STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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*Certiorari to Greenville County*

Perry M. Gravely, Plea Judge
Honorable R. Scott Sprouse, Post-Conviction Relief Judge

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JASON ALLEN LARSON,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

Appellate Case No. 2021-000764

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# BRIEF OF RESPONDENT

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

*Cases:*

***Constitutional Provisions:***



***State Statutes:***

## PETITIONER'S STATEMENT OF THE ISSUE

Did the PCR judge err in refusing to find that plea counsel was ineffective for failing to advise Petitioner, in connection with entering into a plea agreement waiving the right to seek collateral review, that any time served for PWID methamphetamine and possession of a controlled substance prior to the State Grand Jury indictments would not apply to the trafficking methamphetamine charge?

## RESPONDENT'S COUNTERSTATEMENT OF THE ISSUE

Is Petitioner's argument that the PCR court erred in refusing to find plea counsel ineffective for misadvising Petitioner regarding whether he would get credit for time he served on other offenses preserved for appellate review where the sole issue resolved was whether plea counsel properly advised Petitioner regarding the waiver of post-conviction relief when entering into an advantageous plea agreement with the State?

## STATEMENT OF THE CASE

Petitioner Jason Allen Larson is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for the South Carolina State Grand Jury. On October 22, 2015, the State Grand Jury indicted Petitioner for one count of trafficking methamphetamine (conspiracy) (four hundred grams or more) (2015-GS-47-08) as part of a multi-count, multi-defendant indictment stemming from an investigation into a methamphetamine trafficking ring. On the same date, the State Grand Jury also indicted Petitioner for possession with intent to distribute methamphetamine and possession of a schedule I-V controlled substance (2015-GS-47-10) along with co-defendant Felicia Kersey stemming from an October 16, 2014, traffic stop in which quantities of methamphetamine and other illegal drugs were recovered. Scott D. Robinson, Esq., represented Petitioner. Assistant Attorney General Joshua Underwood of the South Carolina Attorney General's Office prosecuted the case.

By agreement filed and entered on January 25, 2017, Petitioner agreed to a number of specific terms in exchange for a reduced trafficking (conspiracy) charge (down to 28-100 grams), and a recommended sentence range of up to fifteen years imprisonment. (App. 3 and 38). He also agreed to plead to the other two offenses as charged, with all sentences to be served concurrently with each other and with Petitioner's unrelated sentences he was then currently serving. (App. 4 and 38). As part of this plea agreement, Petitioner expressly waived his right to pursue a direct appeal or post-conviction relief action beyond the limited issue as to whether counsel was effective for advising him to enter into the waiver agreement:

> The Defendant, Jason Allen Larson, agrees that as a part of the consideration for this plea he will not appeal his plea of guilty or any sentence he receives in General Sessions Court in South Carolina. The Defendant, Jason Allen Larson, acknowledges that he understands that he has a right of direct appeal of his guilty plea or sentence and that he knowingly, voluntarily and expressly waives

> this right of direct appeal. Additionally, the Defendant, Jason Allen Larson, understands that he has a right to file a post-conviction relief (PCR) action in this case but agrees to knowingly and voluntarily waive any post-conviction relief action except for claims that directly attack the effectiveness of advice to agree to this waiver.

(App. 42). Petitioner initialed each page of this written plea agreement and signed on January 25, 2017. (App. 38-44).

On January 25, 2017, Petitioner appeared before the Honorable Perry H. Gravely, circuit court judge, and pursuant to the agreement, pled guilty to one count of the lesser included offense of conspiracy to traffick (28-100 grams) (first offense), possession with intent to distribute methamphetamine (first offense), and possession of a schedule I-V controlled substance. (App. 11-12). Judge Gravely asked if Petitioner understood that the judge was not "bound" by the State's recommendation but retained the authority to sentence Petitioner "to the maximum amount on each of these charges." (App. 13). Petitioner stated that he understood. (App. 13). Judge Gravely asked Petitioner if he understood the terms of his plea agreement. Petitioner affirmed that he understood the terms of the plea agreement and had entered into the plea agreement freely and voluntarily. (App. 14). Petitioner confirmed to Judge Gravely that no additional promises were made, and also that he was satisfied with counsel. (App. 14 and 8-9). After agreement on the factual basis, the judge accepted Petitioner's pleas and deferred sentencing. (App. 35-36).

On May 18, 2018, Petitioner again appeared before Judge Gravely for sentencing. Plea counsel requested Judge Gravely not only run Petitioner's new sentences concurrently with his active sentences for his unrelated Pickens County convictions but also asked that the new sentences be backdated to start when his active, unrelated, sentences started. (App. 49). He also argued Petitioner should be given credit since his arrest from the traffic stop, arguing that Petitioner had no control over when the State Grand Jury decided to indict and serve him based on the drug

conduct that arose out of Pickens County. (App. 53-54). The State opposed the request, noting that Petitioner would be unfairly benefitting from prior crimes if the court were to give him credit for the entirety of his active sentences. The State also disagreed that Petitioner should receive credit for the time served since entering his pleas in this case. (App. 52-53).

Judge Gravely agreed with the State that Petitioner would be unfairly benefiting from his prior crimes and only backdated the sentence to the time his plea was entered. Judge Gravely explicitly denied Petitioner's request that he receive credit for the entirety of his sentence on the unrelated convictions. (App. 54-55). Judge Gravely sentenced Petitioner to imprisonment for nine years for trafficking in methamphetamine, to eight years for possession with intent to distribute methamphetamine, and to time served for possession of a schedule I-V controlled substance, with the sentences to be served concurrently to each other and to his active sentence.[1] (App. 56). Petitioner did not pursue a direct appeal.

Petitioner, however, filed an application for post-conviction relief on December 19, 2018, asserting various claims of ineffective assistance: (a) Counsel failed to respond to Petitioner and did not visit with him, (b) Counsel failed to review discovery with Petitioner, and (c) Plea agreement breached because Petitioner was not given credit for time served for the entirety of his unrelated sentence, which is also affecting Petitioner's custody status within SCDC. (App. 84-93).

In support of his allegation regarding the plea agreement, Petitioner asserted, in part: "Plea

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[1] Petitioner has nearly completed service of all his referenced sentences. As of the filing of this brief, he has served the sentences apart from the trafficking sentencing of nine years. Further, at present, the South Carolina Department of Corrections website "Inmate Search Detail Report" for Petitioner shows that Petitioner's projected released date is currently set for September 16, 2023. https://public.doc.state.sc.us/scdc-public/inmateDetails.do?id=%2000338587 (last checked Dec. 4, 2023). The Disciplinary Sanctions on the same report reflect two entries for loss of good time credits for "use, poss. narc, marij, unauth drug, inhalant." *Id.*

agreement stated sentence would run concurrent with the sentence I am serving time for now. Sentence start date should be back dated to June 2014. This start date of 1/25/17 was a split sentence which was not stipulated in plea agreement. . . . Attorney General elected to pick up distribution and controlled substance charges to aide and assist them to indict me on conspiracy. Therefore, I was not allowed to plea (sic) guilty and I entered SCDC with holds and detainers. Because of them picking up charges, I have had to remain a level two custody status instead of a level one. My co-defendant's are receiving all their jail credits. . . ." (App. 85-86) As requested relief, Petitioner sought resentencing to give him credit since June 1, 2014, and a reduction of his trafficking sentence. (App. 89 and 91).

In response, Respondent made its return and a motion to dismiss in part, seeking summary dismissal of all claims beyond whether counsel was ineffective for advising Petitioner to enter the waiver portion of the plea agreement waiving his rights to challenge his conviction through post-conviction relief pursuant to *Sanders v. State*, 412 S.C. 611, 617, 773 S.E.2d 580, 583 (2015).

An evidentiary hearing was convened March 2, 2021, via WebEx before the Honorable R. Scott Sprouse. Petitioner was present at the hearing and represented by Sarah Henry, Esquire. At the start of the hearing, Respondent renewed its motion to dismiss, arguing the hearing should be limited to the narrow issue of whether counsel was ineffective in advising Petitioner to enter into the waiver provision of the plea agreement and that any credit related claims were more properly addressed through internal Department of Corrections grievance procedures. The PCR court expressly found the only issue that would be litigated in the hearing would be whether plea counsel was ineffective in advising Petitioner to enter into the waiver provision of the plea agreement. (App. 122). The hearing proceeded under this limitation. At the conclusion of the hearing, the PCR court took the matter under advisement. (App. 170). On March 2, 2021, the PCR court

advised of its ruling and requested a proposed order. By order signed on June 4, 2021, and filed June 15, 2021, the PCR court denied relief, finding, in relevant part, that counsel's credible testimony demonstrated that he properly explained the waiver of both direct appeal and post-conviction remedies, and concluding that Petitioner made a knowing and voluntary waiver of those remedies in exchange for a favorable agreement with the State. (App. 183-186). Petitioner did not file any post-judgment motions, but timely appealed.

Petitioner, through counsel, filed his petition for writ of certiorari on December 15, 2021, in the Supreme Court of South Carolina. The return was filed on May 2, 2022, with the reply following on May 9, 2022. On May 17, 2022, our Supreme Court transferred the appeal to this Court. On August 21, 2023, this Court granted the petition. Petitioner, again through counsel, filed his Brief of Petitioner on September 20, 2023. This Brief of Respondent follows.

## RESPONDENT'S STATEMENT OF FACTS

The State presented the factual basis for all three charges at the plea. For the trafficking charge, the State set out the facts as follows:

> ... Your Honor, that Count involved a drug trafficking organization operating out of Greenville County, as well as several other counties including Pickens County, Spartanburg, Laurens, Charleston and Berkeley counties. Your Honor, as part of this organization, a number of Mexican nationals were involved in importing large amounts of methamphetamine, multiple kilograms at a time from the Atlanta, Georgia area in South Carolina.
>
> Early-on this conspiracy -- the contact person in South Carolina who was bringing this methamphetamine in was a defendant, Christopher David Smith, who has already pled guilty before the Court. Mr. Smith was importing, again, large amounts of methamphetamine which he would then break down and sell to other dealers.
>
> During his involvement with the conspiracy he was involved in a relationship with Aubrey Trammell. She would accompany him during drug transactions and assist him in those transactions.
>
> After Christopher David Smith when [sic] to prison on the revocation of Federal charges, his mother, Sandra Duncan, took over his role in the drug trafficking organization. She would then sell large amounts of methamphetamine to other dealers.
>
> Jason Larson was one of the dealers who was selling directly for Sandra Duncan. She would sell multiple-ounce amounts, a minimum of six ounces at a time, to Mr. Larson over a period of time throughout this conspiracy, up to the point when he was arrested on unrelated charges. Overall, Your Honor, he was responsible for selling at least ten pounds, in the aggregate, of methamphetamine.
>
> Your Honor, this organization was operating from January 2011 up through 2015.

(App. 23-25). Petitioner contested the amount reported in the recitation of facts; however, he admitted to the conspiracy and the "threshold amount" of twenty-eight grams up to one hundred grams. (App. 33-34).

The remaining drug charges stemmed from a stop at a traffic checkpoint in Pickens County on October 16, 2014:

> During the traffic stop it was found that Mr. Larson was driving with a suspended driver's license. During the stop a canine was utilized and alerted to the odor of controlled substances. A search of the vehicle then led to the discovery of three plastic baggies containing 8.47 grams of methamphetamine. Two of the bags were found under the driver's seat and the third bag was found between the center console and the passenger's seat.
>
> As to Count 2, ... again during that checkpoint, it was found that Mr. Larson, in addition to the methamphetamine, also was in possession of pills, particularly Oxycodone, which is a Schedule II controlled substance. That was concealed inside a beer can. I would note for the record that Mr. Larson did not have a valid prescription to have that controlled substance.

(App. 25-27).

## STANDARD OF REVIEW

Appellate courts will "defer to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them." *Smalls v. State*, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). However, appellate courts "review questions of law de novo, with no deference to trial courts." *Id.*, at 180-181, 819 S.E.2d at 839.

## ARGUMENT

### I.

> Petitioner's argument that the PCR court erred in failing to find his plea was not knowingly, intelligently, and voluntarily entered due to incorrect advice regarding credit for time served is not preserved for review because the PCR court did not rule on this substantive issue but properly limited the scope of the hearing to plea counsel's advice on the PCR waiver pursuant to *Sanders v. State*, 412 S.C. 611, 773 S.E.2d 580 (2015).

The sole issue before the PCR court was whether plea counsel was ineffective in advising Petitioner as to the waiver of appeal and PCR remedies. Petitioner's argument here, though, rests on whether the *underlying specific claim* on counsel's advice as to possible additional time to be credited to his sentence was valid.[2] (*See* BOP at 1). The underlying claim was not reached. The merits argument here is barred.

The PCR court initially limited the scope of the action and continued to keep that narrow focus throughout the hearing. The PCR court set out prior to taking testimony at the PCR hearing that:

> ... we will be limited in the testimony to the advice and circumstances surrounding and entering into the agreement and the waiver. And we're going to stick to that. ...

(App. at 122, lines 4-10). PCR counsel for Petitioner requested to offer evidence as to time available under S.C. Code Ann. § 24-13-40.[3] (*See* App. 116; 122-123). The PCR court allowed

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[2] Of course, if Petitioner was truly entitled to credit by statute, regardless of advice (if any), he would receive that credit under the calculations made by the South Carolina Department of Corrections. The sentencing sheet directs the Department to calculate and apply the credit under S.C. Code Ann. § 24-13-40. (*See* App. 78). Even so, Petitioner has conceded that he is not entitled to any credit on the trafficking sentence. (BOP at 9). Again, that is the only sentence Petitioner is currently serving.

[3] *But see Cooper v. State*, 338 S.C. 202, 206, 525 S.E.2d 886, 888 (2000) (claims asserting error in credit calculation under S.C. Code Ann. § 24-13-40 are not cognizable in PCR).

the evidence to be proffered, but again affirmed the narrow scope of the hearing. (App. 123). Even while allowing some factual context, the PCR court instructed Petitioner's PCR counsel to "keep it to what they discussed when the decision to sign" the plea agreement was made. (App. 134, lines 17-22) (referencing agreement at App. 42).

On March 2, 2021, the PCR court advised of its ruling and requested a proposed order. The PCR court subsequently issued a written order with findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80. The order only makes findings as to the restricted issue before the PCR court—whether plea counsel was ineffective in advising Petitioner to enter into the waiver portion of the plea agreement. (App. 179-186).

Because the PCR court expressly declined to entertain the substantive issue regarding counsel's advice, if any, about entitlement to time served before the plea (apart from credit on the trafficking sentence), the PCR court did not make findings regarding that issue in its order. Consequently, Petitioner's issue based on whether the advice was correct, and if that induced the plea, is not preserved for this Court's review. Simply, this Court has nothing to review.

Of note, the instant procedural bar argument is based not on a failed effort to preserve an otherwise cognizable claim in the lower court proceedings,[4] but on the limitation recognized in

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[4] To be sure, this distinction does not undermine the importance of preservation procedures. 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). *See also Johnson v. Lee*, 578 U.S. 605, 612 (2016) ("A State's procedural rules are of vital importance to the orderly administration of its criminal courts...") (quoting *Lambrix v. Singletary*, 520 U.S. 518, 525 (1997). In that same vein, our Supreme Court, while advising lower courts of the "flexibility of our Rules" in civil procedure where a procedural bar may arise in PCR, has also declined on appeal to take "the extraordinary action of excusing ... procedural default." *Mangal v. State*, 421 S.C. 85, 101, 805 S.E.2d 568, 576 (2017); *see also id.,* at 97, 805 S.E.2d at 574 ("In most PCR cases, ... we have refused to excuse the pleading and issue-preservation requirements that apply in all civil cases.").

*Sanders* on the scope of the argument that is cognizable in PCR. The holding in *Sanders* expressly sets out the only allowable inquiry:

> ... we hold that although a defendant may waive his right to collateral review, he is nevertheless still entitled to challenge whether the advice he received in agreeing to that waiver was constitutionally defective. Accordingly, the PCR court erred in not allowing Sanders to present evidence of ineffective assistance of counsel *on the limited issue of his counsel's advice in connection with entering into the agreement.*

*Sanders*, at 617, 773 S.E.2d at 583 (emphasis added).

Here, the record is abundantly clear that the PCR court did not rule on any issue beyond whether counsel was ineffective in advising Petitioner as to waiver. Despite a lack of ruling on his issue, Petitioner nevertheless argues plea counsel was ineffective regarding sentencing advice. This is wrong in several ways.

Initially, as demonstrated, the argument offends *Sanders*. Petitioner essentially alleges that the claim of ineffective assistance based on purportedly erroneous advice as to time-served credit calculation must be decided before the PCR court may determine if the advice on the PCR waiver was reasonable. (*See* BOP at 16-17). If true that advice on specific issues should be litigated before the advice as to waiver is considered, then *Sanders* would have to be read to disapprove of such waivers at all. It did not. Rather, the lane carved by *Sanders* was narrow. The *Sanders* Court expressly limited the issue to the advice on waiver – a much broader assessment. Stated differently, the advice that may be questioned concerns the waiver of a remedy, not the waiver of an issue. Moreover, the limitation is not unique, but mirrors similar limitations reviewed in other jurisdictions.

For example, the Seventh Circuit upholds enforceability of waiver provisions and limits challenges "to those discrete claims which relate directly to the *negotiation* of the waiver." *Jones*

*v. United States*, 167 F.3d 1142, 1145 (7th Cir. 1999)[5] (emphasis added). *See also United States v. Cockerham*, 237 F.3d 1179, 1187 (10th Cir. 2001) ("we hold that a plea agreement waiver of postconviction rights does not waive the right to bring a § 2255 petition based on ineffective assistance of counsel claims challenging the validity of the plea or the waiver. Collateral attacks based on ineffective assistance of counsel claims that are characterized as falling outside that category are waivable."); *Jackson v. State*, 241 S.W.3d 831, 833 (Mo. Ct. App. 2007) (claim of involuntary plea based on purportedly incorrect sentencing advice not addressed on the "merits ... because movant's waiver of his right to file a 24.035 motion as part of his plea bargain requires dismissal"). Such a limitation is likewise acknowledged in this Second Circuit case that is instructive:

> Parisi's challenge, which rests on his assertion that an effective lawyer would have successfully obtained dismissal of his case, does not relate *to the process by which Parisi agreed to plead guilty*. He urges us to allow his claim, despite its reliance on events prior to the plea negotiation rather than the negotiation itself, based on the theory that an effective lawyer would have changed Parisi's strategic bargaining position pre-plea. Parisi would have this Court turn its gaze away from the plea process and toward the multitude of ways in which pre-plea events might reduce the strength of the defense and worsen the defendant's bargaining power vis-à-vis the prosecutor. We decline that invitation.

*Parisi v. United States*, 529 F.3d 134, 138 (2d Cir. 2008) (emphasis added). Though that case focused on the waiver of appellate issues based on a guilty plea, the process distinction is persuasive.

Further, the distinction is easily kept. The focus simply remains on the advice given to explain the waiver and accept the waiver term as part of a favorable plea deal in total. Even if no

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[5] Relied upon in *Sanders*, at 616, 773 S.E.2d at 582.

specific advice on time-served credit was given at all (which appears to be the case here),[6] the weighing of benefits is still key. Afterall, if the credit for other time served was a specific consideration, it was not the only consideration. To reduce consideration of waiver to one aspect of advice on one narrow issue fails to evaluate the full consideration of plea-bargaining process.[7]

Lastly, Petitioner implicitly acknowledges that the time-credit advice substantive issue was not ruled upon and is not preserved because, although he requests a new trial based on ineffective assistance, he also asks for a remand "for further findings with regard to ineffective assistance of counsel." (BOP at 18).[8] This concession supports the procedural bar, which is evident in the record and the Order of Dismissal. The substantive issue raised is procedurally barred.[9]

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[6] Petitioner would have a difficult time in making his case for relief even if the claim was available and wrong advice was mentioned. First, credit for the time he is attempted to receive was not a term of the agreement. Second, incorrect advice can be "cured by the information conveyed at the plea hearing." *Moorehead v. State*, 329 S.C. 329, 333, 496 S.E.2d 415, 416 (1998) (citing *Wolfe v. State*, 326 S.C. 158, 485 S.E.2d 367 (1997)). The sentencing judge explained that he would not back date the sentence and would not give credit for time not served on the instant charges by the State Grand Jury. (App. 53-54). Petitioner did not hesitate to challenge the factual basis, (*see* App. 34-35), though the State expressly reserved the right to present the facts at the plea as it would have presented the facts at trial, (App. 42). Yet Petitioner made no attempt to challenge the decision as to the start date of his sentence. But again, the underlying claim of ineffective assistance of counsel is procedurally barred for the reasons argued above.

[7] The PCR court, having found the waiver valid, also "dismisse[d] all other allegations contained in [the] application and raised at the hearing." (*See* App. 180). Petitioner is not attempting to argue those claims would be appropriate. It is likewise not appropriate, under *Sanders,* to consider the substantive claim argued in this action. The PCR court did not do so but kept the correct and proper focus under *Sanders.*

[8] Petitioner is not clear as to whether he requests a remand just on the "advice on time-credit" issue. To refer to other potential issues, however, only underscores the damage to waivers that would be inflicted if the process was stretch to allow litigation on each underlying claim.

[9] As an independent request for relief, the suggestion for remand should be considered abandoned as Petitioner failed to argue a legal and factual basis for remand. *See In the Matter of the Care and Treatment of McCracken,* 346 S.C. 87, 551 S.E.2d 235 (2001) (issue abandoned if appellant fails to support the argument with authority or the argument is only conclusory); *State v. Lindsey*, 394 S.C. 354, 363, 714 S.E.2d 554, 558 (Ct. App. 2011) ("An issue is deemed

## II.

**The PCR court properly found Petitioner made a knowing, intelligent, and voluntary waiver of the right to PCR with the advice of competent counsel and upheld the waiver provision of the plea agreement; thus, no further determination on the individual claim was authorized.**

In addition to arguing that his plea counsel was wrong about potential time-credit, Petitioner argues "[p]lea counsel was ineffective in advising Petitioner about the plea and waiver." (BOP at 7). For prejudice, Petitioner relies upon his own testimony that he would not have pled guilty had he understood he could not file a PCR on the time-credit issue. (BOP at 7). However, the PCR court's finding that plea counsel "adequately and fully explained" the waiver of PCR properly led to the court's conclusion that the waiver stands. (App. 185-186). The PCR court's findings are supported by probative evidence of record. This Court should affirm.

A defendant has a right to the assistance of effective counsel as provided by the Sixth Amendment to the United States Constitution, whether the case resolves by trial or plea. *See* U.S. Const. amend. VI; *Strickland v. Washington*, 466 U.S. 668 (1984). "A claim of ineffective assistance of guilty plea counsel requires the applicant present evidence satisfying two prongs: first, evidence that counsel's performance was deficient; and second, evidence that the applicant was prejudiced by that deficiency." *Stalk v. State*, 383 S.C. 559, 560–61, 681 S.E.2d 592, 593 (2009) (citing *Hill v. Lockhart,* 474 U.S. 52 (1985)). To demonstrate sufficient prejudice for relief, an applicant "must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.*, at 562 (quoting *Hill*, at 59).

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abandoned and will not be considered on appeal if the argument is raised in a brief but not supported by authority.").

Plea agreements in general operate under contractual principles and are upheld when each party receives the benefit of the bargain. *State v. Thrift*, 312 S.C. 282, 292, 440 S.E.2d 341, 347 (1994). However, a criminal defendant who has waived his appellate and collateral review is still entitled to a PCR challenge on the very narrow issue regarding his attorney's conduct in advising him to agree to the waiver. *Sanders,* 412 S.C. at 617, 773 S.E.2d at 583.

In the present case, Petitioner chose to waive his PCR rights in exchange for an advantageous plea offer that significantly reduced the mandatory-minimum sentence he could receive. Both parties received a benefit of the bargain, and this agreement is valid under contractual law. Petitioner failed to demonstrate relief was due under *Sanders*.

At the PCR hearing, plea counsel testified he met with Petitioner and discussed every aspect of the plea agreement, including his waiver of appellate and collateral challenges to his plea. Counsel testified he advised Petitioner generally about what direct appeal and post-conviction relief actions were, the types of errors that could be challenged through each, and that he would be waiving the right to file a direct appeal or post-conviction relief action by accepting the plea agreement. (App. 149-150, and 157-162). Counsel testified that the review of the plea agreement (including the waiver) was not a rushed or quick process. (App. 147 and 163-164). Counsel also testified that Petitioner appeared to understand what a post-conviction relief action was, and that the plea agreement would significantly foreclose on his ability to pursue post-conviction relief. (App. 149 and 163). Counsel testified that Petitioner "really did not want to take a chance with going to trial with 400 grams or more." (App. 148). Counsel testified that he was familiar with the provisions to waive appellate and PCR rights, and noted, "the reason I think they put that in there is because they're dropping a large amount of time. He's going from 25 years mandatory down to an amount of time that is very low compared to that." (App. 148). Counsel testified that

he had reviewed the waiver of PCR provision with Petitioner, but also underscored that Petitioner "was concerned about the amount of - - if going to trial for 400 grams or more and the benefit that he got from pleading to a lesser included charge." (App. 149 and 163).

In contrast, Petitioner testified he did not read the plea agreement and merely initialed and signed where counsel instructed him to initial and sign.[10] (App. 140). He testified counsel never reviewed the PCR waiver provision with him and he did not understand the PCR waiver portion of the plea agreement. (App. 127, 136-38, 140-42). In his direct testimony, Petitioner asserted that he would not have pled if he had known he would not be able to challenge the credit issue in an appeal or PCR, but on cross-examination, Petitioner testified that counsel had, in fact, advised him as to the waiver of direct appeal. (App. 137 and 141-142).[11] Further, Petitioner testified that he

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[10] This makes little sense considering the plea agreement was signed at different times. Petitioner and the prosecutor signed on the same date, but counsel signed earlier. (*See* App. 44). A more reasonable take away is that Petitioner reviewed each of the items at least twice at different times, especially when counsel affirmed by his signature that, "[t]o [his] knowledge, the decision to make this plea agreement is informed and voluntary, including the waivers of direct appeal and post-conviction relief as set forth herein." *Id.* That view is consistent with counsel's PCR testimony as set out above.

[11] Again, the record supports the PCR judge's determination that counsel was far more credible in his assertions. Petitioner is focusing in on time calculation. It is not logical that he would refuse a lesser offense taking away a mandatory minimum, and negotiations that resulted in a cap in sentencing exposure. Moreover, in the plea, he confirmed that he understood the judge could sentence him to more time than even that favorable cap, (App. 13), but wished to plead under the offered terms anyway. Notably, as the Supreme Court has instructed: "Courts should not upset a plea solely because of *post hoc* assertions from a defendant about how he would have pleaded but for his attorney's deficiencies. Judges should instead look to contemporaneous evidence to substantiate a defendant's expressed preferences." *Lee v. United States,* 582 U.S. 357, 369 (2017). Our Supreme Court has similarly found that "*Hill* makes clear that th[e] prejudice prong ordinarily requires more than simply a defendant's assertion that but for counsel's deficient performance he would not have pled but would have gone to trial." *Stalk*, at 563, 681 S.E.2d at 595; *see also Taylor v. State,* 404 S.C. 350, 362, 745 S.E.2d 97, 103 (2013) ("Despite Petitioner's assertions to the contrary, there is probative evidence in the Record before us that he would not have chosen to proceed to trial"); *Goins v. State*, 397 S.C. 568, 575, 726 S.E.2d 1, 4 (2012) ("Although Goins testified at the PCR hearing that he accepted the plea because of the erroneous advice on the

understood that his was an "open plea from 7 to 15" years, which he "had no problem with...." (App. 140). He then qualified that had he understood that he would not receive credit for all the time he had previously served "it ***may have*** persuaded me not to sign the agreement." (App. 140) (emphasis added). He also testified that he wanted the plea judge to accept the plea under the terms of the agreement. (App. 142).

After listening to the testimony of plea counsel and Petitioner, the PCR court properly determined Petitioner made a knowing, intelligent, and voluntary waiver of his right to post-conviction relief and dismissed the application.[12] The PCR court specifically found counsel's testimony was credible and that credible testimony established that counsel had adequately advised Petitioner of the waiver of post-conviction remedies. These findings are supported by the record and should be afforded great weight. *See Frierson v. State*, 423 S.C. 257, 262, 815 S.E.2d 433, 435 (2018) (appellate courts "afford great deference to a PCR court's credibility findings"); *Washington v. State*, 440 S.C. 550, 563, 891 S.E.2d 668, 675 (Ct. App. 2023) ("This court gives

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suppression of the evidence, his testimony specifically was found not to be credible. We therefore find evidence to support the PCR court's finding that Goins failed to prove he was prejudiced by counsel's ineffective assistance because he has not demonstrated he would have gone to trial absent the erroneous advice.").

[12] Moreover, although not properly before this Court because the PCR court properly limited the scope of the hearing pursuant to *Sanders*, the substantive issue regarding whether counsel promised Petitioner that he would receive credit for the time he served on warrants from the Pickens County drug offenses prior to the adoption of those charges from the State Grand Jury is also refuted by the record. Counsel unequivocally testified he never told Petitioner he would receive credit for any particular period of time and specifically testified he did not promise Petitioner he would receive credit for the time from his arrest on the Pickens County drug charges. Counsel testified he did not represent Applicant at the time of his arrest of those county drug offenses and unequivocally stated he never told him he would receive credit for that period of time because he was not even certain he was aware of those specific warrants for which he was never representing Petitioner. (App. 152-57, 161). Petitioner's assertions that his plea was induced specifically because he was promised credit for this period of time from arrest on the Pickens County drug offenses is not supported by the record. However, this issue is not preserved for appellate review.

great deference to the PCR court's findings on matters of credibility.") (quoting *Putnam v. State*, 417 S.C. 252, 260, 789 S.E.2d 594, 598 (Ct. App. 2016)).

Ultimately, the evidence from the PCR hearing demonstrated that Petitioner knowingly, intelligently, and voluntarily entered into a favorable plea agreement with the advice of competent counsel, and the agreement included a valid waiver of his right to post-conviction relief. This was not induced by erroneous advice on the waiver provision, but by his own desire to secure a favorable plea offer. The trafficking charge was reduced which in turn reduced his sentence exposure. (App. 162-163). Specifically, Petitioner was originally facing a mandatory minimum of 25 years, with potentially other charges being run consecutively. (App. 145-146). The plea greatly reduced that sentencing exposure. As the PCR court reasonably found:

> Here, Applicant chose to plead guilty and agreed to waive his appellate and collateral rights in exchange for a favorable negotiated sentence. Both parties received a benefit of the bargain, and [... the ...] plea agreement is valid under contractual law.

(App. 185).

Petitioner's argument appears to urge this appellate court to reconsider the credibility of the PCR hearing testimony concerning waiver, but that was properly a matter for the PCR court. *Frierson, supra.* The PCR court credited counsel's testimony, (App. 185), which was supported by the signed agreement, (App. 42), and not Petitioner's complaint which was inconsistent with the record, the written plea agreement, and, ultimately, Petitioner's highest goal as described by counsel – to reduce sentence exposure by and through the bargaining process.

The PCR court's factual findings are amply supported by the record and his legal conclusion is sound based upon those facts. Consequently, Petitioner is not due any relief.

## CONCLUSION

Based on the foregoing, the Court should affirm the decision of the PCR court, or, in the alternative, dismiss as improvidently granted. Either lead to the correct result as Petitioner is not entitled to any relief.

Respectfully submitted,

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