

THE STATE OF SOUTH CAROLINA

In the Supreme Court

APPEAL FROM THE COUNTY OF Horry

Court of Common Pleas

The Honorable Circuit Court Judge, William H. Seals Jr.

RECEIVED

MAY 08 2020

S.C. SUPREME COURT

Case No. 2017-CP-26-07756

Clifford W. Powell #372293..... Petitioner,

v.

State of South Carolina,Respondent.

NOTICE OF APPEAL

The Petitioner appeals the Honorable Judge William H. Seals Jr. Order filed denying post conviction relief to the Petitioner.

The Order was received by the undersigned counsel on May 6, 2020. A copy of the said Order on appeal is attached to this Notice.

This is the 7nd day of May, 2020.



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ALAN WILSON
ATTORNEY GENERAL

May 1, 2020

The Honorable Renee N. Elvis
Clerk of Court, Horry County
Post Office Box 677
Conway, SC 29528-0677

Re: Clifford W. Powell, #372293 v. State of South Carolina
2017-CP-26-07756

Dear Ms. Elvis:

Enclosed please find the original **Order of Dismissal** signed by the Honorable William H. Seals, Jr., in the above-captioned case, for filing in your office.

Should you have any questions, please do not hesitate to contact me at (803) 734-3737.

Sincerely,

/s Chelsey F. Marto
Chelsey F. Marto
Assistant Attorney General

CFM/ec

Enclosure

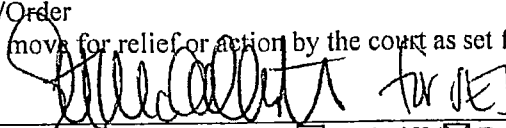
Cc: Steven W. Fowler, Esquire

STATE OF SOUTH CAROLINA)
)
 COUNTY OF Horry)
)
Clifford W. Powell, Jr., #372293)
 Plaintiff,)
 vs.)
)
STATE OF SOUTH CAROLINA)
 Defendant.)

IN THE COURT OF COMMON PLEAS
 FIFTEENTH JUDICIAL CIRCUIT

CASE NO: 2017-CP-26-07756

**MOTION AND ORDER INFORMATION
 FORM AND COVERSHEET**

Plaintiff's Attorney: Steven Williard Fowler 730 Main Street Unit #237 North Myrtle Beach, SC 29582 Phone: _____ Fax _____ E-mail: _____ Other: _____	Defendant's Attorney: Johnny E. James Jr., Esquire Address: South Carolina Attorney General's Office PO Box 11549 Columbia, SC 29211 Phone: _____ Fax _____ E-mail: _____ Other: _____
<input type="checkbox"/> MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) <input type="checkbox"/> FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) <input checked="" type="checkbox"/> PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)	
SECTION I: Hearing Information	
Nature of Motion: _____ Estimated Time Needed: _____ Court Reporter Needed: <input type="checkbox"/> YES / <input checked="" type="checkbox"/> NO	
SECTION II: Motion/Order Type	
<input type="checkbox"/> Written motion attached <input checked="" type="checkbox"/> Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order.	
<div style="display: flex; justify-content: space-between; align-items: center;"> <div style="text-align: center;">  Signature of Attorney for <input type="checkbox"/> Plaintiff / <input checked="" type="checkbox"/> Defendant </div> <div style="text-align: right;"> April 3, 2020 Date submitted </div> </div>	
SECTION III: Motion Fee	
<input type="checkbox"/> PAID – AMOUNT: \$ _____ EXEMPT: (check reason)	
<input type="checkbox"/> Rule to Show Cause in Child or Spousal Support <input type="checkbox"/> Domestic Abuse or Abuse and Neglect <input type="checkbox"/> Indigent Status <input type="checkbox"/> State Agency v. Indigent Party <input type="checkbox"/> Sexually Violent Predator Act <input checked="" type="checkbox"/> Post-Conviction Relief <input type="checkbox"/> Motion for Stay in Bankruptcy <input type="checkbox"/> Motion for Publication <input type="checkbox"/> Motion for Execution (Rule 69, SCRPC) <input type="checkbox"/> 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: _____ <input type="checkbox"/> Other: _____	
JUDGE'S SECTION <input type="checkbox"/> Motion Fee to be paid upon filing of the attached order. <input type="checkbox"/> Other: _____	JUDGE CODE _____ Date: _____
CLERK'S VERIFICATION	
Collected by: _____ Date Filed: _____ <input type="checkbox"/> MOTION FEE COLLECTED: \$ _____ <input type="checkbox"/> CONTESTED – AMOUNT DUE: \$ _____	

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	FOR THE FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY)	
Clifford Wayne Powell, Jr.,)	Case No.: 2017-CP-26-07756
S.C.D.C. No. 372293,)	
)	
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 Clifford Wayne Powell, Jr. (“Applicant”) on November 28, 2017. Respondent made its return on or about March 1, 2018. The Court convened an evidentiary hearing into the matter on October 9, 2019, at the Horry County Government & Justice Center in Conway, 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. One of Applicant’s two plea counsels, Jonny D. McCoy, Esq., as well as Dr. Harold Morgan 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 Horry 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 Horry County Clerk of Court. Applicant was indicted at the September

2014 term of the Horry County Grand Jury for murder (2014-GS-26-03666).¹ James Irvin and Jonny D. McCoy, Esqs. (collectively “Counsels”) represented Applicant. Nancy R. Livesay and Christopher D. Helms, Esqs., of the Fifteenth Circuit Solicitor’s Office, prosecuted the case. On April 26, 2017, Applicant pled guilty to the lesser-included offense of voluntary manslaughter. Upon recommendation by the State of a sentence of no more than twenty-five years, the Honorable Larry B. Hyman, Jr. sentenced Applicant to imprisonment for a term of twenty-five 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. “For Failure to File Notice of Appeal”
 - i. “Applicant did not knowingly, intelligently, and voluntarily waive his rights to a direct appeal.”
 - b. “For Failure to Present a Competency and Insanity Defense”
 - i. “Counsel failed to present a competency and insanity defense.”
 - c. “For Failure to Advise and Assert Defenses to Applicant”
 - i. “Counsel failed to inform Applicant adequately of all available defenses including failure to inform Applicant of the M’Naughten insanity defense, codified as S.C. Code 17-24-10”
 - d. “For Failure to Adequately Investigate and Prepare for Trial”
 - i. “Counsel failed to adequately investigate and prepare for trial by not investigating mental illness claims of Applicant by State’s witnesses, State’s victim/witness, Applicant’s family, Applicant himself, and a psychiatrist’s diagnosis informing Applicant’s counsel of findings of mental illnesses.”
 - e. “For Failure to Challenge Statements Presented By State’s Witness At Sentencing”
 - i. “Counsel failed to challenge statement’s presented by State’s witness at sentencing to the Court, towards Applicant which was blast, held no value, was no evidence to support witness’ claim accusing the Applicant of a hate crime using racial terminology.

¹ Applicant was additionally indicted for attempted murder (2014-GS-26-03665; superseding 2014-GS-26-04029); unlawful possession of a firearm by a person convicted of a violent offense (2014-GS-26-03667); and possession of a weapon during the commission of a violent crime (2015-GS-25-00423). These indictments were dismissed *nolle prosequi* as part of Applicant’s plea.

Counsel's failure to raise challenge to this statement as well as notify the Court of Applicant's mental illnesses was erroneous and possibly affected the Court's consideration for leniency and a considerably lower sentence."

- f. "By Dual Representation"
 - i. "Applicant's counsel began representing Applicant on June 10, 2014 and dual represented a State's witness in November 2014. This State witness had collected evidence and turned said evidence over to police, gave statements to State prosecutor and a detective interview which was used in having Applicant plead guilty. Counsel represented said State's witness, in the company of the State's "star" witness/victim in a separate hearing/case. The Applicant's counsel maintained a close relationship with this State witness throughout pre-trial. This believability affected Applicant's case and in turn prejudiced counsel towards Applicant's defense and decisions concerning trial."
- g. "For Failure to Move For Suppression of Evidence"
 - i. "Counsel failed to move to suppress evidence used in having the Applicant plead guilty, such as:"
 - 1. "Written statement, (2) detective interviews of State's "star" witness/victim/[illegible]"
 - 2. "Written statement, (2) detective interviews of State's witness/roommate of Applicant."
 - 3. "Investigative report of State's 2nd Eyewitness provided by Ginger Pop in April 2017."
 - ii. "Incorrect/misdated residential search warrant used to collect items from Applicant's home used in having the Applicant plead guilty."
 - iii. "The items listed [above] were used to get the Applicant to plead guilty. These witnesses gave inconsistent statements and in audio recordings on 911 calls, detective interviews and written; Investigator Pop's investigation report of eyewitnesses in April 2017 completely contradicts and is very inconsistent with his (2) 911 calls and detective interview on June 1st 2014."
- h. "For Advice Concerning Plea, Going to Trial And Preserving the Applicant's Rights"
 - i. "Counsel advised Applicant to plead guilty despite the repeated objections to doing so by the Applicant on April 24th, 2017 at the Horry County Courthouse and repeatedly on April 26th 2017 at the Horry County Courthouse immediately before the hearing for sentencing, at which time Applicant was coerced and frightened into pleading guilty."
- i. "Miscellaneous Ineffectiveness of Counsel"
 - i. "Applicant's counsel was undergoing treatment for lung cancer while representing Applicant at the January 2017 bond hearing and at the April 26th 2017 sentencing hearing. Counsel never informed Court of life threatening illness, treatment of disease including

medication, or the Applicant. It is possible Applicant's Counsel's judgment and performance was effected by his illness, treatment and medication."

- j. "For Failure to Investigate Witnesses"
 - i. "Counsel failed to investigate all witnesses who had information concerning the Applicant's guilt and innocence. Counsel had a duty and obligation to investigate all witnesses who may have had information concerning the Applicant. Counsel failed to contact and investigate all alibi witnesses. Complete failure to investigate these witnesses can hardly be considered a tactical decision."
2. "Voluntariness of Plea Unrelated to Attorney Error"
 - a. "The court failed to advise the Applicant about supervised release upon completion of prison sentence term at the sentencing hearing."

Applicant requests relief as follows:

- "Direct Appeal to Be Reinstated, Guilty Plea And Sentence To Be Vacated, And A New Trial Ordered."

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. 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 Review or Introduce Footprint Evidence

Applicant alleges that Counsels were ineffective for failing to file a notice of appeal from his plea. Given the collection of claims raised, the Court must consider whether Applicant was wrongly denied his right to an appeal both (1) in the context of his mental health claims and (2) divorced from the context of mental health. The Court here considers the claim as divorced from the context of mental health. Applicant's White claim as it arises through his competence claims is considered in later sections.

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)).

Near the outset of the plea proceeding, McCoy explained to the court that he was appointed to the case roughly two months prior “to insure that if Mr. Irvin had any difficulties with health issues that we’d have somebody here just in case.” (Tr. 5, ll. 5-8). Later in the proceeding, the plea court explicitly informed Applicant of his right to file an appeal, and Counsels affirmed their ability and obligation to assist Applicant in filing one if so desired. (Tr. 19, ll. 6-18). Applicant confirmed his understanding of that right and how to act upon it. (Tr. 19, ll. 19-23).

At the evidentiary hearing, Applicant testified that after the plea proceeding he was taken to J. Reuben Long Detention Center. Irvin visited him some four hours later. Applicant claimed that the post-plea meeting was when he first learned Irvin was battling cancer. Applicant testified he asked Irvin to file a notice of appeal during that meeting. No such appeal was filed, and Irvin died shortly thereafter.

Applicant acknowledged McCoy was appointed as co-counsel, and acknowledged McCoy’s statement during the plea proceeding explaining his appointment, but nonetheless asserted he did not understand why McCoy was brought on at the time he was appointed. Applicant testified McCoy was appointed pursuant to a contract under Rule 608, SCACR, even

though he had retained Irvin at considerable expense. Applicant testified he was told that McCoy would be co-counsel, but the original order of appointment indicated he was lead, and that the order had to be amended. Notwithstanding Applicant's avowed lack of knowledge about Irvin's cancer, Applicant wrote a letter to McCoy prior to the plea, explaining he was worried about Irvin, that he respected McCoy, and that he wanted McCoy to be lead counsel. McCoy did not become lead counsel.

On cross-examination, Applicant testified he never asked McCoy to file an appeal. Applicant explained McCoy was co-counsel, and so he asked Irvin. Applicant understood that a letter to one attorney would be made known to the other, but testified there were things McCoy didn't know about.

McCoy testified warmly to Irvin's role as his mentor. Irvin was in poor health and asked McCoy to appear on his behalf at a bond hearing after Irvin was injured in a car wreck. McCoy subsequently met with the Honorable Steven H. John and volunteered to help Irvin with Applicant's case, which Applicant wanted. McCoy was appointed to the case at no cost to Applicant. Applicant wrote a letter to McCoy praising him. On cross-examination, McCoy affirmed he filed no notice of appeal.

The Court finds Applicant has failed to meet his burden of proof. There is no question that Applicant was aware of his right to file an appeal, as it was clearly explained during the plea proceeding. Applicant's White claim turns on the credibility of Applicant's testimony that he told the now-deceased Irvin to file a notice of appeal. This Court enjoyed the opportunity to closely observe Applicant during his testimony and weigh his statements against the other testimony and records before this Court. This Court finds Applicant's testimony that he told Irvin to file a notice of appeal is not credible. There being no other evidence to support

Applicant's claim, Applicant presents no credible evidence to support his claim of deficient performance, and his claim for relief by way of this allegation is **DENIED**.

2. Failure to Investigate, Prepare, Present, and Advise of Mental Health Defenses

Applicant alleges Counsels were ineffective in failing to investigate, prepare, present, and advise him of potential mental health defenses. Though raised as separate allegations in the application, because of shared relevant law and testimony, all of Applicant's mental health related ineffective assistance claims are addressed together in this section.

Law

"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) (citing Bishop v. United States, 350 U.S. 961 (1956)). "This right cannot be waived by a guilty plea." Id. (citing Pate v. Robinson, 383 U.S. 375 (1966)). "The test of competency to enter a plea is the same as required to stand trial." Id., 308 S.C. at 232, 417 S.E.2d at 595-96 (citing State v. Lambert, 266 S.C. 574, 225 S.E.2d 340 (1976)). 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).

Irrespective of a defendant's competency to stand trial or plead guilty, "[a]n accused who lacks the capacity to distinguish moral or legal right from moral or legal wrong *at the time of the crime* is relieved of responsibility for his acts." Davenport v. State, 301 S.C. 39, 40, 389 S.E.2d 649, 649 (1990) (emphasis added); see also S.C. Code Ann. § 17-24-10 (codifying the same). "The key to insanity is the power of the defendant to distinguish right from wrong in the act itself—to recognize the act complained of is either morally or legally wrong." Sate v. Senter, 396 S.C. 547, 552, 722 S.E.2d 233, 236 (Ct. App. 2011) (quoting State v. Lewis, 328 S.C. 273, 278, 494 S.E.2d 115, 117 (1997)) (cleaned up). "A criminal defendant is presumed to be sane; the State does not have to prove sanity." Id. (quoting State v. Smith, 298 S.C. 205, 208, 379 S.E.2d 287, 288 (1989)).

However, a defendant is merely "guilty but mentally ill if, at the time of the commission of the act constituting the offense, he had the capacity to distinguish right from wrong or to recognize his act as being wrong . . . , but because of mental disease or defect he lacked sufficient capacity to conform his conduct to the requirements of the law." S.C. Code Ann. § 17-24-20(A).

“The purposes for the enactment of GBMI statutes are (1) to reduce the number of defendants being completely relieved of criminal responsibility and (2) to insure mentally ill inmates receive treatment for their benefit as well as society’s benefit while incarcerated.” State v. Hornsby, 326 S.C. 121, 126, 484 S.E.2d 869, 872 (1997) (citing State v. Wilson, 306 S.C. 498, 413 S.E.2d 19 (1992)). “A verdict of GBMI does not absolve a defendant of guilt.” Id. “A defendant found GBMI must be sentenced as provided by law for a defendant found guilty.” Id. As such, a claim that defense counsel was ineffective for failing to pursue a GBMI “defense” does not constitute a *prima facie* case against the validity of the conviction, but only regards the conditions of the applicant’s incarceration, and is thus inadequate to establish prejudice under Strickland and Hill. People v. Manning, 883 N.E.2d 492, 504 (Ill. 2008) (“[T]here is virtually no difference in the treatment that defendant will receive under GBMI as opposed to a guilty plea. The [E]ighth [A]mendment to the United States Constitution requires that inmates receive adequate mental care[,]” to include mental health care.); see also Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (2000) (holding complaints regarding the conditions of incarceration are administrative matters not properly raised in a PCR action); cf. Wade v. State, 348 S.C. 255, 559 S.E.2d 843 (2002) (noting Al-Shabazz and that PCR actions do not treat the conditions of incarceration in determining Inmate Litigation Act was inapplicable to PCR actions); but cf. State v. Curry, 410 S.C. 46, 54-55, 762 S.E.2d 721, 725-26 (Ct. App. 2014) (vacating an entire conviction upon finding error in trial judge’s refusal to instruct the jury on the option of a GBMI verdict).

Plea

During the plea proceeding, Applicant consistently affirmed he understood the plea court’s questions. When asked about prior employment, Applicant answered: “I’ve owned – I started off with my ex-wife with an ice cream business and went from there. And I opened an air

brush business with her, and we built our empire from there. And things just fell apart.” (Tr. 13-14). Applicant subsequently denied ever suffering from any mental health problems, addiction issues, or “anything of that nature” that would impair his ability to understand the proceedings. (Tr. 14, ll. 10-14). The plea court concluded his colloquy with Applicant:

THE COURT: Okay. Mr. Powell, I asked you these questions because I want to know if there is any reason in the world that you can think of or suggest to me that might keep you from fully appreciating what we’re doing here and the consequences of your plea.

THE DEFENDANT: Absolutely clear, Your Honor.

THE COURT: Okay, you understand.

THE DEFENDANT: Yes, I do.

(Tr. 14-15).

The State set out a detailed factual recitation:

On June the 1st of 2014, in the early morning hours of around 1:30 a.m., 2 a.m., Angela Powell, the victim of the attempted murder that’s been dropped, was out celebrating her birthday with three other friends, including the victim Charles Royal.

When they were out that night, they saw Clifford Powell. There was no altercation at that time, no issues. She saw him, he saw her, there was a brief speaking, that was the end of it. They then make arrangements all to come back to Angelina Powell’s apartment to continue hanging out for her birthday. Her and Mr. Royal, the victim, get there first. They get out of the vehicle.

Charles Royal is walking up first. Clifford Powell is there waiting. They both approach, there’s some words exchanged. The Defendant then shoots the victim six times with a 9 millimeter. He then holds the gun up to Angelina Powell’s head, makes some statements to the gist of, you would be dead too, but I still love you. He then takes off running.

The six gunshot wounds to the victim were all to the right side, the right back of the head, the right elbow, the right abdomen, the right thigh and below the kneecap. I just bring that up because the State believes it’s indicative of some sort of defensive position where he’s leaning to the right. And the shots are fired.

He then takes off running. There is a fence that separates where the victim’s apartment is to where the Defendant lives. A witness sees him run to that fence, climb over the fence. He then is seen minutes later at a trash can or a

dumpster a few blocks down, a witness sees him dumping things into the dumpster. He gets back in the vehicle, takes off to his apartment.

Later on what's found in that dumpster is a 9 millimeter, two holsters and 9 millimeter bullets. The State through investigator [Pop] and the ATF was ultimately able to trace that gun back to Clifford Powell. He goes back to the apartment, the roommate testifies he then sees the Defendant in a towel, indicating that he had showered. He says he then tells him that he is going to the gold club.

Later on that night he's at the gold club, the police of course come to the scene. Angelina Powell immediately identifies Clifford Powell, she recognizes his voice and she recognizes all the clothes he's wearing. The police immediately go pick up Mr. Powell and interview him. At that time, of course, he denies any sort of involvement with the murder.

(Tr. 15-17). Applicant confirmed the State's version of the facts and admitted he did shoot and kill the victim, Charles Royal. (Tr. 15-17). Applicant affirmed to the plea court that he was entering the plea freely and voluntarily, that he had plenty of time to think about it, and that he did not need to discuss the matter any further with his attorneys. (Tr. 17, ll. 12-20).

Five individuals spoke on behalf of the victim. (Tr. 19-26). After remarks from attorney Irvin, Applicant addressed the plea court:

THE DEFENDANT: I'm guilty for what I'm charged with. There's nothing that I can say or do to replace Charles Royal. There's nothing that I can say or do to please his family. For three years I've had this on my conscience. And I've wanted to come forward, but I had to find God, like Mr. Royal said. And I have, but it's been hard for me to forgive myself for what happened. I can never go back to that split second that I saw him with my wife, I had a break. In that split second I did something terrible and I've --

THE COURT: Did you know him? I mean, there seems to be some people who know you and knew him. I just wonder if you knew him.

THE DEFENDANT: I knew him on the boulevard.

THE COURT: Okay.

THE DEFENDANT: And he had come to work, my wife had hired him at the air brush store, and we began to work together. And then things started arising between us three, and then he left our -- he stopped working. And then he began working across the street at our other air brush store.

But there's not a day that goes by that I'm not sorry for this. I feel so much remorse because I can – they can never see their son again, and I feel the worst for his daughter because I know what it's like to grow up without a father, it hurts. And there's nothing that I can do to replace him. There's nothing that I can say. And I'm sorry for what I did, and I'm guilty of it. And I'm sorry.

THE COURT: All right.

THE DEFENDANT: There's nothing I can do, just go back and stop what I did. I wish I could, but I can't. That's all I got to say.

(Tr. 28-30). Attorney McCoy then emphasized in mitigation that Applicant passed on the opportunity to plead under North Carolina v. Alford, 400 U.S. 25 (1970) and instead “said that the family deserves closure.” (Tr. 30-31, quotation at Tr. 30, line 10). McCoy touched on the long familiarity with Applicant, and opined that in high school “he was probably more afraid of me than I was of him[.]” (Tr. 31, ll. 2-12). McCoy emphasized again that “this was his idea not to plead under Alford, it was his idea to say, I'm sorry, it was his idea to stand here with us today regardless of what we wanted to go forward with on the trial.” (Tr. 32, ll. 1-4). The plea court sentenced Applicant to twenty-five years. (Tr. 32, ll. 19-20).

PCR Evidentiary Hearing

At the evidentiary hearing, Applicant testified that after he reviewed his evidence and discovery after the plea, he started consulting with Dr. Harold Morgan. Applicant testified that he originally met with Dr. Morgan on January 10, 2015, for about two hours. Dr. Morgan and attorney Irvin subsequently went to lunch. After the lunch meeting, Applicant recalled Irvin told him that he suffered from no mental health issues whatsoever. Applicant testified that when he reported Irvin's version of the lunch meeting to Dr. Morgan after his plea proceeding, Dr. Morgan replied that Applicant in fact did have mental health issues, and that Irvin never paid him for his services. Applicant testified he was never told about the concept of an insanity defense, or any defense strategy for that matter.

Applicant testified that Counsels received discovery, then brought a copy to Applicant and told him to review the materials. Applicant did not receive audio/video recordings as part of the copied materials, but testified he received full discovery days before the plea proceeding. Applicant explained that his brother obtained an additional copy of his file from McCoy after Applicant was sentenced. In the files, Applicant obtained an e-mail dated March 28, 2015, from Dr. Morgan to Irvin which offered a cursory opinion:

It will come as no surprise to you that your client has lots of problems. He is sensitive and tends to be volatile and acts impulsively. His excessive drinking makes all of these qualities more extreme. I have not seen any of the investigative materials yet so don't know what the police and prosecution are saying about his behavior. If it comes to a plea guilty but mentally ill may be appropriate.

Please send me the investigative material when it is available.

(Applicant's Exhibit #1). Applicant testified the e-mail prompted him to contact Dr. Morgan in October 2017. Applicant opined that Irvin's representation was impacted by his declining health. Applicant recalled Irvin was strong and healthy at the outset of his representation, but that "things slowed down" and he communicated less frequently as time passed.

On cross-examination, Applicant testified he met at least once a month with Irvin, for a total of dozens of meetings. Applicant testified he met with McCoy three times. Applicant disclosed his version of what happened to Counsels only after McCoy joined the case. Reviewing the timeline, Applicant recalled that Irvin told him there were no mental health issues before hearing Applicant's version of events. Applicant acknowledged he understood that even with severe mental health issues, he could still be guilty. Applicant testified he understood his Counsels and was freely able to communicate with them. Applicant declined to assert that he was insane at the time of the crime, but offered that he was not competent at the time of the plea. Applicant explained that he was very stressed at the plea and was directed what to say and do by Counsels: answer simply, say he was guilty, and offer no expression. Applicant testified he had

wanted more time with his attorneys, but did not tell the plea court. Applicant affirmed he understood the elements of the offenses charged and that he had been satisfied with his attorneys at the time.

Applicant recalled the events of the day of the killing, and described his emotions as volatile. Applicant opined that he should have listened to his wife, Angelina Powell. Applicant admitted he pointed a gun at Angelina. Applicant described his reaction to killing Royal as "horrified," "afraid," full of regret, and distinguished the act from hunting. Applicant slipped in that Dr. Morgan believed he blacked out. Applicant denied knowing at the time that it was right or wrong to shoot Royal. Applicant recalled that law enforcement called him; he told police where he was, then denied involvement in the shooting. Applicant retained Irvin and, while he did not admit to what happened, Applicant offered Irvin a list of potential witnesses who could speak to his defense: his wife, his mother, an individual named Thomas Davis, and family. Applicant testified he had been afraid of a life sentence, as Irvin told him that he never knew what jurors would do.

Dr. Harold Morgan testified at the evidentiary hearing. Dr. Morgan testified he was retained by Irvin to check Applicant's competency and criminal responsibility. Irvin told Dr. Morgan he had funds to pay for the examinations, but he never paid. Dr. Morgan evaluated Applicant on January 10, 2015. After a series of true/false questions with Applicant, Dr. Morgan concluded he showed emotional problems and felt he could assume Applicant was suffering a severe mental disorder; the doctor floated bipolar and adjustment disorders as potential candidates. Dr. Morgan did not reach a final clinical diagnosis.

However, Dr. Morgan firmly concluded Applicant was competent to stand trial and had no insanity defense at all. At best, Applicant was a possible candidate for entering a plea of

guilty-but-mentally-ill. After evaluating Applicant, Dr. Morgan reported his conclusions to Irvin. Dr. Morgan never asked for additional meetings with Applicant, but asked Irvin to provide investigative materials; the documents were never provided. The doctor described Applicant's life as chaotic and abusive, recalling one instance described by Applicant where Applicant's mother told him she wished she had aborted him. No real father figure existed in Applicant's life. Nonetheless, without any further follow-up from Irvin, Dr. Morgan performed no further work, and the doctor heard nothing more about the matter until Applicant began writing him personally. Dr. Morgan thereafter corresponded numerous times with Applicant. Dr. Morgan expressed his surprise that Irvin never followed up with him, and testified that he never had any contact with McCoy. The State did not cross-examine Dr. Morgan.

McCoy described himself as a *trial* lawyer, and that he joined the case with the expectation of a trial. McCoy recalled that he went to the detention center to discuss "arraignment" with Applicant at the jail. Applicant was very calm. McCoy told Applicant to tell the truth, and Applicant opened up. McCoy punchily described Applicant's disclosure: Applicant planned it, concealed it, lay in wait, shot Royal, pointed the gun at his wife, and threw his guns into a dumpster. McCoy felt Applicant wanted to tell the truth, and noted there was no indicia of self-defense. McCoy, who was present in the courtroom during Dr. Morgan's testimony, opined that Irvin did everything correctly, and noted that Dr. Morgan's conclusions were that Applicant was not insane and competent to stand trial. McCoy believed the expert would have potentially harmed Applicant's case and risked a life sentence. After Applicant disclosed, McCoy learned there had been an offer of twenty-five years, which the State was willing to put back on the table.

On cross-examination, McCoy testified he had gone to high school with Applicant. McCoy again opined Irvin was not wrong to not follow up further with Dr. Morgan after his findings that Applicant was competent and sane.

Findings

The Court finds no ineffectiveness on the part of Counsels. No evidence supports Applicant's claims as to either prong of Strickland. The Court finds Irvin conducted an appropriate and reasonable investigation by contacting Dr. Morgan and having Applicant preliminarily evaluated. Dr. Morgan reported his preliminary findings to Irvin that Applicant was competent and criminally responsible. With the mental health lead exhausted, Irvin properly ceased pursuing it, and turned his attention to other matters. Applicant thus fails to show any deficiency under Strickland and Hill.

The Court concurs in Dr. Morgan's conclusions that Applicant was criminally responsible. Applicant lay in wait, ambushed the victims, fled, attempted to dispose of evidence, and denied his involvement when apprehended by law enforcement. These are not the actions of one who is criminally insane, but repeatedly reflect Applicant's knowledge that he knew right from wrong, that what he was doing was wrong. Applicant himself could not assert he was insane at the time of the crime. No evidence is before this Court to show Applicant was criminally insane.

The Court also concurs in Dr. Morgan's conclusions that Applicant was competent to stand trial and plead guilty. The record as a whole reflects that Applicant was thoroughly capable of assisting his attorneys throughout representation. Applicant—as evidenced by his statements both at the plea and the PCR hearing—understood the charges against him, the elements of the offenses, the possibly and likely punishment if convicted, and his various

constitutional rights as a defendant. Applicant's statements to the plea court were eloquent and poignant, and reflected his deep understanding and acceptance of the gravity of his actions. No evidence is before this Court to show Applicant was not competent to enter his guilty plea.

The Court does not concur in Dr. Morgan's preliminary conclusion that Applicant was a good candidate for a plea of guilty-but-mentally-ill. The facts of the case and Applicant's intelligent conduct throughout his relationship with Irvin and McCoy, throughout the plea proceeding, and throughout the evidentiary hearing, at no point reflect the actions of a man who was incapable of conforming his conduct to the confines of the law. Applicant was able to lay in wait to ambush Angelina and Royal. Applicant was able to restrain himself from killing Angelina even as he murdered Royal. Applicant was able to attempt to conceal his culpability after the killing by disposing of evidence in different locations and denying involvement when law enforcement caught up with him. Though this Court is not in a position to deny Applicant suffers from some mental defect, such defect alone does not provide for a GBMI plea. Furthermore, even if Applicant could have theoretically pled GBMI, Applicant's knowledge of as much would not have changed the outcome of Applicant's plea, as a guilty-but-mentally-ill plea is still a guilty plea, and would have only impacted the conditions of Applicant's incarceration. To establish prejudice under Hill, an applicant must show that but for the deficiency alleged, Applicant *would not* have pled guilty, but would have proceeded to trial, and this Court is presented no evidence to show that had Applicant known of the GBMI statute, he would have turned down the State's offer and insisted on proceeding to trial. Applicant pled pursuant to a plea agreement with the State due, in part, to his fear of receiving a life sentence, a fear that could not have been otherwise mollified by knowledge of GBMI. There is nothing to show the State would have extended the same offer in the GBMI context.

For all of these reasons, Applicant has failed to meet his burden of proof as to either prong of Hill, and his request for relief by way of this allegation is **DENIED**.

3. Conflict of Interest

Applicant alleges Counsels were ineffective because one of them represented one of the State's witnesses while also representing Applicant. "To establish a violation of the Sixth Amendment right to effective counsel due to a conflict of interest arising from multiple representation, a defendant who did not object a trial must show an *actual* conflict of interest adversely affected his attorney's performance." Jordan v. State, 406 S.C. 443, 449, 752 S.E.2d 538, 541 (2013) (quoting Thomas v. State, 346 S.C. 140, 143, 551 S.E.2d 254, 256 (2001)). "The mere possibility defense counsel may have a conflict of interest is insufficient to impugn a criminal conviction." Id. (quoting Lomax v. State, 379 S.C. 93, 101, 665 S.E.2d 164, 168 (2008)). An actual conflict of interest occurs:

when a defense attorney places himself in a situation inherently conducive to divided loyalties. . . . If a defense attorney owes duties to a party whose interests are adverse to those of the defendant, then an actual conflict exists. The interests of the other client and the defendant are sufficiently adverse if it is shown that the attorney owes a duty to the defendant to take some action that could be detrimental to his other client.

Lomax, 379 S.C. at 101, 665 S.E.2d at 168 (quoting Duncan v. State, 281 S.C. 435, 438, 315 S.E.2d 809, 811 (1984)). "[U]ntil a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance." Id. "However, a defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice to obtain relief." Id. (quoting Staggs v. State, 372 S.C. 549, 551-52, 643 S.E.2d 690, 692 (2007)). Conflicts of interest may be waived so long as such waiver is done knowingly, intelligently, and voluntarily. Thomas v. State, 346 S.C. 140, 551 S.E.2d 254 (2001).

At the evidentiary hearing, Applicant testified Irvin previously represented Applicant's landlord, Tom Davis, who was to be a witness for the State. Applicant testified Davis was his grandmother's sister's husband, and had turned evidence over to the State. Applicant testified Irvin had represented Davis in an eviction action against Applicant. Applicant opined Irvin had no right to represent Davis against Applicant when Davis was going to testify against Applicant.

McCoy testified he was not familiar with anything related to the dual representation allegation.

The Court takes judicial notice of case number 2014-CV-26-1092605, which appears to be an eviction matter between Applicant and Tom Davis, which was resolved September 3, 2014. Curiously, the public index does not indicate representation by either party.

The Court finds Applicant has failed to meet his burden of proof as to this allegation. Aside from his limited testimony and this Court's *sua sponte* judicial notice, Applicant presented no evidence to provide *any* details regarding Irvin's alleged representation of Davis in the eviction action. Given the absence of any record to corroborate Applicant's claim that Irvin represented Davis, and the self-serving character of the claim, this Court gives no weight to Applicant's testimony and cannot conclude Irvin represented Davis at all. Assuming *ad arguendo* that Irvin represented Davis in the eviction matter, no evidence has been presented to this Court to show that it created any conflicting interest in Irvin's criminal defense of Applicant. This Court is left with the scantest speculation of the mere possibility of a conflict, which is simply inadequate to sustain any relief. Finally, Applicant was represented by not only Irvin, but McCoy, and pled guilty consistent with the advice of both attorneys; this Court finds even if Irvin had recused himself from the case, Applicant still would have pled guilty. For all of these reasons, Applicant's request for relief by way of this allegation is **DENIED**.

4. Failure to Move to Suppress Evidence

Applicant alleges Counsels were ineffective by failing to file a motion to suppress various items of evidence. “Under the Fourth and Fourteenth Amendments to the United States Constitution, a defendant has the right to challenge false statements in a search-warrant affidavit.” State v. Robinson, 415 S.C. 600, 606, 785 S.E.2d 355, 358 (2016); see also Franks v. Delaware, 438 U.S. 154 (1978) (establishing same). “In order to obtain relief, the defendant must prove the affiant knowingly and intentionally, or with reckless disregard for the truth, included false statements in the search-warrant affidavit.” Robinson, 415 S.C. at 606, 785 S.E.2d at 358. “The burden is on the defendant to establish the falsity by a preponderance of the evidence.” Id. (citing Franks, 438 U.S. at 156).

Applicant testified a witness named “Robert” gave inconsistent statements, such that they could have been suppressed. Applicant also asserted that a search warrant executed by law enforcement was backdated and thus false. Applicant complained of the lack of a motion to suppress before the plea. As noted previously, Applicant testified he had all of his discovery prior to his plea.

McCoy testified that he would have moved to suppress evidence at the time of trial, not before.

This Court finds no ineffectiveness on the part of Counsels. First, and most simply, the Court is satisfied with McCoy’s answer, and finds Counsels were not deficient in delaying in filing motions to suppress until trial. Filing and pursuing motions prior to trial could have, and likely would have, risked the availability of the plea offer Applicant accepted. Second, Applicant presents no probative evidence to support any proposed motions to suppress. As to the first suggested motion, that a statement bears inconsistencies does not in and of itself provide a

basis for its suppression; to the contrary, inconsistent prior statements are often admissible under Rule 801(d)(1)(A), SCRE. In any event, Applicant did not present Robert's statements to this Court. As to the second suggested motion, Applicant did not present the search warrant to this Court, or any evidence to support the falsehood he alleges, and so he has failed entirely to meet his burden of showing he could have prevailed in a Franks² hearing, such that he would not have pled guilty but would have proceeded to trial.

Applicant additionally alleged in his original application that various other ill-defined elements of evidence in his discovery should have been suppressed. Applicant presented no evidence at the evidentiary hearing in support of these remaining grounds, and the Court considers these allegations to be abandoned.

Accordingly, Applicant has failed to meet his burden of proof as to either prong of Hill by way of these allegations, and his request for relief is **DENIED**.

5. Coerced Guilty Plea

Applicant alleges Counsels were ineffective by coercing him into pleading guilty by advising him to do so despite his repeated objections. "All that is required to knowingly and voluntarily enter a plea of guilty is that a defendant have a full understanding of the consequences of his plea and of the charges against him." Gustine v. State, 325 S.C. 123, 128, 480 S.E.2d 444, 446 (1997).

This Court will not address this meritless allegation at great length: Applicant presented no evidence in support of the claim at the evidentiary hearing. In any event, advice by counsel to accept an offer and plead guilty does not amount to undue coercion. The record reflects Applicant was fully aware of the consequences of the plea, the charges against him, and his constitutional right to a jury trial, to remain silent, and to confront the witnesses against him.

² Franks v. Delaware, 438 U.S. 154 (1978).

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**.

6. General Ineffectiveness Due to Illness

Applicant alleges Irvin's "judgment and performance" was possibly affected by his illness, treatment, and medication. Respondent argues in its Return that while Irvin's cancer could be argued as an underlying cause of specific deficiencies alleged, the illness in and of itself does not constitute an independent, *prima facie* ground for relief under the Uniform Post-Conviction Procedure Act. This Court concurs in Respondent's judgment, and finds that Irvin's infirmity, divorced from the other allegations, does not in and of itself provide a colorable claim for relief under Strickland and Hill. Accordingly, Applicant's request for relief by way of this allegation is **DENIED**.

7. Failure to Investigate Witnesses

Applicant alleges in the original application for relief that Counsels were ineffective for failing to investigate potential alibi witnesses. The Supreme Court of South Carolina "has repeatedly held a PCR applicant *must produce the testimony* of a favorable witness *or otherwise offer the testimony in accordance with the rules of evidence* at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial." Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) (emphasis original). Applicant presented no alibi witnesses at the evidentiary hearing, and stated on cross-examination that he was not arguing he had an alibi. As Applicant failed to present any evidence as to this claim and affirmatively abandoned it in his testimony at the evidentiary hearing, his request for relief is **DENIED**.

B. Due Process Violations

Applicant alleges his rights to due process of law were violated, primarily in the context of his mental health. “Due process considerations apply in contested cases or hearings which affect an individual’s property or liberty interests as contemplated by the federal and state constitutions.” Dangerfield v. State, 376 S.C. 176, 179, 656 S.E.2d 352, 353-54 (2008) (citing U.S. Const. amend. XIV, § 1; S.C. Const. art. I, § 3). “The procedural component of the state and federal due process clauses requires the individual whose property or liberty interests are affected to have received adequate notice of the proceeding, the opportunity to be heard in person, the opportunity to introduce evidence, the right to confront and cross-examine adverse witnesses, and the right to meaningful judicial review.” Id., 376 S.C. at 179, 656 S.E.2d at 354 (citing State v. Hill, 368 S.C. 649, 656, 630 S.E.2d 274, 278 (2006)). The substantive component of due process, meanwhile, “requires a rational basis for legislation depriving a person of life, liberty, or property.” In re Ronnie A., 355 S.C. 407, 409, 585 S.E.2d 311, 311 (2003).

However, when asserting a violation of a constitutional right in a post-conviction relief action, the applicant “generally must frame the issue as one of ineffective assistance of counsel.” Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (2000) (citing Drayton v. Evatt, 312 S.C. 4, 9, 430 S.E.2d 517, 520 (1993)); but see Fortune v. State, 428 S.C. 545, 559, 837 S.E.2d 37, 44-45 (2019) (recognizing rare cases of due process violations may be exceptions). Issues which could have been raised at trial or on direct appeal are not cognizable in an action for post-conviction relief. S.C. Code Ann. § 17-27-20(b); Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1974). Therefore, an applicant who contends his due process rights were violated must usually show he was deprived of those rights due representation that fell below an objective standard of

reasonableness, and 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.

1. Court Failure to Advise of Supervised Release

Applicant alleges his plea was not voluntarily entered because the plea court "failed to advise the Applicant about supervised release upon completion of prison sentence term at the sentencing hearing." As previously noted, "[a]ll that is required to knowingly and voluntarily enter a plea of guilty is that a defendant have a full understanding of the consequences of his plea and of the charges against him." Gustine, 325 S.C. at 128, 480 S.E.2d at 446.

Applicant cites to no authority to support his claim that a plea is rendered involuntary in the absence of some discussion of supervised release, nor can this Court independently find any. To the contrary, the possibility of supervised release is a collateral consequence, such that it need not be specifically advised before entering a guilty plea. See Smith v. State, 329 S.C. 280, 283, 494 S.E.2d 626, 628 (1997) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)) (parole eligibility is a collateral consequence that need not be specifically advised before entering a guilty plea); Id., 329 S.C. at 284-85, 494 S.E.2d at 628-29 (violent classification and associated impacts are all collateral consequences, including preclusion from supervised furlough). Applicant's claim is without merit as a matter of law. Additionally, this Court perceives no reason why this allegation could not have been more properly framed as an allegation of ineffective assistance of counsel, such that it is not cognizable as presented. For all of these reasons, Applicant's request for relief by way of this allegation 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), SCRCR 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 23 day of April, 2020.


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

, South Carolina