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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On 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.

BRIEF OF RESPONDENT

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The Court of Appeals' correctly affirmed 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 as third or subsequent offense (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]

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

(App. 85, 113-114). Petitioner informed the court he understood his 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 Section 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 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 he was indeed guilty of distributing 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.

Leah B. Moody, 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).

Respondent served its return on May 22, 2017, and requested an evidentiary hearing to

[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.

resolve the issues in the application. Petitioner never amended his application with additional grounds for relief.

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 plea agreement with the prosecutor for a fourteen-year term of incarceration. (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 while there was no clear transaction of drugs on the videotape, he advised Petitioner that 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 former Chief Justice Toal more than a decade prior and because, in this case, everyone knew the identify of the confidential informant 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).

[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.

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 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 incredibly 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 Dec. 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. Respondent then filed a return to the petition, and Petitioner filed a reply. By order dated January 12, 2023, this Court denied certiorari as to questions I and II and granted certiorari as to question III. Petitioner filed his brief on February 13, 2023. This brief follows.[5]

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[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.

[5] On March 10, 2023, after the filing of his brief in this on-going appeal, Petitioner, though different retained counsel, filed a successive post-conviction relief application (2023-CP-46-0770) based on claims of newly discovered evidence in the form of an affidavit from George Leach, who

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).

purports that he was one of the confidential informants in Petitioner's case regarding the circumstances of his involvement in a 2014 drug transaction with Petitioner. Respondent is in the process of evaluating Petitioner's successive application and claims in accordance with the procedures as set forth pursuant to the Uniform Post-Conviction Procedures Act and rule of civil procedure.

ARGUMENT

The Court of Appeals properly affirmed 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 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 he argues rendered his plea invalid. Specifically, 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.

The "guilty plea and the often concomitant plea bargain are important components of this country's criminal justice system. Properly administered, they can benefit all concerned. . . . These advantages can be secured, however, only if dispositions by guilty plea are accorded a great measure of finality." Blackledge v. Allison, 431 U.S. 63, 71 (1977). "More often than not a prisoner has everything to gain and nothing to lose from filing a collateral attack upon his guilty plea. If he succeeds in vacating the judgment of conviction, retrial may be difficult." Blackledge,

431 U.S. at 71–72. "A guilty plea is a solemn, judicial admission of the truth of the charges against an individual; thus, a criminal inmate's right to contest the validity of such a plea is usually, but not invariably, foreclosed." Dalton v. State, 376 S.C. 130, 137, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing Blackledge). A valid guilty plea "must be treated as final in the vast majority of cases." Jamison v. State, 410 S.C. 456, 469–71, 765 S.E.2d 123, 129–30 (2014).

Petitioner has the burden of establishing that his guilty plea was involuntarily entered, as the applicant in a post-conviction relief action bears the burden of proving the allegations by a preponderance of the evidence—a mere allegation of that a plea is involuntary is insufficient to warrant granting relief. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

"[I]t is the prerogative of any person to waive his rights, confess, and plead guilty, under judicially defined safeguards, which are adequately enforced." Reed v. Becka, 333 S.C. 676, 685, 511 S.E.2d 396, 401 (Ct. App. 1999). Accordingly, because a criminal defendant waives several constitutional rights by pleading guilty the Due Process Clause requires that guilty pleas are entered into voluntarily, knowingly, and intelligently. Boykin v. Alabama, 395 U.S. 238 (1969); Pittman v. State, 337 S.C. 597, 524 S.E.2d 623 (1999).

To be intelligent, a plea must be made by a mentally competent defendant who understands both the charges against him or her and the consequences of his or her plea. Brady v. United States, 397 U.S. 742, 748 (1970). To be voluntary, a plea must be free of threats or other coercion that would impermissibly distort the defendant's choice. Id. at 755; see also United States v. Smith, 440 F.2d 521, 528–529 (7th Cir. 1971) (Stevens, J., dissenting) (explaining voluntariness relates to the trustworthiness of the admission of guilt and binding character of the waiver of the constitutional protections which would be available to the accused if he elected to stand trial).

Before a court can accept a guilty plea, the defendant must be advised of the constitutional rights he or she is waiving; the right to a jury trial, the right to confront one's accusers, and the privilege against self-incrimination. Boykin, 395 U.S. at 243. Additionally, in order to knowingly and voluntarily plead guilty, the defendant must have a full understanding of the consequences of the plea, including the nature and crucial elements of the offense(s); the maximum and any mandatory minimum penalty; and the nature of the constitutional rights being waived. Pittman, 337 S.C. at 599, 524 S.E.2d at 624.

However, it is "well established that a guilty plea is not rendered invalid because it represents a compromise by defendant, thrusts a difficult judgment upon him, or is motivated by fear of greater punishment." United States v. Cox, 464 F.2d 937, 942 (6th Cir. 1972) (citing Brady, 397 U.S. 742). The standard for determining the validity of a guilty plea is "whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." Id. at 31.

A defendant's knowing and voluntary waiver of statutory or constitutional rights must be established by a complete record, and "may be accomplished by colloquy between court and defendant, between court and defendant's counsel, or both." State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993); see also Wolfe v. State, 326 S.C. 158, 485 S.E.2d 367 (1997) (guilty plea not involuntary where the colloquy demonstrated the trial judge asked defendant twice whether he understood there were no promises and that no sentencing recommendations were binding on the judge). To ensure the defendant understands the consequences of his or her guilty or the trial judge "usually questions the defendant about the facts surrounding the crime and punishment that could be imposed." Dover v. State, 304 S.C. 433, 434–35, 405 S.E.2d 391, 392 (1991). However, the plea judge "does not have to direct the defendant's attention to every consequence of his plea

provided the record reveals affirmative awareness of the consequences of a guilty plea." Carter v. State, 329 S.C. 355, 362, 495 S.E.2d 773, 776 (1998).

Additionally, Petitioner had the right to the assistance of effective 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.422, 423-24, 392 S.E.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).

In the present case, the record establishes Petitioner entered a knowing, intelligent, and voluntary plea after waiving his right to counsel to accept an extremely advantageous plea offer that he personally negotiated.

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.*

Furthermore, Petitioner's claims that his guilty plea should be rendered involuntary due to coercive actions of the State that prevented him from reviewing discovery also lack merit. The

record clearly establishes that Petitioner, either personally or through his counsel, was provided with all discovery in this case. 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 in accordance with Rule 5, SCRCrimP, and Brady[6] requirements.[7] 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 rendered his guilty plea involuntary. 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 Cox, 464 F.2d at 942 ("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, 397 U.S. 742, 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)).

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

[6] Brady v. Maryland, 373 U.S. 83 (1963).

[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.

instead of hiring another attorney. The Court of Appeals correctly affirmed the post-conviction relief court's denial of relief.

CONCLUSION

For the foregoing reasons, this Court should affirm the Court of Appeals and the post-conviction relief court.

Respectfully submitted,

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March 15, 2023