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

Domenic J. Merino, #350098
☐ Plaintiff

v.

State Of South Carolina
☒ Defendant.

CASE NO.
2016-CP-26-6155

MOTION AND ORDER INFORMATION FORM AND COVER SHEET

Plaintiff's Attorney:	Defendant's Attorney:
William G. Yarborough, Iii, Bar No. 10271 Address: 308 West Stone Avenue Greenville, South Carolina 29609 phone: fax: e-mail: other:	Johnny E. James Jr, Bar No. 101260 Address: Post Office Box 11549 Columbia SC 29211-1549 phone: (803) 734-3737 fax: (803) 734-4113 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)**

RECEIVED
MAR 20 2020
SC Court of Appeals

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 — November 20, 2019 Date submitted

SECTION III: Motion Fee

☐ PAID – AMOUNT:
☒ EXEMPT: (check reason)
☐ Rule to Show Cause in Child or Spousal Support
☐ 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
HORRY COUNTY
2020 JAN 15 P 3:18
RENEE N. ELVIS
CLERK OF COURT
HORRY COUNTY, S.C.

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.
☐ Other:

JUDGE

CODE: Date:

CLERK'S VERIFICATION

Date Filed:

Collected by:

☐ MOTION FEE COLLECTED:
☐ CONTESTED – AMOUNT DUE:

SCCA/233 (11-03)

STATE OF SOUTH CAROLINA COUNTY OF HORRY	)	IN THE COURT OF COMMON PLEAS FOR THE FIFTEENTH JUDICIAL CIRCUIT
Domenic J. Merino, S.C.D.C. No. 350098, Applicant, v. State of South Carolina, Respondent.	)	Case No.: 2016-CP-26-06155 **ORDER OF DISMISSAL**

This matter comes before the Court by way of an application for post-conviction relief filed by Domenic J. Merino ("Applicant") on September 19, 2016, and amended by filing on March 27, 2018. Respondent made its return on or about July 5, 2017, and made an amendment on or about April 13, 2018. The Court convened an evidentiary hearing into the matter on Tuesday, October 8, 2019, at the Horry County Government & Justice Center in Conway, South Carolina. Applicant was present at the hearing and represented by William G. Yarborough, III, 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 plea counsel, Ralph J. Wilson, Jr., Esq. ("Counsel") also testified. The Court had before it Applicant's records from the South Carolina Department of Corrections, a copy of the original motion and plea transcripts of April 20, 2015, the records of the Horry County Clerk of Court regarding the subject convictions, Applicant's direct appeal records, and the pleadings. 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 Horry County Clerk of Court. Applicant was indicted at the January 2014 term of the Horry County Grand Jury for burglary, first degree (2014-GS-26-00323); and kidnapping (2014-GS-26-00322). Applicant was further indicted at the January 2015 term for armed robbery (2015-GS-26-00361). Ralph J. Wilson, Jr., Esq. represented Applicant, and Thomas G. Terrell, III, Esq., of the Fifteenth Circuit Solicitor's Office, prosecuted the case. On April 20, 2015, Applicant pled guilty as indicted. The Honorable Benjamin H. Culbertson sentenced Applicant to imprisonment for concurrent terms of 22 years on each charge.

By and through Counsel, Applicant filed a timely notice of appeal, and offered the following explanation for the appeal:

> No issues were raised during the plea at issue in this appeal. The Appellant entered his plea under duress due to the totality of the circumstances depicted in Appellant's Factual Basis for Appeal and imminent trial facing life imprisonment. Following the Appellant's plea was sentencing by the Honorable Judge Benjamin H. Culbertson. The sentence of 22 years per charge concurrently was far harsher than the previous offer to the plea. It is for the for the foregoing reasons the Appellant requested my office file the Notice of Intent to Appeal and subsequently respond to this court's requests.

The factual basis for appeal there referenced set forth the following:[1]

> The Appellant was charged with Burglary 1st Degree, Armed Robbery, and Kidnapping in the Horry County General Sessions Court on April 20, 2015. Appellant was set for trial. Additionally, the Court scheduled pretrial motions on the same day. One of these motions was the Motion to Enforce the Previous Plea Deal. [. . .] This motion stated that Appellant received correspondence from Assistant Solicitor [Thomas Groom] Terrell, III on January 9, 2014, extending an offer for Appellant to plead guilty to kidnapping for a negotiated sentence of 13 years. The correspondence stated that the offer must be accepted by February 28, 2014, or it is considered rejected. This pela was extended again verbally by Senior Assistant Solicitor Donna Elder on July 16, 2014. A subsequent offer to plead to [armed] robbery with no recommendation was extended by Senior Assistant Solicitor Nancy Livesay on August 4, 2014. Appellant served a Motion for Ruel 5

[1] Though long, because of its procedural relevance to the claim for relief raised, it is restated here in its entirety.

Disclosure and Brady Material on the state by and through Assistant Solicitor Terrell on February 11, 2014.

On February 11, 2014, I received a response to discovery request containing 80 pages of documents and 1 CD which contained statement[s] from alleged victims, various witnesses, codefendant Paige Martin, and codefendant Kyla Saitta. On March 30, 2015, Appellant was served with a supplemental Brady response enclosing a DVD of a recorded interview of Carl Thomas dated July 23, 2014. This statement was exculpatory in nature. The State does not have the ability to decide what, if any, materials are utilized by a defendant in his defense. Appellant was not given the opportunity to review the evidence in possession of the state at the time the offer was given although it did exist at the time. Appellant would have accepted the plea offer and counsel would have advised him as to the same if Counsel had been aware of this evidence. The Court heard the motion and questioned the State as to why the evidence was not turned over before March 30, 2015, and the State responded with no valid reason. After arguments, the Court denied the Motion to Enforce Original Plea Offer. My argument before the court on behalf of Appellant at the time was simply that the Prosecutor had a duty to deal with Defendant fairly.

Client requested a Notice of Intent to Appeal be filed on his behalf. The Notice of Intent to Appeal was filed and served on behalf of Pro Se Appellant on April 28, 2015.

The reasons stated above and any other reasons Appellant has for filing the action are the subject of this appeal.

By order filed October 22, 2015, the South Carolina Court of Appeals dismissed the appeal for failure to provide a sufficient explanation as required by Rule 203(d)(1)(B)(iv), SCACR. The Remittitur was issued on November 10, 2015.

Present Application

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

1. "Pursuant to Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 2064, 80 L. Ed. 23 674, 692 (1984) Applicant was denied his Sixth Amendment right to effective assistance of counsel due to counsel's failure to provide discovery materials under Rule 5."
    a. "Statements were made by material witnesses that were Rule 5 material that had never been turned over to the Applicant before trial. Had Applicant been advised of these statements by counsel prior to the trial, the Applicant

could have had the opportunity to refute the statements, plan for defense witnesses to refute those statements, and he would have had the opportunity to enter into a knowingly and voluntarily plea negotiation with the State as a resolution. In the alternative, the Applicant would have been able to make an informed and voluntary decision and may have continued on with the trial in lieu of entering a guilty plea. Roscoe v. State, 345 S.C. 16, 546 S.E.2d 417 (2001)."

b. "The State made available a plea offer to the Applicant concerning each of the charges. The original plea offer was thirteen (13) years for each: Burglary First, Kidnapping, and Armed Robbery. Although the S.C. Code Ann. Section 16-11-311 states that the penalty is life imprisonment or not less than fifteen (15) years, again, the Applicant was made an offer of thirteen (13) years. Based on the negotiation phase, there is no way to ensure that the Applicant was even remotely capable of entering into any plea voluntarily, knowingly, and intelligently at that point, as is required in Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709 (1969), and the South Carolina Supreme Court requires that a defendant must be made aware of the nature and [crucial] elements such as any maximum and minimum penalties and the nature of the constitutional rights being waived. Pittman v. State, 337 S.C. at 599, 524 S.E.2d at 624; Dover v. State, 304 S.C. 433, 405 S.E.2d 391 (1991)."

c. "Pursuant to Evitts v. Lucey, 469 U.S. 387, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985), which states that "...a defendant is constitutionally entitled to effective assistance of appellate counsel." Applicant will show that his Direct Appeal was abandoned. Applicant will show that he was deprived of his constitutional right to appeal as a direct correlation to appellate counsel's deficient performance and that the applicant was unquestionably prejudiced by that deficiency. Gilchrist v. State, 364 S.C. 173, 612 S.E.2d 702 (2005)."

Applicant requests relief as follows:

- "to reconsider sentence, or in the alternative, grant a new trial, or allow for a Belated Appeal pursuant to Wilson v. State, 348 S.C. 215, 599 S.E.2d 581 (2002)."

II. 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. Involuntary Guilty Plea

Applicant claims his rejection of the State's prior plea offer was not made knowingly or voluntarily. To find a guilty plea is voluntarily and knowingly entered into, the record must establish Applicant had a full understanding of the consequences of the plea and the charges against him or her. Dover v. State, 304 S.C. 433, 434, 405 S.E.2d 391, 392 (1991); see also Boykin v. Alabama, 395 U.S. 238, 243 (1969) (Courts must make sure defendants have "a full understanding of what the plea connotes and of its consequence. When the judge discharges that function, he leaves a record adequate for any review that may be later sought, and forestalls the spin-off of collateral proceedings that seek to probe murky memories."). In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence presented at the PCR hearing. See Harris v. Leeke, 282 S.C. 131, 134, 318 S.E.2d 360, 361 (1984).

An applicant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of the plea by showing that trial counsel's representation fell below an objective standard of reasonableness, and that there is a reasonable probability that, but for trial counsel's errors, the defendant would not have pled guilty, but would have insisted on going to trial instead. Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001); Richardson v. State, 310 S.C. 360, 363, 362 426 S.E.2d 795, 797 (1993). Given Applicant's burden of proof and the analysis to be applied to this claim, Applicant's claim of involuntary plea is, in essence, a claim of ineffective assistance of counsel, and it will be treated as such.

B. 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 Recover Expired Plea Offer

Applicant's claims are framed in a variety of ways, but all revolve around the singular issue of whether Counsel was ineffective in his efforts to recover the State's expired offer to plead guilty in exchange for a sentence of 13 years.

The relevant facts of this case are not in dispute. Applicant was extended an offer to plead guilty in exchange for a sentence of 13 years, which initially expired February 28, 2014, and extended again verbally on July 16, 2014. Applicant did not accept the offers. Ultimately, the offer was replaced with an inferior offer on August 4, 2014, to plead straight up to armed robbery without a recommendation. On March 30, 2015, Counsel received a supplemental Brady response which included a recorded interview of Carl Thomas dated July 23, 2014. Counsel then sought to obtain the previously rejected 13-year offer, but the State refused to reinstate the offer. Counsel then filed a motion dated April 14, 2015, asking the court to enforce the previous plea offer because

the State's refusal went "against the spirit of the Memorandum of Chief Justice Toal dated March 1, 2004."

Counsel argued the motion on April 20, 2015, before Judge Culbertson. (Motion Tr. 29-35). Counsel argued that Carl Thomas' statement possessed both exculpatory and inculpatory elements, and thus the State had an obligation to turn the statement over prior to withdrawing a plea offer. (Motion Tr. 29-31). Judge Culbertson inquired as to "any authority that says the State has to turn over all inculpatory and exculpatory evidence prior to withdrawing a plea bargain[,]" and Counsel offered the memorandum issued by Chief Justice Toal on March 1, 2004. (Motion Tr. 31-32). Judge Culbertson noted it was a memorandum, again asked for legal authority, and noted there was no constitutional right to plea bargain, with which Counsel agreed. (Motion Tr. 32-33). The court again asked "what is the legal authority that mandates [the State] leave a plea bargain open until all Brady and Rule 5 disclosures have been made?" (Motion Tr. 33, ll. 11-13). Counsel again offered the memorandum. (Motion Tr. 33, ll. 14-19). Judge Culbertson read the memorandum, and recited part of it into the record:

> "I believe that it is unethical to premise a plea agreement on the Defendant relinquishing the right to discovery. It has come to my attention that solicitors in some circuits are offering plea agreements to Defendants on the condition that they forego discovery."

(Motion Tr. 34, ll. 9-14). Counsel argued the language of the memorandum imposed upon the State a duty to turn over all evidence in their possession at the time they extended the plea offer; Judge Culbertson disagreed and denied the motion. (Motion Tr. 34-35). Two of Applicant's co-defendants made similar motions based on similar arguments, both of which were denied. Motion Tr. 35-40). Applicant ultimately pled guilty and received a sentence of 22 years.

"Prosecutors have broad powers in the plea bargain process[.]" Reed v. Becka, 333 S.C. 676, 684, 511 S.E.2d 396, 400 (Ct. App. 1999). "Under the separation of powers doctrine, which

is the basis for our form of government, the Executive Branch is vested with the power to decide when and how to prosecute a case." Id. (quoting State v. Thrift, 312 S.C. 282, 291-92, 400 S.E.2d 341, 346-47 (1994)). "Prosecutors may pursue a case to trial, or they may plea bargain it down to a lesser offense, or they can simply decide not to prosecute the offense in its entirety." Id., 333 S.C. at 684, 511 S.E.2d at 400-01. "The Judicial Branch is not empowered to infringe on the exercise of this prosecutorial discretion; however, on occasion, it is necessary to review and interpret the results of the prosecutor's actions. We must, therefore, analyze the State's agreement within our judicial constraints." Id.

"[A] defendant has no constitutional right to plea bargain." Id. (citing State v. Easler, 322 S.C. 333, 471 S.E.2d 745 (Ct. App. 1996), aff'd as modified, 327 S.C. 121, 489 S.E.2d 617 (1997)). "Furthermore, a trial judge is not required to accept a plea. Id. (citing Santobello v. New York, 404 U.S. 257 (1971)). "A plea agreement is only an 'offer' until the defendant enters a court-approved guilty plea. A defendant accepts the 'offer' by pleading guilty. Thus, until formal acceptance of the plea by the court has occurred, the plea binds no one, not the defendant, the State, or the court." Id., 333 S.C. at 688, 511 S.E.2d at 402 (citing Harden v. State, 453 So.2d 550 (Fla.Dist.Ct.App. 1984); see also State v. Nesbitt, 411 S.C. 194, 201 n.7, 768 S.E.2d 67, 71 n.7 (2015) ("We note that the Due Process clause is not implicated until the defendant enters his guilty plea, and that plea is accepted by the court. Therefore, if the defendant enters into a negotiated plea agreement prior to the court's acceptance of his guilty plea, that agreement is a mere executory promise that, standing alone, has no constitutional significance, as it binds neither the government nor the defendant."); Puckett v. United States, 556 U.S. 129, 137 (2009) ("Although the analogy may not hold in all respects, plea bargains are essentially contracts."). The only exception is where a defendant can show he has detrimentally relied upon a plea agreement. Id., 333 S.C. at 688-89,

511 S.E.2d at 402-03. Otherwise, a prosecutor may withdraw a plea offer at any time prior to an actual entry of the guilty plea. Id., 333 S.C. at 689-90, 511 S.E.2d at 403-04.

A textbook example of such detrimental reliance is found in Custodio v. State, 373 S.C. 4, 644 S.E.2d 36 (2007). In Custodio, the defendant was offered a 15 year cap on his sentence conditioned on if he would cooperate with law enforcement, disclose all of the burglaries in which he was involved, and help retrieve and return stolen property. Id., 373 S.C. at 7, 644 S.E.2d at 37. Custodio met with law enforcement the following day, told them he wished to accept the deal, and promptly directed them to "twelve to fifteen homes he had burglarized or attempted to burglarize." Id. When Custodio attempted to get the oral agreement in writing, he was placated that a writing was a technicality. Id., 337 S.C. at 8, 644 S.E.2d at 37. After Custodio was appointed counsel, the attorney asserted the agreement was unenforceable. Id. Custodio pled guilty and was sentenced to 45 years incarceration. Id., 377 S.C. at 7, 644 S.E.2d at 37. The Supreme Court of South Carolina found that Custodio's complete cooperation with law enforcement and assistance in recovering "over a half million dollars in stolen property" represented precisely the kind of detrimental reliance identified by Reed v. Becka. Custodio, 377 S.C. at 11-12, 644 S.E.2d at 39-40.

There is no evidence of any detrimental reliance on an agreement by Applicant. Here, rather, Applicant's claim is founded upon the undisputed claim that not all discovery in the State's possession was turned over prior to the expiration of the 13 year offer; thus, Applicant and Counsel misapprehended the considerable strength of the State's case against Applicant. "There is no general constitutional right to discovery in a criminal case, and Brady[2] did not create one[.]" Weatherford v. Bursey, 429 U.S. 545, 559 (1977). Rather, the scope of disclosures required to be

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

made by the State are established by *specific* constitutional rights and the rules promulgated in the South Carolina Rules of Criminal Procedure. See, e.g. Brady v. Maryland, 373 U.S. 83 (1963) (suppression by prosecution of evidence favorable to the accused violates due process); Giglio v. United States, 405 U.S. 150 (1972) (must disclose offers made to cooperating witnesses); Rule 5(a)(1), SCCrimP (specifically listing information subject to disclosure upon defendant's request, as well as information not subject to disclosure). There is "no clearly established Supreme Court law" to provide "that a prosecutor is required to facilitate [a defendant's] consideration of the prosecution's plea bargaining positions or offers, or that a prosecutor cannot take a harsh or unpleasant position, including revocation of the plea offer." Williams v. Schriro, 351 Fed.Appx. 252, 254 (9th Cir. 2009) (citing United States v. Ruiz, 536 U.S. 622 (2002) (holding the Constitution does not require pre-guilty plea disclosure of impeachment information)). To the contrary, the Constitution, "in respect to a defendant's awareness of relevant circumstances, does not require complete knowledge of the relevant circumstances, but permits a court to accept a guilty plea, with its accompanying waiver of various constitutional rights, despite various forms of misapprehension under which a defendant might labor." Ruiz at 630-31. "[A] constitutional obligation to provide impeachment information during plea bargaining, prior to entry of a guilty plea, could seriously interfere with the Government's interest in securing those guilty pleas that are factually justified, desired by defendants, and help to secure the efficient administration of justice." Id. at 631. A rule to the contrary "risks premature disclosure of Government witness information, which, the Government tells us, could 'disrupt ongoing investigations' and expose prospective witnesses to serious harm." Id. at 631-32.

Applicant's claim appears comparable to one of the arguments rejected by the Supreme Court of the United States in Weatherford v. Bursey. In Weatherford, the defendant Brett Allen

Bursey vandalized the Richland County Selective Service office in Columbia, South Carolina, alongside Jack M. Weatherford, an undercover agent for the South Carolina Law Enforcement Division. Weatherford at 547. Weatherford reported the incident, and in order to maintain his cover, he was arrested and charged along with Bursey, and even retained counsel. Id. The ruse was active and detailed—Weatherford reported to Bursey and Bursey's lawyer that he would obtain a severance of their trials, which neither man questioned. Id. at 548. Ultimately, Weatherford testified against Bursey at trial, after which Bursey was convicted and sentenced to 18 months in prison. Id. at 549. Bursey filed suit in federal court, and the Fourth Circuit Court of Appeals reversed the conviction, and further held Weatherford personally liable for damages. Bursey v. Weatherford, 528 F.2d 483 (4th Cir. 1975). Among the various issues raised, the 4th Circuit concluded in part:

> In Brady the Court held that the prosecution had a duty under the due process clause to insure that 'criminal trials are fair' by disclosing evidence favorable to the defendant upon request. Here appellees insist that state officers may conceal the identity of an informant from a defendant during his trial preparation, that the informant can deny up through the day before his appearance at trial that he will testify against the defendant, and that he can then testify with devastating effect—all without impairing a fair trial. We think not. Deception is an appropriate instrument in crime solution. It is inappropriate and highly suspect when utilized after indictment with the effect of lulling a defendant into a false sense of security and thus denying him the opportunity (1) *to consider whether plea bargaining might be the best course*, (2) to do a background check on Weatherford for purposes of cross-examination, and (3) to attempt to counter the devastating impact of eyewitness identification.

Id. at 487 (emphasis added). The Supreme Court, however, reversed the Fourth Circuit, reinstated the conviction, and very summarily dispensed with the here-relevant portion of the 4th Circuit's ruling:

> The Court of Appeals suggested that Weatherford's continued duplicity lost Bursey the opportunity to plea bargain. But there is no constitutional right to plea bargain; the prosecutor need not do so if he prefers to go to trial.

Weatherford at 560-61.

To the extent Applicant would rely upon constitutional principles, he could not prevail. There is no right under the United States Constitution to have certain materials disclosed prior to the extension of a plea offer. Applicant offers no binding legal authority for as much and this Court cannot independently find any. To the contrary, the issue appears to have been repeatedly raised and repeatedly rejected, as evidenced by Weatherford.

To the extent Applicant insists Counsel should have argued the failure to disclose the statement constituted a Rule 5, SCCrimP, violation, rather than a Brady violation, such that the plea offer should have been reinstated, his argument still fails. Rule 5 does not authorize discovery of:

> . . . statements made by prosecution witnesses or prospective prosecution witnesses provided that after a prosecution has testified on direct examination, the court shall, on motion of the defendant, order the prosecution to produce any statement of the witness in the possession of the prosecution which relates to the subject matter as to which the witness has testified; and provided further that the court may upon sufficient showing require the production of any statement of any prospective witness prior to the time such witness testifies.

Rule 5(a)(2), SCCrimP. Thus, Counsel acted within the scope of reasonably effective assistance in opting to argue the statement was discoverable pursuant to Brady because it was partly exculpatory, albeit largely devastating, where Rule 5(a)(2), SCCrimP, imposed no obligation to disclose the statement until trial. See Yarborough, 540 U.S. at 5 ("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."). Furthermore, even if the statements were specifically required to be disclosed by Rule 5 in a way that they were not by Brady, this Court is still unable to find any authority or construction of the rule to provide that plea offers extended must remain open until all discoverable materials in the State's possession are made available to the defendant.

To the extent Applicant again relies upon the Toal memorandum, Counsel clearly raised that issue to the trial court, obtained a ruling, and then set forth the issue in the explanations for

the subsequent appeal. Counsel could do no more than he did. To the extent Applicant may seek to raise the claim of trial court error independent from the framing of ineffective assistance, he cannot do so, because PCR is not a substitute for direct review on appeal of the sentence or conviction. S.C. Code Ann. § 17-27-20(B); Gibson v. State, 329 S.C. 37, 41, 495 S.E.2d 426, 428 (1998).

Applicant is doubtlessly frustrated by the State's apparently inadvertent[3] and "delayed"[4] disclosure of a highly inculpatory statement after he rejected a prior plea offer. However, this Court finds the law is unavailing to him. Further, the Court finds Counsel did all he could conceivably do to get the offer reinstated: he attempted to negotiated with the State, he filed a motion to argue the only possible authority available to him, and then filed explanations of the issue on the appeal from the guilty plea. Applicant identifies no new authority Counsel should have argued upon which Counsel could have prevailed. Accordingly, the Court finds no deficiency on the part of Counsel, nor any prejudice therefrom, and Applicant's request for relief is **DENIED.**

2. White Claim

Applicant also alleges that he should be entitled to relief pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974). 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.

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[3] Applicant offers no evidence the non-disclosure was deliberate, and the records previously submitted by Counsel on appeal appear to reflect the State believed the Carl Thomas statement had already been turned over.

[4] As noted above, the State was not yet obliged to disclose the statement under Rule 5, and Applicant himself now insists it was not at all exculpatory, but purely damaging, such that Brady is unavailing.

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).

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)).

In the present matter, the record reflects Counsel did appeal and submitted multiple documents detailing how the plea offer was extended, rejected, and only thereafter was Carl Thomas' statement turned over to the defense. The South Carolina Court of Appeals did not find the explanation convincing and dismissed the appeal without detailed comment on the issue raised. Because Counsel did file the notice of appeal, along with a thorough explanation as required by the rules, Applicant is not entitled to White relief, and his claim thereto 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 2 **day of** January **, 2019.**

WILLIAM H. SEALS, JR.
Presiding Judge
Fifteenth Judicial Circuit

_____, South Carolina