THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
JUL 07 2020
S.C. SUPREME COURT

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas
Post Conviction Relief

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

Case No.: 2017-CP-22-01051

Dennis Cumbee, Jr., 370848, Petitioner,

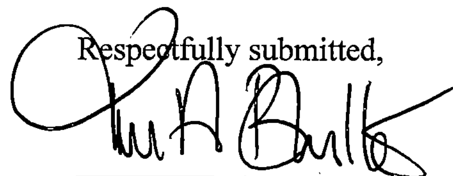
vs.

State of South Carolina Respondent.

NOTICE OF APPEAL

Dennis Cumbee, Jr., Petitioner, appeals the Order Denying Post Conviction Relief issued by the Honorable William H. Seals, Jr., on January 10, 2019, which was filed on January 15 2020.[1] Petitioner, through counsel timely filed a Rule 59, SCRCP, Motion. Thereafter, the Court issued an Order Denying Applicant's Motion for Reconsideration on May 29, 2020, which was filed on June 5, 2020. Petitioner, through counsel, received notice of the entry of the Order Denying Applicant's Motion for Reconsideration via email on June 9, 2020.

Respectfully submitted,



Tricia A. Blanchette
S.C. Bar No. 74904
PO Box 2147
Leesville, SC 29070
(803) 908-3266

July 3, 2020

---

[1] The January 10, 2019 date was in error and a duplicative Order of Dismissal was issued on February 12, 2020 and filed on February 14, 2020. Petitioner is providing a Notice of his intent to appeal and a copy of both Orders since the Court did not provide an Order stating the second Order of Dismissal superseded the first.

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
) FOR THE FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF GEORGETOWN)

Dennis Cumbee, Jr.,) Case No.: 2017-CP-22-01051
S.C.D.C. No. 370848,)

Applicant,)

ORDER OF DISMISSAL

v.

State of South Carolina,

Respondent.

2020 JAN 15 PM 1:27
ALMA Y. WHITE
CLERK OF COURT
FILED

This matter comes before the Court by way of an application for post-conviction relief filed by Denis Cumbee, Jr. ("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 March 25, 2019, at the Georgetown County Judicial Center in Georgetown, South Carolina. Applicant was present at the hearing and represented by Tricia A. Blanchette, Esq. Johnny Ellis James Jr., of the South Carolina Attorney General's Office, represented Respondent.

Four witnesses testified at the evidentiary hearing: Applicant's first counsel, Cezar McKnight, Esq. ("McKnight"); Applicant's second and ultimate counsel, John M. Hilliard, III, Esq. ("Hilliard") (attorneys collectively as "Counsels"); Applicant himself; and Applicant's mother Denise Giles ("Giles"). The Court had before it Applicant's records from the South Carolina Department of Corrections, a copy of the original plea transcript, the records of the Georgetown County Clerk of Court regarding the subject convictions, the pleadings, the amendment, Applicant's memorandum of law submitted at the evidentiary hearing, and the exhibit introduced at the hearing. The Court finds as follows:

I. PROCEDURAL HISTORY

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Georgetown County Clerk of Court. Applicant was indicted at the May 2015 term of the Georgetown County Grand Jury for murder (2015-GS-22-00427).[1] Applicant was initially represented by Cezar McKnight, Esq., and ultimately represented by John M. Hilliard, III, Esq. Richard D. Todd, Esq., of the Fifteenth Circuit Solicitor's Office, prosecuted the case. On December 12, 2016, Applicant pled guilty as indicted for murder. The Honorable Benjamin H. Culbertson sentenced Applicant to imprisonment for a term of 35 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, in that:
   a. "My counsel did not have an adequate amount of time to prepare for my case and wasn't able to look at my case thoroughly."

By and through PCR counsel Blanchette, Applicant amended his application by filing on March 1, 2019, to raise the following grounds for relief:

1. "Ineffective assistance of counsel that rendered Applicant's guilty plea involuntary due to counsel advising Applicant incorrectly about the service of his sentence prior to the entry of his guilty plea."
2. "Ineffective assistance of counsel for failure to interject and/or move to withdraw Applicant's guilty plea after the court addressed the service of Applicant's sentence. Transcript pp. 7-8."

[1] Applicant was also indicted at the March 2014 term for discharging a firearm into a dwelling (2014-GS-22-00294), unlawful carrying of a pistol (2014-GS-22-00295), at the March 2015 term for aggravated breach of peace (2015-GS-22-00122), and at the May 2015 term for possession of a weapon during the commission of a violent crime (2015-GS-22-00428). These indictments were all dismissed *nolle prosequi* as part of the Applicant's plea.

Applicant, through his amendment, requests "a new trial or whatever relief the court deems proper." At the evidentiary hearing, Applicant proceeded forward on allegations as set forth in the March 1, 2019 amendment.

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).

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. Misadvice as to Expected Term of Incarceration

The Court finds Applicant has failed to meet his burden of showing prejudice as a result of his Counsels' misadvice that he could be eligible for some form of release after serving 85% of the sentence imposed. "A guilty plea is not rendered involuntary if the defendant is not informed of the collateral consequences of his sentence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Brown v. State, 306 S.C. 381, 412 S.E.2d 399 (1991)). "Typically, parole eligibility is considered a collateral consequence of a sentence. However, if trial counsel actively misinforms the defendant about parole eligibility, the defendant must prove he relied on the misinformation to receive PCR." Id. (citing Smith v. State, 329 S.C. 280, 494 S.E.2d 626 (1997)).

The laws governing parole eligibility and community release are labyrinthine, and the calculus for the incarceration of persons convicted of murder is governed by a smorgasbord of overlapping statutes. The crime of murder is a "no parole offense." See S.C. Code Ann. § 24-13-100 (defining a "no parole offense" to include those crimes exempt from the felony classification

system); S.C. Code Ann. § 16-1-10(D) (exempting murder from the felony classification system). Notwithstanding any other provision of law, an inmate convicted of a "no parole offense" and sentenced to the custody of the Department of Corrections, is not eligible for early release, discharge, or community supervision until the inmate has served at least eighty-five percent of the actual term of imprisonment imposed. S.C. Code Ann. §§ 24-13-150(A). *However*, the same statute provides that "[n]othing in this section may be construed to allow an inmate convicted of murder [. . .] to be eligible for work release, early release, discharge, or community supervision." Id.; see also S.C. Code Ann. § 24-21-560(A) (same language). Additionally, the relevant portion of the murder statute provides:

> No person sentenced to a mandatory minimum term of imprisonment *for thirty years to life* pursuant to this section is eligible for parole or any early release program, nor is the person eligible to receive any work credits, education credits, good conduct credits, or any other credits that would reduce the mandatory minimum term of imprisonment for *thirty years to life* required by this section.

S.C. Code Ann. § 16-3-20(A).[2] Altogether, the interconnected statutes provide for the more common legal and judicial parlance that murder is a "day-for-day offense," such that those convicted of murder will remain incarcerated in SCDC for every single day the sentence imposed.

At the evidentiary hearing, both Counsels testified they instructed Applicant he could expect to serve 85% of his sentence before he would become eligible for some form of release. Applicant testified that Hilliard did the math and informed him he would be eligible for release after serving twenty-nine years and seven months of his sentence. Giles confirmed further that the attorneys had instructed her and her son that he would serve 85% of the sentence before becoming eligible for some form of release. The Court finds Applicant's Counsels affirmatively misadvised

[2] How any number greater than thirty could similarly constitute the mandatory minimum term is an unanswered question of statutory construction not ultimately before this Court.

him regarding the potential for parole or other early release, and such affirmative misadvice constituted deficient performance under Strickland and Hill.

The inquiry thus moves to the prejudice prong. Deficient advice on the part of counsel may be cured by a thorough and accurate colloquy by the plea court prior to the entry of the guilty plea. Holden v. State, 393 S.C. 565, 575, 713 S.E.2d 611, 616 (2011), abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). At the plea proceeding the plea court instructed Applicant:

> THE COURT: Do you also understand that this crime carries a mandatory minimum sentence, which means the absolute minimum sentence that must be imposed is 30 years in prison. Do you understand that?
>
> MR. CUMBEE: Yes, sir.
>
> THE COURT: Do you also understand that this crime is classified as a violent crime, and what that means is if you're ever convicted of another violent crime then that [subsequent] violent crime conviction you would not be eligible for probation and you would not be eligible for parole. Do you understand that?
>
> MR. CUMBEE: Yes, sir.
>
> [. . .]
>
> THE COURT: You understand that for this crime you would not be eligible for parole. *So if I impose the 35-year sentence you're going to have to serve the 35-year sentence. Do you understand that?*
>
> MR. CUMBEE: *Yes, sir.*

(Tr. 7-8) (emphasis added). Applicant only thereafter pled guilty. (Tr. 8, ll. 17-25).

At the evidentiary hearing, Hilliard acknowledged the above exchanges and replied that he did not realize the statements of the plea court meant Applicant would have to serve "day-for-day" rather than 85% of the sentence. Hilliard continued by explaining that the Department of Corrections habitually utilized "different languages" such that he believed that an 85% sentence was tantamount to a day-for-day sentence. Hilliard opined that the best practice was likely to not

tell clients what percentage of their sentence they could realistically expect to serve. Hilliard additionally explained he reviewed the case with Applicant, looked for any trial defenses available to Applicant, but ultimately could not find any.

Applicant testified that his understanding that he would serve only 85% of his sentence was a decisive factor in his decision to plead guilty. When confronted with the plea court's remarks that the mandatory minimum was thirty years, Applicant answered that the plea court's question gave him no cause for concern about his Counsels' prior advice. When confronted with the plea court's remarks as to parole eligibility, Applicant testified he asked Hilliard about the question, and Hilliard replied that the plea judge had to state as much in case the law changed subsequent to the plea. Applicant testified he did not discover that murder required him to serve 100% of his sentence until he arrived at Kirkland Correctional Institute and was informed as much. On cross-examination, Applicant testified he pled guilty because he felt Hilliard had not had enough time to prepare for trial, and that he had lied to the plea court when he confirmed that he was pleading guilty because he had committed the crime. On redirect examination, Applicant testified Hilliard told him what to say during the plea proceeding. Applicant testified he knew he had to agree with the court's questions in order to get the plea. Applicant asserted he pled guilty in part because he was told he would only need to serve a minimum of 85% of the sentence before he became eligible for early release, which was in line with what he expected to receive if he took the case to trial and secured a conviction for the lesser-included offense of voluntary manslaughter.

The Court finds Applicant has failed to meet his burden of showing that but for Counsels' advice he would not have pled guilty, but would have proceeded to trial. First, the plea court's statements that Applicant was not eligible for parole and would have to serve the entire thirty-five year sentence could scarcely be clearer. Applicant expressed no confusion during the plea

proceeding, and communicated no concerns on the record to the plea court. The plea court's colloquy cured any misapprehension, and Applicant knew that he was going to serve the entirety of the negotiated thirty-five year sentence, and he proceeded with pleading guilty anyway.

Second, the Court does not find Applicant's self-serving testimony, his attorney's advice regarding parole eligibility was what induced him to plead guilty, sufficient to establish that he relied on the misinformation in pleading guilty. See Fraiser v. State, 351 S.C. 285, 389, 570 S.E.2d 172,174 (2002) (internal citation omitted). Applicant rightly notes in his memorandum of law that, *depending on the facts of the case*, an applicant's self-serving statements *may* be sufficient to establish prejudice under Hill. Davie v. State, 381 S.C. 601, 613, 675 S.E.2d 416, 422-23 (2009). The present matter, however, is not an appropriate circumstance to rely upon such a statement. Applicant has now made many alternative and conflicting assertions.[3] Taking them all into consideration, the Court does not find them sufficient to establish that the Applicant, relying on the misinformation by his attorney and wholly disregarding the corrective plea colloquy, would have not pled guilty, but for counsel's misadvice. Even if the Court gave sufficient weight to Applicant's testimony that Hilliard told him what to say, or that Hilliard dismissively explained away the plea court's cure during the colloquy, a defendant cannot rely upon an attorney's dismissal of the gravity of the plea proceeding as a basis to answer untruthfully during the plea proceeding. Moorehead v. State, 329 S.C. 329, 333, 496 S.E.2d 415, 417 (1998) (citing Wolfe v. State, 326 S.C. 158, 485 S.E.2d 367 (1997).

This Court finds Applicant accepted a generous offer to plead guilty in exchange for a negotiated sentence because he was guilty and because the State's strong case against him involved

[3] Applicant has now alternately asserted (1) he pled guilty because he was in fact guilty, (2) he pled guilty because he was told he would be eligible for early release after service of 85% of the sentence, and (3) he pled guilty because Hilliard did not have enough time to prepare the case for trial.

numerous witnesses identifying him as the aggressor and shooter from a party involving fifteen to twenty people, and forensic evidence to establish Applicant shot the victim in the back numerous times before the victim fell and was coldly executed.[4] Applicant, at the evidentiary hearing, went so far as to largely reaffirm the State's factual recitation from the plea proceeding. These facts contrast noticeably with those which required relief in Ray v. State, 303 S.C. 374, 401 S.E.2d 151 (1991): where Ray steadfastly maintained his innocence and provided uncontroverted testimony that he would not have pled guilty but for his attorney's uncured misadvice as to the sentence he could expect, Applicant has now repeatedly acknowledged his complicity in the killing at the heart of his murder charge and conviction, and given multiple conflicting answers as to precisely why he pled guilty. "A guilty plea is a solemn, judicial admission of truth of charges against an individual[,]" Garren v. State, 423 S.C. 1, 12, 813 S.E.2d 704, 710 (2018), and this Court is presented no sufficient reason to set aside Applicant's admissions made under oath during that plea.

Though Applicant was no doubt misadvised prior to the plea as to his eligibility for some form of release before serving the entire thirty-five year sentence, any misconception was remedied by the plea court during the plea colloquy. Applicant knew he would serve every day of his sentenced, and pressed ahead with his plea anyway. Applicant's self-serving, inconsistent statements are inadequate to meet his burden of establishing a reasonable probability of a different outcome, and he has thus failed to establish prejudice under Hill. Accordingly, Applicant's request for relief by way of this allegation is **DENIED.**

---

[4] Applicant firmly reminds the Court that under Frierson v. State, 423 S.C. 257, 815 S.E.2d 433 (2018), forecloses any "overwhelming evidence" analysis. This Court does not note the strength of the State's case against Applicant for the purpose of considering whether prejudice may be foreclosed, but in considering the totality of the record in determining what motivated Applicant to plead guilty in the first place.

2. Failure to Move to Withdraw Guilty Plea

The Court finds no merit in Applicant's alternative argument that if the plea court's cure was sufficient, then Hilliard was ineffective for failing to interject and move to withdraw Applicant's guilty plea. When there is reason to think a rational defendant would want to withdraw his plea, or when the defendant reasonably demonstrated an interest in so withdrawing his plea, plea counsel may be constitutionally obliged to move to terminate a plea proceeding or otherwise move to withdraw his client's guilty plea. See, e.g. Thompson v. State, 340 S.C. 112, 531 S.E.2d 294 (2000) (finding counsel ineffective for failing to move to withdraw a plea after the state reneged on its plea agreement); Smith v. State, 407 S.C. 270, 754 S.E.2d 900 (Ct. App. 2014) (same); Jordan v. State, 297 S.C. 52, 374 S.E.2d 683 (1988) (same); Rolen v. State, 384 S.C. 409, 683 S.E.2d 471 (2009) (finding counsel ineffective for failing to move to withdraw a plea after client repeatedly asserted his innocence during the plea hearing); cf Turner v. State, 380 S.C. 223, 224-25, 670 S.E.2d 373, 374 (2008) (comparable standard in the context of failure to appeal from a guilty plea). Where a defendant seeks to withdraw his guilty plea, whether to permit such withdrawal is within the sound discretion of the trial judge. State v. Riddle, 278 S.C. 148, 150, 292 S.E.2d 795, 796 (1982).

First, there is nothing in the record to indicate Applicant or anybody on Applicant's behalf ever asked Hilliard to move to withdraw the plea. Second, given the alternating reasons for pleading guilty offered by Applicant, it is not clear that Hilliard should have been immediately prompted to action by the plea court's clarification that Applicant would have to serve thirty-five years of the thirty-five year sentence. As noted in the previous section, the Court does not find sufficient weight to establish prejudice in Applicant's testimony that Hilliard instructed him on what to say during the plea, or that Hilliard dismissively explained away the plea court's cure.

Third, even if Hilliard had moved to withdraw the plea after the fact, this Court perceives no reasonable probability the plea court would have permitted him to do so on a basis of an issue that was explicitly addressed and clarified during the plea colloquy. For all of these reasons, the Court finds Applicant has failed to meet either prong of Strickland by way of this allegation, and his request for relief is **DENIED**.

[*Conclusion and signature page to follow*]

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 10 day of January, 2019.

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

Marion, South Carolina

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
) FOR THE FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF GEORGETOWN)

Dennis Cumbee, Jr.,) Case No.: 2017-CP-22-01051
S.C.D.C. No. 370848,)

Applicant,)

v.) **ORDER OF DISMISSAL**

State of South Carolina,)

Respondent.)

2020 FEB 14 AM 11: 15
ALMA Y. WHITE
CLERK OF COURT
FILED
GEORGETOWN COUNTY

This matter comes before the Court by way of an application for post-conviction relief filed by Denis Cumbee, Jr. ("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 March 25, 2019, at the Georgetown County Judicial Center in Georgetown, South Carolina. Applicant was present at the hearing and represented by Tricia A. Blanchette, Esq. Johnny Ellis James Jr., of the South Carolina Attorney General's Office, represented Respondent.

Four witnesses testified at the evidentiary hearing: Applicant's first counsel, Cezar McKnight, Esq. ("McKnight"); Applicant's second and ultimate counsel, John M. Hilliard, III, Esq. ("Hilliard") (attorneys collectively as "Counsels"); Applicant himself; and Applicant's mother Denise Giles ("Giles"). The Court had before it Applicant's records from the South Carolina Department of Corrections, a copy of the original plea transcript, the records of the Georgetown County Clerk of Court regarding the subject convictions, the pleadings, the amendment, Applicant's memorandum of law submitted at the evidentiary hearing, and the exhibit introduced at the hearing. The Court finds as follows:

I. PROCEDURAL HISTORY

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Georgetown County Clerk of Court. Applicant was indicted at the May 2015 term of the Georgetown County Grand Jury for murder (2015-GS-22-00427).[1] Applicant was initially represented by Cezar McKnight, Esq., and ultimately represented by John M. Hilliard, III, Esq. Richard D. Todd, Esq., of the Fifteenth Circuit Solicitor's Office, prosecuted the case. On December 12, 2016, Applicant pled guilty as indicted for murder. The Honorable Benjamin H. Culbertson sentenced Applicant to imprisonment for a term of 35 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, in that:
    a. "My counsel did not have an adequate amount of time to prepare for my case and wasn't able to look at my case thoroughly."

By and through PCR counsel Blanchette, Applicant amended his application by filing on March 1, 2019, to raise the following grounds for relief:

1. "Ineffective assistance of counsel that rendered Applicant's guilty plea involuntary due to counsel advising Applicant incorrectly about the service of his sentence prior to the entry of his guilty plea."
2. "Ineffective assistance of counsel for failure to interject and/or move to withdraw Applicant's guilty plea after the court addressed the service of Applicant's sentence. Transcript pp. 7-8."

[1] Applicant was also indicted at the March 2014 term for discharging a firearm into a dwelling (2014-GS-22-00294), unlawful carrying of a pistol (2014-GS-22-00295), at the March 2015 term for aggravated breach of peace (2015-GS-22-00122), and at the May 2015 term for possession of a weapon during the commission of a violent crime (2015-GS-22-00428). These indictments were all dismissed *nolle prosequi* as part of the Applicant's plea.

Applicant, through his amendment, requests "a new trial or whatever relief the court deems proper." At the evidentiary hearing, Applicant proceeded forward on allegations as set forth in the March 1, 2019 amendment.

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).

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. Misadvice as to Expected Term of Incarceration

The Court finds Applicant has failed to meet his burden of showing prejudice as a result of his Counsels' misadvice that he could be eligible for some form of release after serving 85% of the sentence imposed. "A guilty plea is not rendered involuntary if the defendant is not informed of the collateral consequences of his sentence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Brown v. State, 306 S.C. 381, 412 S.E.2d 399 (1991)). "Typically, parole eligibility is considered a collateral consequence of a sentence. However, if trial counsel actively misinforms the defendant about parole eligibility, the defendant must prove he relied on the misinformation to receive PCR." Id. (citing Smith v. State, 329 S.C. 280, 494 S.E.2d 626 (1997)).

The laws governing parole eligibility and community release are labyrinthine, and the calculus for the incarceration of persons convicted of murder is governed by a smorgasbord of overlapping statutes. The crime of murder is a "no parole offense." See S.C. Code Ann. § 24-13-100 (defining a "no parole offense" to include those crimes exempt from the felony classification

system); S.C. Code Ann. § 16-1-10(D) (exempting murder from the felony classification system). Notwithstanding any other provision of law, an inmate convicted of a "no parole offense" and sentenced to the custody of the Department of Corrections, is not eligible for early release, discharge, or community supervision until the inmate has served at least eighty-five percent of the actual term of imprisonment imposed. S.C. Code Ann. §§ 24-13-150(A). *However*, the same statute provides that "[n]othing in this section may be construed to allow an inmate convicted of murder [. . .] to be eligible for work release, early release, discharge, or community supervision." Id.; see also S.C. Code Ann. § 24-21-560(A) (same language). Additionally, the relevant portion of the murder statute provides:

> No person sentenced to a mandatory minimum term of imprisonment *for thirty years to life* pursuant to this section is eligible for parole or any early release program, nor is the person eligible to receive any work credits, education credits, good conduct credits, or any other credits that would reduce the mandatory minimum term of imprisonment for *thirty years to life* required by this section.

S.C. Code Ann. § 16-3-20(A).[2] Altogether, the interconnected statutes provide for the more common legal and judicial parlance that murder is a "day-for-day offense," such that those convicted of murder will remain incarcerated in SCDC for every single day the sentence imposed.

At the evidentiary hearing, both Counsels testified they instructed Applicant he could expect to serve 85% of his sentence before he would become eligible for some form of release. Applicant testified that Hilliard did the math and informed him he would be eligible for release after serving twenty-nine years and seven months of his sentence. Giles confirmed further that the attorneys had instructed her and her son that he would serve 85% of the sentence before becoming eligible for some form of release. The Court finds Applicant's Counsels affirmatively misadvised

---

[2] How any number greater than thirty could similarly constitute the mandatory minimum term is an unanswered question of statutory construction not ultimately before this Court.

him regarding the potential for parole or other early release, and such affirmative misadvice constituted deficient performance under Strickland and Hill.

The inquiry thus moves to the prejudice prong. Deficient advice on the part of counsel may be cured by a thorough and accurate colloquy by the plea court prior to the entry of the guilty plea. Holden v. State, 393 S.C. 565, 575, 713 S.E.2d 611, 616 (2011), abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). At the plea proceeding the plea court instructed Applicant:

> THE COURT: Do you also understand that this crime carries a mandatory minimum sentence, which means the absolute minimum sentence that must be imposed is 30 years in prison. Do you understand that?
>
> MR. CUMBEE: Yes, sir.
>
> THE COURT: Do you also understand that this crime is classified as a violent crime, and what that means is if you're ever convicted of another violent crime then that [subsequent] violent crime conviction you would not be eligible for probation and you would not be eligible for parole. Do you understand that?
>
> MR. CUMBEE: Yes, sir.
>
> [. . .]
>
> THE COURT: You understand that for this crime you would not be eligible for parole. *So if I impose the 35-year sentence you're going to have to serve the 35-year sentence. Do you understand that?*
>
> MR. CUMBEE: *Yes, sir.*

(Tr. 7-8) (emphasis added). Applicant only thereafter pled guilty. (Tr. 8, ll. 17-25).

At the evidentiary hearing, Hilliard acknowledged the above exchanges and replied that he did not realize the statements of the plea court meant Applicant would have to serve "day-for-day" rather than 85% of the sentence. Hilliard continued by explaining that the Department of Corrections habitually utilized "different languages" such that he believed that an 85% sentence was tantamount to a day-for-day sentence. Hilliard opined that the best practice was likely to not

tell clients what percentage of their sentence they could realistically expect to serve. Hilliard additionally explained he reviewed the case with Applicant, looked for any trial defenses available to Applicant, but ultimately could not find any.

Applicant testified that his understanding that he would serve only 85% of his sentence was a decisive factor in his decision to plead guilty. When confronted with the plea court's remarks that the mandatory minimum was thirty years, Applicant answered that the plea court's question gave him no cause for concern about his Counsels' prior advice. When confronted with the plea court's remarks as to parole eligibility, Applicant testified he asked Hilliard about the question, and Hilliard replied that the plea judge had to state as much in case the law changed subsequent to the plea. Applicant testified he did not discover that murder required him to serve 100% of his sentence until he arrived at Kirkland Correctional Institute and was informed as much. On cross-examination, Applicant testified he pled guilty because he felt Hilliard had not had enough time to prepare for trial, and that he had lied to the plea court when he confirmed that he was pleading guilty because he had committed the crime. On redirect examination, Applicant testified Hilliard told him what to say during the plea proceeding. Applicant testified he knew he had to agree with the court's questions in order to get the plea. Applicant asserted he pled guilty in part because he was told he would only need to serve a minimum of 85% of the sentence before he became eligible for early release, which was in line with what he expected to receive if he took the case to trial and secured a conviction for the lesser-included offense of voluntary manslaughter.

The Court finds Applicant has failed to meet his burden of showing that but for Counsels' advice he would not have pled guilty, but would have proceeded to trial. First, the plea court's statements that Applicant was not eligible for parole and would have to serve the entire thirty-five year sentence could scarcely be clearer. Applicant expressed no confusion during the plea

proceeding, and communicated no concerns on the record to the plea court. The plea court's colloquy cured any misapprehension, and Applicant knew that he was going to serve the entirety of the negotiated thirty-five year sentence, and he proceeded with pleading guilty anyway.

Second, the Court does not find Applicant's self-serving testimony, his attorney's advice regarding parole eligibility was what induced him to plead guilty, sufficient to establish that he relied on the misinformation in pleading guilty. See Fraiser v. State, 351 S.C. 285, 389, 570 S.E.2d 172,174 (2002) (internal citation omitted). Applicant rightly notes in his memorandum of law that, *depending on the facts of the case*, an applicant's self-serving statements *may* be sufficient to establish prejudice under Hill. Davie v. State, 381 S.C. 601, 613, 675 S.E.2d 416, 422-23 (2009). The present matter, however, is not an appropriate circumstance to rely upon such a statement. Applicant has now made many alternative and conflicting assertions.[3] Taking them all into consideration, the Court does not find them sufficient to establish that the Applicant, relying on the misinformation by his attorney and wholly disregarding the corrective plea colloquy, would have not pled guilty, but for counsel's misadvice. Even if the Court gave sufficient weight to Applicant's testimony that Hilliard told him what to say, or that Hilliard dismissively explained away the plea court's cure during the colloquy, a defendant cannot rely upon an attorney's dismissal of the gravity of the plea proceeding as a basis to answer untruthfully during the plea proceeding. Moorehead v. State, 329 S.C. 329, 333, 496 S.E.2d 415, 417 (1998) (citing Wolfe v. State, 326 S.C. 158, 485 S.E.2d 367 (1997).

This Court finds Applicant accepted a generous offer to plead guilty in exchange for a negotiated sentence because he was guilty and because the State's strong case against him involved

[3] Applicant has now alternately asserted (1) he pled guilty because he was in fact guilty, (2) he pled guilty because he was told he would be eligible for early release after service of 85% of the sentence, and (3) he pled guilty because Hilliard did not have enough time to prepare the case for trial.

numerous witnesses identifying him as the aggressor and shooter from a party involving fifteen to twenty people, and forensic evidence to establish Applicant shot the victim in the back numerous times before the victim fell and was coldly executed.[4] Applicant, at the evidentiary hearing, went so far as to largely reaffirm the State's factual recitation from the plea proceeding. These facts contrast noticeably with those which required relief in Ray v. State, 303 S.C. 374, 401 S.E.2d 151 (1991): where Ray steadfastly maintained his innocence and provided uncontroverted testimony that he would not have pled guilty but for his attorney's uncured misadvice as to the sentence he could expect, Applicant has now repeatedly acknowledged his complicity in the killing at the heart of his murder charge and conviction, and given multiple conflicting answers as to precisely why he pled guilty. "A guilty plea is a solemn, judicial admission of truth of charges against an individual[,]" Garren v. State, 423 S.C. 1, 12, 813 S.E.2d 704, 710 (2018), and this Court is presented no sufficient reason to set aside Applicant's admissions made under oath during that plea.

Though Applicant was no doubt misadvised prior to the plea as to his eligibility for some form of release before serving the entire thirty-five year sentence, any misconception was remedied by the plea court during the plea colloquy. Applicant knew he would serve every day of his sentenced, and pressed ahead with his plea anyway. Applicant's self-serving, inconsistent statements are inadequate to meet his burden of establishing a reasonable probability of a different outcome, and he has thus failed to establish prejudice under Hill. Accordingly, Applicant's request for relief by way of this allegation is **DENIED**.

---

[4] Applicant firmly reminds the Court that under Frierson v. State, 423 S.C. 257, 815 S.E.2d 433 (2018), forecloses any "overwhelming evidence" analysis. This Court does not note the strength of the State's case against Applicant for the purpose of considering whether prejudice may be foreclosed, but in considering the totality of the record in determining what motivated Applicant to plead guilty in the first place.

2. Failure to Move to Withdraw Guilty Plea

The Court finds no merit in Applicant's alternative argument that if the plea court's cure was sufficient, then Hilliard was ineffective for failing to interject and move to withdraw Applicant's guilty plea. When there is reason to think a rational defendant would want to withdraw his plea, or when the defendant reasonably demonstrated an interest in so withdrawing his plea, plea counsel may be constitutionally obliged to move to terminate a plea proceeding or otherwise move to withdraw his client's guilty plea. See, e.g. Thompson v. State, 340 S.C. 112, 531 S.E.2d 294 (2000) (finding counsel ineffective for failing to move to withdraw a plea after the state reneged on its plea agreement); Smith v. State, 407 S.C. 270, 754 S.E.2d 900 (Ct. App. 2014) (same); Jordan v. State, 297 S.C. 52, 374 S.E.2d 683 (1988) (same); Rolen v. State, 384 S.C. 409, 683 S.E.2d 471 (2009) (finding counsel ineffective for failing to move to withdraw a plea after client repeatedly asserted his innocence during the plea hearing); cf Turner v. State, 380 S.C. 223, 224-25, 670 S.E.2d 373, 374 (2008) (comparable standard in the context of failure to appeal from a guilty plea). Where a defendant seeks to withdraw his guilty plea, whether to permit such withdrawal is within the sound discretion of the trial judge. State v. Riddle, 278 S.C. 148, 150, 292 S.E.2d 795, 796 (1982).

First, there is nothing in the record to indicate Applicant or anybody on Applicant's behalf ever asked Hilliard to move to withdraw the plea. Second, given the alternating reasons for pleading guilty offered by Applicant, it is not clear that Hilliard should have been immediately prompted to action by the plea court's clarification that Applicant would have to serve thirty-five years of the thirty-five year sentence. As noted in the previous section, the Court does not find sufficient weight to establish prejudice in Applicant's testimony that Hilliard instructed him on what to say during the plea, or that Hilliard dismissively explained away the plea court's cure.

Third, even if Hilliard had moved to withdraw the plea after the fact, this Court perceives no reasonable probability the plea court would have permitted him to do so on a basis of an issue that was explicitly addressed and clarified during the plea colloquy. For all of these reasons, the Court finds Applicant has failed to meet either prong of Strickland by way of this allegation, and his request for relief is **DENIED**.

[*Conclusion and signature page to follow*]

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.

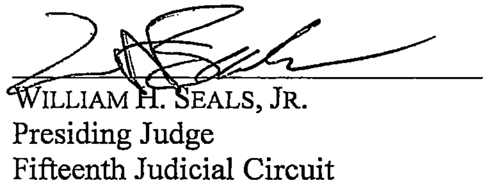
This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), 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:

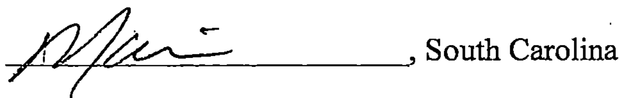
1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and

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

AND IT IS SO ORDERED this 12 **day of** Feb **, 2020.**



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



, South Carolina

STATE OF SOUTH CAROLINA)
COUNTY OF GEORGETOWN)

IN THE COURT OF COMMON PLEAS
IN THE FIFTEENTH JUDICIAL CIRCUIT

Dennis Cumbee, Jr., #370848,
Applicant,

v.

State of South Carolina,
Respondent.

Case No.: 2017-CP-22-1051

2020 JUN -5 AM 10:48
ALMA Y. WHITE
CLERK OF COURT

ORDER DENYING APPLICANT'S MOTION FOR RECONSIDERATION

The matter before this Court by way of an Application for post-conviction relief (hereafter "PCR") filed December 11, 2017. This Court convened an evidentiary hearing into the matter on March 25, 2019, at the Georgetown County Judicial Center. Applicant was present at the hearing and represented by Tricia A. Blanchette. Respondent was represented by Jacob Isenburg, Esquire, of the South Carolina Attorney General's Office. The Court denied relief by written Order dated January 10, 2019. On February 4, 2020, Applicant, through Counsel, filed a Motion for Reconsideration. Respondent's attorney, Chelsey F. Marto, Esquire, submitted its return on March 13, 2020, which was perfected on March 19, 2020.

After careful consideration of the arguments of Counsel and review of the record, this Court is unable to discover any material fact or principle of law that has either been overlooked or disregarded, and further finds no error of law or fact not appropriately considered. The Order of Dismissal issued by this Court contains the appropriate findings of fact and conclusions of law as required by section 17-27-80 of the South Carolina Code of Laws and Rule 52(a) of the South Carolina Rules of Civil procedure. Accordingly, Applicant's Motion for Reconsideration is **DENIED.**

IT IS THEREFORE ORDERED that Applicant's motion is hereby **DENIED AND DISMISSED.**

AND IT IS SO ORDERED this 29 day of May, 2020.

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

Florence, South Carolina

STATE OF SOUTH CAROLINA COUNTY OF GEORGETOWN	)	IN THE COURT OF COMMON PLEAS FOR THE FIFTEENTH JUDICIAL CIRCUIT
Dennis Cumbee, #370848	)	
Applicant,	)	Case No.: 2017-CP-22-1051
v.	)	Certificate of Service
State of South Carolina	)	
Respondent,	)	

1. Undersigned is counsel of record for the Respondent in the above-captioned action.

2. Pursuant to the South Carolina Supreme Court's Order "RE: Operation of the Trial Courts During the Coronavirus Emergency" (Appellate Case No. 2020-000447), dated April 3, 2020), "a lawyer admitted to practice law in this state may serve a document on another lawyer admitted to practice law in this state using the lawyer's primary email address listed in the Attorney Information System (AIS)."

3. Undersigned has served a copy of the **Order Denying Applicant's Motion for Reconsideration** in the above-captioned matter on opposing counsel by emailing a copy to the email address as listed in the AIS:

Tricia A. Blanchette, Esquire
blanchettelaw@gmail.com

DATED this 9th Day of June, 2020.

/s Chelsey F. Marto
Chelsey F. Marto
Assistant Attorney General
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737
ChelseyMarto@scag.gov