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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

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2019-CP-23-3410

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Kendall Arnold, .................... Appellant,
v.
The State, .......................... Respondent.

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# NOTICE OF APPEAL

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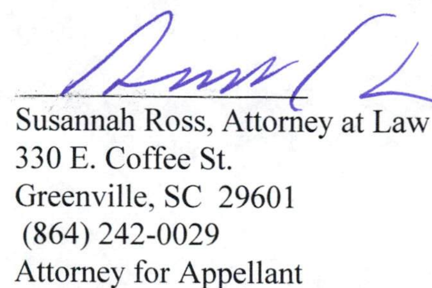
Kendall Arnold appeals the Honorable R. Lawton McIntosh's Order of Dismissal filed March 25, 2021.

This 25 day of March, 2021.



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STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS
FOR THE THIRTEENTH JUDICIAL CIRCUIT

Kendall Donyale Arnold, #352414,

Applicant,

v.

State of South Carolina,

Respondent.

Case No. 2019-CP-23-03410

**ORDER OF DISMISSAL**

2021 MAR 16 PM 2:
FILED-CLERK OF COURT
PAUL B. WICKENSIMER
GREENVILLE CO. S.C.

ENTERED COMPUTER

This matter comes before this Court by way of an application for post-conviction relief filed on June 14, 2019, by Kendall Donyale Arnold ("Applicant"). The State ("Respondent") filed its return on February 10, 2020, requesting that the Court convene an evidentiary hearing. Applicant, through counsel, filed an amended application March 13, 2020. An evidentiary in the matter was held before the undersigned on December 2, 2020, with the parties appearing by WebEx due to the ongoing COVID-19 pandemic. Applicant appeared by WebEx from Lieber Correctional Institution and was represented by Susannah C. Ross, Esquire. Assistant Attorney General Taylor Z. Smith of the South Carolina Attorney General's Office represented Respondent. Applicant testified on his own behalf. Larry Holmes Cooke ("plea counsel"), Esquire, and Assistant Solicitor L. Mark Moyer of the Thirteenth Circuit Solicitor's Office testified on Respondent's behalf. 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 the requisite burden of proof and denies this application for post-conviction relief.

## PROCEDURAL HISTORY

Applicant is presently incarcerated in the South Carolina Department of Corrections. During its November of 2017 term, the Greenville County Grand Jury indicted Applicant for three

counts of armed robbery (2017-GS-23-003385; -003386; -003389) and one count of possession of a weapon during the commission of a violent crime (-003386). Plea counsel represented Applicant and Moyer prosecuted the case. On March 4, 2019, Applicant appeared before the Honorable Robin B. Stilwell and pleaded guilty to all three counts of armed robbery. Judge Stilwell sentenced Applicant to imprisonment for eighteen years for each of three counts with the sentences running concurrently and credit for Applicant's time served. On March 5, 2019, the State dismissed the indictment for possession of a weapon during the commission of a violent crime.

Applicant did not appeal his convictions or sentences.

## CURRENT PROCEEDING

In his application for post-conviction relief, filed on June 14, 2019, Applicant alleges he is entitled to post-conviction relief based upon his claims that (1) plea counsel did not advise Applicant of his right to appeal his convictions or sentences and (2) that Applicant did not knowingly and voluntarily waive his right to a direct appeal. In his amended application, filed through counsel on March 13, 2020, Applicant alleges he is entitled to post-conviction relief based upon his claims that (2) plea counsel was constitutionally ineffective for failing to review discovery to find inculpatory photographs until the assistant solicitor's plea offer, which Applicant would have taken had he known of the evidence, had expired, and (2) Applicant's due process rights were violated when the plea offer expired before he was shown inculpatory evidence. Applicant informed the Court at the evidentiary hearing that the remedy he was seeking was for this Court to order the specific performance of the sentencing recommendation so that Applicant would be resentenced in accordance therewith.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has thoroughly reviewed the record in its entirety. Before this Court are: the records of the Greenville County Clerk of Court regarding Applicant's convictions, the records of the Greenville County Clerk of Court regarding the charge dismissed in accordance with Applicant's plea agreement with the State, the transcript from Applicant's guilty plea hearing, Applicant's records from the South Carolina Department of Corrections, and the filings made in this post-conviction relief action. Set forth below are the relevant findings of facts and conclusions of law with regards to each of the claims Applicant advanced at the evidentiary hearing, as required pursuant to S.C. Code Ann. §17-27-80 (1985).

***Applicant has failed to prove that he did not knowingly and voluntarily waive his right to direct appellate review of his convictions and sentences.***

Applicant claims he is entitled to post-conviction relief because he did not knowingly and voluntarily waive his right to direct appellate review of his convictions and sentences. In White v. State, 263 S.C. 110, 119, 108 S.E.2d 35, 39 (1974), the South Carolina Supreme Court held that, even though a post-conviction relief court may find that an applicant did not voluntarily and intelligently abandon his right to a direct appeal, the PCR court does not have jurisdiction to grant a belated appeal. However, when an accused establishes in a post-conviction relief hearing that he was unconstitutionally deprived of his 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. Id. at 119, 108 S.E.2d at 39-40. Applicant seeks this relief.

This Court finds that Applicant has failed to prove that he did not knowingly and voluntarily waive his right to direct appellate review of his convictions and sentences. Counsel has a constitutionally-imposed duty to consult with a defendant about an appeal when there is reason

to think either: (1) that a rational defendant would want to appeal or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing. Roe v. Flores-Ortega, 528 U.S. 470 (2000). When counsel has consulted with the defendant regarding the right to appeal, "Counsel performs in a professionally unreasonable manner only by failing to follow the defendant's express instructions with respect to an appeal." Id. at 478 (underlining added). In order to establish that he was prejudiced by counsel's failure to file an appeal, an applicant must show he would have appealed absent counsel's deficient performance. See Id. at 484. "Acts inconsistent with the continued assertion of a right, such as a failure to insist upon the right, may constitute waiver." Bonnette v. State, 277 S.C. 17, 18, 282 S.E.2d 597, 598 (1981).

At the evidentiary hearing, Applicant testified that he wanted to appeal his convictions and sentences, but that he was not aware at the time that he could do so. Plea counsel testified he did not have any notes in his file indicating that he discussed with Applicant his right to appeal. Plea counsel believed Applicant was happy with his sentence considering the greater potential sentences that Applicant could have received. Plea counsel testified he thought Applicant would have been aware of his right to appeal regardless of whether plea counsel told him of it because Applicant had been in prison before. Plea counsel never thought that Applicant wanted to appeal because it would have made no sense considering for Applicant to do so considering the significant prison time to which Applicant would have been exposed if his sentences had been vacated. Plea counsel affirmed that he would have filed a notice of appeal if Applicant had asked him to do so. Applicant admitted on cross-examination that Judge Stilwell informed him at the guilty plea hearing that Applicant had the right to appeal and had to do so within ten days, but testified that he did not understand what Judge Stilwell meant when he informed Applicant of that right.

This Court finds that Applicant has failed to prove that plea counsel had a constitutionally

imposed duty to consult with Applicant about Applicant's right to appeal the convictions and sentences. Applicant and plea counsel both agree on the fact that Applicant did not ask plea counsel to file a notice of appeal. Applicant's testimony was that he was not even aware of the right, which, putting aside for now the fact that that testimony is manifestly untrue, inevitably leads this Court to the conclusion that Applicant could not have invoked the right in his discussions with plea counsel. Plea counsel's testimony on the point was that his notes from his representation of Applicant did not indicate that he and Applicant had discussed appealing. Not only has Applicant failed to prove that he reasonably demonstrated to plea counsel that he wanted to appeal, but he has failed to prove that there was a reason for plea counsel to believe that Applicant wanted to appeal. Plea counsel testified that there was a never a time during his representation of Applicant that Applicant did not want to plead guilty. Plea counsel testified that he believed that Applicant had been happy with the outcome of the guilty plea hearing, especially since Judge Stilwell backdated Applicant's sentence so that it ran concurrently with an eight-year sentence that Applicant was serving for a different conviction. In addition, Judge Stilwell's eighteen-year, concurrent sentences would certainly be preferred by any defendant to the lengthier sentences Judge Stilwell could have imposed, which would have included an aggregate sentence of more than 100 years. Applicant would have been exposed to that risk again if he had been successful on appeal.

This Court finds Applicant was aware of his right to appeal his convictions and sentences because, even if plea counsel did not so inform him, Judge Stilwell did so at the guilty plea hearing. Plea Tran. 23; Holden v. State, 393 S.C. 565, 575, 713 S.E.2d 611, 616 (2011) (citations omitted) (concluding that any alleged deficiency in plea counsel's advice to Holden was cured by the plea court's colloquy), abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836

(2018). Applicant testified before this Court that he did not understand the right to appeal even after Judge Stilwell's colloquy, but this Court finds that that testimony is not credible. Applicant failed to prove that he did not understand that right or any other discussed at the guilty plea hearing. This Court finds that Applicant, after being made aware by Judge Stilwell of his right to appeal his convictions and sentences, waived that right knowingly and voluntarily by not requesting that plea counsel file a notice of appeal.

Applicant's claim that he did not knowingly and voluntarily waive his right to direct appellate review of his convictions and sentences is denied and dismissed with prejudice.

***Applicant has failed to prove that plea counsel was constitutionally ineffective for not reviewing with Applicant inculpatory photographs until after the State's plea offer had expired.***

Applicant claims he is entitled to post-conviction relief because there were inculpatory photographs turned over to plea counsel by the State in discovery that would have caused Applicant to accept the State's plea offer instead of proceeding to trial if Applicant had known of them before rejecting the offer.[1]

Applicant, like all other defendants, has a right to the assistance of effective counsel as provided by the Sixth Amendment to the United States Constitution. Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008); Strickland v. Washington, 466 U.S. 668 (1984). Applicant has the burden of proving the allegations in his post-conviction relief action, and when alleging that counsel was constitutionally ineffective, he 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

[1] At the hearing before this Court, Applicant stated that the claim in his amended application that his due process rights were violated when the State's plea offer expired before Applicant was shown the inculpatory photographs was really meant to be the same argument as the claim that plea counsel was constitutionally ineffective, so this Court will consider the two pleaded claims as a single ineffectiveness claim.

result." Strickland, at 686. In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, at 668. First, Applicant must prove that counsel's performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, at 117, 386 S.E.2d at 625 (quoting Strickland, at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, at 690). Applicant must overcome this presumption to receive relief. Cherry, at 118, 386 S.E.2d at 625. Second, counsel's deficient performance must have prejudiced Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52 (1985). A defendant who pleads guilty on the advice of counsel may collaterally attack the plea only by showing: (1) counsel was deficient and (2) there is a reasonable probability that but for counsel's errors, the defendant would not have pleaded guilty and would have insisted on going to trial. Roscoe v. State, 345 S.C. 16, 546 S.E.2d 417 (2001). The "prejudice prong ordinarily requires more than simply a defendant's assertion that but for counsel's deficient performance he would not have pled but would have gone to trial." Stalk v. State, 383 S.C. 559, 563, 681 S.E.2d 592, 595 (2009).

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. 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. Strickland, at 670. Moreover, Strickland does not require a finding of ineffectiveness merely for deviation from some rigid rule of representation. Rather, Strickland requires the post-conviction relief applicant to prove "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. at 697. Therefore, the function of the post-conviction relief court is to determine if "in light of all the circumstances, the identified acts or omissions were outside the wide range of professional competent assistance" required of a criminal defense attorney. Id. at 690.

"A guilty plea is a solemn, judicial admission of the truth of the charges against an individual; thus, a criminal inmate's right to contest the validity of such a plea is usually, but not invariably, foreclosed." Dalton v. State, 376 S.C. 130, 137, 654 S.E.2d 870, 874 (S.C. Ct. App. 2007) (citing Blackledge v. Allison, 431 U.S. 63, 74 (1977)). "Indeed, where a thorough colloquy is conducted, courts must exercise caution in setting aside the guilty plea." Garren v. State, 423 S.C. 1, 12, 813 S.E.2d 704, 712 (2018); see Jamison v. State, 410 S.C. 456, 469-71, 765 S.E.2d 123, 129-30 (2014) (observing that "guilty plea[s] must be treated as final in the vast majority of cases" and instructing that caution must be exercised so as not to "undermine the solemn nature of a guilty plea and the finality that generally attaches to a guilty plea"). The South Carolina Supreme Court has instructed that:

> The longstanding 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. To find a guilty plea is voluntarily 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.

State v. Inman, 395 S.C. 539, 556, 720 S.E.2d 31, 40 (2011) (internal quotations and citations omitted). "[A] guilty plea constitutes a waiver of nonjurisdictional defects and claims of violations of constitutional rights." Jamison, at 468, 765 S.E.2d at 129 (citations omitted).

Assistant Solicitor Moyer testified before this Court that law enforcement officers in North Carolina and with the Greenville Police Department downloaded the contents of Applicant's mobile phone, found in the crashed car after Applicant was arrested. Moyer testified that he initially provided the photographs recovered from that phone to plea counsel in discovery in a digital format only. Moyer testified that the property and evidence sheets that he turned over to plea counsel noted that Applicant's mobile phone had been recovered from the crashed vehicle and that law enforcement officers had downloaded the contents of the phone. Moyer testified that he provided hard copies of the photographs to plea counsel later on February 27, 2019, when showing to plea counsel, as a professional courtesy, the exhibits that Moyer intended to use during trial.

Plea counsel testified he met with Applicant on multiple occasions and has notes from those meetings saved in his defense file. Plea counsel estimated that he met with Applicant on seven or eight occasions. Plea counsel testified he went over the discovery with Applicant. Plea counsel had a letter in his file showing that he sent the complete discovery file to Applicant in July of 2017. Plea counsel testified that he was not sure if he gave a copy of the specific photographs to Applicant in hard copy but testified that he gave to Applicant a copy of everything that was in his defense file, including any documents that were in hard copy. Plea counsel testified he advised Applicant to plead guilty and accept the State's offer to make a sentencing recommendation for imprisonment for fifteen years because plea counsel believed that the evidence of Applicant's guilt was overwhelming. Plea counsel testified that it was possible that Applicant did not see the inculpatory

photographs because all of the photographs turned over in discovery were saved on discs, discs that he nevertheless forwarded to Applicant. Plea counsel did not recall personally going over the photographs saved on the discs with Applicant. Plea counsel testified that he did inform Applicant that the law enforcement officers had lifted Applicant's fingerprints, though. Plea counsel said that Applicant called him after receiving the discovery from plea counsel and said that Applicant had been unable to sleep that night after looking at the discovery, that Applicant wanted to plead guilty instead of proceeding to trial, and that Applicant rejected the State's offer of a fifteen-year sentencing recommendation but said he would only agree to plead guilty in exchange for an offer of ten or twelve years.

Plea counsel testified that, after Applicant rejected the fifteen-year plea offer, Moyer did not make another offer and put Applicant on the trial docket. Plea counsel testified that the inculpatory photograph that Applicant was concerned about was one that Moyer had enlarged so that the State could use it as an exhibit at trial. Plea counsel testified that he was unsure if the photograph would be admitted into evidence at trial, but testified that its admission would not be good for the defense because the photograph showed Applicant holding the firearm used in the robberies and wearing the clothing described by the witness. Plea counsel testified that he shared with Applicant his opinion that the admission of the photograph into evidence would be harmful to the defense.

Applicant testified before this Court that plea counsel did not talk about discovery with him. Applicant testified that he became aware of the inculpatory photographs downloaded from his mobile phone on the morning of his trial. Applicant admitted that he affirmed to Judge Stilwell at the guilty plea hearing that he and plea counsel had gone over the State's evidence. Applicant agreed on cross-examination that he had had his mobile phone in his pocket when he crashed the

vehicle and that it should have been no surprise to him that law enforcement officers would thereafter have been in possession of his phone. Applicant testified that the inculpatory photographs had been stored on his Google Gmail account, which was accessible through the mobile phone, but that he was nonetheless surprised that law enforcement officers had been able to download the photographs from Applicant's phone.

This Court finds that Applicant has failed to prove that plea counsel's performance was deficient based on Applicant's allegation that plea counsel did not show the inculpatory photographs to Applicant before the State's plea offer expired. This Court finds that plea counsel provided all of the discovery turned over to him by the State to Applicant, including the inculpatory photographs. The testimony from Moyer and plea counsel shows that the relevant photographs were provided to plea counsel by Moyer in a digital format initially. Moyer's testimony also established that he submitted hard copies of other documents to plea counsel that indicated that law enforcement officers were in possession of Applicant's mobile phone and that the officers had been able to download data and/or photographs from that phone. Plea counsel's testimony shows that he turned over everything in his file to Applicant, including the disc containing the photographs and the hard copies provided to him by Moyer. It is not clear to this Court whether Applicant was able to view the photographs saved on the disc or discs while in jail, but the documents sent to Applicant by plea counsel put Applicant on notice that the State was in possession of his mobile phone and evidence pulled therefrom. Applicant's own testimony indicates he knew of the existence of the photographs and knew that they were stored or at least accessible from his mobile phone. It could not therefore have been a surprise to Applicant that the photographs could or would serve as evidence of his guilt at trial. Applicant's reaction to seeing the evidence, his remaining awake all night, seems to have been the natural consequence of his

realization of the strength of the State's evidence. The only fault that this Court can find in plea counsel's representation is that plea counsel—perhaps—did not personally view the photographs with Applicant before Applicant rejected the State's fifteen-year plea offer; however, the evidence indicates that Applicant knew of the existence of the photographs and that they were in the State's possession before Applicant directed plea counsel to reject the State's offer and to make a counteroffer of ten or twelve years instead. Applicant's testimony to the contrary is not credible, while the testimonies or plea counsel and Moyer on this point is credible.

This Court finds that Applicant has failed to prove that he suffered prejudice from plea counsel's performance. For Applicant to prove that he has suffered prejudice, he "must demonstrate a reasonable probability that: (1) he would have accepted the earlier plea offer had he been afforded effective assistance of counsel; (2) the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it; and (3) the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time." Collins v. State, 422 S.C. 250, 263, 810 S.E.2d 871, 878 (2018). Although our Supreme Court's opinion in Collins concerned a defense attorney's failure to request the reinstatement of a plea offer that expired before the attorney was appointed, the analysis and remedy discussion in that opinion indicate that this case is applicable in the present situation in which Applicant claims he would have taken advantage of a plea offer that he rejected had he been fully aware of a specific piece of evidence, especially in light of citations in Collins to cases like Missouri v. Frye, 566 U.S. 134 (2012) and Lafler v. Cooper, 566 U.S. 156, 174 (2012). Id.

Assistant Solicitor Moyer testified before this Court about the evidence that the State had of Applicant's guilt and provided much of the same information to Judge Stilwell at Applicant's guilty plea hearing. A victim identified Applicant as the robber from a photographic lineup; a

victim from the second robbery knew Applicant personally and was able to identify Applicant as the robber. Plea Tran. 25. A North Carolina law enforcement officer, after Applicant led him on a high-speed traffic chase, stopped Applicant for speeding on the night of the second and third robberies. Plea Tran. 25-26. A victim had been Applicant driving the vehicle during the second robbery earlier that night. Plea Tran. 25-26. Law enforcement officers found in the crashed vehicle a rifle and a BB gun that matched the description of those used in the robbery. Plea Tran. 27. The crashed vehicle contained property stolen during all three of the robberies. Plea Tran. 27. Law enforcement officers were able to lift Applicant's fingerprints from the inside of the crashed vehicle and from one of the gift cards stolen during one of the robberies. Plea Tran. 27-28. The vehicle also contained Applicant's mobile phone, from which law enforcement officers recovered photographs of Applicant wearing the same distinctive clothing—white shoes and a red Adidas jumpsuit with stripes—that he had been wearing and the same weapon he had been carrying during the first robbery. Plea Tran. 13, 28. Those photographs had been taken on the day of the robbery. Plea Tran. 14. Moyer also testified that a security camera recording showed Applicant jumping out of the vehicle wearing the distinctive clothing.

Plea counsel testified that there was never a point in his representation of Applicant that Applicant did not want to plead guilty. Plea counsel testified that he engaged in plea negotiations on Applicant's behalf and that, after Applicant reviewed the discovery that plea counsel sent to him, Applicant rejected the State's offer of a sentencing recommendation of fifteen years because, rather than wanting to go to trial, Applicant still wanted to plead guilty but wanted Moyer to agree to a sentencing recommendation of ten or twelve years instead. Plea counsel testified that Applicant told him that he had been unable to sleep through the night after seeing the discovery. Plea counsel testified that Applicant always believed that he would get more than one plea offer

from Moyer, despite the fact that plea counsel informed Applicant that that was not necessarily what would happen if he rejected the State's first offer. Plea counsel testified that, after Applicant rejected the State's fifteen-year offer, Moyer did not extend another offer.

Applicant testified before this Court that the photographs were so damning that he would have pleaded guilty and accepted the State's plea offer rather than rejecting it had he known about the photographs before the plea offer expired. While being cross-examined, Applicant testified that he had not wanted to plead guilty but instead had wanted to go to trial when he turned down the State's fifteen-year offer. Applicant testified that he was not worried about the strength of the State's evidence. When questioned about the facts that the State had a victim who personally knew Applicant and would testify that he was the robber, that the State had Applicant on a video recording wearing the distinctive clothing that the robber wore, and that the State had lifted Applicant's fingerprints from the car used in the robberies and the stolen property, Applicant testified that he thought he would somehow have been able to beat this evidence at trial; Applicant essentially testified that the only thing that worried him about his chances of being acquitted at trial was that the State had the photographs, downloaded from Applicant's mobile phone, that showed Applicant wearing the distinctive red jumpsuit.

This Court finds that Applicant has failed to prove that there is a reasonable probability that he would have accepted the fifteen-year plea offer if plea counsel had done more to make Applicant aware that the State was in possession of the inculpatory photographs and that Moyer intended to introduce them into evidence at trial. Applicant's testimony that he wanted to go to trial until plea counsel showed him the enlarged photographs from the mobile phone on the morning of his guilty plea hearing is not credible. Plea counsel's credible testimony proved that Applicant never wanted a trial, but was instead engaging in a sentence negotiation strategy by

rejecting the State's offer in the hopes that he would get a more favorable offer. Applicant's testimony that he believed that he would be able to overcome all of the State's evidence at trial up until he saw the photographs in trial exhibit format is not credible. Plea counsel believed that the evidence of Applicant's guilt was overwhelming and informed Applicant of that belief. The internal turmoil that Applicant told plea counsel about after seeing the discovery proves that Applicant was not as confident about the outcome of trial as his incredible testimony before this Court indicates. It is no wonder that Applicant was distressed at seeing the State's evidence because that evidence was overwhelming. Felder v. State, 427 S.C. 518, 528-59, 832 S.E.2d 591, 596 (2019) (citing Smalls v. State, 422 S.C. 174, 192, 810 S.E.2d 836, 845 (2018) ("For the evidence to be 'overwhelming' such that it categorically precludes a finding of prejudice . . . it must include something conclusive, such as a confession, DNA evidence demonstrating guilt, or a combination of physical and corroborating evidence so strong that the Strickland standard cannot possibly be met.")). This Court concludes that Applicant, despite being faced with so much evidence of his guilt, still rejected the plea offer because he wanted a better deal, that Applicant would have rejected the fifteen-year plea offer even if plea counsel had met with him to show him the photographs downloaded from the mobile phone, and that Applicant's testimony to the contrary is not credible.

This Court finds that Applicant has failed to prove that there is a reasonable likelihood that, if plea counsel had personally reviewed with Applicant the photographs downloaded from Applicant's mobile phone, the guilty plea would have been entered without the prosecution canceling it or the trial court refusing to accept it. Moyer's testimony gave this Court no reason to think that the State would have withdrawn its fifteen-year plea offer before Applicant's guilty plea was entered, had Applicant accepted the offer. But Judge Stilwell was made aware at Applicant's

guilty plea hearing that Moyer had offered a fifteen-year deal and that Applicant had rejected it. Judge Stilwell took the fact of that plea offer into consideration. In issuing an eighteen-year sentence, Judge Stilwell considered that offer just as he would have considered it if Applicant had come before him to plead guilty with the benefit of the fifteen-year sentencing recommendation, "just like if [Arnold] came before [him] with a recommendation of 15 years. [He] could either take it or not . . . ." Plea Tran. 14-16. Since plea counsel made attempts to get Judge Stilwell to sentence Applicant as if Applicant had accepted the State's fifteen-year sentencing recommendation and Judge Stilwell, in issuing the higher sentence, stated that he was taking that fact into consideration just as if Applicant had, in fact, accepted that offer, this Court concludes that Applicant has failed to prove that there is a reasonable probability that Judge Stilwell would have sentenced Applicant to imprisonment for fifteen years.

This Court finds that Applicant has failed to prove that there is a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time if plea counsel had personally reviewed with Applicant the photographs downloaded from Applicant's mobile phone. Plea counsel's testimony proves that Applicant was set on pleading guilty from the beginning of the representation, but was concerned only with negotiating a sentence that Applicant viewed as acceptable, which was ten or twelve years in prison. Moyer's testimony showed that he would have had no incentive to offer any deal to Applicant better than the fifteen-year deal; indeed, Moyer's decision to call the case to trial after Applicant rejected the fifteen-year deal and his decision to refuse to offer a sentencing recommendation when Applicant subsequently decided to plead guilty prove that the fifteen-year deal was the best that Applicant was going to be offered. Plea counsel informed Judge Stilwell at the time of Applicant's guilty plea hearing that he had told Moyer that Applicant wanted to plead

guilty and take the fifteen-year sentencing recommendation that had been offered by the State earlier, but that "[o]f course [Moyer] wouldn't do it. It's on the trial docket." Plea Tran. 12. Judge Stilwell knew of the back-and-forth of the parties' plea negotiations and took that into consideration. Plea Tran. 15. Judge Stilwell noted that, inasmuch as the fifteen-year plea offer was a recommendation from the State only and not a negotiated sentence, Judge Stilwell would have been free to go along with the State's recommendation or to reject it and issue some other sentence. Plea Tran. 15. Judge Stilwell said that, since the fifteen-year deal would have been a recommendation only, Applicant was in the same position without the benefit of a sentencing recommendation as he would have been without it: subject to the range of possible penalties allowed in the applicable criminal statutes and Judge Stilwell's discretion to sentence within that range. Plea Tran. 15. Judge Stilwell stated that he did not have to honor any plea deal worked out between the parties. Plea Tran. 15. Judge Stilwell stated that, even though Applicant was pleading guilty without the benefit of a plea agreement, that he would nevertheless consider that earlier plea offer when issuing a sentence. Plea Tran. 16. Judge Stilwell affirmed that he would "consider it just like if [Applicant] came before [him] with a recommendation of 15 years." Plea Tran. 16. Applicant has failed to prove that there is a reasonable probability that, even if Applicant had taken the State's offer and pleaded guilty with the benefit of a fifteen-year sentencing recommendation from the State, he would have ended up with a more favorable sentence than the one he received. Judge Stilwell indicated he took into consideration that Applicant had turned down the fifteen-year offer and later wanted to accept it and that he was treating Applicant just as he would have if Applicant had come before him having taken that deal. And Judge Stilwell's sentence was still higher than fifteen years. Applicant has given this Court no reason to find that his sentence would have been lighter had he not rejected the fifteen-year offer.

This Court finds that, even if Applicant had met his burden and proved that plea counsel was constitutionally ineffective with regards to this claim, Applicant's claim would dismissed anyway because it is moot. The South Carolina Supreme Court has held that "[a] justiciable controversy exists when there is a real and substantial controversy which is appropriate for judicial determination, as distinguished from a dispute that is contingent, hypothetical, or abstract." Sloan v. Friends of Hunley, Inc., 369 S.C. 20, 25-26, 630 S.E.2d 474, 477 (2006) (finding that the litigation was moot when, among other things, Friends of Hunley, Inc., provided all documents requested by Sloan in accordance with the Freedom of Information Act) (citing Byrd v. Irmo High School, 321 S.C. 426, 468 S.E.2d 861 (1996)). Our Supreme Court has also held that:

> A case becomes moot when judgment, if rendered, will have no practical legal effect upon existing controversy. This is true when some event occurs making it impossible for reviewing Court to grant effectual relief.

Mathis v. South Carolina State Highway Department, 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973) (finding the Department's appeal from the trial court's order directing the Department to revoke its suspension of Mathis's driver's license was moot when Mathis became entitled to the return of his driver's license before the Supreme Court issued its opinion).

If this Court were to grant the application, it could offer no remedy to Applicant that would give him any benefit that he has not already received. In Lafler v. Cooper, 566 U.S. 156, 174 (2012), the United States Supreme Court instructed that a court in a situation as this should not order the specific performance of the original plea agreement between the applicant and the state. The correct remedy, according to Supreme Court, was for the state to reoffer the plea agreement and, if the applicant accepted it, for the trial court to exercise its discretion in determining whether to vacate the convictions and resentence the applicant in accordance with the plea agreement, vacate only some of the convictions and resentence accordingly, or leave the convictions and

sentence already imposed undisturbed. The Supreme Court left it to the trial court to determine how best to exercise its discretion in all circumstances of the case.

This Court finds that Applicant has failed to prove that plea counsel's performance was deficient and that Applicant suffered any prejudice therefrom. This claim is denied and dismissed with prejudice.

Applicant's request for specific performance is not one that this Court has the authority to grant, and Applicant assured this Court that he did not want his sentences to be vacated but wanted only to be sentenced anew with the benefit of the fifteen-year sentencing recommendation. The problem for Applicant, though, is that Applicant was afforded the same opportunity to make his case for a sentence of fifteen years at his guilty plea hearing before Judge Stilwell that he would have if this Court granted the application. Plea counsel and Moyer informed Judge Stilwell of the history of their plea negotiations and the details of the State's two previous offers: one for a recommended sentence of eighteen years and the final one for a recommended sentence of fifteen years. Judge Stilwell considered that history of plea negotiations and the State's previous plea offers and sentenced Applicant to imprisonment for eighteen years while treating Applicant just as he would have if Applicant had accepted the fifteen-year offer. What Judge Stilwell did was essentially what a court would do if it resentenced Applicant following any grant of post-conviction relief by this Court. In effect, Judge Stilwell took into consideration at the guilty plea hearing everything required by Lafler. A future court could do nothing that has not already been done. In a practical sense, Judge Stilwell conducted the guilty plea hearing in such a way as to cure any prejudice that resulted from the alleged deficiency in plea counsel's performance. If post-conviction relief were granted to Applicant with respect to this claim, any resulting hearing would be an academic exercise repeating what has already been done. The claim, therefore, is moot.

## CONCLUSION

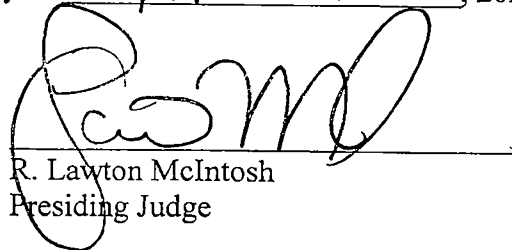
Based on all the foregoing, this Court finds that Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. Therefore, this application is denied and dismissed with prejudice.

This Court notes Applicant, through counsel, must file and serve a notice of appeal within thirty days from the receipt of this Order by counsel to secure the appropriate appellate review. See Rule 203 and 243, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides if the applicant wishes to seek appellate review, he must serve and file a Notice of Appeal. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

**IT IS THEREFORE ORDERED:**

1. This application for post-conviction relief is denied and dismissed with prejudice; and
2. Applicant shall remain in the custody of the State within the South Carolina Department of Corrections.

**AND IT IS SO ORDERED** this 3rd day of March, 2021.



R. Lawton McIntosh
Presiding Judge

Anderson, South Carolina

Copy mailed to
Attorney General / S. Ross
on 3 / 16 / 2021.