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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Petition for Writ of Certiorari to the Court of Appeals
Honorable R. Lawton McIntosh, Post-Conviction Relief Judge
Honorable John C. Hayes, III, Plea Judge
Appellate Case No. 2022-000341

TRAVIS HINES,

Petitioner,

vs.

THE STATE,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF ISSUE ON CERTIORARI

I. Is certiorari warranted to review the Court of Appeals' correct decision to affirm the denial of post-conviction relief when Petitioner failed to meet his burden of establishing the prosecution violated Rule 5, SCRCrimP, or other discovery obligations in a case in which the State properly and timely disclosed all discovery materials to Petitioner or his counsel prior to Petitioner's knowing, intelligent, and voluntary guilty plea?

II. Is Petitioner's newly-raised argument regarding the propriety Hyman v. State, 397 S.C. 35, 723 S.E.2d 375 (2012), preserved for this Court's review when Petitioner failed to present such an argument to either the post-conviction relief court or the Court of Appeals and, instead, waited to make the argument for the first time in this Rule 242, SCACR, petition for writ of certiorari? Furthermore, regardless of preservation concerns, does Petitioner's argument that this Court should overrule its Hyman decision lack merit?

III. Is certiorari warranted to review the Court of Appeals' correct decision to affirm the denial of post-conviction relief when Petitioner failed to meet his burden of establishing his guilty plea was involuntary where Petitioner made a knowing, intelligent, and voluntary decision to relieve his second attorney and represent himself, personally negotiated an extremely advantageous plea offer, and entered a plea pursuant to the terms of this plea agreement to a drug offense that he expressly admitted to committing during the plea proceeding?

STATEMENT OF THE CASE

On May 21, 2014, Petitioner Travis Hines distributed heroin to a confidential informant in Rock Hill, South Carolina. Thereafter, during December 2015, the York County Grand Jury indicted Petitioner for distribution of heroin (2015-GS-46-03685) and an accompanying proximity charge as a result of this drug transaction. Petitioner was originally represented by Assistant Public Defender Mark T. McKinnon of the Sixteenth Circuit Solicitor's Office, but Petitioner later retained private counsel, Christopher Wellborn, to represent him on these charges. Assistant Solicitor Ryan Newkirk of the Sixteenth Circuit Solicitor's Office prosecuted Petitioner's case.

On December 15, 2015, Petitioner appeared before the Honorable Daniel D. Hall, circuit court judge, for a hearing on his motion to relieve his counsel based on prior comments Petitioner made to the court regarding his unhappiness with his counsel's representation during an earlier plea hearing that was aborted prior to entry of a guilty plea. (App. 110-113). At this hearing, Petitioner expressly stated to the court he was prepared to go forward without a lawyer. (App. 113). He did, however, inform the Court that he had intended to hire a specific, well-known criminal defense attorney (Jack Swerling), and, despite being previously unable to retain Swerling, Petitioner stated he still intended to hire Swerling. (App. 113-14). In response to questioning from the Court, the prosecutor informed the court that the State intended to call the case for trial during the January 11, 2016 term, and, based on Petitioner's prior convictions, intended to serve Petitioner with notice of its intention to seek life without parole pursuant to S.C. Code Ann. § 17-25-45.[1] (App. 85, 113-114). Petitioner informed the court he understood his

[1] Petitioner, a habitual drug offender, had prior qualifying convictions for Distribution of Cocaine within Proximity of a Park (2005-GS-46-2297) and Distribution of Ecstasy within

case would be called for trial during the January 11, 2016, term and reiterated that he did not want Wellborn as his counsel without any further explanation. (App. 114). The court then relieved Wellborn as counsel for Petitioner. (App. 114). Following that, Petitioner expressed that he "didn't know just because [he] was firing [his] lawyer [he] had to go to trial." (App. 115). The court explained to Petitioner that the time in which the State could call his case for trial has nothing to do with Petitioner relieving his counsel. (App. 115). The court advised Petitioner that because he had already relieved two attorneys, the court would not appoint another attorney to represent Petitioner and if he did not retain another attorney, the court would advise him in detail about representing himself prior to the January 11, 2016 term of court. (App. 116-117). Petitioner acknowledged the court's admonishment regarding the right to counsel. (App. 117). The State then served Petitioner with notice of its intention to seek life without parole pursuant to S.C. Code Ann. § 17-25-45. (App. 85, 117-118). The State also advised Petitioner that its previously extended offer for a fifteen-year term of incarceration would expire at the conclusion of the court term. (App. 118).

Later that same day, Petitioner, in his *pro se* capacity, approached Assistant Solicitor Newkirk and asked to engage in further plea negotiations. (App. 55, 100-101). Assistant Solicitor Newkirk advised Petitioner the best possible offer he could make would be for a fourteen-year term of imprisonment and the dismissal of the accompany proximity charge. Petitioner accepted the terms of this new, more favorable plea offer and signed a plea waiver form evidencing his intention to plead guilty to third-offense distribution of heroin for a fourteen-year sentence. (App. 86-89). Petitioner acknowledged and initialed next to the following:

I understand that I have the right to be represented by a lawyer at all stages of the

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Proximity to a School (2008-GS-46-3000) that made him eligible for life without parole under Section 17-25-45. (App. 85). Petitioner also has other prior drug convictions. (App. 93)

> proceeding. I can hire my own lawyer, or the court will appoint a lawyer for me if I cannot afford one. I understand an attorney would be of benefit to me, and since I am not an attorney, there is a danger on my representing myself. ***Understanding this, I give up this right.***

(App. 87) (emphasis added). Petitioner then signed and dated the plea waiver form, indicating he agreed with and understood all initialed portions of the waiver, including his right to counsel and his waiver of this right. (App. 89).

Two days later, on December 17, 2015, Petitioner appeared *pro se* before the Honorable John C. Hayes, III, circuit court judge, to enter his guilty plea in accordance with the extremely favorable plea agreement that he had personally brokered with the State. At the start of the proceeding, Assistant Solicitor Newkirk advised the court of the terms of the plea agreement, that Petitioner had relieved two prior attorneys before personally negotiating the fourteen-year plea offer with the State, that Judge Hall had advised Petitioner of his right to counsel at the hearing two days prior, and that he personally did not have any doubt as to Petitioner's competency or understanding. (App. 100-101). The court then questioned Petitioner regarding his age (twenty-nine), his education (currently enrolled in college), and his employment status (an electrician's helper) before advising Petitioner of his right to an attorney, the danger of proceeding without an attorney, and the benefit of having an attorney. (App. 101-102). Petitioner unequivocally responded that he understood those rights and wanted to give up the right to counsel. (App. 102). The court then determined that Petitioner "ha[d] freely voluntarily knowingly and intelligently understanding the benefits of counsel and the danger of self-representation exercise[d] his right to proceed *pro se*." (App. 102). The court then engaged in a colloquy with Petitioner about the indictment to which he was pleading guilty and the constitutional rights he was waiving by pleading guilty before Petitioner again affirmed that he wanted to plead guilty. (App. 102-104). Petitioner told the court he agreed with the facts as

presented by the State and expressly admitted his guilt to distribution of heroin while apologizing to the court:

> Well, your Honor, I just want to apologize for being up here once again. I was really getting my life together. I wasn't dealing drugs but I was using drugs and ***I just made a mistake by trusting my uncle having a kind heart in giving him some drugs***. And I feel fourteen years I know I got to pay my debts to society b[u]t I feel fourteen years is a long time for a mistake but thank y'all . . .

(App. 106) (emphasis added). The court accepted Petitioner's plea and sentenced him to fourteen years of imprisonment pursuant to the plea agreement. Petitioner did not pursue an appeal.

Petitioner initiated a timely post-conviction relief proceeding and raised the following grounds for relief:

10(a) "Counsel was ineffective and performance was inadequate."

> 11(a) "Counsel procrastinated and hindered me from accepting a lesser sentence because he had not yet examined certain evidence."

10(b) "Counsel conduct was deficient."

> 11(b) "Lack of communication with me as well as the solicitor put me in a position to be forced and coerced to plead guilty."

10(c) "Counsel was also incompetent and unprofessional."

> 11(c) "Motions weren't filed and evidence wasn't reviewed in a timely manner and if counsel performed adequately the results would've been different."

(App. 68-74, 79-80).[2] Notably, Petitioner did not raise any claims of prosecutorial misconduct in his post-conviction relief application.

Respondent served its return on May 22, 2017, and requested an evidentiary hearing to resolve the issues in the application. Leah B. Moody, Esquire, was appointed to represent him in this action. Petitioner never amended his application with additional grounds for relief.

[2] For reasons unclear, the handwritten attachments to Petitioner's post-conviction relief application appear as part of Respondent's return to the application in the Appendix.

On July 31, 2017, an evidentiary hearing was convened before the Honorable R. Lawton McIntosh, circuit court judge. Petitioner appeared alongside counsel Moody. Petitioner testified on his own behalf and presented testimony from former counsel Wellborn and the prosecutor, Assistant Solicitor Newkirk.

During the hearing, Petitioner stated that he has seen his "full Brady motion" with all discovery when it was provided to him by post-conviction relief counsel. (App. 11-12). He also stated that counsel Wellborn had an opportunity to review the video of the drug transaction in November. (App. 12-13). At the hearing, Petitioner's frustration was clearly not that counsel had not seen the video but instead that counsel "procrastinated" and delayed his case due to defense counsel's desire to view the video before advising Petitioner regarding the plea offer. (App. 12-14). He testified that he wanted to relieve Wellborn but he never wanted to proceed forward *pro se*. (App. 14-16). He testified that he called Jack Swerling the day that Wellborn was relieved and Swerling declined to represent him, and, thereafter, he personally negotiated a fourteen-year plea agreement with the prosecutor. (App. 16-18). Petitioner testified he pled guilty to avoid the risk of a life sentence. (App. 20). He testified that Wellborn first advised him the State would likely seek life without parole in October—two months prior to his guilty plea. (App. 20-21). Petitioner stated that Wellborn was able to view the video of the drug transaction while he represented him and that Wellborn indicated that there was no clear transaction of drugs on the video tape, advised Petitioner the tape showed Petitioner "messing" with drugs, and that he should accept the State's offer and plead guilty. (App. 23-24). Petitioner expressly stated that the prosecutor informed him of his right to counsel and that Judge Hayes also reviewed this right to counsel with him during his guilty plea. (App. 25-26). Petitioner again stated he had now seen

his discovery materials[3], "kn[e]w what [he's] up against," and wanted a new trial. (App. 29).

Petitioner also presented testimony from his former plea counsel Wellborn. Wellborn testified he received electronic discovery from the State on July 7, 2015, in response to his discovery motions. (App. 30-31). He testified he review the discovery personally as well as with Petitioner. (App. 31). He testified that discovery included still photographs from the video of the drug transaction with the confidential informant. (App. 31). He testified that Petitioner initially claimed that he was the buyer of drugs, not the seller, and that based on this information, Wellborn advised Petitioner not to accept any plea offers from the State until they were able to view the video. (App. 32). Wellborn testified that he was advised by the State in August that upon further investigation by the solicitor's office, the plea offer was increased to eighteen years of imprisonment and that Petitioner was eligible for a life without parole sentence based on his prior record. (App. 34-35). Wellborn testified that he was uncomfortable with advising his client to plead guilty without viewing the video of the drug transaction, particularly in light of an advisory memorandum issued by Chief Justice Toal more than a decade prior and in this case, everyone knew who the confidential informant was so he did not believe there was a need to protect the identity of the informant. (App. 35-36). Wellborn testified he "continued to press on the video tape issue" and that he was eventually able to view the video of the drug transaction on November 17th—a month prior to Petitioner's eventual plea. (App. 37-41). Wellborn testified that he relayed and discussed the contents of the video with Petitioner after he viewed it and advised Petitioner that he would likely be convicted if he proceeded to trial. (App. 40-41). Wellborn testified that the State still engaged in plea negotiations with him after Wellborn

[3] Crucially, Petitioner never testified that he has not seen the video of his drug transaction, that he wanted to see the video of his drug transaction, or that his counsel was prohibited from viewing the entirety of his drug transaction—arguments he has now injected into the appellate process for the first time at this late stage.

viewed the video and the offer was reduced to fifteen years of imprisonment. (App. 41-42). He testified that Petitioner initially accepted this fifteen-year plea offer and a plea hearing was scheduled for December 3rd. (App. 42-45). He testified that he was certain it was "made clear" to Petitioner that he had a right to counsel. (App. 43).

Petitioner then provided testimony from the prosecutor, Assistant Solicitor Newkirk. Newkirk testified the offer to Petitioner was raised to eighteen years based on additional review of Petitioner's case, which included his prior record and his potential involvement in drug activity in the area. (App. 51-54). Newkirk testified the offer was then reduced to fifteen years' imprisonment and was eventually reduced to fourteen years of imprisonment after Petitioner personally approached him to negotiate a plea offer following the hearing where Wellborn was relieved as his counsel. (App. 55). Regarding the solicitor's office's policy on releasing videos of confidential informants, Newkirk elaborated:

> I think to elaborate, Mr. Wellborn did indicate that our policy is generally not to release the video of a confidential informant in a drug case unless the defendant is then willing to not accept an offer from the State, especially in cases where the life of the confidential informant could be in danger. Now Mr. Wellborn indicated to me that the defendant knew who the confidential informant was but I couldn't just take his word for it. I had to try and protect the confidential informant especially in Mr. Hines's case who had been convicted of intimidation of a witness in the past and had been charged with murder.
>
> So in this particular case it was incredibility important for us to protect the confidential informant. I did send still shots of the video to Mr. Wellborn and—

(App. 56). Newkirk further explained that Wellborn suggested a protective order so that he could personally view the video of the drug transaction and, once this order was signed, Wellborn was able to view the video. (App. 56-57). Newkirk testified he received the drug report on October 16th and turned it over to Wellborn on October 22nd. (App. 58). He testified that he promptly provided discovery to Petitioner's counsel when it was available absent the video (which was

eventually viewed once a protective order was signed) but confirmed that still photographs of the video were provided. (App. 58-61).

At the conclusion of the hearing, the post-conviction relief court allowed the record to remain open to afford Petitioner the opportunity to provide an affidavit from his fiancé; however, such an affidavit was never provided. (App. 66). The court took the matter under advisement. On August 1, 2017, the court issued a Form 4 order denying relief and asking the State to prepare and submit a proposed order for the court's consideration. (App. 108-109). By order filed November 21, 2017, the court denied and dismissed the application for post-conviction relief. (App. 121-136). In this order, the court expressly rejected Petitioner's claims of ineffective assistance of counsel regarding viewing of the video and other discovery matters and found that counsel provided competent representation regarding plea offers. The Court similarly rejected Petitioner's assertions that he was denied the right to counsel or not properly advised before pleading guilty *pro se*. Finally, the court denied Petitioner's claims of prosecutorial misconduct.

Petitioner sought appellate review pursuant to Rule 243, SCACR. Following the submission of his petition for writ of certiorari and the State's return to the petition, this Court transferred the case to the South Carolina Court of Appeals pursuant to Rule 243(l), SCACR. Following briefing and argument, the Court of Appeals affirmed the post-conviction relief court's denial of relief by published opinion. Travis Hines v. State, Op. No. 5877 (Ct. App. filed December 8, 2021). In this opinion, the Court of Appeals determined the State did not commit prosecutorial misconduct or violate discovery provisions in its handling of Petitioner's case. The Court of Appeals further found that Petitioner was sufficiently advised of the right to counsel and made a knowing, intelligent, and voluntary waiver of that decision to enter a favorable plea.

Petitioner served and filed a petition for rehearing January 5, 2022. Upon request from the Court of Appeals, Respondent served and filed its return to the petition on January 24, 2022. Petitioner then served and filed a reply to the return to the petition for rehearing on January 26, 2022. The petition was denied by the Court of Appeals on February 24, 2022.

Petitioner filed his petition for a writ of certiorari and appendix[4] with this Court on March 28, 2022, along with a motion to supplement the appendix with materials that were not presented to the post-conviction relief court or Court of Appeals, and a motion to transport the video of the drug transaction (which, again, was not before the post-conviction relief court or Court of Appeals). On April 26, 2022, Respondent filed a motion to accept returns to these motions out of time, returns in opposition to both motions, and a motion to strike Petitioner's petition for writ of certiorari. On May 2, 2022, Petitioner filed a return to Respondent's motion. By order filed May 17, 2022, this Court granted Respondent's motion to strike Petitioner's petition because the materials were not before the post-conviction relief court or court of appeals and instructed Petitioner to file an amended petition. Petitioner served this amended Petition on May 21, 2022, and it was filed with Court on May 23, 2022. This return follows.

[4] Petitioner's Amended Petition for Writ of Certiorari and Appendix to this Court omit any reference to Respondent's return to the petition for rehearing and Petitioner's reply.

STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839 (2018). On appellate review, courts defer to a post-conviction relief court's findings of fact and will uphold them if there is any evidence in the record to support them. Id. at 180-81, 810 S.E.2d at 839-40 (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Smalls, 422 S.C. at 180-81, 810 S.E.2d at 839-40. Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

I. Certiorari is not warranted to review the Court of Appeals' proper decision to affirm the denial of post-conviction relief because Petitioner failed to meet his burden of establishing the prosecution violated Rule 5, SCRCrimP, or other discovery obligations in a case in which the State properly and timely disclosed all discovery materials to Petitioner or his counsel prior to Petitioner's knowing, intelligent, and voluntary guilty plea.

In affirming the post-conviction relief court, the Court of Appeals correctly applied the law, reviewed the record, and determined the post-conviction relief court properly rejected Petitioner's assertions that the State violated any discovery provisions, such as Brady or Rule 5, SCRCrimP, in its handling of Petitioner's case. Specifically, the Court of Appeals rejected Petitioner's assertions that the State engaged in prosecutorial misconduct by refusing to show Petitioner the video of the drug transaction unless Petitioner elected to go to trial, relying on Hyman v. State, 397 S.C. 35, 723 S.E.2d 375 (2012), abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). In Hyman, a strikingly-analogous case to Petitioner's, this Court rejected Hyman's assertions on post-conviction relief that his guilty plea was involuntary, determined that the State acted in accordance with Brady and Rule 5, SCRCrimP, and rejected Hyman's claims that the State committed prosecutorial misconduct by allowing his counsel (rather than Hyman personally) to view the video of a drug transaction with a confidential informant and by providing Hyman personally with still photographs from the video. Despite the glaring similarities between Petitioner's case and Hyman's, Petitioner argues first that the State did indeed commit prosecutorial misconduct in violation of Rule 5, SCRCrimP, and then next argues that Hyman should be overruled because it violates Rule 5, SCRCrimP.[5] However, certiorari is not warranted to review the Court of Appeals' proper decision to affirm the post-conviction relief court's denial of relief where Petitioner failed to

[5] This second argument is addressed infra in section II.

meet his burden of establishing a violation of Rule 5, SCRCrimP, or any other discovery provisions, Petitioner did not establish the State engaged in prosecutorial misconduct, and the record is abundantly clear that the State properly and timely disclosed all discovery materials to Petitioner or his counsel prior to Petitioner's entry of a knowing, intelligent, and voluntary guilty plea. Petitioner has failed to show any "special or important reasons" to warrant this Court's grant of certiorari review pursuant to Rule 242, SCACR, and this Court should deny certiorari.

In his amended petition to this Court, Petitioner asserts that the critical issue in this case is whether the State violated his right to view discovery pursuant to Rule 5, SCRCrimP[6], by conditioning plea offers on Petitioner personally viewing discovery. Petitioner's argument is based on a misguided reading of Rule 5, SCRCrimP, that adds additional terms and provisions not contained within the language of the rule, such as the time by which discovery materials must be provided to the defendant, that the defendant personally must be given unfettered access to the discovery rather than his or her counsel of record, and that this full disclosure must occur while plea offers remain extended to the defendant. See e.g. State v. White, 338 S.C. 56, 58, 525 S.E.2d 261, 263 (Ct. App. 1999) ("We, of course, must take the statute as we find it, giving effect to the legislative intent as expressed in its language. We cannot under our power of construction supply an omission in the statute."); Goldston v. State Farm Mut. Auto. Ins. Co.,

[6] In his amended petitioner, Petitioner asserts that "[t]hroughout the entirety of this case, Mr. Hines has properly argued the State violated Rule 5(a)(1)(C) of the South Carolina Rules of Criminal Procedure." (Am. PWC 8). However, Petitioner never raised this issue in his post-conviction relief application and did not make this specific argument at the post-conviction relief hearing. Instead, Petitioner simply briefly mentioned prosecutorial misconduct generally at the end of his hearing without specifically mentioning Rule 5, SCRCrimP. Moreover, Petitioner failed to include any mention or cite to Rule 5, SCRCrimP, in his brief to the Court of Appeals and only raised a specific Rule 5, SCRCrimP, issue in his reply brief. Nonetheless, the Court of Appeals analyzed his claim of prosecutorial misconduct under both Brady and Rule 5, SCRCrimP, in rejecting his claims of prosecutorial misconduct, and, accordingly, the State is not asserting a procedural bar in response to this claim. Respondent notes that Petitioner's argument that his claim has been consistently raised is disingenuous and not supported by the record.

358 S.C. 157, 177, 594 S.E.2d 511, 522 (Ct. App. 2004) (noting a subtle or forced construction of the statutory language for the purpose of expanding its operation is prohibited). None of these terms are included within the language of Rule 5, SCRCrimP, which states,

> Upon request of the defendant the prosecution shall permit the defendant to inspect and copy books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the prosecution, and which are material to the preparation of his defense or are intended for use by the prosecution as evidence in chief at the trial, or were obtained from or belong to the defendant.

Rule 5, SCRCrimP.

Despite the unambiguous language of Rule 5, SCRCrimP, Petitioner is asking this Court create a new rule that would require the State to immediately provide defendants personally—and not his or her counsel of record—with all discovery materials without any provisions to allow the State to safeguard the identities of confidential informants or witnesses, all while plea negotiations are on-going and offers must remain extended to a defendant. Unsurprisingly, Petitioner fails to cite to any authority to support such an interpretation of Rule 5, SCRCrimP, likely because such a reading of Rule 5, SCRCrimP, is illogical, is not supported by a plain reading of the rule, would violate the executive authority of the State to pursue appropriate dispositions of criminal cases, and would violate the separation of powers by forcing the State to extend plea offers in cases, all without any concern for the safety of confidential informants.

In Hyman, a strikingly-similar case where a petitioner sought post-conviction relief following a guilty plea to drug offenses involving a confidential informant and asserted (amongst other claims) that the State violated discovery provisions such as Rule 5, SCRCrimP, by not allowing him to personally view the video of the drug transaction, this Court took a balanced approach to safeguarding the discovery rights of defendants while protecting the safety of

confidential informants in drug cases. Noting that "[c]ompliance with Rule 5 is a fact-based inquiry," this Court determined the State complied with Rule 5, SCRCrimP,

> Under the present facts, the State not only disclosed the existence of the videotape, but also made the evidence available for inspection by defense counsel. The State even took the extra step of generating still photographs to assuage Petitioner's concerns about the contents of the videotape. Plea negotiations were ongoing until the day before jury selection, and there is no indication that the State would have withheld the videotape if a full trial on the merits followed. In fact, the identity of the informant had been disclosed to the defense by the time Petitioner pleaded guilty, removing any remaining impediment to Petitioner's access to the videotape in time for his trial. We note that, in cases involving a confidential informant, a criminal defendant's interest in access to certain evidence must be weighed against the State's interest in protecting the identity and safety of the informant. See State v. Humphries, 354 S.C. 87, 90, 579 S.E.2d 613, 614–15 (2003) ("Although the State is generally privileged from revealing the name of a confidential informant, disclosure may be required when the informant's identity is relevant and helpful to the defense or is essential for a fair determination of the State's case against the accused. For instance, if the informant is an active participant in the criminal transaction and/or a material witness on the issue of guilt or innocence, disclosure of his identity may be required depending upon the facts and circumstances." (internal citations omitted)). Here, the State struck the appropriate balance by allowing defense counsel to view the videotape and providing Petitioner with stills during negotiations. Therefore, under these circumstances, the manner and extent of disclosure to defense counsel was satisfactory under Rule 5 of the South Carolina Rules of Criminal Procedure.
>
> Accordingly, it cannot be said that defense counsel acted unreasonably in failing to seek to compel disclosure of the videotape to defendant personally under the facts of this case.

Id. at 47–48, 723 S.E.2d at 381.

Hyman, which was correctly decided, controls in this case. Here, Petitioner, either personally or through his counsel, was provided with all discovery in this case. The record clearly establishes Wellborn, as counsel of record for Petitioner, received the bulk of discovery in July shortly after he made his initial discovery requests (including still photographs from the video of the drug transaction), received the drug report within days of the prosecutor receiving the report, and was permitted to view the video of the drug transaction a month prior to

Petitioner's guilty plea.[7] The State properly complied with Rule 5, SCRCrimP, in Petitioner's case. Petitioner has failed to establish that his desire to avoid a mandatory life without parole sentence by personally negotiating an extremely advantageous plea offer to a crime he readily admitted he committed was the result of any prosecutorial misconduct. Rather, Petitioner's plea was the result of a desire to avoid a likely conviction and life sentence following a jury trial, a difficult but nonetheless constitutional choice that Petitioner knowingly, intelligently, and freely made. See United States v. Cox, 464 F.2d 937, 942 (6th Cir. 1972) ("It is also well established that a guilty plea is not rendered invalid because it represents a compromise by defendant, thrusts a difficult judgment upon him, or is motivated by fear of greater punishment.") (citing Brady v. United States, 397 U.S. 742 (1970), McMann v. Richardson, 397 U.S. 759 (1970); Parker v. North Carolina, 397 U.S. 790 (1970); North Carolina v. Alford, 400 U.S. 25 (1970); McGautha v. California, 402 U.S. 183, 213 (1971)). Certiorari should be denied as to this issue.

II. Petitioner's newly-raised argument regarding the propriety Hyman is not preserved for this Court's review because Petitioner failed to present such an argument to the post-conviction relief court and the Court of Appeals and makes the argument for the first time in this Rule 242, SCACR, petition for writ of certiorari. Regardless of preservation concerns, Petitioner's argument that this Court should overrule its Hyman decision lacks merit.

For the first time, Petitioner argues this Court wrongly decided Hyman and urges this Court to overrule Hyman. However, as this argument was never presented below, it is not preserved for appellate review.

[7] Petitioner's protestations that counsel was limited from viewing the full drug transaction are not supported by the record, as counsel Wellborn repeatedly testified that he watched the video of the transaction without claiming that his review was somehow limited. Assistant Solicitor Newkirk similarly testified that the video was shown to Wellborn. Despite his repeated complaints to the contrary, Petitioner has failed to show that his counsel of record was somehow precluded from viewing the video or any other evidence in this case.

In South Carolina, issue preservation requirements are a fundamental component of appellate procedure. Gaddy v. Douglass, 359 S.C. 329, 350, 597 S.E.2d 12, 23 (Ct. App. 2004). Significantly, the application of issue preservation requirements ensures the trial court has an opportunity "to rule properly after it considered all relevant facts, law, and arguments." I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). In order for an issue to properly be preserved for appellate review, the issue must be: (1) raised to and ruled upon by the trial court; (2) raised by the appellant; (3) raised in a timely manner; and (4) raised to the trial court with sufficient specificity. State v. Rogers, 361 S.C. 178, 183, 603 S.E.2d 910, 912-913 (Ct. App. 2004); see JEAN HOEFER TOAL ET AL., APPELLATE PRACTICE IN SOUTH CAROLINA 57 (2nd ed. 2002) (identifying the four requirements that must be met in order for an issue to be properly preserved for appellate review). Although our courts have recognized the somewhat relaxed procedures in post-conviction relief cases and will excuse procedural defaults in extraordinary cases, "[i]n most PCR cases, however, [appellate courts] have refused to excuse the pleading and issue-preservation requirements that apply in all civil cases." Mangal v. State, 421 S.C. 85, 97, 805 S.E.2d 568, 574 (2017). In Mangal, this Court noted,

> [T]here are situations where the interests of justice require PCR courts to be flexible with procedural requirements before PCR applicants suffer procedural default on substantial claims. Such flexibility is consistent with the purpose and spirit of our Rules of Civil Procedure. These considerations should guide PCR courts when struggling to balance procedural requirements against the importance of the issues at stake in PCR proceedings. We encourage trial courts in PCR cases to use the discretion we grant them on procedural matters to find reasonable ways—within the flexibility of our Rules—to reach the merits of substantial issues.

Mangal, 421 S.C. at 99–100, 805 S.E.2d at 575–76.

In the present case, Petitioner never raised or otherwise presented a claim that his case was improperly handled based on purported constitutionality concerns with this Court's Hyman

decision. Petitioner did not raise this issue to the post-conviction relief court nor did he raise it to the Court of Appeals, who relied heavily on Hyman in reaching its decision to affirm the post-conviction relief court. Instead, Petitioner merely attempted to distinguish his case from Hyman despite the striking similarities in the two cases in his petition for rehearing to the Court of Appeals (to which is an argument he appears to now abandon in favor of his new argument that this Court decided Hyman wrongly).

Despite never raising this argument before, Petitioner is trying to bypass preservation requirements by weaving this argument into his assertion that the State committed prosecutorial misconduct pursuant to Rule 5, SCRCrimP. This simply does not preserve the unpreserved issue. This issue is not properly preserved for appellate review and this is not an extraordinary case where preservation deficiencies should be overlooked in the interest of justice.

Regardless of error preservation concerns, Petitioner's assertions that Hyman was wrongly decided also fails on the merits. As discussed at length above, Petitioner's arguments that Rule 5, SCRCrimP, somehow mandates that a defendant personally review all discovery materials well in advance of trial and while plea offers are still extended are beyond the plain reading of Rule 5, SCRCrimP, and do not render Hyman unconstitutional or otherwise invalid. Again, Petitioner fails to cite to any authority to support his position. This Court's decision in Hyman comports with Rule 5, SCRCrimP, and appropriately balances a defendant's right to view discovery and the State's valid interest in protecting the safety of confidential informants. This Court should deny certiorari.

III. Certiorari is not warranted to review the Court of Appeals' proper decision to affirm the denial of post-conviction relief because Petitioner failed to meet his burden of establishing his guilty plea was involuntary where Petitioner made a knowing, intelligent, and voluntary decision to relieve his second attorney and represent himself, personally negotiated an extremely advantageous plea offer, and entered a plea pursuant to the terms of this plea

agreement to a drug offense that he expressly admitted to committing during the plea proceeding.

Petitioner also asserts his guilty plea was involuntarily entered without the benefit of counsel due to coercive actions of the State that prohibited him from personally viewing discovery and the plea court's failure to properly advise him of his right to counsel, the combination of which rendered his plea invalid.

First, Petitioner argues "the [court's] colloquy with Hines was perfunctory at best and was not a meaningful inquiry into whether Hines was making a knowing and voluntary waiver of his right to counsel." Petitioner argues the court did not following the procedures set forth in State v. Samuel, 422 S.C. 596, 813, S.E.2d 487 (2018), a 2018 case this Court decided two-and-a-half years *after* Petitioner's motion to relieve counsel and guilty plea proceedings, to support his position that the court failed to engage in a meaningful inquiry with Petitioner regarding his right to counsel. However, this argument fails, as Petitioner was properly advised regarding the right to counsel and made a knowing, intelligent, and voluntary decision to waive this right.

An accused has the right to the assistance of counsel. State v. Justus, 392 S.C. 416, 418, 709 S.E.2d 668, 670 (2011) (citing U.S. Const. amend. VI; Gideon v. Wainwright, 372 U.S. 335 (1963). A defendant may waive his right to counsel, but he must do so knowingly and intelligently. Faretta v. California, 422 U.S. 806 (1975). A defendant may waive counsel "by an affirmative, verbal request" or a defendant's actions may constitute a "waiver of counsel." State v. Roberson, 382 S.C. 185, 187, 675 S.E.2d 732, 733 (2009). Although a specific inquiry by the judge expressly addressing the disadvantages of a *pro se* defense is preferred, the ultimate test is not the trial judge's advice but the accused's understanding. State v. Cash, 309 S.C. 40, 42, 419 S.E.2d 811, 813 (Ct. App. 1992) (citing Wroten v. State, 301 S.C 293, 391 S.E.2d 575 (1990)). In the absence of an inquiry by the judge, courts look to the record to determine if the accused

had a sufficient background to understand the disadvantages of self-representation. Id. (citing Bridewell v. State, 306 S.C. 518, 413 S.E.2d 30 (1992)).

To establish a valid waiver of counsel, Faretta requires the accused be: (1) advised of the right to counsel; and (2) adequately warned of the dangers of self- representation. Bridwell, 306 S.C. 518, 413 S.E.2d 30 (citing Faretta, 422 U.S. 806; Prince v. State, 301 S.C.2d 575, 576 (1990) ("Faretta requires that a defendant 'be made aware of the dangers and disadvantages of self-representation so that the record will establish he knows what he is doing and his choice is made with eyes open.'") (internal citation omitted). In evaluating the voluntariness of a defendant's waiver of counsel, the only standard is whether the "record demonstrates the defendant's decision to represent himself was made with an understanding of the risks of self-representation, the requirements of a voluntary waiver will be satisfied." Gardner v. State, 351 S.C. 407, 411-412, 570 S.E.2d 184, 186 (2002) (internal citations omitted).

The Court of Appeals properly rejected Petitioner's argument that he was not sufficient advised of the right to counsel, finding "under the circumstances of this case, the plea court's warning was sufficient to satisfy the Sixth Amendment and Petitioner 'made an informed choice to proceed *pro se* . . . with "eyes open."' This finding is legally and factually correct.

Here, the record establishes Petitioner had the benefit of an appointed counsel whom he relieved when he retained counsel of his choosing. Petitioner then moved to have retained counsel relieved, and when he was questioned as to whether he was prepared to go forward without a lawyer, Petitioner explicitly responded that he was. Petitioner was apprised by the Court and the State of his trial date and that he would need to retain new counsel or proceed *pro se*, to which Petitioner acknowledged he understood. While Petitioner asserted that he did not want to proceed without counsel and wanted to retain Jack Swerling to represent him, his actions

clearly indicated otherwise. Rather than hiring new counsel as he claimed he intended to do that day, Petitioner pursued Assistant Solicitor Newkirk and entered into plea negotiations immediately following the hearing to relieve Wellborn. The record also demonstrates Petitioner consistently wanted to plead guilty, grew frustrated with counsel's advice that he wait to see the video of the drug transaction before he did, and was aptly able to negotiate an extremely favorable plea agreement with the State the same day counsel was relieved upon Petitioner's motion. Upon securing this plea deal, Petitioner reviewed and signed a plea waiver form covering a litany of rights, including his right to counsel, and acknowledged at his evidentiary hearing that Assistant Solicitor Newkirk had specifically reviewed his right to counsel with him. Petitioner also acknowledged that the plea court reviewed this right with him, which is supported by the record establishing that the plea court questioned Petitioner regarding his educational background, age, and current employment.

The plea court then engaged in the following colloquy with Petitioner:

> **Judge Hayes:** You have a right to have an attorney represent you in regard to this charge and if you cannot afford one the State would be required to appoint an attorney to represent you within some limits. That is you would be appointed an attorney to represent you if you wish. If you could not afford one the limitation being that you are assigned an attorney and that would be your attorney. Its dangerous for you to proceed without an attorney since you're not one and there is a benefit in having an attorney represent you. Do you understand that?
>
> **Petitioner:** Yes, sir.
>
> **Judge Hayes:** Do you wish to have an attorney in regard to this charge or give up that right?
>
> **Petitioner:** I give up that right.
>
> **Judge Hayes:** I find [Petitioner] has freely voluntarily knowingly and intelligently understanding the benefits of counsel and the danger of self representation exercises his right to proceed pro se.

(App. p. 102).

Although this colloquy with Petitioner was not extensive, Petitioner was advised of his right to an attorney, and his right to have an attorney appointed if he were unable to retain counsel on his own. Petitioner was further warned about the dangers of not having a lawyer. Two days after Petitioner informed Judge Hall that he intended to hire an attorney, Petitioner made the conscious decision to forgo legal counsel and plead guilty to distribution of heroin in order to receive the benefit of an extremely favorable plea offer from the State. Petitioner, through his own admission, was advised of his right to counsel by both Assistant Solicitor Newkirk and Judge Hayes prior to pleading guilty. Petitioner had the assistance of counsel for nearly one year prior to relieving counsel and representing himself for approximately two days, during which he negotiated an advantageous plea offer to his substantial benefit.

Moreover, Petitioner also had a sufficient background to make a valid waiver of his right to counsel. In State v. Cash, the court listed ten factors that the court will use to determine whether a defendant had sufficient background to make a valid waiver of counsel. Specifically, the court indicated the following factors are considered:

> (1) the accused's age, educational background, and physical and mental health; (2) whether the accused was previously involved in criminal trials; (3) whether he knew of the nature of the charge and of the possible penalties; (4) whether he was represented by counsel before trial or whether an attorney indicated to him the difficulty of self-representation in his particular case; (5) whether he was attempting to delay or manipulate the proceedings; (6) whether the court appointed stand- by counsel; (7) whether the accused knew he would be required to comply with the rules of procedure at trial; (8) whether he knew of legal challenges he could raise in defense to the charges against him; (9) whether the exchange between the accused and the court consisted merely of pro forma answers to pro forma questions; and (10) whether the accused's waiver resulted from either coercion or mistreatment.

Cash, 309 S.C. at 43, 419 S.E.2d at 813.

These factors also support the lower court's determination that Petitioner made a knowing, intelligent, and voluntary decision to represent himself and enter his guilty plea.

Petitioner was twenty-nine years old at the time of his plea, was currently enrolled in college, and was employed as an electrician's helper. Petitioner had previously been involved in criminal proceedings, as Petitioner had two previous sets of drug convictions. Petitioner was well aware of both the charges he was facing and the potential penalties and had been for months, as Wellborn testified that he and Petitioner knew the State was going to seek life without parole in August. Petitioner was represented by two separate attorneys from the time he was arrested until the time he relieved Wellborn two days prior to his plea. It is arguable whether Petitioner was attempting to delay the process, as Petitioner had previously elected to enter a guilty plea that was abandoned and expressed dismay that he may have to proceed to trial in January if counsel was relieved. The record is silent as to whether the trial court would have appointed stand-by counsel or advised Petitioner of his adherence to the rules of procedure at trial because the case never proceed to this point because Petitioner immediately negotiated and accepted a favorable plea offer and entered his plea within two-days of relieving counsel. Additionally, Petitioner was aware of the possible defenses he could raise if he went to trial, as Wellborn testified he discussed these with Petitioner during the course of his representation, and these possible defenses are what led Wellborn to suggest Petitioner wait until Wellborn had seen a copy of the drug buy video prior to Petitioner pleading guilty. The exchanges between Petitioner, Judge Hall, and Judge Hayes were not merely pro forma but reflect a meaningful discussion on the right to counsel and Petitioner's understanding of that right. Finally, although Petitioner now argues he was coerced into pleading guilty without the assistance of counsel, the court advised Petitioner of his right to counsel and Petitioner voluntarily waived this right prior to pleading guilty in order to accept the State's plea offer prior to it expiring at the end of the week. Petitioner was aware that he could proceed to trial the following month with or without the assistance of counsel; however

Petitioner decided it was in his best interest to accept the State's plea offer and avoid a possible sentence of life without parole if he were convicted at trial. The record establishes Petitioner had a sufficient background to make a valid waiver of counsel and made that decision not only on December 15, 2015, when he relieved Wellborn and negotiated his own guilty plea but also on December 17, 2015, when he informed the court that he was forgoing the assistance of counsel and entering his guilty plea *pro se.* Therefore, the post-conviction relief court and Court of Appeals properly found that Petitioner voluntarily waived his right to counsel when he decided to negotiate his own plea deal instead of hiring another attorney. The Court of Appeals correctly affirmed the post-conviction relief court's denial of relief. The petition for a writ of certiorari should be denied

CONCLUSION

For the foregoing reasons, certiorari should be denied.

Respectfully submitted,

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