

# APPENDIX C



## SUPREME COURT OF GEORGIA Case No. S21A0871

September 29, 2021

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

### HOLLY HARVEY v. THE STATE.

On August 19, 2021, Harvey filed a pro se Motion for Reconsideration. Harvey was represented by counsel during her appeal, and counsel has never withdrawn from the representation. “[A] criminal defendant in Georgia does not have the right to represent [herself] and also be represented by an attorney, and pro se filings by represented parties are therefore unauthorized and without effect.” (Citations and punctuation omitted.) *Dos Santos v. State*, 307 Ga. 151, 154 (2) (834 SE2d 733) (2019). Because Harvey is not permitted to file a pro se motion while being represented by counsel, her filing is hereby order stricken from the docket.

*All the Justices concur, except Colvin, J., not participating.*

SUPREME COURT OF THE STATE OF GEORGIA  
Clerk's Office, Atlanta

I certify that the above is a true extract from the  
minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto  
affixed the day and year last above written.

John S. Barnes, Clerk

In the Supreme Court of Georgia

Decided: August 10, 2021

S21A0871. HARVEY v. THE STATE.

BETHEL, Justice.

Holly Harvey entered a negotiated guilty plea to two counts of malice murder for the killing of her grandparents, Carl and Sarah Collier.<sup>1</sup> While serving consecutive life sentences, Harvey sought to challenge that plea through a motion for an out-of-time appeal,

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<sup>1</sup> On September 15, 2004, a Fayette County grand jury indicted Harvey for two counts of malice murder, two counts of felony murder, and one count of armed robbery in connection with the stabbing deaths of the Colliers. On April 14, 2005, after reaching a deal with the State concerning sentencing recommendations and the disposition of other counts, Harvey entered a guilty plea to two counts of malice murder, and the trial court entered an order of nolle prosequi as to the remaining counts. The same day, the trial court sentenced Harvey to two consecutive life sentences. On June 22, 2012, Harvey filed a pro se motion for out-of-time appeal, which she later amended several times. On November 13, 2020, Harvey filed through counsel a “superseding motion to permit an out-of-time appeal from the judgment on her guilty plea.” Following a hearing on December 29, 2020, the trial court denied the motion for an out-of-time appeal on February 19, 2021. Harvey filed a notice of appeal directed to this Court on February 24, 2021, which she amended on March 10, 2021. This case was docketed in this Court to the term commencing in April 2021 and submitted for a decision on the briefs.

which the trial court denied. Harvey appeals from the denial of that motion. She argues that her plea counsel provided constitutionally ineffective assistance in advising her of her appellate rights and that she is entitled to withdraw her guilty plea due to that ineffectiveness. Because Harvey's claim that trial counsel provided constitutionally ineffective assistance fails, we affirm.

1. At the hearing on the entry of her guilty plea, Harvey testified about the following. At the time of the August 2, 2004 murders, Harvey, who was 15, lived with her grandparents, the Colliers, and was in a relationship with 16-year-old Sandy Ketchum.<sup>2</sup> On the day of the murders, Harvey and Ketchum decided to kill the Colliers and take their truck. They tested several knives together inside the residence to determine if they were sharp enough to stab someone. Harvey testified that there were several reasons she wanted to kill her grandparents. First, she explained that she wanted to kill her grandmother because her grandmother had called her a "slut" and would often tell her that the only reason Harvey

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<sup>2</sup> Ketchum's case is not part of this appeal.

lived there was so that she did not "go to [DFCS]." Harvey also testified that her grandfather hit her and that she wanted to kill her grandparents so that she and Ketchum "could be together" and "could leave."

On the afternoon of the murders, Harvey and Ketchum smoked marijuana so that the odor would lure Harvey's grandparents to Harvey's downstairs bedroom to investigate. When her grandparents entered the room, Harvey retrieved a knife concealed in her pants and repeatedly stabbed her grandmother in the back. When Mrs. Collier screamed, Mr. Collier turned around, saw what was occurring, and punched Harvey in the face. Mr. Collier attempted to pin Harvey down, but Harvey stabbed him in the chest. Harvey called to Ketchum to help. Mr. Collier retreated up the stairs and Harvey handed Ketchum the knife. Fearing her grandfather was going to call 911, Harvey chased him up the stairs. Harvey testified that when she saw her grandfather in the kitchen with a telephone in his hand, she pulled the cord out of the wall, took the knife Mr. Collier had grabbed to defend himself out of his hand, and

started stabbing him "real fast." Harvey testified that she was covered in blood, and that most of it came from a stab wound to her grandfather's neck. Mr. Collier staggered around the kitchen island and collapsed onto the floor.

Meanwhile, downstairs, Ketchum had stabbed Mrs. Collier in the heart, the back of the head, and the arm. Harvey and Ketchum then stole the Colliers' truck, took the murder weapons, and drove to Tybee Island, where the police arrested them the following day. Harvey entered a plea of guilty to two counts of malice murder, was sentenced to consecutive life terms of imprisonment, and began serving her sentences. Around 15 years later, Harvey filed a motion for an out-of-time appeal through new counsel.

Plea counsel testified as follows at the hearing on Harvey's motion. Harvey asked plea counsel where she would be taken after she entered the guilty plea, and counsel explained what would happen. Plea counsel also told Harvey about the possibility of withdrawing her plea. Plea counsel explained to Harvey that there was a limited time to withdraw the plea and that she would need to

establish a basis for doing so, which plea counsel did not think existed. Plea counsel further explained to Harvey that if she chose to withdraw the guilty plea, she would have to go to trial, would likely be convicted, would likely be sentenced to additional time, and that another attorney would ultimately need to be brought in to handle the plea withdrawal. Harvey did not indicate to plea counsel that she wished to pursue this option and instead asked plea counsel what counsel recommended. Plea counsel responded that if she thought withdrawing the guilty plea was in Harvey's best interest, then she would not have recommended entering a guilty plea to begin with. After this interaction, Harvey did not ask plea counsel to withdraw the plea or to file a direct appeal, and did not express any dissatisfaction with her sentence for many years.

In denying Harvey's motion for an out-of-time appeal, the trial court found, among other things, that Harvey did not establish that she had reasonably demonstrated to plea counsel that she was interested in appealing. This appeal followed.

2. Harvey first argues that the trial court erred in rejecting her

claim that plea counsel provided constitutionally ineffective assistance by not adequately advising her of her appellate rights following entry of her guilty plea. She argues that but for counsel's constitutionally ineffective assistance, she would have timely appealed. We conclude that Harvey's claim lacks merit.

A trial court's ruling on a motion to file an out-of-time appeal is reviewed for an abuse of discretion. See *Davis v. State*, 310 Ga. 547, 548 n.4 (2) (852 SE2d 517) (2020). A defendant "is entitled to an out-of-time appeal if [her] counsel's constitutionally deficient performance deprived [her] of an appeal of right that [s]he otherwise would have pursued." *Collier v. State*, 307 Ga. 363, 364 (1) (834 SE2d 769) (2019). Where, as here,

a defendant alleges that [s]he was deprived of an appeal of right that [s]he otherwise would have pursued by [her] counsel's constitutionally deficient performance in providing advice about or acting upon such appeal, that alleged violation is reviewed under the familiar standard of *Strickland v. Washington*, 466 U. S. 668 (104 SCt 2052, 80 LE2d 674) (1984). With respect to the first component of the *Strickland* standard, the defendant must show that [her] appeal of right was lost as a consequence of [her] counsel's deficient performance, and the trial court must make a factual inquiry into those allegations. With

respect to the second component of the *Strickland* standard, the defendant is required to demonstrate only that there is a reasonable probability that, but for counsel's deficient performance, [s]he would have timely appealed.

(Citation and punctuation omitted.) *Davis*, 310 Ga. at 549 (2).

To determine whether plea counsel was constitutionally ineffective for failing to file a timely notice of appeal, the first question that must be answered is whether counsel "consulted" with the defendant about an appeal – that is, whether counsel "advise[d] the defendant about the advantages and disadvantages of taking an appeal, and ma[de] a reasonable effort to discover the defendant's wishes." If counsel adequately consulted with the defendant, counsel performed deficiently only if he failed "to follow the defendant's express instructions with respect to an appeal."

*Ringold v. State*, 304 Ga. 875, 879 (823 SE2d 342) (2019) (quoting *Roe v. Flores-Ortega*, 528 U. S. 470, 478 (II) (A) (120 SCt 1029, 145 LE2d 985) (2000)). "However, if counsel did not consult with the defendant, the court must in turn ask a second, and subsidiary, question: whether counsel's failure to consult with the defendant itself constituted deficient performance." (Citation and punctuation omitted.) *Ringold*, 304 Ga. at 879.

Counsel has a constitutionally imposed duty to consult

with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that [she] was interested in appealing. In making this determination, courts must take into account all the information counsel knew or should have known. For example, a highly relevant factor in this inquiry will be whether the conviction follows a trial or guilty plea, both because a guilty plea reduces the scope of potentially appealable issues and because such a plea may indicate that the defendant seeks an end to judicial proceedings

(Citation and punctuation omitted.) *Id.*

Here, Harvey does not raise any argument that a duty to consult existed because “a rational defendant would want to appeal.” *Id.* Instead, Harvey argues that plea counsel had a constitutional duty to consult with her about an appeal because she demonstrated an interest in appealing through her post-plea questions to counsel and because she asked plea counsel whether she should move to withdraw the plea. However, under the facts of this case, we disagree that this exchange created a duty to consult beyond the scope of counsel’s responses to Harvey’s questions.

Even assuming plea counsel failed to properly consult with

Harvey regarding an appeal, we cannot say that the trial court abused its discretion by concluding that that failure was not constitutionally deficient because Harvey's exchange with counsel did not demonstrate that she had an interest in appealing. Indeed, the record supports the trial court's finding: counsel testified that, after Harvey entered her plea, she asked counsel about where she would be taken after entering her plea, and that counsel explained to her what would happen. Harvey does not point to any evidence that she expressed to counsel dissatisfaction with her plea or sentence or that she otherwise expressed to counsel an interest in appealing or otherwise challenging her plea, including when counsel explained to her in detail the option of withdrawing her plea. In addition, Harvey waited years to express any dissatisfaction with her plea agreement. Compare *Palacios v. United States*, 453 Fed. Appx. 887, 888-889 (11th Cir. 2011) (duty to consult where counsel acknowledged defendant was unhappy following sentencing and asked counsel about what to do next). Based on the foregoing, we determine that the trial court did not abuse its discretion in

concluding that Harvey did not reasonably demonstrate an interest in appealing and that plea counsel therefore did not perform deficiently. See *McDaniel v. State*, \_\_\_ Ga. \_\_\_ (1) (857 SE2d 479, 483) (2021) (no duty to consult where, among other things, defendant never expressed an interest in appealing or a desire for plea counsel to withdraw the guilty plea). Accordingly, Harvey's enumeration fails.

3. Harvey next argues that the Sixth Amendment to the United States Constitution requires this Court to create a right to file an out-of-term motion to withdraw a guilty plea when counsel's deficient performance has frustrated her ability to seek review of that plea. However, because we hold that Harvey's plea counsel did not perform deficiently in advising Harvey regarding her appellate rights, we need not address this argument.

*Judgment affirmed. All the Justices concur, except Colvin, J., not participating.*

IN THE SUPERIOR COURT OF FAYETTE COUNTY

STATE OF GEORGIA

STATE OF GEORGIA )  
vs. ) 2004R-0342  
HOLLY HARVEY, ) Judge Sams  
Defendant. )

FILED IN OFFICE  
CLERK OF SUPERIOR, STATE  
AND MAGISTRATE COURTS  
SHEILA STURDIVANT, CLERK  
2021 FEB 19 AM 11:34  
FAYETTE COUNTY, GA

ORDER DENYING DEFENDANT'S  
MOTION TO ALLOW AN OUT OF TIME APPEAL

The Defendant's Motion to Permit and Out-of-Time Appeal from the Judgment on Her Guilty Plea, filed on November 13, 2020 in the above-styled case having come before this Court for consideration on the 29<sup>th</sup> day of December 2020, and the Court having heard evidence presented by both parties, and having considered the same as well as the entire record, the Court finds as follows:

FACTS AND PROCEDURAL HISTORY

This case stems from the August 2, 2004 murder of Harvey's maternal grandparents Carl and Sarah Collier in Fayette County. At the time of the homicides, then fifteen (15) year old Harvey was living with her grandparents and was involved in a relationship with her then sixteen (16) year old co-defendant, Sandy Ketchum. On the day of the murders, Harvey and Ketchum decided to kill Harvey's grandparents and take their truck. Together with Ketchum, Harvey tested

several knives inside the victims' residence to determine if they were sharp enough to stab someone. [T. (Plea, 4/20/2005) 16-19, 21]. Harvey explained she wanted to kill her grandmother, Sarah Collier, because she called Harvey a "slut" and "used to scream at me" and "tell me that the only reason that I lived there was...so I didn't go to DFACS." [T. (Plea, 4/20/2005) 22]. Regarding her motivation to kill her grandfather, Carl Collier, Harvey explained, "he hit me." [T. (Plea, 4/20/2005) 22]. Further, Harvey stated she killed her grandparents so that she and her co-defendant Ketchum "could be together" and "could leave." [T. (Plea, 4/20/2005) 23].

On the afternoon of the murders, Harvey and Ketchum smoked marijuana so that the odor would lure Harvey's grandparents to investigate. [T. (Plea, 4/20/2005) 20-21]. When Harvey's grandparents entered Harvey's room, Harvey retrieved a concealed knife from the back of her pants and repeatedly stabbed her grandmother "in the back." [T. (Plea, 4/20/2005) 24-26]. When Sarah Collier "screamed", Carl Collier turned around, saw what was occurring and "punched [Harvey] in the face." [T. (Plea, 4/20/2005) 27]. After Carl Collier "had [Harvey] pinned down", she stabbed him "in the chest." [T. (Plea, 4/20/2005) 27]. Carl Collier retreated up the stairs and, fearing he was going to call 911, Harvey gave chase. [T. (Plea, 4/20/2005) 28]. Harvey testified that, when she saw her grandfather with the telephone in his hand, she "pulled the cord out of the wall"

and "started stabbing my grandpa real fast." [T. (Plea, 4/20/2005) 28]. Harvey testified she was covered in blood, "like somebody poured a big old bucket of hot water on me." [T. (Plea, 4/20/2005) 28]. Harvey testified this massive amount of blood came from a stab wound to her grandfather's neck. [T. (Plea, 4/20/2005) 29]. Carl Collier "stagger[ed]" around the kitchen island and fell onto the kitchen floor. [T. (Plea, 4/20/2005) 28].

Harvey testified that Ketchum told her "she was stabbing my grandma in the heart and in the back of the head and that she had cut some of the skin off of [her grandmother's] arm." [T. (Plea, 4/20/2005) 28-29]. Harvey testified Ketchum had blood "on her hands and shoes"; whereas blood was "all over [Harvey's] face and all down the right side of [her] body." [T. (Plea, 4/20/2005) 30]. After murdering her grandparents, Harvey and Ketchum took their truck and the murder weapons because "[Harvey] thought we shouldn't leave them there." [T. (Plea, 4/20/2005) 29-31]. The pair drove the stolen truck to Tybee Island where they were arrested the following day. [T. (Plea, 4/20/2005) 31-33].

With the assistance of counsel and pursuant to a plea agreement, Harvey entered a guilty plea in April 2005 to two counts of malice murder. [T. (Plea, 4/20/2005) Entire]. The court sentenced Harvey to life imprisonment for malice murder with both counts to be served consecutively. [T. (Plea, 4/20/2005) Entire; (Hearing, 12/28/2020) 20]. In consideration of Harvey's guilty plea, the District

Attorney agreed to dismiss one count of Armed Robbery—which carried the potential for an additional consecutive life sentence—stemming from the theft of the victims' truck. Id. No appeal was taken.

In June 2012, Harvey filed a pro se motion for an out-of-time appeal. Following some delay—the undersigned is the fifth judge assigned to preside over this case—an attorney was appointed<sup>1</sup> to represent Harvey. The matter was set for a hearing on December 28, 2020, at which Harvey and her plea counsel testified.

Harvey's plea counsel testified she repeatedly informed Harvey of the rights she was waiving by entering a guilty plea, including her right to an appeal; and, more importantly, that she also informed Harvey of her right to seek to withdraw her guilty plea. [T. (Hearing, 12/28/2020) 16, 19, 31-34, 37-38]. Indeed, Harvey's plea counsel testified that, even after Harvey entered her guilty plea, she met with Harvey in person and spoke with her by telephone and informed Harvey a second time that "she could withdraw it" but "she had a very limited amount of time to do that." [T. (Hearing, 12/28/2020) 37-38, 33-34]. Further, Harvey's plea counsel testified that she informed Harvey, "I didn't think it was in her best interest to do that" because it would result in a harsher sentence if she were convicted by a jury,

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<sup>1</sup>The Court is aware that Harvey was not entitled to court-appointed counsel. Davis v. State, S20A1318, \_\_\_ Ga. \_\_\_ (1) (decided December 7, 2020).

which seemed likely. [T. (Hearing, 12/28/2020) 34-35, 38-39]. Harvey's plea counsel testified that Harvey never expressed any dissatisfaction with her representation. [T. (Hearing, 12/28/2020) 72]. Plea counsel also testified that Harvey never asked her to withdraw her plea or expressed any desire in pursuing an appeal. [T. (Hearing, 12/28/2020) 67-68; 72, ln. 7-16; 35, 38-39, ("She asked me 'what did I advise[?]' and I said 'if I thought you should withdraw it, we wouldn't have entered it.'"); ("I told her she had the right, she never said, 'I wish to do that.'")].

In contrast, Harvey testified that she did not trust her plea counsel and, regarding her understanding of plea counsel's advice, she merely repeated any advice back to counsel. [T. (Hearing, 12/28/2020) 80-81 ("I could repeat it back to her, but I think I had a very limited understanding of what was actually going on."); 81 ("She never explained it to me."); 84 ("[S]he had me terrified. So, I said, 'yes sir, yes sir, yes sir' [at the plea]...I didn't really understand what was going on.")]. Harvey testified she entered a guilty plea to avoid public disclosure of gruesome crime scene photographs and to avoid "five life sentences". [T. (Hearing, 12/28/2020) 80-83, 93-94]. Regarding the withdrawal of her plea, Harvey testified she did not know she could "change her mind" and, had she known, she "would have opted to do that." [T. (Hearing, 12/28/2020) 85-86, 87 ("I didn't know I had that option.")]. Harvey insisted her plea counsel never discussed withdrawing her

plea or pursuing an appeal other than a sentence review. [T. (Hearing, 12/28/2020) 88-89, 93 ("I realized she lied to me to get me to plead guilty."); 95 ("I was not aware of any remedies at that point [when I entered the plea]"). Instead, Harvey maintained she only learned she "had options" when she turned 17 and was moved from a juvenile facility to "the general population." [T. (Hearing, 12/28/2020) 90]. Presently, Harvey maintains, "I believe I was entitled to manslaughter." [T. (Hearing, 12/28/2020) 96-97].

#### CONCLUSIONS OF LAW

##### **I. INEFFECTIVE ASSISTANCE OF COUNSEL**

Harvey argues her plea counsel provided ineffective assistance of counsel for her handling of Harvey's appellate rights, which she argues was objectively unreasonable; and that there is a reasonable probability that, but for plea counsel's performance, Harvey would have timely exercised her right to review.

"A criminal defendant is entitled to an out-of-time appeal if [her] counsel's constitutionally deficient performance deprived [her] of an appeal of right that [she] otherwise would have pursued." Collier v. State, 307 Ga. 363, 364 (1) (834 SE2d 769) (2019); Davis v. State, S20A1318, \_\_\_ Ga. \_\_\_ (2) (decided December 7, 2020). Where a defendant alleges that she was deprived of an appeal of right that she otherwise would have pursued except for her counsel's constitutionally deficient performance in providing advice about or acting upon such appeal, that

alleged violation "is reviewed under the familiar standard of Strickland v. Washington." Collier, 307 Ga. at 365 (1); Davis, \_\_\_ Ga. \_\_\_ (2) (citation and punctuation omitted).

With respect to the first component of the Strickland standard, Harvey must show that her appeal of right was lost as a consequence of her counsel's deficient performance, and this Court must make a factual inquiry into those allegations.

With respect to the second component of the Strickland standard, Harvey is required to demonstrate only that there is a reasonable probability that, but for her plea counsel's allegedly deficient performance, she would have timely appealed.

Id.

Here, the Court finds Harvey testified she filed a motion seeking an out-of-time appeal in 2012 after other adult inmates advised she "had options." Harvey testified that she did not seek an appeal after she entered her guilty plea because she was incarcerated at a juvenile facility until she was 17 and lacked access to resources including a law library. Harvey testified she failed to timely seek withdrawal of her guilty plea because she was never informed of this option. Instead, Harvey maintained her plea counsel "lied" to her in order to induce her guilty plea and also failed to inform her of her right to seek withdrawal of her guilty plea. According to Harvey, had she been properly informed about her right to seek withdrawal, she would have timely pursued this remedy.

Here, of course, Harvey's plea counsel's testimony directly refutes Harvey's testimony in every material aspect. Moreover, Harvey's chief complaints appear to be that 1) owing to prescribed medication, she could have successfully pursued an intoxication defense at trial; 2) plea counsel affirmatively misrepresented her eligibility for parole (after 20 years); 3) she did not knowingly and voluntarily enter her plea; 4) her plea counsel threatened her with "five life sentences" in order to induce her plea; 5) her plea was induced by her plea attorney's misrepresentations about the publication of gruesome crime scene photographs; and 6) a proper disposition of the charges should have involved a plea to voluntary manslaughter, not malice murder. But, because this Court finds the resolution of these six matters turn primarily on the credibility of the witnesses, and because this Court further finds that Harvey's plea counsel was the more credible witness on these points, it is unnecessary to address Harvey's complaints in detail. Nevertheless, the Court will undertake to examine these issues briefly as set out more fully below.

Here, the Court finds that Harvey's plea counsel was admitted to practice law in 1981 and, by 2004, was a member of the board of indigent defense for Fayette County. Plea counsel, an experienced criminal defense attorney, was appointed to represent Harvey on the day of her arrest and visited with Harvey at a juvenile facility on several occasions immediately after her arrest. Plea counsel

applied for a guardian-ad-litem to represent Harvey's best interests and specifically requested that a part-time juvenile court judge be appointed to represent Harvey. This request was granted. Thereafter, plea counsel obtained complete copies of Harvey's school and medical records. [T. (Hearing, 12/28/2020) 22-23].

Upon reviewing these records, plea counsel sought and obtained funds to retain a mental health expert, Dr. Stark, to determine whether Harvey was competent and, if so, whether any viable mental health defenses were available to Harvey. [T. (Hearing, 12/28/2020) 60-63]. The psychiatric evaluation, in counsel's estimation, was not helpful to the defense. In the course of making this inquiry, plea counsel also interviewed Harvey's pediatrician, Dr. Eggert. Plea counsel learned that, while Harvey had previously been prescribed prescription medication, at the time of the murders, she was no longer taking them. [T. (Hearing, 12/28/2020) 63 ("At the time of the murder[s], "she had been off [the prescribed medication]" "[S]he had been off it for several months.")]. Plea counsel testified this information, along with Harvey's unlawful use of marijuana and cocaine on the day of the murder, precluded her from pursuing a defense of prescription medication intoxication. [T. (Hearing, 12/28/2020) 63-64]. The Court finds that plea counsel's assessment and rejection of this potential defense was a reasonable one made as a matter of strategy following plea counsel's thorough investigation. No deficient performance is shown.

Harvey's plea counsel testified she advised Harvey that, while it was unlikely she would be paroled in twenty years, nevertheless, Harvey would be eligible for parole consideration in twenty years. [T. (Hearing, 12/28/2020) 30-31]. Indeed, Harvey admitted during the plea proceedings that she had been advised she could not be eligible for parole before serving at least twenty (20) years. [T. (Plea, 4/20/2014) 33 ("My lawyer tried to make it clear as she can, that I have to serve at least 20 years.")]. Though there appears to be some confusion among Harvey and her current counsel, this Court finds that, under the applicable version of the statute in effect at the time, Harvey was properly advised of her eligibility for parole. See, former OCGA § 42-9-39 (c)<sup>2</sup> ("When a person receives consecutive life sentences as the result of offenses occurring in the same series of acts and any one of the life sentences is imposed for the crime of murder, such person shall serve consecutive

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<sup>2</sup>OCGA § 42-9-39 (c) currently provides that "When a person receives consecutive life sentences as the result of offenses occurring in the same series of acts and any one of the life sentences is imposed for the crime of murder, such person shall serve consecutive 30 year periods for each such sentence, up to a maximum of 60 years, before being eligible for parole consideration." This code section was enacted in 2006, after the commission of these 2004 offenses. See, Ga. L. 2006, p. 379, § 27/HB 1059.

ten-year periods for each such sentence, up to a maximum of 30 years, before being eligible for parole consideration.”). Harvey’s claims that her plea counsel affirmatively misrepresented her eligibility for parole are meritless. Harvey was properly advised regarding her parole eligibility based on the statutes in effect at the time of her plea. Here again, no deficient performance by plea counsel is shown.

Harvey argues her plea was not freely and voluntarily given with a full understanding of the consequences, including her right to an appeal. Harvey also contends her guilty plea was coerced based on her plea counsel’s purported representations that Harvey was facing “five life sentences” and by her plea attorney’s misrepresentations about the publication of gruesome crime scene photographs.

Harvey’s plea counsel testified she repeatedly explained to Harvey all the rights she would be waiving by entering a guilty plea. [T. (Hearing, 12/28/2020) 31-40]. Harvey’s plea counsel specifically discussed Harvey’s right to an appeal from a judgment of conviction entered on a guilty plea, including a limited window of opportunity<sup>3</sup>, but Harvey expressed no interest in an appeal. *Id.* To the contrary,

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<sup>3</sup> Harvey entered her guilty plea on April 20, 2005 in the March 2005 term of court for the Griffin Judicial Circuit. See former OCGA § 15-6-3 (19) (A). Any motion

trial counsel testified Harvey primarily desired to plead guilty to avoid the publication of the crime scene photographs despite plea counsel's warning that others had possession of the photographs and for this reason plea counsel could not prevent them from being distributed to third parties. [T. (Hearing, 12/28/2020) 57-59]. Plea counsel also testified that Harvey was motivated to enter her guilty plea after learning that Ketchum had made incriminating statements following their arrest and intended to testify against Harvey at trial. [T. (Hearing, 12/28/2020) 57-59].

After a review of the plea proceedings, during which Harvey affirmed that she understood each of the various rights she was waiving by pleading guilty, [T. (Plea, 4/14/2005) 5-6], and in light of her plea counsel's testimony<sup>4</sup> which this

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seeking to withdraw her guilty plea had to be filed by September 12, 2005, the second Monday in September 2005.

<sup>4</sup> Among other things, Harvey's plea counsel testified that, based on her multiple conversations with Harvey and following her review of Harvey's school records, she found Harvey "to be intelligent" and formed the opinion that Harvey "had the intelligence to understand" the rights she was waiving. [T. (Hearing, 12/28/2020) 34]. Based on the record, and in light of this Court's observations of Harvey during the hearing and her testimony, this Court is satisfied—as was the judge who

Court credits as truthful, [T. (Hearing, 12/28/2020) 31-35], this Court finds that Harvey's guilty plea was freely and voluntarily entered with a full understanding of the rights she was waiving. Though Harvey claims her plea counsel threatened that she was facing "five life sentences" and promised Harvey that the crime scene photographs would never be published or distributed, this Court finds Harvey's testimony is not credible and, for this reason, is not worthy of belief. Harvey has failed to show that her plea was coerced by her plea counsel or that her plea counsel performed deficiently with respect to her advice regarding the rights Harvey waived by entering her plea.

Finally, Harvey presently claims that an appropriate disposition of her crimes would be a plea to Voluntary Manslaughter. [T. (Hearing, 12/28/2020) State's Exhibit #4; 97 ("I believe that I was entitled to manslaughter.")]. Of course, the decision whether to convey such a plea offer is within the sole discretion of the District Attorney. Based on the testimony of Harvey's plea counsel, expressing concerns that Harvey would be convicted on all counts, especially in light of the purportedly gruesome crime scene photographs, and owing to the State's current opposition to Harvey's pending motion; the Court finds that Harvey has failed to

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accepted the plea—that Harvey made a knowing and voluntary waiver of her rights.

show there is a reasonable probability her desired outcome—that she was “entitled to manslaughter”—will ever occur. See, State v. Kelley, 298 Ga. 527 (783 SE2d 124) (2016) (the trial court does not have the authority to accept a guilty plea to an uncharged, lesser included offense without the consent of the State, and, where the State makes a timely and specific objection, the prosecutor has the legal authority to withdraw his consent from a negotiated plea and demand a trial when he learns that the trial court does not intend to follow the sentencing recommendation.). Under these circumstances, Harvey fails to show her trial counsel performed deficiently in any respect.

In conclusion, this Court finds that Harvey’s plea counsel properly explored whether, in light of a previously prescribed medication, Harvey could have successfully pursued a medication intoxication defense at trial; that plea counsel properly counseled Harvey regarding her eligibility for parole; that plea counsel appropriately counselled Harvey regarding the rights she was waiving resulting in a knowing and voluntary plea; that plea counsel never threatened Harvey with “five life sentences” in order to induce her plea; that Harvey’s plea was not induced by her plea attorney’s representations about the potential for publication of gruesome crime scene photographs; and that there is no evidence showing Harvey was offered a plea to reduced charges. In all these respects, trial counsel’s performance did not constitute a breach of her professional duty to Harvey.

### **Harvey's Right to an Appeal**

The remaining and central question is whether Harvey's plea counsel appropriately counselled Harvey about her right to appeal following the entry of a guilty plea.

Counsel has a constitutionally imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that she was interested in appealing. In making this determination, courts must take into account all the information counsel knew or should have known. See Strickland, 466 US at 690 (focusing on the totality of the circumstances). Although not determinative, a highly relevant factor in this inquiry will be whether the conviction follows a trial or a guilty plea, both because a guilty plea reduces the scope of potentially appealable issues and because such a plea may indicate that the defendant seeks an end to judicial proceedings. Even in cases when the defendant pleads guilty, this Court must consider such factors as whether the defendant received the sentence bargained for as part of the plea and whether the plea expressly reserved or waived some or all appeal rights. Only by considering all relevant factors in a given case can a court properly determine whether a rational defendant would have desired an appeal or that the particular defendant

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sufficiently demonstrated to counsel an interest in an appeal. Roe v. Flores-Ortega, 528 U.S. 470, 480 (II) (A) (120 SCt 1029, 145 LE2d 985) (2000); Davis v. State, \_\_\_ Ga. \_\_\_ (2).

In this case, the record shows and the Court finds that, Harvey has failed to establish she reasonably demonstrated to plea counsel that she was interested in appealing. And yet, despite there being no reason to think that Harvey desired an appeal, nevertheless, her plea counsel consulted with Harvey notwithstanding the absence of a constitutional responsibility to do so. Thus, pretermitted whether Harvey's plea counsel was constitutionally required to advise Harvey of her right to seek to withdraw her guilty plea, this Court finds Harvey was properly advised.

And because Harvey waited years to express any dissatisfaction with the plea agreement, there is no credible<sup>5</sup> evidence of the record showing that Harvey

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<sup>5</sup>Harvey has produced a letter written to her by plea counsel in July 2008 which references "discuss[ing] a habeas" petition and arranging a meeting with plea counsel. In the letter, plea counsel mentions providing plea counsel's copy of Harvey's plea transcript, if desired by Harvey. [T. (Hearing, 12/28/2020) Defendant's Exhibit #2]. The Court finds that, at the time plea counsel wrote this letter, she had been diagnosed with a seizure disorder and due to adjustments with her medication, plea counsel could not recall having authored the letter.

wavered in her desire to plead guilty until 2011 when she began filing motions which substantively sought to attack her guilty plea. Indeed, if Harvey desired to attack her guilty plea earlier, the record shows she could have obtained a copy of her plea transcript from plea counsel as early as the summer of 2008. [T. (Hearing, 12/28/2020) Defendant's Exhibit #2]. Though Harvey presently claims she failed to seek habeas relief owing, in part, to her inability to obtain her plea transcript from plea counsel, [T. (Hearing, 12/28/2020) 113], the record clearly shows otherwise.

Finally, Harvey presently claims that she was sexually and physically abused by her grandparents. [T. (Hearing, 12/28/2020) 108-109, 113]. Pretermitted whether there is any substance to these claims, the Court finds that plea counsel testified—in response to questioning—that she ensured Harvey's juvenile records were protected from disclosure to the media (and presumably from the prosecuting attorney) as a matter of strategy. [T. (Hearing, 12/28/2020) 64-65]. More importantly, the Court finds that plea counsel was never asked whether she was

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Nevertheless, this Court further finds that, as early as the summer of 2008, Harvey was evidently aware of the availability of a writ of habeas corpus as an option and, more importantly, Harvey's plea counsel offered to provide Harvey with a copy of the transcript. Thus, the letter directly rebuts Harvey's testimony.

informed of the purported abuse or, more importantly, for her reasons for failing to present this evidence of abuse in mitigation or for some other purpose. [T. (Hearing, 12/28/2020) Entire]. For this reason, the Court finds that, assuming plea counsel was informed of purported abuse, Harvey fails to show that her plea counsel performed deficiently for failing to offer this evidence. See, e.g., Ballard v. State, 281 Ga. 232, 233 (2) (637 SE2d 401) (2006) (no ineffective assistance shown, where trial counsel consulted an expert witness beforehand and elected not to pursue a “battered woman” defense, counsel’s decisions was a reasonable one made as a matter of strategy); Butler v. State, 292 Ga. 400, 405 (3), n. 8 (738 SE2d 74) (2013) (“Figuratively speaking, the hill that must be climbed to make out a claim of ineffective assistance is almost always high and steep. In this case, however, it is especially high and steep because [Harvey] failed to put on any evidence in support of [her] claim — including any testimony [on this point from her plea] lawyer — at the hearing on [her] motion....”); Maxwell v. State, 290 Ga. 574, 575 (2) (722 SE2d 763) (2012) (“It is extremely difficult to overcome the presumption of reasonable professional assistance where counsel does not testify.”). No deficient performance is shown.

Consequently, this Court, after considering the evidence and testimony, finds there appear to have been no nonfrivolous grounds for appeal which a rational defendant would have wanted to pursue, and there is no evidence to

indicate that Harvey demonstrated to her plea counsel that she was interested in appealing until the summer of 2008. Because Harvey has failed to show that her appeal of right, which expired on the second Monday of September 2005, was lost as a consequence of her plea counsel's performance, which this Court finds was not shown to be deficient in any respect, she has failed to show that she is entitled to an out-of-time appeal on ineffective assistance grounds. See Collier, 307 Ga. at 365 (1); Davis, \_\_\_ Ga. \_\_\_ (2).

**IT IS HEREBY ORDERED THAT** the Defendants' Motion for an Out of Time Appeal is DENIED on each and every ground thereof.

This 18<sup>th</sup> day of July, 2021.



~~HONORABLE W. FLETCHER SAMS  
JUDGE, FAYETTE SUPERIOR COURT  
GRIFFIN JUDICIAL CIRCUIT~~

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