsel's testimony establish that Plea Counsel did present mitigating evidence on Applicant's behalf at his guilty plea hearing. Plea Counsel credibly testified that the main point he wanted to highlight to the court was the fact that Applicant was a drug addict, and that Applicant acknowledged his drug problem. Plea Counsel credibly testified that due to the plea offer having a negotiated sentence, further mitigation at this point would not have made much, if any, of a difference considering Applicant's sentence was already negotiated. Plea Counsel credibly testified that, at prior hearings, he highlighted to the court that Applicant was a high school graduate and maintained employment in construction and landscaping. Additionally, Applicant offered no testimony regarding this claim. Therefore, Applicant cannot establish that Plea Counsel was constitutionally ineffective for failing to present mitigating evidence on his behalf, as the record shows Plea Counsel did present mitigating evidence to the court. Further, Applicant's sentence was negotiated and therefore would not have been affected much, if at all, by presenting further mitigation.

Based on the foregoing, this Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that Plea Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Plea Counsel committed either errors or omissions to prove the second prong of Strickland—that he was prejudiced by Plea Counsel's performance.

This Court finds through the combination of the record and Plea Counsel's testimony that Applicant has failed to meet the burden of showing Plea Counsel was constitutionally ineffective. Accordingly, this Court finds Applicant has failed to establish any deficiency by Plea Counsel or any prejudice flowing therefrom. Thus, this allegation must be **DENIED** and **DISMISSED**.

CONCLUSION

Based on all the foregoing, this Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be **DENIED and DISMISSED WITH PREJUDICE.**

This Court notifies 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), an applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP, provides that PCR counsel must serve and file a Notice of Appeal on Applicant's behalf if Applicant wishes to seek appellate review. Your attention is directed to South Carolina Appellate Court Rule 243 for the appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the Application for Post–Conviction Relief must be denied and dismissed with prejudice; and

2. Applicant must be remanded to the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 21 **day of** July **, 2026.**

WALTON J. MCLEOD, IV
Presiding Judge
Seventh Judicial Circuit

Greenville, South Carolina.

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