THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

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APPEAL FROM HORRY COUNTY
Court of Common Pleas
Post Conviction Relief

Honorable Paul M. Burch, Circuit Court Judge

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Case No.: 2018-CP-26-02728

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Rasheed Glover, 367438, Petitioner,

vs.

State of South Carolina, Respondent.

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NOTICE OF APPEAL

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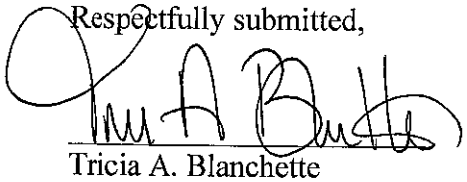
Rasheed Glover, Petitioner, appeals the Order of Dismissal issued by the Honorable Paul M. Burch on May 7, 2021, which was filed on May 11, 2021. Petitioner, through counsel timely filed a Rule 59, SCRCP, Motion. Thereafter, the Court issued an Order Denying Applicant's Motion Pursuant to Rule 59(a) & (e), SCRCP, on August 30, 2021, which was filed on September 1, 2021. Petitioner, through counsel, received notice of the entry of the Order via email from the Office of the Attorney General on September 10, 2021.

Respectfully submitted,



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October 7, 2021

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| STATE OF SOUTH CAROLINA<br>COUNTY OF HORRY | IN THE COURT OF COMMON PLEAS<br>FOR THE FIFTEENTH JUDICIAL CIRCUIT |
| Rasheed Glover, SCDC No. 367438<br><br>Applicant,<br><br>v.<br><br>State of South Carolina<br><br>Respondent. | Case No. 2018-CP-26-02738<br><br>**ORDER OF DISMISSAL** |



This matter comes before this Court by way of Applicant Rasheed Glover's May 2, 2018, application for post-conviction relief. Respondent, the State of South Carolina, made its return on August 2, 2018, and moved to dismiss the allegations. Applicant subsequently amended the application on February 20, 2020, to include five specific allegations of ineffective assistance of counsel. An evidentiary hearing into this matter was held before the undersigned on Wednesday, March 31, 2021, with the parties appearing by WebEx due to the ongoing COVID-19 pandemic. Applicant appeared virtually from Lee Correctional Institution and was represented by Attorney Tricia Blanchette. Assistant Attorney General William H. Ray represented Respondent. Applicant testified, along with his mother, his girlfriend, and his trial counsel, Attorney Johnny Gardner. Following a thorough review of the record in its entirety and the testimony and evidence presented at the evidentiary hearing, this Court finds that Applicant has failed to prove that he is entitled to post-conviction relief and denies the application with prejudice.

## I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections. He was indicted for armed robbery (2018-GS-26-01237) by the Horry County Grand Jury at its March 2015 term. Applicant was represented by Attorney Johnny Gardner and Assistant Solicitors Lauree

Richardson and Thomas G. Terrell, III, of the Fifteenth Circuit Solicitor's Office, prosecuted the case. On October 12, 2015, a jury trial proceeded against Applicant *in absentia* before the Honorable R. Ferrell Cothran. The jury found Applicant guilty, as indicted, on October 13, 2015. Judge Cothran issued a bench warrant for Applicant's arrest, prepared a sentence, and sealed it, pending Applicant's arrest and subsequent appearance.

On March 15, 2016, Applicant appeared before the Honorable Steven H. John, who unsealed, read, and imposed a sentence of twenty-five years' imprisonment. Applicant, through counsel, moved for a new trial and a motion for reconsideration of his sentence. Judge John denied both motions on March 17, 2016.

Applicant filed a timely notice of appeal and the appeal was perfected by Appellate Defender Kathrine H. Hudgins of the South Carolina Commission on Indigent Defense-Office of Appellate Defense, who filed an *Anders* brief and petition to be relieved as counsel. In his *Anders* brief, Applicant raised the following issue:[1]

> 1. Did the judge who unsealed and pronounced sentence following a trial in the Appellant's absence abuse his discretion in refusing to reconsider the twenty five year sentence imposed by the trial judge when a co-defendant received a lesser sentence and the record fails to reflect an appropriate basis for the disparate sentence?

Applicant then filed his own *pro se* brief. The South Carolina Court of Appeals affirmed Applicant's conviction. *State v. Glover*, Op. No 2017-UP-210 (S.C. Ct. App., Filed May 17, 2017). The remittitur was sent on June 2, 2017.

## II. FACTUAL HISTORY

On January 1, 2015, the Scotchman convenience store in Conway, South Carolina was robbed at gunpoint. (ROA 44, 9-18). It had been a slow night and the clerk was making doughnuts

[1] *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396 (1967).

when two men ran in, pointed a gun in her face, and took twenty eight dollars out of the register (ROA 45, 1 – ROA 46, 18). Fearing for her life, she kept her eyes on the floor and noticed one of the robbers had on a muddy pair of Nikes and the other had on red sneakers. (ROA 45, 11-25). She described the one in the red shoes as having on a red sweatshirt, and the other wore fake diamond earrings, skinny blue jeans, and black gloves. (ROA 45, 4-23). The robbers fled after unsuccessfully attempting to access the safe. (ROA 46, 13 – ROA 47, 5). On the way out they grabbed a box of cigarillos and the clerk's cellphone before heading towards Four Mile Road. (ROA 47, 11-22; ROA 48, 7-11). The clerk then hit the panic button and hid behind the counter, waiting for police to arrive. (ROA 47, 5; ROA 49, 13-16).

About this time a customer in a white pickup truck pulled up to a gas pump. (ROA 49, 16-18). The clerk, fearing for his safety, yelled for him to call 911 and not come inside the store. (ROA 49, 18 – ROA 50, 7). He testified that he pulled up to the gas pump and saw two men run out of the store. (ROA 76, 20-24). They were wearing blue jeans, either black or red jackets and appeared to be carrying something in their hands. (ROA 77, 5-22; ROA 79, 12-20). He then saw the clerk calling for help and called 911. (ROA 77, 13 – ROA 78, 2). The police arrived very quickly. (ROA 78, 12-16).

Police responded to the scene, established a perimeter, and began saturating the area with officers and dogs. (ROA 56, 10-19; ROA 94, 23 – ROA 95, 6). The police were searching for two young black males, one wearing a red shirt and another wearing a dark blue or black hoodie. (ROA 59, 6-13; ROA 82, 23 – ROA 83, 2; ROA 96, 24 – ROA 97, 1). An officer spotted a black knit hat laying on the ground near the scene. (ROA 84, 2-13; ROA 123, 1-8).

A van was spotted leaving the parking lot of the nearby Horry County Schools Education building, which was unusual because it was around 2:00 AM. (ROA 60, 6-16). As it passed,

officers realized it was a taxi and a young black male in a red shirt was sitting in the passenger seat. (ROA 60, 17-24; ROA 96, 14-21). The vehicle was stopped, a lot of movement was noticed among the passengers, and everyone was asked to place their hands on the ceiling. (ROA 61, 14 – ROA 62, 6). By a stroke of luck, the taxi driver pulled over in the parking lot of the Scotchman that had just been robbed. (ROA 86, 19-24).

The passengers were asked to step out of the vehicle and the officer noticed that some of them had muddy shoes. (ROA 64, 11-15). The clerk was able to identify one of the passengers, Tyreke Phillips, as being involved in the robbery. (ROA 65, 3-20; ROA 68, 7-23). A cell phone matching the description of the one stolen was seen in plain view on the floorboard of the vehicle. (ROA 98, 1-6; ROA 122, 2-14). A search of the vehicle revealed a black handgun under the front passenger seat, a red hoodie behind the front seat, a black hoodie between the center seats, and a plastic bag in the rear of the vehicle containing cigarillos and another handgun. (ROA 99, 25 – ROA 100, 14; ROA 106, 8-12; ROA 121, 6-18). Applicant was in the back of the van wearing a white shirt. (ROA 88, 18-21).

Asia Collier testified that she had been charged with armed robbery because she drove Applicant, Amontre Ellerbe, Tyreke Phillips, and Aikeem Coles to the Scotchman that night. (ROA 132, 7-20). She was dating Applicant at the time and knew Ellerbe, Phillips, and Coles through him. (ROA 134, 9-19). The group had planned the robbery earlier that day at Applicant's mother's house. (ROA 133, 7 – ROA 134, 2; ROA 136, 12-16). The plan was for her to drive Applicant's brother's truck, while Applicant and Ellerbe went into the store and the other two remained outside. (ROA 137, 5-24). She first drove everyone to Walmart where they purchased black gloves, then dropped them off near the Scotchman. (ROA 138, 4-17). All four men got out, and about five minutes later they returned, appearing panicked, and told her to drive. (ROA 140,

17 – ROA 141, 8). She drove them to a nearby apartment complex, stopped, and told them to get out and call a cab because she did not want to be involved any longer. (ROA 143, 15 – ROA 144, 11).

She noted that Ellerbe and Phillips had weapons, and that Ellerbe was wearing a black jacket and a hat. (ROA 141, 11-20; ROA 142, 15-21). They were all attempting to brush the sand off their shoes and Ellerbe took off his hat when he got back in the truck. (ROA 142, 16-21). Collier stated that Applicant had carried an extra pair of shoes with him and changed into them after the robbery. (ROA 143, 1-10). Applicant told her to throw away the discarded shoes and gloves, which she did after they exited the vehicle. (ROA 147, 1-19). She stated that she became involved in the robbery because Applicant was very manipulative and she wanted his acceptance. (ROA 145, 6-13). She turned herself into police several weeks later and gave a written statement inconsistent with her testimony provided in court. (ROA. 149, 2 – ROA 150, 2). She explained that Applicant told her what to tell the police and she made the misleading statement because she was afraid. (ROA 150, 3-8; ROA 160, 9-20). Applicant was said to be the mastermind of the robbery, and him and Ellerbe were the ringleaders. (ROA 155, 7-16).

Amontre Ellerbe testified that he was incarcerated for armed robbery for robbing the Scotchman with Applicant, Phillips, Coles, and Collier. (ROA 163, 3-13). He had entered a guilty plea prior to Applicant's trial. (ROA 163, 14-15). He and Applicant were the two men who went into the store with guns and committed the crime. (ROA 164, 1-5). The original plan was for everyone to go into the store, but Coles and Phillips backed out, and chose to stand behind the building. (ROA 166, 1-10). He stated that Applicant began changing his clothes after the robbery, losing his red hoodie and putting on a pair of black Vans, before leaving the shoes in the getaway vehicle. (ROA 166, 19 – ROA 167, 15; ROA 168, 24 – ROA 169, 6). Ellerbe testified that he was

wearing a black hoodie at the time. (ROA 168, 6-20). He stated that it was Applicant's plan to rob the store and that he was testifying against him because Applicant had tried to blame him for everything. (ROA 169, 7-8; ROA 170, 10-23; ROA 172, 20-21).

Applicant did not testify at his trial. In fact, Applicant did not show up at all and was tried *in absentia* by a jury and the Honorable R. Ferrell Cothran. (ROA 23, 5 – ROA 29, 13). At the close of his trial, the judge stated that "when he's arrested, I don't know if I'll still be here or not but you can bring him before some judge and he'll open this sentence and read it to him and see what happens." (ROA 207, 18-21) His sentence was sealed and a bench warrant was issued for his failure to appear. Two arrest warrants were also issued, one for escape and another for removing an electronic monitoring device, after his GPS monitor that he was required to wear as a condition of his bond was found in the parking lot of a Conway apartment complex. (ROA 207, 11-17; warrant no.'s 2015A2610202429; –2430). The two arrest warrants were later dismissed in February, 2016.

Applicant was apprehend the following March, and was brought before the Honorable Steven H. John for his sentencing hearing. (ROA 209 – ROA 218). Applicant's trial counsel was involved in another trial at the time, so an attorney, Jarrett Bouchette, was sent to the hearing in his place. (ROA. 211, 12-14). Attorney Bouchette stated that he had no post-trial motions to make, but requested that the matter be held in abeyance until trial counsel could appear. (ROA 212, 1-17).

Trial counsel appeared two days later, after his conflicting professional obligations had concluded. (ROA 213, 10 – ROA 218). He moved for a new trial and for reconsideration of the sentence. (ROA 213, 22 – ROA 214, 4). He stated that he had done a little research and believed that the court had the power to reconsider the sentence. (ROA 214, 1-4). The court agreed with

him, stating that "whoever opens the sealed sentence by that Supreme Court decision does have the authority to change the prior sentence issued in this matter." (ROA 214, 5-11). In support of the motion, trial counsel argued that the Applicant had no prior record, his codefendants had received ten years, and he was a twenty-year old resident of Horry County with no children. (ROA 214, 12-22).

The Assistant Solicitor responded by arguing that the codefendants had entered guilty pleas prior to Applicant's trial, and the two who received ten year sentences were Phillips and Coles, who had not entered the store. (ROA 215, 5-11). Ellerbe had also entered a plea, but received a fifteen year sentence, which was reduced to ten after he cooperated with the State by testifying against Applicant. (ROA 215, 13-21). Judge Cothran was the judge who resentenced Ellerbe, and reduced the sentence to ten years after hearing the trial and determining that the testimony was essential to the conviction. (ROA 215, 17-21). She also pointed out that evidence was presented at trial showing that both Applicant and Ellerbe were armed, and the robbery was planned during a time when "a lot of clerks were getting killed" in Horry County. (ROA 216, 1-5). The State opposed resentencing because Judge Cothran was the one who heard these facts. (ROA 216, 7-12). After consulting with Applicant, trial counsel requested a ten or fifteen year sentence. (ROA 216, 15-24).

Judge John refused to alter the sentence, stating that there was no trial transcript at that time and Judge Cothran was the one who had heard the testimony. (ROA 217, 2-7) He stated that his decision was based on the sentencing range for armed robbery, its classification as a violent and most serious offense, as well as the information conveyed by the solicitor that Applicant was an active participant in the crime. (ROA 217, 7-18). Judge John also refused to grant a new trial because no sufficient showing to grant such a request had been made. (ROA 218, 19-25).

## III. CURRENT APPLICATION

In his current application for post-conviction relief, as amended, Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel for failure to actively negotiate a plea offer and/or ensure that Applicant had the opportunity to properly reject the opportunity to enter a guilty plea.
2. Ineffective assistance of counsel for failure to properly advise Applicant about being tried in his absence if he did not appear for trial.
3. Ineffective assistance of counsel for failure to move for a continuance prior to jury selection and/or object to the trial in Applicant's absence.
4. Ineffective assistance of counsel for failure to offer meaningful representation during the sentencing phase of Applicant's trial.
5. Ineffective assistance of counsel related to the hearing to open Applicant's sentence and for post trial motions, specifically, but not limited to:
    a. Failure to have knowledge of, prepare for and be present at the hearing opening Applicant's sentence. Additionally, failure to ensure that the representative that appeared on his behalf was properly prepared and advocating for Applicant.
    b. Ineffective assistance of counsel for failure to make an oral or written request and/or objection for additional time and/or for the trial court to hear Applicant's post trial motions.
    c. Ineffective assistance of counsel for failure to be properly prepared to provide information beneficial to Applicant or make arguments at the final motion hearing.

### *Testimony Presented at the PCR Hearing*

The PCR Hearing saw testimony from Applicant, his girlfriend Samantha Daley, his mother Roslyn Glover, and his trial counsel Johnny Gardner. Applicant testified that he was not present at his 2015 trial for armed robbery of a Scotchman convenience store in Horry County. (PCR Tr. 13, 24 – PCR Tr. 14, 11). He stated that he had four codefendants, two of whom testified against him at his trial. (PCR Tr. 14, 16-25). One of those codefendants, Asia Collier, had her charges dismissed, and the other, Amontre Ellerbe, entered a guilty plea and received ten years' imprisonment for his involvement in the crime. (PCR Tr. 15, 1-4).

Applicant testified that Attorney Buddy Long was initially appointed to represent him, but he was subsequently replaced by Attorney Johnny Gardner ("trial counsel"), because of a conflict of interest with one of Applicant's codefendants. (PCR Tr. 16, 1-11). Applicant was provided with a plea offer, requesting his guilty plea in exchange for a ten to fifteen year recommended sentence. (PCR Tr. 16, 12-18; Applicant's exhibit no. 1). Applicant stated that he rejected the offer because he wanted no more than ten years' imprisonment and to be sentenced under the Youthful Offenders Act. (PCR Tr. 16, 19 – PCR Tr. 17, 13; PCR Tr. 33, 4-6). No more plea deals were forthcoming despite trial counsel's efforts to obtain a more lenient offer. (PCR Tr. 8-11; PCR Tr. 33, 10-14).

Applicant stated that he met with trial counsel the week before his trial was set to begin and discussed his charge and the possible outcomes of the trial. (PCR Tr. 18, 18 – PCR Tr. 19, 1). He had been released on bond at the time. (PCR Tr. 31, 18-23). Applicant testified that at that point he did not want to proceed to trial and told his trial counsel that he wished to accept a plea offer. (PCR Tr. 19, 2-11). Applicant claimed he was not given advice on what would happen if he did not attend the trial, but was aware of the date and knew that his attendance was expected. (PCR Tr. 33, 15-21). Nevertheless, he skipped his trial because he was afraid and "felt like [he] was being forced to go. . . ." (PCR Tr. 19, 12-23). In the process he removed his GPS ankle monitor. (PCR Tr. 31, 24 – PCR Tr. 32, 6). He stated that he thought he could avoid the trial entirely by not showing up, but did not explain why having his trial continued would have alleviated his fears. (PCR Tr. 34, 5 – PCR Tr. 35, 2).

Applicant acknowledged that his trial counsel moved for a continuance prior to the trial's commencement, and said that he would have liked for the matter to have been continued so that he could have either been present or enter a guilty plea. (PCR Tr. 20, 23 – PCR Tr. 21, 4).

Applicant stated that he was aware that his codefendant Asia Collier was going to testify against him, but was not aware that the State was going to call Amontre Ellerbe. (PCR Tr. 21, 5-9). He indicated that he understood Ellerbe's testimony was that he was the ringleader of the crime and that his sentence had been reduced after he testified. (PCR. Tr. 21, 10-16). He stated that he disagreed with Asia Collier's testimony that he manipulated her into becoming involved in the crime, instructed her to throw away evidence, and directed her statements to the police. (PCR Tr. 35, 16 – PCR Tr. 35, 17).

He stated that he wanted his attorney to speak on his behalf before the sentence was imposed. (PCR Tr. 21, 17-23). He was at an apartment complex in Conway, South Carolina when he was arrested, held for a short period of time, and brought in for his sentencing hearing. (PCR Tr. 22, 1-8; PCR Tr. 39, 9-15). He stated that he did not know what was going on at the time, but figured it was related to his charges. (PCR Tr. 22, 13-16). Trial counsel's partner, Attorney Jarrett Bouchette, was at the courtroom to represent Applicant, but the two did not have discussions prior to the sentencing hearing's commencement. (PCR Tr. 22, 18 – PCR Tr. 23, 17). Attorney Bouchette requested the matter be held in abeyance and Applicant was held in the county jail for two days before he was able to speak with Mr. Gardner just prior to the sentencing hearing reconvening. (PCR Tr. 23, 18 – PCR Tr. 24, 4). Applicant stated that the conversation was rushed because the hearing was about to begin, and he did not remember anything being discussed. (PCR Tr. 24, 5-8; PCR Tr. 39, 24 – PCR Tr. 40, 3).

Applicant testified that he had concerns about how much time his trial counsel had to prepare for the sentencing hearing. (PCR Tr. 25, 2-9). Specifically, he said he did not have an opportunity to discuss the motion for reconsideration of the sentence, nor was he told why Judge Cothran was not the one unsealing the sentence. (PCR Tr. 25, 13-21). Applicant acknowledged his

trial counsel made arguments in support of his motion to reconsider, but stated that he would have liked for him to have gotten letters or people to appear and speak on his behalf. (PCR Tr. 25, 22 – PCR Tr. 26, 7). He added that he would have also liked to speak for himself at the reconsideration hearing, to tell the Court he had finished high school, attended college, was loved in his community, and would "give a hand to anybody that needed it." (PCR Tr. 27, 2-17). He stated he did not speak on his own behalf because he did not know he could. (PCR Tr. 39, 24 – PCR 40, 8).

Applicant acknowledged that he spoke with trial counsel during a break in the sentencing hearing and told him he would like to receive the same sentence as his codefendants. (PCR Tr. 28, 3-9). Applicant stated that he would have liked for his trial counsel to obtain the trial transcript for the Court to review. (PCR Tr. 28, 15-18). He stated that he would have also liked the opportunity to explain to Judge Cothran why he did not appear for his trial. (PCR Tr. 29, 2-10).

Samantha Daley testified that Applicant is her boyfriend and they met during their freshman year of high school. (PCR Tr. 42, 7-14). She stated that she had prepared a letter in anticipation of the PCR hearing to present to the Court. (PCR Tr. 42, 15 – 19). She explained that had she been asked by trial counsel to provide the letter for the reconsideration hearing, she would have done so before reading the letter aloud at the hearing. (PCR Tr. 44, 6-21).

Roslyn Glover testified that she is Applicant's mother and was present at the sentencing hearing before Judge John. (PCR Tr. 46, 1-11). She did not speak with trial counsel at the time, but stated that she would have wanted to speak to the Court had she been given an opportunity. (PCR Tr. 46, 12-18). She also read a letter she prepared that could have been presented at the sentencing hearing. (PCR Tr. 46, 19-25).

Trial counsel testified that he had been practicing criminal law in Horry County for almost thirty years and was appointed to represent Applicant after previously appointed counsel, Attorney

Buddy Long, had been conflicted out. (PCR Tr. 48, 1-15). He stated that he did not specifically recall the plea offer that was provided to Applicant, but explained that he had discussed plea negotiations with Applicant and told him that if he could not reach a plea agreement then he would have to go to trial. (PCR Tr. 48, 19 – PCR Tr. 49, 7). He believed that he continued to negotiate a plea offer after Applicant rejected the first offer, but was unsuccessful. (PCR Tr. 62, 17 – PCR. Tr. 63, 7). He said that he had ample opportunity to meet with Applicant and prepare for trial. (PCR Tr. 49, 8-12). During these pretrial discussions he spoke with Applicant about the potential range of sentences he was facing. (PCR Tr. 63, 8-15).

He testified that he met with Applicant on the Friday before trial and the last thing he told Applicant was that he would see him at the courthouse on the following Monday. (PCR Tr. 49, 13-25). He did not recall specifically discussing a *trial in absentia*, but said that he did tell Applicant that the trial was going forward regardless of whether Applicant appeared. (PCR Tr. 50, 6-12). He said he made efforts to reach Applicant after he surprisingly did not show up, but was unsuccessful. (PCR Tr. 50, 13 – PCR Tr. 51, 2). He explained that he moved for a continuance and did not believe it would be beneficial to explain on the record all of the efforts he made to contact Applicant. (PCR Tr. 51, 3-7).

Trial counsel testified that the State's case was not dependent upon Amontre Ellerbe's testimony, but that Ellerbe's sentence was reduced as a result of his testimony. (PCR Tr. 13-22). After Applicant was convicted, trial counsel stated that he remained quiet before the sentence was sealed because he did not want to make the judge mad, after he had just sat through a long trial where the defendant did not appear. (PCR Tr. 52, 2-10).

Trial counsel stated that he did not receive much notice and was in court on an unrelated trial when he first heard about the sentencing hearing when Applicant was arrested on the bench

warrant. (PCR Tr. 52, 11-21). He did not expect anything to happen on that date, but nevertheless arranged for an attorney to be present in his place. (PCR Tr. 67, 22 – PCR Tr. 68, 11). The matter was continued because of his trial so that he may be able to appear on Applicant's behalf at the sentencing hearing. (PCR Tr. 53, 4-11). Despite the continuance, he did not have an opportunity to meet with Applicant before the sentencing hearing due to the gravity of his other professional obligations. (PCR Tr. 53, 12 – PCR Tr. 54, 12). He stated that the motions for a new trial and sentence reconsideration are ones he makes every time a client is convicted. (PCR Tr. 64, 25 – PCR Tr. 65, 11). Trial counsel testified that he did not reach out to Applicant's friends and family because he was too busy with the other trial. (PCR Tr. 56, 9-18).

Trial counsel explained that, at the time, he was not sure that a non-sentencing judge could be doing the consideration to amend the sentence, but he agreed that it could be done at the time because he hoped it would benefit his client. (PCR Tr. 54, 14 – PCR Tr. 55, 14). "That's just trial tactics," he explained. (PCR Tr. 55, 9). He felt certain that the judge would reduce the sentence. (PCR Tr. 55, 13-14). Trial counsel did not order the trial transcript to provide to the Court, and stated that it may have been hard to get at that time even if he had. (PCR Tr. 55, 21 – PCR Tr. 56, 8). He did not expect that the judge would consider the fact he had not presided over the trial when denying the motion to reconsider. (PCR Tr. 56, 19 – PCR Tr. 57, 1).

Trial counsel stated that a rule limiting consideration of post-trial motions to the judge who presided over the trial would likely prove unworkable, but stated that if something is not considered properly it is "not essentially being considered." (PCR Tr. 57, 2-20). He interpreted the judge's decision in this matter as a refusal to exercise discretion. (PCR Tr. 57, 21 – PCR Tr. 58, 14). Looking back at it with the benefit of hindsight he wished that he had requested the matter be continued until the transcripts were available. (PCR Tr. 58, 18-25). Based upon the outcome, he

stated that he did not believe Applicant had a fair opportunity to have his sentence reconsidered, despite having a "really good trial." (PCR Tr. 59, 1-5). He stated that he did not believe any objections to the proceedings would have made a difference because the judge was "well within his rights" to unseal the sentence. (PCR Tr. 67, 2-21).

Trial counsel testified that had Applicant been present at the hearing he could have likely entered a guilty plea at that point, avoided trial, and received a ten year sentence. (PCR Tr. 59, 5-21). In his experience, it is almost a certainty that a conviction at trial will carry more time than a guilty plea. (PCR Tr. 60, 5-9). Nevertheless, he testified that he did not recall either judge commenting on Applicant's decision not to appear at trial at any point. (PCR Tr. 66, 4-11).

## IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the record and heard the testimony at the PCR hearing. This Court has observed the evidence and witnesses presented at the evidentiary hearing, judged their credibility, and weighed their testimony accordingly. Set forth below are the findings of fact and conclusions of law made pursuant to §17-27-80 of the South Carolina Code (2014).

### Ineffective Assistance of Trial Counsel

Applicant's PCR application raises five claims of ineffective assistance of counsel, all of which concern either trial counsel's representation before the trial began, or after the verdict was reached. The pretrial allegations relate to trial counsel's plea negotiations, and his representation regarding the trial in absentia. The remaining allegations all arise from trial counsel's representation during the sentencing hearing. After a thorough review of the record, this Court finds Applicant has not met his burden of proof and is not entitled to relief on any of these grounds.

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. U.S. Const. amend VI;

*Strickland v. Washington*, 466 U.S. 668 (1984); *Lomax v. State*, 379 S.C. 93, 665 S.E.2d 164 (2008). 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 result." *Strickland*, 466 U.S. at 686.

*Strickland* does not guarantee perfect representation, only a "'reasonably competent attorney.'" 466 U. S. at 687 (quoting *McMann v. Richardson*, 397 U.S. 759, 770 (1970)). Representation is constitutionally ineffective only if it "so undermined the proper functioning of the adversarial process" that the defendant was denied a fair proceeding. *Strickland*, 466 U.S. at 686. Just as there is no expectation that competent counsel will be a flawless strategist or tactician, an attorney may not be faulted for a reasonable miscalculation or lack of foresight or for failing to prepare for what appear to be remote possibilities. *Id.*

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in *Strickland*, 466 U.S. 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*, 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 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*, 466 U.S. at 690). 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 Petitioner such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625.

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. *Id.* 466 U.S. at 697. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. *Strickland*, 466 U.S. 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.

Although courts may not indulge "post hoc rationalization" for counsel's decision making that contradicts the available evidence of counsel's actions, *Wiggins v. Smith*, 539 U.S. 510, 526-527 (2003), neither may they insist counsel confirm every aspect of the strategic basis for his or her actions. There is a "strong presumption" that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than "sheer neglect." *Yarborough v. Gentry*, 540 U. S. 1, 8 (2003). After an adverse verdict at trial even the most experienced counsel may find it difficult to resist asking whether a different strategy might have been better, and, in the course of

that reflection, to magnify their own responsibility for an unfavorable outcome. *Strickland*, however, calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind. *Strickland* at 688; *Harrington v. Richter*, 562 U.S. 86 (2011).

With respect to prejudice, an applicant must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. It is not enough "to show that the errors had some conceivable effect on the outcome of the proceeding." *Id.* at 693. Counsel's errors must be "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 687. *See Harrington*, 562 U.S. 86.

"Surmounting *Strickland's* high bar is never an easy task." *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010). An ineffective assistance of counsel claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the *Strickland* standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversarial process the right to counsel is meant to serve. *Strickland*, 466 U.S. at 689–690. Even under de novo review, the standard for judging counsel's representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings knew of materials outside the record and interacted with the client, with opposing counsel, and with the judge. It is "all too tempting" to "second-guess counsel's assistance after conviction or adverse sentence." *Id.* at 689; *see also Bell v. Cone*, 535 U. S. 685, 702 (2002); *Lockhart v. Fretwell*, 506 U. S. 364, 372 (1993). The question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom. *Strickland*, 466 U.S at 690.

In assessing prejudice under *Strickland*, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. *Wong v. Belmontes*, 558 U.S. 15 (2009); *Strickland*, 466 U.S. at 693. Instead, *Strickland* asks whether it is "reasonably likely" the result would have been different. *Id.* at 696. 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." *Id.* at 693, 697. The likelihood of a different result must be substantial, not just conceivable. *Id.* at 693; *Harrington*, 562 U.S. 86.

Based on the testimony and evidence presented at the evidentiary hearing, Applicant has failed to meet his burden of proof as to each allegation of ineffective assistance of counsel. This Court will address each individual allegation against counsel below:

**A. Plea Negotiations**

Applicant alleges that his trial counsel provided constitutionally ineffective assistance by failing to actively negotiate a plea offer and failing to make sure that he had an adequate opportunity to accept or reject such a plea.

Defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused. *Missouri v. Frye*, 566 U.S. 134, 145 (2012); *Collins v. State*, 422 S.C. 250, 261, 810 S.E.2d 871, 876 (2018). Generally, where defense counsel does not communicate such an offer to the defendant, counsel has rendered ineffective assistance. *Id.* In essence, having to stand trial, not choosing to waive it, is the prejudice alleged. *Lafler v. Cooper*, 566 U.S. 156 (2012).

Testimony and evidence presented at the PCR hearing, including one of Applicant's own exhibits, shows that he was extended an offer of ten to fifteen years' imprisonment in exchange for a guilty plea. Both Applicant and his trial counsel testified that he rejected the offer because he wanted to serve less time and wanted to be sentenced under a different statutory scheme. His trial counsel further testified that he continued with the negotiations, but no further offers were extended. It is clear from this testimony that Applicant was made aware of the offer, given an opportunity to consider it, and chose to reject it because he was not satisfied with its terms. Therefore, Applicant has failed to show that a plea offer would have been accepted but for his counsel's errors, and has not met his burden of proving deficiency or prejudice from his trial counsel's handling of his plea negotiations. Post-conviction must be denied on these grounds and the allegation must be dismissed with prejudice.

**B. Trial in Absentia**

Applicant alleges that his trial counsel provided constitutionally ineffective assistance for failing to properly advise him about being tried in his absence if he did not appear for trial. Applicant also claims that trial counsel was constitutionally ineffective because he did not move for a continuance after Applicant failed to appear at the start of his trial.

Although the Sixth Amendment of the Constitution guarantees the right of an accused to be present at every stage of his trial, this right may be waived. *State v. Bell*, 293 S.C. 391, 401, 360 S.E.2d 706, 711 (1987); *Ellis v. State*, 267 S.C. 257, 260, 227 S.E.2d 304, 305 (1976). Rule 16 of the South Carolina Rules of Criminal Procedure states:

> [A] person indicted for misdemeanors and/or felonies may voluntarily waive his right to be present and may be tried in his absence upon a finding by the court that such person has received notice of his right to be present and a warning was given that the trial would proceed in his absence upon a failure to attend the court.

Rule 16, SCRCrimP.

Nonetheless, a waiver of such an important right is permitted only in limited circumstances. *City of Aiken v. Koontz*, 368 S.C. 542, 547, 629 S.E.2d 686, 689 (2006). Therefore, before a defendant may be tried *in absentia*, the trial court must determine a defendant voluntarily waived his right to be present at trial, making findings of fact on the record that the defendant (1) received notice of his right to be present and (2) was warned that the trial would proceed in his absence. *Id.* However, if the record does not reveal that the defendant was afforded notice of his trial, the resulting conviction cannot stand. *State v. Jackson*, 290 S.C. 435, 436, 351 S.e.2d 167 (1986). A bond form that provides notice that a defendant can be tried *in absentia* may serve as the requisite notice. *City of Aiken, supra*. Since Applicant's trial, the South Carolina Court of Appeals has ruled that a court may not try a criminal defendant *in absentia* unless it finds that he received notice of the trial and voluntarily chose to be absent. *State v. Wrapp*, 421 S.C. 531, 808 S.E.2d 821 (2017).

The granting of a motion for a continuance is within the sound discretion of the trial court and will not be disturbed absent a clear showing of an abuse of discretion. *State v. Tanner*, 299 S.C. 459, 462, 385 S.E.2d 832, 834 (1989). Failure to request a continuance when a criminal defendant fails to appear for trial has been deemed deficient performance. *Morris v. State*, 371 S.C. 278, 639 S.E.2d 53 (2006). This deficiency will rise to the level of ineffective assistance of counsel if the defendant is prejudiced by the failure to make the request, such as when the defendant would have entered a plea to a lesser included offense had they appeared. *Id.* 371 S.C. at 283, 639 S.E.2d at 56.

The trial transcript shows that trial counsel specifically moved for a continuance prior to the first witness being sworn. (ROA 28, 23-24). It also clearly shows that Applicant was provided with notice of the date of his trial, told that his attendance was expected, and that the trial would proceed in his absence if he failed to appear. (ROA 22, 18 – ROA. 29, 7). Trial counsel testified

that he provided Applicant with specifics regarding the date, and was certain that Applicant knew when the trial would occur. He further testified that he informed Applicant that the trial would proceed, even if he did not show up. His trial counsel also stated that Applicant would have likely had an opportunity to enter a plea and avoid the trial entirely had he shown up, and would have likely received less time.

Applicant testified at his PCR hearing that he knew the date of his trial and that he was expected to be present, but was scared and therefore did not appear. He claimed to have thought that there would simply be no trial if he did not appear. He did not explain why his fears about attending his trial would have subsided had a continuance been granted. The record shows that trial counsel properly advised Applicant that his trial would go forward with or without him, and that he moved for a continuance when Applicant failed to appear. As such, Applicant has shown neither deficiency nor prejudice resulting from trial counsel's performance. Therefore, this allegation is without merit, relief is denied, and the allegation is dismissed with prejudice.

### C. Representation during Sentencing

The focal point of Applicant's effort to obtain post-conviction relief are his allegations that his trial counsel was ineffective in representing him when his sentence was unsealed, read, and imposed. He asserts that his counsel failed to be present, and failed to have a well-prepared attorney appear on his behalf. He further asserts that his attorney failed to request additional time for the trial court to hear his post-trial motions. Finally, he asserts that his attorney was not properly prepared to provide information beneficial to Applicant or to make arguments at the final motion hearing.

At the evidentiary hearing, Applicant expressed additional concerns that he received a twenty-five year sentence at trial, while his codefendants received ten year sentences in exchange

for their guilty pleas and/or testimony. While the issue of whether trial counsel was ineffective for failing to object to the imposition of a "trial tax" was never formally pleaded in a written allegation, it was addressed at the hearing and therefore shall be addressed herein.

***Failure to be Present and Prepared for the Sentencing Hearing***

Applicant alleges that his trial counsel was ineffective for failing to be present at his sentencing hearing, and failing to have prepared counsel appear in his place. This allegation is without merit.

Applicant was apprehend in March, 2016, and was brought before the Court on March 15, 2016, to have his sentence unsealed. At that time, Applicant's trial counsel was unavailable because he was involved in an unrelated trial. He arranged for a representative from his office, Attorney Jarrett Bouchette, to appear on his behalf. Attorney Bouchette initially stated that he had no motions to make, but did request that the matter be held in abeyance until Applicant's trial counsel could appear at the end of the week, when his trial was expected to conclude. This request was granted, and Applicant was held at the county detention center until his trial counsel could be present.

The hearing was reconvened later in the week and trial counsel personally appeared. He made "standard post-trial motions" which were a motion for a new trial as well as a motion to reconsider the sentence. He stated that he had done "a little bit [of] research" into whether the court could reconsider the sentence, requested that he be allowed to argue against the sentence imposed by Judge Cothran, and proceeded to do just that. (ROA. 214, 1-22).

The record shows that Applicant's counsel did what could be expected of a competent attorney under prevailing professional norms. He received short notice that Applicant had been apprehended and would be brought into court. His other professional obligations would not permit

the trial or hearing was held. The motion may, in the discretion of the court, be determined on briefs filed by the parties without oral argument.

As noted above, the granting of a motion for a continuance is within the sound discretion of the trial court and will not be disturbed absent a clear showing of an abuse of discretion. *Tanner*, 299 S.C. at 462, 385 S.E.2d at 834. Where counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel. *Stokes v. State*, 308 S.C. 546, 419 S.E.2d 778 (1992). Counsel's strategy will be reviewed under "an objective standard of reasonableness." *Ingle v. State*, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002). Every effort must be made to eliminate the distorting effects of hindsight and evaluate counsel's decisions at the time they were made. *Edwards v. State*, 392 S.C. 449, 710 S.E.2d 60 (2011) (citing *Strickland*, 466 U.S. at 689). To achieve this goal, an attorney's retrospective testimony that he would have done something differently may be disregarded if his actions at the time were in furtherance of an objectively reasonable strategy. *Id.* 392 S.C. 458, 710 S.E.2d at 65.

The record clearly shows that Applicant's trial counsel had an attorney from his office appear on his behalf when Applicant's sentence was initially meant to be unsealed. That attorney *did* request additional time. At the time, trial counsel was content going forward with the hearings on Applicant's post-trial motions, despite being bogged down by other work and having reservations about whether the matter was going to be properly heard, because he believed it would be beneficial to his client. Doing so, he explained, was just a matter of trial tactics. This was an objectively reasonable strategy considering the fact that the judge hearing the motion to reconsider did not hear the damaging evidence presented by Applicant's codefendants at trial, which he hoped would yield more benefit than being before the trial judge.

Applicant suggests that trial counsel should have requested more time. Trial counsel expressed regret for not ordering the trial transcript. In hindsight, trial counsel may not have

him to appear, so he made arrangements for another attorney to be present at the hearing. That attorney requested that the matter be held in abeyance until he could be present, and this motion was granted. The hearing was then delayed for two days, and he testified that he briefly met with Applicant prior to the sentencing hearing. Then, he made two post-trial motions, and argued for a sentencing reduction. Applicant had a brief opportunity to speak with his attorney prior to the sentencing hearing, and then again during a break in the hearing.

Trial counsel's post-trial motions were unsuccessful, but it is not because he was deficient in failing to appear or have a prepared attorney appear in his place. There is little more, if anything, trial counsel could have done given the short notice of the hearing, his competing professional obligations, and the fact that no trial transcript existed at the time. He stated at the PCR hearing that his tactics going into the sentencing hearing were to do what he could to allow the judge an opportunity to reconsider the sentence because he believed it would benefit his client. Unfortunately for Applicant, it was not a winning strategy, but that does not mean it was unsound or amounted to ineffective assistance of counsel. As such, Applicant has failed to meet his burden of proof, the allegation shall be dismissed with prejudice, and post-conviction relief shall be denied.

***Failure to Request Additional Time***

Applicant alleges that his trial counsel was ineffective for failing to request additional time for post-trial motions to be heard. This allegation is without merit.

Rule 29 of the South Carolina Rules of Criminal Procedure states:

> [P]ost-trial motions shall be made within ten (10) days after the imposition of the sentence. . . . The time within which to make the motion shall not be affected by the ending of a term of court or departure of the judge from the circuit, and the circuit judge shall retain jurisdiction of the action for the purpose of hearing and disposing of the motion if not heard and disposed of during the term. Except by consent of the parties, argument on the motion shall be heard in the circuit where

provided the perfect, flawless representation that Applicant hopes for, but that is not what is required under the Sixth Amendment standard for assistance of counsel. It is clear that trial counsel developed a legitimate, reasonable strategy for the sentencing hearings. That strategy would not have benefitted from extra time. Therefore, trial counsel was not deficient in failing to request extra time for the sentencing hearing.

Furthermore, Applicant has failed to prove he was prejudiced by trial counsel's failure to request an additional continuance. There is no evidence before the Court that a denial of a continuance would have amounted to an abuse of discretion, and therefore his counsel's failure to request one could not have prejudiced Applicant. The judge unsealed the sentence, heard arguments on Applicant's post-trial motions, and stated that he was considering both before denying each. This is a blatant exercise of sound discretion, and Applicant has not presented any evidence that his post-trial motions would have been made more likely to succeed simply by delaying their consideration. All that has been provided by Applicant is speculation with the benefit of hindsight, which is explicitly what *Strickland* and its progeny assert must be avoided. Therefore, Applicant has failed to meet his burden of proof, this allegation shall be dismissed with prejudice, and post-conviction relief shall be denied.

***Failure to Provide Beneficial Information or Arguments***

Applicant alleges that his trial counsel provided constitutionally ineffective assistance when he failed to provide beneficial information or arguments at the sentencing hearing. At the PCR hearing, Applicant presented letters written and read by his mother and girlfriend. Applicant presented these letters to show what could have been presented at the sentencing hearing in support of his motion to reconsider.

South Carolina's courts have not yet developed robust authorities on ineffective assistance of counsel claims arising from motions to reconsider made at sentencing hearings. However, other courts have applied the *Strickland* test and found that failure to file a motion to reconsider a sentence does not in and of itself constitute ineffective assistance of counsel. *State v. Brooks*, 260 So.3d 713 (La. Ct. App. 2018). Where an applicant alleges that their counsel was ineffective for failing to move for reconsideration of a sentence, they must show that there is a reasonable probability that the motion would have resulted in a different sentence. *State v. Lee*, 636 So.2d 634 (La. Ct. App. 1994). And again, objectively reasonable trial strategies do not constitute ineffective assistance of counsel. *Ingle*, 348 S.C. 467, 560 S.E.2d 401.

*Strickland* itself addressed questions about the effectiveness of representation provided at sentencing hearings. Evidence showing that "numerous people who knew respondent thought he was a generally good person" is not enough to find a "reasonable probability that the omitted evidence would have changed the conclusion . . . and, hence, the sentence imposed." *Strickland*, 466 U.S. at 700. Instead, it must be shown that counsel failed to present strong evidence of mitigating circumstances, such as a history of mental health issues, drug abuse, childhood trauma, or limited intellectual capacity. *See Council v. State*, 380 S.C. 159, 670 S.E.2d 356 (2008) (finding that a defendant in a capital case was prejudiced by counsel's failure to investigate and present mitigating evidence beyond the brief testimony of the defendant's mother).

In determining whether trial counsel's performance was deficient, it cannot be understated that there is no *per se* obligation on counsel move for reconsideration of a sentence or to move for a new trial. Applicant's trial counsel did both. He requested reconsideration because Applicant was a young man, without a prior record, who lived in the community, and was now facing a lengthy prison sentence. He also noted that Applicant's codefendants had received significantly

lower sentences, and asked that Applicant be given a similar sentence. The Court, in the exercise of its discretion, considered and rejected this argument. In doing so the judge stated that the sentence would remain unchanged because it was within the statutory range, classified as a violent and most serious offense, and Applicant was one of the participants in the robbery who actually entered the store.

Applicant has failed to show deficiency or prejudice from his counsel's performance at the sentencing hearing because he has not produced evidence that, had it been presented, would have reasonably altered the outcome of the sentencing hearing under an abuse of discretion standard. He does not allege that his sentence exceeded the limits provided for by statute. Instead, at the PCR hearing, all he presented was testimony that shows "that numerous people who knew [him] thought he was generally a good person." Without more, there is no reason to believe his sentence would have been reduced had his counsel provided the additional evidence requested. Therefore, this claim is without merit, and post-conviction relief shall be denied, and the allegation shall be dismissed with prejudice.

***Trial Tax***

At bottom, Applicant's allegations about his trial counsel's performance at the sentencing hearing seem to be that counsel failed to do *something* to avoid his lengthy sentence. At the PCR hearing, Applicant provided cases on the issue of a "trial tax." While the allegation of ineffective assistance of counsel for failing to object to the length of the sentence relative to those imposed upon the codefendants was never raised in the pleadings, Applicant flirted with the issue at the PCR hearing and therefore it merits attention herein. The Court need not delve into whether trial counsel's performance was prejudicial to Applicant's interests because it is clear that no trial tax

was imposed, the sentence was justified under the facts of the case and the law of the State of South Carolina, and any objection or exception to it would have been fruitless.

A trial judge is allowed broad discretion in sentencing within statutory limits. *Brooks v. State*, 325 S.C. 269, 481 S.E.2d 712 (1997); *Garrett v. State*, 320 S.C. 353, 465 S.E.2d 349 (1995). The trial court has broad discretion in sentencing because it is generally in a better position than reviewing courts to determine the appropriate sentence by weighing the defendant's credibility, demeanor, and moral character, among other factors. *State v. Brouwer*, 346 S.C. 375, 550 S.E.2d 915 (2001) (citing *People v. Hernandez*, 319 Ill.App.3d 520, 745 N.E.2d 673 (2001)). A sentence is not excessive if it is within statutory limitations and there are no facts supporting an allegation of prejudice against defendant. *Brooks*, 325 S.C. at 272, 481 S.E.2d at 713. South Carolina law provides a broad range of ten to thirty years for first time armed robbery convictions. S.C. Code Ann. §16-11-330 (1976).

A trial judge may not consider a criminal defendant's choice to go to trial during sentencing. *Davis v. State,* 336 S.C. 329, 520 S.E.2d 801 (1999); *Brouwer*, 346 S.C. 375, 550 S.E.2d 915. Such improper considerations may be shown by comments made during the proceeding. *Id.* For example, reversible error occurs where a trial judge expresses his preference for guilty pleas, or their belief that admitting guilt is the first step towards rehabilitation. *Davis*, 336 S.C. at 332, 520 S.E.2d at 802; *Brouwer*, 346 S.C. at 387, 550 S.E.2d at 922. Furthermore, codefendants who receive disparate sentences for the same crime may be evidence of a "trial tax" if they are similarly situated but one admitted guilt and the other went to trial. *Id.* 336 S.C. at 333.

Trial counsel was not deficient in failing to object or otherwise take exception to the sentence itself because the sentence was proper. It is only now, with the benefit of hindsight after receiving a stiff sentence, that Applicant points the finger at his attorney, suggesting that he has

suffered a harsher penalty than his codefendants because he exercised his right to trial while they entered guilty pleas. Unlike every case cited by Applicant, there was no statement by the trial judge to the fact that Applicant had decided to proceed to trial. Instead, the judge instructed the jury, *sua sponte*, that it was not to consider the fact that Applicant was not present at his trial. (ROA 174, 5-14; ROA 195, 2-7). The judge went even further and agreed to instruct the jury on mere presence, even though he did not believe it was warranted by the evidence, because he felt that an appellate court may look down on a *trial in absentia*. (ROA 175, 21 – ROA 176, 15). Applicant has presented no evidence, and there is no reason to believe, that Applicant's sentence was influenced either by his decision to go to trial or his decision to skip it altogether. Furthermore, nothing contradicts trial counsel's testimony that an objection to the sentence would have been fruitless.

Instead, the sentence is assuredly a product of Applicant playing a different role in the crime than his codefendants. Two people involved in the crime testified against Applicant, and both identified him as the mastermind and the ringleader. Asia Collier, the getaway driver, testified that she was manipulated by Applicant into participating in the crime, disposed of evidence at his request, and lied to police at his direction. Amontre Ellerbe testified that he and Applicant were the only two who actually entered the store and stuck a gun in the clerk's face, while the other two stood behind the building and "did nothing." (ROA. 166, 1-11). Applicant simply is not similarly situated to his codefendants such that he is entitled to their sentences.

In fact, Applicant rejected a plea offer that would have given him a similar sentence to his codefendants, despite proof that he played a much greater role in planning, organizing, and committing the crime. He cannot now claim the benefit of their bargain by alleging a trial tax after already unsuccessfully raising the issue on direct appeal. He certainly cannot do it by pointing the blame at his trial counsel by alleging that he failed to somehow protect him from the imposition

of a lawful sentence. Applicant rejected the plea offer and the sentence that he now desires because he wanted even less time. He chose to proceed to trial, fully aware of its risks and benefits. More correctly, he did not *proceed* to trial. He chose to abscond, removing his GPS monitor in the process, only to be apprehended months later and brought before a judge wholly unfamiliar with him, his character and demeanor, and the facts of his crimes. It is quite possible, as his trial counsel suggested at the PCR hearing, that the new judge's unfamiliarity with the case would have made him more inclined to reconsider the sentence. But ultimately, Applicant could have, and should have, avoided this issue entirely by being present at his trial. Whatever issue he may have with his sentence is not the product of ineffective assistance of counsel, it is wholly a product of Applicant's own choices. Therefore his counsel was not deficient and Applicant was not prejudiced by his performance. Post-conviction relief must be denied and the application shall be dismissed with prejudice.

## V. CONCLUSION

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

This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. *See* Rule 203, SCACR. Pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP provides that if the Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on the Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

**IT IS THEREFORE ORDERED:**

1. That the application for post-conviction relief must be denied and dismissed with prejudice; and

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

**AND IT IS SO ORDERED this** 7th **day of** May, **2021**

Paul M. Burch
Presiding Judge
Fifteenth Judicial Circuit

Charleston, South Carolina

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|---|---|---|
| STATE OF SOUTH CAROLINA<br>COUNTY OF HORRY | ) | IN THE COURT OF COMMON PLEAS<br>FOR THE FIFTEENTH JUDICIAL CIRCUIT |
| Rasheed Glover, SCDC No. 367438 | ) | Case No. 2018-CP-26-02728 |
| Applicant, | ) | **ORDER DENYING APPLICANT'S MOTION PURSUANT TO RULE 59(a) and (e), SCRCP** |
| v. | ) | |
| State of South Carolina | ) | |
| Respondent. | ) | |



This matter comes before this Court by way of Applicant's "Motion Pursuant to Rule 59(a) & (e), SCRCP," asking this Court to alter or amend its final order of dismissal denying Applicant's application for post-conviction relief.

Applicant is presently confined in the South Carolina Department of Corrections. He was indicted for armed robbery (2018-GS-26-01237) by the Horry County Grand Jury at its March 2015 term. Applicant was represented by Attorney Johnny Gardner and Assistant Solicitors Lauree Richardson and Thomas G. Terrell, III, of the Fifteenth Circuit Solicitor's Office, prosecuted the case. On October 12, 2015, a jury trial proceeded against Applicant *in absentia* before the Honorable R. Ferrell Cothran. The jury found Applicant guilty, as indicted, on October 13, 2015. Judge Cothran issued a bench warrant for Applicant's arrest, prepared a sentence, and sealed it, pending Applicant's arrest and subsequent appearance.

On March 15, 2016, Applicant appeared before the Honorable Steven H. John, who unsealed, read, and imposed a sentence of twenty-five years' imprisonment. Applicant, through counsel, moved for a new trial and a motion for reconsideration of his sentence. Judge John denied both motions on March 17, 2016.

PWB

Applicant filed a timely notice of appeal and the appeal was perfected by Appellate Defender Kathrine H. Hudgins of the South Carolina Commission on Indigent Defense-Office of Appellate Defense, who filed an *Anders* brief and petition to be relieved as counsel. In his *Anders* brief, Applicant raised the following issue:[1]

> 1. Did the judge who unsealed and pronounced sentence following a trial in the Appellant's absence abuse his discretion in refusing to reconsider the twenty five year sentence imposed by the trial judge when a co-defendant received a lesser sentence and the record fails to reflect an appropriate basis for the disparate sentence?

Applicant then filed his own *pro se* brief. The South Carolina Court of Appeals affirmed Applicant's conviction. *State v. Glover*, Op. No 2017-UP-210 (S.C. Ct. App., Filed May 17, 2017). The remittitur was sent on June 2, 2017.

Applicant then submitted an application for post-conviction relief filed May 2, 2018. Respondent, the State of South Carolina, made its return on August 2, 2018, and moved to dismiss the allegations. Applicant subsequently amended the application on February 24, 2020, to include the following five specific allegations of ineffective assistance of counsel:

> 1. Ineffective assistance of counsel for failure to actively negotiate a plea offer and/or ensure that Applicant had the opportunity to properly reject the opportunity to enter a guilty plea.
> 2. Ineffective assistance of counsel for failure to properly advise Applicant about being tried in his absence if he did not appear for trial.
> 3. Ineffective assistance of counsel for failure to move for a continuance prior to jury selection and/or object to the trial in Applicant's absence.
> 4. Ineffective assistance of counsel for failure to offer meaningful representation during the sentencing phase of Applicant's trial.
> 5. Ineffective assistance of counsel related to the hearing to open Applicant's sentence and for post trial motions, specifically, but not limited to:
>    a. Failure to have knowledge of, prepare for and be present at the hearing opening Applicant's sentence. Additionally, failure to ensure that the representative that appeared on his behalf was properly prepared and advocating for Applicant.

[1] *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396 (1967).

b. Ineffective assistance of counsel for failure to make an oral or written request and/or objection for additional time and/or for the trial court to hear Applicant's post trial motions.

c. Ineffective assistance of counsel for failure to be properly prepared to provide information beneficial to Applicant or make arguments at the final motion hearing.

An evidentiary hearing into this matter was held on Wednesday, March 31, 2021, with the parties appearing by WebEx due to the COVID-19 pandemic. Applicant appeared virtually from Lee Correctional Institution and was represented by Attorney Tricia Blanchette. Assistant Attorney General William H. Ray represented Respondent. Applicant testified, along with his mother, his girlfriend, and his trial counsel, Attorney Johnny Gardner.

Following the evidentiary hearing, the Court issued an Order of Dismissal signed May 7, 2021 and filed May 11, 2021, provisionally denying and dismissing this action with prejudice. Applicant received notice of this order on June 23, 2021 and filed his motion to alter or amend pursuant to Rule 59(a) and (e), SCRCP on July 1, 2021. Respondent made its return to the motion on August 19, 2021.

Applicant's motion takes issue with the Court's finding that Applicant was not prejudiced by counsel's performance. Applicant also takes issue with the weight and significance the Court afforded to certain pieces of testimony, including the evidence presented in mitigation to show what could have been presented by counsel, the admissions of counsel that he should have handled the case differently, and Applicant's own testimony that things should have been done differently. Finally, Applicant's motion requests that the Court reconsider its original denial of relief and instead adopt his own proposed order granting him a new trial. Respondent's responsive pleading argues that the Court properly considered the matters before it, weighed the evidence appropriately, and made the necessary findings in response to the allegations. Respondent also asserts that Applicant's disagreement with the finding that Applicant was not prejudiced by

counsel's performance would be better addressed on appeal, rather than a Rule 59(e), SCRCP, motion.

This Court finds its final order of dismissal contains the required findings of facts and conclusions of law as required by S.C. Code Ann. §17-27-80 (1976) and Rule 52(a), SCRCP. *See also McCray v. State*, 305 S.C. 329, 408 S.E.2d 241 (1991). Having carefully reviewed the entire record in this matter, this Court finds there is no basis for altering or amending its prior ruling.[2] Therefore, this Court hereby denies Applicant's motion in its entirety, and affirms the previous final order of dismissal.

This Court notes if Applicant desires to secure appellate review of this order and the final order of dismissal, a notice of appeal must be filed and served within thirty days of the service of this Order. Applicant is directed to Rules 203, 206, 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of appeal has been timely filed.

**AND IT IS SO ORDERED this** 30th **day of** August **, 2021.**

PAUL M. BURCH
Presiding Judge
Fifteenth Judicial Circuit

Chesterfield, South Carolina

[2] The Court, in its discretion, has considered this matter based upon the motions submitted by the parties and the post-conviction relief file, since oral argument will not aid the Court in reaching its decision. *See* Rule 59(f), SCRCP.