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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM FAIRFIELD COUNTY
Court of Common Pleas

The Honorable Robert E. Hood, Circuit Court Judge

Case No. 2019-CP-20-0109

Michael Clayton,

Petitioner,

v.

State of South Carolina,

Respondent.

NOTICE OF APPEAL

Petitioner Michael Clayton appeals the Honorable Robert E. Hood's Order Denying his Application for Post-Conviction Relief, and the Court's Order Denying Applicant's Motion to Alter or Amend Judgment (Rule 59(e), SCRCP) filed on **August 17, 2020**. The undersigned Counsel received written notice via email confirming the filed Order denying Applicant's Motion to Alter or Amend on **August 26, 2020**.

Dayne C. Phillips, Esq.
1614 Taylor Street, Suite D.
Columbia, SC 29201

August 26, 2020

ATTORNEY FOR PETITIONER

Other Counsel of Record:
Samuel Key, Assistant Attorney General
South Carolina Attorney General's Office
1000 Assembly Street, Room 519
Columbia, SC 29201

cc:
Judy M. Bonds, Fairfield County Clerk of Court
Michael Clayton

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF FAIRFIELD
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2019 CP-20-0109

2020 AUG 17 AM 10:33
FAIRFIELD COUNTY
CLERK OF COURT

Michael Clayton, Jr.	State of South Carolina
PLAINTIFF(S)	DEFENDANT(S)

Submitted by:	Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT**. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT**. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court: **Based on the hearing that took place, the arguments made, and the testimony taken, Applicant's Motion to Alter or Amend is hereby denied.**

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.
Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		$
		$
		$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.
Note: Title abstractors and researchers should refer to the official court order for judgment details.
E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

Circuit Court Judge	2164 **Judge Code**	8/12/2020 **Date**

For Clerk of Court Office Use Only

This judgment was entered on the day of , 20 and a copy mailed first class or placed in the appropriate attorney's box on this day of , 20 to attorneys of record or to parties (when appearing pro se) as follows:

Dayne Phillips	Samuel Key AAG
ATTORNEY(S) FOR THE PLAINTIFF(S)	**ATTORNEY(S) FOR THE DEFENDANT(S)**

CLERK OF COURT

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

THE STATE OF SOUTH CAROLINA)	IN THE COURT OF **COMMON PLEAS**
COUNTY OF **FAIRFIELD**)	**SIXTH** JUDICIAL CIRCUIT
Michael Clayton, Jr.,)	Case No.: **2019-CP-20-0109**
Applicant,)	
v.)	**MOTION TO ALTER OR AMEND PURSUANT TO RULE 59(E), SCRCP**
State of South Carolina,)	
Respondent.)	

TO: The Honorable Robert E. Hood

The Applicant, by and through the undersigned Counsel, moves this Court to alter or amend the "Order of Dismissal" filed on August 3, 2020, in the above-captioned case pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure. *See Strickland v. Washington*, 466 U.S. 668 (1984); U.S. Const. amends. V, VI, XIV; S.C. Const. art. I, §§ 3 and 14; *See* S.C. Code § 17-27-20(A)(1), (4), and (6). Specifically, the Order of Dismissal does not contain specific findings of fact and conclusions of law regarding all the facts, claims, and exhibits presented at the evidentiary hearing and in Applicant's Memorandum in Support of Post-Conviction Relief. *See generally Reese v. State*, 425 S.C. 108, 820 S.E.2d 376 (2018); *Fishburne v. State*, 427 S.C. 505, 832 S.E.2d 584 (2019).

In support of this motion, Applicant submits the following arguments and does not abandon or waive any previous arguments or issues raised in the prior pleadings and evidentiary hearing in this PCR action:

(1) Applicant incorporates by reference the Memorandum in Support of Post-Conviction Relief as if fully set forth verbatim into this motion. Notably, the facts

and arguments contained in that memorandum necessitate the granting of post-conviction relief.

(2) Respectfully, although the Court allowed Applicant to submit a memorandum in support of PCR, the procedure followed by this Court denied Applicant an opportunity to have his PCR claims adjudicated by an independent judicial officer in violation of the separation of powers doctrine. *See* S.C. Art. I, § 8. Specifically, the Court did not provide the State with any basis for denying Applicant's claims other than delegating the responsibility of drafting a proposed order of dismissal. The Court adopted the State's adversarial proposed Order Denying Post-Conviction Relief despite that this independent judicial function cannot be delegated to an executive agency without providing specific instructions and rationale for omitting findings of fact and/or denying each claim. *See Marlar v. State*, 375 S.C. 407, 408, 653 S.E.2d 266 (2007) (holding, "Pursuant to S.C. Code Ann. § 17-27-80 . . . , the PCR judge must make specific findings of fact and state expressly the conclusions of law relating to each issue presented.").

(3) The Order Denying Post-Conviction Relief fails to properly summarize all the testimony presented at the hearing. Fundamental fairness necessitates the importance of an accurate summation of the testimony and arguments to ensure the Court's Order contains all the relevant findings of fact and conclusions of law to conduct an objective and independent review and to preserve all issues for appellate review.

(4) The Order Denying Post-Conviction Relief fails to properly address Applicant's claim that Plea Counsel provided ineffective assistance of counsel by failing to

interview Applicant's ex-wife, Tova Clayton. Specifically, the Order indicated that Counsel "did not interview Tova because he knew she would not speak to him about the case" yet Counsel made this speculative claim without attempting to contact this critical witness. This testimony should not be credible and considered deficient performance by failing to conduct a reasonable investigation of a material witness where credibility is the lynchpin of the Prosecution's case. *See Wiggins v. Smith*, 539 U.S. 510 (2003); *Lounds v. State*, 380 S.C. 454, 670 S.E.2d 646 (2008); *McKnight v. State*, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008); *Cf. Praylow v. Martin*, 761 F.2d 179 (4th Cir. 1985) (provides that a defendant's stated interest in pleading guilty does not relieve counsel of his duty to investigate possible defenses).

a. Applicant also established prejudice based on Tova's testimony at the evidentiary hearing, which contained critical omissions and inconsistencies based on her video recorded statement with Investigator Karen Castles of the Fairfield County Sheriff's Office, and Minor Child 1's statements in her mental health records. *See* Exhibit Nos. 4 and 5 (mental health records and video recorded statements). These omissions and inconsistences include but are not limited to Tova's knowledge of and failure to do anything about the abuse, Tova seeing Applicant leave her daughter's bedroom with an erection, her daughter's denials of the abuse, the timing of her daughter's disclosures to her and their maternal grandmother, and the living situation in the home (moving in-and-out of the home on numerous times by her, her daughters, and her family members).

b. Tova also admitted that text messages between her and Applicant proved

she was shocked when Applicant texted her asking for a divorce. *See* Exhibit No. 2 (text messages). Tova also admitted that she "never expected this", was "crying like a baby", was "devasted", and even asked Applicant on "what grounds?" was he seeking a divorce despite the existence of this allegations.

c. Notably, Tova's affidavit from their divorce failed to mention any abuse, based the grounds for divorce on adultery (Applicant had cheated on her and had a child with another woman), and noted that Applicant was like an Angel sent from God and that she could not ask for a better partner. *See* Exhibit No. 1 (Affidavit of Tova Clayton).

d. Furthermore, Tova knew Minor Child 2 filed a complaint with the Fairfield County Sheriff's Office on June 23, 2016, two days after the divorce decree was issued on June 21, 2016. Tova also was not present on the morning of trial, which ultimately resulted in a plea hearing pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970).

(5) The Order Denying Post-Conviction Relief fails to properly address Applicant's claim that Plea Counsel provided ineffective assistance of counsel by failing to interview and subpoena character witnesses on Applicant's behalf for trial. Specifically, Plea Counsel's deficient performance and prejudicial representation would have prevented Applicant from being able to request a jury instruction on good character and reputation by not subpoenaing these witnesses to trial. *See State v. Harrison*, 343 S.C. 165, 539 S.E.2d 71 (Ct. App. 2000); *Cf. Stalk v. State*, 383 S.C. 559, 681 S.E.2d 592 (2009); *see also Pantovich v. State*, 427 S.C. 555,

562-64, 832 S.E.2d 596, 600, 601 (2019), *reh'g denied*, (September 27, 2019) (finding for an ineffective assistance claim, the PCR court must "determine whether counsel was ineffective *at the time of the alleged error*. . . Thus, the court must consider the law as it existed at the time of trial and "not as it has evolved today . . . .").

a. Plea Counsel claimed that he did not change his trial strategy the morning of trial and that he wanted Applicant to testify. If that is true, then Counsel's strategy was not reasonable because he failed to have character witnesses available to testify on Applicant's behalf.

(6) Plea Counsel's decision not to interview witness or conduct any investigation is not objectively reasonable given the type of case where credibility is the critical factor the jury's determination of whether to find Applicant guilty or not guilty. *See Roseboro v. State*, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995) (finding "counsel must articulate a valid reason for employing a certain strategy to avoid a finding of ineffectiveness, and where counsel articulates a strategy, it is measured under an objective standard of reasonableness"); *Hicks v. State*, 314 S.C. 280, 443 S.E.2d 907 (1994) (finding ineffective assistance of counsel when there is a reasonable probability the result would have been different had trial counsel introduced relevant and favorable evidence at trial).

(7) The Order Denying Post-Conviction Relief fails to properly address Applicant's claim that Plea Counsel provided ineffective assistance of counsel by mischaracterizing Applicant's testimony. Specifically, Applicant explained that he felt coerced into pleading guilty because Counsel was not prepared for trial,

changed his trial strategy the morning of trial, had not prepared him to testify, and did not have any character witnesses subpoenaed to corroborate his credibility. In other words, Applicant felt his chances of winning at trial were hopeless based on Counsel's deficient performance and prejudicial representation. *Cf. Boykin v. Alabama*, 395 U.S. 238 (1969) (finding a guilty plea is voluntarily and knowingly entered into when the accused has a full understanding of the consequences of his plea and the charges against him); *See Pittman v. State*, 337 S.C. 597, 524 S.E.2d 623 (1999) (finding a defendant must understand the sentencing consequences of his plea for it to be considered voluntarily given); *see also United States v. Taylor*, 659 F.3d 339, 347 (4th Cir. 2011) (noting "[a]n *Alford* plea is an arrangement in which a defendant maintains his innocence but pleads guilty for reasons of self-interest.").

(8) The Order Denying Post-Conviction Relief fails to properly address Applicant's claim that Plea Counsel abandoned his role as defense counsel by failing to conduct a reasonable investigation and adequately prepare for trial. *See United States v. Cronic*, 466 U.S. 648, 659 (1984); *See Nance v. Ozmint*, 367 S.C. 547, 548-52, 626 S.E.2d 878, 878-80 (2006) (holding that "pre-se prejudice occurs if there has been a constructive denial of counsel," which arises when defense counsel's deficient performance constitutes "a classic example of a complete breakdown in the adversarial process"); *see also Green v. State*, 351 S.C. 184, 196, 569 S.E.2d 318, 324 (2002) (holding that although an applicant "must ordinarily show actual prejudice, he may be relieved of that burden if counsel's ineffectiveness is so pervasive as to render a particularized prejudice inquiry

unnecessary").

(9) Therefore, this Court should reconsider its Order Denying Post-Conviction Relief (filed on April 23, 2019), withdraw that order, enter an order granting Applicant post-conviction relief, and remand this case to the Court of General Sessions for a new trial.

CONCLUSION

Based on the foregoing reasons, the undersigned Counsel respectfully requests that this Court reconsider the Order of Dismissal denying Post-Conviction Relief by conducting an objective review of the facts and law based on the arguments presented by the parties, and independently entering an Order Granting Post-Conviction Relief. *See* Rule 59(e), SCRCP; *Strickland v. Washington*, 466 U.S. 668 (1984); U.S. Const. amends. V, VI, XIV; S.C. Const. art. I, §§ 3 and 14; S.C. Code § 17-27-20(A)(1), (4), and (6).

IT IS SO MOVED.

Respectfully submitted,

Dayne C. Phillips, Esq.
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ATTORNEY FOR THE APPLICANT

August 6, 2019

CERTIFICATE OF SERVICE

I hereby certify that I have this date served the within and foregoing Motion to Alter or Amend pursuant to Rule 59(e), SCRCP, by depositing a true and correct copy of the same via first-class mail, postage prepaid, upon all parties as follows:

The Honorable Robert E. Hood
PO Box 192
Columbia, SC 29202

Samuel Key, Esq.
SC Attorney General's Office
1000 Assembly Street, Room 519
Columbia, SC 29201

The Honorable Judy M. Bonds
Fairfield County Clerk of Court
P.O. Drawer 299
Winnsboro, SC 29180

By: Courtney Powers

Courtney Powers
Paralegal for Dayne C. Phillips, Esq.

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August 6, 2020

Post Office Drawer 299
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Clerk of Court (803) 712-6526
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Family Court (803) 712-6528
Fax (803) 712-1478

CLERK OF COURT FAIRFIELD COUNTY

JUDY M. BONDS

Tammy I. Durham
Deputy Clerk of Court

Beverly Bookert
Family Court Deputy

CERTIFICATE OF MAILING

Date: August 3, 2020

RE: Michael Clayton Jr

Dayne Phillips, Attorney
1614 Taylor Street
Suite D
Columbia SC 29201

Case No: 2019-CP-20-00109

Judy M. Bonds, Clerk of Court of Fairfield County, has personally mailed a copy of the *Order of Dismissal* by mailing the same in the United States mail at the United States Post Office, Winnsboro, South Carolina, at 2:00 PM on August 3, 2020, properly addressed to each party named at the address opposite his/her name as set out below, with correct postage prepaid on each:

Samuel L. Key
SC Attorney General's Office
PO Box 11549
Columbia SC 29211

Dayne Phillips
1614 Taylor Street
Suite D
Columbia SC 29201

s/Judy M. Bonds
Judy M. Bonds
Clerk of Court for Fairfield County

STATE OF SOUTH CAROLINA COUNTY OF FAIRFIELD	)	IN THE COURT OF COMMON PLEAS FOR THE SIXTH JUDICIAL CIRCUIT
	)	
Michael Clayton, Jr.,	)	2019-CP-20-0109
Applicant,	)	
v.	)	**ORDER OF DISMISSAL**
State of South Carolina,	)	
Respondent.	)	

I. INTRODUCTION

The matter before the Court is Michael Clayton's (Applicant) post-conviction relief (PCR) action commenced on March 19, 2019. The State made its return on July 8, 2019, requesting an evidentiary hearing on Applicant's allegations of involuntary guilty plea and ineffective assistance of counsel. A hearing into the matter convened on January 30, 2020, at the Lancaster County Courthouse before the undersigned. Applicant was present and represented by Dayne C. Phillips, Esquire. Assistant Attorney General Samuel L. Key represented the State.

At the outset of the hearing, by stipulation, Applicant entered law enforcement's recorded interviews of Tova Clayton, Victim 1, and Victim 2 into evidence under seal. (App's Ex. 5). The following witnesses testified at the hearing: Applicant, George Speedy (Counsel), Tova Clayton, Robert Dennis, Karen Castles, Tiffany Drew, Barry Glymph, Kevin Chalk, Gwen Ray, Marsha Valasco, Michael Clayton, Sr., and Dave Anatra. Also before the Court were the Fairfield County Clerk of Court records of the underlying convictions, the plea transcript, and the PCR application.

After review of the record and all evidence presented, for the reasons stated below, the Court concludes Counsel was neither deficient nor was Applicant prejudiced by Counsel's alleged

deficiencies. Accordingly, the Court denies relief on all allegations and dismisses the action with prejudice.

II. FACTS & PROCEDURAL HISTORY

Applicant is currently on probation. Applicant was indicted at the August 2018 term of the Fairfield County Grand Jury for second-degree criminal sexual conduct (CSC) with a minor (2018-GS-20-181). Applicant was represented by George Speedy (Counsel) of Speedy, Tanner & Atkinson, LLC. Assistant Solicitor Julie Hall prosecuted the case.

On August 27, 2018, Applicant pleaded pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970), to two counts of second-degree CSC with a minor before Judge John C. Hayes, III. Applicant waived presentment of the additional second-degree CSC with a minor charge at the plea hearing. (Plea Tr. 4-5).

Applicant's charges stem from his relationship with Tova Clayton (Tova) and her two daughters—Victim 1 and Victim 2.[1] Tova and her four children (Victim 1, Victim 2, child 1, and child 2) moved into Applicant's home in 2003. Victim 1 and Victim 2 had separate bedrooms across the hall from each other. (Plea Tr. 10).

In 2004, Applicant began visiting Victim 1 and Victim 2's rooms separately. Applicant would enter one victim's bedroom, stay in the room for about ten minutes, and then transition to the other victim's bedroom. Victim 1 and Victim 2 both reported Applicant digitally penetrated their vaginas, groped them, and made them touch his penis on several occasions during his visits

[1] The victims are referred to in this order as Victim 1 and Victim 2 pursuant to the Supreme Court's order regarding personal identifiers. *See Re: Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings*, S.C. Sup. Ct. Order filed April 15, 2014 ("If a minor is the victim of a sexual assault or the victim in an abuse or neglect case, the minor's name must be completely redacted and a term such as 'victim' or 'child' should be used.").

to their bedrooms over the course of several years. (Plea Tr. 10-11). Applicant molested Victim 1 from age ten-to-fourteen, and Victim 2 from age eleven-to-eighteen. (Plea Tr. 11-12).

The plea court conducted a thorough plea colloquy at the plea hearing. The plea court explained the meaning of an *Alford* plea. (Plea Tr. 6). The plea court explained "while you're maintaining your innocence you have decided it's in your best interest based on the State's recommendation and your feeling that were you to go to trial a jury most probably or likely would find you guilty." Applicant understood the meaning of an *Alford* plea. (Plea Tr. 6). The plea court then explained the charges against Applicant and the sentencing exposure Applicant faced. Applicant stated he understood. (Plea Tr. 6–7). Applicant affirmed he had not been promised or threatened into pleading guilty, he was not intoxicated, and he was pleading freely and voluntarily. (Plea Tr. 8). The plea court then explained Applicant's constitutional rights: to a jury trial; the presumption of innocence; the State always has the burden of proof beyond a reasonable doubt; to remain silent; to confront the State's witnesses; and the right to present witnesses in defense. (Plea Tr. 8–9). Applicant understood his constitutional rights, and Applicant understood he waived those constitutional rights by pleading guilty. (Plea Tr. 9).

Judge Hayes accepted Applicant's *Alford* plea and sentenced him to serve concurrent terms of imprisonment for five years on each charge, suspended upon the service of five years' probation. Applicant did not appeal.

III. ALLEGATIONS

Applicant timely commenced this PCR action on March 19, 2019, alleging ineffective assistance of counsel rendering his *Alford* plea unknowing and involuntary. Applicant asserts Counsel was deficient in several aspects, and contends he would not have plead guilty but for Counsel's alleged deficiencies. Applicant amended/supplemented his allegations on January 13

and January 17, 2020. At the outset of the PCR hearing, PCR counsel clarified Applicant was proceeding on the issues contained in the second amendment, as all issues previously raised in the original application and first amendment were contained in the second amendment. Therefore, the sum of Applicant's allegations of ineffective assistance of counsel and involuntary guilty plea are as follows:

1. Involuntary guilty plea due to Counsel's:
    a. Failure to investigate;
    b. Failure to interview critical witnesses who could have challenged the credibility of the State's witnesses and could have undermined the State's evidence when it was reasonable and necessary to do so in preparation for trial;
        i. Specifically, Tova Clayton, Meredith Suber, Cindy Long, and Roger Long regarding the allegations of the victims' disclosure of sexual abuse;
    c. Failure to interview potential character witnesses;
    d. Failure to review pictures Applicant possessed that would have contradicted portions of the victims' statements to the police;
    e. Failure to interview the Newberry County law enforcement officers who received the report filed in Newberry County by the victims' biological father and for failing to further investigate the complaint when Newberry County law enforcement did not pursue charges against Applicant;
        i. Specifically, Lt. Garrett Lominack and Inv. Robert Dennis;
    f. Failure to adequately prepare for trial;
    g. Decision to change the trial strategy immediately before trial;
    h. Erroneous and coercive advice that Applicant plead guilty the morning of trial;
    i. Failure to advise Applicant of all sentencing consequences; specifically, Applicant would be required to register as a sex-offender, comply with special conditions of supervision, and attend specific treatment demanding he accept responsibility for the offenses with polygraph testing;
    j. (same as allegation (e)).

Applicant requests relief in the form of a new trial.

IV. PCR TESTIMONY

Tova Clayton

Tova Clayton testified at the PCR hearing.[2] Tova testified she gave a statement to Investigator Karen Castles of the Fairfield County Sheriff's Department during law enforcement's investigation. Tova testified she learned about the alleged abuse from her mother, Jane Barefoot. When Tova learned of the abuse, Victim 1 had already moved out of the home and into Barefoot's home, and Victim 2 was still in school. Tova did not recall the exact date she learned of the abuse from Barefoot; however, she remembered Barefoot told her before Easter. Tova testified Barefoot told her Applicant abused Victim 1. While Tova never saw the alleged abuse occur, she did recall previously seeing Applicant exit Victim 1's room with an erection.

Tova testified the first person she confronted about seeing Applicant with an erection was Applicant, and she did so immediately after seeing him walk out of Victim 1's room. She testified she told Castles about the erection incident, and she told Castles she confronted Applicant and Victim 1 about the erection incident. Tova stated she got angry and yelled at Applicant and asked him what happened, but Applicant told her she was overreacting. Tova then confronted Victim 1, and Barefoot confronted Victim 1 as well. Tova testified Barefoot was the first outside person she told about the erection incident.

[2] Tova was present and represented by Terri H. Bailey, Esquire, of the South Carolina Victim Assistance Network. Tova, through counsel, moved to quash the subpoena because Tova was not present at the plea hearing. Applicant responded Tova was a critical witness that would have testified had Applicant's case gone to trial because she was married to Applicant, lived in the same home of the alleged events, and she was interviewed by law enforcement in its investigation. In reply, Tova asserted testifying would be a traumatic event, and anything she would testify to could come into evidence through Counsel. The Court denied Tova's motion to quash the subpoena finding Tova's testimony was critical to the *Strickland* inquiry.

Tova testified she learned of Victim 2's allegations from a letter Victim 2 gave her with details describing the abuse. Tova testified that Victim 2 initially told her nothing happened between Applicant and Victim 1; however, when Victim 2 turned eighteen, she told Tova what happened. Tova testified she told Castles that Victim 1 initially told her nothing happened between her and Applicant.

Tova testified her ex-husband, the victims' biological father, called her about alleged abuse, and she learned that he complained about the alleged abuse to the Newberry County Sheriff's Department. Tova stated her ex-husband filed the complaint long after the erection incident occurred; however, Barefoot had told her about Victim 1's disclosure a few weeks before her ex-husband reported the abuse.

Tova testified about her divorce from Applicant. She recalled the divorce occurred in 2015 or 2016, and the ground for divorce was adultery. After her memory was refreshed, Tova testified she did not put anything about the sexual abuse in her divorce affidavit. Tova stated she made the affidavit before she learned of the sexual abuse. Tova's affidavit was admitted into evidence without objection. (App's Ex. 1).

Tova then testified she and Applicant exchanged text-messages after Applicant filed for divorce. These text-messages were admitted into evidence without objection. (App's Ex. 2). Tova testified she was shocked Applicant filed for divorce because she had already contacted a lawyer about filing for divorce. She testified they were getting divorced because Applicant was having a baby with another woman. The divorce was finalized June 21, 2016. Tova recalled Victim 2 called law enforcement to report the sexual abuse on June 23, 2016, two days after the divorce was final.

Tova gave a timeline of the events that occurred. She and Applicant met over the internet in 2003. Tova moved to South Carolina in December 2003. She officially moved in with Applicant

in June 2004. Applicant proposed on July 4, 2004, and they married in 2005. Tova returned to work in June 2006, and Tiffany Drew would babysit. In August 2006, the victims had separate bedrooms after Applicant's grandmother passed away. In March 2007, Tova's parents moved into the home. Victim 1 graduated high school in June 2011, and she moved out in either June or July of that year. In September 2011, Jeremy, a cousin, moved into the home. Victim 2 graduated high school in June 2012. Tova moved out in October 2012. She would still let her sons, child 1 and child 2, visit and stay with Applicant after she learned of the allegations. Tova moved back in with Applicant a year later. In 2014, Tova asked Applicant if he would take care of her sons if she went to jail for smacking Victim 1. On March 28, 2015, Tova received a text-message from Applicant asking for a divorce. Tova testified she received no alimony from the divorce.

Robert Dennis

Investigator Robert Dennis of the Newberry County Sheriff's Department testified he received a sexual abuse complaint on December 8, 2011, from the victims' father. Dennis explained the father stated his daughter told him she was inappropriately touched by Applicant, and the father told his daughter to she needed to report the abuse to the police. Dennis's report was admitted into evidence without objection. (App's Ex. 3).

Dennis testified he spoke to the father and discovered the incident occurred in Fairfield County, not Newberry County, and did not conduct much follow up investigation besides attempting to discern where the incident occurred. Dennis testified the Solicitor's Office in Fairfield County informed him they were preparing a case, so he stopped investigating. He never attempted to speak to the victims, Applicant, or Tova. Dennis testified he made the determination the allegation was unfounded because there was nothing indicating the events occurred in Newberry County.

Karen Castles

Investigator Karen Castles of the Fairfield County Sheriff's Department recalled receiving a sexual abuse complaint regarding Applicant on June 23, 2016. Castles recalled she spoke to someone at the Newberry County Sheriff's Department regarding a similar complaint on November 8, 2016. Castles stated she received the Newberry report. Castles recalled Tova and Applicant stating in their interviews they had divorced two days before the complaint was filed. Castles's believed she spoke to the victims' father, but she did not have that conversation documented. Castles recalled she reviewed Victim 2's mental health record during her investigation. Victim 2's mental health record and the report of the mental health records were admitted into evidence without objection. (App's Ex. 4, under seal). She also interviewed Applicant once, someone named Ciera twice, Tova once, Jane Barefoot once, Victim 1 once, and Victim 2 once.

Castles recalled Victim 1 told her about the erection incident in her interview, but did not think Tova reported the erection incident. She recalled the erection incident occurred around Easter when Victim 1 was thirteen or fourteen. Castles stated Tova told her that Tova confronted Victim 1 about the abuse when Victim 2 was seventeen; however, Tova stated Victim 2 denied the allegations. Castles recalled Victim 1 informed her she told Tova everything in 2012 after she disclosed the abuse to her grandmother Jane Barefoot. Castles initial report and her notes were entered into evidence without objection. (App's Ex. 6 & 7).

Castles recalled Applicant told her that Tova wanted to have a baby with him, and had her "tubes untied" to try and have a child with him. Castles recalled speaking to Meredith Suber, who was Victim 2's friend, but Suber and Victim 2 had a falling out because Suber slept with Applicant and was pregnant with his child. Castles stated Victim 2 stated she filed the complaint because she

heard Applicant was going to have another child and she did not want the baby to get molested like she did.

Castles clarified she gathered the evidence and consulted with the Solicitor's Office before filing any charges. Further, she conducted all of the interviews before bringing any charges. Castles stated she reached out to the Newberry County Sheriff's Department after Victim 1 mentioned the Newberry charges. Finally, Castles clarified that Suber told her that Victim 2 told Suber about the abuse when they were younger. Suber told Castles she felt guilty for sleeping with Applicant knowing that Applicant abused Victim 2 when they were younger. Castles Clarified Victim 2 disclosed to Suber before their falling out.

Tiffany Drew

Tiffany Drew testified she is Applicant's cousin and lives close to Applicant. Drew recalled Applicant, Tova, Victim 1, Victim 2, child 1, child 2, and Applicant's mother lived in the home. Drew stated she and the victims were friends and hung out every day after school. She stated Applicant would play with the children. Drew testified Victim 2 told her she did not like Applicant because he was a disciplinarian and that Tova did not discipline the children. Drew stated Applicant treated Tova's children as if they were his own children and would discipline them if they acted irresponsibly. Drew recalled an incident between Victim 1, Victim 2, and their bus driver where the victims alleged the bus driver was racist. However, this allegation was unfounded. Drew remembered several other instances where the victims lied. However, Drew never saw Applicant do anything inappropriate.

Barry Glymph

Barry Glymph testified he worked at VC Summer with Applicant for nearly twenty years. Glymph described Applicant as a good step-father, father, and trustworthy person. Glymph

admitted he was testifying because he believed in him, and would not think twice about leaving his children alone with Applicant.

Kevin Chalk

Kevin Chalk also was Applicant's co-worker at VC Summer. Chalk testified he and Applicant were close friends and would work out together daily after work. Chalk testified Applicant lived with him for five-and-a-half months after the divorce. Chalk testified Applicant was generous and trustworthy. Chalk admitted he was Applicant's close friend and would trust him with his children. Chalk testified he did not believe the allegations were true.

Gwen Ray

Gwen Ray testified she is Applicant's aunt. She testified she never saw any animosity towards Applicant from Tova's children, and Applicant basically raised Tova's boys, child 1 and child 2, as his own. She stated Applicant raised the boys and Tova raised the girls. Ray testified Applicant was a strict father. She also testified she trusted Applicant and would feel comfortable letting him watch her children. Ray recalled the victims did not move into their own room until Applicant's grandmother died.

Marsha Valasco

Marsha Valasco testified Applicant is her son. She recalled living with Applicant for over a year in 2005. Valasco recalled Applicant was the disciplinarian in the relationship. Valasco described the layout of the home, and stated that when she lived there the victims shared a room.

Michael Clayton, Sr.

Michael Clayton, Sr., testified he is Applicant's father, and he was present the morning of trial. He stated he traveled from New York to South Carolina for the trial. Clayton testified they were waiting for the trial to start and Counsel stated he was going to put Applicant on the stand to

testify, while another lawyer was pressuring Applicant to decide whether he wanted to go to trial or plead guilty. Clayton testified that, in his opinion, the lawyers seemed unprepared for trial and wanted Applicant to plead guilty. Clayton believed the lawyers were unprepared because earlier they planned not to call any witnesses. He testified the lawyers left the conference room they were in and went and spoke to the prosecutor, and when they returned, they wanted Applicant's decision on a plea or trial and stated they would call Applicant as a witness if he chose trial. Clayton stated he did not hear anything about the sex-offender registry when he was with Applicant and his attorneys.

Dave Anatra

Dave Anatra testified he was a licensed private investigator hired by PCR counsel to look into Applicant's case. Applicant proffered Anatra as an expert witness in investigations, and the State objected. The State argued anything regarding the investigation could be testified to by Counsel, and whether Counsel reasonably investigated was a legal conclusion for the Court to decide, not an expert witness. The Court declined to rule Anatra was an expert witness but allowed Anatra to testify.

Anatra testified he reviewed the plea transcript, the discovery, the video interviews, and looked into what witnesses Counsel investigated. Anatra testified he reviewed Counsel's entire case file. Anatra testified he attempted to speak to and interview the victims and Tova, but they all declined to speak to him. However, Anatra was able to interview the witnesses from the Sheriff's offices. Anatra also testified he contacted Meredith Suber, who did not testify, and Applicant's cousin who testified. Anatra testified Suber told him she was in school when Victim 2 made the allegations that Applicant had touched her in ways he should not have.

Anatra clarified that Suber heard from Victim 2 that Applicant had touched her, and Suber stated Victim 2 disclosed the abuse to her before she had sex with Applicant.

Applicant

Applicant testified he previously worked at VC Summer for nineteen years, and he currently works for Saluda Hill Landscapes, since 2017, where he is in a senior management position. Applicant recalled he and Counsel discussed the allegations and Applicant's version of events in their first meeting. Applicant also recalled Counsel discussing the charges against him and the exposure he faced. Applicant remembered Counsel moved for discovery and then provided him with the discovery so Applicant could make notes regarding it. Applicant also recalled Counsel provided him with the police interviews, and Counsel wanted Applicant to make a timeline of the events. Applicant stated he made a timeline from when he met Tova until his arrest, including when Tova and her children started visiting him, when Tova and her children moved into his home, and other significant events that occurred during that timeframe. Applicant stated that eventually, Tova wanted to move out and go out and party every weekend. Applicant stated he and Counsel met and compared their respective timelines.

Applicant testified that initially, Counsel told him he would not testify at trial. Applicant recalled he heard from Counsel every three months during Counsel's representation unless Counsel had something new to discuss with him. Applicant recalled Counsel would send him a letter if something new came up they needed to discuss. Applicant testified that during trial preparation, he provided Counsel with his divorce documents, his preliminary hearing documents, exhibits Tova introduced into evidence during the divorce proceeding, and some pictures. Applicant recalled meeting with Counsel to review the video interviews and compare notes.

However, Applicant stated Counsel did not want to introduce evidence at trial because Counsel wanted to preserve the last argument to the jury.

Applicant stated he told Counsel he had a number of witnesses he wanted called at trial, but calling those witnesses did not fit into Counsel's trial strategy. Applicant recalled Counsel informing him he planned on attacking the State's witnesses' inconsistencies to show reasonable doubt. Applicant did not think Counsel investigated any potential witnesses, and Counsel also did not discuss the possibility of hiring a personal investigator for the case. Applicant informed Counsel his mother, father, and aunt—who paid the retainer—could potentially be witnesses.

Applicant recalled meeting with Counsel several times the week before trial. Applicant stated he informed Counsel he would not take a plea deal that included a felony charge or required him to register as a sex-offender. Applicant recalled Counsel took a plea offer to the State for a plea to second-degree assault and battery, but the State rejected the offer.

Applicant stated that on the morning of trial, he was prepared to go to trial and not testify because Counsel had not prepped him to testify. However, the morning of trial, Counsel told Applicant that after speaking to his associate, Trey Cook, Esquire, Counsel thought Applicant would be a good witness and should testify. Applicant clarified Counsel wanted him to testify, but Applicant knew he did not have to testify at trial. Applicant also stated that Counsel was sure he could get the original plea deal back on the table that morning. Applicant believed the original plea offer was similar to the offer he accepted. Applicant felt as though Counsel "played [his] emotions" by telling Applicant he might not go home that night if they went to trial, which made Applicant emotional. Applicant recalled Counsel suggested that he take the plea offer, but Counsel also told him they stood a good chance at trial. However, Applicant asserted he was prepared to testify at trial but would have liked to have been prepped by Counsel to testify.

Applicant testified he was concerned because Counsel's trial strategy had changed the morning of trial but there were no other witnesses prepared to testify on his behalf. This led Applicant to question how much time Counsel put into preparing his case for trial, and made Applicant believe Counsel was not ready for trial because of the rapid change in strategy. Applicant stated the fear of not being able to go home affected his decision to enter the plea. Applicant stated that had he felt Counsel was prepared for trial, he would never have taken the plea. Further, he would have proceeded to trial if his witnesses had been present and ready to testify. Applicant opined he would have won at trial due to the inconsistencies in the State's witnesses' stories and his character witnesses.

Applicant testified Counsel did inform him he would have to register as a sex-offender; however, Counsel did not tell Applicant everything that went along with registering as a sex-offender. Specifically, Applicant complained he had to attend counseling for eighteen months. Applicant stated that his counseling required him to confess his crime, or he would not be allowed to continue the program. Applicant felt his counseling contradicted his taking of an *Alford* plea, but if he did not confess to something, he felt it would constitute a parole violation. Applicant stated he was unaware of the counseling aspect until the plea judge informed him of it during the plea colloquy. Applicant stated he was handed the sex-offender conditions after he entered his plea, and he never reviewed the conditions with Counsel. A document setting out Applicant's sex-offender conditions was entered into evidence without objection. (App's Ex. 8). However, Applicant recalled Counsel explaining to him his plea to second-degree CSC with a minor would not require him to be GPS monitored like a plea to first or third-degree CSC with a minor would. Applicant testified the State offered a plea to second-degree CSC with a minor because it knew he would not accept a plea offer requiring GPS monitoring.

Applicant recalled being sworn-in at the plea hearing. Applicant recalled waiving presentment of one of his charges. He recalled informing the plea court no one had promised him anything or threatened him into pleading. Applicant stated it was his decision to plead.

In sum, Applicant believed Counsel was not prepared for trial because: Counsel could not keep the names of the children straight; every time they met, Applicant had to go back over the basic facts of the case with Counsel; Counsel changed the trial strategy at the last minute; Applicant felt coerced to plead guilty in the moment; Counsel did not interview Tova; and they briefly discussed the Newberry charge, but it ended up being unfounded.

Counsel

Applicant called George Speedy, Esquire (Counsel), at the PCR hearing. Counsel has been practicing law in South Carolina since 1975. Counsel was retained in this case.

Counsel testified he first met with Applicant, then got the discovery. Counsel then tried to talk to people that knew about Applicant's case. Counsel testified he did not try and speak to Tova or the victims because he knew they would not speak to him about the case. Counsel stated he never likes to put his client on the stand and prefers not to put up any evidence. Counsel explained in this case, after reviewing everything and speaking to Applicant, he felt having the last word to the jury was the best strategy.

Counsel stated he reviewed his file prior to the PCR hearing and none of Applicant's PCR witnesses were in his file, indicating he was not asked to look into them as witnesses. However, Counsel testified he would not have called the witnesses presented at the PCR hearing because the risk of something damaging coming out was too great. Further, Counsel testified that a lot of the witnesses presented at PCR testified to things he would not have wanted to come out at trial. Specifically, Counsel asserted he would not have subpoenaed Tova had the case gone to trial.

Counsel testified he advised Applicant of the value of having witnesses; however, he told Applicant the trial would hinge on the victims' credibility—if the jury believed the victims, Applicant would be convicted.

Counsel stated he created a timeline as well for trial and highlighted the inconsistencies in the victims' statements throughout the timeline. Counsel testified he and Applicant compared each other's timelines and reviewed where the State's witnesses' stories changed. Counsel refuted Applicant's testimony that he changed the strategy just before trial. Counsel stated if he had changed the strategy, he would have done so during trial, not before. Counsel specifically refuted ever having a conversation with Applicant urging Applicant to testify.

Counsel recalled the Thursday before trial was scheduled to start, he got a call from the Solicitor's Office, and the possibility of a plea came up. Counsel could not recall how the offer specifically came up, but he remembered the State conveying the victims would go along with a probationary sentence for Applicant to plead to third-degree CSC with a minor. However, a third-degree CSC would entail mandatory GPS monitoring and sex-offender registry. Counsel recalled Applicant did not want to accept the offer, so they countered with second-degree assault and battery; however, the State refused their offer.

Counsel spent the weekend before trial preparing. Counsel brought in his associate, Trey Cook, to be his second chair and help with trial preparation. Counsel testified he was ready for trial, and he assured Applicant he was ready to go to trial. However, the day trial was scheduled to begin, the State reopened plea negotiations and reoffered the original offer. Counsel recalled Applicant's parents being present during their discussion of the plea offer, with Applicant's father in favor of the plea offer and his mother in favor of going to trial.

Counsel stated he contemplates hiring a personal investigator in every case, but he did not see the need to hire one in this case and chose not to. Counsel recalled advising Applicant there would be restrictions on where he could go and that he would have to have treatment. Counsel stated he spoke to Castles and made sure she had given him everything.

Counsel testified if he had changed his strategy, he would have investigated the character witnesses, but he did not investigate the character witnesses because he did not change his trial strategy. Counsel stated his trial strategy was to pick apart the case based on the witnesses' inconsistencies. Counsel recalled making checklists for each of the State's witnesses to prepare for his cross-examination and still had the checklists in his file.

Counsel reiterated he was ready for trial, but it was Applicant's decision to plead guilty. Counsel felt he conducted a reasonable investigation in gathering what he determined to be the relevant evidence, which he for hours. Based on what he had, Counsel did not see the need for further investigation. Counsel further testified he did not see the need to contact the victims, Tova, Suber, or the Newberry witnesses because they were all adverse witnesses. Counsel did not want to contact these witnesses because it risked them getting adversely involved in the case.

Counsel clarified he was aware of the Newberry report and had seen it was unfounded. Counsel stated he chose not to pursue it any further because he saw no value in the report, only risk. He and Applicant discussed the report and they both felt the allegations arose from the divorce situation because Applicant was arrested two days after the divorce was finalized.

Counsel stated he explained to Applicant his strategy of preserving the last closing argument, and he felt Applicant understood it was Applicant's decision whether to testify. Counsel reiterated that Tova was subpoenaed as a State's witness, and he planned to cross-examine her about her still allowing her sons to visit Applicant even after the allegations came out. Counsel did

not think he would have pursued a good character jury charge because he felt he would have needed to present character witnesses to support the charge, and he did not want to call any witnesses and lose the last closing argument. Counsel testified he would not have called Suber as a defense witness.

Counsel stated he advised Applicant he would have to register as a sex-offender by accepting the plea offer. Counsel also stated the plea court went along with the State's recommendation. Counsel testified he did not force Applicant to take the plea offer, he advised Applicant of his rights, and he recommended Applicant accept the plea offer.

V. DISCUSSION

This Court has reviewed the record and evidence introduced at the hearing. This Court has also observed the witnesses presented at the evidentiary hearing, judged their credibility, and weighed their testimony accordingly in its discussion below. Set forth below are findings of fact and conclusions of law as required by section 17-27-80 of the South Carolina Code (2014).

1. Involuntary Guilty Plea

Applicant asserts he did not knowingly and voluntarily enter his *Alford* plea due to ineffective assistance of Counsel. An applicant who entered a plea on the advice of counsel may only attack the knowing and voluntary nature of the plea by showing ineffective assistance of counsel. *Roscoe v. State*, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001). To establish ineffective assistance of counsel, the PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness, and (2) the applicant sustained prejudice as a result of counsel's deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984); *Cherry v. State*, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989).

For deficiency, the applicant must show counsel's performance was not "within the range of competence demanded of attorneys in criminal cases." *Watson v. State*, 287 S.C. 356, 357, 338 S.E.2d 636, 637 (1985). For prejudice in the context of a guilty plea, the applicant must show a reasonable probability he would not have pleaded guilty and would have insisted on going to trial absent plea counsel's alleged deficiency. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). "In assessing prejudice under *Strickland*, the question ***is not*** whether a court can be certain counsel's performance had no effect on the outcome . . . ." *Harrington v. Richter*, 562 U.S. 86, 111 (2011) (emphasis added). "Instead, *Strickland* asks whether it is 'reasonably likely' the result would have been different." *Id.* (quoting *Strickland*, 466 U.S. at 696). "The likelihood of a different result must be substantial, not just conceivable." *Id.* at 112.

The test 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." *Alford*, 400 U.S. at 31. "To find a guilty plea is voluntary and knowingly entered into, the record must establish the defendant had a full understanding of the consequences of his plea and the charges against him." *Boykin v. Alabama*, 395 U.S. 238, 242 (1969). "[A] defendant must be aware of the privilege against self-incrimination, the right to a jury trial, and the right to confront one's accusers." *Roddy v. State*, 339 S.C. 29, 33, 528 S.E.2d 418, 421 (2000). Further, "[A] defendant entering a guilty plea must be aware of the nature and crucial elements of the offense, the maximum and any mandatory minimum penalty, and the nature of the constitutional rights being waived." *Pittman v. State*, 337 S.C. 597, 599, 524 S.E.2d 623, 624 (1999).

"A defendant's knowing and voluntary waiver of the constitutional rights which accompany a guilty plea may be accomplished by colloquy between the Court and the defendant, between the Court and defendant's counsel, or both." *Pittman*, 337 S.C. at 600, 524 S.E.2d at 625.

"[T]he voluntariness of a guilty plea 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 v. Leeke*, 282 S.C. 131, 133, 318 S.E.2d 360, 361 (1984). "When determining issues relating to guilty pleas, [courts] will consider the entire record, including the transcript of the guilty pleas and the evidence presented at the PCR hearing." *Roddy*, 339 S.C. at 33, 528 S.E.2d at 420.

Investigation

First, Applicant alleges trial counsel was not prepared for trial because Counsel failed to investigate the case. Specifically, Counsel was ineffective for: (a) failing to investigate generally; (b) failing to interview critical witnesses who could have challenged the credibility of the State's witness and could have undermined the State's evidence when it was reasonable to do so in preparation for trial; (c) failing to interview potential character witnesses; (d) failing to review pictures Applicant possessed that would have contradicted portions of the victims' statements to the police; and (e) failing to interview the Newberry County law enforcement officers who received the report filed by the victims' biological father and for failing to further investigate the complaint when Newberry County law enforcement did not pursue charges against Applicant. The Court disagrees.

Counsel must, at a minimum, make some effort to interview potential witnesses identified by the defendant, and make an independent investigation of the facts and circumstances of the case. *Edwards v. State*, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011); *Walker v. State*, 407 S.C. 400, 405, 756 S.E.2d 144, 147 (2014). However, no particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant.

Strickland, 466 U.S.at 688-689. "Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." *Id.* at 691. Therefore, judicial scrutiny of counsel's performance must be highly deferential. *Id.* at 689. Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. *Roseboro v. State*, 317 S.C. 292, 454 S.E.2d 312 (1996); *Underwood v. State*, 309 S.C. 560, 425 S.E.2d 20 (1992); *Stokes v. State*, 308 S.C. 546, 419 S.E.2d 778 (1992).

Further, "Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel." *Whitehead v. State*, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992). In making a fair assessment of attorney performance, a court must make every effort 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." *Strickland*, 466 U.S. at 689.

a. Failure to investigate generally

Applicant asserts Counsel failed to adequately investigate his case. However, the Court finds, based on the PCR testimony, it is clear Counsel diligently and reasonably investigated the case to prepare for trial. The Court finds credible Counsel's testimony he reviewed all the discovery in the case, discussed the discovery with Applicant, viewed the police interviews, and looked into the Newberry County charges. Further, Applicant provided Counsel with the information and court documentation from Applicant and Tova's divorce. Counsel then used the discovery and the divorce documents to create a timeline to formulate and prepare his trial strategy. Applicant also recalled Counsel asking him to create a similar timeline for the two to compare in preparation for trial. Then, Counsel decided his trial strategy would be to attack the victims' and Tova's credibility by showing the allegations were retaliation for the divorce. Based on the

foregoing, the Court finds Counsel's investigation and trial preparation well within the reasonable professional norms of criminal defense attorneys. Therefore, Counsel was not deficient for failing to reasonably investigate the case.

As for prejudice, the Court finds credible Applicant's testimony he entered the *Alford* plea because he feared not being able to go home. Applicant faced the choice of pleading and receiving a probationary sentence, or going to trial and risking imprisonment. Applicant chose to plead to avoid imprisonment. Therefore, he has failed to show prejudice. *See Goins v. State*, 397 S.C. 568, 575, 726 S.E.2d 1, 4 (2012) (noting an applicant cannot establish prejudice where the defendant did not choose to plead guilty on basis of erroneous advice, but rather on basis of the State's offer to dismiss two charges and recommend a ten year sentence).

Based on the foregoing, Counsel was not deficient for failing to investigate, and Applicant was not prejudiced by Counsel's alleged deficiency; therefore, Counsel was not constitutionally ineffective. As such, the Court denies relief and dismisses this allegation with prejudice.

b. Failure to interview key witnesses

Applicant contends Counsel was ineffective for failing to interview critical witnesses who could have challenged the credibility of the State's witnesses and could have undermined the State's evidence at trial. Specifically, Applicant contends Counsel should have interviewed Tova Clayton, Meredith Suber, Cindy Long, and Roger Long regarding the victims' disclosure of sexual abuse. The Court disagrees.

First, the only fact witness Counsel allegedly failed to interview who could have challenged the State's witnesses' credibility and undermined the State's evidence at trial presented at the PCR hearing was Tova Clayton. Therefore, Counsel cannot be constitutionally ineffective for failing to investigate Meredith Suber, Cindy Long, and Roger Long because Applicant has failed to show

any prejudice resulted from Counsel's alleged failure to investigate them. *See Glover v. State*, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995) (stating a PCR applicant must produce the witnesses at the PCR hearing, or otherwise introduce the witnesses' testimony, to support a claim that counsel was ineffective for failing to interview potential witnesses because speculation as to how Counsel's failure to investigate said witnesses cannot satisfy the applicant's burden of showing prejudice).

As for Counsel's alleged failure to interview Tova, the Court finds reasonable Counsel's decision not to do so. As noted above, Counsel testified he did not interview Tova because he knew she would not speak to him about the case because she was an adverse witness. The Court finds, based on its observation of Tova's testimony at PCR, she was in fact an adverse witness who was not willing to aid in Applicant's defense. This finding is further supported by Applicant's PCR investigator's testimony that he unsuccessfully attempted to interview Tova. Therefore, Applicant has failed to show Counsel was deficient for failing to interview Tova because he correctly concluded she was an adverse witness who was unwilling to aid Applicant's defense.

As for prejudice, the Court finds credible Applicant's testimony he entered the *Alford* plea because he feared not being able to go home. Applicant faced the choice of pleading and receiving a probationary sentence, or going to trial and risking imprisonment. Applicant chose to plead to avoid imprisonment. Therefore, he has failed to show prejudice. *See Goins*, 397 S.C. at 575, 726 S.E.2d at 4 (noting an applicant cannot establish prejudice where the defendant did not choose to plead guilty on basis of erroneous advice, but rather on basis of the State's offer to dismiss two charges and recommend a ten year sentence).

Based on the foregoing, Counsel was not deficient for failing to interview key witnesses, and Applicant was not prejudiced by Counsel's alleged deficiency; therefore, Counsel was not

constitutionally ineffective. As such, the Court denies relief and dismisses this allegation with prejudice.

c. Failure to interview character witnesses

Applicant alleges Counsel was ineffective for failing to interview potential character witnesses. The Court disagrees.

As stated above, Applicant testified he told Counsel of witnesses he wanted called at trial, but Counsel explained to him that calling those witnesses did not fit into Counsel's trial strategy. Applicant recalled Counsel informing him he planned on attacking the State's witnesses' inconsistencies to show reasonable doubt. Applicant stated that on the morning of trial, he was prepared to go to trial and not testify or present any character witnesses. Applicant recalled Counsel suggested that he take the plea offer the morning of trial, but Counsel also told him they stood a good chance at trial.

Applicant testified, however, the morning of trial, Counsel told Applicant that after speaking to his associate, Trey Cook, Esquire, Counsel thought Applicant would be a good witness and should testify. Applicant clarified Counsel wanted him to testify, but he knew he did not have to testify at trial. However, Applicant stated he was concerned because Counsel's trial strategy had changed the morning of trial but there were no other witnesses prepared to testify on his behalf. This led Applicant to question how much time Counsel put into preparing his case for trial, and made Applicant believe Counsel was not ready for trial because of the rapid change in strategy. Applicant stated that had he felt Counsel was prepared for trial, he would never have taken the plea. Further, he would have proceeded to trial if his witnesses had been ready to testify.

Counsel stated he was fully prepared to go to trial, and he told Applicant he was prepared for trial the morning of trial. Counsel stated he reviewed his file prior to the PCR hearing and none

of Applicant's PCR witnesses were in his file indicating he was not asked to look into them as witnesses. However, Counsel testified he would not have called the witnesses presented at the PCR hearing because the risk of something damaging coming out was too great.

Counsel refuted Applicant's testimony that he changed the strategy just before trial. Counsel stated if he had changed the strategy, he would have done so during trial, not before. Counsel specifically refuted ever having a conversation with Applicant urging Applicant to testify.

The Court finds credible Counsel's testimony he did not change his trial strategy the morning of trial, and he assured Applicant he was prepared to go to trial. The Court finds not credible Applicant's assertion that Counsel changed his trial strategy the morning of trial. Additionally, the Court finds reasonable Counsel's articulated strategy of not presenting a defense, but rather attacking that State's case through cross-examination of its witnesses. *See Whitehead*, 308 S.C. at 122, 417 S.E.2d at 531 ("Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel."). Therefore, Counsel was not deficient for failing to investigate the character witnesses because Applicant agreed with Counsel's reasonable strategy, and Counsel did not change his trial strategy.

As for prejudice, the Court finds not credible Applicant's assertion he would have chosen to go to trial had his witnesses been present and ready to testify. Applicant's own testimony that he was prepared to go to trial without presenting any evidence or testimony conflicts this assertion. Additionally, while Applicant alleged Counsel wanted him to testify, Applicant knew he did not have to testify at trial. Therefore, even if Counsel had wanted to call Applicant as the only witness, Applicant knew he did not have to testify or put up any defense.

However, the Court finds credible Applicant's testimony he entered the *Alford* plea because he feared not being able to go home. Applicant faced the choice of pleading and receiving a probationary sentence, or going to trial and risking imprisonment. Applicant chose to plead to avoid imprisonment. Therefore, he has failed to show prejudice. *See Goins*, 397 S.C. at 575, 726 S.E.2d at 4 (noting an applicant cannot establish prejudice where the defendant did not choose to plead guilty on basis of erroneous advice, but rather on basis of the State's offer to dismiss two charges and recommend a ten year sentence).

Based on the foregoing, Counsel was not deficient for failing to interview character witnesses, and Applicant was not prejudiced by Counsel's alleged deficiency; therefore, Counsel was not constitutionally ineffective. As such, the Court denies relief and dismisses this allegation with prejudice.

d. Failure to review pictures Applicant possessed

Applicant alleges Counsel was ineffective for failing to review pictures Applicant possessed that would have contradicted portions of the victims' statements to the police. The Court disagrees.

Applicant introduced pictures of text messages between himself and Tova discussing their divorce. (App's Ex. 2). The pictures were included in the materials Applicant provided to Counsel from Applicant's divorce proceedings. Counsel testified he created a timeline of the events using the discovery and divorce materials for trial and highlighted the inconsistencies in the victims' statements throughout the timeline. Counsel testified he and Applicant compared each other's timelines and reviewed where their stories changed. As found above, Counsel articulated a reasonable strategy for attacking the victims' and Tova's credibility by preparing thorough cross-examinations. However, he never needed to employ his prepared cross-examinations because

Applicant chose to accept the State's plea offer. The Court finds Applicant has failed to show how Counsel was deficient because Counsel used the material's from Applicant's divorce, which included the pictures, to formulate his cross-examination to attack the victims' and Tova's credibility.

As for prejudice, the Court finds credible Applicant's testimony he entered the *Alford* plea because he feared not being able to go home. Applicant faced the choice of pleading and receiving a probationary sentence, or going to trial and risking imprisonment. Applicant chose to plead to avoid imprisonment. Therefore, he has failed to show prejudice. *See Goins*, 397 S.C. at 575, 726 S.E.2d at 4 (noting an applicant cannot establish prejudice where the defendant did not choose to plead guilty on basis of erroneous advice, but rather on basis of the State's offer to dismiss two charges and recommend a ten year sentence).

Based on the foregoing, Counsel was not deficient for failing to review the pictures/ text messages, and Applicant was not prejudiced by Counsel's alleged deficiency; therefore, Counsel was not constitutionally ineffective. As such, the Court denies relief and dismisses this allegation with prejudice.

e. Failure to look into Newberry County charge

Applicant alleges Counsel was ineffective for failing to look into Applicant's unfounded Newberry County charge. The Court disagrees.

Applicant testified he and Counsel briefly discussed the Newberry charge, but Counsel told him the charge was unfounded. Counsel testified he discussed the Newberry charge with Applicant and explained it would not help because it was unfounded. Counsel clarified he was aware of the Newberry report and had seen it was unfounded. Counsel stated he chose not to pursue it any further because he saw no value in the report, only risk. Inv. Robert Dennis explained the Newberry

charge was initiated by the victims' biological father. However, after further investigation, the report was unfounded because the allegations took place in Fairfield County, not Newberry County.

The Court finds credible Counsel's testimony he was aware of the report. Further, the Court finds valid Counsel's reasoning not to look further into the report because the report was declared unfounded not because the allegations were untrue, but because the allegations took place in a different jurisdiction—Fairfield County. Counsel felt digging into another jurisdiction's report presented no value to Applicant's case, only risk. The Court will not second guess Counsel's judgement. *See Whitehead*, 308 S.C. at 122, 417 S.E.2d at 531 ("Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel."). As such, Counsel was not deficient for failing to investigate the Newberry County charge, or interview the investigators that initiated the report.

As for prejudice, the Court finds credible Applicant's testimony he entered the *Alford* plea because he feared not being able to go home. Applicant faced the choice of pleading and receiving a probationary sentence, or going to trial and risking imprisonment. Applicant chose to plead to avoid imprisonment. Therefore, he has failed to show prejudice. *See Goins*, 397 S.C. at 575, 726 S.E.2d at 4 (noting an applicant cannot establish prejudice where the defendant did not choose to plead guilty on basis of erroneous advice, but rather on basis of the State's offer to dismiss two charges and recommend a ten year sentence).

Based on the foregoing, Counsel was not deficient for failing to look into Applicant's unfounded Newberry County charge, and Applicant was not prejudiced by Counsel's alleged

deficiency; therefore, Counsel was not constitutionally ineffective. As such, the Court denies relief and dismisses this allegation with prejudice.

Advice to plead under Alford

Applicant alleges Counsel coerced him into pleading guilty by playing on Applicant's emotions. Specifically, Applicant alleges Counsel advised him if he pleaded guilty, he would get to go home that night, but if he was convicted at trial, he would be sentenced to prison time. The Court disagrees and finds the plea transcript and Applicant's relevant PCR testimony dispositive of this issue.

The plea court conducted a thorough colloquy during the plea hearing, and Applicant, under oath, informed the plea court no one had promised, threatened, or forced him into entering the plea. (Plea Tr. 8). Additionally, at the PCR hearing, Applicant testified it was his decision to plead guilty. The Court finds Counsel did not force Applicant into pleading guilty based on the plea transcript, where Applicant stated he was not forced or threatened into pleading, and Applicant's PCR testimony it was his decision to plead guilty.

The Court also finds Counsel was not constitutionally ineffective for advising Applicant if he pleaded he would get to go home, but if he was convicted at trial he would go to prison. First, it was Counsel's duty to advise Applicant of the potential exposure he faced if convicted at trial. *See Pittman*, 337 S.C. at 599, 524 S.E.2d at 624 ("[A] defendant entering a guilty plea must be aware of the nature and crucial elements of the offense, the maximum and any mandatory minimum penalty, and the nature of the constitutional rights being waived."). Second, Counsel reasonably advised Applicant his opinion of the sentence Applicant would receive if convicted at trial. *See Bennett v. State*, 371 S.C. 198, 204–05, 638 S.E.2d 673, 676 (2006) (finding plea counsel not deficient for advising the applicant to plead guilty based on what plea counsel reasonably

believed the sentence would have been if convicted at trial). Counsel's sentencing advice was not coercive, it was reasonable. Counsel was not deficient for adequately advising Applicant of his sentencing exposure.

The Court also finds Applicant has failed to prove prejudice as to this allegation. The Court finds credible Applicant's testimony he entered the *Alford* plea because he feared not being able to go home. Applicant faced the choice of pleading and receiving a probationary sentence, or going to trial and risking imprisonment. Applicant chose to plead to avoid imprisonment. Therefore, he has failed to show prejudice. *See Goins*, 397 S.C. at 575, 726 S.E.2d at 4 (noting an applicant cannot establish prejudice where the defendant did not choose to plead guilty on basis of erroneous advice, but rather on basis of the State's offer to dismiss two charges and recommend a ten year sentence). Applicant has failed to show Counsel coerced him into pleading, and has failed to show he would not have pleaded guilty despite Counsel's alleged coercion. Therefore, the Court denies this allegation with prejudice.

Applicant also alleges Counsel failed to adequately advise him of the sentencing consequences of pleading to the charges. Specifically, Applicant alleges he was unaware he would be required to register as a sex-offender, comply with special conditions of supervision, and attend specific treatment demanding he accept responsibility for the offenses with polygraph testing. The Court disagrees.

"To find a guilty plea is voluntary and knowingly entered into, the record must establish the defendant had a full understanding of the consequences of his plea and the charges against him." *Boykin*, 395 U.S. at 242. Defendants must be advised of the direct consequences of their plea, but not the collateral consequences. *Smith v. State*, 329 S.C. 280, 283, 494 S.E.2d 626, 628 (1997). "The distinction between 'direct' and 'collateral' consequences of a plea, while sometimes

shaded in the relevant decisions, turns on whether the result represents a definite, immediate and largely automatic effect on the range of the defendant's punishment." *Cuthrell v. Dir., Patuxent Inst.*, 475 D.2d 1364, 1366 (4th Cir. 1973). "The imposition of a sentence may have a number of collateral consequences, however, and a plea of guilty is not rendered involuntary in a constitutional sense if the defendant is not informed of the collateral consequences." *Brown v. State*, 306 S.C. 381, 382-83, 412 S.E.2d 399, 400 (1991). However, if counsel chooses to advise the defendant of collateral consequences, he must provide correct advice. *Smith*, 329 S.C. at 283, 494 S.E.2d at 628.

Here, Applicant and Counsel both testified that Counsel advised Applicant he would have to register as a sex-offender, comply with special conditions of supervision, and attend specific treatment. Applicant's allegation focuses on his assertion that Counsel was deficient for not specifically explaining the treatment requirements—accepting responsibility for the charges. However, Applicant's conditions he register as a sex-offender, comply with special conditions of supervision, and attend specific treatment have no effect on the range of his punishment. Therefore, the conditions are a collateral consequence of sentencing. *See Williams v. State*, 378 S.C. 511, 515-16, 668 S.E.2d 615, 617-18 (Ct. App. 2008) (finding registration on the sex-offender registry is a collateral consequence of sentencing). Counsel had no duty to advise Applicant of these collateral consequences. However, Counsel did advise him of the consequences. Even so, the Court finds Counsel did not misadvise Applicant of the collateral consequences. Indeed, Applicant does not contend Counsel misadvised him at all, he alleges Counsel did not advise him as specifically as he wished, in hindsight. Therefore, because Counsel did not actively misadvise Applicant of the collateral consequences, Counsel was not deficient.

As for prejudice, the Court finds credible Applicant's testimony he entered the *Alford* plea because he feared not being able to go home. Applicant faced the choice of pleading and receiving a probationary sentence, or going to trial and risking imprisonment. Applicant chose to plead to avoid imprisonment. Therefore, he has failed to show prejudice. *See Goins*, 397 S.C. at 575, 726 S.E.2d at 4 (noting an applicant cannot establish prejudice where the defendant did not choose to plead guilty on basis of erroneous advice, but rather on basis of the State's offer to dismiss two charges and recommend a ten year sentence).

Based on the forgoing, Counsel did not deficiently advise Applicant, and Applicant has failed to establish prejudice resulted from Counsel's alleged deficiencies. Therefore, these allegations are denied and dismissed with prejudice.

VI. CONCLUSION

Based on the foregoing, Applicant knowingly and voluntarily pleaded guilty. Applicant knowingly and intelligently waived his constitutional rights, was aware of the nature and elements of the charges he faced, and knew the maximum and mandatory minimum penalty for the charges. Further, Applicant has failed to show Counsel was deficient in any way, or how Applicant was prejudiced by Counsel's alleged deficiencies. Importantly, the Court finds it was Applicant's decision to plead guilty to avoid imprisonment.

The Court notes 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. *See* Rule 203, SCACR. Pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of PCR. 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.

THEREFORE:

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

AND IT IS SO ORDERED.

Pettood

ROBERT E. HOOD
Presiding Judge
Sixth Judicial Circuit

Columbia, South Carolina

7/29, 2020.