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December 17, 2019

The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
P.O. Box 11330
Columbia, S.C. 29211

RE: Tony Fulmer, SCDC # 375466, Appellant -vs- State of South Carolina, Respondent
2018-CP-39-1297

Dear Mr. Shearouse:

I was appointed to represent Mr. Fulmer in the above-referenced post-conviction relief action. Judge Verdin issued a written order dismissing the action. Mr. Fulmer has instructed me to file an appeal.

Enclosed, for filing, please find the following relating to this matter:

1) A copy of Judge Verdin's written order;
2) A Notice of Appeal;
3) A Proof of Service; and
4) A Certificate of Filing (as to the filing of the Notice of Appeal and Proof of Service with the Pickens County Clerk of Court).

I am turning this matter over to the Office of Appellate Defense for any further proceedings.

Sincerely yours,

Don A. Thompson

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
DEC 19 2019
S.C. SUPREME COURT

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

Letitia H. Verdin, Circuit Court Judge

Case No. 2018-CP-39-1297

Tony Fulmer, SCDC # 375466,

Applicant,

vs.

State of South Carolina,

Respondent.

NOTICE OF APPEAL

Tony Fulmer appeals the order of the Honorable Letitia H. Verdin, dated November 4, 2019. Appellant received written notice of entry of this order on November 12, 2019.

December 9, 2019

Don A. Thompson
(S.C. Bar No. 5545)
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Other Counsel of Record:
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(803) 734-3970

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

Letitia H. Verdin, Circuit Court Judge

Case No. 2018-CP-39-1297

Tony Fulmer, SCDC # 375466,

Applicant,

vs.

State of South Carolina,

Respondent.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on the State of South Carolina (respondent) by depositing a copy of it in the United States Mail, postage prepaid, on December 9, 2019, addressed to the State's attorney of record, Lillian L. Meadows, Assistant Attorney General, S.C. Attorney General's Office, Post Office Box 11549, Columbia, South Carolina 29211.

December 9, 2019

Don A. Thompson
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Attorney for Appellant

THE STATE OF SOUTH CAROLINA
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Tony Fulmer, SCDC # 375466,

Appellant,

vs.

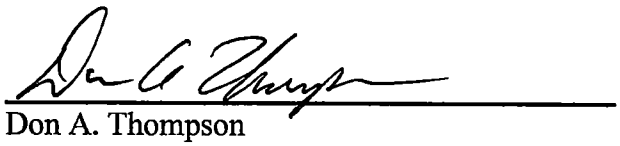
State of South Carolina,

Respondent.

CERTIFICATE OF FILING
WITH PICKENS COUNTY CLERK OF COURT

I certify that I have filed the Notice of Appeal and Proof of Service in this matter with the Pickens County Clerk of Court by depositing a copy of it in the United States Mail, postage prepaid, on December 9, 2019, addressed to The Honorable Harold P. Welborn, Jr., Pickens County Clerk of Court, P.O. Box 215, Pickens, S.C. 29671.

December 17, 2019



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STATE OF SOUTH CAROLINA COUNTY OF PICKENS	)	IN THE COURT OF COMMON PLEAS IN THE THIRTEENTH JUDICIAL CIRCUIT
Tony Fulmer, SCDC #375466 Applicant, v. State of South Carolina, Respondent.	)	Case No. 2018-CP-39-1297 **ORDER OF DISMISSAL**

I. INTRODUCTION

The matter before the Court is an action for post-conviction relief (PCR) commenced by Tony Fulmer (Applicant) on December 5, 2018. The State requested an evidentiary hearing through its return on July 22, 2019. Applicant, through counsel, filed an amended application with the Pickens County Clerk of Court on August 16, 2019. On August 27, 2019, the Court convened an evidentiary hearing at the Greenville County Courthouse before the undersigned. Applicant was present and represented by Don Thompson, Esquire. Assistant Attorney General Lillian L. Meadows represented the State. Applicant testified on his own behalf at the hearing, as did his plea counsel, Daniel King, Esquire (Counsel). In addition to the pleadings in this action, the Court had before it a copy of the records of the Pickens County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, and the plea transcript.

After hearing the testimony at the PCR hearing and a full review of the record, the Court finds Applicant's allegations regarding ineffective assistance of counsel are without merit.

Therefore, for the reasons discussed below, the Court denies relief and dismisses this action with prejudice.

II. FACTS & PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Pickens County Clerk of Court. During its January 2018 term, the Pickens County Grand Jury indicted Applicant for second-degree criminal sexual conduct with a minor (2017-GS-39-1621) and second-degree sexual exploitation of a minor (2017-GS-39-1620). Assistant Public Defender Daniel King (Counsel) of the Pickens County Public Defender's Office represented Applicant. Assistant Solicitor Brandi Hinton of the Thirteenth Circuit Solicitor's Office prosecuted the case.

Applicant was arrested on April 21, 2017, following an investigation into allegations of sexual abuse involving his step granddaughter occurring between April 2016 and January 2017. At the time Applicant began sexually abusing the victim, she was only fourteen years old. (Plea Tr. 9). Applicant was sixty-five years old. (Plea Tr. 9). Their relationship almost immediately began as a sexual one, which according to the victim, was oral, vaginal, and anal. (Plea Tr. 9). Applicant took videos of the victim performing sexual acts upon his body and photographed her naked in the bathtub. (Plea Tr. 9). As a result of the sexual intercourse, the victim birthed Applicant's child. (Plea Tr. 9).

On February 20, 2018, the case was called for trial by jury with the Honorable Perry H. Gravely presiding. A jury was selected and the court heard pretrial motions. However, before the jury was sworn the following morning, Applicant elected to plead guilty as indicted without formal negotiations or recommendations from the State. Judge Gravely sentenced Applicant to consecutive terms of fifteen years' imprisonment for second-degree criminal sexual conduct with

a minor and seven years' imprisonment for second-degree sexual exploitation of a minor. Applicant did appeal his guilty plea or sentence. Applicant timely commenced this PCR action on December 5, 2018.

III. ISSUES BEFORE THIS COURT

In his original PCR application, Applicant alleged he is being held in custody unlawfully due to ineffective assistance of counsel. Specifically, Applicant alleged ineffective assistance of plea counsel based on:

1. "... failure to discharge his duty of due diligence to investigate, the facts, evidence, and witness(es) in the case."
    a. "Counsel failed to properly and fully investigate the case."
    b. "Counsel was ineffective for providing erroneous and incorrect advice to plead guilty instead of challenging the State's evidence through the protections of trial. Therefore, Petitioner's plea was unknowing and involuntary entered into, due to incomprehension of the indictment, and the guilty plea. Petitioner has never seen the indictment, or reviewed it with counsel."
    c. "Furthermore, Petitioner did not understand that a guilty plea must be entered voluntarily and intelligently. The Defendant must be advised of his privilege against self-incrimination, the right [to] trial by jury, and the right to confront one's accusers. A valid waiver of these rights cannot be presumed from a silent record."
    d. Petitioner's counsel used coercion and scare tactics to obtain a guilty plea."
    e. "Counsel failed to adequately investigate the alleged crime scene or the allegation so as to be prepared to present testimony through direct and cross-examination of relevant evidence related to the matter."

f. "Counsel failed to interview or call as a witness a number of people who would have relevant information in the matter."
g. "Counsel failed to spend adequate time with Petitioner reviewing discovery with him."
h. "Counsel failed to request a preliminary hearing so Petitioner could more adequately be informed about case."
i. "Counsel failed to file a direct appeal."
j. "Counsel failed to provide Petitioner with a copy of discovery in the case so Petitioner could review evidence, and prepare for trial."

2. ". . . an involuntary plea"
3. ". . . failure to provide a proper defense for physical evidence."
4. ". . . failure to have a valid strategy."

Pursuant to Rule 71.1, SCRCP, Applicant, through PCR counsel, amended his application to include the following allegations:

1. Counsel did not fully review and explain discovery with Applicant.
2. Counsel was indecisive in his approach to a defense strategy.
    a. Counsel would meet with applicant and be excited, and advise applicant as to how they would proceed in defending applicant, only to come back to applicant on a later date to say they could not defend the case in that manner. This occurred on several occasions.
3. Counsel misinformed applicant as to a plea offer by the State.
    a. The State offered applicant a plea deal of twelve (12) years, which applicant was willing to take, but counsel advised applicant not to take the deal because it was the State's first offer and that the State would come back later with another (better) offer.
    b. Based on the advice of counsel, applicant rejected the twelve (12) year plea offer. As it turned out, no other offer was forthcoming from the State.

4. Counsel never fully explained the guilty plea to applicant so that applicant was making an informed decision.
    a. Counsel advised applicant that the State wanted him to do ten (10) years in prison and at the time of his guilty plea applicant believed that the sentence he would receive would be such that he would only have to do approximately ten (10) years in prison.
    b. The sentence applicant received was fifteen (15) years on the criminal sexual conduct charge and seven (7) years consecutive on the sexual exploitation charge.
    c. Given that the sentence applicant received was not the sentence applicant was led to believe he would receive, applicant would allege that he was not fully informed and did not enter the guilty plea freely, voluntarily and intelligently.
5. Counsel failed to fully investigate this matter.
    a. He never interviewed the victim in this matter.
    b. Applicant is informed and believes that had counsel interviewed the victim he would have learned that the sex between the applicant and the victim was consensual. Applicant believes that had counsel informed the Court of this, it would have had an impact on his sentence.
6. Counsel never advised applicant of his right to appeal or discussed with applicant his right to appeal in this matter.
    a. Applicant did not learn of his right to appeal until after the time to file the appeal had passed. Given the outcome of the guilty plea, had applicant been explained his right to appeal, he would have instructed counsel to file an appeal for him.
    b. Therefore, applicant would allege that he did not freely, voluntarily and intelligently waive his right to appeal.

Although not specifically pled in his application or by formal amendment, Applicant presented testimony and argument regarding the following issues, and accordingly, the Court will address these issues as well:

1. Failure to pursue consent as a defense by calling the victim as a witness

IV. STANDARD OF REVIEW

An applicant may seek PCR upon 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;

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 the assistance of counsel guaranteed them by the Sixth and Fourteenth Amendments to the United States Constitution. *Strickland v. Washington*, 466 U.S. 668 (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. Rule 71.1(e), SCRCP; *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985); *State v. Pendergrass*, 270 S.C. 1, 4, 239 S.E.2d 750, 751 (1977). A PCR applicant must produce facts or testimony in support of each individual allegation in order to establish that the claim meets the standard warranting relief. S.C. Code. Ann. § 17-27-50. Otherwise, dismissal is appropriate. *Bannister v. State*, 333 S.C. 298, 509 S.E.2d 807 (1998).

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 or sentence. 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.* 668; *Butler,* 286 S.C. at 442, 334 S.E.2d at 814.

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, 130 S. Ct. 1473, 1482, 176 L. Ed. 2d 284 (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, 117–18, 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 an 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, 6 (2003) ("The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight."). Thus, a fair assessment of attorney performance requires every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. *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.

A reviewing court "must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed at 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."

Strickland, 466 U.S. at 690 (emphasis added). 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 and 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 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) (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). Moreover, the South Carolina Supreme Court has repeatedly held a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice. *Bannister v. State*, 333 S.C. at 303, 509 S.E.2d at 809.

In assessing prejudice under *Strickland*, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible reasonable doubt might have been established if counsel acted differently. *Wong v. Belmontes*, 558 U.S. 15 (2009); *Strickland*, 466 U.S. at 693. Instead, *Strickland* asks whether it is "reasonably likely" the result would have been different. *Id.* at 696. However, the likelihood of a different result must be *substantial*, not just *conceivable*. *Id.* at 693 (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." *Hill*, 474 U.S. 52; *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 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. 52.

Thus, the analysis of counsel's performance under the first prong of *Strickland* remains unchanged—the applicant must show that counsel's representation fell below an objective standard of reasonableness demanded of attorneys in criminal cases. *Hill*, 474 U.S. at 58–59; *accord Thompson v. State*, 340 S.C. 112, 115, 531 S.E.2d 294, 296 (2000). An applicant alleging his guilty plea was induced by ineffective assistance of counsel must prove counsel's advice to

plead guilty was not "within the competence demanded of attorneys in criminal cases." *Hill*, 474 U.S. at 56.

The second, or "prejudice" prong, however, "focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process." *Id.* at 58–59. Specifically, when an applicant claims counsel's deficient performance caused him to accept a plea, the applicant "must show that there is a reasonable probability that, but for [plea] counsel's [alleged] errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.* at 59.

This inquiry "focuses on a defendant's decisionmaking" and does not turn on the outcome of a defendant's actual criminal proceeding or potential outcome had a defendant chosen to proceed to trial. *Lee v. United States*, 582 U.S. ___, 137 S. Ct. 1958, 1966 (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).

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. ___, 137 S. Ct. at 1967 (internal citations and quotation marks omitted); *cf. Hill*, 474 U.S. at 58 ("[R]equiring a 'prejudice' showing from defendants who seek to challenge the validity of their guilty pleas on the ground of ineffective assistance of counsel 'will serve the fundamental interest in the finality of guilty pleas.'"). 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. ___, 137 S. Ct. at 1967. Rather, judges should "look to

contemporaneous evidence to substantiate a defendant's expressed preferences." *Id.* Thus, 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 guilty 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." *Id.* 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 ground of lack of sufficient prejudice, the court may evaluate the prejudice prong only. *Id.*

V. FINDINGS OF FACT & CONCLUSIONS OF LAW

The Court has reviewed the testimony presented at the PCR hearing, observed the witnesses, passed upon their credibility, and weighed their testimony accordingly. After hearing the testimony presented and considering the legal arguments by counsel, as well as the record in this action incorporated by way of the State's return, the Court proceeds to the claims raised in the amended application and finds each to be without merit. Pursuant to S.C. Code Ann. § 17-27-80, the Court makes the following findings of facts and conclusions of law based upon all of the probative evidence presented.

As a matter of general impression, the Court finds credible and persuasive the testimony of Counsel, who presented well-recollected testimony of relevant events leading up to Applicant's

guilty plea. The Court finds Applicant's testimony and assertions lack credibility, and often contradicted allegations raised in the application. These credibility findings have been applied to the Court's findings and conclusions set forth below.

A. Failure to Review and Explain Discovery

In the amended application, Applicant first alleges counsel was ineffective for "failing to fully review and discuss with him the contents of his discovery." The Court disagrees, and finds Counsel was not deficient based on Applicant's representations to the plea court, Applicant's testimony at the evidentiary hearing, and Counsel's credible testimony he thoroughly reviewed all discovery with Applicant. Applicant further failed to show he would have benefitted from any additional consultation with Counsel in this regard, and thus failed to meet his burden.

At the PCR hearing, Applicant testified he vaguely recalled Counsel reviewing discovery with him, but claimed he never received a copy of the discovery. Counsel testified he met with Applicant eight times over the course of his representation. During these meetings, Counsel credibly testified he explained to Applicant the elements of the offenses, discussed Applicant's version of events, and extensively reviewed all evidence and discovery with him.

Counsel recalled discovery including pictures of Applicant's home, explicit photographs and videos of the victim found on Applicant's computer, results of a DNA test confirming Applicant fathered the victim's child, and videos of the victim's statement to law enforcement and Applicant's confession to law enforcement. Counsel testified the only piece of discovery Applicant did not examine were the videos of the victim's statement and Applicant's statement to law enforcement. Counsel specifically recalled a meeting with Applicant where Counsel planned to watch these videos with Applicant. However, once Counsel started playing the video of the

victim's statement, Applicant almost immediately asked Counsel to stop the video because he did not want to watch it.

The Court finds credible Counsel's above-referenced testimony, which demonstrates Counsel adequately conferred and discussed with Applicant about discovery in this case. The Court does not find credible Applicant's testimony that Counsel did not sufficiently review the evidence and discovery with him prior to his pleading guilty. Moreover, Applicant failed to identify precisely what Counsel did not explain or disclose to him from materials provided in discovery, or what, if anything, could have been achieved had Counsel spent more time with him in consultation regarding the contents of his discovery. *See Smith v. State*, 404 S.C. 493, 500–501, 745 S.E.2d 378, 382 (Ct. App. 2012) (noting that an applicant must present evidence to show how additional time spent in consultation regarding discovery would have resulted in a different outcome).

The Court further points to Applicant's representation to the plea judge that he was completely satisfied with Counsel and that Counsel had answered all of his questions. (Plea Tr. 4); *see Dalton v. State*, 376 S.C. 130, 137–38, 654 S.E.2d 870, 874 (Ct. App. 2007) ("[S]tatements made during a guilty plea should be considered conclusive unless a criminal inmate presents valid reasons why he should be allowed to depart from the truth of his statements."). Applicant also declined several opportunities by the plea judge to consult further with Counsel prior to entering the plea.

Thus, the Court finds no deficiency in Counsel's consultation with Applicant regarding discovery, nor any prejudice to Applicant resulting therefrom. Accordingly, Applicant's ineffective assistance claim pertaining to this allegation is **DENIED.**

B. Failure to Investigate, Prepare for Trial, and Develop a Clear Theory of Defense

Applicant alleges Counsel was deficient for failing to investigate, prepare for trial, and pursue a clear theory of defense. The Court disagrees, and finds Counsel reasonably and thoroughly investigated Applicant's case, evaluated the veracity of the evidence against Applicant, and established a trial strategy therefrom.

Even assuming Counsel was deficient in this regard, the Court finds Applicant failed to meet his burden. *Hill* makes clear the prejudice prong ordinarily requires "something more" than simply a defendant's assertion that but for counsel's deficient performance he would not have pleaded guilty but would have gone to trial. *Stalk v. State*, 383 S.C. 559, 563, 681 S.E.2d 592, 595 (2009) (*citing Hill*, 474 U.S. at 58–59). The Court finds Applicant failed to present evidence of any viable defense, investigative tactic, or alternate strategy Counsel should have explored which would have helped Applicant's case or affected his decision to plead guilty.

1. Failure to interview the victim

Applicant first claims Counsel was ineffective for failing to conduct an interview with the victim as part of Counsel's investigation. Had Counsel personally interviewed the victim, according to Applicant, Counsel "would have learned that the sex between Applicant and the victim was consensual." Applicant contends he was prejudiced by Counsel's alleged failure to conduct said interview because, "if Counsel had informed the Court [of the alleged consent by the victim], it would have had an impact on [his] sentence." The Court disagrees, and finds reasonable Counsel's decision not to interview the victim. The Court further finds Applicant failed to show he would have elected to go to trial had Counsel interviewed the victim.

"A criminal defense attorney has the duty to conduct a reasonable investigation to discover all reasonably available mitigation evidence and all reasonably available evidence tending to rebut

any aggravating evidence introduced by the State." *McKnight v. State*, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008). "[W]hile the scope of a reasonable investigation depends on a number of issues, at a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case." *Ard v. Catoe*, 372 S.C. 318, 331–32, 642 S.E.2d 590, 597 (2007) (internal quotation marks omitted) (emphasis omitted). However, counsel need only interview potential witnesses "when it is reasonable to do so." *Edwards v. State*, 392 S.C. 449, 457, 710 S.E.2d 60, 65 (2011). "In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691.

Our Supreme Court has cautioned reviewing courts not to lose sight of the reasonableness standard regarding counsel's duty to investigate. *Ard*, 372 S.C. at 331, 642 S.E.2d at 597 ("this duty is limited to a reasonable investigation"). Reviewing courts "should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case." *Strickland*, 466 U.S. at 690. Thus, in applying the *Strickland* standard to a claim of failure to investigate, counsel's decision not to undertake a particular investigation must be evaluated with heavy deference to counsel's judgment. *Bagwell*, 410 S.C. at 265, 763 S.E.2d at 63.

At the PCR hearing, Applicant failed to present testimony or evidence of anything Counsel could have discovered had he interviewed the victim. [1] Applicant's testimony about what the victim would have told Counsel if he had conducted an interview—that the sexual relationship was consensual—is nothing more than mere speculation and is irrelevant to Applicant's charges.

[1] The Court notes that, even if the victim had provided favorable testimony at the PCR hearing, Applicant simply cannot show prejudice because a minor is legally incapable of giving consent. *State v. Whitener*, 228 S.C. 244, 89 S.E.2d 701 (1955).

See generally id., 318 S.C. 496, 458 S.E.2d 538 (1995) (holding that applicant's allegations, alone, will not support a finding of prejudice when applicant claims counsel was ineffective for failing to investigate witnesses; instead, applicant must show the results of an investigation would have resulted in a different outcome at trial).

Even had Counsel been otherwise deficient for failing to interview the victim, Applicant cannot show prejudice when Counsel *did* present his opinion to the plea court that the victim was a willing participant in the relationship. (Plea Tr. 14). Counsel testified that a thorough assessment of the discovery, which included the victim's interview with police and the photographs and videos retrieved from Applicant's computer, led him to this determination. In fact, Counsel's mitigation presentation largely focused on, though not legally consensual, Applicant "never forced the victim into anything." (Plea Tr. 14–15). At the PCR hearing, Applicant admitted he recalled Counsel making these statements to the plea court on his behalf.

For the foregoing reasons, the Court finds no deficiency in Counsel's failure to interview the victim, nor any prejudice resulting therefrom. Accordingly, Applicant's request for relief by way of this allegation is **DENIED.**

2. Failure to call the victim as a witness

Similarly, at the PCR hearing, Applicant testified Counsel was ineffective for failing to pursue consent as a defense by calling the victim as a witness. Applicant claims that, had Counsel called the victim as a witness, "the truth would have come out" and he "would have received a lighter sentence." The Court disagrees, and finds credible Counsel's testimony he discussed potential defenses with Applicant and advised Applicant that consent was not a defense to criminal sexual conduct with a minor. Applicant further failed to establish how he would have benefitted from the victim's testimony

To support a claim that trial counsel was ineffective for failing to call potential witnesses, our Supreme Court has repeatedly held a PCR applicant must introduce evidence of what the uncalled witness's testimony would have been. *Glover*, 318 S.C. at 498-99, 458 S.E.2d 538 at 540; *cf. Ard*, 372 S.C. at 331, 642 S.E.2d at 596 ("A PCR applicant cannot show that he was prejudiced by counsel's failure to call a favorable witness to testify at trial if that witness does not later testify at the PCR hearing or otherwise offer testimony within the rules of evidence."). "Mere speculation" by the applicant as to what the witness's testimony would have been "cannot, by itself, satisfy the applicant's burden of showing prejudice." *Glover*, 318 S.C. at 499, 458 S.E.2d at 540.

To show prejudice, the applicant must then present evidence to show how the witness's testimony would have resulted in a different outcome or otherwise affected the applicant's decision to plead guilty. *Harris*, 377 S.C. at 75-76, 659 S.E.2d at 145-46; *see also Glover v. State*, 318 S.C. at 498, 458 S.E.2d at 540 (holding that trial counsel's failure to contact an alleged alibi witnesses did not prejudice the applicant where the applicant failed to show the witnesses' testimony would have established an alibi defense).

At the outset of the PCR hearing, Applicant did not deny he had sexual relations with the victim, and openly admitted he was guilty of the crimes alleged. Applicant, however, continues to maintain his innocence on the basis that the "relationship" was consensual. Counsel testified he repeatedly explained to Applicant that prostitution and consent are not defenses to criminal sexual conduct with a minor.

On cross-examination, Applicant was *again* informed that consent would never have been a viable defense due to the victim's age. In response, Applicant stated, "you would have to know

this lady." Applicant testified the victim was "already smoking weed and raiding her dad's liquor cabinet."

As an initial matter, the Court finds Applicant's insistence on the allegedly consensual nature of the sexual relationship between him and the victim is irrelevant to Applicant's guilt or innocence. As is well recognized, consent is never a defense to charges of criminal sexual conduct with a minor in South Carolina. *See State v. Whitener*, 228 S.C. 244, 89 S.E.2d 701 (1955) (holding that minors are legally incapable of consenting) *Doe ex rel. Roe v. Orangeburg Cty. Sch. Dist. No. 2*, 335 S.C. 556, 558–59, 518 S.E.2d 259, 260 (1999) ("Minors under the age of 16 are not legally capable of voluntarily consenting to a sexual battery committed by an older person.").

Nonetheless, Applicant failed to present testimony from the victim or any other evidence at the PCR hearing tending to show the victim would have provided favorable testimony on Applicant's behalf. *See Bannister v. State,* 333 S.C. at 303, 509 S.E.2d at 809 ("This Court has repeatedly held a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial."); *compare with Thomas v. State,* 308 S.C. 123, 417 S.E.2d 531 (1992) (finding that the applicant showed uncalled witness' testimony would have made a difference in the trial because it would have cast doubt on the sole witness' identification of the petitioner).

The Court further finds Applicant's representations to the plea court to be dispositive on this issue. Counsel testified he explained to Applicant that he would be able to confront and cross-examine witnesses against him and call witnesses on his own behalf at trial. Applicant thereafter went before the plea judge where he confirmed, under oath, that he wished to waive this right in order to plead guilty. (Plea Tr. 7).

For the foregoing reasons, the Court finds no deficiency in Counsel's failure to interview the victim, nor any prejudice resulting therefrom. Accordingly, Applicant's request for relief by way of this allegation is **DENIED.**

3. Failure to establish a clear theory of defense

Applicant next alleges Counsel was ineffective for failing to develop and employ a clear theory of defense or trial strategy. In his amended application, Applicant claims Counsel was ineffective because he was "indecisive in his approach to a defense strategy." Specifically, Applicant complains Counsel, on several occasions, would consult Applicant about a possible defense "only to come back to Applicant on a later date to say they could not defend the case in that manner." The Court disagrees, and finds Counsel's testimony shows Counsel adequately prepared and developed a valid theory of defense.

As an initial matter, the Court finds Counsel cannot be found ineffective for communicating with and updating his client as he investigates the case, explores possible defenses, and develop a strategy for defending the client. Part of that process includes making a determination that certain defenses or strategies will not be effective based on examination of the evidence, facts, and circumstances of a particular case. That Applicant felt "discouraged" when Counsel advised him a certain defense would not be successful is irrelevant.

As to trial strategy, Counsel testified he reviewed and discussed with Applicant the evidence against him and the difficulties of challenging the State's evidence on several occasions. Counsel testified that, given the strength of the State's case, he would primarily focus on challenging the admissibility of the incriminating photographs and videos found on Applicant's laptop, which were the basis of the sexual exploitation charge. Counsel made statements to this effect at the plea hearing. (Plea Tr. 14).

Counsel testified he believed challenging the chain of custody of the photographs, videos, and Applicant's laptop itself would have been a viable defense at trial. Specifically, Counsel testified he planned to elicit testimony from a forensics expert to show the State improperly extracted evidence from Applicant's laptop. Counsel further planned to use testimony from the forensics expert to challenge the admissibility of the photographs and videos based on issues with the chain of custody of the laptop itself.

As to the criminal sexual conduct charge, Counsel testified he attempted to challenge the admissibility of Applicant's confession to law enforcement through a *Jackson v. Denno*[2] hearing. However, the judge found the confession was voluntary and therefore admissible at trial.

Counsel testified Applicant believed his son, the victim's stepfather, impregnated the victim. Based on Counsel's discussion with Applicant about this issue, Counsel testified he planned to have a second DNA test done and an expert analysis of the paternity test. *Bagwell,* 410 S.C. at 265, 763 S.E.2d at 634 (internal citations omitted) ("Counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions.

The Court finds Counsel was not deficient in preparing Applicant's case for trial or developing a defense strategy. Applicant failed to present any evidence of any issue Counsel missed in his preparation of the case or any meritorious defense Applicant was unable to raise due to Counsel's allegedly deficient performance. Accordingly, Applicant's request for relief by way of this allegation is **DENIED.**

C. Failure to Properly Advise Applicant as to the State's Plea Offer

In the amended application, Applicant alleges Counsel was ineffective in advising him not to accept the State's original plea offer of twelve years. Applicant claims he was willing to accept

[2] 378 U.S. 368, (1964)

the offer, but "Counsel advised Applicant not to take the deal because it was the State's first offer, and the State would come back with a better offer." Based on this advice, Applicant claims, he rejected the plea offer; however, "no other offer was forthcoming from the State." The Court disagrees, and finds Applicant's testimony is dispositive on this issue.

At the PCR hearing, Applicant admitted Counsel never advised him to either accept or reject State's initial plea offer. Applicant testified it was his own decision to reject the plea offer. Counsel testified it is his general practice not to advise clients as to whether offers are good are not. In this case, Counsel testified Applicant turned down the twelve-year plea offer because Applicant maintained he was not guilty based on the allegedly consensual nature of the relationship. Counsel also testified Applicant rejected the offer because twelve years was a *de facto* death sentence considering Applicant was sixty-eight years old.

The Court finds no deficiency in Counsel's consultation with Applicant regarding the State's plea offer nor any prejudice to Applicant resulting therefrom. Accordingly, Applicant's ineffective assistance allegation pertaining to Counsel's failure to properly advise Applicant as to the State's plea offer is **DENIED.**

D. Failure to Advise Applicant of his Right to Appeal

Applicant alleges Counsel was ineffective for failing to advise him of his right to appeal. Applicant claims he only became aware he could appeal his plea after the period in which to file an appeal had expired. Applicant claims that, had Counsel explained to Applicant his appellate rights, he would have instructed counsel to file an appeal on his behalf. Consequently, Applicant claims he did not freely, voluntarily and intelligently waive his right to appeal. The Court disagrees and finds Counsel was not deficient for failing to consult with Applicant about appealing his guilty

plea. The Court further finds Applicant's allegation he was unaware of his right to appeal is refuted by the court's colloquy with Applicant in the plea transcript.

To waive a direct appeal, a defendant must make a knowing and intelligent decision not to pursue the appeal. *Davis v. State*, 288 S.C. 290, 342 S.E.2d 60 (1986); *White v. State*, 263 S.C. 110, 208 S.E.2d 35. Counsel has a constitutionally-imposed duty to consult with a defendant about an appeal only when there is reason to think either: (1) that a rational defendant would want to appeal or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing. *Roe v. Flores-Ortega*, 528 U.S. 470, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000).

In determining whether counsel has a duty to consult his client about an appeal, "[o]ne highly relevant factor will be whether the conviction follows a trial or a guilty plea, because a plea both reduces the scope of potentially appealable issues and may indicate that the defendant seeks an end to judicial proceedings." *Id.* at 480. 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. 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." *Weathers v. State*, 319 S.C. 59, 61, 459 S.E.2d 838, 839 (1995)

At the PCR hearing, Counsel testified he does not usually discuss with his clients their right to appeal following a guilty plea "unless something weird happens." Here, Applicant failed to show any extraordinary circumstances existed during the plea proceeding that would have triggered Counsel's duty to advise Applicant of his right to appeal. Applicant testified he "did not know [he] could appeal" and he "would have done so" had he known.

However, any deficiency on Counsel's part was cured by the plea court's colloquy with Applicant, which included the following exchange:

> PLEA COURT: All right. Now, you also have a right to appeal your plea and the sentence but you have to do so in writing within ten days from today; do you understand that?
>
> APPLICANT: Ten days?
>
> PLEA COURT: Yes. Do you understand that?
>
> APPLICANT: Yes.

(Plea Tr. 8). When asked about this exchange on cross-examination, Applicant claimed he did not remember the plea court advising him of his right to appeal.

Nonetheless, the Court finds Applicant failed to show there were any grounds for appeal or any extraordinary circumstances that would warrant a direct appeal from his guilty plea. The Court finds credible Counsel's testimony he had no reason to consult Applicant about appealing. Even if Counsel was deficient in this regard, Applicant's claim he was unaware he had a right to appeal is refuted by the plea transcript.

Accordingly, Applicant's ineffective assistance allegation pertaining to Counsel's failure consult Applicant about his right to appeal is **DENIED.**

E. Involuntary Guilty Plea

Applicant alleges Counsel's ineffective assistance in failing to explain the implications and consequences of pleading guilty caused Applicant to enter into an involuntary and unknowing guilty plea. The Court disagrees, and finds the combined record from the plea hearing and the evidentiary hearing establishes Applicant freely, knowingly, and voluntarily pleaded guilty.

"[I]t is the prerogative of any person to waive his rights, confess, and plead guilty, under judicially defined safeguards, which are adequately enforced." *Reed v. Becka*, 333 S.C. 676, 685, 511 S.E.2d 396, 401 (Ct. App. 1999). Accordingly, because a criminal defendant waives several constitutional rights by pleading guilty, the Due Process Clause requires that guilty pleas are entered into voluntarily, knowingly, and intelligently. *Boykin v. Alabama*, 395 U.S. 238 (1969); *Pittman v. State*, 337 S.C. 597, 524 S.E.2d 623 (1999).

To be intelligent, a plea must be made by a mentally competent defendant who understands both the charges against him and the consequences of his plea. *Brady v. United States*, 397 U.S. 742, 748 (1970). To be voluntary, a plea must be free of threats or other coercion that would impermissibly distort the defendant's choice. *Id.* at 755.

Before a court can accept a guilty plea, the defendant must be advised of the constitutional rights he or she is waiving; the right to a jury trial, the right to confront one's accusers, and the privilege against self-incrimination. *Boykin*, 395 U.S. at 243. Additionally, in order to knowingly and voluntarily plead guilty, the defendant must have a full understanding of the consequences of the plea, including the nature and crucial elements of the offense(s); the maximum and any mandatory minimum penalty; and the nature of the constitutional rights being waived. *Pittman*, 337 S.C. at 599, 524 S.E.2d at 624; *See United States v. Smith*, 440 F.2d 521, 528–529 (7th Cir.) (Stevens, J., dissenting) (explaining that voluntariness relates to the trustworthiness of the

admission of guilt and binding character of the waiver of the constitutional protections which would be available to the accused if he elected to stand trial).

"It is also well established that a guilty plea is not rendered invalid because it represents a compromise by defendant, thrusts a difficult judgment upon him, or is motivated by fear of greater punishment." *United States v. Cox*, 464 F.2d 937, 942 (6th Cir. 1972) (*citing Brady*, 397 U.S. 742). The State may properly encourage guilty pleas either by being more lenient to those who enter such pleas, *Brady*, 397 U.S. at 750-753, or by increasing the risks of punishment on those who do not. *North Carolina v. Alford*, 400 U.S. 25, 37 (1970). Thus, the standard for determining the validity of a guilty plea is "whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." *Id.* at 31.

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." *State v. Ray*, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993); *See also Wolfe v. State*, 326 S.C. 158, 164, 485 S.E.2d 367, 370 (1997) (stating any possible misconceptions due to counsel's alleged deficiencies can be cured by the plea court's colloquy). To ensure the defendant understands the consequences of his guilty plea, the trial judge "usually questions the defendant about the facts surrounding the crime and punishment that could be imposed." *Dover v. State*, 304 S.C. 433, 434–35, 405 S.E.2d 391, 392 (1991). However, the trial judge "does not have to direct the defendant's attention to every consequence of his plea provided the record reveals affirmative awareness of the consequences of a guilty plea." *Carter v. State*, 329 S.C. 355, 362, 495 S.E.2d 773, 776 (1998).

Voluntariness "is not determined by an examination of the specific inquiry made by the sentencing judge alone, but is determined from both the record made at the time of the entry of the

guilty plea and the record of the post-conviction hearing." *Harres*, 282 S.C. at 133, 318 S.E.2d at 361. In evaluating an allegation on PCR that a guilty plea was based on inaccurate advice of counsel, the transcript of the guilty plea hearing will be considered to determine whether any possible error by counsel was cured by the information conveyed at the plea hearing. *Wolfe*, 326 S.C. at 165, 485 S.E.2d at 370; *cf. Rayford v. State*, 314 S.C. 46, 443 S.E.2d 805 (1994) (finding that, where the transcript of the guilty plea proceeding refuted applicant's claim that he did not understand the terms of a plea bargain, granting PCR was inappropriate notwithstanding applicant's claim his lawyer misadvised him).

Nonetheless, because a guilty plea is a solemn, judicial admission of the truth of the charges against an individual, admissions made during a guilty plea should be considered conclusive unless an applicant presents valid reasons why he should be allowed to depart from the truth of his statements." *Dalton*, 376 S.C. at 137–38, 654 S.E.2d at 874 (internal citations and quotation marks omitted); *cf. Blackledge v. Allison*, 431 U.S. 63, 73–74 (1977) (pointing out that representations made by a defendant, his lawyer, and the prosecutor at a guilty plea hearing, as well as any findings made by the judge accepting the plea, constitute a "formidable barrier in any subsequent collateral proceedings").

In the amended application, Applicant claims Counsel "never fully explained the guilty plea" to him, which "prevented Applicant from making an informed decision" in this regard. Applicant claims Counsel led him to believe "he would only have to do approximately ten years." Because Applicant ended up receiving a sentence of twenty-two years, Applicant contends he "did not enter the guilty plea freely, knowingly, and voluntarily."

The Court disagrees, and finds Applicant knew the nature of the charges against him, the terms of the plea agreement, and the consequences of pleading guilty pursuant to the requirements

of *Boykin* and *Pittman.* The plea transcript reflects Applicant entered his plea knowingly and voluntarily, engaged in an intelligent colloquy with the plea court, and gave appropriate responses to the court's questions.

At the outset of the plea hearing, the plea judge thoroughly questioned Applicant regarding his understanding of the possible sentences he could receive for each offense, and advised him the State was offering no recommendation as to sentencing. (Plea Tr. 5–6). Applicant indicated he understood the charges against him and the exposure he faced on each indictment (Plea Tr. 6).

The plea judge then explained to Applicant the constitutional rights he would be forfeiting by pleading guilty—including the right to remain silent, to challenge the State's evidence, and to present a defense. (Plea Tr. 6-7). Applicant was further advised that if he did proceed to trial, the burden of proof would not be upon him, but rather would be upon the State to prove every element of every charge against him. (Plea Tr. 7).

Applicant affirmed he understood, and wished to waive these rights in order to plead guilty. (Plea Tr. 6–7). Applicant further indicated to the plea court he was entering his plea freely and voluntarily, and that he had not been threatened in any way or promised anything in exchange for his guilty plea. (Plea Tr. 7).

After a factual recitation from Ms. Hinton, Applicant admitted he was guilty and had committed the conduct giving rise to the offenses as outlined by the State. (Plea Tr. 10). Applicant indicated he was completely satisfied with Counsel; that Applicant had sufficient time to speak with Counsel about the charges against him, that Counsel answered all of Applicant's questions and done all the investigations that Applicant felt was appropriate. (Plea Tr. 4–5). After hearing statements from counsel, the victim's mother, and the State, the plea judge sentenced Applicant to consecutive terms of fifteen years' imprisonment for second-degree criminal sexual conduct with

a minor and seven years' imprisonment for second-degree sexual exploitation of a minor. (Plea Tr. 15-16).

Based on the foregoing, the record contradicts Applicant's assertion he was under a misapprehension as to an alleged deal when he decided to proceed with his plea. *See Rayford v. State*, 314 S.C. 46, 48, 443 S.E.2d 805, 806 (1994) (holding that the record of the plea proceeding, including applicant's answers to the trial judge's questions, clearly established that applicant understood the possible sentences and the terms of the plea agreement and therefore could not have had misconceptions regarding sentencing). Although given multiple opportunities to do so, Applicant never informed the plea court he was under the impression or belief he would receive a certain sentence.

At the PCR hearing, Applicant testified that at the time of the plea was under the impression he would receive a twelve-year sentence of which he would have to serve 85%. Applicant testified this understanding was based on the State's plea offer and Counsel's representation to Applicant that the State wanted him to serve ten years. Applicant testified he would not have pleaded guilty had he known he would receive a twenty-two year sentence.

Applicant testified he did not recall whether the plea court advised him of the potential sentence he was facing. When given the transcript, Applicant claimed that "due to stress, cramped space in his cell, and hearing troubles," he did not recall this exchange. Applicant admitted however, that he "guesses [he] said it since it is in the transcript." However, Applicant failed to provide any justification as to why he was under the impression he would receive a twelve-year sentence or why he did not inform the plea court he was under this impression.

Based on Counsel's initial conversations with the solicitor, Counsel testified he did advise Applicant the State wanted him to serve ten years. However, after Applicant rejected the State's

final offer of twelve years, Counsel testified he never led Applicant to believe he would receive a twelve-year sentence. Counsel's testimony is further corroborated by Applicant's statements to the court at the plea hearing.

"Courts naturally look with a jaundiced eye upon any defendant who seeks to withdraw a guilty plea after sentencing on the ground that he expected a lighter sentence." *United States v. Crusco*, 536 F.2d 21, 24 (3rd Cir. 1976); *see Daniel v. Cockrell*, 283 F.3d 697, 703 (5th Cir. 2002) (absent a showing of force of threat by some other actor, the "guilty plea is not rendered involuntary by the defendant's mere subjective understanding that [he] would receive a lesser sentence . . ."). Contrary to Applicant's PCR testimony, "[t]he colloquy establishes that [Applicant] did not have any misconceptions regarding sentencing." *Roddy v. State*, 339 S.C. 29, 34, 528 S.E.2d 418, 421 (2000) (reversing PCR court's finding of an involuntary guilty plea).

Based on Applicant's testimony at the PCR hearing, it is clear that, despite Applicant's rejection of the twelve-year plea offer, Applicant believed he would receive a twelve-year sentence. However, such a belief does not render Applicant's guilty plea invalid, especially given Applicant's acknowledgment on the record that he knew the sentencing range and that no promises had been made. *Wolfe*, 326 S.C. at 165, 485 S.E.2d at 371; *see also Harres v. Leeke*, 282 S.C. 131, 318 S.E.2d 360 (1984) (finding that the fact that defendant "thought" judge would give lighter sentence not ground for relief).

Thus, based on the evidence presented at the PCR hearing and the record of the plea proceeding, the Court finds Applicant's plea was freely, knowingly, and voluntarily entered into. Accordingly, Applicant's request for relief by way of this allegation is **DENIED.**

VI. ALL OTHER ALLEGATIONS

As to any and all allegations raised in the application or at the hearing in this matter and not specifically addressed in this order, the Court finds Applicant failed to present any evidence regarding such allegations. Accordingly, the Court finds those claims were voluntarily waived and abandoned, and those claims are therefore denied and dismissed with prejudice. S.C. Code Ann. § 17-27-90.

VII. CONCLUSION

Based on the evidence presented at the PCR hearing and the record of the plea proceeding, the Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require the Court to grant his application for post-conviction relief. The Court finds Counsel was not deficient in any manner, nor was Applicant prejudiced by Counsel's representation. The Court finds Applicant freely, knowingly, and voluntarily pleaded guilty and further failed to present any justification as to why the statements he made during the guilty plea hearing should not be considered conclusive. Therefore, based on the foregoing, the Court denies relief on all allegations and dismisses this PCR action with prejudice.

Applicant must file and serve a notice of appeal within thirty days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review pursuant to Rule 203, SCACR. Applicant has a right to appellate counsel's assistance in seeking review of the denial of PCR. *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991). Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to Rule 243, SCACR, for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

2019 NOV 11 P 4:44

1. The Court denies relief and dismisses the action with prejudice; and
2. Applicant shall be remanded to the custody of the State.

CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA

AND IT IS SO ORDERED this 4 day of Nov., 2019.

THE HONORABLE LETITIA H. VERDIN
Presiding Circuit Court Judge
Thirteenth Judicial Circuit

Pickens, South Carolina

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