STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF LEXINGTON) FOR THE ELEVENTH JUDICIAL CIRCUIT

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LISA M. COMER
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LEXINGTON SC

Emonte A. Brooks, SCDC #364670,) C/A No. 2018-CP-32-2432

Applicant,)

v.) **ORDER OF DISMISSAL**

State of South Carolina,)

Respondent.)

I. INTRODUCTION

This matter comes before this Court by way of a post-conviction relief (PCR) action commenced by Emonte A. Brooks (Applicant) on July 16, 2018, alleging he is entitled to post-conviction relief based on constitutionally ineffective assistance of counsel. A hearing into the matter convened before the undersigned on December 13, 2021, at the Lexington County Judicial Center. Applicant was present at the hearing and represented by Ashley A. McMahan. Assistant Attorney General Lillian L. Meadows represented the State. Applicant testified on his own behalf at the hearing, as did his plea counsel, Aimee J. Zmroczek. In addition to the pleadings in this action, this Court had before it a copy of the Lexington County Clerk of Court records regarding the subject convictions; Applicant's records from the South Carolina Department of Corrections; the pre-trial motion and plea transcripts; and the records of the current PCR action.

Following a thorough review of the record in its entirety, along with the testimony and evidence presented at the evidentiary hearing, this Court finds Applicant has failed to establish any constitutional violations or deprivations entitling him to post-conviction relief. For the reasons discussed below, this Court denies relief and dismisses this action with prejudice.

II. Procedural History

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Lexington County Clerk of Court. Applicant was arrested on February 5, 2016, following an investigation into a shooting and armed robbery involving three-codefendants on January 27, 2016, in West Columbia. During its August 2016 term, the Lexington County Grand Jury indicted Applicant for attempted armed robbery (2016-GS-32-2027); discharging a firearm into a dwelling (2016-GS-32-2026); criminal conspiracy (2016-GS-32-2028); and possession of a weapon during the commission of a violent crime (2016-GS-32-2085). Applicant was subsequently indicted for attempted murder (2017-GS-32-0925) in April 2017 and three additional counts of attempted murder (2017-GS-32-1818, -1819, -1820) in May 2017. Aimee J. Zmroczek represented Applicant on these charges. Assistant Solicitor Kate W. Usry and L. McGill Bell, Jr., of the Eleventh Circuit Solicitor's Office prosecuted the case.

On October 30, 2017, Applicant appeared before the Honorable Donald B. Hocker and pleaded as indicted to one count of attempted murder (2017-GS-32-0925), attempted armed robbery (2016-GS-32-2027), and discharging a firearm into a dwelling (2016-GS-32-2026). No formal negotiations or recommendations were made as to sentencing; however, the State dismissed the remaining charges and a separate charge of throwing bodily fluids Applicant picked up in August 2016 while incarcerated. Judge Hocker accepted the pleas, finding there was a factual basis to support them and further finding the pleas were made freely, voluntarily, and intelligently. (Plea Tr. 19–20). Judge Hocker sentenced Applicant to concurrent terms of eighteen years' imprisonment for each charge. Applicant filed a motion to reconsider sentence, which Judge Hocker denied. Applicant did not appeal.

III. <u>SUMMARY OF FACTS</u>

On January 27, 2016, Applicant and his two co-defendants, Daniel Graves and Lilreg Darby, went to a home located in West Columbia with the intent to rob the homeowners. (Plea Tr. 7). At least one of the co-defendants had previously purchased marijuana from these homeowners. (Plea Tr. 7). Their plan was essentially to rob the homeowners of money and drugs. (Plea Tr. 7–8).

When the three arrived, Graves, knocked on the door. (Plea Tr. 8). Doris Shotte, one of the victims, answered the door. (Plea Tr. 8). Graves asked to speak with the other victim, Justin Erving, about purchasing marijuana. (Plea Tr. 8). Two other individuals, Dallas Lyles and Rhett Shotte, were also at the home. (Plea 10–11). Apparently, Mr. Erving did not have the marijuana Graves wanted. (Plea Tr. 8). Graves then left the house and ran straight to his home. (Plea Tr. 8, 11). As Graves was exiting, Applicant began running towards the home with a handgun. (Plea Tr. 8). He pointed the gun at the door, where Mr. Erving had previously been standing, and fired. (Plea Tr. 8). Several witnesses heard the gun clicking multiple times; however, only one bullet successfully discharged. (Plea Tr. 8). It struck the right side of the doorway. (Plea Tr. 8). Ms. Shotte immediately shut the door, but Applicant continued running towards the home. (Plea Tr. 8–9). He attempted to kick the door in but was unsuccessful. (Plea Tr. 9). Applicant and Darby then fled the scene. (Plea Tr. 9).

That night, officers responded and spoke with Ms. Shotte. (Plea Tr. 9). She did not give the full truth of what happened that night at the time because she was protecting her son, Mr. Erving, who was selling drugs out of the home at the time. (Plea Tr. 9). She stated she opened the door, saw Applicant fumbling with the gun, and immediately shut the door. (Plea Tr. 9). Law enforcement later determined from other witnesses that drugs were being sold out of the home. (Plea Tr. 9). The next day, an investigator spoke with Ms. Shotte again, who stated she knew Graves

as a DJ and admitted that he previously purchased marijuana at the home. (Plea Tr. 9). Law enforcement took Graves into custody that day. (Plea Tr. 10). Graves gave law enforcement a statement implicating Applicant, who was also known as "Hotboi" (Plea Tr. 10). Graves also identified Applicant in a photo lineup. (Plea Tr. 10). Graves further identified the other co-defendant, Darby, also known as "Fruitloop." (Plea Tr. 10). Later that day, Graves called Darby with one of the investigators present and attempted to talk about the incident. (Plea Tr. 10).

On January 29th, the following day, law enforcement returned to the crime scene. (Plea Tr. 10). At that time, they were able to retrieve the projectile that was lodged into the wall. (Plea Tr. 10). Law enforcement subsequently arrested Darby on February 2nd. (Plea Tr. 10). Darby gave a full confession, which was consistent with that of Graves. (Plea Tr. 10). Law enforcement also pulled security camera footage from a business nearby that corroborates the co-defendants' statements that Graves ran out of the home and ran straight to his house. (Plea Tr. 11). The footage further corroborates Darby's statement that, after the incident, he and Applicant waited a while before walking back to Graves' house. (Plea Tr. 11)

Darby admitted to having a gun and told law enforcement Applicant also had a gun in his possession. (Plea Tr. 11). Darby ultimately led law enforcement to the home where Applicant left his gun. (Plea Tr. 11). One of the individuals who resided at the home was able to retrieve the gun and turn it over to law enforcement. (Plea Tr. 11). After retrieving the gun and running ballistics tests, SLED was able to match Applicant's gun to the projectile found in the home. (Plea Tr. 11–12). Additionally, DNA taken from the barrel of the gun identified Applicant as a major contributor and the two co-defendants as minor contributors. (Plea Tr. 12).

When Applicant was initially arrested on February 5th, he attempted to give law enforcement a false name. (Plea Tr. 12). Applicant, Graves, and Darby all remained in jail after

they were arrested. (Plea Tr. 12). Applicant repeatedly attempted to send letters, or "kites," to his co-defendants, trying to convince them to change their statements and lie about his involvement. (Plea Tr. 13, Pre-trial Tr. 5). During a pre-trial hearing, Judge McMahon ordered SLED to conduct a handwriting analysis between the kites and a sample of Applicant's handwriting. (Plea Tr. 13, Pre-trial Tr. 16–18). The handwriting analysis matched the handwriting in the kites to Applicant's handwriting sample. (Plea Tr. 13). The report indicated that there were "no discrepancies in the two handwritings that would indicate anybody else could have written those notes." (Plea Tr. 13).

IV. Issues Before this Court

In his original application for post-conviction relief, Applicant alleges he is being held in custody unlawfully based on the following (verbatim):

1. "Involuntary guilty plea"
    a. "Under Boykin v. Alabama, defendant plea[*sic*] must be knowing, voluntarily, and intelligently made. The defendant was not made aware by counsel of the possible sentences each of these charges carried. Nor has[*sic*] court during pleas ensured itself defendant was so properly informed."
2. "Counsel ineffective for failing to investigate and advice to plead guilty wrong"
    a. "Counsel failed to investigate case, as counsel during plea displayed lack of knowledge for elements of Attempted Murder and operable[*sic*]facts. Which state must prove and the facts presented by state during guilty plea does not satisfy crime of attempted murder."
    b. "On attempted armed robbery, once again it can be shown by state account of this crime that a trial evidence would not be sufficient for conviction"
    c. "Counsel advice to plead guilty without investigating case was not within sound legal judgment under Hill v. Lockhart, 'that if but for counsel advice, defendant would not have plead guilty" without an investigation counsel can not advise a client to plead guilty."
3. "Counsel ineffective for not challenging constitutional violations"

a. "Counsel was not aware that arrest warrants lack probable cause under Beck v. Ohio and lack of sufficient proof supporting warrant for arrest."

The State requested an evidentiary hearing through its return on November 13, 2018. On February 25, 2019, Applicant filed a *pro se* "Motion to Amend Pleadings" to include the following claims (verbatim):[1]

1. "Critical stage:"
   a. "Counsel abandoned applicant at a critical stage of the proceedings before guilty plea, counsel did not research law and advice to plead guilty and negotiations was[*sic*] inadequate"
2. "Attempted murder:"
   a. "Counsel failed to research law on this charge and counsel[*sic*] advice to plead guilty was wrong, when counsel failed to understand that attempted murder is lesser included offense of ABHAN and constitutes as[*sic*] a misdemeanor not felony"
3. "Arrest warrants"
   a. "Counsel was ineffective when counsel failed to challenge warrants as void of probable cause and that standard used to obtain warrants is not in accordance with law of US Supreme Court.
   b. "Counsel also was ineffective when counsel did not challenge the police delay to obtain warrants."
4. "Preliminary hearing"
   a. "Counsel was ineffective when counsel allowed state to waive client[*sic*] preliminary hearing and as such interfered with counsel[*sic*] obligation at critical stage of proceedings"
5. "Closely connected offenses"
   a. "Counsel was ineffective when counsel failed to inform client that all charges constitute as[*sic*] one offense"

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[1] Although Applicant was represented by previous PCR counsel when he filed the *pro se* amendments, current PCR counsel expressly adopted the amended allegations as her own at the start of the evidentiary hearing. *See generally State v. Stuckey*, 333 S.C. 56, 57–58, 508 S.E.2d 564, 564 (1998) (finding there is no right to "hybrid representation" under either the United States or South Carolina Constitutions and refusing to consider substantive documents filed *pro se* by person represented by counsel).

On March 25, 2019, PCR counsel, Overture E. Walker,[2] filed an amended application pursuant to Rule 71.1, SCRCP, to include the following allegations:

1. "Applicant asserts ineffective assistance of counsel on the grounds that trial/plea counsel failed to adequately investigate the criminal charge(s) for which Applicant was convicted."
2. "Applicant asserts ineffective assistance of counsel on the grounds that trial/plea counsel advised him to enter a guilty plea that was not knowingly and intelligently made. Applicant entered a guilty plea without negotiations or recommendations from the State after being advised by trial counsel that the State would agree to a sentencing range of five (5) to ten (10) years. Defendant was sentenced to a term of 18 years imprisonment."
3. "Applicant asserts ineffective assistance of counsel on the grounds that trial/plea counsel failed to call or communicate with material witnesses whose testimony would have been favorable to Applicant."

Counsel Walker subsequently filed a second amended application on June 26, 2019, to include the following allegations:

1. "Applicant asserts ineffective assistance of counsel on the grounds that trial/plea counsel failed to adequately investigate the criminal charge(s) for which Applicant was convicted."
2. "Applicant asserts ineffective assistance of counsel on the grounds that trial/plea counsel advised him to enter into a guilty plea that was not knowingly and intelligently made. Applicant entered a guilty plea without negotiations or recommendations from the State after being advised by trial counsel that the State would agree to a sentencing range of five (5) to ten (10) years. Defendant was sentenced to a term of 18 years imprisonment."
3. "Applicant asserts ineffective assistance of counsel on the grounds that trial/plea counsel failed to call or communicate with material witnesses whose testimony would have been favorable to Applicant."
4. "Applicant asserts ineffective assistance of counsel on the grounds that trial/plea counsel failed to argue that probable cause did not exist for him to be charged and/or convicted of the instant offenses attempted murder (2xs) and discharging a firearm into a dwelling."

[2] By order filed August 4, 2020, the Honorable Walton J. McLeod, IV, acting in his capacity as Chief Administrative Judge, relived Counsel Walker from Applicant's case.

5. "Applicant asserts ineffective assistance of counsel on the grounds that trial/plea counsel failed to advise him on South Carolina Code of Laws §§ 17-25-45(7) and 17-25-50, closely connected offenses, triggering offenses, recidivist provisions, and all its implications for sentencing purposes."
6. "Applicant asserts ineffective assistance of counsel on the grounds that trial/plea counsel failed to make timely objections to a defective indictment. Indictment alleges two victims that are not referenced in the arrest warrant. Further, the state alleged that Doris Shotte was a victim for one of the instant offenses which is belied by documents and/or testimony."
7. "Applicant asserts ineffective assistance of counsel on the grounds that trial/plea counsel failed to timely request a preliminary hearing."
8. "Applicant asserts ineffective assistance of counsel on the grounds that trial/plea counsel failed to object when the state proceeded to indict him on the instant charges prior to and without ever conducting a preliminary hearing."
9. "Applicant asserts ineffective assistance of counsel on the grounds that plea/trial counsel failed to advise applicant to plead guilty to attempted murder when the alleged victim(s) did not sustain life threatening injuries."
10. "Applicant asserts ineffective assistance of counsel on the grounds that trial/plea counsel failed to challenge the validity of the attempted robbery warrants for the co-defendants which were all issued four (4) days apart."
11. "Applicant asserts ineffective assistance of counsel on the grounds that trial/plea counsel failed to appeal my involuntary guilty plea."

At the start of the hearing before this Court, PCR counsel indicated Applicant would be proceeding only on the claims raised in the February 25, 2019, *pro se* amended application and the June 26, 2019, amended application filed by Counsel Walker.

V. <u>STANDARD OF REVIEW</u>

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).

The Sixth and Fourteenth Amendments to the United States Constitution guarantee all criminal defendants the right to "assistance by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair." *Strickland v. Washington*, 466 U.S. 668, 685 (1984). Ordinarily, PCR allegations are centered upon an allegation that the applicant did not receive *effective* assistance of counsel guaranteed by the Sixth Amendment. The allegation of denial of such representation sets forth a *prima facie* violation of this constitutional right, and raises a question of fact that can only be determined by an evidentiary hearing. *Rogers v. State*, 261 S.C. 288, 291, 199 S.E.2d 761, 762 (1973).

The reviewing court applies the two-part test outlined in *Strickland* to determine whether counsel's conduct "was so ineffective as to require reversal" of the applicant's conviction. 466 U.S. at 687. To obtain relief, a PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness; *and* (2) there is a reasonable probability the outcome of the proceeding would have been different but for counsel's deficient performance. *Williams v. State*, 363 S.C. 341, 343, 611 S.E.2d 232, 233 (2005) (citing *Strickland*, 466 U.S. 668). Failure to make the required showing of either deficient performance or sufficient prejudice defeats the

ineffectiveness claim. *Strickland*, 466 U.S. at 700; *see also Bell v. Cone*, 535 U.S. 685, 695 (2002) (explaining that "[w]ithout proof of both deficient performance and prejudice to the defense, . . . it could not be said that the sentence or conviction resulted from a breakdown in the adversary process that rendered the result of the proceeding unreliable" (citation and internal quotation marks omitted)).

The applicant bears the heavy burden of establishing both prongs of the *Strickland* standard by a preponderance of the evidence. *Hughes v. State*, 346 S.C. 554, 558, 552 S.E.2d 315, 317 (2001); Rule 71.1(e), SCRCP. To prove deficient performance, the applicant must establish that, in light of all the circumstances, the acts or omissions complained of "fell below an objective standard of reasonableness" as measured by "prevailing professional norms." *Strickland*, 466 U.S. at 688. Reviewing courts should be deferential in this inquiry, and apply "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689. With respect to prejudice, the applicant must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A reasonable probability is a probability "sufficient to undermine confidence in the outcome." *Id.* When evaluating this probability, the reviewing court "should consider the specific impact counsel's error had on the outcome of the trial" coupled with "the strength of the State's case in light of . . . the [totality of the] evidence presented to the jury." *Smalls v. State*, 422 S.C. 174, 188, 810 S.E.2d 836, 843 (2018). Significantly, "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.

Because of the difficulties inherent in making such an evaluation, the reviewing court must indulge in a "strong presumption that counsel's conduct falls within the wide range of reasonably

professional assistance." *Butler v. State*, 286 S.C. 441, 445, 334 S.E.2d 813, 816 (1985). "The burden of rebutting this presumption 'rests squarely on the defendant,' and '[i]t should go without saying that the absence of evidence cannot overcome [i]t.' " *Dunn v. Reeves*, 594 U.S. ___, ___, 141 S. Ct. 2405, 2410 (2021) (alteration in original) (quoting *Burt v. Titlow*, 571 U.S. 12, 22–23 (2013)). 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 '[t]he record does not reveal' that counsel took an approach that *no competent lawyer would have chosen*." *Id.* (alteration in original) (emphasis added) (quoting *Titlow*, 571 U.S. at 23–24). Representation is constitutionally ineffective only if counsel's conduct "so undermined the proper functioning of the adversarial process" that the defendant was denied a fair proceeding. *Strickland*, 466 U.S. at 686; *see Nix v. Whiteside*, 475 U.S. 157, 175 (1986) (noting that under *Strickland*, the "benchmark" of the right to counsel is the "fairness of the adversary proceeding").

Because the Sixth Amendment right to counsel also applies to a defendant entering a guilty plea, *Hill v. Lockhart*, 474 U.S. 52 (1985) extended the two-part *Strickland* test to challenge guilty pleas based on ineffective assistance of counsel. *See Padilla v. Kentucky*, 559 U.S. 356, 373 (2010) (recognizing that the guilty plea process is a "critical phase of litigation" for purposes of the Sixth Amendment right to effective assistance of counsel). When reviewing a guilty plea, the analysis of counsel's performance under the first prong of *Strickland* remains unchanged—the applicant must show that counsel's representation fell below an objective standard of reasonableness demanded of attorneys in criminal cases. *Hill*, 474 U.S. at 58–59; *accord Thompson v. State*, 340 S.C. 112, 115, 531 S.E.2d 294, 296 (2000). An applicant alleging his guilty plea was induced by ineffective assistance of counsel must prove counsel's advice to plead guilty was not "within the competence demanded of attorneys in criminal cases." *Hill*, 474 U.S. at 56. The second, or

"prejudice" prong, however, "focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process." *Id.* at 58–59. Specifically, when an applicant claims counsel's deficient performance caused him to accept a plea, the applicant "must show that there is a reasonable probability that, but for [plea] counsel's [alleged] errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.* at 59.

This inquiry "focuses on a defendant's decisionmaking" and does not turn on the outcome of a defendant's actual criminal proceeding or potential outcome had a defendant chosen to proceed to trial. *Lee v. United States*, 582 U.S. ___, ___, 137 S. Ct. 1958, 1966 (2017). However, the applicant must convince the court that a decision to reject the plea bargain would have been rational under the circumstances. *Padilla*, 559 U.S. at 372. Judges must "look to contemporaneous evidence to substantiate a defendant's expressed preferences." *Lee*, 582 U.S. at ___, 137 S. Ct. at 1967. In determining whether a guilty plea was taken in accordance with constitutional standards, the reviewing judge must analyze and consider the entire record, including the transcript of the guilty plea and the evidence presented at the PCR hearing. *Harres v. Leeke*, 282 S.C. 131, 134, 318 S.E.2d 360, 361 (1984).

Surmounting *Strickland*'s high bar is never an easy task, and the strong societal interest in finality has "special force with respect to convictions based on guilty pleas." *Lee*, 582 U.S. at ____, 137 S. Ct. at 1967 (internal citations and quotation marks omitted); *cf. Hill*, 474 U.S. at 58 ("[R]equiring a 'prejudice' showing from defendants who seek to challenge the validity of their guilty pleas on the ground of ineffective assistance of counsel 'will serve the fundamental interest in the finality of guilty pleas.' "). Reviewing "[c]ourts should not upset a plea solely because of *post hoc* assertions from a defendant about how he would have pleaded but for his attorney's deficiencies." *Lee*, 582 U.S. at ____, 137 S. Ct. at 1967. The question here is whether the applicant,

if correctly informed of circumstances surrounding the plea, would have pleaded guilty—*not* whether counsel would have still advised him or her to plead guilty. *Turner v. State*, 335 S.C. 382, 385, 517 S.E.2d 442, 444 (1999).

VI. Findings of Fact & Conclusions of Law

This Court has reviewed the testimony presented at the PCR hearing, observed the witnesses, passed upon their credibility, and weighed their testimony accordingly. After hearing the testimony presented and considering the legal arguments by counsel, as well as the record in this action incorporated by way of the State's return, this Court proceeds to the claims of ineffective assistance of counsel and involuntary guilty plea articulated at the start of the hearing and finds each to be without merit. Pursuant to S.C. Code Ann. § 17-27-80, this Court makes the following findings of facts and conclusions of law based upon all of the probative evidence presented.

A. Ineffective Assistance of Plea Counsel[3]

Applicant first makes a series of claims alleging Counsel Zmroczek's performance was constitutionally ineffective before, during, and after plea negotiations. Specifically, he claims she abandoned him during a "critical stage" of the proceedings against him by failing to request a preliminary hearing; failing to challenge the arrest warrants; failing to research the law on attempted murder; failing to timely object to an allegedly defective indictment; failing to advise him on whether his charges constitute "closely connected offenses;" failing to investigate, review discovery, and communicate with material witnesses; and failing to file a notice of appeal on his behalf. *See Padilla*, 559 U.S. at 373 (noting that the Court has "long recognized that the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to

[3] Claims 1–5 in the February 25, 2019, *pro se* amended application; claims 1, 3, 4 and 6–11 in the June 26, 2019, second amended application.

effective assistance of counsel" (citing *Hill*, 474 U.S. at 57 and *McMann v. Richardson*, 397 U.S. 759, 770–71 (1970))). He further claims she provided ineffective assistance after his plea for failing to file an appeal on his behalf.

This Court disagrees, and notes that many of these claims fail as a matter of law. *See Basham v. United States*, 109 F. Supp. 3d 753, 776 (D.S.C. 2013) (noting that "[i]t is axiomatic that if the claim or claims that counsel failed to raise are devoid of legal merit, a defendant suffers no prejudice and cannot establish a claim of ineffective assistance of counsel" (citing *Strickland*, 466 U.S. at 687)), *aff'd*, 789 F.3d 358 (4th Cir. 2015), and *aff'd*, 789 F.3d 358 (4th Cir. 2015). This Court finds Applicant failed to overcome the strong presumption that Counsel Zmroczek rendered adequate assistance and exercised reasonable professional judgment in her representation of Applicant at all stages of the proceedings. *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007); *Strickland*, 466 U.S. at 689. This Court further finds Applicant failed to produce any evidence showing that Counsel Zmroczek tendered improper or inaccurate advice either before or during the plea hearing. Given that Applicant was facing trial on, among other charges, four counts of attempted murder and in light of the State's strong evidence against him, this Court finds Applicant failed to demonstrate that "a decision to reject the plea bargain would have been rational under the circumstances." *Padilla*, 559 U.S. at 372; *see United States v. Fugit*, 703 F.3d 248, 260 (4th Cir. 2012) (noting that "subjective preferences . . . are not dispositive; what matters is whether proceeding to trial would have been objectively reasonable in light of all of the facts").

This Court finds credible and persuasive the testimony of Counsel Zmroczek, who presented well-recollected testimony of the events leading up to Applicant's plea and demonstrated knowledge of the rules, statutes, and case law addressing many of Applicant's claims against her. Counsel Zmroczek's credible testimony further demonstrates that she met with Applicant multiple

times, engaged in plea negotiations on his behalf, and worked out a plea deal that was beneficial to him. Applicant's own testimony, although predominantly incredible, established Counsel Zmroczek met with him multiple times to discuss the State's evidence, discovery, potential witnesses, proceeding to trial, and plea offers.

1. Failure to Request Preliminary Hearing

Applicant makes several allegations of ineffective assistance of counsel pertaining to his desire for a preliminary hearing. Specifically, Applicant claims Counsel Zmroczek was ineffective for allegedly allowing the State to waive his preliminary hearing; for failing to timely request a preliminary hearing; and for failing to object to the State indicting him without conducting a preliminary. This Court disagrees.

At the PCR hearing, Applicant testified he was initially represented by Derrick E. Mobley, but that the Court later appointed Counsel Zmroczek to represent him. Applicant testified that he filled out and timely submitted a form requesting a preliminary hearing after he was informed that he had ten days to do so. Nonetheless, he explained, Counsel Zmroczek waived his right to a preliminary hearing without his consent by letting a grand jury indict him.

Counsel Zmroczek testified that she was appointed due to a conflict of interest with the Lexington County Public Defender's Office. At that point, Applicant had already been indicted and therefore she could not request a preliminary hearing pursuant to Rule 2(c), SCrimP. This Court agrees with Counsel Zmroczek's assessment. *See State v. Ballington*, 346 S.C. 262, 268–69, 551 S.E.2d 280, 283 (Ct. App. 2001) ("[A]lthough Ballington may have timely requested a preliminary hearing, his right to have the hearing ended with the grand jury's indictment."), *overruled on other grounds by State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009).

"The purpose of the preliminary hearing is to establish that probable cause exists to continue the criminal process." *State v. Cunningham*, 275 S.C. 189, 193, 268 S.E.2d 289, 291 (1980); Rule 2(c), SCrimP. While every criminal defendant is entitled to notice of his right to a preliminary hearing, neither the South Carolina nor United States Constitution require a preliminary hearing before a grand jury can indict a person for a crime. *State v. McClure*, 277 S.C. 432, 434, 289 S.E.2d 158, 160 (1982) (citing *State v. Irby*, 166 S.C. 430, 164 S.E. 912 (1932)); *State v. Keenan*, 278 S.C. 361, 365, 296 S.E.2d 676, 678 (1982).

Thus, no such hearing may be held if the defendant is indicted by a grand jury before a preliminary hearing is held. Rule 2(b), SCRCrimP; *see State v. Hawkins*, 310 S.C. 50, 54–55, 425 S.E.2d 50, 53 (Ct. App. 1992) (holding the trial court did not err in refusing to quash the defendant's indictments because he did not receive a requested preliminary hearing where he was indicted before a preliminary hearing was held); Rather, the indictment itself constitutes a finding of probable cause and thus avoids the need for a preliminary hearing." *McClure*, 277 S.C. at 434, 289 S.E.2d at 160; *accord. United States v. Soriano-Jarquin*, 492 F.3d 495, 502 (4th Cir. 2007) (noting that the probable cause requirement may be satisfied either by a preliminary hearing or by indictment by a grand jury).

Accordingly, this Court finds Applicant failed to establish Counsel Zmroczek's failure to request a preliminary hearing constitutes deficient performance because such a request would have been futile. Further, Applicant cannot establish prejudice because he was indicted for these offenses by a grand jury. Because each indictment itself constitutes a finding of probable cause, Applicant's request for relief by way of this allegation is **DENIED.**

2. <u>Failure to Challenge Arrest Warrants</u>

Applicant next raises three claims alleging Counsel Zmroczek was ineffective for failing to challenge his arrest warrants. First, Applicant claims she "failed to argue that probable cause did not exist for him to be charged and/or convicted of the instant offenses attempted murder (2xs) and discharging a firearm into a dwelling." Second, Applicant claims she failed to challenge the validity of the attempted armed robbery warrant based on his co-defendants' armed robbery warrants being issued four days apart. Finally, he alleges she failed to challenge the validity of the attempted murder warrant, which was defective because it failed to comply with the statutory requirement to provide evidence that Applicant caused substantial bodily harm to the victim.

This Court disagrees, and finds Applicant failed to establish a cognizable basis upon which Counsel Zmroczek could have challenged the arrest warrants for lack of probable cause. Further, even if Counsel Zmroczek was somehow deficient in this regard, he cannot establish prejudice because he was indicted for these offenses after his arrest, which also would have established probable cause. *See generally Law v. S.C. Dep't of Corr.*, 368 S.C. 424, 441, 629 S.E.2d 642, 651 (2006) (noting South Carolina has long embraced the rule that a true bill of indictment is *prima facie* evidence of probable cause).

i. Lack of Probable Cause, Generally

The United States Supreme Court has held that the constitutional validity of an arrest warrant "depends in turn upon whether, at the moment the arrest was made, the officers had probable cause to make it—whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense." *Beck v. State of Ohio*, 379 U.S. 89, 91 (1964); *Law*, 368 S.C. at 441, 629 S.E.2d at 651 ("Probable cause

is defined as a good faith belief that a person is guilty of a crime when this belief rests on such grounds as would induce an ordinarily prudent and cautious man, under the circumstances, to believe likewise."). "The rule of probable cause is a practical, nontechnical conception affording the best compromise that has been found for accommodating . . . often opposing interests. Requiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of the officers' whim or caprice." *Beck*, 379 U.S. at 91 (alteration in original) (quoting *Brinegar v. United States*, 338 U.S. 160, 176 (1949)).

Here, law enforcement had more than sufficient probable cause to arrest Applicant for attempted murder. The arrest warrant indicates Applicant was arrested on February 5, 2016, for crimes he committed on January 27, 2016. As set forth in Section III, *supra*, the solicitor set forth a detailed summary of law enforcement's investigation and timeline. Notably, both of Applicant's co-defendants implicated him in the crime and identified him in a photo lineup. Law enforcement also pulled security camera footage from a business nearby that corroborated the co-defendants' statements and Ms. Shotte's description of their clothing. The specifically corroborated Darby's statement that, after the incident, he and Applicant waited a while before walking back to Graves' house. (Plea Tr. 11). All of this occurred prior to law enforcement obtaining the warrants for Applicant's arrest.

In *Ex parte U.S.*, the United States Supreme Court noted that "[i]t reasonably cannot be doubted that, in the court to which the indictment is returned, the finding of an indictment, fair upon its face, by a properly constituted grand jury, conclusively determines the existence of probable cause for the purpose of holding the accused to answer." 287 U.S. 241, 250 (1932). The Court further explained in *Gerstein v. Pugh* that "[t]he willingness to let a grand jury's judgment substitute for that of a neutral and detached magistrate is attributable to the grand jury's

relationship to the courts and its historical role of protecting individuals from unjust prosecution." 420 U.S. 103, 118 n.19 (1975); *cf. Brooks v. City of Winston-Salem, N.C.*, 85 F.3d 178, 182 (4th Cir. 1996) (holding that "charge that probable cause for a warrantless arrest was lacking, and thus that the seizure was unconstitutional, would not necessarily implicate the validity of a subsequently obtained conviction").

As discussed above regarding the preliminary hearing issue, Applicant had already been indicted by the time Counsel Zmroczek was appointed. This Court likewise finds Applicant failed to establish Counsel Zmroczek's failure to challenge the arrest warrants based on lack of probable cause constitutes deficient performance because such a request would have been futile. Further, Applicant cannot establish prejudice because he was indicted for these offenses by a grand jury. Therefore, even if Counsel Zmroczek or his prior counsel had successfully challenged the arrest warrants, Applicant would have been arrested after he was later indicted for the same charges. Accordingly, Applicant's request for relief by way of this allegation is **DENIED.**

ii. Attempted Armed Robbery Warrants

Applicant further alleges Counsel Zmroczek was ineffective for failing to challenge the validity of the attempted armed robbery warrant because it was issued four days after the attempted armed robbery warrants were issued for his co-defendants. As set forth in Section III, *supra*, the solicitor set forth a detailed timeline of the investigation, including when the co-defendants were arrested. Specifically, Graves was taken into custody the day after the crime—on January 28, 2016. Darby was arrested on February 2, 2016. Applicant was arrested on February 5, 2016.

This Court would note that Applicant failed to introduce his co-defendants' arrest warrants at the PCR hearing or provided any testimony in this issue. He further failed to provide a cognizable basis upon which Counsel Zmroczek could have challenged the validity of the arrest

warrant for attempted armed robbery based on it being issued several days after his co-defendants were arrested. This Court is unaware of any law or rule that requires co-defendants to be arrested on the same day. Further, Applicant had already been indicted for this offense by a grand jury at the time Counsel Zmroczek was appointed. Therefore, even had Counsel Zmroczek or his prior counsel successfully challenged the arrest warrant, Applicant would have been arrested after he was later indicted for the same charge. Accordingly, Applicant's request for relief by way of this allegation is **DENIED.**

iii. Attempted Murder Warrant

At the PCR hearing, Applicant testified that an element of attempted murder is substantial bodily harm caused to another. However, the warrant did not provide any evidence that Applicant caused substantial bodily harm to anyone by simply shooting into the home. Despite these insufficiencies, Applicant explained, Counsel Zmroczek failed to challenge the attempted murder warrant. Applicant reiterated that the State had not and could not establish probable cause for attempted murder because (1) merely shooting into a dwelling was insufficient to establish probable cause and (2) Applicant did not cause any substantial bodily harm.

Counsel Zmroczek addressed Applicant's erroneous contention that the State had to prove he caused substantial injury to the victims for him to be convicted of attempted murder. She correctly explained that, pursuant to *State v. King*, 422 S.C. 47, 810 S.E.2d 18 (2017), attempted murder is a specific intent crime that *does not require actual injury*. Further, two recent published opinions from our appellate courts addressing the element of attempted murder—*State v. Geter*, 434 S.C. 557, 864 S.E.2d 569 (Ct. App. 2021), *reh'g denied* (Nov. 5, 2021), and *State v. Smith*, 430 S.C. 226, 845 S.E.2d 495 (2020)—were cases she tried. Counsel Zmroczek explained that the State only had to prove the *ability* to cause great bodily harm. By shooting into a home knowing

people were inside, Applicant had satisfied both the specific intent element and the ability to cause great bodily harm element. This Court again agrees with Counsel Zmroczek's assessment.

South Carolina's attempted murder statute provides that "[a] person who, with intent to kill, attempts to kill another person with malice aforethought, either expressed or implied, commits the offense of attempted murder." S.C. Code Ann. § 16-3-29. *See Keys v. State*, 766 P.2d 270, 273 (Nev. 1988) ("Attempted murder is the performance of an act or acts which tend, but fail, to kill a human being, when such acts are done with express malice, namely, with the deliberate intention unlawfully to kill." (cited with approval in *King*, 422 S.C. at 56–57, 810 S.E.2d at 23)). Nothing in the attempted murder statute suggests that substantial bodily harm or even injury to the victim is required. *Cf. State v. Middleton*, 407 S.C. 312, 315–16, 755 S.E.2d 432, 434–35 (2014) (where the trial judge "misconstrued the statutory definition of assault and battery in the first degree as *requiring an injury to the victim*," clarifying that first-degree assault and battery based on attempt to injure another person in manner likely to produce death or great bodily injury is lesser-included offense of attempted murder with respect to one of two victims *who suffered no injury*) (emphasis added); *King*, 422 S.C. at 59, 810 S.E.2d at 24 (2017) (contrasting the statutory offense of attempted murder with the now-abolished common law offense of assault and battery with intent to kill (ABWIK), which is often described as follows: "if the victim had died from the injury, the defendant would have been guilty of murder") (quoting *State v. Sutton*, 340 S.C. 393, 396, 532 S.E.2d 283, 285 (2000)).

Applicant's claim the attempted murder warrant was defective based on lack of evidence that he caused substantial bodily harm to the victim therefore fails as a matter of law. Applicant failed to offer any further basis upon which Counsel Zmroczek could have challenged the

attempted murder warrant based on lack of probable cause. Accordingly, Applicant's request for relief by way of this allegation is **DENIED.**

3. Failure to Research the Law on Attempted Murder

Applicant further raises two claims pertaining to Counsel Zmroczek's alleged misunderstanding of the law on attempted murder, including the elements of the offense and lesser-included offenses. Specifically, Applicant claims Counsel Zmroczek (1) erroneously "advise[d] applicant to plead guilty to attempted murder when the alleged victim(s) did not sustain life threatening injuries;" and (2) "failed to understand that attempted murder is lesser included offense of ABHAN and constitutes . . . a misdemeanor not felony." This Court disagrees.

i. Advice to Plead

Analogous to his claim that the State could not establish probable cause for attempted murder because he did not cause substantial bodily harm to the victim, Applicant contends Counsel Zmroczek erroneously advised him to plead guilty to attempted murder where the victims did not sustain life-threatening injuries. As aforementioned, substantial bodily harm is not an element of attempted murder. As Counsel Zmroczek explained, Applicant satisfied both the specific intent element and the ability to cause great bodily harm elements by shooting into a home knowing people were inside. Therefore, this claim similarly fails as a matter of law.

Moreover, this Court would point out that Applicant twice rejected plea offers—against Counsel Zmroczek's advice—that would have resulted in dismissal of his attempted murder charges. Counsel Zmroczek first advised Applicant to accept the State's plea offer for attempted armed robbery, discharging a firearm into a dwelling, and criminal conspiracy in 2016. *See* State's Exhibit #1. Applicant rejected the offer. The State then re-extended this offer in April of 2017, right before his trial was scheduled to start. Applicant rejected the offer again, and Counsel

Zmroczek had Applicant sign a document acknowledging that his decision to reject the plea offer was against his best interest. *See* State's Exhibit #2.

This Court finds credible Counsel Zmroczek's testimony that she explained the elements of the crimes to Applicant multiple times, and he never raised any questions or expressed any misunderstanding of what the State was required to prove. Applicant failed to produce any evidence showing that Counsel Zmroczek tendered improper or inaccurate advice either before or during the plea hearing regarding the elements of attempted murder. Accordingly, Applicant's request for relief by way of this allegation is **DENIED.**

ii. Lesser-Included Offense

Applicant's claim regarding Counsel Zmroczek's purported "failure to research the law" on attempted murder and "failure to understand" that attempted murder is a lesser-included offense of ABHAN—based on Applicant's own misunderstanding—fails as a matter of law. Counsel Zmroczek correctly testified that, as provided in S.C. Code Ann. § 16-3-600(B)(3), "assault and battery of a high and aggravated nature [(ABHAN)] is a lesser-included offense of attempted murder." *Accord. Middleton*, 407 S.C. at 315, 755 S.E.2d at 434. Additionally, this allegation is wholly irrelevant to Applicant's case given that he was not charged with ABHAN nor offered to plead to ABHAN as a lesser-included offense of attempted murder. Further, both attempted murder and ABHAN are felonies that are classified as violent under section 16-1-60. Accordingly, Applicant's request for relief by way of this allegation is **DENIED.**

4. <u>Failure to Object to Indictments</u>

Applicant next contends Counsel Zmroczek was ineffective for failing to timely object to alleged defects in one of the indictments, which purportedly references two victims that are not

mentioned in the arrest warrant.[4] This Court disagrees, and would note as an initial matter that an indictment is a mere notice document. "The primary purposes of an indictment are to put the defendant on notice of what he is called upon to answer, *i.e.*, to apprise him of the elements of the offense and to allow him to decide whether to plead guilty or stand trial, and to enable the circuit court to know what judgment to pronounce if the defendant is convicted." *Evans v. State*, 363 S.C. 495, 508, 611 S.E.2d 510, 517 (2005) (citing *State v. Gentry*, 363 S.C. 93, 102–03, 610 S.E.2d 494, 500 (2005) and S.C. Code Ann. § 17-29-30); *see also State v. Tumbleston*, 376 S.C. 90, 98, 654 S.E.2d 849, 853 (Ct. App. 2007) ("The true test of the sufficiency of an indictment is not whether it could be made more definite and certain, but whether it contains the necessary elements of the offense intended to be charged and sufficiently apprises the defendant of what he must be prepared to meet.").

Here, the indictments were certainly sufficient to give Applicant notice of the charges against him. Each indictment is facially valid because it states all the necessary elements of the crime, the date of the offense, and the name of the accused. *Costello v. United States*, 350 U.S. 359, 363 (1956); S.C. Code Ann. §§ 17-19-20, -30. All three indictments were true billed and signed by the foreman of the grand jury.

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[4] Applicant does not identify which warrant or indictment he is referring to. Warrant #2016A3221100056 identifies both Ms. Shotte and Mr. Erving as victims. The solicitor explained at the plea hearing that Applicant was pleading guilty to attempted murder only with regards to Justin Erving. (Plea Tr. 10–11). She further noted that there were three additional attempted murder warrants for Doris Shotte, Rhett Shotte, and Dallas Lyles, who were also in the home. Those charges were dismissed as part of the plea agreement. Warrant #2016A3221100057, which was the basis for the attempted armed robbery indictment (2016-GS-32-2027), mentions the "victim" but does not identify any victim or victims by name. Because Applicant pleaded guilty to the attempted murder of both Ms. Shotte and Mr. Erving, this Court assumed Applicant is referring to that indictment.

Further, Applicant freely and voluntarily pleaded guilty and admitted he committed the conduct outlined in the indictments. Judge Hocker engaged in the following colloquy with Applicant during the plea hearing:

> THE COURT: Okay. And you admit that you attempted armed robbery as it concerns Doris Shotte and Justin Erving?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Is that a yes? You need to speak up.
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: And do you agree that you attempted to murder Justin Erving?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: And do you agree or admit that you discharged a firearm into a dwelling either owned or occupied or possessed by Doris Shotte and Justin Erving?
>
> THE DEFENDANT: Yes, sir.

(Plea Tr. 15–16); *See Whetsell v. State*, 276 S.C. 295, 297, 277 S.E.2d 891, 892 (1981) (explaining that a plea waives all non-jurisdictional defects and defenses, including challenges to the sufficiency of the evidence and claims of a violation of a constitutional right prior to the plea) (citing *Rivers v. Strickland*, 264 S.C. 121, 213 S.E.2d 97 (1975)).

Further, as discussed above, "an indictment, 'fair upon its face,' and returned by a 'properly constituted grand jury,' conclusively determines the existence of probable cause . . ." *Gerstein*, 420 U.S. at 118 n.19. Regardless of the information contained in the arrest warrant, Applicant was indicted by the grand jury for the conduct set forth in the indictment. He did not present any evidence or testimony at the PCR hearing regarding the basis upon which counsel should have challenged any of the indictments.[5] Applicant further failed to demonstrate a reasonable

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[5] Even had Counsel Zmroczek successfully moved to quash the indictment and been successful, jeopardy does not attach until a jury is sworn or the plea judge accepts the guilty plea. *Crist v. Bretz*, 437 U.S. 28, 37 (1978). Under this well-settled principle, the State would have been readily

probability that, had Counsel Zmroczek challenged his indictments, he would have chosen to forego the benefits of the plea deal and gone to trial. Accordingly, Applicant's claims pertaining to Counsel Zmroczek's failure to timely object to alleged deficiencies in the indictments is **DENIED.**[6]

5. Failure to Advise Applicant on Closely Connected Offenses: Double Jeopardy

Applicant raises two ineffective assistance of counsel claims relating to whether his charges constitute closely connected offenses.[7] Applicant first claims Counsel Zmroczek was ineffective for failing to inform him "that all charges constitute . . . one offense." Although Applicant states this claim is based on "closely connected offenses," it appears from his testimony that this allegation is based on double jeopardy. At the PCR hearing, Applicant testified that the grand jury indicted him on three charges that all stemmed from one incident. He stated this was clearly an error, because he can only receive one charge per incident. Specifically, he explained that he should have only been charged with one offense "because it was just one action of shooting into a home."

The "Double Jeopardy Clause protects against a second prosecution for the same offense after acquittal or conviction, and protects against multiple punishments for the same offense." *State v. Brandt*, 393 S.C. 526, 538, 713 S.E.2d 591, 597 (2011) (quoting *Stevenson v. State*, 335 S.C. 193, 198, 516 S.E.2d 434, 436 (1999)). In *Blockburger v. United States*, the United States Supreme

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able to re-indict Applicant on the same charge. *State v. Prince*, 279 S.C. 30, 32–33, 301 S.E.2d 471, 472–73 (1983).

[6] Regarding the indictment issue, Applicant further claims that "the State alleged that Doris Shotte was a victim for one of the instant offenses which is belied by documents and/or testimony." Applicant did not present any such "documents and/or testimony" suggesting Ms. Shotte was not a victim for any of the offenses he pled to at the PCR hearing, nor did he elaborate on this claim. Accordingly, this Court finds this particular claim was voluntarily waived and abandoned and is therefore denied and dismissed with prejudice. S.C. Code Ann. §§ 17-27-80 and -90.

[7] The second claim regarding "closely connected offenses" relates to the voluntariness of his plea and is addressed below.

Court clarified "[t]he applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." 284 U.S. 299, 304 (1932). In other words, "*a single act may be an offense against two statutes*; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other." *Id.* (emphasis added); *accord. State v. Moyd*, 321 S.C. 256, 258, 468 S.E.2d 7, 9 (Ct. App. 1996) ("A defendant may be severally indicted and punished for separate offenses without being placed in double jeopardy *where a single act consists of two 'distinct' offenses*.") (emphasis added).

This Court finds Applicant's claim fails as a matter of law. Each of the offenses Applicant pleaded guilty to clearly involve distinct elements. *Compare* S.C. Code Ann. § 16-3-29 ("A person who, with intent to kill, attempts to kill another person with malice aforethought, either expressed or implied, commits the offense of attempted murder."), *with* S.C. Code Ann. § 16-11-330 (B) ("A person who commits attempted robbery while armed with a pistol, dirk, slingshot, metal knuckles, razor, or other deadly weapon, or while alleging, either by action or words, he was armed while using a representation of a deadly weapon or any object which a person present during the commission of the robbery reasonably believed to be a deadly weapon, is guilty of a felony . . ."), *and* S.C. Code Ann. § 16-23-440 (A) ("It is unlawful for a person to discharge or cause to be discharged unlawfully firearms at or into a dwelling house, other building, structure, or enclosure regularly occupied by persons."). Accordingly, Applicant's request for relief by way of this allegation is **DENIED.**

6. Failure to Investigate, Review Discovery, and Communicate with Material Witnesses[8]

Applicant next contends Counsel Zmroczek was ineffective for failing to adequately investigate his case, failing to review discovery with him, and failing to call or communicate with material witnesses whose testimony would have allegedly been favorable to Applicant. This Court disagrees, and finds plea counsel adequately conferred with Applicant, conducted a proper investigation, and was thoroughly competent in her representation.

i. PCR Testimony

At the PCR hearing, Applicant testified he met with Counsel Zmroczek approximately five to six times. Applicant testified that Counsel Zmroczek provided him with a copy of the discovery although she never reviewed the discovery with him. However, he later testified on cross-examination that they discussed the State's evidence and reviewed the discovery. He further testified that he and Counsel Zmroczek did not discuss possible defense theories or trial strategies.

Applicant further expressed concerns regarding Counsel Zmroczek's investigation. Specifically, Applicant testified he requested that Counsel Zmroczek reach out to a potential witness who could say that Applicant was not at the scene of the crime. While Counsel Zmroczek allegedly spoke with the witness, the witness never appeared before the court. Applicant further testified he wanted one of the victims to testify he had nothing to do with the shooting. He stated he asked Counsel Zmroczek to obtain an affidavit from one of the victims stating that he was not involved in the robbery; however, she never produced the affidavit.

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[8] Although Applicant did not expressly raise a claim of ineffective assistance of counsel for failing to review discovery, this Court finds there was sufficient testimony and evidence presented on this issue such that it was implicitly raised. *See* Rule 15(b), SCRCP (pleadings may be amended, even after judgment, to conform to issues tried by express or implied consent but not raised in the original pleadings); *see also, e.g., Mangal v. State*, 421 S.C. 85, 94–96, 805 S.E.2d 568, 573 (2017), *Simpson v. Moore*, 367 S.C. 587, 599, 627 S.E.2d 701, 708 (2006), *abrogated on other grounds by Smalls*, 422 S.C. 174, 810 S.E.2d 836.

Counsel Zmroczek testified that she has been practicing law since November 2008. She recalled being appointed to Applicant's case in early 2016 due to a conflict with the Lexington County Public Defender's Office. She testified she met with Applicant multiple times to discuss numerous aspects of the case. Specifically, they reviewed the discovery; discussed the elements of the crimes; examined plea offers; and explained Applicant's constitutional rights and the effect of pleading guilty. Because Applicant was extremely difficult, she kept extensive records relating to their meetings. *See* State's Exhibit #3. She made sure to put everything in writing and have him sign it. Through Counsel Zmroczek, the State introduced a document signed by Applicant on October 4, 2017, confirming that he had reviewed everything in his file. State's Exhibit #4.

As to the facts of the case and the State's evidence, Counsel Zmroczek testified that Applicant and three co-defendants were caught on camera—in very identifiable clothing—robbing the victim's home. The two co-defendants implicated Applicant in the crime and identified him as the individual who kicked the door open and shot into the home.

Counsel Zmroczek recalled the difficulties with this case and how they impacted her trial strategy. The most concerning evidence was the testimony of the co-defendants implicating Applicant and the letters from Applicant to the co-defendants asking them to lie about his involvement. *See* (Pre-trial Tr. 1–22). The State's handwriting expert confirmed that Applicant was the author of the kites from "Hotboi" to the co-defendants, insisting that they lie about his involvement. In addition to the letters, the State obtained text messages discussing "Hotboi's" attempted to rob the home.

Counsel Zmroczek nonetheless stated that her trial strategy was to discredit the co-defendants and the victims with the ultimate goal of raising reasonable doubt that Applicant was the shooter. She testified she hired two private investigators—one for the digital evidence one to

assist her with trial preparation. Despite Counsel Zmroczek's best efforts, she struggled to find any evidence to support their defense theory.

For example, Counsel Zmroczek hoped to use still images from the security camera to raise doubt as to Applicant's presence at the scene. However, the enlarged images made it even easier to identify Applicant as the perpetrator. She further recalled speaking with numerous individuals as part of her investigation. One of her private investigators interviewed the homeowner in an attempt to discredit her identification of Applicant as the shooter. Unfortunately, it did not prove helpful for Applicant's case. Ms. Shotte was able to provide extensive details regarding Applicant's attire when he robbed the home. Likewise, the other victims were able to identify the co-defendants based on their distinct clothing.

Counsel Zmroczek testified that Applicant gave her and her investigator numerous versions of the events that took place the night of the crime, but he mainly emphasized that he was not present. Applicant's girlfriend was able to provide her with a partial alibi; however, it did not cover the entire duration of the crime. Despite these concerns, Counsel Zmroczek had secured individuals to testify on Applicant's behalf and was prepared to proceed to trial.

ii. Discussion

This Court finds again finds applicable the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." *Ard*, 372 S.C. at 331, 642 S.E.2d at 596 (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). Essentially, trial "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691.

Our Supreme Court has cautioned reviewing courts not to lose sight of the reasonableness standard regarding counsel's duty to investigate. *See Ard*, 372 S.C. 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).

This Court finds Applicant failed to establish Counsel Zmroczek was ineffective for failing to communicate with allegedly favorable witnesses. Applicant did not provide the name of any witness or witnesses he believes Counsel Zmroczek should have contacted. Counsel Zmroczek's credible testimony indicates she spoke with numerous witnesses during her investigation; however, none of them were very helpful to Applicant's case. Further, Applicant cannot meet his burden because he did not present any evidence or testimony from the purportedly favorable witness or

witnesses at the PCR hearing. *See Bannister v. State*, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) (a PCR 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); *see also Glover v. State*, 318 S.C. 496, 498–99, 458 S.E.2d 538, 540 (1995) (mere speculation as to un-presented witness' testimony does not satisfy PCR applicant's burden); *Clark v. State*, 315 S.C. 385, 434 S.E.2d 266 (1993) (pure conjecture as to what a witness's testimony would have been is not sufficient to show a reasonable probability the result at trial would have been different); *accord. Bassette v. Thompson*, 915 F.2d 932 (4th Cir. 1990) (petitioner's allegation that attorney performed ineffective investigation does not support relief, absent proffer of the supposed witness's favorable testimony).

This Court further finds Applicant failed to establish Counsel Zmroczek was ineffective for failing to review the discovery with him. Counsel Zmroczek credibly testified she met with Applicant prior to his plea, reviewed the discovery with him, and discussed his case with him at length. Considering Applicant confirmed to the plea court that he had a full opportunity to review and discuss all the discovery with Counsel Zmroczek and signed a written document confirming he had reviewed everything in his file, this Court does not find credible Applicant's claim that his attorney never reviewed the discovery with him. *See* State's Exhibit #4; (Plea Tr. 18). Applicant further failed to specify what, if anything, could have been achieved had Counsel Zmroczek 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).

Likewise, this Court will not credit Applicant's present claim he would have gone to trial absent Counsel Zmroczek's allegedly deficient performance when he failed to present evidence of any defense strategy or investigatory matter which would have helped his case or affected his decision to plead guilty. *See Moorehead v. State*, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998) (holding trial counsel's failure 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); *Stalk v. State*, 383 S.C. 559, 563, 681 S.E.2d 592, 594 (2009) (noting that to establish prejudice based on failure to investigate or prepare for trial when the applicant enters a guilty plea, he 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").

Because Applicant failed to present evidence of any viable defense, investigative tactic, or alternate strategy Counsel Zmroczek should have explored which would have helped Applicant's case or affected his decision to plead guilty, Applicant's claims pertaining to plea counsel's failure to investigate, review discovery, and communicate with witnesses are **DENIED.**

7. Failure to File Appeal

Although Applicant never stated in his pleadings or at the PCR hearing that he was seeking belated appellate review pursuant to *White v. State*,[9] this Court finds Applicant knowingly and

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[9] In *White*, the PCR judge found the applicant did not knowingly and intelligently waive his right to direct appeal due to ineffective assistance of counsel. 263 S.C. at 117, 208 S.E.2d at 39. As a result, the PCR court directed PCR counsel to attempt to secure a belated appeal to the Supreme Court from his original conviction and sentence. *Id.* On appeal, our Supreme Court explained that it did not have jurisdiction to entertain a belated direct appeal absent the timely filing of notice of appeal. *Id.* at 119, 208 S.E.2d at 39. However, because the *post-conviction relief appeal* was properly before it, the Court reviewed the trial record and all issues properly raised as if the direct appeal had been perfected. *Id.* at 119, 208 S.E.2d at 39–40. The Court ultimately held that "that there was no reversible error in the trial and that there was not an arguably meritorious ground of appeal, even if notice of intention to appeal had been timely served." *Id.* at 119, 208 S.E.2d at 40. *See Davis v. State*, 288 S.C. 290, 342 S.E.2d 60 (1986) (establishing procedural guidelines for

intelligently waived his right to appeal based on the credible testimony of Counsel Zmroczek. Applicant testified she failed to comply with his request to file a notice of appeal. However, Counsel Zmroczek credibly testified that she informed Applicant of his right to appeal and explained he had ten days to appeal following the denial of her motion to reconsider sentence. She inquired about his desire to file a direct appeal; however, he told her wanted to skip the direct appeal and file an application for post-conviction relief. Accordingly, Applicant's claim pertaining to plea counsel's failure to file an appeal on his behalf is **DENIED.**

B. Involuntary Guilty Plea[10]

Applicant further alleges his plea was involuntary as a result of Counsel Zmroczek's ineffective assistance. This Court disagrees, and finds the combined record from the plea hearing and the PCR hearing establishes Applicant freely, knowingly, and voluntarily pleaded guilty.

1. Plea Testimony

At the outset of the plea hearing, Counsel Zmroczek advised the court that Applicant was planning to plead guilty to three of the indicted charges; that she explained to Applicant the charges against him, possible punishments, and constitutional rights; that she agreed with his decision to plead guilty; and that she believed if he went to trial on these charges, there is a strong likelihood he would be found guilty. (Plea Tr. 4). Applicant then confirmed Counsel Zmroczek's representations to the plea court. (Plea Tr. 5). He then stated he was pleading guilty because he is guilty; that he had not been promised anything or coerced into pleading guilty; and that was pleading guilty of his own free will. (Plea Tr. 6). Applicant further old the plea court he was not under the influence of any medications or alcohol and that he did not suffer any physical, mental,

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White review when the PCR judge determines the applicant did not freely and voluntarily waive his appellate rights).

[10] Claims 2 and 5 in Applicant's June 26, 2019, second amended application.

or emotional conditions that would affect his ability to understand the proceedings or make decisions. (Plea Tr. 6–7).

After a factual recitation from the solicitor, Applicant admitted she was substantially correct in the statement of the facts as presented although he did not agree with every single detail. (Plea Tr. 15). Applicant then admitted to the attempted armed robbery of Doris Shotte and Justin Erving; admitted that he attempted to murder Justin Erving; and admitted that he discharged a firearm into a dwelling either owned, occupied, or possessed by Doris Shotte and Justin Erving. (Plea Tr. 15–16).

Judge Hocker then explained to Applicant constitutional rights he waived by pleading guilty; including his right to remain silent, challenge the State's evidence, and present a defense. (Plea Tr. 16–17). Applicant informed the court he was knowingly, voluntarily, and freely waiving those constitutional rights by pleading guilty. (Plea Tr. 8–11). He further confirmed to the plea court that he had a full opportunity to review and discuss all the discovery with Counsel Zmroczek. (Plea Tr. 18). Applicant then indicated he was satisfied with Ms. Zmroczek's representation; that she had done everything he asked her to do; and that he had no complaints against Counsel Zmroczek, anyone in the solicitor's office, or any law enforcement officers involved in his case. (Plea Tr. 17–19).

2. PCR Testimony

i. Applicant

At the PCR hearing, Applicant testified that, during his meetings with Counsel Zmroczek, they would discuss plea deals offered by the State. The State had offered to drop the attempted murder and weapons charges if Applicant would plead guilty to attempted armed robbery, criminal conspiracy, and firing into a dwelling. Applicant understood this offer to be an open plea with the

possibility of zero to twenty years imprisonment. Counsel Zmroczek explained to him that the odds were not in Applicant's favor because the State had two witnesses who identified Applicant as the perpetrator. Applicant recalled Counsel Zmroczek advising him to take that plea deal. However, Applicant expressed that he did not want to take any deals offered by the State.

Applicant then testified that, although he maintained his innocence, he decided to plead guilty after speaking with Counsel Zmroczek, who advised him that he would likely be convicted at trial. Applicant further recalled Counsel Zmroczek ensuring Applicant that if he pleaded guilty, she could get him a sentence between five and ten years. Based on this information, Applicant made the decision to plead guilty. Applicant testified that he was completely shocked when he received eighteen years' imprisonment. Applicant stated he would not have plead guilty had he known he would receive an eighteen-year sentence.

On cross-examination, Applicant reiterated that he and Counsel Zmroczek did not discuss possible defense theories, trial strategies, or the potential sentencing range for any of the plea offers. However, he testified they did discuss the State's evidence discovery, his constitutional rights, a potential favorable witness, and plea offers. Specifically, Applicant recalled discussing the State's first offer, which was as "open plea" to attempted armed robbery, criminal conspiracy, and discharging a firearm into a dwelling with a sentencing range of zero to twenty years. Once again, Applicant explained that he repeatedly told Counsel Zmroczek he did not want to take a plea deal. However, Applicant changed his mind when Counsel Zmroczek allegedly informed him that there was a plea deal that only required him to serve five to ten years.

Further, Applicant initially testified he didn't remember judge saying the State did not have to prove his guilt if he pleaded guilty. He later admitted that he agreed to the facts provided by the solicitor during the plea hearing. Upon reflection, Applicant testified that his decision to plead and

agree with the solicitor's recitation of the facts was solely based on Counsel Zmroczek's advice to plead guilty.

ii. Counsel Zmroczek

Counsel Zmroczek testified that the first thing she did when she was appointed was review the State's evidence. She testified she met with Applicant multiple times and kept extensive records on their meetings and discussions because Applicant was so difficult. During these meetings, she testified they reviewed the discovery; discussed the elements of the crimes; examined plea offers; and explained Applicant's constitutional rights and the effect of pleading guilty.

In December of 2016, the State made an offer for Applicant to plead guilty to attempted armed robbery, discharging a firearm into a dwelling, and criminal conspiracy. All other charges would be dismissed, including the attempted murder indictments and recent charge for throwing bodily fluids. Through Counsel Zmroczek, the State introduced a letter she sent to Applicant on December 15, 2016, summarizing the evidence against him, the plea offer, and conveying her strong recommendation that he accept the plea offer. State's Exhibit #1. Counsel Zmroczek testified Applicant rejected that offer.

In the weeks prior to trial, Counsel Zmroczek continued her attempts to achieve the best outcome for Applicant. The State initially pulled their original offer but then re-extended it in April of 2017, right before his trial was scheduled to start. Applicant rejected the offer again, and Counsel Zmroczek had Applicant sign a document acknowledging that his decision to reject the plea offer was against his best interest. State's Exhibit #2. Beforehand, she reviewed with Applicant the evidence that the State had against him, including the co-defendants' testimony. Furthermore, she explained to Applicant that consequences of proceeding to trial. Namely, she warned Applicant

that he could receive the maximum sentences for each of the charges. Likewise, Counsel Zmroczek informed Applicant that Judge Hocker could decide to run each of the six sentences consecutively.

Counsel Zmroczek candidly testified she could not recall why Applicant ultimately decided to accept a subsequent offer for him to plead to attempted murder, attempted armed robbery, and discharging a firearm into a dwelling. However, she is confident that she never promised or otherwise ensured Applicant he would receive a sentence between five and ten years. Following the plea, Counsel Zmroczek testified she filed a motion to reconsider based on the disparities between his and his co-defendants' sentences. Judge Hocker denied the motion. Counsel Zmroczek inquired about Applicant's desire to file a direct appeal; however, he told her wanted to skip the direct appeal and file an application for post-conviction relief.

3. Discussion

i. Involuntary Guilty Plea, Generally

"[I]t is the prerogative of any person to waive his rights, confess, and plead guilty, under judicially defined safeguards, which are adequately enforced." *Reed v. Becka*, 333 S.C. 676, 685, 511 S.E.2d 396, 401 (Ct. App. 1999). Because a criminal defendant waives several constitutional rights by pleading guilty, the Due Process Clause requires that guilty pleas are entered into voluntarily, knowingly, and intelligently. *Boykin v. Alabama*, 395 U.S. 238 (1969); *Pittman v. State*, 337 S.C. 597, 524 S.E.2d 623 (1999). To be intelligent, a plea must be made by a mentally competent defendant who understands both the charges against him and the consequences of his plea. *Brady v. United States*, 397 U.S. 742, 748 (1970). To be voluntary, a plea must be free of threats or other coercion that would impermissibly distort the defendant's choice. *Id.* at 755; *see also United States v. Smith*, 440 F.2d 521, 528–529 (7th Cir. 1971) (Stevens, J., dissenting) (explaining that voluntariness relates to the trustworthiness of the admission of guilt and binding

character of the waiver of the constitutional protections which would be available to the accused if he elected to stand trial).

Before a court can accept a guilty plea, the defendant must be advised of the constitutional rights he or she is waiving; the right to a jury trial, the right to confront one's accusers, and the privilege against self-incrimination. *Boykin*, 395 U.S. at 243. Additionally, the defendant "must be aware of the nature and crucial elements of the offense, the maximum and any mandatory minimum penalty, and the nature of the constitutional rights being waived." *Pittman*, 337 S.C. at 599, 524 S.E.2d at 624. The 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 court and defendant, between court and defendant's counsel, or both." *State v. Ray*, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993); *see generally Wolfe v. State*, 326 S.C. 158, 485 S.E.2d 367 (1997) (guilty plea not involuntary where the colloquy demonstrated the trial judge asked defendant twice whether he understood there were no promises and that no sentencing recommendations were binding on the judge). To ensure the defendant understands the consequences of his guilty plea, the plea judge "usually questions the defendant about the facts surrounding the crime and punishment that could be imposed." *Dover v. State*, 304 S.C. 433, 434–35, 405 S.E.2d 391, 392 (1991). However, the plea judge "does not have to direct the defendant's attention to every consequence of his plea provided the record reveals affirmative awareness of the consequences of a guilty plea." *Carter v. State*, 329 S.C. 355, 362, 495 S.E.2d 773, 776 (1998).

The 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." *North Carolina v. Alford*, 400 U.S. 25, 31 (1970). It is "well established that a guilty plea is not

rendered invalid because it represents a compromise by defendant, thrusts a difficult judgment upon him, or is motivated by fear of greater punishment." *United States v. Cox*, 464 F.2d 937, 942 (6th Cir. 1972) (citing *Brady*, 397 U.S. 742). The State may properly encourage guilty pleas either by being more lenient to those who enter such pleas, *Brady*, 397 U.S. at 750–53, or by increasing the risks of punishment on those who do not. *Alford*, 400 U.S. at 37.

An applicant who enters a plea on the advice of counsel may "only attack voluntary, knowing and intelligent character of the plea by showing that plea counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the [applicant] would not have pled guilty, but would have insisted on going to trial." *Roscoe v. State*, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001). In evaluating an allegation on PCR that a guilty plea was based on inaccurate advice of counsel, the transcript of the guilty plea hearing will be considered to determine whether any possible error by counsel was cured by the information conveyed at the plea hearing. *Wolfe*, 326 S.C. at 165, 458 S.E.2d at 370; *cf. Rayford v. State*, 314 S.C. 46, 443 S.E.2d 805 (1994) (finding that, where the transcript of the guilty plea proceeding refuted applicant's claim that he did not understand the terms of a plea bargain, granting PCR was inappropriate notwithstanding applicant's claim his lawyer misadvised him). The 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." *Harres*, 282 S.C. at 133, 318 S.E.2d at 361.

Nonetheless, because "[a] guilty plea is a solemn, judicial admission of the truth of the charges against an individual . . ., 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)); *see McMann*, 397 U.S. at 774 (noting the compelling interests in maintaining the finality of guilty-plea convictions validly obtained). Indeed, admissions made during a guilty plea should be considered conclusive unless an applicant presents valid reasons why he should be allowed to depart from the truth of his statements." *Dalton*, 376 S.C. at 137–38, 654 S.E.2d at 874 (internal citations and quotation marks omitted); *cf. Blackledge*, 431 U.S. at 73–74 (pointing out that representations made by a defendant, his lawyer, and the prosecutor at a guilty plea hearing, as well as any findings made by the judge accepting the plea, constitute a "formidable barrier in any subsequent collateral proceedings"); *United States v. Broce*, 488 U.S. 563, 569 (1989) ("A plea of guilty and the ensuing conviction comprehend all of the factual and legal elements necessary to sustain a binding, final judgment of guilty and a lawful sentence. Accordingly, when the judgment of conviction upon a guilty plea has become final and the offender seeks to reopen the proceeding, the inquiry is ordinarily confined to whether the underlying plea was both counseled and voluntary. If the answer is in the affirmative then the conviction and the plea, as a general rule, foreclose the collateral attack.").

Guilty pleas "must be treated as final in the vast majority of cases. Indeed, '[w]hat is at stake in this phase of the case is not the integrity of the state convictions obtained on guilty pleas, but whether, years later, defendants must be permitted to withdraw their pleas, which were perfectly valid when made, and be given another choice between admitting their guilt and putting the State to its proof.' " *Jamison v. State*, 410 S.C. 456, 469, 765 S.E.2d 123, 129 (2014) (quoting *McMann*, 397 U.S. at 773. "Furthermore, there must be some consequence attached to the decision to plead guilty." *People v. Schneider*, 25 P.3d 755, 761 (Colo. 2001) (*cited with approval in Jamison*, 410 S.C. at 469, 765 S.E.2d at 129).

This Court finds Applicant knew the nature of the charges against him, the terms of the plea agreement, and the consequences of pleading guilty in accordance with the requirements of *Boykin* and *Pittman.* The plea transcript reflects Applicant understood the proceedings, interacted intelligently with the plea court, and entered his guilty plea knowingly and voluntarily. Applicant failed to present any valid reasons why he should be allowed to depart from the truth of the statements he made during the plea proceeding. *Dalton*, 376 S.C. at 137–38, 654 S.E.at 874; *see also Crawford v. United States*, 519 F.2d 347, 350 (4th Cir. 1975) (finding that the accuracy and truth of an accused's statements at a guilty plea proceeding are "conclusively" established unless he makes some reasonable allegation why this should not be so), *overruled on other grounds by United States v. Whitley*, 759 F.2d 327 (4th Cir. 1985). This Court further finds the voluntary and intelligent nature of the plea is evidenced by the "by the fact that the plea agreement was favorable to him and accepting it was a reasonable and prudent decision" in light of the additional attempted murder and other charges that were dismissed. *Fields v. Gibson*, 277 F.3d 1203, 1299 (10th Cir. 2002)

Further, any possible deficiency or error by counsel was cured by the information conveyed at the plea hearing. *Id.* at 1214 (In the course of emphasizing the importance of plea colloquies, the Court stated that "[t]his colloquy between a judge and a defendant before accepting a guilty plea is not *pro forma* and without legal significance. Rather, it is an important safeguard that protects defendants from incompetent counsel or misunderstandings"). In *Brady*, the United States Supreme Court explained:

> Often the decision to plead guilty is heavily influenced by the defendant's appraisal of the prosecution's case against him and by the apparent likelihood of securing leniency should a guilty plea be offered and accepted. Considerations like these frequently present imponderable questions for which there are no certain answers; judgments may be made that in the light of later events seem

> improvident, although they were perfectly sensible at the time. The rule that a plea must be intelligently made to be valid does not require that a plea be vulnerable to later attack if the defendant did not correctly assess every relevant factor entering into his decision. A defendant is not entitled to withdraw his plea merely because he discovers long after the plea has been accepted that his calculus misapprehended the quality of the State's case or the likely penalties attached to alternative courses of action.

Id. at 756–57.

Surmounting *Strickland*'s high bar is never an easy task, and the strong societal interest in finality has "special force with respect to convictions based on guilty pleas." *Lee*, 137 S. Ct. at 1967; *cf. Hill*, 474 U.S. at 58 ("[R]equiring a 'prejudice' showing from defendants who seek to challenge the validity of their guilty pleas on the ground of ineffective assistance of counsel 'will serve the fundamental interest in the finality of guilty pleas.' "). Based on the evidence presented at the PCR hearing and the record of the plea proceeding, this Court finds Applicant's plea was freely, knowingly, and voluntarily entered. Accordingly, Applicant's request for relief by way of this allegation is **DENIED.**

ii. Failure to Advise Applicant on Closely Connected Offenses: Recidivist Statutes

As discussed in section A, *supra*, Applicant raises two ineffective assistance of counsel claims relating to whether his charges constitute closely connected offenses. The second claim is based on the possible consequences of pleading guilty to these offenses and the effect they may have on any future convictions under South Carolina's recidivist statutes. Specifically, Applicant next alleges Counsel Zmroczek was ineffective for failing to "advise him on South Carolina Code of Laws *§§* 17-25-45([F]) and 17-25-50, closely connected offenses, triggering offenses, recidivist provisions, and all its implications for sentencing purposes." This Court finds this claim is both refuted by the record and based on a collateral consequence of sentencing of which a defendant need not be specifically advised before entering a guilty plea.

South Carolina's recidivist statutes or habitual offender legislation "attempts to encourage offenders to stay out of trouble and punishes those who refuse to be deterred even after a conviction." *State v. Benjamin*, 353 S.C. 441, 446, 579 S.E.2d 289, 291 (2003), *overruled on other grounds by State v. Gordon*, 356 S.C. 143, 588 S.E.2d 105 (2003). Section 17-25-45 mandates that criminal defendants who are convicted of two "most serious" or three "serious" crimes be sentenced to life imprisonment without parole (LWOP) while section 17-25-50 requires the sentencing court to "treat as one offense any number of offenses which have been committed at times so closely connected in point of time that they may be considered as one offense."

Further, section 17-25-45(F) specifically provides that "a prior conviction shall mean the defendant has been convicted of a most serious or serious offense . . . on a separate occasion, prior to the instant adjudication. Sections 17-25-45 and 17-25-50 "must be construed together in determining whether crimes committed at points close in time qualify for a recidivist sentence." *Gordon*, 356 S.C. at 154, 588 S.E.2d at 111, *overruled on other grounds by Bryant v. State*, 384 S.C. 525, 683 S.E.2d 280 (2009). In *State v. Bryant*, our Supreme Court held that section 17-25-45(F) sets forth a straightforward timing feature for identifying "a prior conviction" while section 17-25-50 is intended to serve as a "legislatively sanctioned safeguard" to ensure that a life without parole sentence is not imposed in cases where the predicate offenses "are inextricably connected and share an immediate temporal proximity." 385 S.C. at 534–35, 683 S.E.2d at 285.

At the plea hearing, Judge Hocker advised Applicant that "attempted murder, attempted armed robbery are violent, most serious offenses." (Plea Tr. 25). He further told Applicant, "you have laid a lot of groundwork for a potential life without parole sentence sometime in the future if you were to continue to engage in criminal activity." (Plea Tr. 25–26). Applicant confirmed that

he understood. (Plea Tr. 26). Therefore, Applicant's claim that Counsel Zmroczek failed to explain the potential consequences of pleading guilty to "most serious" offenses is refuted by the record.

Further "a plea's possible enhancing effect on a subsequent sentence is merely a collateral consequence of the conviction; it is not the type of consequence about which a defendant must be advised before the defendant enters the plea." *Wright v. United States*, 624 F.2d 557, 561 (5th Cir. 1980); *see United States v. Brownlie*, 915 F.2d 527, 528 (9th Cir. 1990) ("The possibility that the defendant will be convicted of another offense in the future and will receive an enhanced sentence based on an instant conviction is not a direct consequence of a guilty plea."); *Appleby v. Warden, N. Reg'l Jail & Corr. Facility*, 595 F.3d 532, 540–41 (4th Cir. 2010) (rejecting petitioner's claim of involuntary plea based on counsel's failure to advise that a guilty plea would expose him to recidivist sentencing proceedings); *United States v. Littlejohn*, 224 F.3d 960, 965 (9th Cir. 2000) ("[W]here the consequence is contingent upon action taken by an individual or individuals other than the sentencing court . . . the consequence is generally 'collateral.' "); *see also Brown v. State*, 306 S.C. 381, 382, 412 S.E.2d 399, 400 (1991) ("The imposition of a sentence may have a number of collateral consequences . . . and a plea of guilty is not rendered involuntary in a constitutional sense if the defendant is not informed of the collateral consequences."); *cf. Smith v. State*, 329 S.C. 280, 286, 494 S.E.2d 626, 629 (1997) (finding that classification of a crime as violent and non-violent is also a collateral consequence of sentencing and counsel is not ineffective for failure to inform a defendant of consequences of a violent crime conviction).

Therefore, even had Judge Hocker not questioned Applicant about his understanding of the consequences of pleading guilty to "most serious" offenses, his plea would nonetheless be voluntary. Accordingly, Applicant's request for relief by way of this allegation is **DENIED.**

VII. ALL OTHER ALLEGATIONS

As to any and all allegations raised in the application or at the hearing in this matter and not specifically addressed in this order, this Court finds Applicant failed to present any evidence regarding such allegations. Accordingly, this Court finds those claims were voluntarily waived and abandoned, and those claims are therefore denied and dismissed with prejudice. S.C. Code Ann. § 17-27-90.

VIII. CONCLUSION

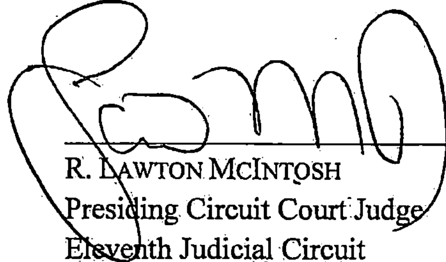
Based on all the foregoing, this Court finds Applicant has not established any other constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. Therefore, this application for post-conviction relief is denied and dismissed with prejudice.

Applicant must file and serve a notice of appeal within thirty days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review pursuant to Rule 203, SCACR. Pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has the right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to Rule 243, SCACR, for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. The application for post-conviction relief be denied and dismissed with prejudice; and
2. Applicant be remanded to the custody of the State.

AND IT IS SO ORDERED this 20 day of April, 2022.



R. LAWTON MCINTOSH
Presiding Circuit Court Judge
Eleventh Judicial Circuit

Anderson, South Carolina

FORM 4

STATE OF SOUTH CAROLINA COUNTY OF LEXINGTON IN THE COURT OF COMMON PLEAS	JUDGMENT IN A CIVIL CASE CASE NUMBER 2018CP3202432

Emonte Brooks 364670		South Carolina State of	
PLAINTIFF(S)		DEFENDANT(S)	

Submitted by:	Attorney for: ☐ Plaintiff ☐ Defendant ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED (*CHECK REASON*):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: ____________

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: ____________

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: ____________

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.
Additional Information for the Clerk: ____________

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.
Note: Title abstractors and researchers should refer to the official court order for judgment details.
E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

Circuit Court Judge	Judge Code	4/29/2022 Date

For Clerk of Court Office Use Only

This judgment was entered on , and a copy mailed first class or placed in the appropriate attorney's box on **29th of April 2022**, to attorneys of record or to parties (when appearing pro se) as follows:

Ashley A. McMahan PO Box 50536 Columbia, SC 29250

ATTORNEY(S) FOR THE PLAINTIFF(S)

Taylor Zane Smith PO Box 11549 Columbia, SC 29211-1549

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter

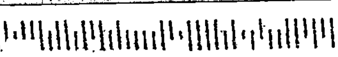
Lisa M. Comer - Clerk of Court

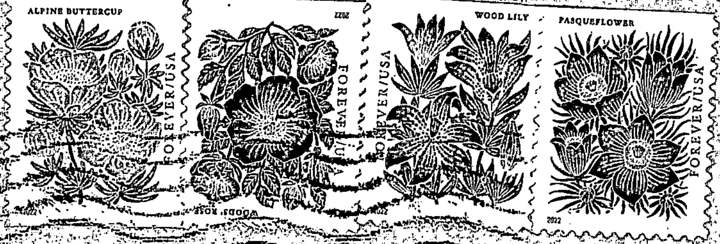
Court Reporter:

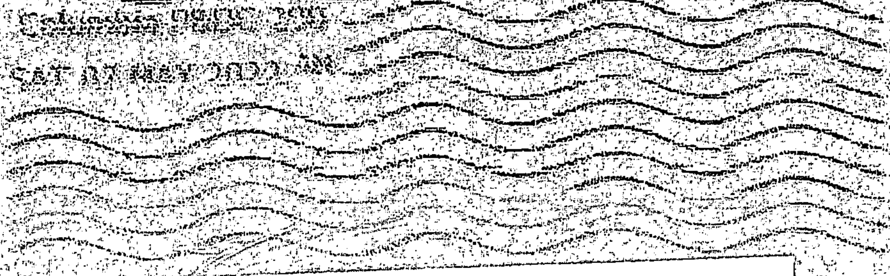
E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.







AN LAW, LLC
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SC 29250

RECEIVED
MAY 09 2022
S.C. SUPREME COURT

The Honorable Patricia A. Howard
Clerk, Supreme Court of South Carolina
Post Office Box 11330
Columbia, SC 29211