

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

Appeal from Greenville County Court of Common Pleas
The Honorable G. D. Morgan, Jr., Circuit Court Judge

Case No. 2019-CP-23-02686

State of South Carolina,.....Respondent,

v.

Regina Gail Owings, # 195454,.....Petitioner.

NOTICE OF APPEAL

The Petitioner, Regina Gail Owings, hereby appeals the Order of Dismissal issued by the Honorable G. D. Morgan, Jr. The Order of Dismissal was filed with the Greenville County Clerk of Court on April 10, 2022. Undersigned Counsel received notice of its filing today, April 13, 2022 by email. A copy of the Order is attached to this Notice.

This Notice has also been forwarded to the Honorable Paul B. Wickensimer via email and the Appellate Division of the South Carolina Commission on Indigent Defense.

Respectfully submitted,

William G. Yarborough, III

Lauren Carole Hobbis

By: /s/ Lauren C. Hobbis, #103190

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STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

Regina Gail Owings, #195454,

Applicant,

v.

State of South Carolina,

Respondent.

) IN THE COURT OF COMMON PLEAS
) FOR THE THIRTEENTH JUDICIAL CIRCUIT
)

Case No. 2019-CP-23-02686

ENTERED COURT REPORTER

ORDER OF DISMISSAL

REGINA GAIL OWINGS, #195454
vs.
STATE OF SOUTH CAROLINA

This matter comes before this Court by way of an application for post-conviction relief filed by Regina Gail Owings (“Applicant”), through counsel, on May 10, 2019. The State’s (“Respondent”) return to the application included a motion for a more definite statement and a motion for the summary dismissal of some of the claims raised in the application. An evidentiary hearing in this matter was held before the undersigned at the Greenville County Courthouse on November 9, 2021. Applicant was present and was represented by William G. Yarborough, III. Taylor Zane Smith of the South Carolina Attorney General’s Office represented Respondent. 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 she is entitled to post-conviction relief, and denies the application with prejudice.

PROCEDURAL HISTORY

Applicant is presently imprisoned in the South Carolina Department of Corrections. On January 29, 2019, Applicant appeared before the Honorable Letitia H. Verdin (“the plea court”), waived presentment, and pleaded guilty to second-degree criminal sexual conduct with a minor (2019-GS-23-15) pursuant to North Carolina v. Alford, 400 U.S. 25 (1970). Michael David Morin (“plea counsel”) represented Applicant at the guilty plea hearing. Christine Kednocker

Sustakovitch (“the solicitor”) of the Thirteenth Circuit Solicitor’s Office prosecuted Applicant. At the guilty plea hearing, the solicitor provided the following recitations of facts that she would seek to prove if Applicant proceeded to trial:

[B]etween Thanksgiving of 2014 and 2015, [Applicant] was living with [co-defendant] William Lee Carpenter, Jr. And the grandchildren who are the subject of the abuse in this case were living in the home, as well. The victim in this case . . . did disclose in the summer of 2016 that while she was in [Applicant’s] and the co-defendant’s bedroom, one time on a couch, that the co-defendant did digitally penetrate her and one time put his penis in her. The child did state that [Applicant] held her shoulders during that incident—those instances.

Plea Tran. 10-11. After the solicitor provided the recitation, Applicant agreed that the State would likely be able to prove her guilt if she proceeded to trial. Plea Tran. 11. In accordance with the solicitor’s recommended sentencing cap of imprisonment for fifteen years, the plea court sentenced Applicant to imprisonment for fourteen years, with credit for time served.

Applicant did not appeal her conviction or sentence.

CURRENT PROCEEDING

This Court interprets the claims raised in the application for post-conviction relief, filed on July 2, 2020, as follows:

1. Plea counsel was constitutionally ineffective for failing to represent Applicant adequately;
2. Applicant was the victim of wrongful prosecution because the prosecution was based on “supposition and mistruths;
3. Applicant’s sentence was excessive and unfair; and
4. The denial of due process to Applicant by plea counsel and the plea court served as a violation of state’s rights.

On July 2, 2020, Applicant filed an amended application, supplementing her application with additional claims, which this Court interprets as follows:

1. Applicant’s guilty plea was not knowingly, intelligently, and voluntarily entered because plea counsel was constitutionally ineffective for:
 - a. Failing to advise Applicant of the effects and consequences of entering an Alford plea, which hindered Applicant’s ability to

- knowingly, voluntarily, and intelligently accept the State's offer;
 - b. Failing to notify Applicant of all plea offers, and a proffer agreement, extended by the State;
 - c. Failing to conduct an adequate investigation by not interviewing two material witnesses—Jeremy Owens and Amber Gordon—who lived with Applicant, Applicant's codefendant, and the victims;
 - d. Failing to conduct an adequate investigation into mitigating circumstances, such as Applicant's long history of abuse, Applicant's mental disorders, and Applicant's engaging in prostitution, and failing to present them to the plea court, which caused Applicant to plead guilty rather than proceeding to trial;
 - e. Failing to review discovery with Applicant adequately;
 - f. Failing to explain the nature of the charges and the implications of any potential sentence;
 - g. Failing to explain adequately to Applicant the terms, advantages, and disadvantages of the plea agreement; and
 - h. Failing to explain to Applicant the implications and consequences of pleading guilty;
2. Applicant did not knowingly and voluntarily waive her right to direct appellate review of her conviction and sentence;
 3. Applicant's sentence was unfair and excessive based upon the circumstances; and
 4. Applicant's sentence was unfair and excessive because she was prosecuted based on suppositions and mistruths.

On August 24, 2020, Applicant filed a second amended application, supplementing her application with multiple claims, which this Court interprets as follows:

1. Plea counsel was constitutionally ineffective for:
 - a. Failing to explain to Applicant the nature of the charges and the extent of the State's evidence of Applicant's guilt;
 - b. Failing to review discovery with Applicant adequately;
 - c. Failing to advise Applicant of potential trial strategies, the potential for an acquittal should Applicant proceed to trial, and Applicant's decision to plead guilty;
 - d. Failing to explain the implications of the potential sentences Applicant could receive, the nature and implications of pleading guilty, and to advise Applicant sufficiently of the rights she would be waiving by pleading guilty;
 - e. Failing to inform or explain adequately to Applicant the proffer and plea offers previously extended to Applicant and the terms thereof, including any requirement of cooperation, and to advise Applicant accordingly;
 - f. Failing to conduct an adequate investigation by not interviewing two material witnesses—Jeremy Owens and Amber Gordon—who lived

- with Applicant, Applicant's codefendant, and the victims; and
- g. Failing to conduct an adequate investigation into mitigating circumstances, such as Applicant's long history of abuse, Applicant's mental disorders, and Applicant's engaging in prostitution, and failing to present them to the plea court; and
2. Applicant did not knowingly and voluntarily waive her right to direct appellate review of her conviction and sentence.

At the start of the evidentiary hearing before this Court, Applicant affirmed that she would move forward at the hearing only upon the claims laid out in her second amended application. During the course of the hearing, Applicant asked questions that this Court interprets as questions meant to support the following claims: (1) that plea counsel was constitutionally ineffective for having a conflict of interest between Applicant and Applicant's co-defendant and (2) that plea counsel was constitutionally ineffective for seeking to have Applicant's trial severed from her co-defendant's trial. This Court finds that Applicant has abandoned and waived all claims but those presented in the second amended application and the two additional claims presented during the course of the hearing, and will address only these claims in this order.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has thoroughly reviewed the record in its entirety. Before this Court are: the records of the Greenville County Clerk of Court for Applicant's conviction and sentence; Applicant's records from the Department of Corrections; the transcript from Applicant's guilty plea hearing; and all filings in this matter. Set forth below are the relevant findings of facts and conclusions of law with regards to the claims that Applicant advanced at the evidentiary hearing, as required by S.C. Code Ann. §17-27-80 (1985).

Applicant's claim that plea counsel was constitutionally ineffective for failing to explain to Applicant the nature of the charges and the extent of the State's evidence of Applicant's guilt.

Applicant raises a claim that plea counsel was constitutionally ineffective for failing to explain to Applicant the nature of the charges and the extent of the State's evidence of Applicant's

guilt. Applicant called plea counsel as a witness at the hearing before this Court. Plea counsel testified that he met with Applicant on at least ten occasions and that he spoke with her by phone outside of those meetings. He testified that he told her about the nature of the charged offenses, and that Applicant gave him no reason to believe that she did not understand the substance of those conversations. He testified that he went over with Applicant the things turned over to him in discovery, and made arrangements with the Greenville County Sheriff's Office for him to be able to use his laptop and headphones at the county jail to allow Applicant to watch the video recordings of the forensic interviews of the minor victims. He testified that, at that point, he had already gone over the documentary discovery with Applicant. He testified that he could not remember if he had actually given the police reports and forensic interview reports to Applicant, although he testified that he always tries to do that for clients, but he remembered going over the reports with Applicant. He testified that he went over everything in his file with Applicant and that there was nothing that he received in the discovery that he did not show to Applicant or discuss with her. He testified that Applicant gave him no reason to think that she did not understand the things in the discovery because she discussed them with him.

Plea counsel testified that, after he had reviewed the forensic interview reports with Applicant, Applicant told him that the minor victims' allegations were false, that the minor victims' parents would have known about the alleged instances of abuse if they had actually happened, and that Applicant herself would have had some recollection of the instances of abuse. He testified that he thinks that Applicant attended the trial of William Lee Carpenter ("co-defendant"), Applicant's husband and co-defendant, because Applicant called him, frantically, at

the conclusion of Carpenter's trial and tasked plea counsel with negotiating a plea deal for her.¹ He testified that, based upon his conversations with Applicant, he determined that he likely would not be able to assert the defense of voluntary intoxication if Applicant proceeded to trial because such would not have been a valid defense to the crimes, even though Applicant told him that she did not remember what happened during the alleged instances of abuse due to her drug use. He testified about the trial strategy that he would have employed had Applicant proceeded to trial and testified that he discussed it with Applicant. He testified that he advised Applicant of the possible sentences that she could receive if she were found guilty. He testified that he advised Applicant of her constitutional trial rights and the fact that she would be waiving them if she pleaded guilty. He testified that he believed that Applicant understood everything that he told her. Plea counsel testified later during the hearing that Applicant had been charged with second-degree criminal sexual conduct with a minor, and that he was worried that the State might yet indict her for first-degree criminal sexual conduct with a minor, and that he told her that she could be imprisoned for twenty or thirty years if she went to trial and was convicted of that crime, too.

Applicant testified at the hearing before this Court that plea counsel told her that entering an Alford plea was like pleading not guilty. She testified that she told plea counsel that her co-defendant had a good relationship with his son, that her co-defendant was paying for his son's home in Charleston, and that the victims' mother wanted her co-defendant's money. She testified that she asked plea counsel to interview the adults and children who lived in the home at the time of the alleged incidents of abuse. She testified that plea counsel did not show some medical reports to her, but she admitted that plea counsel showed her the video recordings of the forensic

¹ The South Carolina Court of Appeals affirmed the co-defendant's convictions and sentences. State v. Carpenter, Op. No. 2021-UP-182 (S.C. Sup. Ct. filed May 19, 2021) (per curiam). The plea court presided over the co-defendant's trial.

interviews of the children. She testified that she told plea counsel that she was innocent and that she did not remember the events that the kids were describing. She testified that she wanted a trial at first but became scared when plea counsel told her that, if she went to trial, she could get thirty years in prison like her co-defendant did. She testified that plea counsel did not tell her about all of the things that were favorable to her. She testified that she does not know why she pleaded guilty, and that plea counsel told her that she was pleading not guilty. She testified that she pleaded guilty only because plea counsel told her that she would receive only five to eight years in prison and because she really did not understand the evidence against her. She testified that she pleaded guilty because she knew that plea counsel would not fight for her. She testified that she wishes that she had known more about Alford pleas. She testified that she did not remember calling plea counsel and saying that she wanted to plead guilty. She testified that plea counsel visited her when she was at her mother's home, and that he told her that the best thing that she could do would be to enter an Alford plea, and that he believed that she would get only five years in prison despite the fifteen-year cap.

On cross-examination, Applicant affirmed that the plea court had informed her of the fifteen-year cap. She affirmed that she had agreed with the plea court that she wanted to waive her right to a trial, and testified that she made that decision because plea counsel told her that that was the best thing for Applicant to do. She testified that she agreed with the plea court that she would likely be found guilty at trial because that is what plea counsel told her to say. She agreed that she had told the plea court that she was happy with plea counsel's representation, and testified that she had been happy with it at that time. She testified that plea counsel told her that she would get the same sentence as her co-defendant if she went to trial.

All defendants have a right to the assistance of effective counsel as provided by the Sixth Amendment to the United States Constitution. Strickland v. Washington, 466 U.S. 668 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008). A post-conviction relief applicant has the burden of proving the allegations in his post-conviction relief action, and when alleging that his lawyer was constitutionally ineffective, he must prove that the conduct of her lawyer “so undermined the proper functioning of the adversarial process that [that conduct] cannot be relied upon as having produced a just result.” Strickland, 466 U.S. at 686. In evaluating allegations of ineffective assistance of counsel, the post-conviction relief court applies the two-pronged test outlined in Strickland. First, the applicant must prove that the performance of his lawyer was deficient. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (quoting Strickland). Under this prong, the court measures an attorney’s performance by its “reasonableness under prevailing professional norms.” Cherry, at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). In order for a post-conviction relief applicant to successfully prove that his defense attorney’s performance was deficient, the applicant must prove “that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed by the Sixth Amendment.” Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (quotation omitted). “The proper measure of counsel’s performance remains whether he has provided representation within the range of competence required of attorneys in criminal cases.” Id. (citations omitted). The “preeminent authority for all” courts when they are considering an applicant’s claim of constitutional ineffectiveness requires that the courts be highly deferential to a defense lawyer’s performance because:

[I]t is all too easy for a court, examining counsel’s defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the

circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.

Id. at 444-45, 334 S.E.2d at 815-16 (quoting Strickland). An applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. "The burden of rebutting this presumption rests squarely on the defendant, and it should go without saying that the absence of evidence cannot overcome it. In fact, even if there is reason to think that counsel's conduct was far from exemplary, a court still may not grant relief if the record does not reveal that counsel took an approach that no competent lawyer would have chosen." Dunn v. Reeves, 141 S. Ct. 2405, 2410 (2021) (quotation omitted).

Second, the deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for [the lawyer'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. "Representation is an art, and an act or omission that is unprofessional in one case may be sound of even brilliant in another. Even if a defendant shows that particular errors of counsel were unreasonable, therefore, the defendant must show that they actually had an adverse effect on the defense." Hill v. Lockhart, 474 U.S. 52, 58 (1985) (quotation omitted). With respect to a guilty plea counsel, an applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pleaded guilty and would have insisted on going to trial. Hill, 474 U.S. at 59. A defendant who pleads guilty on the advice of counsel may collaterally attack the plea only by showing: (1) that counsel was deficient and (2) that there is a reasonable probability that but for counsel's errors, the defendant would not have pleaded guilty and would have insisted on going to trial. Roscoe v. State, 345 S.C. 16, 546 S.E.2d 417 (2001). The "prejudice prong ordinarily requires more than simply a defendant's assertion that but for counsel's deficient

performance he would not have pled but would have gone to trial.” Stalk v. State, 383 S.C. 559, 563, 681 S.E.2d 592, 595 (2009).

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether a lawyer’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. at 697. 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 that “counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” Id. at 697. Therefore, the function of the post-conviction relief court is to determine if “in light of all the circumstances, the identified acts or omissions were outside the wide range of professional competent assistance” required of a criminal defense attorney. Id. at 690.

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

plea and the finality that generally attaches to a guilty plea”). The South Carolina Supreme Court has instructed that:

The longstanding test for determining the validity of a guilty plea is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant. To find a guilty plea is voluntarily and knowingly entered into, the record must establish the defendant had a full understanding of the consequences of his plea and the charges against him.

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

“[W]hile most pleas of guilty consist of both a waiver of trial and an express admission of guilt, the latter element is not a constitutional requisite to the imposition of criminal penalty.” Alford, 400 U.S. at 37. Indeed, “[a]n individual accused of crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime.” Id. The Supreme Court in Alford went on to note:

That [the defendant] would not have pleaded except for the opportunity to limit the possible penalty does not necessarily demonstrate that the plea of guilty was not the product of a free and rational choice, especially where the defendant was represented by competent counsel whose advice was that the plea would be to the defendant’s advantage.

Id. at 30. In essence, an Alford plea is a guilty plea, which carries the same penalties and punishments. State v. Herndon, 403 S.C. 84, 91, 742 S.E.2d 375, 379 (2013). Furthermore, the entry of an Alford plea “has the same preclusive effect as a standard guilty plea.” Zurcher v. Bilton, 379 S.C. 132, 137, 666 S.E.2d 224, 227 (2008). In South Carolina, “there is no significant distinction between a standard guilty plea and an Alford plea.” Herndon, 403 S.C. at 93, 742 S.E.2d at 380.

This Court finds that Applicant has failed to prove that there was any deficiency in plea counsel's performance with respect to his explanations to Applicant about the nature of the charges and the extent of the State's evidence of Applicant's guilt. Plea counsel's testimony that he discussed the charges, evidence, discovery, and possible defenses with Applicant, and that Applicant gave him no reason to believe that she did not understand the substance of those conversations, is credible. Applicant's testimony that plea counsel did not explain all of this to her and that she did not understand the significance of entering an Alford plea is not credible. Applicant affirmed at her guilty plea hearing that plea counsel had discussed with her the charge against her. Plea Tran. 5. Applicant affirmed that she was aware that the plea court could sentence her to imprisonment for any length of time between zero and twenty years if she pleaded guilty. Plea Tran. 5. Applicant affirmed that she knew about her constitutional trial rights and that she would be waiving them by pleading guilty. Plea Tran. 6. Applicant affirmed that she believed that she would probably be found guilty if she went to trial. Plea Tran. 6. Applicant affirmed that she was satisfied with plea counsel's representation of her. Plea Tran. 5. Applicant's affirmations at her guilty plea hearing undermine her testimony before this Court. Additionally, Applicant undermined her own claim by testifying before this Court that plea counsel advised her of the significance of entering an Alford plea, that she discussed the dynamics in her co-defendant's family with plea counsel, that she made investigatory requests of plea counsel, that plea counsel discussed at least some of the evidence with her (particularly, the video recordings from the forensic interviews of the minor victims), that plea counsel advised her of possible sentencing outcomes if Applicant were to be convicted at trial, that plea counsel visited her at her mother's home in order to discuss the case, that she was aware of the fifteen-year sentencing cap in the

solicitor's sentencing recommendation, and that she was happy with plea counsel's representation of her at the time of the representation.

The Due Process Clause requires that a defendant enter a guilty plea voluntarily, knowingly, and intelligently. Pittman v. State, 337 S.C. 597, 599, 524 S.E.2d 623, 624 (1999) (citing Boykin v. Alabama, 395 U.S. 238 (1969)). The defendant must be aware of the right to confront his accusers, the privilege against his self-incrimination, the right to be tried by a jury, the nature and crucial elements of the offense for which he is being accused, the maximum and minimum possible penalties, and the nature of any constitutional rights being waived by the entry of a guilty plea. Id. (citations omitted). It is not required that a court direct a defendant's attention to "each and every constitutional right and obtain a separate waiver for each." State v. Lambert, 266 S.C. 574, 578-79, 225 S.E.2d 340, 342 (1976) (citing Wade v. Coiner, 468 F.2d 1059 (4th Cir. 1972)). This Court finds that plea counsel adequately informed Applicant of everything that she needed to know in order to enter her Alford plea voluntarily, knowingly, and intelligently, and finds that Applicant has given this Court no credible evidence to believe otherwise. Furthermore, even if plea counsel had incorrectly advised Applicant in matters such as the possible sentences that Applicant could face if she pleaded guilty, the consequences of entering an Alford plea, and the rights that Applicant would be waiving by pleading guilty, any error on plea counsel's part would have been cured by the plea court's colloquy. Holden v. State, 393 S.C. 565, 575, 713 S.E.2d 611, 616 (2011) (citations omitted) (concluding that any alleged deficiency in plea counsel's advice to Holden was cured by the plea court's colloquy), abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018).

This Court finds that Applicant has failed to prove that there is a reasonable likelihood that she would have proceeded to trial instead of entering an Alford plea but for the alleged deficiencies

in plea counsel's performance. Applicant testified before this Court that she had wanted a trial at first but became scared when plea counsel told her that, if she went to trial, she could get thirty years in prison like her co-defendant. She testified that plea counsel did not tell her about all of the things that were favorable to her. She testified that she does not know why she pleaded guilty, and that plea counsel told her that she was pleading not guilty. She testified that she only pleaded guilty because plea counsel told her that she would only receive five to eight years in prison and she really did not understand the evidence against her. She testified that she pleaded guilty because she knew that plea counsel would not fight for her. She testified that she did not remember calling plea counsel and saying that she wanted to plead guilty. This Court finds that Applicant's testimony on these points is not credible. Plea counsel credibly testified that Applicant had always indicated that she wanted to go to trial and that he had been planning to try the case throughout his representation of her, until Applicant's co-defendant was convicted, and that Applicant was highly motivated to seek a plea deal after that point.

This Court finds that Applicant has failed to prove that plea counsel was constitutionally ineffective for failing to explain to Applicant the nature of the charges and the extent of the State's evidence of Applicant's guilt because Applicant has failed to prove any deficiency in plea counsel's performance in this respect, and because Applicant has failed to prove any resulting prejudice. This Court denies Applicant's claim and dismisses it with prejudice.

Applicant's claim that plea counsel was constitutionally ineffective for failing to review discovery with Applicant adequately.

Applicant raises a claim that plea counsel was constitutionally ineffective for failing to review discovery with Applicant adequately. Applicant testified before this Court that plea counsel did not show some medical reports to her, but she admitted that plea counsel showed her the video recordings of the forensic interviews of the children. On cross-examination, Applicant affirmed

that she had agreed with the plea court at the guilty plea hearing that she would likely be found guilty at trial, but added that she did so because that is what plea counsel told her to say. She agreed that she had told the plea court that she was happy with plea counsel's representation, and testified that she had been happy with it at the time. Plea counsel testified that he reviewed with Applicant everything that he had received in discovery. He testified that he allowed Applicant to watch the video recordings of the forensic interviews of the minor victims and that he reviewed every piece of documentary evidence in discovery with Applicant.

This Court finds that Applicant has failed to prove that there was any deficiency in plea counsel's performance with respect to this claim. Applicant's testimony that plea counsel did not review the discovery with her adequately is not credible. Plea counsel credibly testified that he reviewed all of the discovery with Applicant and that Applicant gave the appearance of understanding the substance of their discussions, even to the extent that she engaged plea counsel in discussions about the evidence and possible defenses. Additionally, Applicant's affirmations to the plea court undermine the credibility of her testimony with regard to this claim.

This Court finds that Applicant has failed to prove that there is a reasonable likelihood that she would have proceeded to trial instead of entering an Alford plea but for the alleged deficiencies in plea counsel's review of evidence with her. As previously noted in this order, this Court finds that Applicant's testimony about being motivated to enter an Alford plea because she had been incorrectly advised about various things by plea counsel or because she felt that plea counsel's performance was deficient in some way is not credible; furthermore, this Court repeats here its finding that plea counsel's testimony that Applicant became motivated to plead guilty only after her co-defendant was convicted and that he had been preparing for trial up until that point is credible.

This Court finds that Applicant has failed to prove that plea counsel was constitutionally ineffective for failing to review discovery with Applicant adequately because she has failed to prove that there was any deficiency in plea counsel's performance with regard to this claim and has failed to prove any resulting prejudice. The claim is denied and dismissed with prejudice.

Applicant's claim that plea counsel was constitutionally ineffective for failing to advise Applicant of potential trial strategies, the potential for an acquittal should Applicant proceed to trial, and Applicant's decision to plead guilty.

Applicant raises a claim that plea counsel was constitutionally ineffective for failing to advise her of potential trial strategies, the potential for an acquittal should Applicant proceed to trial, and Applicant's decision to plead guilty. Applicant testified before this Court that plea counsel told her that entering an Alford plea was like pleading not guilty. She testified that she told plea counsel that her co-defendant had a good relationship with his son, that her co-defendant was paying for his son's home in Charleston, and that the victims' mother wanted her co-defendant's money. She testified that she told plea counsel that she was innocent and that she did not remember what the kids were saying. She testified that she wanted a trial at first but became scared when plea counsel told her that, if she went to trial, she could get thirty years in prison like her co-defendant. She testified that plea counsel did not tell her about all of the things that were favorable to her. She testified that she pleaded guilty only because plea counsel told her that she would receive only five to eight years in prison and because she really did not understand the evidence against her. She testified that she pleaded guilty because she knew that plea counsel would not fight for her. She testified that she did not remember calling plea counsel and saying that she wanted to plead guilty. She testified that plea counsel visited her when she was at her mother's home, and that he told her that the best thing that she could do would be to enter an Alford plea, and that he believed that she would get only five years in prison despite the fifteen-

year cap. On cross-examination, Applicant affirmed that she had agreed with the plea court at the guilty plea hearing that she wanted to waive her right to a trial, and testified that she made that decision because plea counsel told her that that was the best thing for Applicant to do. She testified that she had agreed with the plea court that she would likely be found guilty at trial because that is what plea counsel told her to say. She testified that plea counsel told her that she would get the same sentence as her co-defendant if she went to trial.

Plea counsel testified before this Court that he went over with Applicant all of the things turned over to him in the State's discovery disclosure. He testified that Applicant gave him no reason to think that she did not understand the things in the discovery because she discussed them with him. Plea counsel testified that Applicant told him that the victims' allegations were false, that the victims' parents would have known about the alleged instances of abuse if they had actually happened, and that Applicant herself would have had some recollection of the instances of abuse. He testified that he thinks that Applicant attended her co-defendant's trial because Applicant called him, frantically, at the conclusion of that trial and tasked plea counsel with negotiating a plea deal for Applicant. He testified that, based upon his conversations with Applicant, he determined that he likely would not have been able to assert the defense of voluntary intoxication if Applicant proceeded to trial because such would not have been a valid defense to the crimes, even though Applicant told him that she did not remember what happened during the alleged instances of abuse due to her drug use. He testified about the trial strategy that he would have employed had Applicant proceeded to trial and testified that he discussed it with Applicant. He testified that he advised Applicant of the possible sentences that she could receive if she were found guilty. He testified that he advised Applicant of her constitutional trial rights and the fact

that she would be waiving them if she pleaded guilty. He testified that he believed that Applicant understood everything that he told her.

This Court finds that Applicant has failed to prove any deficiency in plea counsel's performance with respect to this claim. Plea counsel credibly testified before this Court about his review of the evidence with Applicant and his discussions with her about the case, including the strategy that he would employ if Applicant proceeded to trial. Plea counsel apparently had concerns about Applicant's chance at getting an acquittal at trial; Applicant began to share plea counsel's concern once her co-defendant was convicted. Applicant's own testimony and plea counsel's proves that plea counsel discussed with Applicant her decision to plead guilty and the potential sentences that she could face, but Applicant's testimony that she did not understand the significance of entering an Alford plea is not credible. Plea counsel credibly testified about his advice to Applicant about the potential strategies or defenses available to her at trial, the chance for an acquittal if she proceeded to trial, and Applicant's decision to plead guilty. Applicant's testimony on those topics is not credible. Furthermore, Applicant's affirmations to the plea court also prove that her testimony is not credible.

This Court finds that Applicant has failed to prove that there is a reasonable likelihood that she would have proceeded to trial instead of entering an Alford plea but for the alleged deficiencies in plea counsel's performance. As previously noted in this order, this Court finds that Applicant's testimony about being motivated to enter an Alford plea because she had been incorrectly advised about various things by plea counsel or because she felt that plea counsel's performance was deficient in some way is not credible; furthermore, this Court repeats here its finding that plea counsel's testimony that Applicant became motivated to plead guilty only after her co-defendant was convicted and that he had been preparing for trial up until that point is credible.

This Court finds that Applicant has failed to prove that plea counsel was constitutionally ineffective for failing to advise Applicant of potential trial strategies, the potential for an acquittal should Applicant proceed to trial, and Applicant's decision to plead guilty because Applicant has failed to prove that there was any deficiency in plea counsel's performance with respect to this claim, and because Applicant has failed to prove that there was any resulting prejudice. This claim is denied and dismissed with prejudice.

Applicant's claim that plea counsel was constitutionally ineffective for failing to explain the implications of the potential sentences Applicant could receive, the nature and implications of pleading guilty, and advise Applicant sufficiently of the rights she would be waiving by pleading guilty.

Applicant raises a claim that plea counsel was constitutionally ineffective for failing to explain the implications of the potential sentences that Applicant could receive, the nature and implications of pleading guilty, and advise Applicant sufficiently of the rights she would be waiving by pleading guilty. Applicant testified at the hearing before this Court that plea counsel told her that entering an Alford plea was like pleading not guilty. She testified that she wanted a trial at first but became scared when plea counsel told her that, if she went to trial, she could get thirty years in prison like her co-defendant. She testified that she does not know why she pleaded guilty, and that plea counsel told her that she was pleading not guilty. She testified that she pleaded guilty only because plea counsel told her that she would receive five to eight years in prison and because she really did not understand the evidence against her. She testified that she did not remember calling plea counsel and saying that she wanted to plead guilty. She testified that plea counsel visited her when she was at her mother's home, and that he told her that the best thing that she could do would be to enter an Alford plea, and that he believed that she would get only five years in prison despite the fifteen-year cap.

On cross-examination, Applicant affirmed that the plea court had informed her of the fifteen-year cap. She affirmed that she had agreed with the plea court that she wanted to waive her right to a trial, and testified that she made that decision because plea counsel told her that that was the best thing for Applicant to do. She testified that she agreed with the plea court that she would likely be found guilty at trial because that is what plea counsel told her to say. She testified that plea counsel told her that she would get the same sentence as her co-defendant if she went to trial.

Plea counsel testified that he met with Applicant on at least ten occasions and that he spoke with her by phone outside of those meetings. He testified that he told her about the nature of the charged offenses, and that Applicant gave him no reason to believe that she did not understand the substance of those conversations. He testified that he went over with Applicant the things turned over to him in discovery used his laptop and headphones at the jail to allow Applicant to watch the video recordings of the forensic interviews of the victims. He testified that he had already gone over the documentary discovery with Applicant. He testified that he could not remember if he had actually given the police reports and forensic interview reports to Applicants, although he always tries to do that for clients, but he definitely remembered going over them with Applicant. He testified that he went over everything in his file with Applicant and that there was nothing that he received in the discovery disclosure that he did not show to Applicant or discuss with her. He testified that Applicant gave him no reason to think that she did not understand the things in the discovery because she discussed them with him.

Plea counsel testified before this Court that he thought that Applicant attended the trial of her co-defendant because Applicant called him, frantically, at the conclusion of that trial and tasked plea counsel with negotiating a plea deal. He testified about the trial strategy that he would have employed had Applicant proceeded to trial and testified that he discussed it with Applicant. He

testified that he advised Applicant of the possible sentences that she could receive if she were found guilty. He testified that he advised Applicant of her constitutional trial rights and the fact that she would be waiving them if she pleaded guilty. He testified that he believed that Applicant understood everything that he told her. Plea counsel testified that he was worried that the State might indict Applicant for first-degree criminal sexual conduct with a minor if she proceeded to trial.

This Court finds that Applicant has failed to prove that there was any deficiency in plea counsel's performance with respect to these claims. Plea counsel credibly testified that he explained the potential sentences that Applicant was facing (including the sentences that she would receive if the State indicted her for first-degree criminal sexual conduct with a minor following her co-defendant's conviction), explained to Applicant the implications of pleading guilty and entering an Alford plea, and advised Applicant of the fact that she would be waiving her constitutional trial rights by pleading guilty. Applicant's testimony to the contrary is not credible. Even then, some of Applicant's testimony before this Court indicates that Applicant and plea counsel did discuss these topics, although she contests the extent of those conversations. Applicant's testimony before this Court is also contradicted by her affirmations to the plea court.

This Court finds that Applicant has failed to prove that there is a reasonable likelihood that she would have proceeded to trial instead of entering an Alford plea but for the alleged deficiencies in plea counsel's performance. As previously noted in this order, this Court finds that Applicant's testimony about being motivated to enter an Alford plea because she had been incorrectly advised about various things by plea counsel or because she felt that plea counsel's performance was deficient in some way is not credible; furthermore, this Court repeats here its finding that plea

counsel's testimony that Applicant became motivated to plead guilty only after her co-defendant was convicted and that he had been preparing for trial up until that point is credible.

This Court finds that Applicant has failed to prove that plea counsel was constitutionally for failing to explain the implications of the potential sentences Applicant could receive, the nature and implications of pleading guilty, and advise Applicant sufficiently of the rights she would be waiving by pleading guilty because Applicant has failed to prove that there was any deficiency in plea counsel's performance with respect to this claim and has failed to prove that there was any resulting prejudice. The claim is denied and dismissed with prejudice.

Applicant's claim that plea counsel was constitutionally ineffective for failing to inform or explain adequately to Applicant the proffer and plea offers previously extended to Applicant and the terms thereof, including any requirement of cooperation, and to advise Applicant accordingly.

The solicitor testified before this Court that she represented the State in its prosecutions of both Applicant and Applicant's co-defendant. She testified that she has been working at the Thirteenth Circuit Solicitor's Office for twenty years and is the head of the sex crimes unit. She testified that she told plea counsel that, if Applicant was honest about what happened during the instances of sexual abuse, it would work in Applicant's favor, but she testified that that offer did not go anywhere because Applicant insisted that she was innocent and that the allegations of abuse were false. She testified that they eventually settled on having Applicant to plead guilty to one count of second-degree criminal sexual conduct with a minor for the abuse of one of the victims, rather than trying Applicant for the sexual abuse of both victims. She testified that, had Applicant proceeded to trial, the State would have tried Applicant for the sexual abuse of both victims instead of only one. She testified that, as part of the plea agreement, the State dismissed the criminal sexual conduct charge relating to the male victim.

Plea counsel testified before this Court that Applicant maintained her innocence during his representation of her. He testified that the first time he had ever discussed the option of pleading guilty with Applicant was when she called him—in a hysterical mood—after her co-defendant was convicted and asked that he engage the solicitor in plea negotiations. He testified that the solicitor planned to charge Applicant with first-degree criminal sexual conduct with a minor and to prosecute Applicant under the theory of accomplice liability. He testified that he suggested that Applicant enter an Alford plea because she said that she did not remember any instances of sexual abuse because she had been taking drugs at the time, and that Applicant wanted to take advantage of a sentencing cap recommendation after her co-defendant was convicted.

When being cross-examined before this Court, Applicant agreed that the plea court had informed her at the guilty plea hearing that the solicitor was recommending a sentencing maximum of fifteen years.

This Court finds that Applicant has failed to prove that there was any deficiency in plea counsel's performance with respect to his communication with and advice to Applicant about plea offers from the State. "[A] defendant has the right to effective assistance of counsel during the plea bargaining process." Bell v. State, 410 S.C. 436, 440-41, 765 S.E.2d 4, 6 (Ct. App. 2014) (quoting Davie v. State, 381 S.C. 601, 675 S.E.2d 416 (2009), abrogated on other grounds by Smalls, 422 S.C. 174, 810 S.E.2d 836. A defense attorney "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." Id. (quoting Missouri v. Fryc, 566 U.S. 134 (2012)). Applicant has presented this Court with no evidence that the solicitor extended any plea offer that plea counsel did not then communicate to Applicant. Plea counsel credibly testified that Applicant expressed no interest in pleading guilty

or engaging in plea negotiations, and in fact maintained her innocence, until her co-defendant was convicted.

This Court finds that Applicant has failed to prove that plea counsel was constitutionally ineffective for failing to inform or explain adequately to Applicant the proffer and plea offers extended to Applicant and the terms thereof, and to advise Applicant accordingly, because Applicant has failed to prove that there was any deficiency in plea counsel's performance with respect to this claim and has failed to prove any resulting prejudice. This claim is denied and dismissed with prejudice.

Applicant's claim that plea counsel was constitutionally ineffective failing to conduct an adequate investigation by not interviewing two material witnesses—Jeremy Owens and Amber Gordon—who lived with Applicant, Applicant's codefendant, and the victims.

Applicant raises a claim that plea counsel was constitutionally ineffective failing to conduct an adequate investigation by not interviewing two material witnesses—Jeremy Owens and Amber Gordon—who lived with Applicant, Applicant's codefendant, and the victims. Applicant also testified that she wanted plea counsel to interview Delana Moore, her co-defendant, and the two victims. A defense attorney has a duty to undertake reasonable investigations or to make a decision that renders a particular investigation unnecessary. Strickland, 466 U.S. at 691. Thus, "[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). A defense attorney's "[f]ailure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result." Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998) (citing Kibler v. State, 267 S.C. 250, 227 S.E.2d 199 (1976)). An applicant alleging that his

attorney failed to prepare for the case must show how additional preparation would have resulted in a different outcome. Skeen v. State, 325 S.C. 210, 214, 481 S.E.2d 129, 132 (1997). Moreover, counsel's decision not to investigate should be assessed for reasonableness under all the circumstances with heavy deference to counsel's judgment. Simpson v. Moore, 367 S.C. 587, 597, 627 S.E.2d 701, 706 (2006). "[A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Id. at 690; Bagwell v. State, 410 S.C. 259, 265, 763 S.E.2d 630, 633-34 (Ct. App. 2014).

This Court finds that Applicant has failed to prove that there was any deficiency in plea counsel's performance with respect to this claim. Applicant has presented this Court with no evidence that plea counsel was required to interview Applicant's co-defendant, the two victims, or Moore. Plea counsel credibly testified before this Court that he believed that Owens and Gordon were Applicant's family members, and he thought that he may have spoken with them on the phone while representing Applicant. He testified that he was not sure that he would have called either of them as a witness at trial had Applicant gone to trial because he was not sure at that point in his representation of Applicant what he would have done at trial. Though plea counsel talked with Owens and Gordon, Applicant provided no explanation for why such was required of plea counsel. Plea counsel credibly testified that the recordings of the interviews of the two victims were included in discovery and that he reviewed them with Applicant. Plea counsel credibly testified that he reviewed the medical records of at least one of the victims in discovery. Plea counsel credibly testified that he did not interview the victims' parents because he already had the parents' statements in discovery and he knew that they were going to be witnesses hostile to Applicant, and he testified that he likely would have interviewed them if there had been any indications in their

statements that they could assist Applicant's defense. Plea counsel credibly testified that he would have done more to gather and interview witnesses had Applicant not decided to plead guilty, as her case had not yet been set for trial at the time of her guilty plea hearing. Plea counsel, therefore, did all that was required of him.

This Court finds that Applicant has failed to prove that there is a reasonable likelihood that she would have gone to trial instead of entering an Alford plea but for the alleged deficiency in plea counsel's pre-trial investigation. An "applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial." Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) (citing Pauling v. State, 331 S.C. 606, 503 S.E.2d 468 (1998)); see also Dempsey v. State, 363 S.C. 365, 370, 610 S.E.2d 812, 815 (2005) (holding that the PCR court's finding that Dempsey was prejudiced by trial counsel's failure to call an expert at trial to rebut the State's expert was merely speculative when Dempsey failed to have an expert testify at his PCR hearing), abrogated on other grounds by Smalls, 422 S.C. 174, 810 S.E.2d 836. Applicant did not call Moore, Owens, Gordon, the two victims, the victims' parents, or her co-defendant as witnesses at her hearing. She has, therefore, produced no evidence that testimony from any of them would have been necessary or valuable at her trial, and has produced no evidence that any of them had testimony that would have had any bearing on Applicant's decision to enter an Alford plea.

This Court finds that Applicant has failed to prove that plea counsel was constitutionally ineffective failing to conduct an adequate investigation by not interviewing Owens and Gordon because Applicant has failed to prove that there was any deficiency in plea counsel's performance

with respect to these two people and has failed to prove that there was any resulting prejudice. The claim is denied and dismissed with prejudice.

Applicant's claim that plea counsel was constitutionally ineffective failing to conduct an adequate investigation into mitigating circumstances, such as Applicant's long history of abuse, Applicant's mental disorders, and Applicant's engaging in prostitution, and failing to present them to the plea court.

Applicant raises a claim that plea counsel was constitutionally ineffective failing to conduct an adequate investigation into mitigating circumstances, such as Applicant's long history of abuse, Applicant's mental disorders, and Applicant's engaging in prostitution, and failing to present them to the plea court. Applicant testified before this Court that she frequently travelled to Spartanburg, South Carolina, in order to take illegal drugs. She testified that she would be away from home on these drug trips for two or three days at a time. She testified that her co-defendant experienced sexual satisfaction by having human feces rubbed onto him and that she was only covered in feces on one occasion. She testified that she has a drug addiction and that she was the first "crack mother" in South Carolina. She testified that she had put two of her biological children up for adoption in the past and that she never took drugs when she was around the minor victims. She testified that she had engaged in prostitution frequently, but that she would not have sexual intercourse with someone younger than she, even if that person was paying for it. She testified that she had done lots of things in order to get drugs, but denied that she had ever sexually abused children. She testified that she had cut off her ankle monitor while she was awaiting trial because she had snorted lots of cocaine. She testified on cross-examination that she would get upset with her co-defendant whenever he would not allow her to have drugs.

Plea counsel testified before this Court that he was aware of the allegations that Applicant's co-defendant induced Applicant's behavior through the use of drugs. He testified that Applicant had been released on bond after her arrest, but that it was subsequently revoked because she had a

drug problem. He testified that he was aware that Applicant and her co-defendant drank each other's urine. He testified that he would have argued at trial, if Applicant had gone to trial, that Applicant's co-defendant was aware of her drug addiction and was victimizing Applicant through the enticement of drugs. He testified that he could not argue voluntary intoxication as a defense at Applicant's trial because it would not have been a valid defense to Applicant's crimes. He testified that he thought that Applicant might be eligible to enter an Alford plea because she said that she could not remember what happened during the instances of sexual abuse due to her drug use. He testified that Applicant had never told him that her co-defendant forced her to take drugs; instead, she was addicted to drugs in her own right and was even doing drugs while out on bond. He testified that Applicant told him that her co-defendant was not forcing her to take drugs but was only making them available for her. He testified that Applicant told him that she had been using drugs during the time period in question, and that Applicant's drug use continued to be a problem for Applicant throughout his representation of her. He considered drugs a controlling factor in Applicant's life. He testified that he was aware that drug addicts can sometimes have certain reactions to the people who supply them with drugs. He testified that there was no disagreement between him and the solicitor that Applicant had a drug addiction problem. He testified that he was considering incorporating Applicant's drug use and family dynamics into a defense at trial, but was not able to get very far in working on that because Applicant decided to enter her Alford plea before a trial had even been scheduled.

The solicitor testified before this Court that she was aware that Applicant had a drug problem. She referenced a jail phone call between Applicant and the minor victims' mother that had been recorded, and in which Applicant said that she could not wait to get more drugs. When referencing a photograph of Applicant lying in a bathtub while covered in feces, she testified that

she questioned whether Applicant understood what was going on in the moment captured in the photograph. She testified that Applicant never said that her co-defendant had forced her to take drugs.

At Applicant's guilty plea hearing, plea counsel informed the plea court that Applicant was in custody because she violated the terms of her home incarceration through substance abuse. Plea Tran. 8. Applicant informed the plea court that she was being treated for bipolar disorder with medication and that she had been going to mental health therapy before she was in custody. Plea Tran. 9. The solicitor notified the plea court of Applicant's past convictions, which included a conviction for prostitution and multiple convictions related to drug use and possession. Plea Tran. 12. Plea counsel argued to the plea court that Applicant's co-defendant, with knowledge of Applicant's drug addiction, had groomed her to satisfy his own sexual proclivities. Plea Tran. 12-15. Plea counsel said that he believed that Applicant had been abusing drugs during the incidents of sexual abuse. Plea Tran. 13-14. Plea counsel asked for a sentence that would allow Applicant to get treatment for her drug addiction. Plea Tran. 16. Plea counsel noted for the plea court that he and Applicant had discussed voluntary intoxication. Plea Tran. 16. When issuing the sentence, the plea court recognized that Applicant was taking responsibility for her crimes despite not having a clear recollection of them, and gave her credit for doing so. Plea Tran. 17.

This Court finds that Applicant has failed to prove that there was any deficiency in plea counsel's performance with respect to his presentation in mitigation to the plea court. Plea counsel was correct that Applicant's voluntary intoxication would not serve as a defense should she have gone to trial. Plea counsel credibly testified that Applicant told him that she willingly took drugs offered to her by her co-defendant, and that testimony was supported by Applicant's own testimony before this Court, in which she detailed her drug addiction and her anger whenever her

co-defendant withheld drugs from her. The plea court was aware of Applicant's addiction to drugs, Applicant's history of addiction, Applicant's past conviction for prostitution, Applicant's mental disorder, as well as Applicant's contention that her drug use may have impaired her memories of the incident of sexual abuse to which she pleaded guilty. Applicant has not proven that there was anything that plea counsel should have done that he did not.

This Court finds that Applicant has failed to prove that, but for the alleged deficiency in plea counsel's performance, she would have proceeded to trial instead of entering an Alford plea or that she would have received a more lenient sentence. The plea court still gave Applicant less time in prison than the solicitor's recommended cap.

This Court finds that Applicant has failed to prove that plea counsel was constitutionally ineffective failing to conduct an adequate investigation into mitigating circumstances, such as Applicant's long history of abuse, Applicant's mental disorders, and Applicant's engaging in prostitution, and failing to present them to the plea court because Applicant has failed to prove that there was any deficiency in plea counsel's performance with respect to this claim and that there was any resulting prejudice. This claim is denied and dismissed with prejudice.

Applicant's claim that plea counsel had a conflict of interest because someone else paid for plea counsel's representation of Applicant.

Although Applicant presented no argument regarding an alleged conflict of interest on the part of plea counsel due to the fact that plea counsel's representation of Applicant was paid for by Applicant's co-defendant, Applicant did ask questions during the course of the hearing before this Court that arguably were meant to advance a claim that plea counsel had a conflict of interest. Therefore, this Court will address the claim here.

Applicant testified before this Court that her co-defendant's brother hired plea counsel to represent her. Plea counsel testified that Applicant hired him to represent her and that her co-

defendant paid for plea counsel's representation of Applicant. He testified that, after Applicant hired him, Applicant's co-defendant came by his office once or twice to talk to plea counsel. He testified that he notified the co-defendant's criminal defense lawyer after each one of the co-defendant's visits. He testified that the co-defendant did not call ahead to notify plea counsel that he was coming to plea counsel's office or schedule the meetings with plea counsel; instead the co-defendant would just show up at the office. He testified that Applicant was aware that plea counsel's services had been paid for by her co-defendant, that plea counsel never felt that the fact that the co-defendant had paid him affected his ability to represent Applicant, and that plea counsel told Applicant that everything that she discussed with plea counsel would be private between them.

A conflict of interest occurs:

[W]hen a defense attorney places himself in a situation inherently conducive to divided loyalties If a defense attorney owes duties to a party whose interests are adverse to those of the defendant, than an actual conflict exists. The interests of the other client and the defendant are sufficiently adverse if it is shown that the attorney owes a duty to the defendant to take some action that could be detrimental to his other client.

Duncan v. State, 281 S.C. 435, 438, 315 S.E.2d 809, 811 (1984) (quoting Zuck v. State of Alabama, 588 F.2d 436 (5th Cir. 1979)). The mere possibility that a defense lawyer had a conflict of interest is insufficient to impugn a conviction of that lawyer's client. State v. Gregory, 364 S.C. 150, 152-53, 612 S.E.2d 449, 450 (2005) (citing Langford v. State, 310 S.C. 357, 426 S.E.2d 793 (1993)).

The South Carolina Supreme Court has instructed that:

In order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance [A] defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief. . . . But until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance.

Duncan, at 437-37, 315 S.E.2d at 810-11 (quoting Cuyler v. Sullivan, 446 U.S. 335 (1980)).

This Court finds that Applicant has failed to prove that plea counsel had a conflict of interest. Plea counsel credibly testified that Applicant's co-defendant paid for his representation of Applicant. Applicant has presented no evidence that plea counsel had divided loyalties between Applicant and her co-defendant. "[T]his is not a case where two or more defendants [were] represented by the same attorney for the same criminal episode" *Id.* at 438, 315 S.E.2d at 811. Neither is this "a case of concurrent representation." *Id.* Applicant has failed to prove that plea counsel "owed a duty to a party . . . whose interests were adverse to" Applicant's. *Id.* at 438, 315 S.E.2d at 811.

This Court finds that Applicant has failed to prove that the alleged conflict of interest had any effect on the adequacy of plea counsel's representation of Applicant. Plea counsel credibly testified that he was not concerned with what would have been beneficial to Applicant's co-defendant, and that he was concerned only with what would have been advantageous for Applicant.

This Court finds that Applicant has failed to prove that plea counsel was constitutionally ineffective due to a conflict of interest because Applicant has failed to prove that any such conflict existed and has failed to prove that the alleged conflict had any effect on the adequacy of plea counsel's representation of Applicant. This claim is denied and dismissed with prejudice.

Applicant's claim that plea counsel was constitutionally ineffective for seeking the severance of Applicant's trial from her co-defendant's trial.

Although Applicant presented no argument regarding plea counsel's decision to seek the severance of Applicant's trial from that of her co-defendant's, Applicant did ask questions during the course of the hearing before this Court that arguably were meant to advance a claim that plea counsel was constitutionally ineffective for seeking the severance. Therefore, this Court will address the claim here.

Applicant testified before this Court that she did not know what a severance was. She

testified that she did not agree with the decision that her trial would be severed from her co-defendant's trial because she wanted to be tried together with him. She testified that she felt that, since the victims alleged that Applicant and her co-defendant working together sexually abused them, she and her co-defendant should be tried together. She testified that she did not want to be tried before the plea court because the plea court presided over her co-defendant's trial.

Plea counsel testified before this Court that he would not have been able to call Applicant as a witness against the co-defendant because Applicant told plea counsel that she could not testify against her co-defendant because he was innocent. He testified that Applicant was not willing to cooperate with the solicitor in the prosecution of the co-defendant because Applicant was adamant that the sexual abuse did not happen and that she was not willing to testify against her co-defendant. He testified that Applicant's co-defendant had sex with multiple partners and engaged in other non-traditional sexual activities, which plea counsel learned about through his conversations with Applicant and through the discovery; those activities that Applicant and her co-defendant engaged in included drinking each other's urine. He testified that there was a photograph in discovery of Applicant covered in feces. He testified that the co-defendant had an earring and a certain way of carrying himself, which plea counsel was worried would cause the jurors to judge the co-defendant's appearance. He testified that the co-defendant admitted during his trial to many of the things plea counsel had discussed in his testimony, and that those admissions would have reinforced for the jury a stereotype that he did not want a jury to associate with Applicant. He testified that he tried to protect Applicant by having the trials severed. He testified that he wanted to avoid having those sexual activities associated with Applicant during a trial. He testified that Applicant's co-defendant was not discreet about his sexual activities. He testified that he told Applicant that he felt that it would be detrimental to her defense if she were tried jointly with her

co-defendant and that she gave him no reason to believe that she did not understand that advice. He testified that the solicitor planned to try Applicant for first-degree criminal sexual conduct with a minor under a theory of accomplice liability if Applicant proceeded to trial. He testified that he understood that he could have strategically had Applicant tried together with the co-defendant but he employed a strategy that involved her not being associated with the co-defendant. He testified that he moved to sever because he did not want Applicant sitting next to her co-defendant at a trial. He testified that, had his motion to sever been denied, he would have employed a strategy at trial of blaming the co-defendant.

The solicitor testified before this Court that there was graphic evidence in this case that she had not seen before in her nineteen years of legal experience. She testified about a photograph of Applicant that shows Applicant covered in feces. She testified that videos and photographs taken from the co-defendant's phone show the sexual activities between Applicant and the co-defendant that included feces and urine. She testified that the victims' allegations were that both Applicant and the co-defendant had abused them sexually. She testified that the female victim was the first to disclose, and that she disclosed that Applicant held her arms while the co-defendant penetrated that victim with her penis. She testified that the male victim made a disclosure months later that the co-defendant had sexually abused him in a bathroom and that Applicant was present with the co-defendant at the time. She testified that both victims disclosed that the co-defendant put his feces on them and had them drink his urine. She testified that she was stunned that the co-defendant admitted to having those sexual proclivities.

The solicitor testified that, had plea counsel not moved to sever Applicant's trial from co-defendant's, she likely would have done so of her own accord. She testified that she was aware that Applicant was a drug addict. She testified that she told plea counsel that it would work in

Applicant's favor if Applicant was honest about the crimes, but that that never went anywhere because Applicant insisted that nothing happened and that she was not involved. She testified that she had charged Applicant for the sexual abuse of the female victim and had also charged Applicant for the sexual abuse of the male victim, but that they ultimately decided to have Applicant plead guilty only for the crime relating to the female victim. She testified that she would have tried Applicant for both offenses had Applicant gone to trial instead of pleading guilty. She testified that she dismissed the charge related to the male victim after Applicant pleaded guilty. She testified that that victim started vomiting during his meeting with her when he was describing the sexual abuse that he had suffered.

This Court finds that Applicant has failed to prove that there was any deficiency in plea counsel's performance with respect to his motion to sever. First, Applicant has failed to provide this Court with any authority requiring Applicant to be tried jointly with her co-defendant even if she had wanted to be so tried. This is a glaring omission here because the more usual complaint from criminal defendants is that they were improperly tried jointly with their co-defendants. E.g., State v. Cope, 385 S.C. 274, 292-93, 684 S.E.2d 177, 186-87 (Ct. App. 2009) (finding that the trial court did not err in denying the defendant's motion to sever his trial from his co-defendant's trial). Second, Applicant has failed to prove that she actually wanted a joint trial. Applicant did testify before this Court that she wanted to be tried jointly with her co-defendant; on the other hand, Applicant also testified that she, after having observed or learned of the events at her co-defendant's trial before the plea court, did not want to be tried before the plea court. The contradiction in Applicant's testimony on this point demonstrates the lack of credibility in her testimony. Third, Applicant has failed to prove that plea counsel's decision to seek the severance deviated from prevailing professional norms. Plea counsel articulated a good reason for not

wanting Applicant to be tried jointly with her co-defendant, which, he explained, was motivated by his desire to protect Applicant from any harm that could be caused by her association in the jurors' minds with her co-defendant and his actions. Although Applicant questioned plea counsel about whether he could have employed a strategy if the trials had not been severed of blaming the co-defendant, plea counsel credibly testified that that strategy would likely have not been successful because Applicant maintained that her co-defendant was innocent. It may be true that Applicant now wishes that she had gone to trial instead of pleading guilty so that she could employ a certain trial strategy, but that does not change the fact that plea "counsel articulate[d] a valid reason for" believing that a different strategy would have been more effective. Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing Caprood v. State, 338 S.C. 103, 525 S.E.2d 514 (2000)). At any rate, it is not clear to this Court how Applicant's now-suggested strategy of blaming the co-defendant for the crimes could have been a defense for Applicant if she had gone to trial jointly with her co-defendant because Applicant defended her co-defendant before this Court.

This Court finds that Applicant has failed to prove that there is a reasonable likelihood that she would have proceeded to trial instead of entering an Alford plea had plea counsel not successfully sought the severance of Applicant's trial from the co-defendant's trial. As already discussed in this order, plea counsel credibly testified that Applicant expressed no interest in pleading guilty or engaging in plea negotiations, and in fact maintained her innocence, until her co-defendant was convicted.

This Court finds that Applicant has failed to prove that plea counsel was constitutionally ineffective for seeking the severance of Applicant's trial from her co-defendant's trial because Applicant has failed to prove that there was any deficiency in plea counsel's performance and has

failed to prove that there was any resulting prejudice. This claim is denied and dismissed with prejudice.

Applicant's claim that she did not knowingly and voluntarily waive her right to direct appellate review of her conviction and sentence.

Applicant raises a claim that she did not knowingly and voluntarily waive her right to direct appellate review of her conviction and sentence. Applicant presented no evidence at the hearing in support of this claim. Plea counsel testified before this Court that he probably discussed with Applicant that she would have the right to appeal her conviction and sentence, and said that his discussion with her would have been cursory because Applicant was pleading guilty. He testified that Applicant gave him no reason to think that she wanted to appeal.

In White v. State, 263 S.C. 110, 119, 108 S.E.2d 35, 39 (1974), the South Carolina Supreme Court held that, even though the post-conviction relief court may find that an applicant did not voluntarily and intelligently abandon his right to a direct appeal, the post-conviction relief court does not have jurisdiction to grant a belated appeal. However, when an accused establishes in a post-conviction relief hearing that he was unconstitutionally deprived of his right to a direct appeal, the South Carolina Supreme Court, upon an appeal of the post-conviction relief decision, will review the trial record and pass upon all issues properly raised and argued as if the direct appeal has been perfected. Id. at 119, 108 S.E.2d at 39-40.

Counsel has a constitutionally-imposed duty to consult with a defendant about an appeal when there is reason to think either: (1) that a rational defendant would want to appeal or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing. Roe v. Flores-Ortega, 528 U.S. 470 (2000). When counsel has consulted with the defendant regarding the right to appeal, "Counsel performs in a professionally unreasonable manner only by failing to follow the defendant's express instructions with respect to an appeal." Id. at 478

(underlining added). In order to establish that he was prejudiced by counsel's failure to file an appeal, an applicant must show he would have appealed absent counsel's deficient performance. See Id. at 484.

This Court finds that plea counsel consulted with Applicant about her right to appeal. Although he did not say that he had so with certainty, plea counsel believed that he had discussed the right to appeal with Applicant, even if he thought that the discussion may only have been cursory. This Court also finds that Applicant did not ask plea counsel to file a notice of appeal on her behalf or give any indication to him that she desired that he do so. Therefore, this Court finds that Applicant knowingly and voluntarily waived her right to direct appellate review of her conviction and sentence. This claim is denied and dismissed with prejudice.

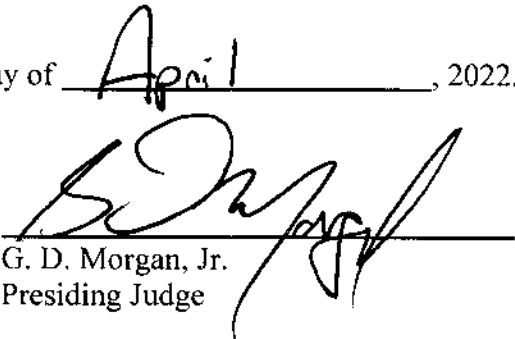
CONCLUSION

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

IT IS THEREFORE ORDERED:

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

AND IT IS SO ORDERED this 10th day of April, 2022.


G. D. Morgan, Jr.
Presiding Judge

Greenville, South Carolina

Copy/mailed to
Attorney <u>general/Bill Gardner</u>
on <u>4</u> / <u>13</u> / <u>22</u>