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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LAURENS COUNTY
Court of Common Pleas

The Honorable R. Kirk Griffin, Circuit Court Judge

Case No. 2019-CP-30-00114

Bryan Lee Roeker, #341043, ... Petitioner,

v.

State of South Carolina,..Respondent.

NOTICE OF APPEAL

Applicant, Bryan Lee Roeker, appeals the order of the Honorable R. Kirk Griffin, filed February 21, 2022, and received by the undersigned on March 2, 2022.

Mar. 8th, 2022

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STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF LAURENS) FOR THE EIGHTH JUDICIAL CIRCUIT

Bryan Lee Roeker, #341043) Case No.: 2019-CP-30-114

Applicant,

v.

) **ORDER OF DISMISSAL**

State of South Carolina,

Respondent.

K. MICHELLE SIMMONS
2022 FEB 21 AM 11:10
LAURENS COUNTY
CLERK OF COURT

This matter comes before the Court by way of an application for post-conviction relief filed by Bryan Lee Rocker ("Applicant") on February 12, 2019. Respondent made its return on or about April 25, 2019. The Court convened an evidentiary hearing into the matter on October 26, 2021, via the WebEx Virtual Courtroom of the Honorable R. Kirk Griffin. Applicant was present at the hearing and represented by Ashley A. McMahan, Esq. Michael J. Neubauer, of the South Carolina Attorney General's Office, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant's trial counsel, Ivan J. Toney, Esq. ("Counsel"), and Assistant Solicitor James C. Todd, IV of the Eighth Circuit Solicitor's Office, also testified. The Court had before it Applicant's records from the South Carolina Department of Corrections, a copy of the original plea transcript, the records of the Laurens County Clerk of Court regarding the subject convictions, and the pleadings. The Court finds as follows:

I. PROCEDURAL HISTORY

Applicant is currently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Laurens County Clerk of Court. In November 2017, the Laurens

County Grand Jury indicted Applicant for trafficking methamphetamine (2017-GS-30-1936). Ivan J. Toney, Esquire represented Applicant. Assistant Solicitor James C. Todd, IV of the Eighth Circuit Solicitor's Office prosecuted the case. On February 20, 2018, Applicant plead guilty as indicted before the Honorable Donald B. Hocker. Pursuant to a negotiated sentence between the State and Applicant, Judge Hocker sentenced Applicant to imprisonment for fifteen years. Applicant was given credit for time served. Applicant did not appeal his conviction or sentence.

II. FACTS

On July 17, 2017, police were dispatched to a residence in Cross Hill after a woman observed a white male removing a motion-activated light from a tree in her backyard. GP Tr. p. 7. The woman provided deputies with a description of the man and officers observed Applicant, who matched the provided description, in the surrounding area. GP Tr. p. 7. Deputies attempted to make contact with Applicant, but Applicant fled. GP Tr. p. 8. Applicant ran into the Volunteer Fire Department building and deputies were able to catch up to him when he exited the back door. GP Tr. p. 8. Deputies located a white substance on Applicant that field tested positive for methamphetamine. GP Tr. p. 8. A SLED report later confirmed Applicant was in possession of approximately forty grams of methamphetamine, which was enough for Applicant to be charged with trafficking methamphetamine. GP Tr. p. 8.

III. PRESENT APPLICATION

In his post-conviction relief application, Applicant alleges he is being held unlawfully for the following reasons:

1. "Ineffective Assistance of Counsel"
    a. "Chain of Custody was broken and never logged properly."
    b. "Attorney never allowed me client confidentiality at all… all evidence that is supposed to be against me is not accounted for nor documented nor logged properly."

c. "Officer swears on warrant with witnesses to weight of drug and … sled swears bag was reopened after sealed and… I was never released from custody during any of this case, my attorney never discussed any of my case with me in any way before he sent me letter to take the plea, I was never in private to speak with him about anything until my scheduled plea date he informed of to take by mail."
d. "Attorney never filed motion to suppress evidence like I told him to at which he agreed to do while he was on 3way call with my wife."
e. "He said that later he spoke with an alleged expert and they said it would be denied he never told me or documented that he filed like he agreed. Never even said who expert was I thought he was my expert."
f. "Evidence was not properly logged nor is ever proven to be accounted for chain of custody for rule 6 never filed nor was I aware to the fact."
g. "Attorney never meet with me at all after he agreed to amount and which I paid in full only other communication was a recorded jail phone."
h. "Two days after I had already been booked in LCDC officer come and tried to get me o sign the second booking list for property that never came to jail with me that is supposed to be the book bag they found the drugs in there is no picture of a book bag in my motion nor was there one in my property when I was transferred in fact in the officers first statement a book bag was never mentioned he said the drugs come of my persons. Several days later he wrote another statement and said he fought me to the ground, forced handcuffs on me behind my back with a alleged backpack on and at that time he searched me in cuffs and found in my backpack I'm supposed to be cuffed with drugs they are saying is mine where is the back pack."

2. Involuntary Guilty Plea
    a. "Attorney promised several times to come and meet with me in jail to discuss my case and devise a plan every time was recorded on Spartanburg county globel toll call that I had to pay for I could not speak freely or about anything about my case because recoded he forced me to plea… I would do 25 if I didn't plea."

On February 3, 2020, Applicant through Counsel, filed an amended application for post-conviction relief alleging Applicant is being held unlawfully for the following reasons:

1. Ineffective Assistance of Counsel of Ivan Toney:
    a. "Failure to object to faulty chain of custody. The SLED report on the drugs has a notation that the 'BEST' evidence kit was not properly sealed when submitted.' Counsel fialed to argue the chain of custody was irreparably broken. *See* State v. Pulley, 423 SC 371 (2018). The drugs were field tested allegedly weighing 43.5 grams. When SLED received the evidence the drugs weighted 36.25 grams."
    b. "Counsel stated during the plea hearing that he met with Applicant on 40 or 50 separate occasions. *See* Transcript, page 5, lines 1-2. Given that counsel was only retained on or about November 10, 2017, Counsel would have had to have met with

the Applicant almost every single business day (or at least every other) available between the date he was hired and the date of the plea, February 20, 2018."

c. "Counsel further stated at the plea hearing that he 'negotiated strenuously over a substantial period of time.' *See* Transcript page 5, lines 20-23. Applicant ended up pleading to a negotiated plea of 15 years. The offer by the solicitor to the public defender was 16 years, which was reoffered again to Mr. Toney in December 2017. *See* letter attached dated December 15, 2017. The second offer was for 15 years, which Counsel told Applicant he would do 8 years. *See* letter attached dated February 13, 2018. Applicant did not get the letter about the plea offer until just before he was taken to court on February 20, 2018, and when Applicant had gotten to court this was the first time Applicant had spoken to Counsel in person except for the date he hired Counsel."

2. "Further, Applicant requests that he be permitted to amend his PCR application to conform to the evidence presented at the PCR hearing should any new or unaddressed issues arise during the course of the hearing that have not been specifically addressed in the Application. *See* Simpson v. Moore, 367 S.C. 587, 627 S.E.2d 701 (2006)."

On October 8, 2021, Applicant through Counsel, filed a second amended application for post-conviction relief alleging Applicant is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel of Ivan Toney
   a. "Mr. Toney wrote a letter regarding plea offers for Mr. Roeker and indicated Mr. Roeker's co-defendant got probation, except Mr. Roeker did not have a co-defendant."
   b. "Mr. Toney told the Applicant he would serve 8 years."
   c. "Mr. Toney was given trial notice in December but did not contact the Applicant to prepare for trial adequately beforehand."
2. "Further, Applicant requests that he be permitted to amend his PCR application to conform to the evidence presented at the PCR hearing should any new or unaddressed issues arise during the course of the hearing that have not been specifically addressed in the Application. *See* Simpson v. Moore, 367 S.C. 587, 627 S.E.2d 701 (2006)."

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, and weighed the testimony accordingly. Further, this Court has reviewed the records submitted to it by the parties and the legal arguments made by the

attorneys. Pursuant to S.C. Code Ann. § 17-27-80, this Court makes the following findings based upon all of the probative evidence presented.

Direct Appeal Issues

This Court finds claims 1a, 1f, and 1h, are direct appeal issues that are not cognizable under the Uniform Post-Conviction Procedure Act[1] (the Act). An applicant may seek PCR upon the following types of allegations:

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

S.C. Code Ann. § 17-27-20(A). However, because an application for post-conviction relief is not a substitute for a direct appeal, and because of the modern simplification of criminal jurisdiction jurisprudence in South Carolina, the *overwhelming* majority of cognizable claims fall under the broad umbrella of "ineffective assistance of counsel," a contention under the Sixth Amendment of the United States Constitution. Applicant's allegations are direct appeal issues that are not cognizable claims under the Uniform Post-Conviction Procedure Act. *See Roscoe v. State*, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001) (noting that allegations of trial court error are not

[1] S.C. Code Ann. § 17-27-10 to -160.

cognizable on PCR); *Simmons v. State*, 264 S.C. 417, 215 S.E.2d 883 (1975) (finding that alleged trial errors and sufficiency of evidence are direct appeal issues that are not cognizable PCR claims); *see also Stepney v. State*, 278 S.C. 47, 292 S.E.2d 41 (1982) (explaining that issues that could have been raised on direct appeal cannot be considered in PCR application absent claims of ineffective assistance of appellate counsel).

An applicant "may allege constitutional violations in PCR proceedings . . . *unless the issue could have been raised by direct appeal*." *Gibson v. State*, 329 S.C. 37, 41, 495 S.E.2d 426, 428 (1998) (citing S.C. Code Ann. § 17-27-20(a)(1)); *Simmons*, 64 S.C. at 423, 215 S.E.2d at 885 ("Generally, post-conviction hearing statutes do not afford relief in the case of alleged errors for which remedies were available before and during the original trial, or by review on motion for a new trial or on appeal. These statutes were not intended to afford a procedure to operate as a substitute for a motion for a new trial, or for an appeal or writ of error; and ordinarily a judgment of conviction may not be challenged on grounds which could have been raised by a direct appeal.").

Here, claims 1a, 1f, and 1h, alleged in the application are direct appeal issues that do not support a cognizable claim for post-conviction relief under any of the statutory grounds. *See, e.g.*, *Drayton v. Evatt*, 312 S.C. 4, 8, 430 S.E.2d 517, 520 (1993) ("[PCR] is not a substitute for appeal or a place for asserting errors for the first time which could have been reviewed on direct appeal."); *cf. Hyman v. State*, 278 S.C. 501, 502, 299 S.E.2d 330, 331 (1983) (finding that direct appeal issues which could have been reviewed on appeal and were not objected to at trial or during guilty plea proceeding may only be presented to support a claim of ineffective assistance of counsel, not as a separate ground for relief). Accordingly, Applicant's request for relief by way of these allegations are denied and dismissed with prejudice.

A. Ineffective Assistance of Counsel

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

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in *Strickland*. First, Applicant must prove that counsel's performance was deficient. *Strickland*, 466 U.S. at 686; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Applicant must so prove his factual allegations by a preponderance of the evidence. Rule 71.1(e), SCRCP. Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." *Cherry*, 300 S.C. at 117, 386 S.E.2d at 625 (quoting *Strickland*, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* (citing *Strickland*, 466 U.S. at 690). "When counsel focuses on some issues to the exclusion of others, there is a strong presumption that he [or she] did so for tactical reasons rather than through sheer neglect." *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003) (citing *Strickland*, 466 U.S. at 690). The Court, in determining deficiency, must affirmatively entertain the range of possible reasons counsel may have had for proceeding as they did. *Cullen v. Pinholster*, 563 U.S. 170, 196

(2011); *Harrington v. Richter*, 562 U.S. 86, 109-10 (2011). "[E]ven if an omission is inadvertent, relief is not automatic. The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." *Yarborough*, 540 U.S. at 6; *see also Murphy v. Davis*, 901 F.3d 578, 592 (5th Cir. 2018) ("[C]ounsel's performance need not be optimal to be reasonable."). Applicant must overcome this presumption to receive relief. *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625.

Second, counsel's deficient performance must have prejudiced Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625. "This does not require a showing that counsel's actions 'more likely than not altered the outcome,' but the difference between *Strickland's* prejudice standard and a more-probable-than-not standard is slight and matters 'only in the rarest case.'" *Harrington*, 562 U.S. at 111-12 (quoting *Strickland*, 466 U.S. at 697). "The likelihood of a different result must be substantial, not just conceivable." *Id.* at 112. "The prejudice analysis requires the court deciding the ineffectiveness claim to consider the totality of the evidence before the judge or jury." *United States v. Basham*, 789 F.3d 358, 371-72 (4th Cir. 2015) (quoting *Elmore v. Ozmint*, 661 F.3d 783, 858 (4th Cir. 2011)).

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

1. Counsel never allowed attorney client confidentiality

Applicant's allegation of ineffective assistance of counsel due to Counsel not allowing Applicant attorney-client confidentiality is without merit.

The attorney-client privilege is based upon a public policy that the best interest of society is served by promoting a relationship between the attorney and the client whereby utmost confidence in the continuing secrecy of all confidential disclosures made by the client within the relationship is maintained. *Wilson v. Preston,* 378 S.C. 348, 359, 662 S.E.2d 580, 585 (2008). No doubt exists that, under normal circumstances, an attorney's advice provided to a client, and the communications between attorney and client are protected by the attorney-client privilege. *In re Grand Jury Proc.*, 102 F.3d 748, 750 (4th Cir. 1996). In order to establish the privilege, it must be shown that the relationship between the parties was that of attorney and client and that the communications were of a confidential nature. *State v. Love*, 275 S.C. 55, 59, 271 S.E.2d 110, 112 (1980).This privilege belongs to the client and not the attorney, and may be waived by the client. *Id.* A client may waive attorney client privilege by discussing privileged communications with a third party. "The attorney-client privilege, though, does not protect communications with non-clients." *Marshall v. Marshall*, 282 S.C. 534, 539, 320 S.E.2d 44, 47 (Ct. App. 1984).

At Applicant's evidentiary hearing, Applicant testified he had many conversations with Counsel between the time he hired Counsel, and the time Applicant plead guilty. Applicant testified that these conversations were predominantly three-way calls between Applicant, Counsel, and Applicant's fiancé. Applicant testified the majority of his conversations involved Applicant trying to arrange a time for Counsel to come meet with Applicant in person. Applicant testified he spoke with Counsel regarding the substance of his case, and the possibility of succeeding on a motion to suppress the drug evidence due to the BEST evidence kit not being properly sealed.

Applicant testified he was not provided a confidential call to speak with Counsel because all of his communications with Counsel were by recorded phone calls while Applicant was incarcerated in Spartanburg. Applicant testified he was never able to speak freely with Counsel due to the jail recording his phone calls. Applicant testified he attempted at least ten times to have Counsel meet with Applicant in person, however Applicant alleges Counsel never came to meet with him. On cross-examination, when asked if he knew the confidentiality of his conversations with Counsel were compromised by the presence of his fiancé, Applicant stated "the calls were recorded, so it was compromised anyway."

At the evidentiary hearing, Counsel testified he met with Applicant in person at the Laurens County Detention Center on November 9th, and November 10th. Counsel testified he spoke with Applicant on the phone innumerable times. Counsel testified Applicant's fiancé was a part of a three-way call for multiple of his conversations with Applicant, however Counsel testified he did have conversations with Applicant without Applicant's fiancé present. Counsel testified he told Applicant's fiancé that if she were helping set up a phone call between Applicant and Counsel that she would have to get off the phone once Applicant connected to avoid breaking their attorney-client privilege. Counsel testified he was concerned with the Solicitor's Office listening in on his conversations with Applicant, though he had no evidence to suggest that the Solicitor's Office has eavesdropped on confidential conversations between an incarcerated defendant and their attorney. Counsel testified he met with Applicant at least four times while Applicant was incarcerated in the Laurens County Detention Center. Counsel testified he also met with Applicant before his bond hearing.

Applicant has failed to establish how Counsel was ineffective in this matter. Counsel credibly testified he spoke with Applicant in private as well as on three-way phone conversations

with Applicant and Applicant's fiancé. Counsel testified he informed Applicant that any conversations between Counsel, Applicant, and Applicant's fiancé would not be privileged, and if they were to talk regarding confidential matters that Applicant's fiancé would have to leave the call. Though Applicant alleges he had no opportunity to have a privileged conversation with Counsel because all of their conversations were conducted through recorded jail phone calls, Counsel credibly testified he met with Applicant multiple times in person, and Applicant and Counsel had an opportunity to discuss Applicant's case prior to Applicant pleading guilty. Applicant has failed to demonstrate how Counsel was ineffective by not allowing for attorney client confidentiality, or how Applicant was prejudiced as a result of Counsel's actions. Therefore, we find Counsel's performance was not ineffective and this allegation is denied and dismissed with prejudice.

2. ***Counsel Did Not Meet with Applicant to Discuss Case with Applicant Prior to Guilty Plea***[2]

Applicant's allegations Counsel was ineffective for failing to meet with Applicant, and for failing to discuss the specifics of Applicant's case with Applicant are without merit. As an initial matter, Applicant, at his evidentiary hearing testified he was originally represented by a public defender, who he only met with one time. Applicant testified he hired Counsel in November of 2017 after a friend recommended Counsel to Applicant. Applicant testified he spoke with Counsel a lot, and discussed Counsel coming to see Applicant in jail, along with discussion of a potential motion to suppress. Applicant testified he never met with Counsel in jail after Applicant agreed to hire Counsel and paid Counsel for his services. Applicant testified he only saw Counsel one time after Applicant was moved to Spartanburg[3], and that was for an unsuccessful bond hearing.

[2] Allegations 1c, 1g, Amended Allegation 1b.
[3] At the time Applicant was incarcerated in the Laurens County Detention Center he had additional charges pending in Spartanburg County.

Applicant testified he spoke with Counsel on the phone "a lot" and the majority of his conversations with Counsel were spent trying to get Counsel to come visit Applicant so they could discuss the case in person. Though Applicant testified he did not discuss the chain of custody with Counsel, Applicant testified he spoke with Counsel regarding the BEST evidence kit which contained the drugs that were found on Applicant's person when he was arrested. Further, Applicant testified he spoke with Counsel regarding possible plea deals, including a fifteen year offer that Counsel received from the Solicitor's office in February of 2018. Applicant testified he never spoke with Counsel regarding possible defenses Applicant could raise. However, Applicant testified he remember telling the judge at his guilty plea hearing that Applicant had an opportunity to discuss discovery with Counsel prior to pleading guilty. Applicant testified if he had more time to discuss defenses and review discovery with Counsel that Applicant would not have plead guilty.

Counsel testified he was retained by Applicant for these charges while Applicant was incarcerated in the Laurens County Jail. Counsel testified he met with Applicant in person on November 9, 2017, November 10, 2017, January 10, 2018, and January 26, 2018 as well as at a court hearing on February 20, 2018, and twice on February 28, 2018. Further, Counsel testified he spoke with Applicant over the phone countless times prior to Applicant's guilty plea. Counsel testified he filed a discovery request, but Counsel believes Applicant had already received a copy of his discovery before he was retained to represent Applicant. Counsel testified he would have spoken with Applicant regarding the facts of the case, and the discovery that Applicant had received during their first few meetings in November of 2017[4]. Additionally, Counsel testified he

[4] Counsel testified he was unsure if Applicant had received discovery prior to their first meetings in November of 2017, however Counsel testified if they did not have discovery they would have discussed Applicant's version of the facts surrounding his arrest, and they would have discussed the discovery at a later time.

discussed issues with the chain of custody due to the BEST evidence kit being partially opened. Counsel further testified he spoke with Applicant regarding his prior record and the impact that may have on Applicant's ability to testify at trial. Counsel testified he spoke with Applicant regarding possible plea offers, including Counsel's belief that the issue with the BEST evidence kit was best used as a tool to facilitate a better plea offer for Applicant instead of the basis for a motion to suppress.

Hill makes clear that the prejudice prong ordinarily requires "something more" than simply a defendant's assertions that but for counsel's deficient performance he would not have plead guilty but would have gone to trial. *Stalk v. State*, 383 S.C. 559, 563, 681 S.E.2d 592, 595 (2009 (*citing Hill*, 474 U.S. at 58-59). Counsel credibly testified he met with Applicant in person on multiple occasions prior to Applicant pleading guilty. Additionally, Counsel testified he reviewed the discovery with Applicant, and discussed the facts of Applicant's case as well as possible defenses and motions Applicant could have used in his defense. This Court does not find credible Applicant's claims that Counsel never met with Applicant in person, that Counsel never reviewed the discovery with him, and that Counsel never discussed the case with Applicant. Applicant further failed to specify what, if anything, could have been achieved had Counsel spent more time with him in consultation regarding the contents of his discovery. *See Smith v. State*, 404 S.C. 493, 500-01, 745 S.E.2d 378, 382 (Ct. App. 2012) (noting that an applicant must present evidence to show how additional time spent in consultation regarding discovery would have resulted in a different outcome; mere speculation as to how the alleged lack of preparation prejudiced an applicant is not sufficient to support a grant of relief).

Accordingly, Applicant's claim regarding Counsel's failure to meet with Applicant in person, along with Applicant's allegations Counsel never discussed the specifics of Applicant's case with Applicant are without merit and are therefore denied and dismissed with prejudice.

3. Failure to File Motion to Suppress[5]

Applicant's allegation Counsel was ineffective for failing to file a motion to suppress the drug evidence found on Applicant's person is without merit. Applicant alleges he asked Counsel to file a motion to suppress while on a phone call with Counsel and Applicant's fiancé. However, Applicant claims Counsel never filed a pretrial motion to suppress.

> When a person claims ineffective assistance based on counsel's failure to file a suppression motion, we apply a "refined" version of the *Strickland* analysis. With respect to the performance prong, we ask whether the unfiled motion would have had some substance. If the motion would have had some substance, then we ask whether reasonable strategic reasons warranted not filing the motion. To satisfy the prejudice prong, the defendant must show that: (1) the [suppression] motion was meritorious and likely would have been granted, and (2) a reasonable probability that granting the motion would have affected the outcome of his trial.

United States v. Pressley, 990 F.3d 383 (2021) (internal citations and quotations omitted).

At Applicant's evidentiary hearing, Applicant testified Counsel informed him that the BEST evidence kit that contained the drug evidence in Applicant's case was not properly sealed. Applicant testified he asked Counsel to file a motion to suppress the drug evidence due to the issue with the BEST evidence kit. Applicant testified he did not know what a chain of custody was prior to arriving in prison, and that he was relying on Counsels advice regarding the chain of custody and the admissibility of the drug evidence. Applicant alleges Counsel stated he spoke with a expert regarding the BEST evidence kit, and Counsel told Applicant the expert did not believe that a motion to suppress would be successful. Further, Applicant testified Counsel stated he believed the court would allow the drugs in regardless, and there was no need to file a motion to suppress.

[5] Allegations 1e, 1f

Applicant testified Counsel told Applicant he had spoken with an expert, and based on his conversations Counsel believed the court would deny a motion to suppress the drug evidence. Applicant testified his only conversations with Counsel regarding the chain of custody or any issues with the BEST evidence kit were Applicant's requests to move to suppress the evidence. Applicant testified it was his idea to file a motion to suppress the drug evidence, and to the best of his knowledge no motion to suppress was ever filed.

At Applicant's evidentiary hearing, Counsel testified one of the issues with the State's case against Applicant was whether the drug evidence would be admissible. Counsel testified if Applicant was not successful on a motion to suppress, Counsel felt the State's case against Applicant was a "slam dunk." Counsel testified he does not recall when he discussed the issues regarding the BEST evidence kit with Applicant, but Counsel does remember discussing this issue with Applicant. Counsel testified he did not speak with an expert regarding the BEST evidence kit issue, but he may have discussed it with a few friends in the legal community. Counsel testified he never told Applicant that he had spoken with an expert regarding this issue. Counsel testified he would look at case law while going through the issues in his head, and if he was still "iffy" he would consult some friends who are also experienced in criminal law. However, Counsel testified this is not the same thing as hiring an expert to consult regarding this issue. Counsel testified the issue with the BEST evidence kit is why Counsel was able to obtain a favorable plea deal for Applicant in this case. Counsel testified the issue with the BEST evidence kit was a "tricky" issue, and was confusing enough for the solicitor that Counsel was able to make headway in plea negotiations as a result of this issue. Counsel testified the BEST evidence kit had been opened, but the bag containing the drugs was still sealed. Counsel testified he felt this issue would not be successful in a motion to suppress, because the issue regarding the BEST evidence kit being

tampered with would be an issue for the jury, not for a suppression motion. Counsel testified he spoke with Applicant and informed him that the issue with the BEST evidence kit was "an up in the air issue, let's use it for leverage on a plea." Counsel testified he did not discuss case law or the legal issues regarding the BEST evidence kit with Applicant, but he did talk about the facts of the issue with Applicant, and informed Applicant this issue would be good leverage for plea negotiations. Counsel testified he spoke with Applicant thoroughly about filing a motion to suppress the drug evidence, but was hesitant to file a motion because it may have ended all plea negotiations with the State. Counsel testified Applicant agreed to plead guilty prior to a motion to suppress being filed. Counsel testified that if Applicant had declined to plead guilty, Counsel would have likely filed a motion to suppress prior to trial.

Applicant has failed to establish any evidence to support his assertion that Counsel was ineffective for failing to file a motion to suppress. Though Applicant testified he was the one who proposed filing a motion to suppress the drug evidence due to the issues with the BEST evidence, Applicant testified he did know what a chain of custody was prior to arriving in prison, and he was relying on the advice of Counsel regarding the admissibility of the drug evidence. Applicant has failed to demonstrate that a motion to suppress would likely have been granted in this case. Counsel testified he review the issue with the BEST evidence kit and felt that it was an issue that would not warrant the suppression of the drug evidence. Further, Applicant has failed to demonstrate that this motion to suppress would have changed the outcome of Applicant's case. Counsel testified he spoke with Applicant regarding the motion to suppress, and Applicant agreed that the issue should be used to help negotiate a more favorable plea offer. Counsel testified he believed that by filing a motion to suppress while attempting to negotiate a plea deal for Applicant, the State may end all plea negotiations. Counsel further testified if Applicant decided he did not want to plead guilty,

Counsel would have sought to suppress the drug evidence. We find Applicant has failed to show how Counsel was deficient, or how Counsel's performance prejudiced Applicant. Therefore, this allegation is denied and dismissed.

4. Failure to Explain the Plea Negotiations

Applicant's allegation of ineffective assistance of counsel due to Counsel failing to communicate plea offers to Applicant until one week before Applicant plead guilty is without merit. In his amended application for post-conviction relief, Applicant alleges he was told about a sixteen year plea offer in December of 2017, and was informed by letter of a second plea offer for fifteen years on February 13, 2018. Applicant plead guilty on February 20, 2018, and alleges this is the first time he spoke with Counsel regarding the fifteen year plea offer.

"[A]s a general rule, 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). Further, ineffective assistance is given "[w]hen defense counsel allow the [plea] offer to expire without advising the defendant or allowing him to consider [the plea]." *Id.* at 145.

When determining prejudice for failure to convey a plea, a case-by-case determination is made "assessing whether but for counsels deficient performance a defendant would have accepted the State's proposed plea bargain and that he would have benefited from the offer.'" *Bell v. State*, 410 S.C.436, 443, 765 S.E.2d 4, 7 (2014). Prejudice is found if applicant "would have taken the plea offer had [he] been afforded effective assistance of counsel", if "the plea would have been entered without prosecution canceling it or the trial court refusing to accept it", and "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, 262, 810 S.E.2d 871, 877 (2018)

(quoting *Frye*, 566 U.S. 147) (quotations omitted). Presumed prejudice is reserved to limited situations. *Bell*, 410 S.C. at 443, 765 S.E.2d at 7.

At Applicant's evidentiary hearing, Applicant testified he hired Counsel because he believed Counsel could get a better plea deal for Applicant that Applicant's public defender had obtained. Applicant testified he first received a fifteen year plea deal from public defender Chelsea McNeil, and Applicant proceeded to fire Ms. McNeil and hire Counsel. Applicant testified Counsel stated he could do a better job negotiating than Ms. McNeil, but came back with an initial plea offer of sixteen years. Applicant testified Counsel stated he could get Applicant released from incarceration without serving any additional time. Applicant testified the second plea offer he received from Counsel was for fifteen years on February 13, 2018. Applicant testified Counsel stated Applicant would only serve about eight years if he plead guilty pursuant to this offer. On cross-examination, Applicant testified he told Counsel to reject the initial sixteen year offer because they believed they could do better and they needed to get together and discuss a possible counter offer. Applicant testified he never suggested a possible plea offer he wanted Counsel to present to the solicitor in this case. Applicant testified he did not learn about the fifteen year non-violent plea offer until he received a letter from Counsel on February 13, 2018, the week before Applicant's scheduled court date. Applicant testified Counsel informed Applicant in his February 13, 2018, letter that Applicant would only serve eight years of his fifteen year sentence.

At the evidentiary hearing, Counsel testified he was able to use the issue with the BEST evidence kit to get Applicant a better plea offer. Counsel he initially received a sixteen year offer where Applicant would have to serve eighty-five percent of his sentence before he would be eligible for release. Counsel testified he was able to negotiate with Assistant Solicitor Todd and get Applicant a fifteen year non-violent offer, which would only require Applicant to serve sixty-

five percent of his sentence. Counsel testified by his calculations, Applicant would only serve approximately eight years in prison if he plead guilty to the fifteen year non-violent offer. Counsel testified he informed Applicant of the first plea offer he received on December 15, 2017. Counsel testified he received a second offer for fifteen years, non-violent, six weeks after Counsel received the initial plea offer. Counsel testified he felt it was a fair offer, and he recommended Applicant accept it. Counsel testified the plea offer he received in February of 2018 was for Applicant to plead to the lesser included charge of Possession with Intent to Distribute Methamphetamine, and Applicant would receive a fifteen year non-violent sentence. Counsel testified he felt the differences in the initial plea offer, and the plea offer he was able to negotiate for Applicant were drastic. On cross-examination, Counsel testified he sent a letter to Solicitor Todd on December 11, 2017, at Applicant's request, suggesting Applicant plea to time served.

Assistant Solicitor Todd testified he prosecuted the case and began plea discussions with Ms. McNeil while she was representing Applicant. Assistant Solicitor Todd testified he extended a sixteen year offer to her which was rejected shortly after. Assistant Solicitor Todd testified Applicant's case was placed on a trial docket before Counsel was retained to represent Applicant. Assistant Solicitor Todd testified he initially offered the same plea deal to Counsel, and Counsel eventually responded with a counter offer. Assistant Solicitor Todd testified the issue with the BEST evidence kit is what spurred additional plea negotiations in Applicant's case. Assistant Solicitor Todd testified he ultimately offered Applicant a non-violent fifteen year plea, and he assumes the issue with the BEST evidence kit would have gone into his considerations while discussing plea offers.

Applicant has failed to demonstrate that any plea offers were presented to Counsel that were not relayed to Applicant. Though Applicant comments that he was not informed of the final

non-violent fifteen year plea offer until a week before his court date on February 20, 2018. Counsel informed Applicant of all available plea offers that were presented. Additionally, Counsel countered plea offers at Applicant's request, and negotiated through the entirety of his representation of Applicant. This Court finds that Applicant has failed to demonstrate any plea offers that were not shared with Applicant, and that Applicant has failed to show that he would have accepted a different plea offer had it been presented to him. This Court finds Applicant has failed to show how Counsel was deficient, or how Counsel's performance prejudiced Applicant. Therefore, this allegation is denied and dismissed.

6. Counsel Indicated Applicant had a Codefendant

Applicant, in his second amended application for post-conviction relief alleges that during plea negotiations, Counsel incorrectly stated Applicant had a co-defendant. This allegation is without merit.

At Applicant's evidentiary hearing, Applicant testified Counsel sent a letter to Assistant Solicitor Todd during plea negotiations stating Applicant had a codefendant who received time served for his involvement. Applicant testified he did not have a codefendant for this charge, and Counsel was aware of this. Applicant testified Counsel represented Applicant on this charge along with other charges stemming from Spartanburg County. Applicant testified during the course of Counsel's representation of Applicant, Counsel kept confusing the facts of Applicant's Abbeville charge and Spartanburg charges, and that Counsel did not put any thought into Applicant's cases.

Counsel testified he spoke with Applicant at length about plea negotiations. Counsel testified he presented an offer to Assistant Solicitor Todd for time served at the request of Applicant. Counsel testified that Assistant Solicitor Todd never responded to Counsel's offer of a sentence of time served for Applicant's guilty plea. Counsel testified the next plea offer he received

from Assistant Solicitor Todd was the fifteen year non-violent sentence that Applicant ultimately plead guilty to. During Counsel's testimony, Counsel did not deny sending a letter to Assistant Solicitor Todd stating that Applicant's codefendant had received time served.

This Court finds Applicant has failed to establish how he was prejudiced by Counsel's performance. In a PCR action, Applicant bears the burden of proving the allegations in his application. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813. To establish prejudice in this matter, Applicant must establish that 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*, 300 S.C. at 117-18, 386 S.E.2d at 625. Though Applicant is correct that Counsel incorrectly stated that Applicant had a codefendant during plea negotiations, Applicant has failed to demonstrate how Counsel's inadvertent reference to a non-existent codefendant prejudiced Applicant, or altered the results of Applicant's proceedings. Though Applicant sought a sentence of time served, Applicant was never offered a plea deal near his desired sentence. Despite Counsel's incorrect statement that Applicant had a codefendant, Counsel was able to continue to negotiate with Assistant Solicitor Todd, and ultimately received a plea offer of fifteen years non-violent, which ultimately lead to Applicant's guilty plea. Applicant has failed to demonstrate how these comments by Counsel affected the negotiations between Counsel and Assistant Solicitor Todd, or how Counsel's performance affected the results of these proceedings. We find Applicant has failed to show how Counsel was deficient, or how Counsel's performance prejudiced Applicant. Therefore, this allegation is denied and dismissed.

7. Counsel told Applicant he would only serve eight years if he plead guilty

Applicant alleges Counsel informed Applicant he would only serve eight years in prison if he plead guilty to the fifteen year non-violent plea offer. This Court finds this allegation is without

merit.

At his evidentiary hearing, Applicant testified he remembers received a letter from Counsel in February of 2018 indicating Applicant received a plea offer for fifteen years non-violent, and that Applicant would only "do eight years and get credit for time served." Applicant testified he spoke with Counsel prior to pleading guilty one time, and Counsel informed Applicant if he did not plead guilty he would likely receive twenty five years if he were convicted at trial. Applicant testified he did not know that the minimum sentence he could receive if convicted at trial was seven years. Applicant testified he decided to accept the plea offer when he was told he would get twenty five years if convicted at trial. On cross-examination, Applicant testified he was sentenced in February, and his expected max out date was in 2024, which would have be less than eight years after Applicant was imprisoned. Applicant testified Counsel did not explain the difference between non-violent and violent sentences, and the impact that this would have on sentencing. Applicant testified Counsel did not explain that his original sentence would require him to serve eighty five percent of his sentence in prison.. Applicant testified Counsel did not explain that by pleading to a non-violent charge he would only have to serve sixty five percent. Applicant testified Counsel only told Applicant that he would get a fifteen year sentence non-violent, and he would only serve eight years.

Counsel testified he received a fifteen year plea offer from Assistant Solicitor Todd in February of 2018. Counsel testified once he received this offer, he informed Applicant of the fifteen year non-violent plea offer in a letter indicating that Applicant would only serve eight years of this sentence, and Applicant would get credit for time served. Counsel testified he did not explain to Applicant what the non-violent aspect of his charge would mean, and that he would only have serve sixty five percent of his sentence because he plead to a non-violent charge. However,

Counsel testified he believed Applicant understood what it meant, and that the non-violent nature of the charge was the reason Applicant would only serve eight years. Counsel testified he did not discuss with Applicant when he could be released on parole, but he did discuss with Applicant the amount of time that he would serve in prison if he accepted the State's fifteen year non-violent offer.

This Court finds Applicant's allegation to be without merit. Applicant testified he was aware that he was pleading guilty to a negotiated sentence of fifteen years. Applicant discussed with Counsel the amount of time that he would likely serve if he plead accepted the State's fifteen year non-violent offer. Applicant plead guilty in February of 2018, and is projected to max out his sentence in July of 2025. From the evidence presented to this Court, it appears Applicant was properly advised of the amount of time he would likely serve if he accepted the negotiated fifteen year non-violent plea offer. Applicant has failed to demonstrate how these comments by Counsel affected the negotiations between Counsel and Assistant Solicitor Todd, or how Counsel's performance affected the results of these proceedings. This Court findss Applicant has failed to show how Counsel was deficient, or how Counsel's performance prejudiced Applicant. Therefore, this allegation is denied and dismissed.

8. Failure to Prepare

Applicant alleges Counsel was ineffective for failing to prepare for trial. Specifically, Applicant alleges Counsel was given a trial notice in December of 2017, but did not contact Applicant at that time to adequately prepare for trial beforehand. This Court finds this allegation is without merit.

At his evidentiary hearing, Applicant testified he hired Counsel in November of 2017. Applicant testified he met with Counsel one time while Applicant was imprisoned in Laurens

County, and did not meet with Counsel in person again unless Applicant had a court appearance. Applicant testified he communicated with Counsel over the phone on countless occasions, however they usually discussed times where Counsel could come meet with Applicant in person to discuss Applicant's case. However, Applicant claims Counsel never came to see Applicant while he was incarcerated. Applicant testified Counsel discussed an issue with the BEST evidence kit in Applicant's case, and as a result of this conversation, Counsel and Applicant discussed filing a motion to suppress the drug evidence. Applicant testified Counsel did not explain what a chain of custody was, and Counsel never discussed possible defenses with Applicant. Applicant testified he received a letter in late December or early January informing him that his trial was scheduled for February of 2018. Applicant testified he did not have a chance to talk with Counsel in person regarding the trial notice, or whether Applicant wanted to proceed to trial or plead guilty. Applicant testified if he had time to discuss defenses with Counsel, and if Counsel had reviewed discovery with Applicant that Applicant would not have plead guilty, but would have went to trial to challenge the chain of custody.

At Applicant's evidentiary hearing, Counsel testified he first met with Applicant in the Laurens County Detention Center on November 9, 2017 and then again on November 10, 2017. Counsel testified he cannot recall if he had discovery in Applicant's case at this point, however Counsel testified he would have talked about the facts of Applicants case in this first meeting with Applicant. Counsel testified he believed Applicant had a copy of the discovery in his case at the time that Counsel was hired. Counsel testified he believes Applicant received a copy from his initial attorney Chelsea McNeil, and Counsel would have discussed this discovery when he first met with Applicant. Counsel testified he started preparing for trial and negotiating a guilty plea simultaneously. Counsel testified he reviewed Applicant's prior criminal record, and discussed

with Applicant the issues with Applicant testify at trial and the possibility of his testimony being impeached. Counsel testified he discussed with Applicant the possible issues that may arise if Applicant testified at trial. Counsel testified he discussed discovery with Applicant, along with Applicant's constitutional rights if he went to trial and Applicant appeared to understand their discussions. Counsel testified he remembers discussing issues with the BEST evidence kit with Applicant prior to Applicant's guilty plea. Counsel testified he reviewed case law, and spoke to colleagues and friends with criminal law experience about possible issues with the BEST evidence kit as Counsel prepared to dispose of Applicant's charges. Counsel testified he relayed his findings to Applicant while they were deciding how to proceed in Applicant's case. Counsel testified he did not discuss any defenses with Applicant other than the issues with the BEST evidence kit because he did not see any defenses that would benefit Applicant in this case. Counsel testified he reviewed the issue with the chain of custody and possible issues with the BEST evidence kit which contained the drugs found on Applicant at the time of his arrest. Counsel testified he discussed the advantages of pleading guilty and the advantages of proceeding to trial in this case. Counsel testified he informed Applicant that a judge would likely let the drug evidence in if Applicant proceeded to trial. and if the evidence was admitted, Applicant would likely be convicted at trial. Regarding notice of a trial date, Counsel testified he does not recall receiving a trial notice in December. Counsel testified he does not dispute that Applicant's case was on the trial docket. Counsel testified he cannot recall if he informed Applicant that he had to be ready for his case to be called during the next term of court. Counsel testified he discussed where Applicant was on the trial docket and how likely it was that Applicant's case would be called during the next term of court. However, Counsel testified he only has a vague recollection of these discussions.

As an initial matter, this Court finds Applicant failed to overcome the "strong presumption

that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007) (citing *Strickland*, 466 U.S. 668). "A criminal defense attorney has the duty to conduct a reasonable investigation to discover all reasonably available mitigation evidence and all reasonably available evidence tending to rebut any aggravating evidence introduced by the State." *McKnight v. State*, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008). "[W]hile the scope of a reasonable investigation depends upon a number of issues, at a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case." *Ard*, 372 S.C. at 331–32, 642 S.E.2d at 597 (internal quotation marks omitted) (emphasis omitted).

However, our Supreme Court has cautioned reviewing courts not to lose sight of the reasonableness standard regarding counsel's duty to investigate. *See, e.g., id.* at 331, 642 S.E.2d at 597 ("Without a doubt, [a] criminal defense attorney has a duty to investigate, but this duty is limited to reasonable investigation."). "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland*, 466 U.S. at 690–91; *see id.* ("In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.").Thus, in applying the *Strickland* standard to a claim of failure to investigate, counsel's decision not to undertake a particular investigation must be evaluated with heavy deference to counsel's judgment. *Bagwell v. State*, 410 S.C. 259, 265, 763 S.E.2d 630, 63 (Ct. App. 2014).

To prevail on a claim of ineffective assistance based on failure to investigate or prepare for

trial, a PCR applicant must ordinarily present some evidence "that would have affected counsel's advice to [him] to accept the plea bargain offered or that would have caused [him] to decline to accept it." *Stalk v. State*, 383 S.C. 559, 563, 681 S.E.2d 592, 594 (2009); *see, e.g., Jackson v. State*, 329 S.C. 345, 353–54, 495 S.E.2d 768, 772 (1998) (reversing the PCR court's grant of relief where the applicant failed to "present any evidence of what counsel could have discovered or what other defenses he would have requested counsel pursue had counsel more fully prepared for the trial").

Applicant has not presented any evidence that would suggest Counsel could have further prepared for Applicant's case. Counsel discussed the discovery with Applicant prior to receiving Applicant's trial notice. Counsel discussed all possible issues with Applicant, including the chain of custody, and the issues with the BEST evidence kit. Counsel discussed the possible issues that would arise if Applicant were to testify at a jury trial. Counsel discussed Applicant's constitutional rights with Applicant, and believed that Applicant understood the extent of their conversations. Applicant has failed to present any evidence that Counsel did not investigate, nor has Applicant presented any information or rights that Counsel failed to discuss with Applicant. As Applicant has failed to present any additional information or evidence that Counsel could have discovered if he were to have prepared further, this Court finds Applicant has failed to show how Counsel's performance was deficient, or how Applicant was prejudiced by Counsel's performance. Therefore, this allegation is denied and dismissed with prejudice.

B. Involuntary Guilty Plea

In Applicant's initial application for post-conviction relief, Applicant alleges his guilty plea was involuntary. Specifically, Applicant asserts Counsel failed to meet with Applicant in person to discuss Applicant's case, and to devise a plan to handle Applicant's case. Applicant alleges

Counsel forced him to plead guilty by telling Applicant if he went to trial he would be sentenced to twenty five years in prison. This Court finds this allegation is without merit.

In the context of a guilty plea, the applicant must show there is a reasonable probability that, but for ineffective assistance of counsel, he or she would not have pled guilty but, instead, would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). Applicant's right to contest the validity of a plea is usually, but not invariably, foreclosed because of the inherent solemnity and truthfulness included in the guilty plea process. *See Blackledge v. Allison*, 431 U.S. 63, 73-74 (1977) ("Solemn declarations in open court carry a strong presumption of verity. The subsequent presentation of conclusory allegations unsupported by specifics is subject to summary dismissal, as are contentions that in the face of the record are wholly incredible."). Absent valid reasons why the applicant is entitled to depart from previous judicial admissions made at the plea hearing, statements made during the original proceeding remain conclusive. *Dalton v. State*, 376 S.C. 130, 137-38, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing *Crawford v. United States*, 519 F.2d 347, 350 (4th Cir. 1975)).

For a plea to be valid, the applicant must have been aware of the nature and crucial elements of the offense the maximum and minimum penalties, and the rights he is waiving by accepting the plea. *Boykin v. Alabama,* 395 U.S. 238 (1969); *Roddy v. State*, 339 S.C. 29 (2000). A plea is not knowing or voluntary if a defendant "lacks knowledge of material evidence in the prosecution's possession." *Gibson v. State*, 334 S.C. 515, 523, 514 S.E.2d 320, 324 (1999).

A defendant's knowing and voluntary waiver of statutory or constitutional rights must be established by a complete record, and "may be accomplished by colloquy between the court and defendant, between the court and defendant's counsel, or both." *Roddy v. State*, 339 S.C. at 34, 528 S.E.2d at 421 (citing *State v. Ray,* 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993)). "'[T]he

voluntariness of a guilty plea is not determined by an examination of the specific inquiry made by the sentencing judge alone, but is determined from both the record made at the time of the entry of the guilty plea and the record of the post-conviction hearing.'" *Dalton*, 376 S.C. at 138, 654 S.E.2d at 874 (quoting *Harres v. Leeke*, 282 S.C. 131, 133, 318 S.E.2d 360, 361 (1984)). Further, "guilty pleas, freely and voluntarily entered, act as a waiver of all non-jurisdictional defects and defenses, including claims of a violation of a constitutional right prior to the plea." *Whetsell v. State*, 276 S.C. 295, 297, 277 S.E.2d 891, 892 (1981).

At his evidentiary hearing, Applicant testified he primarily spoke with Counsel over the phone while preparing his case. Applicant testified he and Counsel discussed issues with the evidence in his case, and though Applicant wanted to move to suppress the evidence, Counsel did not believe that it would be successful. Applicant testified Counsel informed him that if he went to trial he would not win, and Applicant would be sentenced to twenty five years. Applicant testified he did not know the minimum sentence he could receive prior to his decision to plead guilty. Applicant testified he decided to plead guilty after Counsel stated Applicant would be sentenced to twenty five years if he went to trial. Applicant testified he did not want to plead guilty, instead he wanted to go to trial and challenge the State's evidence. Applicant testified if he had time to sit down with Counsel and discuss discovery, and discuss possible defenses, he would not have plead guilty but would have gone to trial. On cross-examination, Applicant testified he remembers the plea judge informing him of the maximum sentence for the charge he was pleading guilty to, and his constitutional rights, including his right to challenge the evidence the state may present at trial. Applicant testified he recalls informing the court he was satisfied with Counsel's services, and that he did not need more time to discuss this case with Counsel prior to pleading guilty. Applicant testified he recalls telling the court nobody forced him or coerced him into

pleading guilty, and that he was pleading guilty because he was in fact guilty. Applicant testified he recalls the court informing him of his right to appeal his conviction or sentence.

Counsel testified he discussed discovery with Applicant in their first two meetings, and that Applicant had an opportunity to explain the facts of his case. Counsel testified he discussed Applicant's constitutional rights with Applicant, and he believed that Applicant understood their conversations. Counsel testified he discussed the advantages and disadvantages of proceeding to trial versus pleading guilty. Counsel testified he believed that if Applicant went to trial there was a high likelihood that Applicant would be convicted due to the fact Applicant was spotted in a yard stealing lights, and was then found by police and lead police on a chase through a volunteer fire department which was full of firefighters. Counsel testified he believed that if the drug evidence that was found on Applicant was not suppressed that Applicant would have received a maximum sentence if he were convicted. Counsel testified he discussed all of the issues regarding the State's evidence with Applicant, and informed Applicant of his belief that Applicant would likely be convicted if he went to trial. Counsel testified he prepared for Applicant's case while negotiating a possible guilty plea for Applicant. Counsel testified he believed that the final offer of fifteen years non-violent was a fair offer, and that Applicant would end up spending substantially less time in prison if he accepted this plea offer. Counsel testified he did not coerce Applicant to plead guilty, and that Applicant freely and voluntarily made the decision to plead guilty.

This Court finds Applicant has failed to establish how his plea was not freely and voluntarily entered. During Applicant's guilty plea, Applicant was informed of his constitutional right, including his right to a jury trial, his right to remain silent, and his right to confront his accusers and challenge the state's evidence. Tr. p. 9, l. 6- p. 10, l. 12. Applicant stated he was satisfied with Counsel's services, that Counsel has done everything that Applicant wanted, and

that he did not need any more time to speak with Counsel before he plead guilty. Tr. p. 10, l. 14-22. Further, Applicant stated he had an opportunity to review discovery with Counsel, and that by pleading guilty, he and his counsel would not be able to challenge any of the evidence the State had collected in this case. Tr. p. 10, l. 23- p. 11, l. 7. Applicant stated he was not under the influence at the time of guilty plea, and the he had not been promised anything, threatened, or coerced into plead guilty. Tr. p. 6, l. 16- p. 7, l. 15. Though Applicant asserts he was threatened by Counsel that he would receive twenty five years if he did not plead guilty, Applicant testified to the court at his guilty plea hearing that he was pleading guilty because he was in fact guilty. Tr. p. 6, l. 16-18. The record clearly shows that Applicant's plea was made voluntarily, and the testimony shows that Applicant made the decision to plead guilty after a thorough review of the case and thorough plea negotiations with the State. Applicant has failed to show that but for Counsel's performance he would have proceeded to trial. Further, Applicant has failed to show that he was unaware of the charges he was pleading guilty to, the evidence the State was prepared to use against him at trial, or the possible penalties Applicant could receive if he went to trial or if he plead guilty. Therefore Applicant has failed to show that his guilty plea was not freely, voluntarily, or intelligently entered. As such, this allegation must be denied and dismissed with prejudice.

III. CONCLUSION

Based on all 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

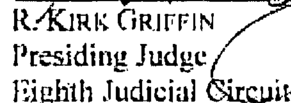
appropriate appellate review. *See* Rule 203, SCACR. Pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP provides that if the Applicant wishes to seek appellate review, 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 16th **day of** February **2022.**



R. KIRK GRIFFIN
Presiding Judge
Eighth Judicial Circuit

Sumter, South Carolina