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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Pickens County

Honorable Letitia H. Verdin, Circuit Court Judge

TONY FULMER,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2019-002067

APPENDIX

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Appellate Defender

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ATTORNEYS FOR RESPONDENT

INDEX

STATE OF SOUTH CAROLINA	
	COURT OF GENERAL SESSIONS
COUNTY OF PICKENS	2017-GS-39-1620; 1621
	ORIGINAL
STATE OF SOUTH CAROLINA PLAINTIFF	
vs.	TRANSCRIPT OF RECORD
TONY CALHOUN FULMER DEFENDANT	

February 21, 2018
Greenville, South Carolina

B E F O R E:

THE HONORABLE ROBIN B. STILWELL, Judge.

A P P E A R A N C E S:

BRANDI HINTON, ESQ.
Attorney for the State

DANIEL KING, ESQ.
Attorney for the Defendant

APRIL HERRON
Official Court Reporter

INDEX OF WITNESSES

TONY FULMER

There were no exhibits.

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THE CLERK: This is docket number 2017-GS-39-1620, The State vs. Tony Calhoun Fulmer, indictment for sexual exploitation of a minor, second degree. Docket number 2017-GS-39-1621, indictment for criminal sexual conduct with a minor, second degree.

MS. HINTON: Judge, may we approach real quick?

THE COURT: Yes, ma'am.

(WHEREUPON, an off-the-record bench conference was held.)

MS. HINTON: Thank you, sorry.

THE CLERK: If you would, raise your right hand.

TONY FULMER, after being duly sworn, testified as follows:

THE CLERK: Thank you.

EXAMINATION

BY THE COURT:

Q All right, are you Tony Calhoun Fulmer?

A I am.

Q How old are you, Mr. Fulmer?

A Sixty-seven years old.

Q How far did you go in school?

A I graduated high school.

Q Are you under the influence of any alcohol, drugs or medication of any type this morning?

A You'll have to forgive me.

Q All right. Are you under the influence of any alcohol, drugs or medication this morning?

A No, I'm not.

Q Do you have any health or mental issues which would keep you from understanding what's going on here today?

A No, I'm good.

Q All right. I know that you have been sick but you can still understand what's going on and talk with your attorney?

A I do.

Q All right.

A And I am.

Q Okay. Now, you're represented by Mr. King. Have you had sufficient time to talk to Mr. King about your charges?

A Yes.

Q Okay. Has he answered all the questions that you have?

A Yes.

Q Has he done all the investigation which you felt was appropriate?

A Oh, yes.

Q All right. Now, are you completely satisfied

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with his representation of you?

A Oh, yes.

Q Do you have any complaints against Mr. King or anybody in his office?

A Repeat again.

Q Do you have any complaints against Mr. King or anybody in his office?

A None.

Q All right.

A None whatsoever.

Q All right. Now, you have a charge of sexual exploitation with a minor which carries a minimum of two years, a maximum of ten years. And you have a criminal sexual conduct, second degree with a minor which carries up to 20 years. Do you understand both of those charges?

A I do.

Q How do you wish to plead?

A Sir?

Q And how do you wish to plead, guilty or not guilty?

A Guilty.

Q To both charges?

A I do.

Q All right. Now, do you realize that I can give you the maximum sentence on both of these charges?

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A I do realize that but I hope you will have some mercy.

Q You realize that that's my understanding that these cases are without recommendation -- based on the sentencing sheet they're without negotiation or recommendation; is that correct?

MS. HINTON: That's correct, Your Honor.

THE COURT: All right.

BY THE COURT:

Q Has anybody promised you anything to plead guilty?

A No.

Q Has anybody threatened you to plead guilty?

A No.

Q All right. Are you pleading guilty freely and voluntarily?

A Yes.

Q All right. Now, you understand that these matters have been sent to the Grand Jury. You understand that you have a right to a jury trial. In fact, we have already selected -- as you know, we have already selected a jury. And we can start your trial this morning. Do you understand you have that right?

A I do.

Q And you're innocent until proven guilty?

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A I understand.

Q And that The State has the burden to prove you guilty beyond a reasonable doubt on each of those charges; do you understand that?

A Yes.

Q You also have a right to confront all of the witnesses that The State has against you. You have the right to examine all of the evidence they have against you. And finally, you have a right to remain silent. And what that means if you go to trial, then nobody can make you testify. And that cannot be used against you in any way. That the jury will be instructed they that could not consider the fact that you exercised your Constitutional right not to testify against you. Do you understand that right?

A I do.

Q Do you understand all of these Constitutional rights?

A I believe I do.

Q All right. And you realize that you're giving up these rights up by pleading guilty?

A Repeat again.

Q I said, you realize you're waiving these rights by pleading guilty?

A I do.

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Q Do you need any additional time to talk to Mr. King before we finalize this?

A No.

Q All right. Now, you also have a right to appeal your plea and the sentence but you have to do so in writing within ten days from today; do you understand that?

A Ten days?

Q Yes. Do you understand that?

A Yes.

Q Okay.

Now, Mr. King, have you had sufficient time to talk with your client about his charges and any defenses or issues that he may have?

MR. KING: I have, Your Honor.

THE COURT: You discussed with him his rights and do you believe he understands those rights and is giving those rights up freely and voluntarily?

MR. KING: I have and I do, Your Honor.

THE COURT: All right.

All right, I'm going to ask the solicitor to give me the facts, a brief summary of the facts. You listen because I'm going to ask if you agree with those facts, okay?

MR. FULMER: Okay.

THE COURT: All right, I'm going to -- she's going to tell me what the fact of this case are, then I'm going to ask you if you agree with those facts, okay?

MR. FULMER: Okay.

THE COURT: All right.

MS. HINTON: All right, thank you, Your Honor. This began in April of 2016. The victim is VICTIM [redacted], she was 14 years old at the time this started. She is the step granddaughter of the Defendant, who was 66 years old at the time.

Your Honor, this almost immediately began as a sexual relationship which she will testify was both orally, vaginal, and anal. There are videos, there are photographs which I know Your Honor has seen. She became pregnant by the Defendant. She birthed his child. We do have DNA evidence that it is one in 13 trillion chances that it was someone other than the Mr. Fulmer's baby. That baby has since been given up for adoption. This case has affected [redacted] VICTIM very much.

Mr. Fulmer has been in jail for 311 days. The State's concern, Your Honor, is that he has shown no remorse during this whole process. And in his interview with law enforcement, he indicated that

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this was the summer of love. That he was not a pedophile. That he was an old man who fell in love with a very young girl. So it's, The State's concern that if he does not get significant active time, that he will be out here doing the same thing. At the appropriate time, Your Honor, the victim's mother would like to address The Court.

THE COURT: All right.

BY THE COURT:

Q All right, Mr. Fulmer, did you hear the facts as the solicitor told me?

A Yes.

Q Is that true?

A Yes.

Q You agree with those facts and still wish to plead guilty?

A Yes.

Q All right. Now, you realize that these charges are violent, they're both designated as violent and most serious. All right. And you realize by -- you discussed with your attorney then what that means?

A Yes.

Q That it means you'll have to serve at least 85 percent of any active sentence. It will effect your parole eligibility and if you're convicted of three or

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more -- or two or more most serious in the future or three serious charges, then you could be sentenced to life without parole. Do you understand that?

A I do.

Q And based on all that you still wish to plead guilty?

A I do.

THE COURT: All right, I will accept your plea. I find that it's been knowingly, intelligently and voluntarily made with the advice of competent, legal counsel with whom you've indicated you're satisfied with his representation. And that there's a substantial, factual basis for the plea.

SENTENCING

All right, let me hear his prior record and then I'll hear from the victim, then I'll hear from y'all.

MS. HINTON: Your Honor, his only prior record is from the 80's. He has a stolen motor vehicle charge then he has a handgun charge.

Your Honor, previously we had offered 12 years to resolve this case. Which we felt given the overwhelming evidence and the impact that this has had on the victim, that that was an appropriate sentence. So, at this juncture, having met with her multiple times and having go through that experience

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again, we would ask for more than that in sentencing.

THE COURT: All right, I'll be glad to hear from somebody on behalf of the victim.

MS. HINTON: State your name.

MS. FULMER: My name is Lisa Fulmer, VICTIM is my daughter. My child has been through so much in the last year and a half. She's made decisions that most grown people wouldn't have to make. She had a child and made the decision to give this child up. Because of her love because she knew that that was what was right for him. She had trust with this man and loved him. Like a grand daughter should love a grandfather. Whether he be her step-grandfather or not, my husband adopted her and that is his child. I loved him. And he has totally destroyed his family that he had. He crushed his son. We thought we loved him and was concerned for him. He has no, at all, any feelings for anybody else other than his own. And I hope he sits the rest of his life knowing that he lost and ruined the only people in his life at the time that loved him. And I hope he remembers and I hope he knows what he did to her.

THE COURT: Thank you and I'm sorry for you having to be here and all that you've been through.

Mr. King.

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MR. KING: May it please the Court, Your Honor. My name is Daniel King and I represent Tony Fulmer today, Judge. First, let me point out The State just said that their offer was 12 years and they're now asking you to go above 12 years now because we're here ready to go to trial. I think that is a impermissible request from The State to punish him for asserting his Constitutional right to a jury trial. I ask you to take that into consideration when you sentence Mr. Fulmer.

Now, Mr. Fulmer is 68 years old. He's been in jail since last April. As of today his health is not doing well. I don't know if it's from being in jail that long or just the flew. He's having significant problems. Not that I think there's competency issues but I just want to make you aware of his current situation, Judge. Mr. Fulmer owned a machine shop until he retired a few years ago. I believe he was a C&C operator. Had a reasonable income and was able to retire. Was living off his social security.

The allegation in this case are that, Judge -- and he has admitted to them. And there's not much I can say unfortunately. I have spoken with him about what happened several times. I've watched the interview in this case with the alleged victim or, I

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guess, she is is the victim now, Ms. VICTIM. And our position is she was 15 and the law says she cannot consent. He never forced her to do anything. That was our position. And that wasn't right at all. I told him earlier on I think any jury's going to look at this if he was a horny old man that got lucky. Unfortunately, that's kind of where we are today.

Now, as for the pictures and the video, computer forensics evidence, I like you to hear me out on that.

THE COURT: All right.

MR. KING: The way The State extracted that evidence was they didn't do it properly. I was bringing an expert here today to testify to that fact. And while I understand why he's pleading guilty, I think he's doing it freely and voluntarily, I feel like we did have a good shot at trial on that charge. That doesn't -- that's not really mitigating what he's done but I want you to be aware of the full implications of what the trial was going to be.

Judge, these cases are never good at all for anybody. This was going to be probably the most uncomfortable day for everybody in this room in recent memory if we went to trial today. That said,

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I don't think Mr. Fulmer was doing -- what he did was out of some sort of ill intent or malice. I think whether he lucked into it, lucks not really a good word, but ended up in a situation where he was able to take advantage. But it wasn't -- he wasn't trying to hurt somebody. I don't believe he had any ill will in this. We'd ask you to grant him some mercy. I told him several times, I think eight years is sufficient given his age. He's 68. He's doing health well. Even if he were to get out after eight years, he would basically have nothing. And he would be a sex offender on top of that. We'd just ask you to consider all of that. And grant him some measure of mercy. Thank you, Judge.

THE COURT: All right, anything further from anybody?

MS. HINTON: No, Your Honor.

THE COURT: Mr. Fulmer, I'm going tell you the only reason I'm giving you any mercy is because by your pleading guilty you're keeping this victim, all these people in this courtroom and all these people on that jury from hearing what sick things you did. And that's the only reason I'm giving you any mercy whatsoever.

So, on the criminal sexual conduct case, the

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sentence of the court is 15 years. Credit for 311 days served. On the sexual exploitation, seven years and that's to run consecutive.

So, good luck to you, Mr. Fulmer.

MS. HINTON: Thank you, Your Honor.

(WHEREUPON, the proceedings were concluded.)

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CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA)

COUNTY OF GREENVILLE)

I, APRIL P. HERRON, Official Court Reporter for the Thirteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of General Sessions for Pickens County, South Carolina, on the 21 day of February, 2018.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

June 10, 2019

April P. Herron

APRIL P. HERRON, Court Reporter

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FORM 5

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

Tony Calhoun Fulmer 2018 DEC -5 P 3:35)
Full name and prison number (if any) of Applicant)

CLERK OF COURT

2018-CP-39- 1297

v.) APPLICATION FOR

State of South Carolina) POST-CONVICTION RELIEF

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Perry Correctional Institution
2. Name and location of Court which imposed sentence General Sessions
3. Name(s) of co-defendant(s) (if any) ___
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
   (a) 2017GS3901620 (Sexual Exploitation of a Minor)
   (b) 2017GS3901621 (Criminal Sex Cond. 2nd/with Minor)
   (c) ___
5. The date upon which sentence was imposed and the terms of the sentence:
   (a) 2-21-2018
   (b) ___

Revised 3/2003

(c) ____

6. Check whether a finding of guilty was made:

(a) after a plea of guilty ✓

(b) after a plea of not guilty ____

(c) after a plea of nolo contendere ____

7 Did you appeal from the judgment of conviction or the imposition of sentence?
No

8 If you answered "yes" to (7), list:

(a) the name of each Court to which you appealed:

i. N/A

ii. ____

iii. ____

(b) the result in each such Court to which you appealed:

i. N/A

ii. ____

iii. ____

(c) the date of each such result:

i. N/A

ii. ____

iii. ____

(d) if known, citations of any written opinion or orders entered pursuant to such results:

i. N/A

ii. ____

iii. ____

9. If you answered "no" to (7), state your reasons for not so appealing:

(a) N/A

(b) ____

(c) ____

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(a) (See Attachments)

(b) ____

(c) ____

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

(a) (See Attachments)

(b) ____

(c) ____

12. Prior to this application have you filed with respect to this conviction:

(a) any petition in a State Court under South Carolina Law? N/A

(b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? N/A

(c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? N/A

(d) any other petitions, motions or applications in this or any other Court? N/A

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

(a) the specific nature thereof:

i. N/A

ii. ____

iii. ____

iv. ____

(b) the name and location of the Court in which each was filed:

i. N/A

ii. ____

iii. ____

iv. ____

(c) the disposition thereof:

i. N/A

ii. ____

iii. ____

iv. ____

(d) the date of each such disposition

i. N/A

ii. ____

iii. ____

iv. ____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. N/A

ii. ____

iii. ____

iv. ____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

N/A

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented

i. N/A

ii. ____

iii. ____

(b) the proceedings in which each ground was raised:

i N/A

ii. ____

iii. ____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) See Attachments

(b) ____

(c) ____

17. Were you represented by an attorney at any time during the course of:

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(a) your arraignment and plea? ✓

(b) your trial, if any? ____

(c) your sentencing? ✓

(d) your appeal, if any, from the judgment of conviction or the imposition of sentence? ____

(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? ____

18. If you answered "yes" to one or more parts of (17), list:

(a) the name and address of each attorney who represented you:

i. Daniel King (Public Defender)

ii. ____

iii. ____

(b) the proceedings at which each such attorney represented you:

i. plea

ii. ____

iii. ____

19. State clearly the relief you seek in filing this application:

Vacate and Remand

20. Are you now under sentence from any other court that you have not challenged?

N/A

STATE OF SOUTH CAROLINA)
) VERIFICATION
County of)

I, , being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

SWORN to and subscribed before me this 28 day of November, 2018

Tamara Conwell (L.S.)
Notary Public
My Commission Expires
September 25, 2023

My Commission Expires:

APPLICATION TO PROCEED WITHOUT PAYMENT OF COSTS AND AFFIDAVIT IN SUPPORT THEREOF

I, , hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

(1) I am the applicant in this action and I believe I am entitled to redress.

(2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

Applicant

SWORN or affirmed to and subscribed before me this 29 day of November, 2018.

Tamara Conwell
Notary Public

My Commission Expires: September 25, 2023

10(A) Ineffective assistance of counsel for failure to discharge his duty of due diligence to investigate the facts, evidence, and witness(es), in the case.
(B) Ineffective assistance of counsel for an involuntary plea.
(C) Ineffective assistance of counsel for failure to provide a proper defense for pysical evidence.
(D) Ineffective assistance of counsel for failure to have a valid strategy.

11(A)(1) Counsel failed to properly and fully investigate the case.
(2) Counsel was ineffective for providing erroneous and incorrect advice to plead guilty instead of challenging the State's evidence through the protections of trial. Therefore, Applicants plea was unknowing and involuntary entered into, pursuant to incomprehension of the indictment and the guilty plea. The Petitioner has never seen the indictment, or reviewed it with counsel. Futhermore, Petitioner did

not understand that a guilty plea must be entered voluntarily and intelligently. The Defendant must be advised of his privilege agaist self-incrimination, the right by trial by jury, and the right to confront one's accusers. A valid waiver of these rights cannot be presumed from a silent record. See Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709 (1969). The court in Boykin also noted that "Ignorance, incomprehension, inducements, coercion, terror, subtle or blatant threats might be the perfect cover up of unconstitutionality" 395 U.S. at 242-243, 89 S.Ct. at 1712". Petitioner's counsel used coercion and scare tactics to obtain a guilty plea.

(3) Counsel failed to adequately investigate the alleged crime scene or the allegations so as to be prepared to present testimony through direct and cross examination of relevant evidence related to the matter.

(4) Counsel failed to interview or call as a witness a number of people who would have relevant information in

the matter.

(5) Counsel failed to spend adequate time with Petitioner reviewing discovery with him.

(6) Counsel failed to request a preliminary hearing so Petitioner could more adequately be informed about case.

(7) Counsel failed to file a direct appeal.

(8) Counsel failed to provide Petitioner with a copy of discovery in the case so Petitioner could review the evidence, and prepare for trial.

11. (A)(B)(C): Ineffective assistance of counsel: This is the only venue I am aware of for this type of claims.

STATE OF SOUTH CAROLINA COUNTY OF PICKENS	)	IN THE COURT OF COMMON PLEAS IN THE THIRTEENTH JUDICIAL CIRCUIT
Tony Fulmer, SCDC #375466, Applicant, v. State of South Carolina, Respondent.	)	Case No. 2018-CP-39-1297 **RETURN, PARTIAL MOTION TO DISMISS, AND MOTION FOR A MORE DEFINITE STATEMENT** **(Counsel Appointed)**

In response to the post-conviction relief action commenced on December 5, 2018, by Tony Fulmer ("Applicant"), the State makes this return:

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Pickens County Clerk of Court. Applicant was arrested on April 21, 2017, following an investigation into allegations of sexual abuse involving his step granddaughter. On January 22, 2018, the Pickens County Grand Jury indicted Applicant for one count of second-degree criminal sexual conduct with a minor (2017-GS-39-1621) and one count of second-degree sexual exploitation of a minor (2017-GS-39-1620). Daniel King, Esq. represented Applicant and Assistant Solicitor Brandi Hinton of the Thirteenth Circuit Solicitor's Office prosecuted the case.

On February 21, 2018, Applicant appeared before the Honorable Robin B. Stilwell and pled guilty as indicted to each of the above-referenced offenses without formal negotiations or recommendations. At the outset of the plea hearing, Judge Stilwell questioned Applicant regarding his understanding of the possible sentences he could receive for each offense, and advised him the

State was offering no recommendation as to a sentence. (GP Tr. 5-6). Applicant told the Court that he understood and wished to proceed forward. (GP Tr. 6). Judge Stilwell then explained to Applicant the constitutional rights he would be forfeiting by pleading guilty—including the right to remain silent, to challenge the State's evidence, and to present a defense. (GP Tr. 6-7). Applicant informed the Court that he was knowingly, voluntarily, and freely waiving his constitutional rights by pleading guilty. (GP Tr. 6-7). He told the court he had not been threatened, coerced, or promised anything to induce his guilty plea. (GP Tr. 6). After a factual recitation from Ms. Hinton, Applicant admitted he was guilty and had committed the conduct giving rise to the offenses as outlined by the State. (GP Tr. 10). He also indicated he was completely satisfied with the services provided to him by Mr. King. (GP Tr. 4-5).

After hearing statements from counsel, the victim's mother, and the State, Judge Stilwell sentenced Applicant to consecutive terms of fifteen years imprisonment for second-degree criminal sexual conduct with a minor and seven years imprisonment for second-degree sexual exploitation of a minor. (GP Tr. 15-16). Applicant did not pursue a direct appeal of his conviction or sentence.

II. FACTUAL HISTORY

The abuse began in April of 2016, when the Victim was fourteen years old. (GP Tr. 9). She is the step granddaughter of [Applicant], who was sixty-five years old at the time. (GP Tr. 9). Their relationship almost immediately began as a sexual one which, according to Victim, was oral, vaginal, and anal. (GP Tr. 9). Applicant took videos of Victim performing sexual acts upon his body and photographed Victim naked in the bathtub. (GP Tr. 9). As a result of the sexual intercourse, Victim birthed Applicant's child. (GP Tr. 9). The baby has since been given up for adoption. (GP Tr. 9).

Upon inquiry by the Court, Applicant confirmed the above articulated facts. (GP Tr. 9)

III. CURRENT APPLICATION

In his application for post-conviction relief, Applicant alleges he is being held in custody unlawfully due to ineffective assistance of counsel. Specifically, Applicant alleges ineffective assistance of plea counsel based on:

1. "... failure to discharge his duty of due diligence to investigate, the facts, evidence, and witness(es) in the case."
    a. "Counsel failed to properly and fully investigate the case."
    b. "Counsel was ineffective for providing erroneous and incorrect advice to plead guilty instead of challenging the State's evidence through the protections of trial. Therefore, Petitioner's plea was unknowing and involuntary entered into, due to incomprehension of the indictment, and the guilty plea. Petitioner has never seen the indictment, or reviewed it with counsel."
    c. "Furthermore, Petitioner did not understand that a guilty plea must be entered voluntarily and intelligently. The Defendant must be advised of his privilege against self-incrimination, the right [to] trial by jury, and the right to confront one's accusers. A valid waiver of these rights cannot be presumed from a silent record."
    d. Petitioner's counsel used coercion and scare tactics to obtain a guilty plea."
    e. "Counsel failed to adequately investigate the alleged crime scene or the allegation so as to be prepared to present testimony through direct and cross-examination of relevant evidence related to the matter."
    f. "Counsel failed to interview or call as a witness a number of people who would have relevant information in the matter."
    g. "Counsel failed to spend adequate time with Petitioner reviewing discovery with him."
    h. "Counsel failed to request a preliminary hearing so Petitioner could more adequately be informed about case."
    i. "Counsel failed to file a direct appeal."
    j. "Counsel failed to provide Petitioner with a copy of discovery in the case so Petitioner could review evidence, and prepare for trial."
2. ". . . an involuntary plea"
3. ". . . failure to provide a proper defense for physical evidence."
4. ". . . failure to have a valid strategy."

Applicant requests relief as follows:

"Vacate and remand"

Attached herewith and incorporated by reference are the records of the Pickens County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the plea transcript, and the current application for relief. The State reserves the right to amend this Return upon receipt of any relevant materials.

IV. RESPONSE TO ALLEGATION OF INEFFECTIVE ASSISTANCE OF COUNSEL

A. Ineffective Assistance of Plea Counsel, Generally

The State submits Applicant's claims of ineffective assistance of counsel are without merit. The Sixth Amendment to the United States Constitution guarantees the Applicant, like all other defendants, the right to effective assistance of counsel. U.S. Const. amend. VI; *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *Lomax v. State*, 379 S.C. 93, 100, 665 S.E.2d 164, 167 (2008). The allegation of denial of such representation sets forth a prima facie violation of this constitutional right, and raises a question of fact that can only be determined by an evidentiary hearing. *Rogers v. State*, 261 S.C. 288, 291, 199 S.E.2d 761, 762 (1973). In order to determine whether a guilty plea was taken in accordance with constitutional standards, the PCR judge must analyze and consider the entire record, including the transcript of the guilty plea and the evidence presented at the PCR hearing. *Harres v. Leeke*, 282 S.C. 131, 134, 318 S.E.2d 360, 361 (1984)

In a post-conviction relief action, an applicant bears the burden of proving the allegations by a preponderance of the evidence—a mere allegation of ineffective assistance is not sufficient to warrant granting relief. Rule 71.1(e), SCRCP; *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985); *State v. Pendergrass*, 270 S.C. 1, 4, 239 S.E.2d 750, 751 (1977). The 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*, 466 U.S. at

686, 104 S. Ct. at 2064; *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. The reviewing court must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. *Strickland,* 466 U.S. at 690, 104 S. Ct. at 2066.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-part test outlined in *Strickland* to determine whether counsel's "assistance was so ineffective as to require reversal" of the applicant's sentence. *Strickland,* 466 U.S. at 687, 104 S. Ct. at 2064. First, the applicant must show that counsel's performance was deficient; and second, that the deficient performance prejudiced the applicant. *Id.; Butler,* 286 S.C. at 442, 334 S.E.2d at 814.

In order to prove deficient performance under the first prong of *Strickland*, the applicant must show that counsel's representation fell below an objective standard of "reasonableness under prevailing professional norms." *Cherry v. State*, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989) (citing *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). 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.

The second prong of *Strickland* requires the applicant to show that counsel's deficient performance prejudiced the 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. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland,* 466 U.S. at 694, 104 S. Ct. at 2068.

In adjudicating a claim of actual ineffectiveness of counsel, "the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." *Id.* at

696, 104 S. Ct. at 2069. The reviewing court must presume that counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Butler*, 286 S.C. at 442, 334 S.E.2d at 814; *See also Strickland*, 466 U.S. at 690, 104 S. Ct. at 2066 (noting that a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct). The applicant must overcome this presumption to receive relief. *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625.

The standards, however, do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. Additionally, "there is no reason a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one." *Strickland*, 466 U.S. at 697, 104 S. Ct. at 2069. In particular, the court "need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. *Id.* If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, the court may evaluate the prejudice prong only. *Id.*

Hill v. Lockhart, 474 U.S. 52, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985), extended the two-part *Strickland* test "to challenges to guilty pleas based on ineffective assistance of counsel." *Id.* at 58, 106 S. Ct. at 370; *See also Stalk v. State*, 383 S.C. 559, 561–62, 681 S.E.2d 592, 594 (2009). The analysis of counsel's performance under the first prong of *Strickland* remains unchanged—the applicant must show that counsel's representation fell below an objective standard of reasonableness demanded of attorneys in criminal cases. *Hill*, 474 U.S. at 58–59, 106 S. Ct. at 370; *See also Thompson v. State*, 340 S.C. 112, 115, 531 S.E.2d 294, 296 (2000).

The second, or "prejudice," however, "focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process." *Hill*, 474 U.S. at 58–59, 106 S. Ct. at 370. In other words, the applicant "must show that there is a reasonable probability that, but for [plea] counsel's [alleged] errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.* at 59, 106 S. Ct. at 370. The question here is whether the applicant, if correctly informed of circumstances surrounding the plea would have pled guilty—*not* whether counsel would have still advised him or her to plead guilty. *Turner v. State*, 335 S.C. 382, 385, 517 S.E.2d 442, 444 (1999) (emphasis added). This "prejudice" showing required from "defendants who seek to challenge the validity of their guilty pleas on the ground of ineffective assistance of counsel will serve the fundamental interest in the finality of guilty pleas." *Hill*, 474 U.S. at 58, 106 S. Ct. at 370.

Because "[a] guilty plea is a solemn, judicial admission of the truth of the charges against an individual," an Applicant's right to contest the validity of such a plea is usually, but not invariably, foreclosed. *Dalton v. State*, 376 S.C. 130, 137–38, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing *Blackledge v. Allison,* 431 U.S. 63, 97 S. Ct. 1621, 52 L.Ed.2d 136 (1977)). Therefore, admissions "made during a guilty plea should be considered conclusive unless [an applicant] presents valid reasons why he should be allowed to depart from the truth of his statements." *Dalton*, 376 S.C. at 137-138, 654 S.E.2d at 874.

B. Involuntary Guilty Plea

Applicant claims his plea was not entered into knowingly or voluntarily because he was not advised of his constitutional rights. Applicant further claims that counsel coerced him into pleading guilty. The State submits these allegations not only meritless, but they are refuted by the record.

Because a criminal defendant waives several constitutional rights by pleading guilty, the Due Process Clause requires that guilty pleas are entered into voluntarily, knowingly, and intelligently. *Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969); *Pittman v. State*, 337 S.C. 597, 524 S.E.2d 623 (1999). The standard for determining the validity of a guilty plea is "whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." *North Carolina v. Alford*, 400 U.S. 25, 31, 91 S. Ct. 160, 164, 27 L. Ed. 2d 162 (1970). Where a defendant is represented by counsel during the plea process and enters his plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel's advice "was within the range of competence demanded of attorneys in criminal cases." *Hill*, 474 U.S. at 56, 106 S. Ct. at 369.

Before a court can accept a guilty plea, the defendant must be advised of the constitutional rights he or she is waiving; the right to a jury trial, the right to confront one's accusers, and the privilege against self-incrimination. *Id.* Additionally, in order to knowingly and voluntarily plead guilty, the defendant must have a full understanding of the consequences of the plea, including the nature and crucial elements of the offense(s); the maximum and any mandatory minimum penalty; and the nature of the constitutional rights being waived. *Pittman*, 337 S.C. at 599, 524 S.E.2d at 624.

A defendant's knowing and voluntary waiver of statutory or constitutional rights must be established by a complete record, and "may be accomplished by colloquy between court and defendant, between court and defendant's counsel, or both." *State v. Ray,* 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993); *See also Wolfe v. State,* 326 S.C. 158, 485 S.E.2d 367 (1997) (guilty plea not involuntary where the colloquy demonstrated the trial judge asked defendant twice whether he understood there were no promises and that no sentencing recommendations were binding on the

judge). To ensure the defendant understands the consequences of his guilty plea, the trial judge "usually questions the defendant about the facts surrounding the crime and punishment that could be imposed." *Dover v. State*, 304 S.C. 433, 434–35, 405 S.E.2d 391, 392 (1991). However, the trial judge "does not have to direct the defendant's attention to every consequence of his plea provided the record reveals affirmative awareness of the consequences of a guilty plea." *Carter v. State*, 329 S.C. 355, 362, 495 S.E.2d 773, 776 (1998).

The voluntariness of a guilty plea, however, "is not determined by an examination of the specific inquiry made by the sentencing judge alone, but is determined from both the record made at the time of the entry of the guilty plea and the record of the post-conviction hearing." *Harres*, 282 S.C. at 133, 318 S.E.2d at 361. In considering an allegation on PCR that a guilty plea was based on inaccurate advice of counsel, the transcript of the guilty plea hearing will be considered to determine whether any possible error by counsel was cured by the information conveyed at the plea hearing. *Wolfe,* 326 S.C. at 165, 485 S.E.2d at 370.

An applicant who enters a plea on the advice of counsel may "only attack voluntary, knowing and intelligent character of the plea by showing that plea counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the [applicant] would not have pled guilty, but would have insisted on going to trial." *Roscoe*, 345 S.C. at 20, 546 S.E.2d at 419. Given Applicant's burden of proof and the analysis to be applied to this claim, Applicant's claim of involuntary plea is, in essence, a claim of ineffective assistance of counsel (which Applicant appears to recognize), and it will be treated as such.

1. Constitutional Rights to Jury Trial, Remain Silent, Confront Accusers

Applicant claims counsel was ineffective for providing erroneous and incorrect advice to

plead guilty instead of challenging the State's evidence through the protections of trial, and further claims he was unaware of his right to a trial. The plea court instructed him of this right and he refused it. (GP Tr. 6). Applicant claims he was not aware of his right to remain silent. The plea court instructed him of this right and he waived it. (GP Tr. 7). Applicant claims he was not aware of his right to confront his accusers. The plea court instructed him of this right and he waived it. (GP Tr. 7). Contrary to Applicant's contentions, the record is not "silent" on the question of his knowledge of his rights. Thus, Applicant's allegation that his plea was involuntary because he was not aware of his constitutional rights must fail.

2. Coercion by Counsel

Applicant claims Mr. King coerced him into pleading guilty. However, during the plea proceeding, Applicant informed the court that no one had threatened or promised him anything in exchange for his guilty plea. (GP Tr. 6). He further indicated that his decision to plead guilty was made by him freely and voluntarily. (GP Tr. 6). The State submits this claim is without merit and must fail.

C. Failure to Investigate

"There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). Moreover, when there is evidence counsel met with Applicant in preparation for trial and there is no evidence additional preparation on the part of counsel would have affected the outcome at trial, counsel cannot be said to have been ineffective. *Harris v. State*, 377 S.C. 66, 659 S.E.2d 140 (2008), *abrogated on other grounds by Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018). "[B]revity of time spent in consultation,

without more does not establish that counsel was ineffective." *Easter v. Estelle*, 609 F.2d 756, 759 (5th Cir. 1980).

"Counsel has a duty to undertake reasonable investigations or to make a decision that renders a particular investigation unnecessary." *Bagwell v. State*, 410 S.C. 259, 265, 763 S.E.2d 630, 633–34 (Ct. App. 2014) (citing *Strickland*, 466 U.S. at 691). "A criminal defense attorney has the duty to conduct a reasonable investigation to discover all reasonably available mitigation evidence and all reasonably available evidence tending to rebut any aggravating evidence introduced by the State." *McKnight v. State*, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008). Moreover, counsel's decision not to undertake a particular investigation should be assessed for reasonableness under all the circumstances with heavy deference to counsel's judgment. *Bagwell*, 410 S.C. at 265, 763 S.E.2d at 633 (citing *Simpson v. Moore*, 367 S.C. 587, 597, 627 S.E.2d 701, 706 (2006)). "[A]t a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case." *Ard v. Catoe*, 372 S.C. 318, 331–32, 642 S.E.2d 590, 597 (2007) (internal quotation marks omitted) (emphasis omitted). "Counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions." *Bagwell*, 410 S.C. at 265, 763 S.E.2d at 634. (internal citations omitted). "[A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Strickland*, 466 U.S. at 690.

In order to prevail upon a claim that counsel did not adequately prepare or investigate a case, an applicant must present evidence of what counsel could have discovered or what other defenses applicant could have requested counsel develop and present had counsel been more prepared. *Harris*, 377 S.C. at 75-76, 659 S.E.2d at 145-46 (citing *Jackson v. State*, 329 S.C. 345,

353-54, 495 S.E.2d 768, 772 (1998)). Furthermore, an applicant must also present evidence to show how the discoverable matters or defenses would have resulted in a different outcome. *Harris*, 377 S.C. at 75-76, 659 S.E.2d at 145-46 (citing *Davis v. State*, 326 S.C. 283, 288, 486 S.E.2d 747, 749 (1997); *Skeen v. State,* 325 S.C 210, 214, 481 S.E.2d 129, 132 (1997)). Mere speculation as to how the alleged lack of preparation prejudiced an applicant is not sufficient to support a grant of relief. *Harris,* 377 S.C. at 75, 659 S.E.2d at 145 (citing *Glover v. State*, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995)).

Applicant asserts that plea counsel "failed to properly and fully investigate the case." However, Applicant wholly fails to set forth facts and circumstances on which this allegation is based, including what Mr. King failed to investigate and what evidence any additional investigation would have uncovered. Accordingly, it is impossible for the State to reply with specificity and requests that Applicant, through counsel, provide a more definite statement of the allegation on which Applicant intends to proceed forward.

Regarding the allegation that counsel failed to adequately investigate the crime scene, Applicant has failed to provide any evidence to show what Mr. King would have discovered had he investigated the crime scene further, nor has Applicant provided any evidence to show that he would not have plead guilty and would have insisted on going to trial but for plea counsel's alleged ineffectiveness. Applicant's claim that counsel failed to interview or call witnesses is also without merit—Applicant fails to specifically name these alleged witnesses nor has he provided any evidence that testimony from these witnesses would have resulted in a different outcome.

Such broad claims regarding counsel's alleged failure to investigate are inadequate to sustain any relief, and the State requests specificity in its motion in Section VI, below. The State set forth an extensive factual recitation at the plea proceeding, including substantial evidence to

support its case against Applicant, to which Applicant agreed. (GP Tr. 10). Additionally, Applicant told the Court he was satisfied with Mr. King's investigation. (GP Tr. 4). The State submits Applicant cannot meet his burden in regard to any claim that counsel was ineffective for failure to investigate and denies Applicant is entitled to relief based on these allegations.

D. Failure to Review Discovery with Applicant

Applicant contends counsel failed to spend adequate time reviewing discovery with him. However, as aforementioned, "the brevity of time spent in consultation with a defendant alone is not indicative of inadequate trial preparation." *Smith v. State*, 404 S.C. 493, 500, 745 S.E.2d 378, 382 (Ct. App. 2012) (citing *Harris v. State*, 377 S.C. 66, 75, 659 S.E.2d 140, 145 (2008)). An applicant must present evidence to show how additional time spent in consultation regarding discovery would have resulted in a different outcome; mere speculation as to how the alleged lack of preparation prejudiced an applicant is not sufficient to support a grant of relief. *Smith*, 404 S.C. at 500-01, 745 S.E.2d at 382 (citing Jackson *v. State*, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998); *Skeen v. State*, 325 S.C. 210, 214-15, 481 S.E.2d 129, 132 (1997)).

Applicant does not specifically identify precisely what it is that Mr. King did not disclose to him from materials provided in discovery, or what, if anything, could have been achieved had Mr. King spent more time with him in consultation regarding the contents of his discovery. Such a broad claim is inadequate to sustain any relief, and the State requests specificity in its motion in Section VI, below. The State denies Applicant is entitled to relief based on the allegation as presented.

E. Failure to File a Direct Appeal

Counsel has a constitutionally-imposed duty to consult with a defendant about an appeal when there is reason to think either: (1) that a rational defendant would want to appeal or (2) that

this particular defendant reasonably demonstrated to counsel that he was interested in appealing. *Roe v. Flores-Ortega*, 528 U.S. 470, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000). When counsel has consulted with the defendant regarding the right to appeal, "Counsel performs in a professionally unreasonable manner *only* by failing to follow the defendant's express instructions with respect to an appeal." *Flores-Ortega*, 528 U.S. at 478, 120 S. Ct. at 1035 (emphasis added). In order to establish he was prejudiced by counsel's failure to file an appeal, Applicant must show he would have appealed absent counsel's deficient performance. *See Flores-Ortega*, 528 U.S. at 484, 120 S. Ct. at 1038. "Acts inconsistent with the continued assertion of a right, such as a failure to insist upon the right, may constitute waiver." *Bonnette v. State*, 277 S.C. 17, 18, 282 S.E.2d 597, 598 (1981).

However, 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, 120 S. Ct. 1029, 1036, 145 L. Ed. 2d 985 (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)).

The State is at present without knowledge or information sufficient to form a belief as to the truth of Applicant's claim regarding Mr. King's alleged failure to file a direct appeal. Applicant *did* know about his right to an appeal, as Judge Verdin informed him of that right, and Applicant does not claim ignorance of that right in the application. (GP Tr. 7). Furthermore, Applicant does not present any facts that would show that he inquired of plea counsel about filing an appeal, communicated to counsel his desire to appeal, or instructed counsel to file an appeal. As such, Applicant likely cannot show that counsel was deficient in failing to file an appeal.

F. Conclusion and Action Requested

In the present case, Applicant's allegations about plea counsel's failure to investigate and prepare for trial, as well as all of Applicant's assertions about his plea counsel's alleged ineffective assistance, are undermined by Applicant's positive testimony regarding plea counsel at his plea hearing. Additionally, Applicant's allegations about being coerced into pleading guilty are likewise undermined by his testimony at the hearing. Therefore, Applicant can satisfy neither requirement of the *Hill* test on his claim of ineffective assistance of counsel, and Applicant cannot succeed in attacking the voluntary and intelligent nature of his plea.

However, as discussed above, it is impossible for the State to adequately respond to Applicant's allegations because Applicant has completely failed to provide any specific facts to support such claims. The State requests Applicant, through counsel, provide specific claims and facts to support these vague allegations.

V. RESPONSE TO CLAIM OF DENIAL OF A PRELIMINARY HEARING

Applicant's allegation that he was denied a preliminary hearing, by itself, is not cognizable in an action for post-conviction relief. An application for post-conviction relief does not serve as a substitute for direct appeal, and an issue that could have been raised at applicant's trial or on appeal is not cognizable in an application for PCR. S.C. Code Ann. § 17-27-20(b); *Simmons v. State*, 264 S.C. 417, 215 S.E.2d 883 (1974). Trial court error is not a cognizable claim for PCR. *See generally Roscoe*, 345 S.C. 16, 546 S.E.2d 417; *Wolfe*, 326 S.C. 158, 485 S.E.2d 367; *Ashley v. State*, 260 S.C. 436, 196 S.E.2d 501 (1973). Applicant's allegation he was wrongfully denied a preliminary hearing could have been raised at trial and thereafter on appeal.[1] Accordingly, the State moves to dismiss this allegation pursuant to Rule 12(b)(6), SCRCP, as it is not a cognizable claim under the Uniform Post-Conviction Procedure Act.

VI. MOTION FOR A MORE DEFINITE STATEMENT

Applicant has failed to set forth any facts to "support each ground" or to explain with any specificity the facts and circumstances upon which his claims are based. The Uniform Post-Conviction Procedure Act requires the Applicant to "*specifically set forth the grounds upon which the application is based.*" S.C. Code Ann. § 17-27-50 (1985) (emphasis added). In an application for post-conviction relief, it is incumbent upon Applicant to make at least a *prima facie* showing entitling him to relief before an evidentiary hearing will be scheduled and held. *Welch v. MacDougall*, 246 S.C. 258, 260, 143 S.E.2d 455, 456 (1965). Furthermore, Rule 8(a), SCRCP, requires all civil pleadings include "a short and plain statement of the facts showing that the pleader

1 And in any event, though an accused may request a preliminary hearing, no such hearing may be held if the defendant is indicted by a grand jury before a preliminary hearing is held. Rule 2(b), SCRCrimP; *see also State v. Ballington*, 346 S.C. 262, 551 S.E.2d 280 (Ct. App. 2001) (*overruled on other grounds by State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009)). There is no indication in the record Applicant ever requested a hearing.

is entitled to relief." Thus, the State moves to require Applicant to provide a more definite statement of his allegations of ineffective assistance of counsel pursuant to Rule 12(e), SCRCP.

VII. ANY FUTURE AMENDMENTS

The State respectfully submits that it is incumbent upon Applicant to amend his application to set forth specific facts upon which his allegations are based so that the State may adequately prepare for an evidentiary hearing. Because Applicant has been appointed an attorney, the attorney, and not Applicant, is the only individual authorized to file amendments to this application. *See* Rule 11, SCRCP. *Pro se* filings will not be considered at the PCR hearing.

If Applicant fails to file a timely and responsive amended application setting forth specific allegations for relief, the State reserves the right to move to dismiss this allegation or claim pursuant to S.C. Code Ann. §§ 17-27-10 to -160 and Rule 71.1 of the South Carolina Rules of Civil Procedure. *See also* Rules 15(a)-(b), SCRCP. The State reserves the right to request that any amendments withheld until the last minute be stricken because of undue prejudice to the State. *See* Rule 15(a), SCRCP.

VIII. GENERAL DENIAL

Each and every allegation contained within the application not expressly admitted, qualified, or explained in this Return is hereby denied.

[*Conclusion and signature on following page*]

IX. CONCLUSION

WHEREFORE, having made its return, the State respectfully requests that this Court grant its partial motion to dismiss as set forth in Section V above and grant its motion for a more definite statement as set forth in Section VI above. The State requests Applicant, through his counsel, amend the application to provide the required specificity for his allegation of ineffective assistance of counsel. Until Applicant files an amended application, Applicant has not shown sufficient cause to warrant an evidentiary hearing on this application and respectfully requests this Court to only schedule a hearing after an amended application is so filed.

Respectfully submitted,

ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

LILLIAN L. MEADOWS
Assistant Attorney General

By: Lilly Meadows
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P.O. Box 11549
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July 22, 2019

STATE OF SOUTH CAROLINA COUNTY OF PICKENS TONY C. FULMER, #375466 Applicant, vs STATE OF SOUTH CAROLINA, Respondent.	IN THE COURT OF COMMON PLEAS 2018-CP-39-1297 AFFIDAVIT OF SERVICE BY MAIL

1. I am an employee of the Respondent in the above-captioned action.

2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.

3. I have this day served a copy of the **Return, Partial Motion to Dismiss, and Motion for a More Definite Statement** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Don A. Thompson, Esquire
107 Smithwood Court
Simpsonville, SC 29681

DATED this 22nd day of July, 2019.

Camille Henry

Camille Henry, Legal Assistant
For Respondent

STATE OF SOUTH CAROLINA) COUNTY OF PICKENS	)	IN THE COURT OF COMMON PLEAS
Tony Calhoun Fulmer, 375466 Applicant, v. State of South Carolina, Respondent	)	AMENDED/SUPPLEMENTAL APPLICATION FOR POST-CONVICTION RELIEF 2018-CP-39-1297

After discussions with the applicant, the applicant, by and through his attorney, Don A. Thompson, would amend/supplement his application for post-conviction relief filed on December 5, 2018, by adding the following specific allegations to his original allegation of ineffective assistance of counsel:

1. Counsel did not fully review and explain discovery with applicant.
2. Counsel was indecisive in his approach to a defense strategy. Counsel would meet with applicant and be excited, and advise applicant as to how they would proceed in defending applicant, only to come back to applicant on a later date to say they could not defend the case in that manner. This occurred on several occasions.
3. Counsel misinformed applicant as to a plea offer by the State. The State offered applicant a plea deal of twelve (12) years, which applicant was willing to take, but counsel advised applicant not to take the deal because it was the State's first offer and that the State would come back later with another

(better) offer. Based on the advice of counsel, applicant rejected the twelve (12) year plea offer. As it turned out, no other offer was forthcoming from the State.

4. Counsel never fully explained the guilty plea to applicant so that applicant was making an informed decision. Counsel advised applicant that the State wanted him to do ten (10) years in prison and at the time of his guilty plea applicant believed that the sentence he would receive would be such that he would only have to do approximately ten (10) years in prison. The sentence applicant received was fifteen (15) years on the criminal sexual conduct charge and seven (7) years consecutive on the sexual exploitation charge. Given that the sentence applicant received was not the sentence applicant was led to believe he would receive, applicant would allege that he was not fully informed and did not enter the guilty plea freely, voluntarily and intelligently.
5. Counsel failed to fully investigate this matter. He never interviewed the victim in this matter. Applicant is informed and believes that had counsel interviewed the victim he would have learned that the sex between the applicant and the victim was consensual. Applicant believes that had counsel informed the Court of this, it would have had an impact on his sentence.
6. Counsel never advised applicant of his right to appeal or discussed with applicant his right to appeal in this matter. Applicant did not learn of his right to appeal until after the time to file the appeal had passed. Given the outcome of the guilty plea, had applicant been explained his right to appeal,

he would have instructed counsel to file an appeal for him. Therefore, applicant would allege that he did not freely, voluntarily and intelligently waive his right to appeal.

Don A. Thompson (S.C. Bar # 5545)
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Greenville, S.C. 29607

Greenville, S.C.

August 15, 2019

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF PICKENS

TONY C. FULMER,	)	
	)	
APPLICANT,	)	2018-CP-39-01297
	)	
-VS-	)	TRANSCRIPT OF RECORD
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
RESPONDENT.	)	
	)	

AUGUST 27, 2019
GREENVILLE, SOUTH CAROLINA

B E F O R E:

THE HONORABLE LETITIA H. VERDIN

A P P E A R A N C E S:

ATTORNEY FOR APPLICANT:

DON A. THOMPSON, ESQ.

ATTORNEY FOR RESPONDENT:

LILLIAN L. MEADOWS
ASSISTANT ATTORNEY GENERAL

SUSAN W. HUDGINS
CIRCUIT COURT REPORTER

INDEX

EXHIBITS

NO	DESCRIPTION	ID	EVIDENCE

(No Exhibits Were Presented During This Hearing)

MS. MEADOWS: May it please the Court?

THE COURT: Yes.

MS. MEADOWS: The first matter is Tony Fulmer versus the State of South Carolina, docket number 2018-CP-29-1297 [sic]. In January of 2018 the Pickens County Grand Jury indicted applicant for one count of criminal sexual conduct with a minor in the second degree under indictment number 2017-GS-39-1621, one count of sexual exploitation of a minor in the second degree under indictment number 2017-GS-39-1620.

On February 21st, 2018 applicant appeared before the Honorable Robin B. Stilwell and pled guilty as indicted without former negotiations or recommendations from the State. Daniel King, esquire, represented applicant. And Assistant Solicitor Brandi Hinton prosecuted the case.

THE COURT: All right.

MS. MEADOWS: Judge Stilwell accepted applicant's plea and sentenced him to consecutive terms of 15 years on the criminal sexual conduct charge and seven years on the sexual exploitation of a minor charge. Applicant did not appeal his plea or sentence.

On December 5th, 2018 applicant filed an application for post conviction relief. And he is present today and represented by Don Thompson, esquire.

THE COURT: All right. Yes, sir.

MR. THOMPSON: Good morning, Judge.

THE COURT: Good morning.

MR. THOMPSON: We're going to move forward with a brief hearing. Mr. Fulmer, I would call to the stand at this time. I had filed an amended supplemental application for post conviction relief. I assume you have it.

THE COURT: Yeah, I believe so. Let me -- yes. Okay. Right here.

MR. THOMPSON: And we're only going forward on the issues that are set forth in that.

THE COURT: All right, then.

MR. THOMPSON: Not any issues from the original application.

THE COURT: All right. Very well. You can call your first witness.

MADAM CLERK: Mr. Fulmer, please place your left hand on the Bible and raise your right hand. Place your left hand on the Bible and raise ---

MR. FULMER: I'm afraid I can't do that.

MADAM CLERK: Can you raise your right hand?

MR. FULMER: I can't swear on the Bible.

THE COURT: Then ---

MR. FULMER: My religious ---

THE COURT: Well, ---

MR. FULMER: --- beliefs won't allow it.

THE COURT: Let me handle this.

MADAM CLERK: Okay.

THE COURT: Thank you. I'm not going to ask you to swear on the Bible. My oath does not require you to do that. Raise your right hand for me. Do you swear or affirm that the testimony you'll give today is the truth, the whole truth and nothing but the truth under penalty of perjury?

MR. FULMER: I do.

THE COURT: All right. Very well. You can have a seat.

MR. THOMPSON: May it please the Court, Your Honor?

THE COURT: Yes, sir.

Direct Examination by Mr. Thompson:

Q. Mr. Fulmer, give us your full name, please, sir.

A. My name is Tony Calhoun Fulmer.

Q. And how old are you?

A. I'm 68.

Q. Okay. And you're sitting there in belly chains and an orange suit. So you're in the Department of Corrections, correct?

A. I am.

Q. Okay. When did you go into the Department of Corrections? Do you recall?

A. Roughly 16 months ago.

Q. All right. And what were you convicted of or ...

A. Criminal sexual misconduct with a minor.

Q. Okay. And was there anything else?

A. Second charge, exploitation of a minor.
Q. Okay. Now did you plead guilty to those charges or did you have a jury trial?
A. I pled guilty.
Q. Okay. Were you represented by an attorney?
A. Yes, I was.
Q. And who was that attorney?
A. Daniel King.
Q. All right. Was he retained or appointed?
A. Appointed.
Q. Okay. Was he a public defender at the time?
A. Repeat again, please.
Q. Did he work in the Public Defender's Office?
A. Yes, he did.
Q. Okay. You're a little bit hard of hearing, right?
A. Yeah, I'm very hard of hearing.
Q. Okay.
A. Excuse me.
Q. I'll try not to scream at you, but I'll try to talk loud enough so you can hear me.
A. All right. Thank you.
Q. Okay. Now, how long after you were arrested was Mr. King appointed to represent you?
A. I'm sorry, I didn't understand.
Q. What was -- you got arrested.

A. Yes.
Q. And then Mr. King was appointed to represent you.
A. Correct.
Q. What was the time period between that?
A. I really don't know exactly.
Q. Okay.
A. Being in jail like I was and all ...
Q. You never made bond? You never made a bond? You were in jail the whole time?
A. No, no bond.
Q. Okay. Before -- how long did -- do you know how long Mr. King represented you before you pled guilty?
A. Roughly, maybe 300 days.
Q. Okay. So a while?
A. It was a while I was in -- in Pickens County.
Q. Okay. Did he meet with you on a number of occasions during that time?
A. Well, yeah, periodically. We met on a few occasions.
Q. Okay. Did he discuss the discovery in the case with you?
A. I'm not sure I understand.
Q. Did he go over incident reports, and statements and things like that with you?
A. Vaguely, I think.
Q. Okay. Did he give you copies of them?
A. I'm not aware of that, no.

Q. Okay. Did he ever discuss a defense strategy with you? How to defend your case?
A. Several times we discussed it.
Q. Okay. Can you tell me about those discussions?
A. Well, we'd meet, and Mr. King would be enthusiastic about it. And then we'd meet later ---
Q. What do you mean by he'd be enthusiastic about it?
A. That we could do this, that or another.
Q. Okay. I'm sorry I cut you off. Now go ahead.
A. Well, I mean, and then we'd meet on other occasions and he'd tell me that wasn't possible.
Q. So let me make sure I got this straight. You would meet with Mr. King and he would tell you he was going -- y'all were going to be able to do a certain thing in defense, and then when you'd meet with him again he'd say that's not possible? Is that what you're saying?
A. That is correct.
Q. Okay. Did this happen on more than one occasion?
A. Yes, sir.
Q. Okay. Did Mr. King ever tell you that he definitely had a defense strategy for you?
A. If he did I'm not -- I'm not aware of it, no, sir.
Q. Okay. Did he ever come to you with a plea -- that the State had made a plea offer?
A. Yes, he did.

Q. Okay. And what was that plea offer?
A. He said the State offered me 12 years.
Q. Okay.
A. And I asked him if he could negotiate a better deal. And he said, no, that the solicitor wanted me to do ten.
Q. Okay.
A. So 12 was her best offer.
Q. Okay. Now, let's back up just one second, though. When he first came to you with a 12 year offer, did you and he discuss whether you should take that offer or not?
A. Well, sure we did.
Q. Okay. And what was the decision on that? Did he tell you to take it or not to take it?
A. He told me, but I think it was up to me.
Q. Okay. So the offer was turned down initially?
A. Yes, sir.
Q. And that was your decision?
A. Yes, sir, I guess so.
Q. Okay. Did he give you advice to accept it?
A. I don't think -- I don't think so, no.
Q. Did he give you advice to turn it down?
A. Well, I felt like at this point I didn't have anything to lose.
Q. Okay. Now when you pled guilty what kind of sentence did you get?

A. I ended up with 22 years.
Q. Was that 15 years on one charge and seven, consecutive, on another?
A. That is correct.
Q. Okay. Now at the time you pled guilty what did you think you were pleading guilty to?
A. The actual charge?
Q. How much time did you think you were going to get when you pled guilty?
A. I felt like -- when I pled guilty in court I felt like I'd get the original 12 year deal.
Q. Okay. Were you under the impression that it was still a situation of where the State wanted you to get ten years?
A. That was under my ---
Q. Or do ten years?
A. Well, Mr. King was assisted in court by an older gentleman from the public defender's office. And while Mr. King was up doing something, the elderly gentleman told me that Mr. King had negotiated the best deal that he could for me and that I should plead guilty.
Q. Okay. Was that John DeJong, the Chief Public Defender?
A. I don't know the gentleman's name.
Q. Beard?
A. Beard, yeah.
Q. Okay.

A. At this point I thought by pleading guilty in court that I'd get the original 12 year plea offer.

Q. And you'd have to do ten off that?

A. Hum?

Q. You'd have to do ten off that?

A. Repeat again.

Q. Okay. You thought you'd get the original 12 years?

A. Right. And do ten, 85 percent.

Q. Eighty-five percent. Okay. If you'd known you were going to get 22 years would you have pled guilty?

A. No.

Q. Now one of the allegations is that Mr. King never talked to the victim in this matter?

A. If he did, I'm not aware of it.

Q. Okay. Do you feel that if he had talked to the victim something might have been different?

A. I feel like if the truth had come out, the so-called victim was consensual, and that it may have had an impact on the sentencing.

Q. Okay. You don't deny that you committed what they say you did, is that correct?

A. I'm guilty of the crime.

Q. Okay. It's just the sentence that you have a problem with?

A. I certainly do. Yes, sir.

Q. And you feel that if Mr. King had interviewed the victim and determined it was consensual from her standpoint, and been able to present that to the court, it may have had an impact on the sentence?

A. Well, actually in the transcript of the trial or the plea Mr. King said that if he'd called her as a witness, and she'd testified it was consensual, that it would have had some impact on the sentencing.

Q. Okay. Now, at any point in time did Mr. King discuss your right to appeal this case?

A. No.

Q. Did you know you had a right to appeal this case?

A. No, I did not.

Q. When did you learn that?

A. After I'd got to prison.

Q. Okay. Had you known that you had a right to appeal this case would you have instructed Mr. King to file an appeal?

A. I would have. Yes, sir.

Q. Do you feel that your failure to file an appeal was free, and voluntary, and intelligently made on your part?

A. No.

Q. You understand that if this Court were to grant your PCR you'd go back to the beginning and start over?

A. That is correct.

Q. And you could be facing even more time?

A. I'd be willing to take that risk.

Q. Okay. Thank you. Answer any questions the State may have, please.

Cross-examination by Ms. Meadows:

Q. Okay. Now, Mr. Fulmer, you said you recall discussing some defenses with your attorney?

A. Excuse me, ma'am, you're going to have to speak ---

Q. Okay.

A. --- up.

Q. Okay. You testified that you discussed some possible defenses with your attorney?

A. Well, we discussed a couple of deals, yeah.

Q. Okay. Do you recall any specific defenses?

A. Other than he was going to call the young lady to the stand, I don't really remember any specific ...

Q. Okay. So you think he failed to investigate because he failed to interview the victim in this case?

A. Well, listen, to be honest with you, I had talked to Mr. King, and I had asked him how long he'd been at the job. And I didn't feel like he'd been at it a long time. I also asked him if he'd ever defended a case like mine. And he said, no.

Q. Okay. But you said you think if he'd interviewed the victim that would have made an impact on your sentence?

A. I think if the truth had come out about it it may have had an impact on it. Yes, it was completely consensual. The

young lady was already smoking marijuana with her cousin and she was already raiding her daddy's liquor cabinet at home.

Q. Okay. Well, do you realize a person under the age of 16 is legally unable to consent?

A. At the time, no.

Q. Okay. So that would not be a defense regardless because she was under the age of 16. Do you realize that?

A. Repeat again.

Q. I said so do you -- because you say that, you know, you allege it was consensual and that that would have helped you, your case, correct?

A. Forgive me, I'm not following you.

Q. Okay. So you alleged that because everything was consensual that this would have helped your sentence?

A. I would have thought it might would have had some effect on my sentencing, yes.

Q. Okay. Even though she was 16 or she was under 16, which legally makes her unable to consent?

A. I believe you'd have to know the young lady.

Q. Okay. Well, that doesn't -- okay. So you turned down the initial 12 year offer, correct?

A. That is correct.

Q. Okay. But you still thought you would get 12 years at the ---

A. I did.

Q. --- plea hearing? Okay.
A. Particularly after the gentleman that assisted Mr. King said that Mr. King had negotiated the best deal he could for me, yes.
Q. Did they say anything specifically about what that deal was?
A. The gentleman at the time? No.
Q. Okay.
A. But I thought the offer was still on the table.
Q. Okay. Do you recall the judge reviewing the maximum sentence for this charge?
A. Repeat again.
Q. Do you recall the judge telling you, informing you of the maximum sentence for these charges during the plea hearing?
A. I don't recall that.
Q. Okay. Would it help if I gave you a copy of the transcript?
A. I don't have my copy of the transcript.
Q. I'll give you one. And I'll tell you, I believe this was on page 5, around line 14. I'm sorry, it starts at line 11.
A. I think it's line 15?
Q. It says that one charge carries a maximum of ten and the other a maximum of 20.
A. Yeah, I understand where you're at.
Q. Okay. And do you recall telling him that you still

wanted to plead guilty knowing that that was the maximum sentence?

A. Could I be honest?

Q. Sure.

A. I mean, seeing the transcript, I see it in writing, but at the time I've got to tell you, I'd been incarcerated, I was under mental stress and strain. I was living in a cell with six gentlemen sleeping on a floor. I had been sick with nausea, vomiting and diarrhea before the trial, and I had a hard time hearing.

Q. Okay.

A. So, I mean, if it's in writing, I'm sure I said it, but ...

Q. Okay. Well, do you recall waiving your constitutional rights, your right to a jury trial, to remain silent and all of that? I believe it's on page seven.

A. If it says so, I guess I did.

Q. Okay. And you allege that your attorney didn't advise you of your right to appeal, correct?

A. That is correct.

Q. Okay. Well, do you recall the judge telling you about your right to appeal?

A. I do not.

Q. Okay. That's on page 8 if you'd like to read it to yourself.

(Pause)

A. I see that, yes.

Q. Okay. And do you recall the judge asking you about your satisfaction with Mr. King's services?

A. I do not personally, but if it's here ...

Q. Okay. That's on page four if you want to take a look at it.

(Pause)

Q. Okay. And do you recall telling the judge that you wished to plead guilty and were doing so freely and voluntarily? And that no one was making you plead guilty?

A. I don't remember that, but if it's here ...

Q. Okay.

MS. MEADOWS: I beg the Court's indulgence.

THE COURT: Certainly.

(Pause)

MS. MEADOWS: Nothing further from the State.

THE COURT: All right. Anything else, Mr. Thompson?

MR. THOMPSON: Nothing further.

THE COURT: Sir, you can step down.

A. All right. Thank you.

THE COURT: Thank you. All right. Anything else from the applicant?

MR. THOMPSON: No other witnesses for the applicant.

THE COURT: All right, then. Yes.

MS. MEADOWS: The State calls Daniel King, esquire.

MADAM CLERK: Mr. King, please place your left hand on the Bible and raise your right hand.

Daniel King, being duly sworn testified as follows;

MADAM CLERK: Thank you. Please state your full name for the record.

MR. KING: My name is Daniel Martin Hines King.

MADAM CLERK: Thank you.

Direct Examination by Ms. Meadows:

Q. All right. Good morning, Mr. King. How long have you been practicing law?

A. So I was sworn in November 2015. I followed a bunch of people around and didn't really fully start practicing until June of 2016, so a little over three years.

Q. Okay. And have all those three years been criminal?

A. Um-hum (affirmative).

Q. Okay. And how did you come to represent Mr. Fulmer?

A. I got appointed. He qualified while he was in the jail.

Q. Okay. And do you recall what he was charged with and how these charges arose?

A. Yeah. He had a CSC, second, and a sexual exploitation of a minor, second. They were with his son's adopted daughter.

Q. Okay. And did you discuss his version of the facts?

A. We did. Early on he wanted to discuss whether or not it

was prostitution.

Q. Okay. And what did he tell you?

A. So his story was that she wanted to start staying at his house. He bought her whatever she wanted. And then one day she crawled into his bed. And then from there things kind of just flowed into a relationship.

Q. Okay. And do you recall about how many times you met with him during the course of your representation?

A. I can count approximately if you can give me a second.

Q. Sure.

(Pause)

A. My guess is about eight.

Q. Okay. And did you discuss his charges and the potential sentence he was facing during those meetings?

A. We did.

Q. Okay. And did you obtain discovery in this case?

A. I did.

Q. Okay. And could you please just give the Court a brief overview of what the State's evidence was against Mr. Fulmer?

A. So there was the victim's interview, the police report. There were pictures from inside Mr. Fulmer's home. There were computer files downloaded from his computer. His cell phone was in evidence, but it was not tested by the State. And I had an expert come test it.

Q. Okay.

A. There was an interview with Mr. Fulmer when he didn't exactly confess.

Q. Okay. And did you -- did you review all this discovery with him?

A. So the only thing I remember not reviewing with him was the victim's video interview. I had him brought up to my office, and we started playing it. And we started watching it. And he said, -- well, he was having trouble hearing it. And so I would listen in and then tell him what she said. And eventually he said there's just no point in watching it.

Q. Okay.

A. So I stopped it.

Q. Okay. And did you do any additional investigation?

A. So I contacted a DNA expert because he had some question whether or not the paternity test was good.

Q. Okay.

A. So I started working with the DNA expert. I did not have a full opportunity, essentially, the time because they put it for trial. And I didn't get a continuance to explore that. And then I hired a computer forensics expert to look at his laptop and his cell phone.

Q. Okay. Well, based on any additional investigation that you did and the discovery, did you explain to him the strengths and weaknesses of his case?

A. We did over the course of the discussion about what we

could do and what we couldn't do.
Q. Okay. And did you discuss any defenses with him?
A. So the only defense, it was more of an evidentiary issue, was the way the computer files were taken off of his computer, were not processed forensically.
Q. Okay.
A. And so there was a potential chain of custody reliability/admissibility issue with the computer forensics. But at, I mean, we discussed how consent was not a defense, how even if she offered to have sex with him in exchange for money or whatever, prostitution certainly wasn't a defense because she couldn't consent.
Q. Right.
A. And we discussed about how it's not a defense, but it could be up to the jury to decide whether or not he was guilty of a crime in all of it.
Q. Okay. And did you discuss his constitutional rights with him?
A. We did ---
Q. Okay.
A. --- early on.
Q. Okay. And did you develop an opinion regarding the State's ability to prove guilt beyond a reasonable doubt?
A. Yeah, we discussed several times how the jury would most likely find him guilty.

Q. Okay. Did he ever indicate to you that he didn't understand the charges, or his rights or anything like that?

A. He did not indicate anything like that.

Q. Okay. And you had originally planned on going to trial on this case, correct?

A. Correct.

Q. Okay. So how did the guilty plea come about since you said y'all were ready to go to trial?

A. Right. So the case was first on the docket, I believe, in January of 2017.

Q. Okay.

A. And that was one month after plea negotiations had been finalized. At that point I asked for a continuance because I hadn't had an opportunity to explore the DNA and computer forensics issues. So then it got rescheduled for February 20th, 2018. I apologize. I guess the first one I said was January 2017. It was January 2018.

Q. Okay.

A. So I met with him the Sunday before, and he was sick as a dog. I went in Monday during jury selection and explained to Judge Gravely that he was sick.

Q. Okay.

A. And Judge Gravely refused to continue the case. We had a Jackson v. Denno that afternoon. Then the next morning we were going to do opening statements.

Q. Okay.
A. At that point, that's when Mr. DeJong went and talked to Mr. Fulmer while I was in chambers talking about probably pretrial issues. And when I came down after meeting with the judge and the solicitor, the -- Mr. DeJong was with Mr. Fulmer in the break-room on the second floor.

At that point we discussed about whether or not he wanted to plead guilty or not. And he said he was just tired and done fighting. And he was still just sick. He looked sick.

Q. Okay.
A. Looked awful.
Q. Okay. And, I'm sorry, back to the original plea offer, that was a 12 year offer, correct?
A. That was a 12 year offer.
Q. Okay. And what did you tell Mr. Fulmer about taking a plea at that time?
A. So I was passing on an offer. I would say it's your call whether or not you want to take it. I don't even take the position if it's a good offer or not. We can discuss what the consequences of that offer are.
Q. Okay.
A. We discussed the registry. And we discussed how he'd have to do about ten years before he got out.
Q. Okay. And what did he tell you about that plea offer?
A. At that point he wanted to fight it. He said anything

like that was going to be a death sentence, so there was no point in pleading guilty.

Q. Okay. So what were the terms of the final plea agreement that Mr. Fulmer entered into?

A. So you talking about before the actual plea or ---

Q. I'm sorry. No, the plea that he -- that he took.

A. Okay. So the plea that he actually entered was a straight-up plea off the trial docket with no recommendation.

Q. Okay. And did you explain to him what that meant?

A. I did ---

Q. Okay.

A. --- multiple times.

Q. Okay. And he also alleges that you never advised him of his right to appeal. Is it your practice to discuss this with your clients?

A. No. I only discuss the right to appeal a guilty plea if something weird goes on with the plea and I think there's some basis for the appeal.

Q. Okay. And did you think there was any factual or legal basis to appeal this case?

A. Not that I was aware of. I mean, it was a -- I was floored by the sentence, but I didn't have a legal basis to appeal it.

Q. Okay.

MS. MEADOWS: Nothing further from the State.

THE COURT: All right, sir.

MR. THOMPSON: Yes, ma'am.

Cross-examination by Mr. Thompson:

Q. Good morning, Mr. King.

A. Good morning.

Q. I'm going to talk loud, not because you need it, but that way Mr. ---

A. I understand.

Q. --- Fulmer can hear me, okay? You say you met with Mr. Fulmer on at least eight occasions?

A. I did.

Q. At any of those occasions did you come up with -- go in and say, well, we could possibly do this? And then the next occasion come back and say, well, we really can't do that?

A. I think probably what that was was -- my guess is is it was probably discussion about what sort of DNA stuff we could get into, what computer forensics, how far we could argue consent, those sort of issues.

Q. Now by the time that the case was on the trial docket in February had the DNA come back by then?

A. The DNA had come back.

Q. So you did have it by then?

A. I had the SLED DNA. I know I contacted an expert on my own.

Q. So you had your own expert's DNA?

A. No. I contacted an expert about talking about retesting and reviewing it, but I never had that opportunity.

Q. Okay. Now on the offer -- do you recall when the State made the offer to Mr. Fulmer?

A. If you can give me a second I can tell you.

(Pause)

A. It's on my notes -- looks like a first offer was made in June of -- June 30th, 2017. That was straight-up. Mr. Fulmer may choose the judge he wishes to plead in front of.

And then it looks like August 16th, 2017 I met with the prosecutor, and we talked about her actually giving an offer at that point or a firm set of time. She said she was going to be willing to negotiate around ten years.

And then on October 20th she brought him up to court and she said the best offer she could agree to was 12 years, because she wants him to die in prison.

Q. Okay. So now on that 12 year offer, was there any conversation about turning it down because she would come back with another offer?

A. No. I -- I never would say that. I -- I either would have said that we can wait a month and try to negotiate further or I would have said he could plead without a recommendation. I would not have -- I hear the three-strike-rule or the three-offer-rule all the time. And I always explain that's nonsense.

Q. Okay. So the State's final offer was 12 years because she wanted him to have to do around ten, ---

A. Correct.

Q. --- is that correct? Okay. And you relayed that to him?

A. I did.

Q. And he turned it down?

A. Correct.

Q. Okay. Now you say when it come time to go to trial in February and when he entered his plea, that the Sunday before that he was sick?

A. Yeah, he was sick as a dog.

Q. Okay. And did that continue on into the first of the week, Monday and Tuesday?

A. Yeah. Monday morning the judge even called the nurse. And the nurse testified or told the judge that she had taken his temperature and he had over a hundred degree fever.

Q. Okay. Was he still sick on Tuesday when he entered his plea?

A. Oh, absolutely.

Q. In your opinion did he understand what was going on in court?

A. He told me he did. He was -- he was clearly exhausted, but he told me he understood what was going on.

Q. Was there any indication or was there any possibility from your standpoint that he could have believed that he was

pleading to 12 years again?
A. I don't see how he could believe that because I -- we talked about it down in the break-room on the second floor that it would be without a recommendation. I told him I would ask for eight years, but it would be up to the judge.
Q. Okay. So he was specifically told prior to the plea that it would be a straight-up plea?
A. Yes, sir.
Q. Okay. Did you ever interview the victim in this matter?
A. I did not.
Q. Is it possible if you had interviewed the victim, and I realize that consent is not a legal defense, but is it possible that had you interviewed the victim and realized that it -- and had been able to present that it had a consensual situation that it could have affected his sentence?
A. So, I mean, it was clear -- the discovery was clear, it was consensual.
Q. That was clear in discovery?
A. Yeah, it's clear in discovery that it was consensual even though she was 15 at the time. Watching the videos -- she claims in her interview that it wasn't consensual, but on the videos and pictures from his computer made it clear that it was consensual. I forget what else you were asking.
Q. Is it possible that it just wasn't relayed to the court strongly enough that it would have affected his sentence?

Could have affected his sentence?

A. I have no idea. When we had that -- part of that chambers conference that morning before I spoke with Mr. Fulmer on the second floor was discussing how far I could go into consent because I had explained to Judge Gravely that it was clear it was consensual.

He ruled that I could not argue consent, but I could argue that it was not forced. And I said, that doesn't make any sense. And he said, well, that's my ruling.

Q. That was if you went to trial?

A. Yeah, that was if we went to trial. I don't remember during the plea whether or not I explained how it was consensual or not.

Q. Okay. But you never talked to the victim personally?

A. I never talked to her personally.

Q. And I believe if you looked at the transcript, members of her family were there. They were very forceful, is that correct?

A. I don't remember that either.

Q. Okay. Did you ever discuss his right to appeal with him?

A. I did not.

Q. You did not?

A. No.

Q. And I realize your practice was probably like mine when I practiced criminal law. On a guilty plea I didn't file an

appeal unless my client told me to.

A. That's correct.

Q. Or unless I saw something wrong myself.

A. Correct.

Q. Okay. How would your client know to tell you if you did not discuss it with him?

A. The judge advises them before the plea.

Q. And he was, you say, sick as a dog during the plea?

A. Yeah.

Q. And it was very quick that the judge went over that?

A. I don't remember how quick it was, but ---

Q. It was basically one question?

A. Yeah.

Q. And is it possible he just did not understand that given his illness?

A. I would be speculating on that.

Q. Would it have been better practice for you to have said you've got a right to appeal afterwards?

A. I don't know if it's better practice. I certainly could have done it.

Q. Yes. Thank you.

THE COURT: Anything else for this witness?

(Pause)

MS. MEADOWS: I'm sorry, Judge. I just have a couple of questions.

THE COURT: Sure.

Redirect examination by Ms. Meadows:

Q. And, Mr. King, you went over Mr. Fulmer's right to confront the witnesses, that he would potentially have that right if he were to go to trial, correct?

A. Yeah. I go over a form with all of my clients. And we went over that on June 6th, 2017.

Q. Okay. All right.

MS. MEADOWS: Nothing further from the State.

THE COURT: All right. Anything else?

MR. THOMPSON: No, ma'am.

THE COURT: Sir, you can step down.

A. May I be excused?

THE COURT: Any objection to Mr. King being excused?

MR. THOMPSON: No objection.

MS. MEADOWS: No, ma'am.

THE COURT: Thank you for being here, Mr. King. Anything else?

MS. MEADOWS: Nothing further from us, Judge.

THE COURT: All right. I mean, I'm happy to -- I know testimony's been fairly brief here today. I'm happy to hear anything to sum things up or if not necessary if you think it's contained in the application, then I'm fine with that as well.

MR. THOMPSON: I believe the application and testimony

covers it, Judge.

THE COURT: Very well.

MS. MEADOWS: Agreed.

THE COURT: All right, then. Very well. Well, as is my practice in these cases, I'm going to take this matter under advisement. I will tell you, Mr. Fulmer, I'm going to read this transcript fully, but I do believe Judge Stilwell went over a number of things with you in this transcript including any kind of physical infirmity or health issues that you might have on that day and a few other things as I'm reading it over, but I want to look through it again.

I don't see anything, in all candor, Mr. Thompson, at this point. I'm going to ask for a proposed order from the State to take a look at it, but also to be provided to you at the same time and in the same manner. All right. Thank you so much.

MR. THOMPSON: Thank you.

MS. MEADOWS: Thank you.

(Hearing Ended at 11:23 am)

(End of Requested Transcript of Record)

Certificate of Reporter

I, The undersigned, Susan W. Hudgins, Official Court Reporter for the Thirteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the trial/hearing of the captioned case, relative to appeal, in the Circuit Court for Pickens County, South Carolina, on the 27th day of August 2019.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

January 31, 2020

Susan W. Hudgins

Circuit Court Reporter

STATE OF SOUTH CAROLINA COUNTY OF PICKENS	)	IN THE COURT OF COMMON PLEAS IN THE THIRTEENTH JUDICIAL CIRCUIT
Tony Fulmer, SCDC #375466 Applicant, v. State of South Carolina, Respondent.	)	Case No. 2018-CP-39-1297 **ORDER OF DISMISSAL**

I. INTRODUCTION

The matter before the Court is an action for post-conviction relief (PCR) commenced by Tony Fulmer (Applicant) on December 5, 2018. The State requested an evidentiary hearing through its return on July 22, 2019. Applicant, through counsel, filed an amended application with the Pickens County Clerk of Court on August 16, 2019. On August 27, 2019, the Court convened an evidentiary hearing at the Greenville County Courthouse before the undersigned. Applicant was present and represented by Don Thompson, Esquire. Assistant Attorney General Lillian L. Meadows represented the State. Applicant testified on his own behalf at the hearing, as did his plea counsel, Daniel King, Esquire (Counsel). In addition to the pleadings in this action, the Court had before it a copy of the records of the Pickens County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, and the plea transcript.

After hearing the testimony at the PCR hearing and a full review of the record, the Court finds Applicant's allegations regarding ineffective assistance of counsel are without merit.

Therefore, for the reasons discussed below, the Court denies relief and dismisses this action with prejudice.

II. FACTS & PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Pickens County Clerk of Court. During its January 2018 term, the Pickens County Grand Jury indicted Applicant for second-degree criminal sexual conduct with a minor (2017-GS-39-1621) and second-degree sexual exploitation of a minor (2017-GS-39-1620). Assistant Public Defender Daniel King (Counsel) of the Pickens County Public Defender's Office represented Applicant. Assistant Solicitor Brandi Hinton of the Thirteenth Circuit Solicitor's Office prosecuted the case.

Applicant was arrested on April 21, 2017, following an investigation into allegations of sexual abuse involving his step granddaughter occurring between April 2016 and January 2017. At the time Applicant began sexually abusing the victim, she was only fourteen years old. (Plea Tr. 9). Applicant was sixty-five years old. (Plea Tr. 9). Their relationship almost immediately began as a sexual one, which according to the victim, was oral, vaginal, and anal. (Plea Tr. 9). Applicant took videos of the victim performing sexual acts upon his body and photographed her naked in the bathtub. (Plea Tr. 9). As a result of the sexual intercourse, the victim birthed Applicant's child. (Plea Tr. 9).

On February 20, 2018, the case was called for trial by jury with the Honorable Perry H. Gravely presiding. A jury was selected and the court heard pretrial motions. However, before the jury was sworn the following morning, Applicant elected to plead guilty as indicted without formal negotiations or recommendations from the State. Judge Gravely sentenced Applicant to consecutive terms of fifteen years' imprisonment for second-degree criminal sexual conduct with

a minor and seven years' imprisonment for second-degree sexual exploitation of a minor. Applicant did appeal his guilty plea or sentence. Applicant timely commenced this PCR action on December 5, 2018.

III. ISSUES BEFORE THIS COURT

In his original PCR application, Applicant alleged he is being held in custody unlawfully due to ineffective assistance of counsel. Specifically, Applicant alleged ineffective assistance of plea counsel based on:

1. "... failure to discharge his duty of due diligence to investigate, the facts, evidence, and witness(es) in the case."
    a. "Counsel failed to properly and fully investigate the case."
    b. "Counsel was ineffective for providing erroneous and incorrect advice to plead guilty instead of challenging the State's evidence through the protections of trial. Therefore, Petitioner's plea was unknowing and involuntary entered into, due to incomprehension of the indictment, and the guilty plea. Petitioner has never seen the indictment, or reviewed it with counsel."
    c. "Furthermore, Petitioner did not understand that a guilty plea must be entered voluntarily and intelligently. The Defendant must be advised of his privilege against self-incrimination, the right [to] trial by jury, and the right to confront one's accusers. A valid waiver of these rights cannot be presumed from a silent record."
    d. Petitioner's counsel used coercion and scare tactics to obtain a guilty plea."
    e. "Counsel failed to adequately investigate the alleged crime scene or the allegation so as to be prepared to present testimony through direct and cross-examination of relevant evidence related to the matter."

f. "Counsel failed to interview or call as a witness a number of people who would have relevant information in the matter."
g. "Counsel failed to spend adequate time with Petitioner reviewing discovery with him."
h. "Counsel failed to request a preliminary hearing so Petitioner could more adequately be informed about case."
i. "Counsel failed to file a direct appeal."
j. "Counsel failed to provide Petitioner with a copy of discovery in the case so Petitioner could review evidence, and prepare for trial."

2. ". . . an involuntary plea"
3. ". . . failure to provide a proper defense for physical evidence."
4. ". . . failure to have a valid strategy."

Pursuant to Rule 71.1, SCRCP, Applicant, through PCR counsel, amended his application to include the following allegations:

1. Counsel did not fully review and explain discovery with Applicant.
2. Counsel was indecisive in his approach to a defense strategy.
    a. Counsel would meet with applicant and be excited, and advise applicant as to how they would proceed in defending applicant, only to come back to applicant on a later date to say they could not defend the case in that manner. This occurred on several occasions.
3. Counsel misinformed applicant as to a plea offer by the State.
    a. The State offered applicant a plea deal of twelve (12) years, which applicant was willing to take, but counsel advised applicant not to take the deal because it was the State's first offer and that the State would come back later with another (better) offer.
    b. Based on the advice of counsel, applicant rejected the twelve (12) year plea offer. As it turned out, no other offer was forthcoming from the State.

4. Counsel never fully explained the guilty plea to applicant so that applicant was making an informed decision.
    a. Counsel advised applicant that the State wanted him to do ten (10) years in prison and at the time of his guilty plea applicant believed that the sentence he would receive would be such that he would only have to do approximately ten (10) years in prison.
    b. The sentence applicant received was fifteen (15) years on the criminal sexual conduct charge and seven (7) years consecutive on the sexual exploitation charge.
    c. Given that the sentence applicant received was not the sentence applicant was led to believe he would receive, applicant would allege that he was not fully informed and did not enter the guilty plea freely, voluntarily and intelligently.
5. Counsel failed to fully investigate this matter.
    a. He never interviewed the victim in this matter.
    b. Applicant is informed and believes that had counsel interviewed the victim he would have learned that the sex between the applicant and the victim was consensual. Applicant believes that had counsel informed the Court of this, it would have had an impact on his sentence.
6. Counsel never advised applicant of his right to appeal or discussed with applicant his right to appeal in this matter.
    a. Applicant did not learn of his right to appeal until after the time to file the appeal had passed. Given the outcome of the guilty plea, had applicant been explained his right to appeal, he would have instructed counsel to file an appeal for him.
    b. Therefore, applicant would allege that he did not freely, voluntarily and intelligently waive his right to appeal.

Although not specifically pled in his application or by formal amendment, Applicant presented testimony and argument regarding the following issues, and accordingly, the Court will address these issues as well:

1. Failure to pursue consent as a defense by calling the victim as a witness

IV. STANDARD OF REVIEW

An applicant may seek PCR upon the following types of allegations:

> 1. That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;
>
> 2. That the court was without jurisdiction to impose sentence;
>
> 3. That the sentence exceeds the maximum authorized by law;
>
> 4. That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
>
> 5. That his sentence has expired, his probation, parole or conditional release unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or
>
> 6. That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy[.]

S.C. Code Ann. § 17-27-20(A).

Ordinarily, PCR allegations are centered upon an allegation that the applicant did not receive the assistance of counsel guaranteed them by the Sixth and Fourteenth Amendments to the United States Constitution. *Strickland v. Washington*, 466 U.S. 668 (1984); *Taylor v. State*, 404 S.C. 350, 359, 745 S.E.2d 97, 101 (2013). Ordinarily, PCR allegations are centered upon an allegation that the applicant did not receive *effective* assistance of counsel guaranteed by the Sixth Amendment. *See generally* S.C. Code Ann. § 17-27-20(A) (enumerating allegations cognizable in PCR actions). The allegation of denial of such representation sets forth a *prima facie* violation of

this constitutional right, and raises a question of fact that can only be determined by an evidentiary hearing. *Rogers v. State*, 261 S.C. 288, 291, 199 S.E.2d 761, 762 (1973).

In a post-conviction relief action, the applicant bears the burden of proving the allegations by a preponderance of the evidence—a mere allegation of ineffective assistance is not sufficient to warrant granting relief. Rule 71.1(e), SCRCP; *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985); *State v. Pendergrass*, 270 S.C. 1, 4, 239 S.E.2d 750, 751 (1977). A PCR applicant must produce facts or testimony in support of each individual allegation in order to establish that the claim meets the standard warranting relief. S.C. Code. Ann. § 17-27-50. Otherwise, dismissal is appropriate. *Bannister v. State*, 333 S.C. 298, 509 S.E.2d 807 (1998).

The reviewing court applies the two-part test outlined in *Strickland* to determine whether counsel's conduct "was so ineffective as to require reversal" of the applicant's conviction or sentence. 466 U.S. at 687. First, the applicant must show that counsel's performance was deficient; and second, that the deficient performance prejudiced the applicant. *Id.* 668; *Butler,* 286 S.C. at 442, 334 S.E.2d at 814.

The first prong—constitutional deficiency—is "necessarily linked to the practice and expectations of the legal community." *Padilla v. Kentucky,* 559 U.S. 356, 366, 130 S. Ct. 1473, 1482, 176 L. Ed. 2d 284 (2010). In order to prove deficient performance, the applicant must show counsel's representation fell below an objective standard of "reasonableness under prevailing professional norms." *Cherry v. State,* 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). 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.

Strickland, however, "does not guarantee perfect representation[—]only a 'reasonably competent attorney.'" *Harrington v. Richter*, 562 U.S. 86, 110 (2011) (*quoting Strickland,* 466

U.S. at 687). Representation is constitutionally ineffective only if counsel's conduct "so undermined the proper functioning of the adversarial process" that the defendant was denied a fair proceeding. *Strickland,* 466 U.S. at 686. Just as there is "no expectation that competent counsel will be a flawless strategist or tactician, an attorney may not be faulted for a reasonable miscalculation or lack of foresight or for failing to prepare for what appear to be remote possibilities." *Harrington*, 562 U.S. at 110.

Accordingly, "[j]udicial scrutiny of counsel's performance must be highly deferential, as it is all too tempting for a defendant to second-guess counsel's assistance after conviction or an adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." *Strickland*, 466 U.S. at 689; *see also Yarborough v. Gentry*, 540 U.S. 1, 6 (2003) ("The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight."). Thus, a fair assessment of attorney performance requires every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. *Id.* Because of the difficulties inherent in making such an evaluation, the reviewing court must indulge in a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Butler*, 286 S.C. at 445, 334 S.E.2d at 816. The applicant must overcome this presumption to receive relief. *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625.

A reviewing court "must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed at the time of counsel's conduct." *Strickland,* 466 U.S. at 690. An applicant making a claim of ineffective assistance "must identify the acts or omissions of counsel that are alleged *not* to have been the result of reasonable professional judgment."

Strickland, 466 U.S. at 690 (emphasis added). The reviewing court must then "determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." *Id.*

The *Strickland* standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. 466 U.S. at 689-690; *see also Harrington,* 562 U.S. at 105 (cautioning that an ineffective assistance of counsel claim could potentially function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial). Even under *de novo* review, the standard for judging counsel's representation is a most deferential one. *Harrington,* 562 U.S. at 105. Unlike a later reviewing court, the attorney observed the relevant proceedings; knew of materials outside the record; and interacted with the client, opposing counsel, and the judge. Thus, the question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," *not* whether it deviated from best practices or most common custom. *Id.* (*quoting Strickland*, 466 U.S. at 690) (emphasis added).

The second, or "prejudice" prong of *Strickland* is rooted in the very purpose of the Sixth Amendment guarantee of counsel—to ensure a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. *Id.* at 691–92. In order to prove prejudice, an applicant must demonstrate counsel's deficient performance prejudiced the 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. A reasonable probability is a probability "sufficient to undermine confidence in the outcome." *Strickland,* 466 U.S. at 694. Thus, it is not enough "to show the errors had some conceivable effect" on the outcome of the proceeding—counsel's errors must be "so serious as to *deprive the defendant of a fair trial.*"

Id. at 687 (emphasis added). Moreover, the South Carolina Supreme Court 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. *Bannister v. State*, 333 S.C. at 303, 509 S.E.2d at 809.

In assessing prejudice under *Strickland*, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible reasonable doubt might have been established if counsel acted differently. *Wong v. Belmontes,* 558 U.S. 15 (2009); *Strickland,* 466 U.S. at 693. Instead, *Strickland* asks whether it is "reasonably likely" the result would have been different. *Id.* at 696. However, the likelihood of a different result must be *substantial*, not just *conceivable*. *Id.* at 693 (emphasis added).

Because the Sixth Amendment right to counsel also applies to a defendant entering a guilty plea, *Hill v. Lockhart* extended the two-part *Strickland* test to challenge guilty pleas based on ineffective assistance of counsel." *Hill,* 474 U.S. 52; *cf. Padilla,* 559 U.S. at 373 (recognizing that the guilty plea process is a "critical phase of litigation" for purposes of the Sixth Amendment right to effective assistance of counsel). A claim of ineffective assistance of guilty plea counsel requires the applicant present evidence satisfying two prongs: first, evidence that counsel's performance was deficient; and second, evidence that counsel's deficient performance prejudiced the defendant by causing him to plead guilty rather than go to trial. *Hill,* 474 U.S. 52.

Thus, the analysis of counsel's performance under the first prong of *Strickland* remains unchanged—the applicant must show that counsel's representation fell below an objective standard of reasonableness demanded of attorneys in criminal cases. *Hill*, 474 U.S. at 58–59; *accord Thompson v. State*, 340 S.C. 112, 115, 531 S.E.2d 294, 296 (2000). An applicant alleging his guilty plea was induced by ineffective assistance of counsel must prove counsel's advice to

plead guilty was not "within the competence demanded of attorneys in criminal cases." *Hill*, 474 U.S. at 56.

The second, or "prejudice" prong, however, "focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process." *Id.* at 58–59. Specifically, when an applicant claims counsel's deficient performance caused him to accept a plea, the applicant "must show that there is a reasonable probability that, but for [plea] counsel's [alleged] errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.* at 59.

This inquiry "focuses on a defendant's decisionmaking" and does not turn on the outcome of a defendant's actual criminal proceeding or potential outcome had a defendant chosen to proceed to trial. *Lee v. United States*, 582 U.S. ___, 137 S. Ct. 1958, 1966 (2017). However, an applicant must convince the court that a decision to reject the plea bargain would have been rational under the circumstances. *Padilla*, 559 U.S. at 372. The question here is whether the applicant, if correctly informed of circumstances surrounding the plea, would have pleaded guilty—*not* whether counsel would have still advised him or her to plead guilty. *Turner v. State,* 335 S.C. 382, 385, 517 S.E.2d 442, 444 (1999).

Surmounting *Strickland's* high bar is never an easy task, and the strong societal interest in finality has "special force with respect to convictions based on guilty pleas." *Lee,* 582 U.S. ___, 137 S. Ct. at 1967 (internal citations and quotation marks omitted); *cf. Hill*, 474 U.S. at 58 ("[R]equiring a 'prejudice' showing from defendants who seek to challenge the validity of their guilty pleas on the ground of ineffective assistance of counsel 'will serve the fundamental interest in the finality of guilty pleas.'"). Reviewing "[c]ourts should not upset a plea solely because of *post hoc* assertions from a defendant about how he would have pleaded but for his attorney's deficiencies. *Lee,* 582 U.S. ___, 137 S. Ct. at 1967. Rather, judges should "look to

contemporaneous evidence to substantiate a defendant's expressed preferences." *Id.* Thus, in determining whether a guilty plea was taken in accordance with constitutional standards, the reviewing judge must analyze and consider the entire record, including the transcript of the guilty plea and the evidence presented at the PCR hearing. *Harres*, 282 S.C. at 134, 318 S.E.2d at 361.

The performance and prejudice standards, however, "do not establish mechanical rules; [t]he ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." *Id.* at 696. Moreover, "there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one." *Id.* at 697. The court "need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. *Id.* If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, the court may evaluate the prejudice prong only. *Id.*

V. FINDINGS OF FACT & CONCLUSIONS OF LAW

The Court has reviewed the testimony presented at the PCR hearing, observed the witnesses, passed upon their credibility, and weighed their testimony accordingly. After hearing the testimony presented and considering the legal arguments by counsel, as well as the record in this action incorporated by way of the State's return, the Court proceeds to the claims raised in the amended application and finds each to be without merit. Pursuant to S.C. Code Ann. § 17-27-80, the Court makes the following findings of facts and conclusions of law based upon all of the probative evidence presented.

As a matter of general impression, the Court finds credible and persuasive the testimony of Counsel, who presented well-recollected testimony of relevant events leading up to Applicant's

guilty plea. The Court finds Applicant's testimony and assertions lack credibility, and often contradicted allegations raised in the application. These credibility findings have been applied to the Court's findings and conclusions set forth below.

A. Failure to Review and Explain Discovery

In the amended application, Applicant first alleges counsel was ineffective for "failing to fully review and discuss with him the contents of his discovery." The Court disagrees, and finds Counsel was not deficient based on Applicant's representations to the plea court, Applicant's testimony at the evidentiary hearing, and Counsel's credible testimony he thoroughly reviewed all discovery with Applicant. Applicant further failed to show he would have benefitted from any additional consultation with Counsel in this regard, and thus failed to meet his burden.

At the PCR hearing, Applicant testified he vaguely recalled Counsel reviewing discovery with him, but claimed he never received a copy of the discovery. Counsel testified he met with Applicant eight times over the course of his representation. During these meetings, Counsel credibly testified he explained to Applicant the elements of the offenses, discussed Applicant's version of events, and extensively reviewed all evidence and discovery with him.

Counsel recalled discovery including pictures of Applicant's home, explicit photographs and videos of the victim found on Applicant's computer, results of a DNA test confirming Applicant fathered the victim's child, and videos of the victim's statement to law enforcement and Applicant's confession to law enforcement. Counsel testified the only piece of discovery Applicant did not examine were the videos of the victim's statement and Applicant's statement to law enforcement. Counsel specifically recalled a meeting with Applicant where Counsel planned to watch these videos with Applicant. However, once Counsel started playing the video of the

victim's statement, Applicant almost immediately asked Counsel to stop the video because he did not want to watch it.

The Court finds credible Counsel's above-referenced testimony, which demonstrates Counsel adequately conferred and discussed with Applicant about discovery in this case. The Court does not find credible Applicant's testimony that Counsel did not sufficiently review the evidence and discovery with him prior to his pleading guilty. Moreover, Applicant failed to identify precisely what Counsel did not explain or disclose to him from materials provided in discovery, or what, if anything, could have been achieved had Counsel spent more time with him in consultation regarding the contents of his discovery. *See Smith v. State*, 404 S.C. 493, 500–501, 745 S.E.2d 378, 382 (Ct. App. 2012) (noting that an applicant must present evidence to show how additional time spent in consultation regarding discovery would have resulted in a different outcome).

The Court further points to Applicant's representation to the plea judge that he was completely satisfied with Counsel and that Counsel had answered all of his questions. (Plea Tr. 4); *see Dalton v. State*, 376 S.C. 130, 137–38, 654 S.E.2d 870, 874 (Ct. App. 2007) ("[S]tatements made during a guilty plea should be considered conclusive unless a criminal inmate presents valid reasons why he should be allowed to depart from the truth of his statements."). Applicant also declined several opportunities by the plea judge to consult further with Counsel prior to entering the plea.

Thus, the Court finds no deficiency in Counsel's consultation with Applicant regarding discovery, nor any prejudice to Applicant resulting therefrom. Accordingly, Applicant's ineffective assistance claim pertaining to this allegation is **DENIED.**

B. Failure to Investigate, Prepare for Trial, and Develop a Clear Theory of Defense

Applicant alleges Counsel was deficient for failing to investigate, prepare for trial, and pursue a clear theory of defense. The Court disagrees, and finds Counsel reasonably and thoroughly investigated Applicant's case, evaluated the veracity of the evidence against Applicant, and established a trial strategy therefrom.

Even assuming Counsel was deficient in this regard, the Court finds Applicant failed to meet his burden. *Hill* makes clear the prejudice prong ordinarily requires "something more" than simply a defendant's assertion that but for counsel's deficient performance he would not have pleaded guilty but would have gone to trial. *Stalk v. State*, 383 S.C. 559, 563, 681 S.E.2d 592, 595 (2009) (*citing Hill*, 474 U.S. at 58–59). The Court finds Applicant failed to present evidence of any viable defense, investigative tactic, or alternate strategy Counsel should have explored which would have helped Applicant's case or affected his decision to plead guilty.

1. Failure to interview the victim

Applicant first claims Counsel was ineffective for failing to conduct an interview with the victim as part of Counsel's investigation. Had Counsel personally interviewed the victim, according to Applicant, Counsel "would have learned that the sex between Applicant and the victim was consensual." Applicant contends he was prejudiced by Counsel's alleged failure to conduct said interview because, "if Counsel had informed the Court [of the alleged consent by the victim], it would have had an impact on [his] sentence." The Court disagrees, and finds reasonable Counsel's decision not to interview the victim. The Court further finds Applicant failed to show he would have elected to go to trial had Counsel interviewed the victim.

"A criminal defense attorney has the duty to conduct a reasonable investigation to discover all reasonably available mitigation evidence and all reasonably available evidence tending to rebut

any aggravating evidence introduced by the State." *McKnight v. State*, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008). "[W]hile the scope of a reasonable investigation depends on a number of issues, at a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case." *Ard v. Catoe*, 372 S.C. 318, 331–32, 642 S.E.2d 590, 597 (2007) (internal quotation marks omitted) (emphasis omitted). However, counsel need only interview potential witnesses "when it is reasonable to do so." *Edwards v. State*, 392 S.C. 449, 457, 710 S.E.2d 60, 65 (2011). "In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691.

Our Supreme Court has cautioned reviewing courts not to lose sight of the reasonableness standard regarding counsel's duty to investigate. *Ard*, 372 S.C. at 331, 642 S.E.2d at 597 ("this duty is limited to a reasonable investigation"). Reviewing courts "should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case." *Strickland*, 466 U.S. at 690. Thus, in applying the *Strickland* standard to a claim of failure to investigate, counsel's decision not to undertake a particular investigation must be evaluated with heavy deference to counsel's judgment. *Bagwell*, 410 S.C. at 265, 763 S.E.2d at 63.

At the PCR hearing, Applicant failed to present testimony or evidence of anything Counsel could have discovered had he interviewed the victim. [1] Applicant's testimony about what the victim would have told Counsel if he had conducted an interview—that the sexual relationship was consensual—is nothing more than mere speculation and is irrelevant to Applicant's charges.

[1] The Court notes that, even if the victim had provided favorable testimony at the PCR hearing, Applicant simply cannot show prejudice because a minor is legally incapable of giving consent. *State v. Whitener*, 228 S.C. 244, 89 S.E.2d 701 (1955).

See generally id., 318 S.C. 496, 458 S.E.2d 538 (1995) (holding that applicant's allegations, alone, will not support a finding of prejudice when applicant claims counsel was ineffective for failing to investigate witnesses; instead, applicant must show the results of an investigation would have resulted in a different outcome at trial).

Even had Counsel been otherwise deficient for failing to interview the victim, Applicant cannot show prejudice when Counsel *did* present his opinion to the plea court that the victim was a willing participant in the relationship. (Plea Tr. 14). Counsel testified that a thorough assessment of the discovery, which included the victim's interview with police and the photographs and videos retrieved from Applicant's computer, led him to this determination. In fact, Counsel's mitigation presentation largely focused on, though not legally consensual, Applicant "never forced the victim into anything." (Plea Tr. 14–15). At the PCR hearing, Applicant admitted he recalled Counsel making these statements to the plea court on his behalf.

For the foregoing reasons, the Court finds no deficiency in Counsel's failure to interview the victim, nor any prejudice resulting therefrom. Accordingly, Applicant's request for relief by way of this allegation is **DENIED.**

2. Failure to call the victim as a witness

Similarly, at the PCR hearing, Applicant testified Counsel was ineffective for failing to pursue consent as a defense by calling the victim as a witness. Applicant claims that, had Counsel called the victim as a witness, "the truth would have come out" and he "would have received a lighter sentence." The Court disagrees, and finds credible Counsel's testimony he discussed potential defenses with Applicant and advised Applicant that consent was not a defense to criminal sexual conduct with a minor. Applicant further failed to establish how he would have benefitted from the victim's testimony

To support a claim that trial counsel was ineffective for failing to call potential witnesses, our Supreme Court has repeatedly held a PCR applicant must introduce evidence of what the uncalled witness's testimony would have been. *Glover*, 318 S.C. at 498-99, 458 S.E.2d 538 at 540; *cf. Ard*, 372 S.C. at 331, 642 S.E.2d at 596 ("A PCR applicant cannot show that he was prejudiced by counsel's failure to call a favorable witness to testify at trial if that witness does not later testify at the PCR hearing or otherwise offer testimony within the rules of evidence."). "Mere speculation" by the applicant as to what the witness's testimony would have been "cannot, by itself, satisfy the applicant's burden of showing prejudice." *Glover*, 318 S.C. at 499, 458 S.E.2d at 540.

To show prejudice, the applicant must then present evidence to show how the witness's testimony would have resulted in a different outcome or otherwise affected the applicant's decision to plead guilty. *Harris*, 377 S.C. at 75-76, 659 S.E.2d at 145-46; *see also Glover v. State*, 318 S.C. at 498, 458 S.E.2d at 540 (holding that trial counsel's failure to contact an alleged alibi witnesses did not prejudice the applicant where the applicant failed to show the witnesses' testimony would have established an alibi defense).

At the outset of the PCR hearing, Applicant did not deny he had sexual relations with the victim, and openly admitted he was guilty of the crimes alleged. Applicant, however, continues to maintain his innocence on the basis that the "relationship" was consensual. Counsel testified he repeatedly explained to Applicant that prostitution and consent are not defenses to criminal sexual conduct with a minor.

On cross-examination, Applicant was *again* informed that consent would never have been a viable defense due to the victim's age. In response, Applicant stated, "you would have to know

this lady." Applicant testified the victim was "already smoking weed and raiding her dad's liquor cabinet."

As an initial matter, the Court finds Applicant's insistence on the allegedly consensual nature of the sexual relationship between him and the victim is irrelevant to Applicant's guilt or innocence. As is well recognized, consent is never a defense to charges of criminal sexual conduct with a minor in South Carolina. *See State v. Whitener*, 228 S.C. 244, 89 S.E.2d 701 (1955) (holding that minors are legally incapable of consenting) *Doe ex rel. Roe v. Orangeburg Cty. Sch. Dist. No. 2*, 335 S.C. 556, 558–59, 518 S.E.2d 259, 260 (1999) ("Minors under the age of 16 are not legally capable of voluntarily consenting to a sexual battery committed by an older person.").

Nonetheless, Applicant failed to present testimony from the victim or any other evidence at the PCR hearing tending to show the victim would have provided favorable testimony on Applicant's behalf. *See Bannister v. State,* 333 S.C. at 303, 509 S.E.2d at 809 ("This Court 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."); *compare with Thomas v. State,* 308 S.C. 123, 417 S.E.2d 531 (1992) (finding that the applicant showed uncalled witness' testimony would have made a difference in the trial because it would have cast doubt on the sole witness' identification of the petitioner).

The Court further finds Applicant's representations to the plea court to be dispositive on this issue. Counsel testified he explained to Applicant that he would be able to confront and cross-examine witnesses against him and call witnesses on his own behalf at trial. Applicant thereafter went before the plea judge where he confirmed, under oath, that he wished to waive this right in order to plead guilty. (Plea Tr. 7).

For the foregoing reasons, the Court finds no deficiency in Counsel's failure to interview the victim, nor any prejudice resulting therefrom. Accordingly, Applicant's request for relief by way of this allegation is **DENIED.**

3. Failure to establish a clear theory of defense

Applicant next alleges Counsel was ineffective for failing to develop and employ a clear theory of defense or trial strategy. In his amended application, Applicant claims Counsel was ineffective because he was "indecisive in his approach to a defense strategy." Specifically, Applicant complains Counsel, on several occasions, would consult Applicant about a possible defense "only to come back to Applicant on a later date to say they could not defend the case in that manner." The Court disagrees, and finds Counsel's testimony shows Counsel adequately prepared and developed a valid theory of defense.

As an initial matter, the Court finds Counsel cannot be found ineffective for communicating with and updating his client as he investigates the case, explores possible defenses, and develop a strategy for defending the client. Part of that process includes making a determination that certain defenses or strategies will not be effective based on examination of the evidence, facts, and circumstances of a particular case. That Applicant felt "discouraged" when Counsel advised him a certain defense would not be successful is irrelevant.

As to trial strategy, Counsel testified he reviewed and discussed with Applicant the evidence against him and the difficulties of challenging the State's evidence on several occasions. Counsel testified that, given the strength of the State's case, he would primarily focus on challenging the admissibility of the incriminating photographs and videos found on Applicant's laptop, which were the basis of the sexual exploitation charge. Counsel made statements to this effect at the plea hearing. (Plea Tr. 14).

Counsel testified he believed challenging the chain of custody of the photographs, videos, and Applicant's laptop itself would have been a viable defense at trial. Specifically, Counsel testified he planned to elicit testimony from a forensics expert to show the State improperly extracted evidence from Applicant's laptop. Counsel further planned to use testimony from the forensics expert to challenge the admissibility of the photographs and videos based on issues with the chain of custody of the laptop itself.

As to the criminal sexual conduct charge, Counsel testified he attempted to challenge the admissibility of Applicant's confession to law enforcement through a *Jackson v. Denno*[2] hearing. However, the judge found the confession was voluntary and therefore admissible at trial.

Counsel testified Applicant believed his son, the victim's stepfather, impregnated the victim. Based on Counsel's discussion with Applicant about this issue, Counsel testified he planned to have a second DNA test done and an expert analysis of the paternity test. *Bagwell,* 410 S.C. at 265, 763 S.E.2d at 634 (internal citations omitted) ("Counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions.

The Court finds Counsel was not deficient in preparing Applicant's case for trial or developing a defense strategy. Applicant failed to present any evidence of any issue Counsel missed in his preparation of the case or any meritorious defense Applicant was unable to raise due to Counsel's allegedly deficient performance. Accordingly, Applicant's request for relief by way of this allegation is **DENIED.**

C. Failure to Properly Advise Applicant as to the State's Plea Offer

In the amended application, Applicant alleges Counsel was ineffective in advising him not to accept the State's original plea offer of twelve years. Applicant claims he was willing to accept

[2] 378 U.S. 368, (1964)

the offer, but "Counsel advised Applicant not to take the deal because it was the State's first offer, and the State would come back with a better offer." Based on this advice, Applicant claims, he rejected the plea offer; however, "no other offer was forthcoming from the State." The Court disagrees, and finds Applicant's testimony is dispositive on this issue.

At the PCR hearing, Applicant admitted Counsel never advised him to either accept or reject State's initial plea offer. Applicant testified it was his own decision to reject the plea offer. Counsel testified it is his general practice not to advise clients as to whether offers are good are not. In this case, Counsel testified Applicant turned down the twelve-year plea offer because Applicant maintained he was not guilty based on the allegedly consensual nature of the relationship. Counsel also testified Applicant rejected the offer because twelve years was a *de facto* death sentence considering Applicant was sixty-eight years old.

The Court finds no deficiency in Counsel's consultation with Applicant regarding the State's plea offer nor any prejudice to Applicant resulting therefrom. Accordingly, Applicant's ineffective assistance allegation pertaining to Counsel's failure to properly advise Applicant as to the State's plea offer is **DENIED.**

D. Failure to Advise Applicant of his Right to Appeal

Applicant alleges Counsel was ineffective for failing to advise him of his right to appeal. Applicant claims he only became aware he could appeal his plea after the period in which to file an appeal had expired. Applicant claims that, had Counsel explained to Applicant his appellate rights, he would have instructed counsel to file an appeal on his behalf. Consequently, Applicant claims he did not freely, voluntarily and intelligently waive his right to appeal. The Court disagrees and finds Counsel was not deficient for failing to consult with Applicant about appealing his guilty

plea. The Court further finds Applicant's allegation he was unaware of his right to appeal is refuted by the court's colloquy with Applicant in the plea transcript.

To waive a direct appeal, a defendant must make a knowing and intelligent decision not to pursue the appeal. *Davis v. State*, 288 S.C. 290, 342 S.E.2d 60 (1986); *White v. State*, 263 S.C. 110, 208 S.E.2d 35. Counsel has a constitutionally-imposed duty to consult with a defendant about an appeal only when there is reason to think either: (1) that a rational defendant would want to appeal or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing. *Roe v. Flores-Ortega*, 528 U.S. 470, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000).

In determining whether counsel has a duty to consult his client about an appeal, "[o]ne highly relevant factor will be whether the conviction follows a trial or a guilty plea, because a plea both reduces the scope of potentially appealable issues and may indicate that the defendant seeks an end to judicial proceedings." *Id.* at 480. 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. 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." *Weathers v. State*, 319 S.C. 59, 61, 459 S.E.2d 838, 839 (1995)

At the PCR hearing, Counsel testified he does not usually discuss with his clients their right to appeal following a guilty plea "unless something weird happens." Here, Applicant failed to show any extraordinary circumstances existed during the plea proceeding that would have triggered Counsel's duty to advise Applicant of his right to appeal. Applicant testified he "did not know [he] could appeal" and he "would have done so" had he known.

However, any deficiency on Counsel's part was cured by the plea court's colloquy with Applicant, which included the following exchange:

> PLEA COURT: All right. Now, you also have a right to appeal your plea and the sentence but you have to do so in writing within ten days from today; do you understand that?
>
> APPLICANT: Ten days?
>
> PLEA COURT: Yes. Do you understand that?
>
> APPLICANT: Yes.

(Plea Tr. 8). When asked about this exchange on cross-examination, Applicant claimed he did not remember the plea court advising him of his right to appeal.

Nonetheless, the Court finds Applicant failed to show there were any grounds for appeal or any extraordinary circumstances that would warrant a direct appeal from his guilty plea. The Court finds credible Counsel's testimony he had no reason to consult Applicant about appealing. Even if Counsel was deficient in this regard, Applicant's claim he was unaware he had a right to appeal is refuted by the plea transcript.

Accordingly, Applicant's ineffective assistance allegation pertaining to Counsel's failure consult Applicant about his right to appeal is **DENIED.**

E. Involuntary Guilty Plea

Applicant alleges Counsel's ineffective assistance in failing to explain the implications and consequences of pleading guilty caused Applicant to enter into an involuntary and unknowing guilty plea. The Court disagrees, and finds the combined record from the plea hearing and the evidentiary hearing establishes Applicant freely, knowingly, and voluntarily pleaded guilty.

"[I]t is the prerogative of any person to waive his rights, confess, and plead guilty, under judicially defined safeguards, which are adequately enforced." *Reed v. Becka,* 333 S.C. 676, 685, 511 S.E.2d 396, 401 (Ct. App. 1999). Accordingly, because a criminal defendant waives several constitutional rights by pleading guilty, the Due Process Clause requires that guilty pleas are entered into voluntarily, knowingly, and intelligently. *Boykin v. Alabama*, 395 U.S. 238 (1969); *Pittman v. State*, 337 S.C. 597, 524 S.E.2d 623 (1999).

To be intelligent, a plea must be made by a mentally competent defendant who understands both the charges against him and the consequences of his plea. *Brady v. United States*, 397 U.S. 742, 748 (1970). To be voluntary, a plea must be free of threats or other coercion that would impermissibly distort the defendant's choice. *Id.* at 755.

Before a court can accept a guilty plea, the defendant must be advised of the constitutional rights he or she is waiving; the right to a jury trial, the right to confront one's accusers, and the privilege against self-incrimination. *Boykin,* 395 U.S. at 243. Additionally, in order to knowingly and voluntarily plead guilty, the defendant must have a full understanding of the consequences of the plea, including the nature and crucial elements of the offense(s); the maximum and any mandatory minimum penalty; and the nature of the constitutional rights being waived. *Pittman,* 337 S.C. at 599, 524 S.E.2d at 624; *See United States v. Smith,* 440 F.2d 521, 528–529 (7th Cir.) (Stevens, J., dissenting) (explaining that voluntariness relates to the trustworthiness of the

admission of guilt and binding character of the waiver of the constitutional protections which would be available to the accused if he elected to stand trial).

"It is also well established that a guilty plea is not rendered invalid because it represents a compromise by defendant, thrusts a difficult judgment upon him, or is motivated by fear of greater punishment." *United States v. Cox*, 464 F.2d 937, 942 (6th Cir. 1972) (*citing Brady*, 397 U.S. 742). The State may properly encourage guilty pleas either by being more lenient to those who enter such pleas, *Brady*, 397 U.S. at 750-753, or by increasing the risks of punishment on those who do not. *North Carolina v. Alford*, 400 U.S. 25, 37 (1970). Thus, the standard for determining the validity of a guilty plea is "whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." *Id.* at 31.

A defendant's knowing and voluntary waiver of statutory or constitutional rights must be established by a complete record, and "may be accomplished by colloquy between court and defendant, between court and defendant's counsel, or both." *State v. Ray*, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993); *See also Wolfe v. State*, 326 S.C. 158, 164, 485 S.E.2d 367, 370 (1997) (stating any possible misconceptions due to counsel's alleged deficiencies can be cured by the plea court's colloquy). To ensure the defendant understands the consequences of his guilty plea, the trial judge "usually questions the defendant about the facts surrounding the crime and punishment that could be imposed." *Dover v. State*, 304 S.C. 433, 434–35, 405 S.E.2d 391, 392 (1991). However, the trial judge "does not have to direct the defendant's attention to every consequence of his plea provided the record reveals affirmative awareness of the consequences of a guilty plea." *Carter v. State*, 329 S.C. 355, 362, 495 S.E.2d 773, 776 (1998).

Voluntariness "is not determined by an examination of the specific inquiry made by the sentencing judge alone, but is determined from both the record made at the time of the entry of the

guilty plea and the record of the post-conviction hearing." *Harres*, 282 S.C. at 133, 318 S.E.2d at 361. In evaluating an allegation on PCR that a guilty plea was based on inaccurate advice of counsel, the transcript of the guilty plea hearing will be considered to determine whether any possible error by counsel was cured by the information conveyed at the plea hearing. *Wolfe*, 326 S.C. at 165, 485 S.E.2d at 370; *cf. Rayford v. State*, 314 S.C. 46, 443 S.E.2d 805 (1994) (finding that, where the transcript of the guilty plea proceeding refuted applicant's claim that he did not understand the terms of a plea bargain, granting PCR was inappropriate notwithstanding applicant's claim his lawyer misadvised him).

Nonetheless, because a guilty plea is a solemn, judicial admission of the truth of the charges against an individual, admissions made during a guilty plea should be considered conclusive unless an applicant presents valid reasons why he should be allowed to depart from the truth of his statements." *Dalton*, 376 S.C. at 137–38, 654 S.E.2d at 874 (internal citations and quotation marks omitted); *cf. Blackledge v. Allison*, 431 U.S. 63, 73–74 (1977) (pointing out that representations made by a defendant, his lawyer, and the prosecutor at a guilty plea hearing, as well as any findings made by the judge accepting the plea, constitute a "formidable barrier in any subsequent collateral proceedings").

In the amended application, Applicant claims Counsel "never fully explained the guilty plea" to him, which "prevented Applicant from making an informed decision" in this regard. Applicant claims Counsel led him to believe "he would only have to do approximately ten years." Because Applicant ended up receiving a sentence of twenty-two years, Applicant contends he "did not enter the guilty plea freely, knowingly, and voluntarily."

The Court disagrees, and finds Applicant knew the nature of the charges against him, the terms of the plea agreement, and the consequences of pleading guilty pursuant to the requirements

of *Boykin* and *Pittman.* The plea transcript reflects Applicant entered his plea knowingly and voluntarily, engaged in an intelligent colloquy with the plea court, and gave appropriate responses to the court's questions.

At the outset of the plea hearing, the plea judge thoroughly questioned Applicant regarding his understanding of the possible sentences he could receive for each offense, and advised him the State was offering no recommendation as to sentencing. (Plea Tr. 5–6). Applicant indicated he understood the charges against him and the exposure he faced on each indictment (Plea Tr. 6).

The plea judge then explained to Applicant the constitutional rights he would be forfeiting by pleading guilty—including the right to remain silent, to challenge the State's evidence, and to present a defense. (Plea Tr. 6-7). Applicant was further advised that if he did proceed to trial, the burden of proof would not be upon him, but rather would be upon the State to prove every element of every charge against him. (Plea Tr. 7).

Applicant affirmed he understood, and wished to waive these rights in order to plead guilty. (Plea Tr. 6–7). Applicant further indicated to the plea court he was entering his plea freely and voluntarily, and that he had not been threatened in any way or promised anything in exchange for his guilty plea. (Plea Tr. 7).

After a factual recitation from Ms. Hinton, Applicant admitted he was guilty and had committed the conduct giving rise to the offenses as outlined by the State. (Plea Tr. 10). Applicant indicated he was completely satisfied with Counsel; that Applicant had sufficient time to speak with Counsel about the charges against him, that Counsel answered all of Applicant's questions and done all the investigations that Applicant felt was appropriate. (Plea Tr. 4–5). After hearing statements from counsel, the victim's mother, and the State, the plea judge sentenced Applicant to consecutive terms of fifteen years' imprisonment for second-degree criminal sexual conduct with

a minor and seven years' imprisonment for second-degree sexual exploitation of a minor. (Plea Tr. 15-16).

Based on the foregoing, the record contradicts Applicant's assertion he was under a misapprehension as to an alleged deal when he decided to proceed with his plea. *See Rayford v. State*, 314 S.C. 46, 48, 443 S.E.2d 805, 806 (1994) (holding that the record of the plea proceeding, including applicant's answers to the trial judge's questions, clearly established that applicant understood the possible sentences and the terms of the plea agreement and therefore could not have had misconceptions regarding sentencing). Although given multiple opportunities to do so, Applicant never informed the plea court he was under the impression or belief he would receive a certain sentence.

At the PCR hearing, Applicant testified that at the time of the plea was under the impression he would receive a twelve-year sentence of which he would have to serve 85%. Applicant testified this understanding was based on the State's plea offer and Counsel's representation to Applicant that the State wanted him to serve ten years. Applicant testified he would not have pleaded guilty had he known he would receive a twenty-two year sentence.

Applicant testified he did not recall whether the plea court advised him of the potential sentence he was facing. When given the transcript, Applicant claimed that "due to stress, cramped space in his cell, and hearing troubles," he did not recall this exchange. Applicant admitted however, that he "guesses [he] said it since it is in the transcript." However, Applicant failed to provide any justification as to why he was under the impression he would receive a twelve-year sentence or why he did not inform the plea court he was under this impression.

Based on Counsel's initial conversations with the solicitor, Counsel testified he did advise Applicant the State wanted him to serve ten years. However, after Applicant rejected the State's

final offer of twelve years, Counsel testified he never led Applicant to believe he would receive a twelve-year sentence. Counsel's testimony is further corroborated by Applicant's statements to the court at the plea hearing.

"Courts naturally look with a jaundiced eye upon any defendant who seeks to withdraw a guilty plea after sentencing on the ground that he expected a lighter sentence." *United States v. Crusco*, 536 F.2d 21, 24 (3rd Cir. 1976); *see Daniel v. Cockrell*, 283 F.3d 697, 703 (5th Cir. 2002) (absent a showing of force of threat by some other actor, the "guilty plea is not rendered involuntary by the defendant's mere subjective understanding that [he] would receive a lesser sentence . . ."). Contrary to Applicant's PCR testimony, "[t]he colloquy establishes that [Applicant] did not have any misconceptions regarding sentencing." *Roddy v. State*, 339 S.C. 29, 34, 528 S.E.2d 418, 421 (2000) (reversing PCR court's finding of an involuntary guilty plea).

Based on Applicant's testimony at the PCR hearing, it is clear that, despite Applicant's rejection of the twelve-year plea offer, Applicant believed he would receive a twelve-year sentence. However, such a belief does not render Applicant's guilty plea invalid, especially given Applicant's acknowledgment on the record that he knew the sentencing range and that no promises had been made. *Wolfe,* 326 S.C. at 165, 485 S.E.2d at 371; *see also Harres v. Leeke*, 282 S.C. 131, 318 S.E.2d 360 (1984) (finding that the fact that defendant "thought" judge would give lighter sentence not ground for relief).

Thus, based on the evidence presented at the PCR hearing and the record of the plea proceeding, the Court finds Applicant's plea was freely, knowingly, and voluntarily entered into. Accordingly, Applicant's request for relief by way of this allegation is **DENIED.**

VI. ALL OTHER ALLEGATIONS

As to any and all allegations raised in the application or at the hearing in this matter and not specifically addressed in this order, the Court finds Applicant failed to present any evidence regarding such allegations. Accordingly, the Court finds those claims were voluntarily waived and abandoned, and those claims are therefore denied and dismissed with prejudice. S.C. Code Ann. § 17-27-90.

VII. CONCLUSION

Based on the evidence presented at the PCR hearing and the record of the plea proceeding, the Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require the Court to grant his application for post-conviction relief. The Court finds Counsel was not deficient in any manner, nor was Applicant prejudiced by Counsel's representation. The Court finds Applicant freely, knowingly, and voluntarily pleaded guilty and further failed to present any justification as to why the statements he made during the guilty plea hearing should not be considered conclusive. Therefore, based on the foregoing, the Court denies relief on all allegations and dismisses this PCR action with prejudice.

Applicant must file and serve a notice of appeal within thirty days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review pursuant to Rule 203, SCACR. Applicant has a right to appellate counsel's assistance in seeking review of the denial of PCR. *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991). Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to Rule 243, SCACR, for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

2019 NOV 11 P 4:44

1. The Court denies relief and dismisses the action with prejudice; and
2. Applicant shall be remanded to the custody of the State.

CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA

AND IT IS SO ORDERED this 4 day of Nov., 2019.

THE HONORABLE LETITIA H. VERDIN
Presiding Circuit Court Judge
Thirteenth Judicial Circuit

Pickens, South Carolina

STATE OF SOUTH CAROLINA)
)
COUNTY OF PICKENS)

AMENDED INDICTMENT FOR
SEXUAL EXPLOITATION OF A MINOR SECOND DEGREE

At a Court of General Sessions, convened on JAN 2 2 2018 the Grand Jurors of Pickens County present upon their oath:

That TONY CALHOUN FULMER did in Pickens County, on or about or between the dates of April 1, 2016 and January 30, 2017, knowing the character or content of the material, record, photograph, film, develop, duplicate, produce, or create digital electronic file or distribute, transport, exhibit, receive, sell, purchase, exchange, or solicit material that contains a visual representation of a minor engaged in sexual activity. This is in violation of §16-15-0405 of the South Carolina Code of Laws (1976) as amended.

Certified Copy
Paul P Wallace
Clerk of Court
Pickens County, SC
Filed Dec 2018

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

Brian Hulett
SOLICITOR BAR # 77844

WITNESSES

Michael P Hendricks

Pickens County Sheriff's Office

4/23/2017

ARREST WARRANT NUMBER
2017A3910100429

ACTION OF GRAND JURY

~~TRUE BILL~~
Date JAN 2 2 2018

Foreperson of Grand Jury

VERDICT

Foreperson of Petit Jury
Date:

AMENDED DOCKET NO. 2017-GS-39-1620
BBH

The State of South Carolina

County of Pickens

COURT OF GENERAL SESSIONS

JAN 2 2 2018 **TERM 2017**

THE STATE

vs.

TONY CALHOUN FULMER

Amended Indictment for

0380

SEXUAL EXPLOITATION OF A MINOR SECOND DEGREE

VIOLATION § 16-15-0405(A)

Certified Copy
Clerk of Court
Pickens County, SC
Dec 2018

STATE OF SOUTH CAROLINA	)	AMENDED INDICTMENT FOR
	)	**CRIMINAL SEXUAL CONDUCT WITH A MINOR 2ND DEGREE**
COUNTY OF PICKENS	)	**(14-15)**

At a Court of General Sessions, convened on JAN 2 2 2018 the Grand Jurors of Pickens County present upon their oath:

That TONY CALHOUN FULMER did in Pickens County, on or about or between the dates of April 1, 2016 and January 30, 2017, engage in sexual battery with [redacted] who was at least fourteen years of age but who was less than sixteen years of age, and that he did so in a position of familial, custodial, or official authority to coerce the victim to submit, and/or he was older than the victim. This is in violation of § 16-3-655(B)(2) [formerly 16-3-655(3)] of the South Carolina Code of Laws (1976) as amended.

Certified Copy
Jarrod P Wallace
Clerk of Court
Pickens County, SC
Dated Dec 2018

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

Brandi Hunter
SOLICITOR BAR # 77844

119

WITNESSES

Michael P Hendricks

Pickens County Sheriff's Office

4/23/2017

ARREST WARRANT NUMBER
2017A3910100428

ACTION OF GRAND JURY

TRUE BILL

JAN 2 2 2018

Foreperson of Grand Jury

VERDICT

Foreperson of Petit Jury
Date:

AMENDED DOCKET NO. 2017-GS-39-1621
BBH

The State of South Carolina

County of Pickens

COURT OF GENERAL SESSIONS

JAN 2 2 2018 **TERM 2017**

THE STATE

vs.

TONY CALHOUN FULMER

Amended Indictment for

0397

CRIMINAL SEXUAL CONDUCT WITH A MINOR 2ND DEGREE (14-15)

VIOLATION § 16-03-0655(B)(2)

ed Copy
f Court
County, SC

120 SOUTH CAROLINA)
OF Pickens)
VS.)
Tony Calhoun Fulmer)
AKA:)
Race: WHITE Sex: M Age: 66)
DOB: [redacted] SS#: [redacted])
Address: [redacted])
City,State,Zip: Marietta, SC 29661-9407)
DL#: [redacted] SID#:)
*CDL Yes☐ No☐ CMV Yes☐ No☐ Hazmat Yes☐ No☐

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2017GS3901620
A/W#: 2017A3910100429
Date of Offense: 9/1/2016
S.C. Code § : 16-15-0405(D)
CDR Code #: 0380

SENTENCE SHEET

2-10

In disposition of the said indictment comes now the Defendant who was ☐ CONVICTED OF or ☒PLEADS
TO: Sex / Sexual Exploitation Of A Minor - S

in violation of § 16-15-0405(D) of the S.C. Code of Laws, bearing CDR Code # 0380
☐ NON-VIOLENT ☒ VIOLENT ☐SERIOUS ☒MOST SERIOUS ☐Mandatory GPS(CSC w/minor 1st or Lewd Act) ☐§17-25-45

The charge is: ☒ As Indicted, ☐Lesser Included Offense, ☐Defendant Waives Presentment to Grand Jury. _____ (defendant's initials)
The plea is: ☒Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST: Brandi Hinton 77844 x Daniel King 102292
Hinton, Brandi Batson SC Bar# Defendant KING, DANIEL SC Bar#

WHEREFORE, the Defendant is commited to the ☐ **State Department of Corrections,** ☐ **County Detention Center,**
for a determinate term of 7 days/months/years or ☐ under the **Youthful Offender Act** not to exceed _____ years
and/or to pay a fine of $ _____; provided that upon the service of _____ days/months/years and/or payment
of $ _____; plus costs and assessments as applicable*; the balance is suspended with **probation** for _____
months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.
☐ CONCURRENT or ☒ CONSECUTIVE to sentence on: 2/21/18
☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections. 311 days
☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.
Pursuant to 18 U.S.C Section 922,it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐**RESTITUTION:** ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered
Total: $ _____ plus 20% fee: _____ $ _____
Payment Terms: _____
☐ Set by SCDPPPS _____
Recipient: _____

*Fine:		$
§ 14-1-206 (Assessments 107.5 %)		$
§ 14-1-211(A)(1) (Conv. Surcharge)	$100	$ 100.00
§14-1-211(A)(2) (DUI Surcharge)	$100	$
§ 56-5-2995 (DUI Assessment)	$12	$
§ 56-1-286 (DUI Breath Test)	$25	$
Proviso 61.6 (Public Def/Probation)	$500	$
§ 14-1-212 (Law Enforce. Funding)	$25	$ 25.00
§ 14-1-213 (Drug Court Surcharge)	$150	$
§ 50-21-114(BUI Breath Test Fee)	$50	$
§ 56-5-2942(J) (Vehicle Assessment)	$40/ea	$
3% to County (if paid in installments)		$ 3.75
TOTAL		$ 128.75

PTUP _____
_____ days/hours Public Service Employment
Obtain GED ☐
Attend Voc. Rehab. or Job Corp. _____
May serve W/E begining _____
Substance Abuse Counseling ☐
Random Drug/Alcohol testing ☐
Fine may be pd. in equal, consecutive weekly/monthly pmts. of $ _____ beginning _____
$ _____ paid to Public Defender Fund
Other: _____

Certified Copy
Clerk of Court
Pickens County, SC
Dated DEC 2018

☐ Appointed PD or appointed other counsel, Proviso 61.6 requires $500 be paid to Clerk during probation and shall be collected before any other fees.

Clerk of Court/ Deputy Clerk Harold P. Wallace
Court Reporter: April Herron
Presiding Judge _____
Judge Code: 2559
Sentence Date: 2/21/2018

SCCA/217 (07/2016)

TH CAROLINA) IN THE COURT OF GENERAL SESSIONS

Pickens)
VS.)
Tony Calhoun Fulmer)
A:)

INDICTMENT/CASE#: 2017GS3901621
A/W#: 2017A3910100428
Date of Offense: 9/1/2016
S.C. Code § : 16-03-0655(B)(2)
CDR Code #: 0397

Race: WHITE Sex: M Age: 66
DOB: [redacted] SS#: [redacted]
Address: [redacted]
City,State,Zip: Marietta, SC 29661-9407
DL#: [redacted] SID#:
*CDL Yes☐ No☐ CMV Yes☐ No☐ Hazmat Yes☐ No☐

SENTENCE SHEET
0-20

In disposition of the said indictment comes now the Defendant who was ☐ CONVICTED OF or ☒ PLEADS
TO: Sex. Crim Sex Cond, 2nd Degree W/Minor 1

in violation of § 16-03-0655(B)(2) of the S.C. Code of Laws, bearing CDR Code # 0397
☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS(CSC w/minor 1st or Lewd Act) ☐ §17-25-45

The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. _____ (defendant's initials)
The plea is: ☒ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST: Brandi Hinton 77844 Defendant Daniel King 102292
Hinton, Brandi Batson SC Bar# KING, DANIEL SC Bar#

WHEREFORE, the Defendant is commited to the ☐ **State Department of Corrections,** ☐ **County Detention Center,**
for a determinate term of 15 days/months/years or ☐ under the **Youthful Offender Act** not to exceed _____ years
and/or to pay a fine of $ _____; provided that upon the service of _____ days/months/years and/or payment
of $ _____; plus costs and assessments as applicable*; the balance is suspended with **probation** for _____
months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.
☐ CONCURRENT or ☒ CONSECUTIVE to sentence on: 2/21/18
☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections. 311 days
☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.
Pursuant to 18 U.S.C Section 922,it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐**RESTITUTION:** ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered
Total: $ _____ plus 20% fee: _____ $ _____
Payment Terms: _____
☐ Set by SCDPPPS _____
Recipient: _____

*Fine:		$
§ 14-1-206 (Assessments 107.5 %)		$
§ 14-1-211(A)(1) (Conv. Surcharge)	$100	$
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Clerk of Court/ Deputy Clerk Harold P. Williams
Court Reporter: April Hereon
Presiding Judge _____
Judge Code: 2755
Sentence Date: 2/21/2018

SCCA/217 (07/2016)