STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
Geordi Jerrell Heyward, # 374238, Applicant, v. State of South Carolina, Respondent.	)	Case No.: 2019-CP-40-0775 **ORDER OF DISMISSAL**

This matter comes before this Court by way of Applicant Geordi Jerrell Heyward's application for post-conviction relief challenging his guilty plea and sentence for second-degree criminal sexual conduct with a minor stemming from his involvement in a human trafficking ring involving three fifteen-year-old girls and his sexual intercourse with one of those girls.

In response, Respondent the State of South Carolina filed a return and requested an evidentiary hearing to resolve the claims set forth in the application. Thereafter, Applicant, though retained counsel Tara D. Shurling, served two amended applications on Respondent with specific claims of ineffective assistance of counsel and involuntary guilty plea.

An evidentiary hearing on this action was convened June 14, 2021, before this Court at the Richland County Courthouse. Applicant appeared alongside counsel Shurling. Respondent was represented by Senior Assistant Deputy Attorney General Megan Harrigan Jameson of the South Carolina Attorney General's Office. Applicant proceeded forward on the claims raised in his two amended applications. This Court heard testimony from Applicant, plea counsel, Bakari Sellers, and prosecutor Nicole Simpson.

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 relief and, accordingly, denies and dismissed this action with prejudice. Specific findings of fact and conclusions of law as required pursuant to S.C. Code Ann. § 17-27-80 are set forth below:

FACTUAL AND PROCEDURAL HISTORY

The records before this Court establish Applicant is presently confined within the South Carolina Department of Corrections. During its February 2017 term, the Richland County Grand Jury indicted Applicant for three counts of trafficking in persons under eighteen (2017-GS-40-0539, -0736, -0737) and contributing to the delinquency of a minor (2017-GS-40-0538). Thereafter, during its July 2017 term, the Richland County Grand Jury indicted Applicant for second-degree criminal sexual conduct with a minor (2017-CP-40-0540). The charges arose from an incident in which Applicant and two co-defendants brought three minor victims to a hotel in Richland County, drugged them, held them against their will, and forced them to have sexual relations with various men. Applicant also sexually assaulted one of the minor victims. The evidence reflects Applicant was the "muscle" who was responsible for keeping the minor victims at the hotel against their wills. Applicant also gave a voluntary statement to law enforcement wherein he admits to having sexual intercourse with the fifteen-year-old child victim.

Applicant retained Bakari Sellers, Esquire, to represent him on these charges. The matter was prosecuted by the Fifth Circuit Solicitor's Office, with Assistant Solicitors Kathryn Luck Campbell, Lamar Fyall, and Nicole Simpson handling the case.

Following extensive plea negotiations with the State, a plea agreement was reached on the cusp of trial for Applicant to resolve all of his pending indictments in exchange for a guilty plea

to second-degree criminal sexual conduct with a minor—the very charge to which he had already given a statement implicating himself and the evidence was overwhelming to support a conviction. On October 12, 2017, Applicant, alongside counsel, appeared before the Honorable Alison R. Lee, circuit court judge, and pled guilty as indicted to second-degree criminal sexual conduct with a minor. Pursuant to the plea agreement between the State and Applicant, the State dismissed the three counts of human trafficking and contributing to the delinquency of a minor, and any sentence he received was to run concurrently to any probation revocation he received for two strong armed robbery convictions and a criminal conspiracy conviction for which he was currently on probation to be handled at a later date.[1] After a thorough colloquy with Applicant, Judge Lee accepted his plea and sentenced him to fifteen years of imprisonment.

On October 18, 2017, Applicant, through counsel Sellers, filed a motion to reconsider his sentence, asserting the State had violated the terms of the plea agreement by asking the Judge Lee to impose a sentence between fifteen to twenty years imprisonment when he believed the terms of the agreement were that the State would not seek any specific sentence and leave sentencing to the discretion of the court. A hearing on this motion was convened December 4, 2017, before Judge Lee. At this hearing, Applicant, though counsel Sellers, presented Judge Lee with two email exchanges between himself and the State regarding the plea offers (dated September 7, 2017 and October 4, 2017). Both parties argued vigorously in support of their positions. Counsel, on behalf of Applicant. argued that the plea offer contained a term requiring the State to remain silent as to sentencing recommendations, a term he asserts that was carried over from an earlier plea offer to

1 Applicant was represented by Assistant Public Defender Robert L. Bank, Jr., on those probation revocation matters, which were not resolved that the plea. Mr. Bank was present at the plea hearing.

which Applicant counteroffered, followed by another counteroffer from the State and then acceptance by Applicant of this final counteroffer. He argued that basic contract principled prevented the State from now arguing this term of silence was not included in the offer, as well as made public policy arguments as to why the offer as he understood it to be should be upheld. In contrast, the State argued that no such term was included in the plea agreement, either in written or oral communications, and the plea was straight-up, allowing both Applicant and the State to argue for what sentenced each believed to be appropriate based on the facts and circumstances of the case. Following argument from both parties, Judge Lee orally denied the motion on the record, stating she sentenced Applicant to fifteen years based on the victim impact statements and Applicant's prior record and status as a probationer for violent crimes for which he was awaiting a revocation hearing. Judge Lee also found the emails did not indicate the agreement was for the State to remain silent as to sentence at the plea and that such a term was not part of the plea agreement.

On December 13, 2017, Applicant filed a notice of appeal and an explanation of appealable issues from the guilty plea pursuant to Rule 203(d)(1)(B)(iv), SCACR. The Court of Appeals reviewed the guilty plea explanation and determined the appeal could proceed forward to briefing. However, before the submission of briefs, Applicant moved to withdrawal his appeal, submitting two affidavits stating that he had been advised on the risk of withdrawing his appeal and wished to drop his appeal. On January 9, 2019, the Court of Appeal issued an order dismissing the appeal. The remittitur was sent on January 25, 2019.

ALLEGATIONS BEFORE THE COURT

In his *pro se* application for post-conviction relief, filed on February 6, 2019, Applicant

alleges he is being held in custody unlawfully based on the following grounds:

-trial counsel was ineffective for failing to investigate the enhancement of charge
-trial counsel was ineffective for failing to inform him of the State of the plea offer
-trial counsel was ineffective for failing to move to withdrawal his guilty plea based on an un-kept plea bargain
-trial counsel was ineffective for failing to object to sentence
-trial counsel was ineffective for failing to inform him of the potential sentences for the crimes
-plea was involuntary based on ineffective assistance of counsel

As requested relief, Applicant states he is seeking vacation of his sentence for a less sentence or a new trial.

In response, Respondent filed its return to the application and asked for an evidentiary hearing to resolve these claims of ineffective assistance of counsel and involuntary guilty plea. Attached to this return and before this Court are the records from Applicant's general sessions proceedings (including his guilty plea transcript and motion to reconsider hearing transcript), his appellate records, his SCDC records, and the records from this current PCR proceeding.

Jonathan Waller, Esquire, was appointed to represent Applicant in this proceeding pursuant to Re: Appointment of Counsel in Post-Conviction Relief Cases before the Circuit Court (S.C. Sup. Ct. Order filed Oct. 6, 2008) and Rule 71.1(d), SCRCP (providing for appointment of counsel only where there is a question of law or fact which necessitates a hearing). Thereafter, Applicant retained Tara D. Shurling, Esquire, to represent him and an order of substitution of counsel was issued in December of 2019.

On June 10, 2021, Applicant, though counsel Shurling, served an amended application, adding the following grounds for relief:

1 A) Plea Counsel neglected to bring the terms of his agreement with the Assistant Solicitor assigned to this matter to the attention of the plea judge at the plea proceeding and at the time of sentencing.

2 A) Plea Counsel neglected to introduce as a Defendant's Exhibit documentary evidence that would have corroborated the terms of an agreement with the State concerning the sentencing in this case.

3 A) Plea Counsel neglected to preserve Applicant's right to be fully and fairly heard on the question of the existence of a plea agreement in his case by neglecting to introduce an email between Plea Counsel and the Assistant Solicitor assigned to this case as a Defendant's Exhibit.

4 A) Plea Counsel neglected to object, at the first available opportunity, when the prosecutor in this matter failed to honor the terms of an agreement she had made with Applicant, through his Plea Attorney.

5 A) Plea Counsel was ineffective for failing to discuss with Applicant the issue of whether he wished to make a Motion to Withdraw his plea based upon the failure of the State to honor the terms of the plea agreement.

6 A) Plea Counsel was ineffective for failing to fully argue the issues relating to the State's failure to honor an express agreement with Applicant, and for failing to introduce documentary evidence which supported the existence of that agreement, and thereby prejudiced Applicant's ability to fully argue that issue on direct appeal.

7 A) Plea Counsel was ineffective for failing to explain to Applicant the weaknesses in the State's cases on the two counts of trafficking pending against him, where the scarcity of competent evidence on those charges, bore directly on Applicant's ability to engage in a thorough analysis of the benefits and risks of going to trial versus entering a plea of guilty under the plea agreement to Criminal Sexual Conduct with a minor to which Applicant pleaded guilty.

9 A) Applicant's plea of guilty was not freely and intelligently entered inasmuch as it was entered in reliance upon information provided to him by Plea Counsel which the State subsequently denounced as untrue and not binding upon the prosecution.

10 A) Applicant's plea was not knowingly and voluntarily entered inasmuch as it was entered in strict reliance upon Plea Counsel's advice that the prosecution was not going to make any recommendation as to sentence if he agreed to plead to one count of Second Degree CSC with a minor. Applicant asserts that he would not have waived his right to trial by jury and pleaded guilty if he had know that counsel

had not obtained written confirmation that the state agreed not to make any recommendation at his plea and sentencing proceeding.

11 A) Plea counsel was ineffective for neglecting to verify in writing all the terms of the plea deal in place, as extended by the State and accepted by Applicant, prior to the Plea proceeding held in this matter.

12 A) Plea Counsel was ineffective for failing to establish in writing, prior to accepting a plea deal with the State on behalf of Applicant, that the State's agreement not to recommend any sentence, as expressed in its first plea offer, remained part of the plea deal after they agreed to dismiss trafficking charges against Applicant.

13 A) Plea Counsel was ineffective for failing to advise Applicant of his right to pursue a Motion to Withdraw his plea as an alternative request to the Motion to Reconsider Sentence that was filed on his behalf.

14 A) Plea Counsel was ineffective for neglecting to immediately bring to the Court's attention the fact that the State was violating a term of the plea agreement once Assistant Solicitor Simpson began arguing for a harsh sentence in this case.

15 A) Plea Counsel was ineffective for failing to present the plea judge with copies of all the emails exchanged between him and Assistant Solicitor Simpson concerning plea negotiations in response to and request from the Judge's law clerk for documents relevant to plea offers.

16 A) Plea Counsel was ineffective for neglecting to confirm on the record which emails were handed up to the Judge during the hearing on his MTRS, by date and sender, thereby establishing some kind of reliable record of what was before the court. This was crucial where the documents sent to the Plea Judge prior to the hearing did not include multiple relevant emails.

17 A) Plea counsel was ineffective for neglecting to investigate what offers had been extended to Applicant's female co-defendant who was, as revealed through the discovery process, the main player in the alleged trafficking conspiracy, and for failing to present that information to the Plea Judge in mitigation of sentencing. Applicant submits he was prejudiced thereby where, despite the fact that his trafficking charges were dismissed, the fact that he was charged in connection to this conspiracy was well known to the Court and where the Court was aware that those counts were dismissed as part of a plea bargain, leaving the realistic possibility that those factors might influence the sentence in the charge pleaded to; second degree CSC with a minor.

18 A) Plea counsel was ineffective for allowing his client to plead guilty on an indictment which alleged he had sexual relations with a girl over the age of 11, but under the age of 14.

19 A) Plea Counsel was ineffective for sending Assistant Solicitor Simpson an email, acting on behalf of Applicant, accepting her offer to plead to Second Degree CSC with a minor, with all other charges being dropped, without expressly mentioning his understanding that the plea bargain included the original agreement that the state would not recommend any sentence.

20 A) Plea Counsel was ineffective for neglecting to argue in support of his argument, in his motion and at the MTYRS hearing, that the "second offer" was not in fact a new offer separate from the first, where Assistant Solicitor Simpson made the offer to plead to 2nd degree CSC with a minor, with the state dismissing the trafficking counts, without reiterating the earlier agreement to dismiss other counts against Applicant, thereby creating a reasonable belief that the dismissal of the trafficking counts was an addition to the original offer, not a superseding plea offer.

21 A) Plea Counsel was ineffective for Volunteering a proposed Order to Judge Lee denying Applicant's motion to reconsider sentence where the order presented, reflected a finding that there had been no violation of a plea bargain. Applicant was prejudiced by this error where it effectively denied Counsel for the Applicant the opportunity to argue a motion to reconsider that ruling.

On the same date, Applicant, though counsel Shurling, also served a second amended application, adding the following additional claim for relief:

22 A) Counsel was ineffective for neglecting to use available information to more thoroughly make an argument that the last statement of an offer amounted to an amendment to the original offer as opposed to a "new" offer as has been argued by the state.

At the evidentiary hearing convened June 14, 2021, Applicant proceeded forward on these twenty-two grounds as set forth in his amended and second amended applications.

SUMMARY OF TESTIMONY PRESENTED AT THE EVIDENTIARY HEARING

An evidentiary hearing was convened before this Court at the Richland County Courthouse on June 14, 2021. Applicant was present alongside counsel Shurling. Respondent was represented

by Senior Assistant Deputy Attorney General Megan Harrigan Jameson. Testimony was taken from Assistant Solicitor Nicole Simpson, plea counsel Bakari Sellers, and Applicant. By consent of both parties, three emails were also introduced as Applicant's Exhibits: Ex. No. 1) a September 7, 2017 email from Assistant Solicitor Lamar Fyall to Bakari Sellers, Ex. No. 2) an October 4, 2017 email chain between the prosecution team and Sellers, and Ex. No. 3) an email between Judge Lee's law clerk and the prosecution and defense.

Assistant Solicitor Simpson testified first. She testified she was part of the prosecution team alongside Lamar Fyall and Kathryn Luck Campbell. She testified that the case was prepared for trial and Applicant elected to accept an extremely favorable offer from the State the week of trial, including for the dismissal of three human trafficking charges and a contributing to the delinquency of a minor charge. She testified this plea offer was reached after extensive negotiations between the State and Applicant, though his counsel, which included emails back and forth and contemporaneous verbal discussions. She consistently and unwaveringly testified that the plea offer did not include any sort of term that the State would remain silent during sentencing. She testified that if this had been a term of the plea agreement, she likely would have included it in the written emails summarizing the plea agreements and would have put it on the record during the plea proceeding. As she did neither, this was not a term of the plea agreement according to her testimony and is consistent with what she told Judge Lee during the motion to reconsider hearing. She testified that the plea offer was for Applicant to receive a concurrent sentence as to a probation revocation to occur at a later date, but that there were no additional terms as to sentencing. She elaborated that this meant that Applicant, though counsel, was able to argue for whatever sentence he thought was appropriate (the record reflects he requested three to five years of imprisonment)

and the State was able to argue what sentence it deemed as appropriate (which was between fifteen to twenty years of imprisonment). She testified one of the victims of the human trafficking charge had a very involved mother who was extremely vocal on behalf of all three minor victims at every proceeding and she expected her to ask the court for the maximum sentence (which she did). She testified that her position is the exact same as it was at the motion to reconsider the sentence hearing—that there was never an agreement (express or implied) that the State would remain silent during sentencing and the plea agreement was not violated when she requested a sentence of between fifteen to twenty years of imprisonment at the plea.

Regarding the indictment for second-degree criminal sexual conduct with a minor, Assistant Solicitor Simpson testified that everyone was well-aware that the minor victim was fifteen years of age, but the indictment had a scrivener's error that was corrected before the plea.

Plea counsel Bakari Sellers testified next. He testified that he believed there was a term in the plea agreement that the State would not make any recommendation as to sentence based on the emails and contemporaneous conversations with the prosecution team. He was surprised when Assistant Solicitor Simpson made a request for a sentence of fifteen to twenty years of imprisonment at the end of the plea. However, he testified this was after the extremely involved mother of one of the victims had forcefully requested the court sentence Applicant to the maximum sentence possible, which had a great impact on the court and sentencing (as evidenced by Judge Lee's comments during the motion to reconsider hearing). When questioned as to why he did not immediately object, ask to stand-down, or otherwise bring this purported plea agreement to the court as soon as the State made its sentencing request at the plea, counsel testified he made a strategic decision not to do so because this was an open plea (meaning the court was free to

sentence Applicant to whatever sentence it deemed appropriate) and he still believed that his Applicant would receive a sentence in between the two ranges recommended by him and the State. Counsel elaborated that he always believed his client would receive a sentence of eight to ten years of imprisonment based on the crime, which he conveyed repeatedly to Applicant and his mother, but he strategically requested a low sentence to counteract what he anticipated to be a forceful request from the victim's mother for a maximum sentence in the hope and belief that the court would "split the baby" and give him a sentence around ten years of imprisonment.

Counsel also testified that there was no legitimate defense to the second-degree criminal sexual conduct with a minor charge based on the overwhelming evidence of his guilt—including Applicant's own admission to having sexual relations with the fifteen-year-old child. Based on this, he did not want to object or otherwise move to withdrawal or stop the plea because he understood that this would stop plea negotiations and Applicant would be facing a trial on all of the charges and an all-but-certain conviction and harsher sentence of seventy or more years. It is this very real concern that caused him to proceed forward with the extremely favorable plea to resolve all pending charges, which he adamantly testified was *still* favorable even with the State requesting a sentence in the higher range. Counsel testified that Applicant did *not* want to proceed to trial on these charges. He also testified repeatedly that Applicant always admitted he was guilty of the second-degree criminal sexual conduct with a minor charge and had no defense to this charge.

Counsel testified this same strategic logic applied as to why he moved to reconsider the sentence rather than withdrawal the plea entirely—he was trying to avoid a much harsher sentence after a trial where his client did not have a viable defense. Counsel testified he presented the court

with the emails supporting his assertions that a plea agreement term was that the State would remain silent as to sentencing and argued that position based on contract law. He testified he believes he preserved all of these issues for appellate review and filed an appeal on his client's behalf, along with an explanation as to preserved appellate issues.

Regarding the indictment scrivener's error with the body of the indictment indicating the minor victim was between eleven and fourteen years old (despite correctly listing her birthday to indicate her actual age was fifteen years old), counsel testified he did not object to an amendment because Applicant had already admitted to having sexual relations with the fifteen-year-old child and the amendment comported with the facts and evidence for which he was on notice.

Applicant testified next. Applicant testified that based on his conversations with counsel, he believed that he would be pleading guilty to second-degree criminal sexual conduct with a minor for a time-served sentence and dismissal of all other charges. He testified that if he had known the State was not going to recommend a time-served sentence, he would have not pled guilty and would have proceeded to trial on all charges. He testified he wanted counsel to object when the State made a recommendation for fifteen to twenty years of imprisonment but did not object or otherwise let counsel know of his concern. He testified he talked to counsel once after the plea and expressed concern that the State had made a recommendation, but counsel said it was up to the judge to sentence him within the range. He testified that he did not ask counsel to file a motion to reconsider his sentence and that counsel did this on his own volition. He said he wanted to withdrawal his plea but was never given this option. He testified counsel never went over his charges or the elements of the offenses with him. He claimed he did not know about the earlier plea offer with would have required him to plead to a human trafficking count in addition to the

second-degree criminal sexual conduct count. Applicant testified that he believed the recommendation was for him to receive a sentence that did not require him to serve *any* time of incarceration and he would go home the day of his plea, but yet acknowledged that counsel asked for a sentence of three to five years.

On cross-examination, Applicant admitted to having sexual relations with the fifteen-year-old child and giving a statement to law enforcement where he admitted to this. Despite this, he still believed he would receive no active incarceration as a result of his guilty plea.

On recall, counsel testified he never advised Applicant he would receive a time-served sentence.

At the close of the hearing, the Court requested memorandums from both parties outlining each parties' positions as to the issues raised. Applicant's counsel requested time to order and review the transcript of this proceeding before submitting a memorandum, which this Court granted. Respondent submitted a memorandum to this Court on March 24, 2022. Applicant did not submit a memorandum.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Applicant has alleged various claims of ineffective assistance of plea counsel and asserts that as a result of counsel's purported errors, he is entitled to have his guilty plea undone and proceed back to the court of general sessions for a new disposition of his case.

Standard of Review

Under the Uniform Post-Conviction Procedures Act, an applicant may seek post-conviction relief 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).

In a post-conviction relief action, the applicant bears the burden of proving the allegations by a preponderance of the evidence. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985); Rule 71.1(e), SCRCP.

Applicant's twenty-two claims for relief as set forth in his amended and second amended application pertain to ineffective assistance of counsel. The Sixth and Fourteenth Amendments to the United States Constitution guarantee Applicant, like all other defendants, the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984); Taylor v. State, 404 S.C. 350, 359, 745 S.E.2d 97, 101 (2013). Ordinarily, post-conviction relief allegations are centered upon an allegation that the applicant did not receive effective assistance of counsel guaranteed by the Sixth Amendment. See generally S.C. Code Ann. § 17-27-20(A) (enumerating allegations cognizable in post-conviction relief actions). 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).

In a post-conviction relief action, the applicant bears the burden of proving the allegations by a preponderance of the evidence—a mere allegation of ineffective assistance is not sufficient to warrant granting relief. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). 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 or sentence. 466 U.S. at 687. First, the applicant must show that counsel's performance was deficient; and second, that the deficient performance prejudiced the applicant. Id. at 668; Butler, 286 S.C. at 442, 334 S.E.2d at 814.

The first prong—constitutional deficiency—is "necessarily linked to the practice and expectations of the legal community." Padilla v. Kentucky, 559 U.S. 356, 366 (2010). In order to prove deficient performance, the applicant must show counsel's representation fell below an objective standard of "reasonableness under prevailing professional norms." Cherry v. State, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814.

Strickland, however, "does not guarantee perfect representation[—]only a 'reasonably competent attorney.'" Harrington v. Richter, 562 U.S. 86, 110 (2011) (quoting Strickland, 466 U.S. at 687). 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. Just as there is "no expectation that competent counsel will be a flawless strategist or tactician, an attorney may not be faulted for a reasonable miscalculation or lack of foresight or for failing to prepare for what appear to be remote possibilities." Harrington, 562 U.S. at 110.

Accordingly, "[j]udicial scrutiny of counsel's performance must be highly deferential, as it is all too tempting for a defendant to second-guess counsel's assistance after conviction or an adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Strickland, 466 U.S. at 689; see also Yarborough v. Gentry, 540 U.S. 1, 6 (2003) ("The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight."). Unlike a later reviewing court, the attorney observed the relevant proceedings; knew of materials outside the record; and interacted with the client, opposing counsel, and the judge. Thus, the question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom. Id. (quoting Strickland, 466 U.S. at 690).

Thus, a fair assessment of attorney performance requires every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Id. 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 reasonable professional assistance." Butler, 286 S.C. at 445, 334 S.E.2d at 816. The applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625.

Reviewing courts "must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed at the time of counsel's conduct." Strickland, 466 U.S. at 690. An applicant making a claim of ineffective assistance "must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." Id. The reviewing court must then "determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." Id.

The Strickland standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. 466 U.S. at 689-690; see also Harrington, 562 U.S. at 105 (cautioning that an ineffective assistance of counsel claim could potentially function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial). Even under *de novo* review, the standard for judging counsel's representation is a most deferential one. Harrington, 562 U.S. at 105. Unlike a later reviewing court, the attorney observed the relevant proceedings; knew of materials outside the record; and interacted with the client, opposing counsel, and the judge. Thus, the question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," **not** whether it deviated from best practices or most common custom. Id. (quoting Strickland, 466 U.S. at 690) (emphasis added).

The second, or "prejudice" prong of Strickland is rooted in the very purpose of the Sixth Amendment guarantee of counsel—to ensure a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. Id. at 691–92. In order to prove prejudice, an applicant must demonstrate counsel's deficient performance prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding

would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. A reasonable probability is a probability "sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. Thus, it is not enough "to show the errors had some conceivable effect" on the outcome of the proceeding—counsel's errors must be "so serious as to deprive the defendant of a fair trial." Id. at 687 (emphasis added).

Because the Sixth Amendment right to counsel also applies to a defendant entering a guilty plea, Hill v. Lockhart extended the two-part Strickland test to challenge guilty pleas based on ineffective assistance of counsel." Hill, 474 U.S. 52; cf. Padilla, 559 U.S. at 373 (recognizing the guilty plea process is a "critical phase of litigation" for purposes of the Sixth Amendment right to effective assistance of counsel). A claim of ineffective assistance of guilty plea counsel requires the applicant present evidence satisfying two prongs: first, evidence that counsel's performance was deficient; and second, evidence that counsel's deficient performance prejudiced the defendant by causing him to plead guilty rather than go to trial. Hill, 474 U.S. 52.

The analysis of counsel's performance under the first prong of Strickland remains unchanged—the applicant must show counsel's representation fell below the 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 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, an 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. 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).

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. ___, 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. ___, 137 S. Ct. at 1967. Rather, judges should "look to contemporaneous evidence to substantiate a defendant's expressed preferences. Id. 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 plea and the evidence presented at the PCR hearing. Harres, 282 S.C. at 134, 318 S.E.2d at 361.

The performance and prejudice standards, however, "do not establish mechanical rules; [t]he ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." Id. at 696. Moreover, "there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one." Id. at 697. The court "need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. Id. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, the court may evaluate the prejudice prong only. Id.

Findings as to Specific Claims Raised

Applicant has alleged twenty-two claims of ineffective assistance of plea counsel and asserts that as a result of counsel's purported errors, he is entitled to have his guilty plea undone. This Court finds has failed to meet his requisite burden of proof as to each allegation. Each allegation is addressed below:

1 A) Plea Counsel neglected to bring the terms of his agreement with the Assistant Solicitor assigned to this matter to the attention of the plea judge at the plea proceeding and at the time of sentencing.

Applicant first asserts plea counsel neglected to bring the terms of his plea agreement with the State to the attention of the plea judge at the time of the plea. Specifically, Applicant asserts that the plea agreement included a term that the State would remain silent as to sentencing and not make a recommendation and that counsel was constitutionally ineffective for failing to inform the plea court of this term of the plea agreement during the plea proceeding, rather than at a subsequent motion to reconsider hearing.

As an initial matter, this Court finds that this claim must fail as a matter of law because Judge Lee already expressly found that there was no such term in the plea agreement and Applicant failed to challenge this ruling when he abandoned his direct appeal. See e.g., State v. Black, 400 S.C. 10, 28, 732 S.E.2d 880, 890 (2012) ("Since Petitioner does not challenge the use of this conviction to impeach Bush's credibility, this ruling, right or wrong, becomes the law of the case."); Carolina Chloride, Inc. v. Richland County, 394 S.C. 154, 714 S.E.2d 869 (2011) (stating an unchallenged ruling, right or wrong, becomes the law of the case); Sheppard v. State, 357 S.C. 646, 662, 594 S.E.2d 462, 471 (2004) (holding when a ruling goes unchallenged, right or wrong, it becomes the law of the case); Caprood v. State, 338 S.C. 103, 525 S.E.2d 514 (2000) (observing where the appealing party does not challenge a ruling, it becomes the law of the case and will not be considered by a reviewing court). Accordingly, it is the law of the case that no such term existed in this plea agreement and Applicant is estopped from now arguing that such a term existed when he failed to appropriately challenge it on appeal. Because no such term existed, counsel cannot be deemed deficient for his handling of a non-existent term.

Next, this claim must fail because counsel articulated a valid, well-reasoned strategic basis for not interjecting or otherwise objecting during the plea proceeding as it would have likely let to the plea falling apart and all-but-certain conviction at trial (at least at to the second-degree criminal sexual conduct with a minor charge). Counsel knew that his client had *no* viable defense to the charge to which he was pleading guilty, knew the plea offer was extremely advantageous because it resolved all pending charges while only having Applicant acknowledge guilt for the crime to which he had always acknowledged guilt, and avoided a trial where he very likely would have been convicted on all counts based on the evidence presented in discovery, including statements from all vicitms

implicating him as an active participant in the human trafficking scheme. Counsel logically concluded that any sort of objection would have led to a withdrawal of the plea and an immediate trial to his client's detriment. He strategically decided to remain silent to preserve the advantageous plea agreement with a hope that his client would receive a sentence in the middle of the range (around ten years). This strategic decision was reasonable based on the circumstances and counsel was not deficient.

Additionally, this claim also fails because there was no such term requiring the State to remain silent as to an appropriate sentence, as Judge Lee correctly found during the general sessions proceeding (specifically during the motion to reconsider his sentence). Assistant Solicitor Simpson testified to this at length—there was never a provision that the State would remain silent as to sentencing, despite what Applicant or his counsel might have *wished* would have happened at the plea. The record does not support a conclusion that Applicant's assertions that such a term existed.

Finally, this claim also must fail because Applicant cannot establish any prejudice where Judge Lee was expressly presented with this argument and rejected it, instead finding she sentenced Applicant based on the victim impact statement, the extremely favorable disposition of his related charges (complete dismissal), and his prior record (that included probation violations as a result of these very charges). The plea court was made aware of this argument and expressly rejected it, and then put all of the independent reasons for its sentence on the record. (Mot. To Recons. Tr. p. 10). Applicant cannot establish that his proceeding would have been different had counsel informed the court of this term because no such term existed, and even if it had, the plea court articulated distinct and independent reasons for its sentence. Additionally, this purported term was not what induced the plea, as Applicant incredibly testified that he believed he would receive a time served sentence in

exchange for his plea to a sex crime against a child. This Court finds this claim fails and relief is denied.

2 A) Plea Counsel neglected to introduce as a Defendant's Exhibit documentary evidence that would have corroborated the terms of an agreement with the State concerning the sentencing in this case.

Applicant next argues that counsel was ineffective for failing to present the emails with the State as documentary evidence of the plea agreement term that the State would remain silent as to sentencing. However, as this Court found as to claim number one, there simply was no such plea agreement term that required the State to remain silent. Judge Lee correctly found this during the motion to reconsider the sentence, Applicant failed to challenge this factual finding on appeal, and, accordingly, it is now the law of the case that no such term existed for the same reasons set forth above. Counsel cannot be deficient for his handling of a non-existent term. Moreover, counsel articulated a reasonable strategy in electing not to object or otherwise stop the plea.

Moreover, the record is clear that these emails *were* in fact provided to Judge Lee during the motion to reconsider proceeding. See Mot. To Recons. Tr. p. 6. Judge Lee reviewed these emails, as she repeatedly indicates during the motions hearing, found that such an agreement did not exist based on these emails, and rejected this claim. This Court finds that counsel cannot be deficient for failing to present something to the court that eventually was presented and had no impact on the outcome of the proceeding. This Court finds that this claim lacks merit and denies relief.

3 A) Plea Counsel neglected to preserve Applicant's right to be fully and fairly heard on the question of the existence of a plea agreement in his case by neglecting to introduce an email between Plea Counsel and the Assistant Solicitor assigned to this case as a Defendant's Exhibit.

This claim is nearly identical to the claim above and this Court's ruling is it the same—there simply was no such plea agreement term that required the State to remain silent. Judge Lee correctly

found this during the motion to reconsider the sentence, Applicant failed to challenge this factual finding on appeal, and, accordingly, it is now the law of the case that no such term existed. Counsel cannot be deficient for his handling of a non-existent term. Again, Judge Lee was also presented with these exact emails and arguments at the motion to reconsider and the emails and arguments had no change of the outcome of the proceeding. Counsel properly presented the plea court with these emails, which were "presented to the Court" for purposes of Rule 210, SCACR ("The Record on Appeal shall include all matter designated to be included by any party under Rule 209 and shall comply with the requirements of Rule 267. The Record shall not, however, include matter which was not presented to the lower court or tribunal."). This Court finds counsel properly preserved the issue for appellate review and was not deficient. This Court finds Applicant has not met his burden of proof as to this claim and denies relief.

4 A) Plea Counsel neglected to object, at the first available opportunity, when the prosecutor in this matter failed to honor the terms of an agreement she had made with Applicant, through his Plea Attorney.

This claim is directly related to the three previous claims, and the same reasons for the denial of relief apply. First, Applicant is precluded from now arguing that there was a term for the State to remain silent when the plea court expressly rejected this claim and he failed to challenge it on appeal. Moreover, Judge Lee correctly found such a term did not exist when she was presented with this information at the motion to reconsider proceeding. This Court finds counsel was not deficient for not advising the court of a non-existent term, and counsel provided a reasonable, strategic basis for why he did not interject or otherwise stop the plea. Applicant has not established any deficiency of counsel.

Additionally, this Court finds Applicant cannot establish prejudice where the plea court was presented with this information and the result remained unchanged. The Applicant also testified it

was not this term that induced the plea, but rather, a wildly incredible claim that he would receive no active imprisonment for this sex crime against a minor. This Court finds Applicant cannot meet his burden of proof and denies relief.

5 A) Plea Counsel was ineffective for failing to discuss with Applicant the issue of whether he wished to make a Motion to Withdraw his plea based upon the failure of the State to honor the terms of the plea agreement.

To the extent that this claim relies upon the assumption that there was a plea agreement that the State would remain silent as to sentencing, this Court finds this claim must fail as such a term simply did not exist as the prosecutor testified at the evidentiary hearing and Judge Lee found at the motion to reconsider hearing.

Regardless of this faulty assumption, this Court finds this claim still fails because it is not credible that Applicant would have forgone an extremely favorable plea offer for the dismissal of *all* related charges (including three human trafficking charges) and proceeded to trial on all charges. Assistant Solicitor Simpson testified the case was on the cusp of trial when Applicant agreed to plead guilty and his main concern appeared to be the dismissal of human trafficking charges, as evidenced by his rejection of the earlier plea offer that would have required him to plead to one count of human trafficking. Had counsel moved to withdrawal the plea, Applicant would have been facing all his original charges and an all-but-certain conviction at trial based on the significant evidence of his guilt, including his own confession to having sexual relations with a fifteen-year-old child. Additionally, Applicant testified that he only pled guilty because he believed he would receive a sentence requiring no active incarceration, not that the State would remain silent as to sentencing. This is clearly refuted by the record. This Court finds this lack is without merit and denies relief.

6 A) Plea Counsel was ineffective for failing to fully argue the issues relating to the State's failure to honor an express agreement with Applicant, and for failing to introduce documentary evidence which supported the existence of that agreement, and thereby prejudiced Applicant's ability to fully argue that issue on direct appeal.

This Court notes this claim is the essentially the same as claim number three and must fail for the same reasons. As this Court found as to claim number three, counsel did present the documentary evidence (the emails) to the plea court at the motion to reconsider hearing. Accordingly, these emails were "presented to the court" for purposes of appellate review and nothing precluded them from being included in a record on appeal pursuant to our appellate court rules. See Rule 210(c), SCACR (discussing the contents of a record on appeal, with prohibits matters not presented to the lower court). Instead of presenting this claim (and these emails) for appellate review of Judge Lee's finding that the plea agreement was not violated and did not include a term that the State would remain silent, Applicant made a knowing, intelligent, and voluntary decision to withdrawal his direct appeal. This was not due to any failing or deficiency of counsel. This Court finds this claim must fail and denies relief.

7 A) Plea Counsel was ineffective for failing to explain to Applicant the weaknesses in the State's cases on the two counts of trafficking pending against him, where the scarcity of competent evidence on those charges, bore directly on Applicant's ability to engage in a thorough analysis of the benefits and risks of going to trial versus entering a plea of guilty under the plea agreement to Criminal Sexual Conduct with a minor to which Applicant pleaded guilty.

Initially, this Court finds that in making this allegation, Applicant inaccurately describes the State's evidence as "scarce" as it relates to two of the human trafficking charges. However, as the record from the plea proceeding and the testimony of Assistant Solicitor Simpson reflect, the evidence against Applicant was incredibly strong as to all charges, including all three human trafficking charges. All three minor victims gave statements that described Applicant's active participation in the

human trafficking ring, including that he acted as the "muscle" to keep these children in a constant state of sexual assault through fear and intimidation (and, as to one of the minor victims, his own sexual assault of her). Applicant has failed to present any credible evidence or argument as to why there was a "scarcity of competent evidence" as to the two human trafficking charges. Accordingly, this Court finds Applicant has failed to meet his requisite burden of proof and this claim must fail.

9 A) Applicant's plea of guilty was not freely and intelligently entered inasmuch as it was entered in reliance upon information provided to him by Plea Counsel which the State subsequently denounced as untrue and not binding upon the prosecution.

This Court finds this claim must fail because it is not supported by the record. At the evidentiary hearing, Applicant incredibly testified he pled guilty based on the advice of counsel that he would receive no active incarceration and would walk out of the courthouse on the day of the plea despite pleading guilty to a sex crime involving a child. Counsel adamantly disagreed with this testimony, stating unequivocally that he never gave Applicant such advice. Applicant has presented no evidence whatsoever that his plea was induced by an agreement that the State would remain silent as to sentence. As Applicant has failed to meet his burden of proof as to this claim, this Court finds this claim must fail and relief must be denied.

10 A) Applicant's plea was not knowingly and voluntarily entered inasmuch as it was entered in strict reliance upon Plea Counsel's advice that the prosecution was not going to make any recommendation as to sentence if he agreed to plead to one count of Second Degree CSC with a minor. Applicant asserts that he would not have waived his right to trial by jury and pleaded guilty if he had know that counsel had not obtained written confirmation that the state agreed not to make any recommendation at his plea and sentencing proceeding.

This Court finds this claim is nearly identical to claim number nine above and also must fail because it is not supported by the record. At the evidentiary hearing, Applicant incredibly testified he pled guilty based on the advice of counsel that he would receive no active incarceration and would

walk out of the courthouse on the day of the plea despite pleading guilty to a sex crime involving a child. Counsel adamantly disagreed with this testimony, stating unequivocally that he never gave Applicant such advice. Applicant has presented no evidence whatsoever that his plea was induced by an agreement that the State would remain silent as to sentence. As Applicant has failed to meet his burden of proof as to this claim, this Court finds this claim must fail and relief must be denied.

11 A) Plea counsel was ineffective for neglecting to verify in writing all the terms of the plea deal in place, as extended by the State and accepted by Applicant, prior to the Plea proceeding held in this matter.

This Court notes this claim is strikingly similar to prior claims made and the argument against it remains the same. Applicant failed to challenge Judge Lee's factual ruling that no plea offer existed, and, accordingly, it is the law of the case that no such term of silence regarding sentencing was part of the plea agreement. Additionally, the credible evidence before this Court establishes that no such term was included in the plea offer, as testified to by the prosecution and determined by Judge Lee. Moreover, this position was advanced to Judge Lee and rejected, with Applicant's sentence remaining unchanged. This Court finds Applicant cannot meet his requisite burden of proof as to deficiency or prejudice, and, accordingly, denies relief.

12 A) Plea Counsel was ineffective for failing to establish in writing, prior to accepting a plea deal with the State on behalf of Applicant, that the State's agreement not to recommend any sentence, as expressed in its first plea offer, remained part of the plea deal after they agreed to dismiss trafficking charges against Applicant.

This Court again notes this claim is strikingly similar to prior claims made and the argument against it remains the same. Applicant failed to challenge Judge Lee's factual ruling that no plea offer existed, and, accordingly, it is the law of the case that no such term of silence regarding sentencing was part of the plea agreement. Additionally, the credible evidence before

this Court establishes that no such term was included in the plea offer, as testified to by the prosecution and determined by Judge Lee. Moreover, this position was advanced to Judge Lee and rejected, with Applicant's sentence remaining unchanged. Applicant cannot meet his requisite burden of proof as to deficiency or prejudice, and, accordingly, this claim fails and relief is denied.

13 A) Plea Counsel was ineffective for failing to advise Applicant of his right to pursue a Motion to Withdraw his plea as an alternative request to the Motion to Reconsider Sentence that was filed on his behalf.

This Court notes that this claim is similar to claim number five and must fail for the same reasons as set forth above. Counsel provided a strategic reason for not moving to withdrawal the plea based on the facts and circumstances of this case, and this strategic decision was objectively reasonable. Accordingly, this Court finds Applicant cannot establish any deficiency of counsel and relief is denied.

14 A) Plea Counsel was ineffective for neglecting to immediately bring to the Court's attention the fact that the State was violating a term of the plea agreement once Assistant Solicitor Simpson began arguing for a harsh sentence in this case.

This Court again notes that this claim is the same as prior claims made and the findings for deny the claim remain the same. Applicant failed to challenge Judge Lee's factual ruling that no plea offer existed, and, accordingly, it is the law of the case that no such term of silence regarding sentencing was part of the plea agreement. Additionally, the credible evidence before this Court establishes that no such term was included in the plea offer, as testified to by the prosecution and determined by Judge Lee. Moreover, this position was advanced to Judge Lee and rejected, with Applicant's sentence remaining unchanged. Counsel also provided a valid, strategic reason for not objecting or otherwise stopping the plea. For all these reasons, this Court finds Applicant cannot meet his requisite burden of proof as to deficiency or prejudice, and this claim is denied.

15 A) Plea Counsel was ineffective for failing to present the plea judge with copies of all the emails exchanged between him and Assistant Solicitor Simpson concerning plea negotiations in response to and request from the Judge's law clerk for documents relevant to plea offers.

This Court notes this claim is essentially the same claim as claim number two and number six and must fail for the same reasons as set forth above. These emails *were* presented to Judge Lee and she nevertheless found that the pela agreement did not contain a provision requiring the State to remain silent. This issue was preserved for appellate review, and rather than pursue a challenge to Judge Lee's decision, Applicant made a knowing, intelligent, and voluntary decision to withdrawal his direct appeal. This Court finds this claim must be denied.

16 A) Plea Counsel was ineffective for neglecting to confirm on the record which emails were handed up to the Judge during the hearing on his MTRS, by date and sender, thereby establishing some kind of reliable record of what was before the court. This was crucial where the documents sent to the Plea Judge prior to the hearing did not include multiple relevant emails.

This Court notes this claim is essentially the same claim as claim number two, number six, and number sixteen and must fail for the same reasons as set forth above. The record is abundantly clear which emails were provided to Judge Lee and, at the motion to reconsider hearing, Judge Lee confirms that she has read the emails and considered them in her denial of the motion to reconsider the sentence. This Court finds this claim must be denied.

17 A) Plea counsel was ineffective for neglecting to investigate what offers had been extended to Applicant's female co-defendant who was, as revealed through the discovery process, the main player in the alleged trafficking conspiracy, and for failing to present that information to the Plea Judge in mitigation of sentencing. Applicant submits he was prejudiced thereby where, despite the fact that his trafficking charges were dismissed, the fact that he was charged in connection to this conspiracy was well known to the Court and where the Court was aware that those counts were dismissed as part of a plea bargain, leaving the realistic possibility that those factors might influence the sentence in the charge pleaded to; second degree CSC with a minor.

This Court finds this claim must fail as a matter of law and fact because it does not comport with the reliable record made at the plea proceeding, motion to reconsider proceeding, or the testimony presented at the evidentiary hearing. Initially, Applicant's assertion that someone else was the "main player" in the human trafficking ring and that he was just an unfortunate bystander who was unjustly indicted for human trafficking is absurd and not based on the record before this Court. All competent and credible evidence before this Court establishes that Applicant was active participant in the human trafficking ring, with the minor victims describing him as the threatening figure that prevented them from escaping their repeated sexual assaults. All three minor victims gave statements that implicated Applicant as a participant in the human trafficking ring. The prosecutor described the human trafficking ring as all co-defendants having their own, active role in the ring, including Applicant. This information was provided to Judge Lee to give her an accurate portrayal as to how the crimes occurred and the extraordinarily substantial benefit Applicant was receiving as a result of his plea agreement. This information was properly considered by the plea court. This Court finds counsel was not deficient for failing to object to information that was properly before the plea court and Applicant cannot establish any resulting prejudice. This Court finds this claim must be denied.

18 A) Plea counsel was ineffective for allowing his client to plead guilty on an indictment which alleged he had sexual relations with a girl over the age of 11, but under the age of 14.

This Court finds this claim fails as a matter of law because Applicant did *not* plead to an indictment which alleged he had sexual relations with a girl over the age of eleven but under the age of fourteen. Applicant was properly indicted for second-degree criminal sexual conduct with a minor who was under the age of sixteen, as clearly indicted on the face of the indictment issued

during the July 2017 term. The body of the indictment also properly includes the minor victim's birthday, reflecting that she was fifteen years old at the time of the sexual assault. However, the indictment did originally contain a scrivener's error indicating the victim was less than fourteen but at least eleven, despite the birthday clearly indicating the victim's age in the same sentence. This scrivener's error was corrected by the consent of the parties prior to the plea to properly reflect the charge to which Applicant was pleading guilty. This Court finds counsel was not deficient for consenting to the amendment, as it comported with the facts of the case and the discovery he had been provided and allowed his client to accept an extremely favorable plea offer to a charge for which he had *no* viable defense and to which Applicant always agreed he was guilty. This Court finds this claim must be denied.

19 A) Plea Counsel was ineffective for sending Assistant Solicitor Simpson an email, acting on behalf of Applicant, accepting her offer to plead to Second Degree CSC with a minor, with all other charges being dropped, without expressly mentioning his understanding that the plea bargain included the original agreement that the state would not recommend any sentence.

As an initial matter, this Court notes that it has found numerous above times in relation to similar claims that there simply was not a plea agreement that the State would remain silent as to sentencing. Had counsel expressly mentioned this term, it would have been rejected as expressed by Assistant Solicitor Simpson at the evidentiary hearing and would have resulted in Applicant proceeding to trial on three counts of human trafficking, second-degree criminal sexual conduct with a minor, and contributing to the delinquency of a minor with strong evidence of guilt supporting convictions as to each charge. Because no such term existed, as determined by Judge Lee and expressed by Assistant Solicitor Simpson at the motions hearing, counsel cannot be deficit for failing to clarify or request a term that did not exist and would not have been agreed to by the

State. This Court finds Applicant has failed to meet his burden of proof as to this claim and denies relief.

> ***20 A) Plea Counsel was ineffective for neglecting to argue in support of his argument, in his motion and at the MTYRS hearing, that the "second offer" was not in fact a new offer separate from the first, where Assistant Solicitor Simpson made the offer to plead to 2nd degree CSC with a minor, with the state dismissing the trafficking counts, without reiterating the earlier agreement to dismiss other counts against Applicant, thereby creating a reasonable belief that the dismissal of the trafficking counts was an addition to the original offer, not a superseding plea offer.***

This Court finds this claim must fail as it is directly refuted by the record. At the motion to reconsider Applicant's sentence, counsel did in fact argue that the "second" offer was an extension of the first offer, and, accordingly, all terms should remain. See Mot. To Recons. Tr. p. 5-8, p. 12. This Court finds this claim is directly refuted by the record and is denied.

> ***21 A) Plea Counsel was ineffective for Volunteering a proposed Order to Judge Lee denying Applicant's motion to reconsider sentence where the order presented, reflected a finding that there had been no violation of a plea bargain. Applicant was prejudiced by this error where it effectively denied Counsel for the Applicant the opportunity to argue a motion to reconsider that ruling.***

This Court finds Applicant has failed to present any plausible arguments to support his theory that he would have been precluded from filing a motion to reconsider the denial of his motion to reconsider his sentence based on his drafting of a barebones proposed order for the Court's consideration *after* the Court had already orally denied his motion and *after* he had already filed a notice of appeal that was held in abeyance until a formal written order was issued. This Court finds counsel prudently acted to protect his client's appellate rights by ensuring a formal order was entered so as to not delay his right to seek redress on appellate review. This Court finds this claim lacks merit and denies it.

22 A) Counsel was ineffective for neglecting to use available information to more thoroughly make an argument that the last statement of an offer amounted to an amendment to the original offer as opposed to a "new" offer as has been argued by the state.

This Court notes this claim is essentially the same as claim number twenty above an must fail for the same reasons as set forth above. This claim is directly refuted by the record. At the motion to reconsider Applicant's sentence, counsel did in fact argue that the "second" offer was an extension of the first offer, and, accordingly, all terms should remain. See Mot. To Recons. Tr. p. 5-8, p. 12. This Court finds this claim is directly refuted by the record and must be denied. This Court also finds Applicant has failed to present any additional "information" that he asserts should have been used to more thoroughly make an argument in support of this potion. This Court finds Applicant has failed to meet his burden of proof and denies relief.

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.

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

IT IS THEREFORE ORDERED:

1. This application for post-conviction relief is denied and dismissed with prejudice; and

2. Applicant Geordi Heyward shall remain remanded to the custody of the State of South Carolina.

AND IT IS SO ORDERED this 14th day of April, 2022.

GEORGE M. MCFADDIN, JR.
Presiding Judge
Fifth Judicial Circuit

Sumter, South Carolina