THE STATE OF SOUTH CAROLINA

In the Supreme Court

RECEIVED

MAR 06 2020

S.C. SUPREME COURT

APPEAL FROM THE COUNTY OF GEORGETOWN

Court of Common Pleas

The Honorable Circuit Court Judge, George M. McFadden, Jr.

Case No. 2016-CP-22-0448

DAQUARIUS HOLMES, SCDC # 364360..... Petitioner,

v.

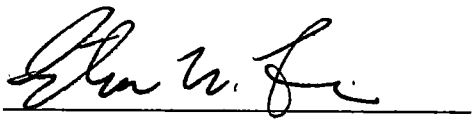
State of South Carolina, ...Respondent.

NOTICE OF APPEAL

The Petitioner appeals the Honorable Judge George M. McFadden Jr.'s Order filed denying postconviction relief to the Petitioner.

The Order was received by the undersigned counsel on 29th day of February, 2020. A copy of the said Order on appeal is attached to this Notice.

This is the third day of March, 2020.



Steven W. Fowler
Fowler Law Firm
730 Main Street, Unit 237
North Myrtle Beach, SC 29582
Telephone: 843-663-0006
Fax: 843-280-0003
myfowlerlaw@gmail.com
SC Bar #69683

THE STATE OF SOUTH CAROLINA

In the Supreme Court

RECEIVED

MAR 06 2020

S.C. SUPREME COURT

APPEAL FROM THE COUNTY OF GEORGETOWN

Court of Common Pleas

The Honorable Circuit Court Judge, George M. McFadden, Jr.

Case No. 2016-CP-22-0448

DAQUARIUS HOLMES, SCDC # 364360..... Petitioner,

v.

State of South Carolina, ...Respondent

PROOF OF SERVICE

I, Steven W. Fowler, court- appointed attorney for Petitioner, certify that I have today served within Notice of Appeal and Copy of the Order signed by the presiding Judge upon the Respondent by depositing a copy of it in the United States Mail, postage prepaid, addressed to the following:

1) Assistant Attorney General, PCR Division, PO Box 11549, Columbia, SC 29211 and
2) Clerk of the South Carolina Supreme Court, 1231 Gervais St, Columbia, SC 29201
3) SCCID Appellate Defense, PO Box 11433, Columbia, SC 29211
4) Petitioner above so named

I further certify that all parties required by Rule to be served have been served on this below named date.

This is the Third day of March, 2020.

Steven W. Fowler
Fowler Law Firm
730 Main Street, Unit 237
North Myrtle Beach, SC 29582
Telephone: 843-663-0006
Fax: 843-280-0003
myfowlerlaw@gmail.com
SC Bar #69683

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF GEORGETOWN)

Daquarius Holmes, #364360) CASE NO.
☐ Plaintiff) 2016-CP-22-0448

v.) MOTION AND ORDER INFORMATION
) FORM AND COVER SHEET

State Of South Carolina)
☒ Defendant.)

Plaintiff's Attorney:	Defendant's Attorney:
Steven W. Fowler, Bar No. 69683	Johnny E. James Jr., Bar No. 101260
Address:	Address:
730 Main Street Unit #237	Post Office Box 11549 Columbia SC 29211-1549
phone: fax:	phone: (803) 734-3737 fax: (803) 734-4113
e-mail: other:	e-mail: JJames@scag.gov other:

☐ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☒ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion:
Estimated Time Needed: Court Reporter Needed: ☐ YES / ☐ NO

SECTION II: Motion/Order Type

☐ Written motion attached
☒ Form Motion/Order
I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☐ Plaintiff / ☒ Defendant — February 14, 2020 Date submitted

SECTION III: Motion Fee

☐ PAID – AMOUNT:
☒ EXEMPT: ☐ Rule to Show Cause in Child or Spousal Support
(check reason) ☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☒ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter:
☐ Other:

FILED
GEORGETOWN COUNTY
2020 FEB 26 PM 1:09
CLERK OF COURT

JUDGE'S SECTION	
☐ Motion Fee to be paid upon filing of the attached order.	JUDGE
☐ Other:	CODE: 2759 Date: 2/21/2020

CLERK'S VERIFICATION

Collected by: Ckinder Date Filed: 2-26-2020

☑ MOTION FEE COLLECTED: 0.0
☐ CONTESTED – AMOUNT DUE:

RECEIVED
MAR 06 2020
S.C. SUPREME COURT

SCCA/233 (11-03)

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF GEORGETOWN	)	
Daquarius Holmes, S.C.D.C. No. 364360,	)	Case No.: 2016-CP-22-00448
Applicant,	)	**ORDER OF DISMISSAL**
v.	)	
State of South Carolina,	)	
Respondent.	)	

This matter comes before the Court by way of an application for post-conviction relief filed by Daquarius Holmes ("Applicant") on May 27, 2016. Respondent made its return on or about July 27, 2017. The Court convened an evidentiary hearing into the matter on Tuesday, November 12, 2019, at the Georgetown County Judicial Center in Georgetown, South Carolina. Applicant was present at the hearing and represented by Steven W. Fowler, Esq. Johnny Ellis James Jr., of the South Carolina Attorney General's Office, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant's co-defendant, Marcus Lambert, and Applicant's plea counsel, Margaret Ann Kneece, Esq. ("Counsel") also testified. The Court had before it Applicant's records from the South Carolina Department of Corrections, a copy of the original plea transcript, the records of the Georgetown County Clerk of Court regarding the subject convictions, the pleadings, and the exhibits introduced at the evidentiary hearing. The Court finds as follows:

I. PROCEDURAL HISTORY

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Georgetown County Clerk of Court. Applicant was indicted at the

October 2013 term of the Georgetown County Grand Jury for armed robbery (2013-GS-22-00978); kidnapping (2013-GS-22-00979); and burglary, first degree (2013-GS-22-00982).[1] Margaret Ann Kneece, Esq. represented Applicant, and Alicia A. Richardson, Esq., of the Fifteenth Circuit Solicitor's Office, prosecuted the case. On June 11, 2015, Applicant pled guilty to the lesser-included offense of burglary, second degree, violent, and as indicted for armed robbery and kidnapping. Consistent with the State's recommendation, the Honorable Benjamin H. Culbertson sentenced Applicant to imprisonment for concurrent terms of fifteen years. Applicant did not appeal his plea or sentence.

Present Application

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

1. "Ineffective assistance of Counsel"
    a. "failure to investigate"
        i. "Counsel fail to investigate co-defendants statement that applicant was not involved in Crime Committed."
    b. "failure to explain Alford plea and plea negotiation"

Applicant informally raised the following additional allegations by communications to Respondent:

2. Ineffective assistance of counsel, in that:
    a. Counsel failed to advise him of his right to a direct appeal;
    b. Counsel failed to quash the indictment;
    c. Counsel failed to investigate, advise Applicant regarding a preliminary hearing.

Applicant requests relief as follows:

- "Applicant would seek relief by New trial or vacated"

[1] Applicant was additionally indicted for assault and battery, first degree (2013-GS-22-00976); possession of a weapon during the commission of a violent crime (2013-GS-22-00977); criminal conspiracy (2013-GS-22-00980); and grand larceny, $10,000 or more (2013-GS-22-00981). These charges were dropped as part of Applicant's guilty plea.

At the evidentiary hearing, Applicant during his direct examination testimony alleged that he was not mentally competent at the time of his guilty plea.

II. MOTIONS FOR CONTINUANCE, RELIEF OF PCR COUNSEL

At the outset of the evidentiary hearing, PCR counsel informed the Court that Applicant wished for a continuance in order to obtain additional records; Respondent opposed the motion. "As actions are called, counsel may request that the action be continued. If good and sufficient cause for continuance is shown, the continuance may be granted by the court." Rule 40(i)(1), SCRCP. Whether to grant or deny a motion for a continuance is addressed to the sound discretion of this court, through circuit courts are advised to be flexible with procedural requirements in post-conviction relief actions before applicants suffer procedural default on *substantial* claims. See State v. Colden, 372 S.C. 428, 435, 641 S.E.2d 912, 916 (Ct. App. 2007) (continuances in discretion of trial court); Mangal v. State, 421 S.C. 85, 805 S.E.2d 568 (2017) (encouraging flexibility).

PCR counsel explained to the Court that the matter had previously been continued in order to obtain the presence of witness Marcus Lambert, and once in order to ensure the hearing would be conducted in Georgetown County, rather than Horry County. PCR counsel provided that Applicant wished to obtain a transcript of a preliminary hearing and that Applicant wanted medical records from the Waccamaw Center for Mental Health. Respondent opposed the motion, arguing the application was filed in 2016, had been pending for more than three years, had been continued numerous times, that Respondent and its witness were prepared to proceed, and that Applicant had enjoyed ample opportunity to obtain any records he desired. Applicant directly addressed the Court and complained he instructed PCR counsel to obtain the records the

previous year, and expressed that he no longer wished to be represented by PCR counsel, but that he did not wish to proceed *pro se*.

Upon this Court's initial denial of the motions from the bench, PCR counsel further argued that Applicant had a right to obtain records he felt were essential to his action, and noted that Applicant was clearly not happy with him. PCR counsel moved to be relieved. Respondent further argued in opposition that Applicant was engaged in merely dilatory conduct of the same kind as addressed in Richardson v. State, 377 S.C. 103, 659 S.E.2d 493 (2008).

This Court reiterates here for clarity its denial of the motions from the bench. Applicant has enjoyed more than three years since filing the application to conduct any further research, raise any additional claims, or obtain records he deems necessary to support any claims he wishes to raise. Applicant is represented by counsel who can perform these tasks on his behalf.

As to the transcript of any preliminary hearing, Applicant has never raised by amendment any allegations relating to any preliminary hearing, has not demonstrated that a preliminary hearing was conduct such that a transcript could have been produced, and has not demonstrated that if a preliminary hearing was conducted, that a transcript could still be produced after the passage of so many years. Further, in the absence of any articulated allegations, this Court is strained to conceive of how any events at any preliminary hearing could provide evidence to support Applicant in meeting his burden under Hill.

As to medical records, again, Applicant has never raised by amendment any allegations relating to his mental health, and has not demonstrated what, if any, records exist to be retrieved. Furthermore, as will be explored in Section II.A.2, below, Applicant's testimony as to his new mental health claim reflects that it is not a substantial claim, but a new and baseless assertion by Applicant intended to further delay the adjudication of his application.

As to the motion to be relieved, the Court finds Respondent's citation to Richardson to be instructive. Applicant's mere dissatisfaction with PCR counsel is inadequate to justify reliving PCR counsel, and Applicant reflects no desire to proceed *pro se*. Applicant is not entitled to appointment of PCR counsel of his choosing, and PCR counsel cannot be relieved of his duties of representation simply because his client is troublesome.

The Court understands the evidentiary hearing was not the first time this matter was called before the court. No good and sufficient cause is demonstrated for either motion and, for all of these reasons, Applicant's motions to continue and relieve counsel were, and are, **DENIED**.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court has reviewed the records submitted to it by the parties and the legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80, this Court makes the following findings based upon all of the probative evidence presented.

A. Ineffective Assistance of Counsel

Applicant's allegations of ineffective assistance of counsel are without merit. In a PCR action, Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland. First, Applicant must prove that counsel's performance was deficient. Strickland, 466 U.S. at 686; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Applicant must so prove his factual allegations by a preponderance of the evidence. Rule 71.1(e), SCRCP. Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). 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. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). "When counsel focuses on some issues to the exclusion of others, there is a strong presumption that he [or she] did so for tactical reasons rather than through sheer neglect." Yarborough v. Gentry, 540 U.S. 1, 5 (2003) (citing Strickland, 466 U.S. at 690). The Court, in determining deficiency, must affirmatively entertain the range of possible reasons counsel may have had for proceeding as they did. Cullen v. Pinholster, 563 U.S. 170, 196 (2011); Harrington v. Richter, 562 U.S. 86, 109-10 (2011). "[E]ven if an omission is inadvertent, relief is not automatic. The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." Yarborough, 540 U.S. at 6; see also Murphy v. Davis, 901 F.3d 578, 592 (5th Cir. 2018) ("[C]ounsel's performance need not be optimal to be reasonable."). Applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625.

Second, counsel's deficient performance must have prejudiced 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. "This does not require a showing that counsel's actions 'more likely than not altered the outcome,' but the difference between Strickland's prejudice standard and a more-probable-than-not standard is slight and matters 'only in the rarest case.'" Harrington, 562 U.S. at 111-12 (quoting Strickland, 466 U.S. at 697). "The likelihood of a different result must be substantial, not just conceivable." Id. at 112. "The prejudice analysis requires the court deciding the ineffectiveness claim to consider the totality of the evidence before the judge or jury." United States v. Basham, 789 F.3d 358, 371-72 (4th Cir. 2015) (quoting Elmore v. Ozmint, 661 F.3d 783, 858 (4th Cir. 2011)).

In the context of a guilty plea, Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he/she would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 59 (1985). Because a guilty plea is a solemn, judicial admission of the truth of the charges against an individual, the PCR applicant's right to contest the validity of such a plea is usually, but not invariably, foreclosed. See Blackledge v. Allison, 431 U.S. 63, 73-74 (1977) ("Solemn declarations in open court carry a strong presumption of verity. The subsequent presentation of conclusory allegations unsupported by specifics is subject to summary dismissal, as are contentions that in the face of the record are wholly incredible."). Statements made during a guilty plea should be considered conclusively, unless an Applicant presents valid reasons why he or she should be allowed to depart from the truth of his statements. Dalton v. State, 376 S.C. 130, 137-38, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing Crawford v. United States, 519 F.2d 347, 350 (4th Cir. 1975)).

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. Strickland, 466 U.S. at 696. A court need not first determine whether counsel's performance was deficient

before examining the prejudice suffered by the defendant as a result of the alleged deficiencies; if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Id. at 696-97.

1. Failure to Investigate – Exculpatory Statement of Marcus Lambert

Applicant alleges Counsel was ineffective in failing to investigate statements made by co-defendant Marcus Lambert exculpating Applicant. "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." Strickland, 466 U.S. at 690-91. "In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Id. at 691. "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." Id.

"The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." Id. "Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant." Id. "In particular, what investigation decisions are reasonable depends critically on such information."

In order to prevail upon a claim that counsel did not adequately prepare or investigate a case, an applicant must present evidence of what counsel could have discovered or what other defenses applicant could have requested counsel develop and present had counsel been more prepared. Harris v. State, 377 S.C. 66, 75-76, 659 S.E.2d 140, 145-46 (2008) (citing Jackson v.

State, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998)). Furthermore, an applicant must also present evidence to show how the discoverable matters or defenses would have resulted in a different outcome. Id. (citing Davis v. State, 326 S.C. 283, 288, 486 S.E.2d 747, 749 (1997); Skeen v. State, 325 S.C 210, 214, 481 S.E.2d 129, 132 (1997)). Mere speculation as to how the alleged lack of preparation prejudiced an applicant is not sufficient to support a grant of relief. Id., 377 S.C. at 75, 659 S.E.2d at 145 (citing Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995)).

During the plea proceeding, the plea court asked Applicant if he was satisfied with the services of Counsel, and Applicant replied in the affirmative. (Tr. 9, ll. 3-4). The State shortly thereafter provided a factual basis for the plea, which provided that the victim, Dan Gasque, was robbed in his home, forced into his own 2013 Dodge Avenger, then escaped at a Kangaroo gas station. (Tr. 9-10). Law enforcement subsequently spotted the Avenger in Hemingway, South Carolina, and pursued the vehicle through three counties before it—as well as "a few" law enforcement vehicles—crashed the high speed chase to an end. (Tr. 10, ll. 4-13). Marcus Lambert was identified as the driver of the vehicle, while Applicant and co-defendant Quantae Priest were also pulled from the wreck. (Tr. 10, ll. 13-16). Applicant confirmed the State's factual recitation. (Tr. 10, ll. 20-21).

Counsel opened mitigation by explaining some of her efforts in the case. Counsel explained that she hired a private investigator to run down Applicant's alibi, but the alibi turned out to be inadequate. (Tr. 10-11). Counsel noted the weaknesses and strengths in the State's case. As to weaknesses, there was no DNA evidence to connect Applicant to the crimes committed at the victim's house, and the victim never positively identified Applicant as one of the perpetrators. (Tr. 11, ll. 5-9) As to strengths, Counsel acknowledged Applicant was found in

the stolen car at the conclusion of the high speed chase, had been seen with the other two co-defendants, and that one co-defendant had given statements inculpating him. (Tr. 11, ll. 10-15). After extolling some of Applicant's virtues, Counsel explained Applicant "had just known Marcus Lambert," and was the youngest of the three involved. (Tr. 11-12, quoted portion at Tr. 12, ll. 6-7). Counsel continued:

> [Applicant] was 17, and he'd only known this individual for a couple of months, Marcus Lambert, who the evidence shows and a videotaped statement said, "I was the one with the gun. I was the one who drove the car. I am the one who wrote the check."

(Tr. 12, ll. 9-13). Counsel thereafter argued for a ten year sentence. (Tr. 12-13). As previously noted in the procedural history, the plea court sentenced Applicant to fifteen years.

At the evidentiary hearing, Applicant testified that Marcus Lambert wrote a letter dated November 23, 2013, that Counsel received the letter, and that Applicant asked her to file a motion to dismiss the charges against him. Applicant acknowledged Counsel hired a private investigator, Don Myers, but not for the purpose of looking into Lambert's letter.

Marcus Lambert, SCDC #353364, was transported to and testified at the evidentiary hearing. Lambert testified he was familiar with Applicant and confirmed that the letter dated November 23, 2013, and postmarked November 26, 2013, was entirely his handwriting. The letter was addressed to Counsel, and read in substance:

> This is Marcus Lambert. I am writing to you today to notify you about my co-defendant Daquarius Holmes. He had nothing to do with the crime that happen on the night of July 17, 2013 that he is being accused of. The investigators that interviewed me forced me to say he did because he was in the car with me when I got caught. He was just getting a ride that was it he didn't know what I did before I picked him and my other co-defendant up. I hope this can help my friend out in any way when we go to Court. I'm going to take full responsibility for my actions. Thanks.

(Applicant's Exhibit #1). Despite the letter, Lambert testified he was never contacted by Counsel. Lambert could not recall ever meeting with Don Myers, and testified that he did not

think he ever spoke to the investigator. Lambert claimed that then-Investigator Melvyn Garrett threatened him with life in prison if he did not stick by his statements inculpating Applicant in the crime. Lambert testified that Applicant was just a bystander who he picked up after the victim escaped at the Kangaroo gas station, and was innocent of the crime.

On cross-examination, Lambert denied that his statements in the letter or his testimony at the evidentiary hearing were the product of any threats or promises. Lambert acknowledged that he had been represented by an attorney at the time of the letter and up to Applicant's guilty plea. Prodded for further details as to the day of the crimes, Lambert testified that after he left the Kangaroo he retrieved clothes from his girlfriend, saw Applicant, picked him up, and then fled from police after seeing blue lights near Johnsonville, South Carolina. Lambert could not recall ever meeting with an Investigator Steve Brown, nor did he recall ever recanting the letter exculpating Applicant.

Counsel testified she began the practice of law in 1995 and that approximately 80% of her experience was in criminal law. Counsel explained the Public Defender's Office filed motions pursuant to Rule 5, SCCrimP, and Brady,[2] and she received discovery responsive to the motions. After summarizing the facts of the case, Counsel testified that Applicant was "all over the board" in his own recollections and required tremendous patience. Counsel investigated Applicant's alibi, but it did not check out. In one version of events, Applicant claimed he saw Lambert driving by, asked him for a ride, fell asleep in the car, and woke up mid-chase. Another version involved Applicant asking for a ride from someone who had no car. Counsel recalled that she would explain to Applicant the defects in his stories, which would prompt Applicant to then change his story.

[2] Brady v. Maryland, 373 U.S. 83 (1963).

Counsel testified she received Lambert's letter and reviewed it. Counsel explained that other witnesses placed Applicant with Lambert. Counsel additionally noted that perhaps most damaging was that Applicant was laughing on the dashcam video of the end of the chase and his arrest. Counsel provided the letter to the State, but Lambert ultimately recanted the letter on or about January 15, 2014, in a recorded interview. Counsel watched the video of Lambert's recantation and showed it to Applicant, after which they ditched any strategy contingent on Lambert's assistance. Counsel testified she independently investigated Applicant's purported routes via MapQuest in conjunction with known facts and determined that there simply was not enough time for Applicant's recollections to be possible. Immediately prior to the entry of Applicant's guilty plea, Counsel presented Applicant a "plea checklist," reviewed with him one final time the subjects set forth therein, and elicited his confirmation that they had discussed the subjects through a series of checkmarks and Applicant's signature. (State's Exhibit #1). Applicant confirmed on the checklist that he and Counsel "7. Discussed evidence against defendant." Id. Applicant further confirmed that he was "14. Satisfied with attorney's services." Id.

On cross-examination, Counsel expanded upon her "all over the board" remark by explaining that Applicant would quote other inmates and offer illogical defenses to her. Counsel again stated that she met with Applicant, discussed the Lambert letter with him, gave the letter to the State, and was thereafter told that Lambert recanted the letter on video. Counsel opined that the letter was not credible and that the original interview and the recantation were both very believable. Counsel and Applicant did not spend much time on Lambert after his recantation.

The Court finds no ineffectiveness on the part of Counsel. The Court finds credible Lambert's testimony that he wrote the letter, sent the letter to Counsel, and was not thereafter

contacted by Counsel. The Court does not find credible Lambert's testimony as to the substantive events of July 2013, or his conspicuous inability to remember recanting the statement. This Court similarly gives no weight to Lambert's claims he was threatened with life in prison if he did not recant. The Court does find credible Counsel's testimony regarding the Lambert letter, and gives it substantial weight. Applicant's testimony on this point was limited to agreed upon facts: Lambert produced a letter and sent it to Counsel; Counsel and Applicant discussed the letter; Applicant asked her to move the charges be dismissed.

The Court finds that Lambert wrote an exculpatory letter and sent it to Counsel. Counsel received the letter, discussed it with Applicant, and forwarded it on to the State. Counsel did not communicate with Lambert directly and could not have done so as he was also charged in the crime and represented by his own attorney. The State accepted the letter and investigated it further with Lambert,[3] who recanted the letter in a video recorded interview. Counsel communicated Lambert's recantation to Applicant, and they moved on to explore other potential defenses. None of the facts before the Court reflect inadequate investigation by Counsel, but rather reflect that she followed up upon new evidence and performed exactly as any reasonably competent attorney would given such a scenario. Applicant was fully aware of Lambert's letter and the subsequent recantation at the time of his guilty plea, and chose at that time to plead guilty. Applicant has failed to show any deficiency on the part of Counsel, or that but for the deficiency alleged he would not have pled guilty but would have proceeded to trial, and accordingly his request for relief by way of this allegation is **DENIED**.

2. Failure to Investigate – Mental Health

[3] That the State was able to directly explore the letter with Lambert would appear to reflect Lambert's willing cooperation with law enforcement under the advice of his attorney, which implicitly suggests Lambert's attorney would not have permitted communications by Counsel to Lambert to do otherwise.

Immediately prior to the evidentiary hearing, and throughout his testimony at the evidentiary hearing, Applicant raised for the first time allegations that Counsel was ineffective for failing to investigate whether he was competent to enter a guilty plea. Excuse from procedural default in PCR matters is rare, but the courts are encouraged to exercise its own discretion to reach the merits of *substantial* issues within the flexibility of the Rules of Civil Procedure. Mangal v. State, 421 S.C. 85, 805 S.E.2d 568 (2017).

"Due process of law prohibits the conviction of a person who is mentally incompetent." Jeter v. State, 308 S.C. 230, 232, 417 S.E.2d 594, 595 (1992). An accused is competent to stand trial if he or she has sufficient capability to consult with his or her lawyer with a reasonable degree of rational understanding and have a rational as well as factual understanding of the proceedings. Id., 308 S.C. at 232, 417 S.E.2d at 596. "The focus of a competency inquiry is the defendant's mental capacity; the question is whether he [or she] has the *ability* to understand the proceedings." Garren v. State, 423 S.C. 1, 14, 813 S.E.2d 704, 711 (2018) (quoting Godinez v. Moran, 509 U.S. 389 (1993)).

As to the deficiency prong under Strickland, an attorney may reasonably rely upon his or her own perceptions of a defendant in determining whether or not their client should be mentally evaluated. Jeter, 308 S.C. at 233, 417 S.E.2d at 596. When establishing Strickland prejudice in the context of counsel's failure to request a mental competency evaluation, the applicant need only show a reasonable probability that he was incompetent at the time of the original proceeding. Garren, 423 S.C. at 12, 813 S.E.2d at 710 (citing Ramirez v. State, 419 S.C. 14, 21, 795 S.E.2d 841, 845 (2017)). As is the case with any other allegation that a defense attorney failed to adequately investigate some matter, an applicant must present some proof of identifiable

mental health issues which undermine his or her competency; mere speculation and conjecture by the applicant is insufficient to establish prejudice. Id., 423 S.C. at 13-14, 813 S.E.2d at 711. An applicant alleging incompetence *in fact* must show by a preponderance of the evidence that he was incompetent at the time of his original proceedings. Id., 423 S.C. at 16, 813 S.E.2d 704, 713; Hall v. Catoe, 360 S.C. 353, 358, 601 S.E.2d 335, 338 (2004).

During the plea proceeding, the plea court asked Applicant if he was under the influence of any alcohol, drugs, or other substances which might affect his understanding, to which Applicant replied "No, sir, not at all." (Tr. 5, ll. 19-23). Applicant confirmed he understood why he was present in the courthouse. (Tr. 5, ll. 24-25).

At the evidentiary hearing, Applicant testified that he had a record of mental health issues, which Counsel did not obtain or review to confirm his competency to proceed with a plea. Applicant conceded he had no records at the evidentiary hearing. Applicant further testified that he was previously diagnosed with attention deficit hyperactivity disorder, and that he required medication to pay attention. Applicant speculated that, at the time of the plea, his medical records could have shown whether he understood everything that was taking place. Applicant testified Counsel never discussed with him the possibility of having him mentally evaluated.

Counsel testified she never perceived any reason to question Applicant's competency. Counsel denied Applicant ever asked her to retrieve any mental health records. Counsel opined that Applicant fully understood their conversations and noted that he independently engaged in tremendous research. Counsel opined there was nothing to support any insanity defense. Though not specifically mentioned in testimony, the Court notes that the plea checklist provided by Counsel and signed by Applicant indicates the two addressed "10. Any mental health problems or addiction issues." (State's Exhibit #1).

On cross-examination, after explaining her "all over the board" remark, Counsel confirmed that she did not send Applicant to be mentally evaluated. Counsel described Applicant as naïve, and again firmly asserted there was not one red flag to prompt her to pursue any competency or insanity issues. Counsel explained that Applicant's proposed defenses were merely unrealistic, such that no jury would have accepted them. Counsel testified she had no problems communicating with Applicant, and that there was no need for any mental health evaluation.

First, the Court finds this issue is not sufficiently meritorious or substantial to justify excusing Applicant's procedural default in failing to properly plead the issue in either his application or in any subsequent amendment. As concluded in Section II, above, this Court is of the firm belief that Applicant's claim is little more than dilatory conduct by an Applicant who can find no sufficiently meritorious claims to justify vacating his guilty plea. Applicant does not bring to the court substantive evidence to support a potentially meritorious claim that he simply forgot to amend into the application, but rather asserts a claim that is breezily unburdened by any meaningful factual support.

The merits of the claim as they are presented to this Court reinforce the Court's finding of procedural default. The plea transcript reflects Applicant's complete understanding of events as they were occurring and his answers to the plea court's questions reflect he was paying attention and knew what was taking place. Applicant never testified at the evidentiary hearing that he did not understand what occurred at the plea proceeding, but rather merely offered the possibility that records might support his claimed diagnosis of ADHD. Applicant presented no records. Counsel testified she never perceived any mental issues to explore with Applicant, and that he was fully engaged in their conversations exploring possible defenses based on his ever-changing

and diverse recollections of precisely what happened on the day in question. Applicant has failed to present any evidence to meet his burden under Hill, and failed to demonstrate any reason why he should be relieved of his procedural default; accordingly, his request for relief by way of this allegation is **DENIED**.

3. Failure to Advise of Alford Pleas

Applicant alleges Counsel was ineffective in failing to discuss the option of entering a plea pursuant to North Carolina v. Alford, 400 U.S. 25 (1970). "The Alford plea is, in essence, a guilty plea and carries with it the same penalties and punishments." State v. Herndon, 403 S.C. 84, 91, 742 S.E.2d 375, 379 (2013). Consequently, this Court is unable to conceive of how further discussion of Alford could have prompted Applicant not to take a course of action which was "different" for the purposes of Strickland or Hill: additional knowledge of Alford would not rationally prompt any defendant to instead proceed to trial, and the possibility a defendant would enter an Alford plea instead of a standard guilty plea is not a meaningful difference in outcome.

In any event, during the plea proceeding, Counsel specifically noted that she discussed with Applicant the options of pursuing an Alford plea or taking the case to trial. (Tr. 11, ll. 5-7). At the evidentiary hearing, Applicant testified he brought up the subject of Alford to Counsel, who explained it to him and purportedly told him it was not an option. Counsel testified she told Applicant that Judge Culbertson would not "appreciate" an Alford plea and that Applicant agreed with her conclusion.

Applicant has failed to present anything to support his burden under Strickland or Hill, and his request for relief by way of this allegation is **DENIED**.

4. Failure to Quash Indictment

Applicant alleges Counsel was ineffective in failing to quash the indictments against him. The Court will not belabor this allegation: as Applicant was pulled laughing from the wreck of the stolen vehicle at the conclusion of a high speed chase, and as Applicant was implicated by co-defendants of involvement in the crimes, ample probable cause existed to support his indictment and no basis for any such motion existed, as acknowledged by Counsel at the evidentiary hearing. Applicant cannot show ineffectiveness by way of this allegation and his claim for relief therefrom is **DENIED**.

5. Failure to Investigate, Advise of, Address Preliminary Hearing

Applicant alleges Counsel was ineffective in failing to do anything with respect to his preliminary hearing. "Any defendant charged with a crime not triable by a magistrate shall be brought before a magistrate and shall be given notice of his right to a preliminary hearing solely to determine whether sufficient evidence exists to warrant the defendant's detention and trial." Rule 2(a), SCCrimP. "The hearing shall not be held, however, if the defendant is indicted by a grand jury or waives indictment before the preliminary hearing is held." Rule 2(b), SCCrimP; see also State v. Ballington, 346 S.C. 262, 269, 551 S.E.2d 280, 283 (Ct. App. 2001) (recognizing a circuit court cannot "restore the right to a preliminary hearing by ordering a post-indictment preliminary hearing"), overruled on other grounds by State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009).

The Georgetown County Sheriff's Department sought and obtained a warrant for Applicant's arrest on July 22, 2013. The warrant was served on Applicant on August 23, 2013. Applicant's indictments were true billed by the Georgetown County Grand Jury on October 16, 2013.

Applicant was uncertain if he did or did not have a preliminary hearing, and was uncertain if Counsel represented him at any preliminary hearing. Applicant testified to his belief that the court must conduct a preliminary hearing before he could be indicted.

Counsel testified she was appointed to represent Applicant pursuant to a contract with the Office of Indigent Defense. Counsel could not recall any preliminary hearing, and did not believe one was held. Counsel noted that she was appointed after Applicant was indicted.

Applicant has failed to show any ineffectiveness. Applicant presents no evidence that he ever requested a preliminary hearing, to show he was wrongfully denied any preliminary hearing, as to whether a preliminary hearing did or did not occur, or how the occurrence or non-occurrence of a preliminary hearing could have impacted his decision to plead guilty. Applicant was indicted by the grand jury and thereafter was no longer entitled to any preliminary hearing. Applicant has failed to meet his burden as to either prong of Hill, and his request for relief by way of this allegation is **DENIED**.

5. Failure to Advise of Direct Appeal Rights

Applicant alleges that he was denied the right to a direct appeal of his plea and sentence. Though counsel is required to make certain that a defendant is made fully aware of his or her right to appeal after a *trial*, a different standard applies to a guilty plea:

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

Turner v. State, 380 S.C. 223, 224-25, 670 S.E.2d 373, 374 (2008) (citations omitted); see also Roe v. Flores-Ortega, 528 U.S. 470, 480 (2000) (imposing the duty to consult when there is reason to think either that a rational defendant would want to appeal or that the particular defendant reasonably demonstrated interest in doing so); contra Frazer v. South Carolina, 430

F.3d 696 (4th Cir. 2005) (reading Flores-Ortega to mean counsel generally has a duty to consult with his client regarding whether to pursue an appeal). Therefore, in a collateral action attacking a guilty plea, the "bare assertion that a defendant was not advised of appellate rights is insufficient to grant relief." Jones v. State, 382 S.C. 589, 598, 677 S.E.2d 20, 23-24 (2009) (quoting Weathers v. State, 319 S.C. 59, 61, 459 S.E.2d 838, 839 (1995)).

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

The plea court made no mention of the right to a direct appeal during the plea colloquy. Applicant testified at the evidentiary hearing that he was not advised of his rights, and that he was not advised of his right to an appeal. Counsel testified she told Applicant about his right to a direct appeal and that Applicant never asked for an appeal. The plea checklist provided by Counsel and signed by Applicant reflects that the two discussed "15. Right to Appeal Guilty Plea – Must be done within 10 days of written order of the Court." (State's Exhibit #1). On cross-examination, Counsel reaffirmed that Applicant never asked for an appeal.

The Court finds Applicant was advised of his rights to a direct appeal and did not ask Counsel to file any such appeal. The Court gives no credence to Applicant's testimony regarding this allegation. The Court finds Counsel's testimony regarding this allegation to be highly

credible and dispositive. Applicant's allegation is refuted by the credible evidence before the Court, such that he cannot meet his burden, and his claim for relief is **DENIED**.

III. CONCLUSION

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

This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP provides that if the Applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

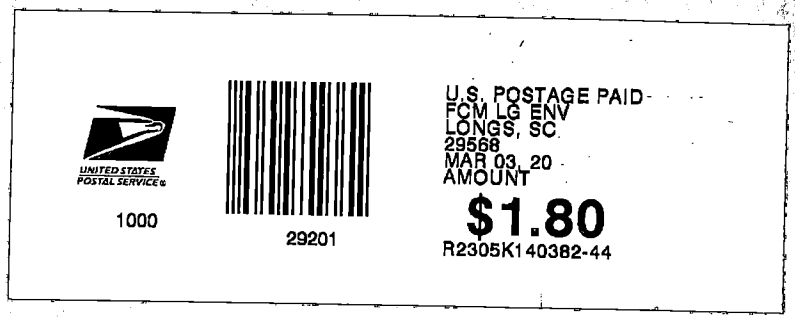
1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and

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

AND IT IS SO ORDERED this 21 **day of** December **, 2020.**

GEORGE M. MCFADDIN, JR.
Presiding Judge
Fifteenth Judicial Circuit

_____, South Carolina



SC Supreme Court
Clerk of Court
1231 Gervais Street
Columbia, SC
29201