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APR 01 2020
S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA

In the Supreme Court

APPEAL FROM THE COUNTY OF GEORGETOWN

Court of Common Pleas

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

Case No. 2017-CP-22-1050

Joseph Skinner #147101......... Petitioner,

v.

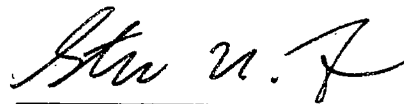
State of South Carolina, ...Respondent.

NOTICE OF APPEAL

The Petitioner appeals the Honorable Judge George M. McFadden Jr. Order filed denying post conviction relief to the Petitioner.

The Order was received by the undersigned counsel on March 20, 2020. A copy of the said Order on appeal is attached to this Notice.

This is the 27nd day of March, 2020.



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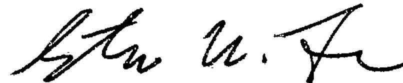
PROOF OF SERVICE

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) South Carolina 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) Respondent 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 the27th day of March, 2020.



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STATE OF SOUTH CAROLINA

COUNTY OF GEORGETOWN

Joseph Skinner, #147101
☐ Plaintiff

v.

State Of South Carolina
☒ Defendant.

IN THE COURT OF COMMON PLEAS

CASE NO.
2017-CP-22-1050

MOTION AND ORDER INFORMATION FORM AND COVER SHEET

Plaintiff's Attorney:	Defendant's Attorney:
Steve 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
North Myrtle Beach, SC 29582	phone: (803) 734-3737 fax: (803) 734-4113
phone: fax:	e-mail: JJames@scag.gov other:
e-mail: 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]
Signature of Attorney for ☐ Plaintiff / ☒ Defendant

January 21, 2020
Date submitted

2020 FEB -5 AM 11:38
ALMA WHITE CLERK OF COURT
FILED GEORGETOWN COUNTY

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:

JUDGE'S SECTION

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

[signature]
JUDGE

CODE: 2258 DATE: 28 Jan 2020

CLERK'S VERIFICATION

Date Filed: 2-5-20

Collected by: AG

☑ MOTION FEE COLLECTED: $0
☐ CONTESTED – AMOUNT DUE:

SCCA/233 (11-03)

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF GEORGETOWN	)	
Joseph Skinner, S.C.D.C. No. 147101,	)	Case No.: 2017-CP-22-01050
Applicant,	)	
v.	)	ORDER OF DISMISSAL
State of South Carolina,	)	
Respondent.	)	

FILED GEORGETOWN COUNTY, S.C.
2020 FEB -5 AM 11:33
ALMA Y. WHITE
CLERK OF COURT

This matter comes before the Court by way of an application for post-conviction relief filed by Joseph Skinner ("Applicant") on December 11, 2017. Respondent made its return on or about February 9, 2018. 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., Esq., of the South Carolina Attorney General's Office, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant's plea counsel, Wyn N. Bessent, 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, 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 Georgetown County Clerk of Court. Applicant was indicted at the November 2016 term of the Georgetown County Grand Jury for burglary, first degree (2016-GS-

22-01096). Wyn N. Bessent, Esq. represented Applicant, and Richard D. Todd, Jr., Esq., of the Fifteenth Circuit Solicitor's Office, prosecuted the case. On July 17, 2017, Applicant pled guilty as indicted. The Honorable Benjamin H. Culbertson sentenced Applicant to imprisonment for a term of seventeen 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. Involuntary Guilty Plea, in that:
    a. "Was Threaten with Life Sentence if I did not plead guilty."
2. "Court Lacked Subject Matter Jurisdiction to accept Guilty Plea"
    a. "No party can waive presentment to the Grand Jury."
3. "Ineffective assistance of Trial Counsel"
    a. "Plea was not knowing and voluntary because I lacked knowledge of material evidence."
4. "Plea was not lesser-included offense"
    a. "Plea was not lesser-included offense"

Applicant requests relief as follows:

- "New Plea hearing / with offer of lesser-included offense"
- "Want charges I plead to to be processed by presentment by the Grand Jury"

At the evidentiary hearing, Applicant initially moved to continue the hearing, then proceeded on the allegations as set forth above, and offered additional testimony in support of an allegation not properly pled; to wit: he was never provided written notice of the State's plea offer.

As to the relief requested, the State confirmed through cross-examination that Applicant understood the relief available in the event post-conviction relief were granted, and that with that understanding that Applicant wished to proceed with his application and evidentiary hearing.

II. MOTION FOR CONTINUANCE

At the outset of the evidentiary hearing, PCR counsel informed the Court that Applicant wished for a continuance in order to consult with a potential witness. "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. No motion for continuance of trial shall be granted on account of the absence of a witness without the oath of the party, his counsel or agent, to wit:

1. That the testimony of the witness is material to the support of the action or defense of the party moving;
2. That the motion is not intended for delay, but is made solely because the party cannot go safely to trial without such testimony; and
3. That there has been due diligence to procure the testimony of the witness or of such other circumstances as will satisfy the court that the motion is not intended for delay.

Rule 40(i)(2), 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).

Applicant personally addressed the Court directly and explained he wished to speak to his sister, as she would be the person to bond him out in the event relief were granted. Applicant additionally explained that he had been subjected to lockdown conditions at Broad River Correctional Institute, which limited the time he could spend in the law library, and that he still wished to research issues for his application. Respondent answered in opposition to the motion, arguing it was prepared and ready to proceed. Applicant replied that he felt he had been "railroaded since day one."

This Court reiterates here for clarity its denial of the motion from the bench. Applicant has enjoyed nearly two years since filing the application to conduct any further research, raise any additional claims, or obtain the testimony of any additional witnesses. Applicant is represented by counsel who can perform these tasks on his behalf, such that the conditions of his incarceration are of limited consequence. Applicant offered nothing to show how his sister, or any other person, would be relevant to any allegations raised or which could be raised. Applicant offered nothing to show that the testimony of his sister, or any other person, was vital to the viability of his claims. Applicant offered nothing to show due diligence in obtaining the presence of his sister, or any other person, at the hearing. 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 and, for all of these reasons, Applicant's motion to continue was, and is, **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. Involuntary Guilty Plea

Applicant claims his plea was not entered 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 in Section III.C., below.

B. Subject-Matter Jurisdiction, Waiver of Presentment

Applicant's allegations regarding jurisdiction are without merit. "[S]ubject matter jurisdiction of the circuit court and the sufficiency of the indictment are two distinct concepts and the blending of these concepts serves only to confuse the issue." State v. Gentry, 363 S.C. 93, 101, 610 S.E.2d 494, 499 (2005). "Circuit courts obviously have subject matter jurisdiction to try criminal matters." Id. Furthermore, Applicant's assertion that a defendant cannot waive his or her right to presentment of the charges to a grand jury is contrary to clearly established law. See S.C. Const. Art. I, § 11 ("The General Assembly may provide for the waiver of an indictment by the accused."); S.C. Code Ann. § 17-23-120 ("[W]hen any defendant is arrested

upon a warrant charging a felony, he may apply to the clerk of court of the county having jurisdiction of such case for an immediate disposition of the case and thereupon the clerk of court shall forward the arrest warrant to the solicitor of the judicial circuit."). In any event, Applicant was true bill indicted by the grand jury; he did not waive presentment. For all of these reasons, Applicant's allegations regarding jurisdiction and his ability to waive presentment, and every part of the application based thereupon, are **DISMISSED** and his request for relief thereby is **DENIED.**

C. 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. Threat of Life Imprisonment

Applicant contends his guilty plea was not voluntarily entered because he was threatened with life imprisonment. Applicant was charged with and ultimately pled to burglary in the first degree, which "is a felony punishable by life imprisonment." S.C. Code Ann. § 16-11-311.

The plea proceeding first began as a hearing prior to jury qualification on Counsel's motion to be relieved, which she made at Applicant's behest. (Tr. 3, ll. 4-16). During the hearing on the motion, Applicant demonstrated clear understanding of his charges and the possible consequences, even as he also demonstrated confusion regarding the rights and obligations of the State:

> I didn't do anything violent, even though it's considered violent because of two priors, but I asked [Counsel] about if I would take it, if they could drop it to at least second non, you know, like nonviolent I would still have to do seven and a half years I would have plea to that instead of going to trial.

(Tr. 8, ll. 11-16). The plea court noted the transcript from Applicant's "arraignment"[1] which indicated the State had not been willing to reduce the severity of the charge. (Tr. 8, ll. 17-22). Applicant expressed generalized lack of understanding, and bemoaned that his predicament was unfair where he "never had nothing violent on my record[;]" the plea court opined the State's position and powers were pretty clear. (Tr. 8-9). Applicant continued to lament that nobody cared about his alcohol problem. (Tr. 9-10). The court explained to Applicant he had the right to plead guilty and the right to proceed to trial, and that if he proceeded to trial that Applicant had the right to testify or not testify. (Tr. 9-11). The court offered Applicant additional time to talk to Counsel, which he accepted, and the court held Applicant had failed to offer any grounds to relieve Counsel. (Tr. 11, ll. 5-12). After a discussion of State v. Tyndall,[2] the court denied the motion to relieve Counsel. (Tr. 11-13). Applicant mentioned no threats.

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[1] This Court's understanding is that standard practice in the Fifteenth Judicial Circuit is to place plea offers, and the rejection thereof, on the record in pre-trial proceedings occurring near the date of trial, and that they are referred to as "arraignment." Fifteenth Circuit arraignments are thus somewhat different from the more general meaning of the term. See Arraignment Definition, Black's Law Dictionary (11th ed. 2019), available at Westlaw ("The *initial step* in a criminal prosecution whereby the defendant is brought before the court to hear the charges and to enter a plea.") (emphasis added).

[2] 336 S.C. 8, 18, 518 S.E.2d 278, 283 (Ct. App. 1999). The transcript refers to State v. Tindall, but contextually it is clear Counsel was citing to Tyndall, and that portion quoting State v. Thrift, 312 S.C. 282, 291-92, 440 S.E.2d 341, 346-47 (1994).

After returning on record, Applicant's case was called as a plea proceeding, and the State contradictorily asserted that it was not making a recommendation, but was asking for a sentence in excess of the minimum in light of the rejected offer to plead guilty in exchange for the minimum possible sentence of fifteen years. (Tr. 14, ll. 1-14). Upon inquiry by the plea court, Counsel confirmed she had discussed with Applicant the consequences of being convicted of burglary, first degree, and that she was of the opinion that Applicant understood. (Tr. 14-15). Applicant confirmed he understood why he was in court and declined the opportunity to speak further with Counsel or ask the court any questions. (Tr. 16, ll. 11-15). Addressing the potential sentencing range, the plea court asked:

> THE COURT: All right. Now, you understand that for this crime I could sentence you to prison for the rest of your life. Do you understand that?
>
> MR. SKINNER: Yes, sir.
>
> THE COURT: Do you understand that this crime carries a mandatory minimum sentence, which means the absolute minimum sentence that I must impose by state law is 15 years in prison?
>
> MR. SKINNER: Yes, sir.

(Tr. 17, ll. 7-15). The plea court further explained to Applicant that burglary, first degree was classified as a violent, most serious crime, and the consequences of those classifications; Applicant confirmed he understood. (Tr. 17-18). Applicant denied anybody had promised him anything or threatened him in any way in order to coerce him into pleading guilty, and that he was pleading guilty voluntarily. (Tr. 18, ll. 17-21).

At the evidentiary hearing, Applicant testified he only met Counsel once over the course of six months. Counsel told Applicant the sentences he could face. Applicant testified that Counsel was honest with him. Applicant recalled that he wrote the prosecutor on one occasion in an attempt to figure out what kind of time he was facing. When asked about the alleged

threats of life imprisonment, Applicant replied that he was not a violent person and that he had simply wished to speak with solicitor Todd. Applicant unequivocally testified he pled guilty of his own free will.

Counsel testified she met with Applicant at least a half-dozen times. Counsel recalled receiving discovery from the State the December prior to the plea, and that she reviewed those materials with Applicant. Counsel advised Applicant that burglary, first degree carried a potential sentence of up to life imprisonment. On cross-examination, Counsel listed the dates and details as to each time she met or otherwise spoke with Applicant. Counsel explained that Applicant always asked many questions.

The Court finds Counsel was not ineffective. The Court does not find credible Applicant's testimony that he only met with Counsel once. To the contrary, Counsel met with Applicant on numerous occasions, and in the course of those meetings Counsel gave Applicant accurate legal advice that if convicted, Applicant faced a potential sentence of up to life in prison for burglary in the first degree. As affirmed by Applicant during the plea, nobody threatened Applicant with anything in order to compel him to plead guilty. The Court finds Applicant fully understood the sentencing range of burglary, first degree, and all of the other consequences he faced if he were convicted of the crime. Applicant himself again affirmed that he voluntarily pled guilty of his own free will. Applicant has presented no evidence to show any deficiency on the part of Counsel, and accordingly his request for relief by way of this allegation is **DENIED.**

2. Failure to Review Discovery with Applicant

Applicant alleges that his plea was not knowingly and voluntarily entered because he lacked knowledge of material evidence. At the evidentiary hearing, Applicant claimed he only

met with Counsel once, and when asked about the material evidence he lacked knowledge of, Applicant merely answered "I dunno..."

Counsel, as noted in the prior section, testified she received discovery from the State and reviewed it with Applicant over the course of numerous meetings. Counsel further recalled that Applicant explained his actions by asserting somebody had told him the pool house he was caught in was in fact a clubhouse and that he could be there, but Applicant was unable to provide any name or other personal identifying information. Counsel explained that the only possible defense for Applicant was not factual, but legal: argue the pool house in which he was caught was not a domicile for the purposes of burglary in the first degree. Counsel explained the potential defense to Applicant. Counsel recalled that she directed an investigator to go take pictures of the pool house and the adjacent house.

The Court finds Applicant's testimony is not credible on this point, and is in any event inadequate to support his claim. As already noted in the prior subsection, the Court finds Counsel's testimony wholly credible, and concludes that she fully reviewed the discovery materials, explained the evidence in the case to Applicant, and explained to him the best available defense based on that evidence. Applicant has presented no evidence to show any deficiency on the part of Counsel, and accordingly his request for relief by way of this allegation is **DENIED.**

3. Failure to Communicate Written Plea Offer

Applicant did not allege in his application, but extensively alleged through his testimony that Counsel failed to timely communicate the State's plea offer to him. As noted in Section II, above, 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).

A defendant has the right to effective assistance of counsel during the plea bargaining process. Davie v. State, 381 S.C. 601, 675 S.E.2d 416 (2009) (abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018)). "The United States Supreme Court has held that 'defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused.'" Collins v. State, 422 S.C. 250, 261, 810 S.E.2d 871, 876 (2018) (quoting Missouri v. Frye, 566 U.S. 134, 145 (2012)). Generally, defense counsel provides deficient performance when he or she does not communicate such an offer to the defendant. Frye, 566 U.S. at 145. To show prejudice, an applicant for post-conviction relief "must demonstrate a reasonable probability that: (1) he [or she] 'would have accepted the earlier plea offer had [he or she] been afforded effective assistance of counsel;' (2) 'the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it;' and (3) 'the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time.'" Collins, 422 S.C. at 262, 810 S.E.2d at 877 (quoting Frye, 566 U.S. at 147; citing Lafler v. Cooper, 566 U.S. 156, 164 (2012)). An applicant must show actual prejudice, but depending on the facts of the case, an applicant's self-serving statement *may* be sufficient to establish actual prejudice. Davie, 381 S.C. at 613, 675 S.E.2d at 422.

During the hearing on his motion to relieve Counsel, Applicant claimed he never received a written plea offer, contrary to Counsel's assertion. (Tr. 4, ll. 13-20). When the court questioned Applicant if he was "arraigned" without being told the plea offer, Applicant asserted that was the case. (Tr. 5, ll. 1-3). Counsel provided the court a copy of the transcript of

Applicant's arraignment, and thereafter explained that the plea offer was extended March 22, 2017, set forth in writing in a letter on March 24, 2017, and received by Counsel on March 30, 2017. (Tr. 5, ll. 6-25). The court noted that the transcript reflected that on May 24, 2017, the Honorable Larry B. Hyman, Jr., reviewed the plea offer with Applicant in its entirety, and which Applicant rejected. (Tr. 6, ll. 2-13). Applicant contended he had not known about the offer until the day prior, and the court emphasized that the point of arraignment was to ensure he knew about the plea offer, and that Applicant rejected the offer. (Tr. 6-7). Applicant questioned if the alleged late notice was "a violation of something" and that he had not enjoyed enough time to actually consider the offer. (Tr. 7, ll. 3-11). The court explained Applicant had no constitutional right to plea bargain, and that the State could have offered nothing at all. (Tr. 7, ll. 14-20). Applicant again asserted he had not enjoyed enough time to consider the offer, and the court curtly informed him that none of this rights had been violated. (Tr. 7-8). Applicant and the plea court continued to discuss the fairness of the State's offer as set forth in Section III.C.1, above.

At the evidentiary hearing, Applicant claimed he did not get the written plea offer until after his plea, and explained that had he more timely received the offer, he would have called his family, bonded out of jail, and privately retained counsel. Applicant recalled that at some point he managed to speak to solicitor Todd, but the solicitor refused to ever re-offer the previously rejected offer. Applicant acknowledged he understood the State did not have to extend any plea offer. Applicant testified that he met with Counsel prior to his plea and demanded his paperwork; when he saw the written plea offer, Counsel told him that she had previously showed it to him, which he denied. Applicant admitted he had known about the plea offer prior to his arraignment, but only for a very short period of time, and that he had less than twenty-four hours

to prepare for the arraignment. Applicant asserted that he almost signed the offer in front of Judge Hyman, but that he had not had enough time to talk to his family.

Counsel testified she received the fifteen year plea offer in March 2017. Counsel discussed the offer with Applicant in May 2017. Counsel recalled that on June 14, 2017, Applicant claimed he never received a copy of the plea offer, so she gave him a physical copy at that time. Counsel recalled that Applicant initially told her he wanted the fifteen year offer, but ultimately rejected the offer in June 2017.

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. This Court is aware of no precedent to provide relief where a defendant is made aware of a plea offer prior to its expiration, and provided the opportunity to accept or reject the offer, but not long enough before expiration to consider the merits of the offer to the extent desired by the defendant. While facts and circumstances could potentially exist to support such a novel claim, no such facts or legal arguments have been properly presented to this Court to support it, let alone to support it where it has not been pled in the first place.

As to the merits notwithstanding the procedural default, the Court finds Applicant was fully aware of the State's plea offer and rejected it. As noted by the plea court, Applicant was fully appraised of the plea offer during his appearance before Judge Hyman. Applicant presents no credible evidence to show that he would have accepted the plea offer had the offer been more quickly communicated to him. To the contrary, Applicant's assertion that he would have bonded out and retained private counsel upon receiving the written plea offer is inconsistent with a desire to accept the plea where all he would have needed to do is indicate his assent and proceed with

Counsel to a plea proceeding. Thus, even if Applicant had properly raised this issue to the Court prior to the initiation of the evidentiary hearing, Applicant has failed to meet his burden under Hill. For all of these reasons, Applicant's allegations regarding provision of the written plea offer, and every part of the application based thereupon, are **DISMISSED** as procedurally defaulted and otherwise without merit, and his request for relief thereby is **DENIED.**

D. Direct Appeal Issue: Lesser-Included Offense

Applicant appears to take issue with the fact that he never received an offer to plead guilty in exchange for a lesser-included offense. Even in the added context of his evidentiary hearing testimony, Applicant's frustration does not for a claim cognizable in a post-conviction relief action. An application for post-conviction relief does not serve as a substitute for direct appeal, and an issue that could have been raised at applicant's trial or on appeal is not cognizable in an application for PCR. S.C. Code Ann. § 17-27-20(b); Drayton v. Evatt, 312 S.C. 4, 8-9, 430 S.E.2d 517, 520 (1993) (citing Hyman v. State, 278 S.C. 501, 299 S.E.2d 330 (1983)); Humbert v. State, 345 S.C. 332, 338, 548 S.E.2d 862, 866 (2001). As has been repeatedly explained to Applicant, the State was under no obligation to offer him the opportunity to plead to a lesser offense. For all of these reasons, Applicant's allegations regarding the State's refusal to offer the opportunity to plead to a lesser offense, and every part of the application based thereupon, are **DISMISSED** and his request for relief thereby is **DENIED.**

[*Conclusion and signature on following page*]

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 28 day of ________, 2020.

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

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