STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Alex Kinlaw, Jr., Circuit Court Judge

2018-CP-40-5508

Douglas Murphy, # 376887,

Appellant,

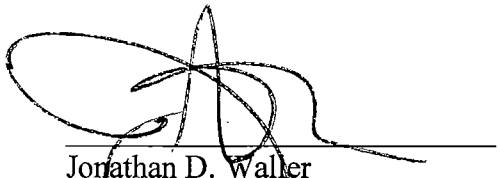
v.

STATE OF SOUTH CAROLINA,

Respondent.

NOTICE OF APPEAL

Douglas Murphy, # 376887, appeals the Order of Dismissal denying his Application for Post-Conviction Relief filed March 4, 2021, issued by the Honorable Alex Kinlaw, Jr., Presiding Judge, Fifth Judicial Circuit.



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STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
Douglas B. Murphy, Jr., # 376887, Applicant, v. State of South Carolina, Respondent,	)	2018-CP-40-5508 **ORDER OF DISMISSAL**

This matter comes before the Court by way of an application for post-conviction relief filed by Douglas B. Murphy, Jr., (Applicant) on October 18, 2018, and amended August 19, 2019. A hearing convened via Cisco WebEx Virtual Platform on October 28, 2020, at which time Applicant was present and represented by Jonathan D. Waller, Esquire. Assistant Attorney General Samuel L. Key represented the State. At the hearing, Applicant testified on his own behalf. Respondent presented testimony from Lir P. Derieg, Esquire ("Plea Counsel").

This Court had the opportunity to listen to their testimony and rule on their credibility. This Court also had before it a copy of the plea transcript, the sentencing transcript, the records of the Richland County Clerk of Court regarding the subject conviction, Applicant's records from the South Carolina Department of Corrections, and pleadings in this matter. Following a thorough review of the record in its entirety, and the testimony and evidence presented at the evidentiary hearing, this Court finds Applicant has failed to meet his requisite burden of establishing any constitutional violations and denies this application.

PROCEDURAL HISTORY

The records before this Court show Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Richland County Clerk of

Court. In May 2016, the Richland County Grand Jury indicted Applicant for one count of murder (2016-GS-40-2424). Applicant was subsequently indicted at the July 2016 term of the Richland County Grand Jury for one count of attempted armed robbery (2016-GS-40-2445). Lir P. Dirieg, Esquire, represented Applicant. Assistant Solicitor Kathryn Cavanaugh, Esquire, prosecuted the case. On May 30, 2018, Applicant pleaded guilty to the lesser-included offense of voluntary manslaughter, and as indicted to attempted armed robbery before the Honorable L. Casey Manning. Pursuant to a negotiated sentence, Judge Manning sentenced Applicant to imprisonment for concurrent terms of twenty years for each offense. Applicant did not appeal his conviction or sentence.

SUMMARY OF FACTS

Applicant, his co-defendant Trajan Mack, and two other co-defendants actively participated in planning the armed robbery and murder of eighteen-year-old Jaelen Josey (Victim). On February 29, 2016, Applicant and the shooter, Jose Reyes, approached Victim's vehicle in an attempt to recoup money and marijuana stolen from another co-defendant earlier that afternoon by an unrelated individual. The plan was to set up a fake drug transaction between Applicant and Victim, with the intention of robbing Victim. When they met up with Victim, Applicant gave Victim ten dollars for drugs, which was found in the vehicle, but then dropped his phone into Victim's car, which caused Jose Reyes to shoot Victim in the back. Victim died as a result of the gunshot wound. Plea Tr. 18–20.

ISSUES RAISED

Applicant alleged the following grounds in his application:

1. "Ineffective Assistance of Counsel"
    a. "Failure to Investigate"
2. "Great Seals not affixed to laws"
    a. "Applicant is sentence[d] under unconstitutional laws."

On August 19, 2019, Applicant amended his application through Counsel to make the following allegations:

1. Counsel was ineffective for failing to properly investigate the facts and circumstances surrounding the allegations against Applicant, thus rendering Applicant's plea unknowingly and involuntarily entered into.
2. Counsel was ineffective for failing to conduct adequate amount of meeting with Applicant to review discovery so that Applicant would know of the allegations against him, thus rendering Applicant's plea unknowingly and involuntarily entered into.
3. Counsel was ineffective for failing to file a notice of appeal when specifically requested by both Applicant and his family

SUMMARY OF PCR TESTIMONY

Applicant's testimony

At the evidentiary hearing, Applicant testified he originally had a different lawyer than Plea Counsel and that Plea Counsel was appointed to represent him, ultimately leading up to his plea. Applicant testified Plea Counsel represented him for about three months before his plea and that Plea Counsel came to see Applicant in the detention center two or three times during those three months. Applicant testified he and Plea Counsel spoke about a letter Plea Counsel sent Applicant during their first meeting, and Plea Counsel told Applicant he was reviewing the paperwork and if Applicant had any questions, to let Plea Counsel know. Applicant testified Plea Counsel gave him a copy of the transcript, but acknowledged that could have been the second time they met. Applicant testified Plea Counsel did not go over discovery with Applicant, but he showed Applicant all of the papers he had and they "spoke about some ideas and stuff but it was

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not discovery." Applicant testified he got discovery from his previous attorney, but asked for it again once Plea Counsel was appointed.

Applicant testified there were about five or six co-defendants and four were charged with armed robbery and murder, including himself. Applicant testified he was not alleged to be the shooter, but he and the shooter approached the car. Applicant testified he turned himself in. Applicant testified he and Plea Counsel were able to discuss the co-defendants' statements, forensics, DNA evidence, specifically Applicant's DNA and Applicant's cell phone, which was in the victim's vehicle. Applicant testified he wanted Plea Counsel to investigate Greg Seals, who was a witness. Applicant testified he was unsatisfied with Plea Counsel's service at some point, which was why Applicant filed a motion for Plea Counsel to be relieved. Applicant explained he filed the motion due to of the lack of communication between him and Plea Counsel–specifically, that Plea Counsel would not talk to Applicant unless Applicant had questions.

Applicant testified at the plea hearing, he told the judge he was satisfied with the plea arrangement and although he was not satisfied with Plea Counsel, he told the judge he was. Applicant acknowledged Plea Counsel discussed what negotiated sentence was and that Applicant knew he would get no more or no less than twenty years. Applicant testified after sentencing, they discussed what an appeal was in the courtroom, but Plea Counsel said he did not need one. Applicant testified after that conversation he told Plea Counsel he wanted an appeal. Applicant testified after the sentencing, he and Plea Counsel "said their peace" and that was the last conversation they had. Applicant testified the only time they discussed going to trial was part of the appeal conversation after the plea hearing, which Plea Counsel said "wouldn't work out in Applicant's favor." Applicant testified this influenced him to plead guilty, and without that influence, he would have gone forward with a trial.

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On cross examination, Applicant testified he was influenced to plead guilty because during conversations where Applicant asked questions and Plea Counsel dissuaded him, stating thinks like: "nah you shouldn't do it" or "that's not in your best interest". Applicant testified on cross that he knew the offer was for twenty years. Applicant testified he and Plea Counsel communicated in person, as well as via a kiosk machine that he and Plea Counsel would send messages through. Applicant testified on cross that he did not tell Plea Counsel he wanted to go to trial after their initial conversation because after that conversation he did not believe it was in his best interest. Applicant testified on cross he asked Plea Counsel to file an appeal after the first hearing when his family was not there because he was notified he had a ninety-day appeal window.

Plea Counsel's testimony

At the evidentiary hearing, Plea Counsel testified he was appointed very late in the process to represent Applicant in March 2018, after stepping in for another contract attorney who had left. Plea Counsel testified he got the solicitor's file and their discovery. Plea Counsel testified he met with Applicant at the jail two or three times and they had multiple meetings in the holding cell, particularly when Applicant filed a motion for Plea Counsel to be relieved in May. Plea Counsel also testified they spoke via the kiosk machine, which cost fifty-cents per message and explained he spent twenty to thirty dollars communicating with Applicant via the kiosk.

Plea Counsel testified he was aware Applicant had gotten discovery from Applicant's former attorney. Plea Counsel testified he and Applicant discussed the discovery and those conversations were pretty cut and dry. Plea Counsel testified Applicant seemed to understand everything. Plea Counsel testified he discussed the right to appeal with Applicant and that the judge explained during the plea colloquy, too. Plea Counsel explained he told Applicant pursuing an appeal would likely be a waste of time, but Applicant could if he wanted to. Counsel testified

he explained the consequences of what would happen if Applicant was successful on appeal–that the plea deal that Plea Counsel negotiated down to twenty years would go away and Applicant could receive the maximum. Plea Counsel testified Applicant never asked him to file an appeal. Instead, Applicant's mother reached out via text message a few weeks after the plea, and well after the ten day deadline. Counsel clarified that Applicant never directly asked him to appeal.

Plea Counsel testified he and Applicant discussed very little about trial because Applicant was cooperating with law enforcement for the plea. Plea Counsel testified that within twenty to thirty minutes of their first meeting, all of their remaining conversations were focused on getting a better deal. Plea Counsel testified that Applicant's cooperation with law enforcement was key to Plea Counsel getting the solicitor to agree to twenty years, which was the best that he could get for Applicant. Plea Counsel testified that he was sure they spoke about Applicant's sentence exposure when he and Applicant discussed trial not being in Applicant's best interest.

On cross examination, Plea Counsel testified that after the plea, Applicant's mom texted him about the Great Seal issue that she wanted Plea Counsel to bring up, but Plea Counsel refused to do so. Plea Counsel testified on cross that he did not speak to Applicant between the three weeks that Applicant pleaded guilty and the date Applicant was sentenced. Plea Counsel testified on cross that he did not speak to Applicant in the three weeks between Applicant pleading guilty, and the date Applicant was sentenced. Plea Counsel testified on cross that Applicant was not happy with the plea offer he had negotiated because Applicant's previous attorney indicated she was trying to get ten to fifteen years, but after Plea Counsel was appointed, Plea Counsel could only get down to twenty years. Plea Counsel testified on cross that was why his and Applicant's relationship deteriorated. Plea Counsel testified on cross Applicant's mother was the only one who wanted a trial because she felt that Applicant was being treated unfairly. An email between

Plea Counsel and Applicant's mother was admitted without objection as Applicant's Exhibit 1. Plea Counsel testified on cross that Applicant never gave him specific information about what he wanted Plea Counsel to investigate, Applicant only focused on getting the ten to fifteen year plea deal.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses present at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. § 17-27-80 (1985).

INEFFECTIVE ASSISTANCE OF COUNSEL

Applicant's allegations of ineffective assistance of counsel are without merit. In a PCR action, Applicant bears the burden of proving the allegations in his application. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *Butler*, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in *Strickland*. First, Applicant must prove that counsel's performance was deficient. *Strickland*, 466 U.S. at 686; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Applicant must so prove his factual allegations by a preponderance of the evidence. Rule 71.1(e), SCRCP. Under this prong, the court measures an attorney's performance

by its "reasonableness under prevailing professional norms." *Cherry*, 300 S.C. at 117, 386 S.E.2d at 625 (quoting *Strickland*, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* (citing *Strickland*, 466 U.S. at 690). "When counsel focuses on some issues to the exclusion of others, there is a strong presumption that he [or she] did so for tactical reasons rather than through sheer neglect." *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003) (citing *Strickland*, 466 U.S. at 690). The Court, in determining deficiency, must affirmatively entertain the range of possible reasons counsel may have had for proceeding as they did. *Cullen v. Pinholster*, 563 U.S. 170, 196 (2011); *Harrington v. Richter*, 562 U.S. 86, 109-10 (2011). "[E]ven if an omission is inadvertent, relief is not automatic. The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." *Yarborough*, 540 U.S. at 6; *see also Murphy v. Davis*, 901 F.3d 578, 592 (5th Cir. 2018) ("[C]ounsel's performance need not be optimal to be reasonable."). Applicant must overcome this presumption to receive relief. *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625.

Second, counsel's deficient performance must have prejudiced Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.*, 300 S.C. at 117-18, 386 S.E.2d at 625. "This does not require a showing that counsel's actions 'more likely than not altered the outcome,' but the difference between *Strickland*'s prejudice standard and a more-probable-than-not standard is slight and matters 'only in the rarest case.'" *Harrington*, 562 U.S. at 111-12 (quoting *Strickland*, 466 U.S. at 697). "The likelihood of a different result must be substantial, not just conceivable." *Id.* at 112.

"The prejudice analysis requires the court deciding the ineffectiveness claim to consider the totality of the evidence before the judge or jury." *United States v. Basham*, 789 F.3d 358, 371-72 (4th Cir. 2015) (quoting *Elmore v. Ozmint*, 661 F.3d 783, 858 (4th Cir. 2011)).

In the context of a guilty plea, Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he/she would not have pleaded guilty and would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). Because a guilty plea is a solemn, judicial admission of the truth of the charges against an individual, the PCR applicant's right to contest the validity of such a plea is usually, but not invariably, foreclosed. *See Blackledge v. Allison*, 431 U.S. 63, 73-74 (1977) ("Solemn declarations in open court carry a strong presumption of verity. The subsequent presentation of conclusory allegations unsupported by specifics is subject to summary dismissal, as are contentions that in the face of the record are wholly incredible."). Statements made during a guilty plea should be considered conclusively, unless an Applicant presents valid reasons why he or she should be allowed to depart from the truth of his statements. *Dalton v. State*, 376 S.C. 130, 137-38, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing *Crawford v. United States*, 519 F.2d 347, 350 (4th Cir. 1975)).

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. *Strickland*, 466 U.S. at 696. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies; if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. *Id.* at 696-97.

Applicant further claims his plea was not entered knowingly or voluntarily. To find a guilty plea is voluntarily and knowingly entered into, the record must establish Applicant had a full

understanding of the consequences of the plea and the charges against him or her. *Dover v. State*, 304 S.C. 433, 434, 405 S.E.2d 391, 392 (1991); *see also Boykin v. Alabama*, 395 U.S. 238, 243 (1969) (Courts must make sure defendants have "a full understanding of what the plea connotes and of its consequence. When the judge discharges that function, he leaves a record adequate for any review that may be later sought, and forestalls the spin-off of collateral proceedings that seek to probe murky memories."). In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence presented at the PCR hearing. *See Harris v. Leeke*, 282 S.C. 131, 134, 318 S.E.2d 360, 361 (1984).

An applicant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of the plea by showing that trial counsel's representation fell below an objective standard of reasonableness, and that there is a reasonable probability that, but for trial counsel's errors, the defendant would not have pled guilty, but would have insisted on going to trial instead. *Roscoe v. State*, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001); *Richardson v. State*, 310 S.C. 360, 363, 362 426 S.E.2d 795, 797 (1993). Given Applicant's burden of proof and the analysis to be applied to this claim, Applicant's claim of involuntary plea is, in essence, a claim of ineffective assistance of counsel, and it will be treated as such.

This Court finds Applicant has failed to meet his burden of proving he is entitled to post-conviction relief on any of his allegations of ineffective assistance of counsel. Applicant has failed to prove both deficiency on the part of Plea Counsel and any prejudice therefrom. Furthermore, after observing the witnesses and passing on their credibility, this court finds Plea Counsel's testimony to be credible. By contrast, this Court finds Applicant's testimony lacks credibility.

1. **Counsel was ineffective for failing to properly investigate the facts and circumstances surrounding the allegations against Applicant, thus rendering Applicant's plea unknowingly and involuntarily entered into.**

Applicant alleges Plea Counsel was ineffective for failing to properly investigate the facts and circumstances surrounding the allegations against Applicant, thus rendering Applicant's plea unknowingly and involuntarily entered into. "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland*, 466 U.S. at 690-91. "In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.* at 691. "In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Id.*

"The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." *Id.* "Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant." *Id.* "In particular, what investigation decisions are reasonable depends critically on such information."

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 v. State*, 377 S.C. 66, 75-76, 659 S.E.2d 140, 145-46 (2008) (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. *Id.* (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. *Id.*, 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)).

Here, Plea Counsel credibly testified he and Applicant discussed very little about trial because Applicant was cooperating with law enforcement for the plea. Plea Counsel credibly testified that within twenty to thirty minutes of their first meeting, all remaining conversations focused on getting a better deal. Plea Counsel credibly testified that Applicant's cooperation with law enforcement was key to Plea Counsel getting the solicitor to agree to twenty years, which was the best deal he could get for Applicant. Additionally, the only information Applicant offered that Plea Counsel could have or should have investigated in furtherance of his defense was a witness, Greg Seals. However, Plea Counsel credibly testified Applicant never asked him to investigate anyone, but rather wanted to focus solely on getting a better deal.

This Court finds that Applicant has failed to prove how Plea Counsel was deficient. Specifically, this Court finds that Plea Counsel's focus on securing a favorable plea deal was reasonable tactical decision given the circumstances of the case and Applicant's strong desire to secure a plea deal. *Strickland*, 466 U.S. at 690-91 ("The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions."); *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003) ("When counsel focuses on some issues to the exclusion of others, there is a strong presumption that he [or she] did so for tactical reasons rather than through sheer neglect.").

Further, this Court finds that Applicant has failed to show any prejudice as a result of Plea Counsel's alleged failure to investigate the witness because Applicant has failed to show how the investigation would have changed the outcome of the case. *Harris*, 377 S.C. at 75-76, 659 S.E.2d

at 145-46 (2008) (explaining an applicant must also present evidence to show how the discoverable matters or defenses would have resulted in a different outcome.) Specifically, this Court finds Applicant cannot establish prejudice because Applicant failed to present any testimony domonstrating that *but for* Counsel's failure to investigate the witness, he would not have pled guilty and instead would have insisted upon going to trial. *Roscoe v. State*, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001)

In conclusion, this Court finds Applicant has failed to show both how Plea Counsel's failure to investigate was deficient and any resulting prejudice from Plea Counsel's alleged deficiency. Accordingly, his demand for relief by way of this allegation is **DENIED.**

2. **Counsel was ineffective for failing to conduct adequate amount of meeting with Applicant to review discovery so that Applicant would know of the allegations against him, thus rendering Applicant's plea unknowingly and involuntarily entered into.**

Applicant alleges that Plea Counsel was ineffective for failing to discuss all discovery information and evidence with Applicant. However, this Court finds Plea Counsel adequately reviewed the discovery in Applicant's case independently and with Applicant, and therefore Plea Counsel was not deficient. Further, this Court finds Applicant wholly failed to demonstrate how Plea Counsel's alleged deficiency prejudiced him in any way.

At the evidentiary hearing, Plea Counsel credibly testified he reviewed discovery with Applicant. Plea Counsel testified he got the solicitor's file and their discovery. Plea Counsel credibly testified he met with Applicant at the jail two or three times and they had multiple meetings in the holding cell, particularly when Applicant filed a motion for Plea Counsel to be relieved in May. Plea Counsel credibly testified he and Applicant spoke via the kiosk machine, which cost fifty-cents per message, and cost him a total of twenty to thirty dollars communicating with Applicant.

Plea Counsel credibly testified he was aware Applicant had gotten discovery from Applicant's former attorney and he and Applicant had conversations about the discovery. Plea Counsel explained those conversations were pretty cut and dry. Plea Counsel testified Applicant seemed to understand everything. Furthermore, Applicant's own testimony corroborates that he and Plea Counsel engaged in discussion of the discovery. Specifically, Applicant testified he and Plea Counsel were able to discuss the co-defendants' statements, forensics, DNA evidence, specifically Applicant's DNA and Applicant's cell phone, which was in the victim's vehicle.

This Court finds Plea Counsel was not deficient because he adequately reviewed the discovery in Applicant's case independently and with Applicant and therefore, Applicant has failed to meet his burden of proving that Plea Counsel was deficient for failing to adequately discussing discovery and evidence with Applicant. Further, this Court finds that Applicant has failed to show any resulting prejudice from Plea Counsel's alleged deficiency. Applicant failed to present any testimony establishing that *but for* Counsel's failure to review discovery, he would not have pled guilty and instead would have insisted upon going to trial. *Roscoe v. State*, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001)

In conclusion, this Court finds Applicant has failed to show both how Plea Counsel's failure to review discovery with Applicant was deficient and how he suffered any resulting prejudice from Plea Counsel's alleged deficiency. Accordingly, his demand for relief by way of this allegation is **DENIED**.

3. **Counsel was ineffective for failing to file a notice of appeal when specifically requested by both Applicant and his family.**

Applicant alleges he is entitled to a belated appeal, pursuant to *White v. State* for Plea Counsel's failure to file a notice of appeal when Applicant and his family requested Plea Counsel file an appeal. However, this Court finds otherwise.

The United States Supreme Court has rejected a bright-line rule that counsel must always consult with the defendant regarding an appeal. *Roe v. Flores-Ortega*, 528 U.S. 470, 480 (2000). Instead, "counsel has a constitutionally imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing." *Id.* Further, "a highly relevant factor in this inquiry will be whether the conviction follows a trial or a guilty plea, both because a guilty plea reduces the scope of potentially appealable issues and because such a plea may indicate that the defendant seeks an end to judicial proceedings." *Id.*

The South Carolina Supreme Court has held there is no constitutional requirement that a defendant be informed of the right to a direct appeal from a guilty plea, absent extraordinary circumstances. *Turner v. State*, 380 S.C. 223, 224, 670 S.E.2d 373, 374 (2008). However, 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). Instead, a defendant must offer proof that extraordinary circumstances exist such that he should have been advised of the right to appeal. *Id.* One situation in which extraordinary circumstances arise is when a defendant explicitly inquires about his right to appeal following a guilty plea. *Jones v. State*, 382 S.C. 589, 596, 677 S.E.2d 20, 23-24 (2009); *Weathers*, 319 S.C. at 61, 459 S.E.2d at 839. To show prejudice in these circumstances, a defendant must demonstrate that there is a reasonable probability that, but for plea counsel's deficient failure to consult with him about an appeal, he would have timely appealed. *Flores-Ortega*, 528 U.S. at 484.

In *White v. State*, 263 S.C. 110, 108 S.E.2d 35 (1974), the South Carolina Supreme Court held that even if the post-conviction relief court finds that the Applicant never voluntarily and

intelligently abandoned his appeal, the court has no jurisdiction to grant a belated appeal. Therefore, where an accused establishes in a post-conviction relief hearing that he was unconstitutionally deprived of his statutory right to a direct appeal, the South Carolina Supreme Court, upon an appeal of the post-conviction relief decision, will review the trial record and pass upon all issues properly raised and argued as if the direct appeal has been perfected.

Here, Applicant pleaded guilty on May 30, 2018. Applicant testified he pleaded freely and voluntarily and he was aware of his right to appeal his guilty plea. Applicant testified he asked Counsel to file an appeal immediately after he was sentenced; however, Applicant acknowledged Plea Counsel discussed what a negotiated sentence was and that Applicant knew he would get no more or no less than twenty years. Applicant testified after sentencing, he and Plea Counsel discussed what an appeal was, but Plea Counsel indicated Applicant did not need one. Applicant testified he told Plea Counsel after that conversation, he wanted an appeal. Applicant testified that after the sentencing, he and Plea Counsel "said their peace" and that was the last conversation they had.

Plea Counsel testified he discussed the right to appeal with Applicant and that the judge also explained it during the colloquy. Plea Counsel testified he told Applicant pursuing an appeal would likely be a waste of time, but Applicant could if he wanted to. Counsel testified he explained the consequences of what would happen if Applicant was successful on appeal–that the plea deal that Plea Counsel negotiated down to twenty years would go away, and Applicant could receive the maximum. Plea Counsel testified Applicant never asked him to file an appeal, but Applicant's mother did via text message a few weeks after the plea, but well after the ten day deadline. Counsel testified that Applicant never directly asked him to appeal.

This Court finds Applicant has failed to meet his burden of proving he did not voluntarily and intelligently waive his right to appeal. Furthermore, after observing the witnesses and passing on their credibility, this court finds Plea Counsel's testimony to be credible. By contrast, this Court finds Applicant's testimony lacks credibility. Specifically, this Court finds credible Counsel's testimony that Applicant never asked him to appeal and even if Applicant's mother did, it was well after the ten day deadline. Accordingly, this Court finds Applicant has failed to satisfy the requirements set forth in the *Roe v. Flores-Ortega* test and therefore, he has failed to show he is entitled to a belated direct appeal under *White v. State*. Therefore, Applicant's request for belated review of direct appeal issues pursuant to *White* is hereby **DENIED**, and the allegation is dismissed with prejudice.

CONCLUSION

Based on all the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant relief. The Court finds Plea Counsel's representation was neither deficient nor prejudicial. The Court finds Applicant knew the meaning and consequences of pleading guilty to the charge against him and was fully aware of the meaning of the negotiated sentence. The Court further finds Applicant voluntarily pleaded guilty. His voluntariness is evinced by the plea transcript and testimony given at the PCR hearing.

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 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

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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:

1. The application for post-conviction relief be dismissed with prejudice; and

2. Applicant be remanded to the custody of the State.

AND IT IS SO ORDERED this 22 day of May, 2021.

ALEX KINLAW, JR.
Presiding Judge
Fifth Judicial Circuit

Greenville, South Carolina