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NOV 13 2018

S.C. SUPREME COURT

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Arthur K. Aiken

A. Bea Hightower

November 9, 2018

The Honorable Daniel E. Shearouse, Clerk
South Carolina Supreme Court
PO Box 11330
Columbia, SC 29211

Re: Eric D. Marsh v. State of South Carolina
Civil Action No.: 2016-CP-32-03709

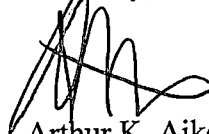
Dear Mr. Shearouse:

I am appointed counsel for the Applicant, Eric D. Marsh, in the above captioned post-conviction relief case. I have enclosed, for filing in your office, a Notice of Appeal and Motion to Proceed in Forma Pauperis for this case. Please return file stamped copies to me.

By copy of this letter with the filings enclosed, I have filed these filings with the Clerk of the Lexington County Court of Common Pleas and have served these filings on the Office of the Attorney General for South Carolina. Please call with any questions.

Thank you for your help

Sincerely,



Arthur K. Aiken

art@aikenandhightower.com

cc: Clerk, Lexington County Court of Common Pleas (w/enclosures)
Office of the Attorney General for South Carolina (w/enclosures)
Eric D. Marsh (w/enclosures)

THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED

APPEAL FROM LEXINGTON COUNTY NOV 13 2018
Court of Common Pleas

Perry H. Gravely, Circuit Court Judge S.C. SUPREME COURT

Case No. 2016-CP-32-03709

Eric D. Marsh.....Applicant/Appellant

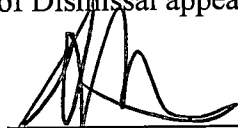
v.

State of South Carolina.....Respondent/Respondent

NOTICE OF APPEAL

This is a post-conviction relief case. Appellant appeals from the Order of Dismissal filed on October 9, 2018 in this case. Appellant received written notice of the Order of Dismissal by US Mail on October 11, 2018. A copy of the Order of Dismissal appealed from is attached.

November 8, 2018



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ATTORNEYS FOR APPELLANT

OTHER COUNSEL OF RECORD:

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ATTORNEYS FOR RESPONDENT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Perry H. Gravely, Circuit Court Judge

Case No. 2016-CP-32-03709

Eric D. Marsh..... Applicant/Appellant

v.

State of South Carolina.....Respondent/Respondent

PROOF OF SERVICE AND FILING

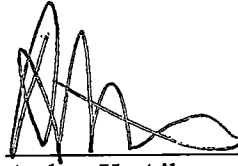
I certify that, on November 9, 2018, I served and filed the Notice of Appeal and Motion to Proceed in Forma Pauperis in the above appeal by mailing copies of those filings to the following:

Office of the Attorney General for South Carolina
Assistant Attorney General Sherrie Butterbaugh
PO Box 11549
Columbia, SC 29201

and

Office of the Lexington County Clerk of Court
205 E. Main St.
Lexington, SC 29072

SIGNATURE ON THE FOLLOWING PAGE



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ATTORNEYS FOR APPELLANT

Columbia, SC
November 9, 2018

FILED

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)

IN THE COURT OF COMMON PLEAS
FOR THE ELEVENTH JUDICIAL CIRCUIT

Eric Dewayne Marsh, #354716

LISA M. COOPER
CLERK OF COURT
LEXINGTON SC

Case No. 2016-CP-32-03709

Applicant,

v.

ORDER OF DISMISSAL

State of South Carolina,

Respondent.

This matter comes before the Court by way of applications for post-conviction relief filed December 2, 2014¹, and November 1, 2016, by Eric Dewayne Marsh (Applicant). The State (Respondent) made its Return on July 3, 2017, requesting an evidentiary hearing be held. Respondent also moved for the two applications to be merged, with the 2016 filing being the surviving case and the 2014 filing being considered an amendment thereto. A consent order of merger to that effect was issued on August 10, 2017, by the Honorable Alison R. Lee. Thereafter, on July 23, 2018, Applicant, through his counsel, filed an amendment to the application for post-conviction relief. An evidentiary hearing into the matter was convened on July 31, 2018, at the Lexington County Courthouse before the Honorable Perry H. Gravely. Applicant was present at the hearing and represented by Arthur K. Aiken, Esquire. Assistant Attorney General Kelly Oppenheimer of the South Carolina Attorney General's Office represented Respondent.

Following a thorough review of the record in its entirety, and the testimony and evidence presented at the evidentiary hearing, this Court finds Applicant has failed to establish any constitutional violations and denied this application with prejudice.

¹ At the time of this first filing, Applicant's direct appeal was still pending.

PROCEDURAL HISTORY

The records before this Court indicate Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Lexington County Clerk of Court. On March 20, 2013, Applicant appeared before the Honorable G. Thomas Cooper, Jr., at the Richland County Courthouse², waived jurisdiction and venue, and also waived presentment to the grand jury for one count second-degree criminal sexual conduct with a minor (2013-GS-32-00965). Assistant Public Defender Bennett E. Casto, of the Eleventh Circuit Public Defender's Office, represented Applicant on this Lexington County charge. At the proceeding before Judge Cooper, Applicant pled guilty to the Lexington County charge³. Pursuant to a recommendation by the State, Judge Cooper sentenced Applicant to a term of imprisonment of fifteen years for each charge. The sentences were to be served concurrently.

Applicant filed a timely notice of appeal from the Lexington County charge. Thereafter, by written order dated September 14, 2016, the Court of Appeals dismissed Applicant's appeal

² During its May 2011 term, the Richland County Grand Jury indicted Applicant for second-degree criminal sexual conduct with a minor (2011-GS-40-01996). Theodore N. Lupton, Esquire, represented him on this charge.

³ Applicant pled guilty pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970), to the Richland County charge. Applicant filed a timely notice of appeal. Thereafter, the South Carolina Court of Appeals dismissed Applicant's appeal for failing to provide a sufficient explanation as required by Rule 203(d)(1)(B)(iv), SCACR. The remittitur was issued on September 17, 2013. Applicant then filed an application for post-conviction relief with respect to this Richland County charge on April 24, 2014 (2013-CP-40-6380). A hearing into the matter was held before the Honorable Robert E. Hood on September 2, 2014. Thereafter, Judge Hood issued an order denying and dismissing the application with prejudice on October 6, 2014. Petitioner filed a timely notice of appeal therefrom. (2014-002325). After the submission of counsel's petition for writ of certiorari pursuant to *Johnson v. State*, 294 S.C. 310, 364 S.E.2d 201 (1988), and Petitioner's *pro se* petition, the Supreme Court of South Carolina denied the petition and granted counsel's request to withdraw on October 21, 2015. The remittitur was issued on November 6, 2015. Applicant then filed a petition for writ of habeas corpus in the United States District Court District of South Carolina on November 12, 2015. (C/A No. 5:15-cv-04633-JMC-KDW). Respondent moved for summary judgment and submitted its return and memorandum of law in support of the motion for summary judgment on April 13, 2016. Thereafter, United States Magistrate Judge Kaymani D. West issued a report and recommendation On February 22, 2017, recommending Respondent's motion for summary judgment be granted and recommending Applicant's petition be denied. United States District Judge J. Michelle Childs issued an order accepting the report and recommendation, granting Respondent's motion for summary judgment, and denied the petition for writ of habeas corpus on March 17, 2017. Applicant subsequently appealed to the United States Court of Appeals for the Fourth Circuit. (No. 17-6593). Thereafter, on August 16, 2018, the United States Court of Appeals for the Fourth Circuit issued a per curiam opinion dismissing the appeal and simultaneously issued judgment to that effect.

PKZ

for failing to provide a sufficient explanation as required by Rule 203(d)(1)(B)(iv), SCACR. The remittitur was issued on September 30, 2016.

STATEMENT OF FACTS

On September 27, 2010, the victim, the fifteen-year-old sister of Applicant's girlfriend, disclosed to her mother that Applicant had been sexually assaulting her for six months. Plea Tr. 10. The victim revealed between February 2010 and August 15, 2010, she had been going to and staying at Applicant's home, where her sister lived with him, in order to spend time with her sister. Plea Tr. 10-11. When she was visiting, Applicant would come into the victim's room after her sister had fallen asleep. Plea Tr. 11. Applicant would get the victim and take her into a garage, which was attached to his home. Plea Tr. 11. The first few times this happened, Applicant would kiss and fondle the victim. Plea Tr. 11. However, the abuse progressed to the point of Applicant having sex with the victim. Plea Tr. 11. Each time, the victim would be crying, saying "no," and asking Applicant not to do that to her. Plea Tr. 11. Applicant would respond by saying it was a secret between the two of them. Plea Tr. 11.

The victim's mother called law enforcement and reported the abuse, and Investigator Jill Beza, of the Irmo Police Department, began investigating. Plea Tr. 10, 11-12. Investigator Beza reached out to Applicant and asked him to come in and tell his side of the story. Plea Tr. 12. Over the phone, Applicant told Investigator Beza he would come in and "this was all a big lie." Plea Tr. 12. He explained to Investigator Beza the Department of Social Services was investigating the victim's family, and the victim was about to be removed from her home, so she made this up. Plea Tr. 12.

Thereafter, on October 25, 2010, the victim was standing outside of her home waiting for the bus. Plea Tr. 12. Applicant drove up to her and attempted to get her in the car. Plea Tr. 12.

The victim turned to run back into her house, but Applicant caught her by the wrists, grabbed her, and said: "If you scream, I'm going to break your fucking wrist." Plea Tr. 12. Applicant then pulled the victim into the car and asked her why she said he had forced himself on her. Plea Tr. 12. Applicant hit the victim in her face twice. Plea Tr. 12.

Applicant began driving around and went to an abandoned house in Lexington County. Plea Tr. 12, 13. Applicant forced the victim to perform oral sex on him and again had sex with her in the back of the car. Plea Tr. 13. The victim was crying, which made Applicant mad, so he choked her, hit her in the stomach, and hit her in the face. Plea Tr. 13. Applicant then got some rope and tape and tied the victim's hands behind her back. Plea Tr. 13.

Applicant then forced the victim to call Investigator Beza to tell her that she made up the allegations against Applicant. Plea Tr. 13-14. Applicant also made the victim tell Investigator Beza he did not do anything to the victim and she wanted to drop the charges. Plea Tr. 14. Investigator Beza, however, could hear in the victim's voice she was scared. Plea Tr. 14.

Applicant returned the victim home at one o'clock in the afternoon, where her parents wondered why she was home since she was supposed to be in school. Plea Tr. 14. The victim then told her parents what happened. Plea Tr. 14. The victim's parents immediately take her to the emergency room, where a rape kit was taken. Plea Tr. 14. In the exam, the notice swelling to the left side of the victim's face and extensive genital abrasions. Plea Tr. 15. Semen was also obtained from a vaginal swab, a rectal swab, a suspected body fluid swab, and cuttings from the victim's underwear. Plea Tr. 16. All of the samples showed the source was one male, and a CODIS hit matched Applicant. Plea Tr. 16.

Law enforcement obtained a warrant for Applicant's arrest. Plea Tr. 15. He was located in Daytona Beach, Florida on November 3, 2010, and he was extradited back to South Carolina.

Plea Tr. 15. While housed at the Alvin S. Glenn Detention Center, Investigator Beza interviewed Applicant. Plea Tr. 15. In that interview, Applicant insisted there was no penetration. Plea Tr. 15-16. He admitted, however, that he rubbed the victim with his penis and ejaculated on her. Plea Tr. 16.

CURRENT APPLICATION

In his application for post-conviction relief, Applicant alleges he is being held in custody unlawfully for the following allegations:

1. Violation of 5th, 6th, and 14th amendment to the US Constitution;
2. The failure to serve warrant in a timely manner; [and]
 - a. Judge stated this on transcript for bond hearing.
3. The failure to produce a crime scene.
 - a. Lawyer stated this on transcript at hearing.

In his *pro se* amendment to the application for post-conviction relief, Applicant further alleges he is being held in custody unlawfully based on:

1. Violation of 5th, 6th, and 14th amendments to the U.S. Constitution.
 - a. Counsels fail [sic] to give effective assistance at critical stage of trial proceeding including protecting [Applicant's] rights to due processing [sic].

In his amendment to the application for post-conviction relief, filed by counsel, Applicant raises the following additional grounds of ineffective assistance of counsel:

1. Applicant's guilty plea was not made with or based on advice of competent counsel;
2. Applicant's guilty plea was not intelligently made;
3. Trial counsel did not discuss the evidence with [Applicant];
4. Trial counsel did not prepare [Applicant's] case for trial, and [Applicant] was left with no choice but to plead guilty;
5. Trial counsel did not advise [Applicant] of the elements of the offense charged and did not discuss potential defenses with [Applicant];
6. Trial counsel never reviewed the pretrial discovery with [Applicant];
7. Trial counsel never discussed the advantages and disadvantages of a trial versus the advantages and disadvantages of a plea with [Applicant] so that [Applicant] could make an informed choice of whether to enter a plea or try his case; [and]

8. Trial counsel did not investigate [Applicant's] case.

At the evidentiary hearing, Applicant proceeded forward on the allegations raised in his amendment to the application for post-conviction relief filed by counsel.

TESTIMONY PRESENTED AT THE EVIDENTIARY HEARING

At the evidentiary hearing, Applicant testified on his own behalf. Respondent presented the testimony of Theodore N. Lupton, Esquire, as well as Assistant Public Defender Casto. This Court also had before it a copy of Applicant's plea transcript, the records of the Lexington County Clerk of Court, Applicant's records from the South Carolina Department of Corrections, and Applicant's appellate records.

During the evidentiary hearing, Applicant testified on his own behalf. Applicant testified he was charged with two counts of second-degree criminal sexual conduct in both Richland and Lexington Counties, and he pled guilty to both at the same time. He elaborated he entered an *Alford* plea to the Richland County charge, whereas he pled guilty to the Lexington County charge. He elaborated there was a sidebar during his plea, which "changed it." He further elaborated he refused to take the plea and continued to refuse to take the plea, but the solicitor yelled at him. He testified at that time, he was unaware he was appearing to plead guilty, but rather thought he was appearing for his speedy trial motion. He explained he was in jail for three years prior to his plea. Applicant testified counsel Lupton and counsel Casto informed him when he got to court he would be pleading guilty. He further testified he was informed if he pled guilty, he would get a sentence between zero and fifteen years. He elaborated he was told he would get a time served sentence for the Richland County charge and three to five years for the Lexington County charge.

Applicant also testified neither counsel investigated his case. He further testified he told them to investigate, and gave them a list of witnesses to talk to and to subpoena. He elaborated no one ever talked to these witnesses, however, because their statements were enough.

Applicant testified he reviewed the discovery with both of his attorneys, and he received the discovery six months after being incarcerated. He explained the plea court and counsel, however, had "different" discovery. He also testified he told the plea court he fully reviewed the facts and evidence with both counsel Lupton and counsel Casto.

He testified he was informed of the elements of the charges while he was in court. He elaborated counsel Lupton told him he would receive a time served sentence for the Richland County charge; but if he did not receive a time served sentence, he would receive no more than three to five years. He further elaborated he signed the sentencing sheet with counsel Lupton first, which indicated a cap of zero to fifteen years. Applicant testified he wanted the three to five year offer in writing. Applicant also testified he refused an offer for ten years in exchange for a plea to assault and battery of a high and aggravated nature.

Applicant testified counsel Casto discussed Applicant's confession with him. He elaborated counsel Casto brought the tape for him to listen to, but they did not listen to the whole tape. He further elaborated counsel Casto told him the confession did not matter. He also testified he and counsel Casto did not discuss proceeding to trial. He elaborated counsel Casto told him to plead, but Applicant did not want to plead guilty. He further testified he had questions about his charge in Lexington County. He explained his warrant on the Lexington County charge was not served until he had already been in jail on the Richland County charge for two-and-a-half years. He elaborated the warrant did not clearly define the scene of the crime, so he did not understand why he was charged in Lexington County.

Applicant further testified the results of the DNA evidence came back later, and there was no match to the DNA in CODIS. He further elaborated there was no DNA and no crime scene. He also testified the DNA connected with the Lexington County case was put in a box, and later Officer Collins re-tested it. He elaborated there was no chain of custody for the DNA for nine days. He further testified he asked for the chain of custody, but has never received it. Applicant further testified counsel Lupton told him the issues with the DNA would be addressed at the plea.

He testified he did not agree with the facts at the plea. He understood he pled under *Alford* to the Richland County charge. He also testified he was confused and did not understand what the plea court was saying. Applicant admitted, however, to having a sexual encounter with the victim, but he denied knowing she was fifteen years old. He further testified he was familiar with the victim and her family.

Applicant also testified he informed the plea court he was satisfied with both counsel Lupton and counsel Casto. He further testified he told the plea court counsel had done everything he asked of them, but that was before he had all of the information. He testified he also informed the plea court he was satisfied with the advice of counsel, but again that was before he had all of the information.

He testified at the time of the plea, he thought he was pleading freely and voluntarily. He explained, however, he decided to plead guilty after being forced because he thought it was his only chance. Applicant testified he told the plea court no one had made him any promises or held out any hope of reward in order to get him to plead guilty. He recalled the plea court reviewing each of his rights at trial with him. He elaborated he informed the plea court he understood each of those rights; and understanding those rights, he wanted to plead guilty. He



also testified he told counsel Casto he wanted to back out of the plea, but that request was never made to the plea court.

Applicant further testified he wrote to counsel Casto about appealing, and counsel Casto filed an appeal. He elaborated, however, the courts told him he could not file two appeals. He further elaborated he wrote to the Court of Appeals for an appeal and addressed all of the issues, but he did not have all of the information.

After Applicant's testimony, Applicant rested his case, and Respondent presented the testimony of counsel Lupton, who represented Applicant in his concurrent Richland County charge. Counsel Lupton testified he has been practicing law for twenty-three years, and approximately one hundred percent of his practice has been criminal law. He further testified he was appointed to represent Applicant on his Richland County charge. He explained he was Applicant's third attorney on the Richland County case, and by that time, Applicant had been in jail for two years. He further explained at that point in time, the Lexington County charge had not been served, which was a concern for him. He elaborated he worked with both the Richland County and Lexington County Solicitors' Offices in order to get the Lexington County charge served.

He also testified once the Lexington County charge had been served on Applicant, counsel Casto was appointed on that charge and they collaborated in their representation of Applicant. He elaborated he, counsel Casto, and Applicant would meet together and did so approximately six or more times. He further elaborated in these meetings they would discuss the evidence against Applicant, any proposed plea negotiations, any legal issues, the risks at trial, and the risks and benefits of a plea.

Counsel Lupton further testified he only represented Applicant on the Richland County charge, but was familiar with the Lexington County charge. He explained that in his legal analysis, Rule 404(b), SCRE, evidence would come in at trial for either case because the allegations were tied together. He testified in Richland County, there were four encounters, which occurred at Applicant's home, but there was no physical evidence. He elaborated if this were the only charge and there had not been any other evidence, the Richland County case would have been triable. He explained, however, there was DNA evidence and Applicant's confession, in which he indicated he knew the victim was underage, in the Lexington County case. Counsel Lupton further testified counsel Casto discussed the Lexington County case with Applicant, specifically the DNA evidence and Applicant's statement. He testified they showed Applicant all of the evidence against him, including the taped confession and the DNA evidence.

He also testified the DNA evidence was back at the time of the plea, but they did not receive a copy of the report until afterwards. He explained the DNA came back with a CODIS hit for Applicant early on, but the results of the lab tests were pending, of which Applicant was aware. He testified in his career, he has never known a CODIS hit to be incorrect. He further explained he could have impeached the evidence and attacked the chain of custody, but it would not impact the introduction of the DNA evidence at trial.

Counsel Lupton further testified Applicant's recorded statement was associated with the Lexington County case, and they played "a good bit" of the tape for Applicant. He testified Applicant never asked for additional portions of the tape to be played, and they did not refuse to play the tape for Applicant.

He also testified Applicant gave him a list of witnesses to interview, and he interviewed those witnesses who could be reached. He explained most of these witnesses would have been

character witnesses, and he and Applicant discussed the substance of the testimony of these witnesses. He further testified the victim's family refused to cooperate. He also testified he spoke with Applicant's mothers on a number of occasions.

He testified Applicant did not specifically discuss a plea or a trial, but rather wanted all of the charges to go away. He further testified Applicant never said he wanted to go to trial. He elaborated Applicant did not believe the State could prove its case against him, despite the fact they played the audiotape of his confession to him. He further elaborated Applicant denied kidnapping the victim and did not admit to committing either charge. Counsel Lupton also testified they explained to Applicant the fact this was a compelling case against him, and there was a possibility of a sentence of life without the possibility of parole. He explained had the Richland County case, with no physical evidence and delayed reporting by the victim, been alone, there were issues that could have been raised at trial. He further explained, however, the Lexington County case occurred during the investigation of the Richland County case. Counsel Lupton testified Applicant kidnapped the victim at the bus stop, drove her around Lexington County, raped her, and forced her to recant. He testified Applicant was insistent on using the victim's recantation. Counsel Lupton also testified in his opinion, the odds of winning at trial were not high. He explained had there been a conviction in the Richland County case, then the Lexington County charge would have been a second most serious offense, and the State indicated its intent to seek a sentence of life without the possibility of parole. He further testified Applicant eventually agreed there were dangers of proceeding to trial and agreed the plea offer was in his best interest.

He also testified they were able to work out an offer, for concurrent terms of imprisonment and a cap of fifteen years. He explained this plea deal protected Applicant from a

life without the possibility of parole sentence, and he explained to Applicant this offer was in his best interest. He testified Applicant agreed to the offer, but wanted to plead under *Alford*. He further testified the plea court, however, refused to take an *Alford* plea on the Lexington County case, due to the DNA evidence. He elaborated they explained this to Applicant, and Applicant wanted his mother's opinion. He further elaborated after talking with his mother, who told him he should take the plea offer, Applicant agreed. Counsel Lupton testified it was Applicant's decision to plead guilty.

He further testified he did not promise Applicant he would receive a time served sentence, nor promised Applicant he would receive a sentence of three to five years. He explained he believed a three to five year sentence was appropriate and told Applicant he would ask for it. He further explained, however, he made it clear to Applicant the offer was for a cap of fifteen years. He testified Applicant was fully aware he was facing fifteen years.

Following counsel Lupton's testimony, counsel Casto testified. Counsel Casto testified he has been practicing law since 2007, and has been employed with the Eleventh Circuit Public Defender's Office that entire time. He testified he was appointed to represent Applicant on the Lexington County charge. He further testified by the time he was appointed, the Richland County charge had been pending for a couple of years. He explained during the time the Richland County charge was pending, the Lexington County charge arose. He further explained Applicant abducted the victim from the bus stop and held her against her will, all the while driving her around Lexington County. He testified Applicant had the victim call the detective in Richland County and recant her allegations. He did not recall whether Applicant's girlfriend was involved in the recantation. He further testified Applicant then raped victim in Lexington

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County, which the victim reported that same day. He elaborated he confirmed the crime scene was in Lexington County.

Counsel Casto testified he filed *Brady*⁴ and Rule 5, SCRCrimP, motions, and he reviewed the discovery materials with Applicant. He further testified the Lexington County case was stronger than the Richland County case because the Lexington County charge was supported by DNA evidence. He elaborated a sexual assault kit was taken from the victim, and a CODIS hit came back from that kit matching Applicant. He also testified Applicant had a lot of questions, but he understood the results of the CODIS hit. He further testified he did not recall whether or not he had the DNA results prior to the plea. He further elaborated Applicant made a full confession to law enforcement, in which he admitted to having sex with the victim, though he denied he forced her to have sex with him. He testified he played the entire recording of Applicant's confession for Applicant.

He further testified Applicant did not give him any leads or witnesses to investigate, so he did not do any independent investigation. He testified, however, he collaborated with counsel Lupton. He also testified he explained the elements of the charges to Applicant and also discussed potential sentences. He further testified he did not recall Applicant asking him about the elements, but his standard practice is to inform his clients about the elements of the offenses. He testified he did not make any promises to Applicant regarding any sentence. Counsel Casto further testified they did not extensively discuss potential defenses, other than alleging the victim made this story up. He explained they reviewed the strong evidence the State had against Applicant. He further explained they reviewed what the strategy at trial would have been, highlighting they would have to explain the DNA and Applicant's statement to the jury. He

⁴ *Brady v. Maryland*, 373 U.S. 83 (1963).



elaborated this would be difficult to overcome, which he explained to Applicant on multiple occasions.

Counsel Casto testified at times, Applicant wanted to plead; and at other times, he wanted something other than a plea or a trial. He further testified Applicant never told him he did not want to plead. He elaborated on March 7, 2013, he spoke with Applicant about the plea offer; and on March 15, 2013, Applicant was willing to plead. He further elaborated he did not recall if he informed Applicant the exact day of the plea on March 15th, but told him it would be coming up. He also testified it was Applicant's decision to plead guilty. He elaborated had Applicant decided he did not want to plead, he would have been prepared for trial. He testified Applicant had questions for him during the plea, but he did not specifically recall those questions.

He also testified he filed a timely appeal on Applicant's behalf; but because both cases were resolved the same day, the appellate court thought the two cases were consolidated. He testified he spoke with the Court of Appeals about this and provided the court with everything he sent. He further testified the appeal proceeded on the Lexington County case.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

Applicant's allegations are two-fold: (1) ineffective assistance of counsel for failing to prepare for trial, failing to properly advise Applicant, and failing to investigate and (2)



involuntary guilty plea. On these claims, this Court finds Applicant has wholly failed to meet his burden.

Ineffective Assistance of Counsel

In a post-conviction relief action, an applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRPC; *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, the applicant must prove “counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result.” *Strickland v. Washington*, 466 U.S. 668 (1984); *Butler*, 286 S.C. 441, 334 S.E.2d 813.

The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Butler*, 286 S.C. 441, 334 S.E.2d 813. The applicant must overcome this presumption to receive relief. *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove counsel’s performance was deficient. Under this prong, attorney performance is measured by its “reasonableness under professional norms.” *Cherry*, 300 S.C. at 117, 385 S.E.2d at 625 (citing *Strickland*). Second, counsel’s deficient performance must have prejudiced the applicant such that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625. In order to satisfy the prejudice prong of this test following a guilty plea, the applicant “must show that there is a reasonable probability that, but



for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

After careful review based on the standard discussed above, this Court finds Applicant has failed to carry his burden in this action. Below are this Court's findings in regards to each of Applicant's allegations of ineffective assistance of counsel.

Counsel's alleged failure to prepare for trial

Applicant alleges Counsel was ineffective for failing to prepare for trial. In particular, Applicant alleges Counsel was ineffective for failing to advise Applicant of the elements of the offense, for failing to discuss potential defenses with Applicant, for failing to discuss the advantages and disadvantages of trial with Applicant, and for failing to discuss the evidence with Applicant. "There is a strong presumption counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). Moreover, when there is evidence that counsel met with Applicant in preparation for trial and there is no evidence additional preparation on the part of counsel would have affected the outcome at trial, counsel cannot be said to have been ineffective. *Harris v. State*, 377 S.C. 66, 659 S.E.2d 140 (2008), *abrogated on other grounds by Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018).

This Court finds both counsel Lupton's and counsel Casto's testimony with respect to this allegation very credible, whereas Applicant's testimony is not credible. Counsel testified they met with Applicant on a number of occasions. During these meetings, they would discuss the charges, potential defenses, the plea offers, and the advantages and disadvantages of proceeding to trial or taking a plea, particularly highlighting the danger of a sentence of life without the possibility of parole should Applicant be convicted of the Richland County charge

prior to the disposition of the Lexington County charge. Counsel also testified they reviewed all of the discovery materials with Applicant, including the CODIS hit on the DNA evidence and Applicant's confession to law enforcement. Indeed, counsel played the recording of the confession for Applicant prior to the plea. Furthermore, counsel Casto specifically testified had Applicant insisted on proceeding to trial, he would have been prepared; but Applicant never indicated he did not want to plead guilty. In addition, this Court finds this allegation is conclusively refuted by the record. At his plea, Applicant informed the plea court both counsel had discussed the facts of the case with him. Plea Tr. 9. Moreover, he informed the plea court counsel had shown him all of the evidence the State would offer at trial. Plea Tr. 9. Counsel was preparing for trial, as he not only reviewed with Applicant the elements of the charge and potential sentences but also reviewed with Applicant the discovery and the risks and benefits at trial. In addition, counsel reviewed the extent of the evidence against Applicant with him, particularly highlighting the likelihood of prevailing at trial, possible evidentiary challenges, and assessing potential meritorious defenses. This Court, therefore, finds Applicant has failed to establish any deficiency on the part of Counsel. *See Harris*, 377 S.C. at 75, 659 S.E.2d at 145 (finding trial counsel was not deficient when he had been practicing law for a number of years and had met with the applicant, however brief, particularly in light of the fact counsel is presumed to have rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case).

This Court similarly finds Applicant has presented no evidence which would establish any prejudice on the part of Applicant. In particular, Applicant has wholly failed to provide this Court with any evidence as to what benefit could have been realized from additional preparation by Counsel. *See Harris*, 377 S.C. at 75, 659 S.E.2d at 145 ("Furthermore, Harris did not offer



any evidence or augment as to how counsel's alleged lack of preparation prejudiced him. Therefore, it is merely speculative that counsel's alleged deficient performance was prejudicial to Harris."'). Accordingly, this allegation must be denied and dismissed with prejudice.

Counsel's alleged failure to investigate

Applicant further contends Counsel was ineffective for failing to investigate. "Counsel's concern is the faithful representation of the interest of his client and such representation frequently involves highly practical considerations as well as specialized knowledge of the law." *Tollett v. Henderson*, 411 U.S. 258, 267-68 (1973). "Although counsel should conduct a reasonable investigation into potential defenses, *Strickland* does not impose a constitutional requirement that counsel uncover every scrap of evidence that could conceivably help their client." *Tucker*, 350 F.3d at 442 (quoting *Green v. French*, 143 F.3d 865, 892 (4th Cir. 1998)). "In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Strickland*, 466 U.S. at 691; *Wiggins v. Smith*, 539 U.S. 510, 521-22 (2003). Moreover, "failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to result." *Porter*, 368 S.C. at 385-86, 629 S.E.2d at 357, *abrogated on other grounds by Smalls*, 422 S.C. 174, 810 S.E.2d 836 (citing *Moorehead v. State*, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998)).

Here, counsel Casto testified Applicant did not provide him with any leads or witnesses to investigate. Counsel Lupton testified, however, Applicant did provide him with a list of witnesses to investigate, and he spoke with those he could find. Both counsel testified they collaborated with one another in their representations of Applicant. Because Applicant did not provide counsel Casto with any independent leads or witnesses to investigate and because



counsel Casto collaborated in his efforts with counsel Lupton, this Court finds counsel's investigation was reasonable under the circumstances.

This Court further finds Applicant has failed to establish any resulting prejudice from the alleged deficiency. Applicant did not provide counsel Casto with any independent information from which he could investigate his case. Indeed, the only witnesses provided to counsel Lupton could have merely be used as character witnesses if Applicant had proceeded to trial. Moreover, Applicant did not present the testimony of any of these witnesses at the evidentiary hearing. Applicant's bare assertions as to what these witnesses would have testified, without more, do not give rise to the level of proof required for Applicant to meet his burden. *See Porter*, 368 S.C. at 385-86, 629 S.E.2d at 357 ("Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to result."). In addition, Applicant has wholly failed to provide this Court with any additional investigation counsel Casto should have performed or would have been beneficial to his case. Accordingly, this allegation must be denied and dismissed with prejudice.

Involuntary Guilty Plea

Applicant further alleges his guilty plea was not voluntarily made. This Court finds Applicant's guilty plea was freely and voluntarily made. In evaluating issues concerning guilty pleas, this Court will consider the entire record, including the transcript of the guilty pleas and the evidence presented at the post-conviction relief hearing. *Roddy v. State*, 339 S.C. 29, 528 S.E.2d 418 (2000). A defendant's knowing and voluntary waiver of statutory or constitutional rights must be established by a complete record, and "may be accomplished by colloquy between court and defendant, between court and defendant's counsel, or both." *Id.* at 34, 528 S.E.2d at 421 (citing *State v. Ray*, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993)). Voluntariness of a



guilty plea is not merely determined by an examination of a specific inquiry by the plea court alone but rather is determined by the record of both the guilty plea proceeding and the post-conviction relief hearing. *Id.* However, the overarching concept remains “a guilty plea should only be accepted where the record evidences ‘an affirmative showing that it was intelligent and voluntary.’” *Boykin v. Alabama*, 395 U.S. 238, 242 (1969) (internal quotation omitted); *Parke v. Raley*, 506 U.S. 20, 29 (1992). This is because “waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.” *Brady v. United States*, 397 U.S. 742, 748 (1970).

Key to the analysis in reviewing a plea for voluntariness is looking to “whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.” *Raley*, 506 U.S. at 29 (quoting *Alford*, 400 U.S. at 31). In order to find a guilty plea was knowingly and voluntarily entered into, the record must establish the defendant had a full understanding of the consequences of his plea and the charges against him. *Boykin*, 395 U.S. at 244. Further, “[a] guilty plea is a solemn, judicial admission of the truth of the charges” against the applicant; thus, an applicant’s right to contest the validity of such a plea is “usually, but not invariably, foreclosed.” *Dalton v. State*, 376 S.C. 130, 137–38, 654 S.E.2d 870, 874 (citing *Blackledge v. Allison*, 431 U.S. 63 (1977)). Therefore, admissions “made during a guilty plea should be considered conclusive unless [an applicant] presents valid reasons why he should be allowed to depart from the truth of his statements.” *Id.* (citing *Crawford v. United States*, 519 F.2d 347 (4th Cir. 1975)); *Edmonds v. Lewis*, 546 F.2d 566 (4th Cir. 1976).

This Court finds this allegation is without merit, and Applicant has failed to carry his burden of proving that his guilty plea was involuntarily made. This Court finds Applicant’s plea was entered into freely and voluntarily. The record before this Court reflects that the plea court

thoroughly reviewed all of Applicant's constitutional rights with him, including his right to a jury trial. Plea Tr. 7-8. Applicant indicated he understood his constitutional rights and, understanding those rights, still wanted to enter a guilty plea. Plea Tr. 7-8. Applicant further indicated no one had promised him anything, threatened him, or held out any hope of reward in order to get him to plead guilty. Plea Tr. 8. Additionally, Applicant indicated he was entering these guilty pleas freely, voluntarily, and of his own accord. Plea Tr. 9.

Counsel testified they reviewed all discovery materials with Applicant and reviewed all of the elements which the State would be required to prove at trial, the potential punishments, and his constitutional rights to Applicant. Despite Applicant's assertion counsel promised him he would receive a time served sentence on the Richland County charge and three to five years on the Lexington County charge, both counsel testified they never promised Applicant he would receive any particular sentence. Indeed, both counsel testified they made Applicant very aware he was facing up to fifteen years imprisonment under the plea offer. Counsel further testified after their discussions with Applicant, Applicant ultimately made the decision to enter the guilty pleas.

Therefore, this Court finds Applicant had a full understanding of the consequences of his plea and the charges against him, and the plea court correctly found Applicant's plea was freely, voluntarily, and intelligently made. Consequently, this allegation must be denied and dismissed with prejudice.



CONCLUSION

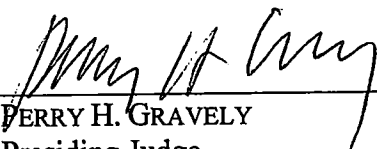
Based on all the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

This Court notes Applicant must file and serve a notice of appeal within thirty 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 (1991), an applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRPC, provides if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That this application for post-conviction relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to and remain in the custody of the State.

AND IT IS SO ORDERED this 5th day of Oct., 2018.


PERRY H. GRAVELY
Presiding Judge
Eleventh Judicial Circuit

Pickens, South Carolina

FORM 4

**STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON
IN THE COURT OF COMMON PLEAS**

**JUDGMENT IN A CIVIL CASE
CASE NUMBER 2016CP3203709**

| | | | |
|--------------------------|--|-------------------------|--|
| Eric Dwayne Marsh 354716 | | South Carolina State of | |
|--------------------------|--|-------------------------|--|

| | |
|----------------------|---|
| PLAINTIFF(S) | DEFENDANT(S) |
| Submitted by: | Attorney for: <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant <input type="checkbox"/> Self-Represented Litigant |

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit);
 Rule 43(k), SCRPC (Settled); Other: _____
- ACTION STRICKEN (CHECK REASON):** Rule 40(j) SCRPC; Bankruptcy;
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other: _____
- STAYED DUE TO BANKRUPTCY**
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other:

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order; (formal order to follow) Statement of Judgment by the Court:

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

| Judgment in Favor of (List name(s) below) | Judgment Against (List name(s) below) | Judgment Amount To be Enrolled (List amount(s) below) |
|--|--|--|
| | | |
| | | |
| | | |

If applicable, describe the property, including tax map information and address, referenced in the order: _____

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

| | | |
|----------------------------|-------------------|--------------------------|
| Circuit Court Judge | Judge Code | 10/9/2018 Date |
|----------------------------|-------------------|--------------------------|

For Clerk of Court Office Use Only

This judgment was entered on **October 9th 2018**, and a copy mailed first class or placed in the appropriate attorney's box on **October 9th 2018**, to attorneys of record or to parties (when appearing pro se) as follows:

Arthur Kerr Aiken 2231 Devine St. Ste. 201 Columbia, SC
29205

Kelly Oppenheimer Rembert.C. Dennis Building PO Box
11549 Columbia, SC 29211

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

LISA COMER/jp

Court Reporter

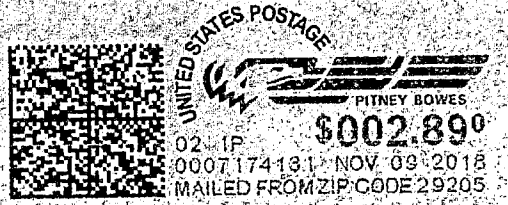
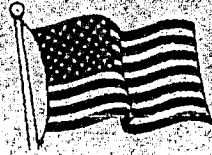
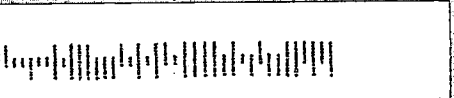
Lisa M. Comer - Clerk of Court

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.



en & Hightower, PA
31 Devine Street, Suite 201
Columbia, SC 29205

The Honorable Daniel E. Shearouse, Clerk
South Carolina Supreme Court
PO Box 11330
Columbia, SC 29211