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SC Court of Appeals

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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Certiorari to Greenville County

Honorable R. Scott Sprouse, Circuit Court 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 PETITIONER

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### **ISSUE PRESENTED**

Did the PCR judge err in refusing to find that plea counsel's advice to enter a plea agreement that required a waiver of the right to seek collateral review was constitutionally defective because plea counsel failed to advise Petitioner that the time served for PWID methamphetamine and possession of a controlled substance prior to the State Grand Jury indictments and the time served on an unrelated ABHAN charge would not apply to the trafficking methamphetamine charge rendering the waiver of collateral review and the guilty plea invalid?

## STATEMENT

On October 16, 2014, Petitioner was arrested at a traffic checkpoint in Pickens County and charged with distribution of methamphetamine and possession of a controlled substance. (App. p. 25, line 22 – p. 26-27, line 1; p. 81). These charges resulted in indictments #2015-GS-39-915, 017 that were later dismissed on August 21, 2018, because the charges were adopted by the State Grand Jury. (App. pp. 82-83). On September 30, 2015, Petitioner pled guilty to an unrelated ABHAN. (App. p. 126, lines 13-16). On October 21, 2015, the State Grand Jury indicted Petitioner in count one of a multi-defendant, multi-count indictment for trafficking methamphetamine, 400 grams or more (conspiracy), indictment #2015-GS-47-08. (App. pp. 58-60). On October 21, 2015, the State Grand Jury also indicted Petitioner for possession with intent to distribute methamphetamine [PWID] and possession of a controlled substance stemming from the October 16, 2014, charges in Pickens County, indictment #2015-GS-47-10. (App. pp. 76-77).

On January 25, 2017, Petitioner appeared before the Honorable Perry H. Gravely and, pursuant to a written plea agreement, (App. pp. 38-44), pled guilty to the lesser included offense of trafficking methamphetamine, 28-100 grams (conspiracy), PWID methamphetamine and possession of a controlled substance. Scott Robinson represented Petitioner at the plea. Joshua Underwood represented the State. The judge deferred sentencing. (App. p. 35, line 25).

On May 18, 2018, Petitioner appeared before Judge Gravely for sentencing. Again, Scott Robinson represented Petitioner and Joshua Underwood represented the State. Defense counsel asked that the sentence be backdated and served concurrent to the ABHAN sentence. (App. p. 49, lines 14-17). The State did not oppose the sentences running concurrent to the ABHAN sentence but opposed backdating. (App. p. 52, line 22- p. 53, lines 1-7). Judge

Gravely sentenced Petitioner to nine (9) years for trafficking, eight (8) years concurrent for PWID and time served for the controlled substance violation. (App. p. 56, lines 12-19). The judge ordered the sentences run concurrent to the ABHAN sentence and backdated the sentence to January 25, 2017, the time of the guilty plea. (App. pp. 78-80).

On December 19, 2018, Petitioner filed an application for post-conviction relief [PCR]. (App. pp.84-94). On April 30, 2019, the State filed a return and partial motion to dismiss. (App. pp. 95-103). On March 1, 2021, a hearing was held before the Honorable R. Scott Sprouse. Sarah M. Henry represented Petitioner. Lindsey A. McCallister represented the State. In a written order signed June 4, 2021, Judge Sprouse denied relief and dismissed the application. (App. pp. 172-187). A timely notice of intent to appeal was served on July 13, 2021. The petition for writ of certiorari was filed with the South Carolina Supreme Court on December 15, 2021. The return was filed on May 2, 2022. The reply brief was filed on May 9, 2022. On May 17, 2022, pursuant to Rule 243(1), SCACR, the South Carolina Supreme Court transferred the case to the South Carolina Court of Appeals. On August 21, 2023, the South Carolina Court of Appeals granted the petition for writ of certiorari and ordered briefing as provided by Rule 243(j), SCACR. This brief of petitioner follows.

### **STANDARD OF REVIEW**

“Our standard of review in PCR cases depends on the specific issue before us. We defer to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016) (citing Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013) ). We review questions of law de novo, with no deference to trial courts. Sellner, 416 S.C. at 610, 787 S.E.2d at 527 (citing Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014) ).” Smalls v. State, 422 S.C. 174, 180–81, 810 S.E.2d 836, 839–40 (2018).

## ARGUMENT

**The PCR judge erred in refusing to find plea counsel's advice to enter a plea agreement that required a waiver of the right to seek collateral review was constitutionally defective because plea counsel failed to advise Petitioner that the time served for PWID methamphetamine and possession of a controlled substance prior to the State Grand Jury indictments and the time served on an unrelated ABHAN charge would not apply to the trafficking methamphetamine charge rendering the waiver of collateral review and the plea invalid.**

Petitioner pled guilty, pursuant to a written plea agreement, to trafficking methamphetamine, 28-100 grams (conspiracy), PWID methamphetamine and possession of a controlled substance. Two of these three charges, the PWID and controlled substance charges, resulted from a Pickens County traffic checkpoint arrest on October 16, 2014. (App. p. 25, line 22 – 26, 27, line 1). These charges were originally indicted in Pickens County, indictments #2015-GS-39-915, 017. These indictments were later dismissed because the State Grand Jury issued an indictment for those two charges, indictment #2015-GS-47- 0010, as well as a separate indictment for trafficking, #2015-GS-47-0008. (App. pp. 82-83; pp. 58-77).

During the plea the prosecutor told the judge, “The State is recommending an overall sentence cap of fifteen (15) years, to run concurrently with each other as well as his current sentence in the Department of Corrections for an unrelated charge.” (App. p. 4, lines 4-8). Petitioner pled guilty to ABHAN on September 30, 2015, and was serving an eight-year sentence for the ABHAN at the time of the State Grand Jury plea on January 25, 2017. The plea agreement states that, “The State will recommend that the sentence run concurrently with Defendant’s current sentence and all other counts listed in this agreement.” (App. p. 39). The plea agreement does not indicate that the sentence would be backdated.

During the sentencing hearing on May 18, 2018, plea counsel told the judge, “Judge, what we’re asking for is a sentence, a minimum sentence of seven years in this case. We’re

actually asking that this be concurrent and that it be backdated to when he started this sentence about five years ago.” (App. p. 49, lines 4-8). The State opposed backdating the sentence. (App. p. 52, line 22 – p. 53, lines 1-18). The State told the judge, “I don’t believe that that would be appropriate. Mr. Larson’s ABHAN charge, which he was already in custody when these charges came about, that arose sometime significantly before these charges. I don’t feel it would be appropriate to give him credit for that time in the middle.” (App. p. 53, lines 1-7). Defense counsel argued that his client had no control over when the State Grand Jury brought charges. (App. p. 53, line 22 – p. 54, lines 1-11; p. 54, line 20 – p. 55, lines 1-12). Counsel’s comments at the sentencing hearing seem to reflect a general lack of understanding about backdating and when one is entitled to credit for time served. Neither plea counsel nor the State made the sentencing judge aware of any jail time Petitioner served after being arrested for PWID and possession of a controlled substance on October 16, 2014, to the time of his plea to ABHAN on September 30, 2015, jail time he for which he was statutorily entitled. See S.C. Code §24-13-40. The judge declined to backdate the sentence as requested by plea counsel. The judge sentenced Petitioner to nine (9) years for trafficking, eight (8) years concurrent for PWID and time served for the controlled substance violation. (App. p. 56, lines 12-19). The judge ordered the sentences run concurrent to the ABHAN sentence and backdated the sentence to January 25, 2017, the time of the guilty plea. (App. pp. 78-80).

During the PCR hearing Petitioner testified that when he pled guilty to trafficking methamphetamine, 28-100 grams (conspiracy), PWID methamphetamine and possession of a controlled substance he thought the sentence would be backdated to when he started serving time on the ABHAN offense. Petitioner testified, “Part of the plea agreement was to run my sentence concurrent with what I was doing at that time. Which is ABHAN. He led me to believe it would

be backdated to June of 2014. Which is when I started the assault and battery high and aggravated nature.” (App. p. 135, lines 13-17). Petitioner’s testimony is supported by plea counsel’s comment at the sentencing hearing on May 18, 2018, when he told the judge, “Judge, what we’re asking for is a sentence, a minimum sentence of seven years in this case. We’re actually asking that this be concurrent and that it be backdated to when he started this sentence about five years ago.” (App. p. 49, lines 4-8). Petitioner, however, was not entitled to a sentence backdated to the June 2014, start of the ABHAN sentence. Petitioner was not entitled to credit for time served on the two County charges, PWID methamphetamine and possession of a controlled substance, to apply to the trafficking charge because the trafficking charge was separate from these other two County drug charges that were later adopted by the State Grand Jury. Plea counsel failed to advise Petitioner that the time served for the County charges prior to adoption by the State Grand Jury and the time served on the unrelated ABHAN charge would not apply to the trafficking methamphetamine charge. Plea counsel was ineffective in advising Petitioner about the plea and waiver.

During the PCR hearing PCR counsel asked Petitioner, “So did you and Scott [plea counsel] ever discuss your appellate rights and your PCR rights if the sentence was not backdated like he said it was going to be?” (App. p. 137, lines 11-14). Petitioner answered, “Not at all.” (App. p. 137, line 15). PCR counsel asked, “Okay. Would you have gone forward with the plea if you had known that you were not – if you did not get this credit that could not appeal that or file a post-conviction relief action about that?” (App. p. 137, lines 16-19). Petitioner answered, “One hundred percent, no.” (App. p. 137, line 20). Petitioner demonstrated prejudice as a result of plea counsel’s deficient advice with regard to the plea and the waiver.

During the hearing PCR counsel asked Petitioner, “So did Scott [plea counsel] ever tell you prior to the sentencing that you would get or that you would be assured or that you would absolutely get jail credit for time you served?” (App. p. 128, lines 8-11). Petitioner answered, “Yes.” (App. p. 128, line 12). With regard to the plea agreement, Petitioner testified that he remembered discussing with plea counsel the waiver of direct appeal but not the waiver of PCR. (App. p. 140, lines 2-8). Petitioner testified that he signed the plea agreement on counsel’s advice and initialed without reading it. (App. p. 140, line 16 – p. 141, lines 1-6). Petitioner testified, “But if I would have known that I wasn’t going to receive the time I already done, it may have persuaded me not to sign the agreement.” (App. p. 140, lines 22-25). During the guilty plea the prosecutor did not mention the waiver of appellate and PCR rights with regard to Petitioner. (App. p. 3, line 12 – p. 4, lines 1-8). The prosecutor, however, specifically mentioned the waiver of appellate and PCR rights with regard to other defendants, Jose Manuel Carrillo, (App. p. 2, lines 21-24), Aubrey Trammell, (App. p. 4, lines 16-18), and Stephanie Joelle Hollingsworth, (App. p. 5, line 25 – p. 6, lines 1-2).

During the PCR hearing, when asked about time served credit, plea counsel testified, “And what I told him was that we would ask for the Judge to give him any time that he was entitled to. I also advised him that once he gets to SCDC that they will figure out how much time he is entitled to. I asked The Judge to backdate the time at one point. And the Judge decided not to do that.” (App. p. 150, line 21 – p. 151, line 1). When asked about his discussions about prior jail time plea counsel testified, “We would discuss anything as far as if he was entitled to any time served, SCDC would give that to him. And we would ask for any sort of time that he would be entitled to.” (App. p. 151, lines 21-24). In this case, however, SCDC would not be aware of jail time served prior to the State Grand Jury indictments because

neither plea counsel nor the prosecutor made the sentencing judge aware of the prior time served and the arrest warrants from October 16, 2014, are not referenced on the State Grand Jury indictment. When asked specifically what time plea counsel told Petitioner he was entitled plea counsel testified, “The time he would be entitled to is any time that he served in jail on these charges for the State Grand Jury. That’s what he would be entitled to. When that first started.” (App. p. 152, lines 5-8). When questioned further about the prior jail time plea counsel testified, “I don’t know if I discussed the – you’re basically, saying that he would be entitled to the previous time that he had when he was in jail on the other charges, right? The warrants; is that correct? That were took over by the State Grand Jury.” Plea counsel then admitted, “Okay. I don’t know if I discussed – I don’t know if I knew about those times as far as what that was. I’m not sure about that one.” (App. p. 153, lines 2-4).

Counsel should have known about any prior jail time served for PWID and possession of a controlled substance from October 16, 2014 to September 30, 2015. Petitioner was entitled to any time he spent in jail on the two County charges that were later indicted by the State Grand Jury from October 16, 2014, to the time of his plea to ABHAN on September 30, 2015. See S.C. Code §24-13-40. Plea counsel failed to make the sentencing judge aware of the amount of time served on the County charges that were later indicted by the State Grand Jury. The time served on these two County charges, however, would not apply to the trafficking indictment. Petitioner reasonably believed, based on counsel’s general advice that Petitioner would receive the jail time credit to which he was entitled, that he would receive credit for the time served for both the trafficking indictment as well and the PWID and controlled substance indictment. Plea counsel was ineffective in failing to advise Petitioner that he would not receive credit for time served for the trafficking charge and in failing to advise Petitioner that he was not entitled to a backdated

sentence. Petitioner testified that he would not have gone forward with the plea if he knew that he would not receive credit for time served. (App. p. 137, lines 16-20). Counsel's failure to advise Petitioner that he would not receive jail credit for the trafficking methamphetamine charge rendered the waiver of collateral review involuntary and unknowing. Counsel was constitutionally ineffective in advising Petitioner to waive collateral review without specifically advising Petitioner about time served credit.

In the order of dismissal the judge wrote:

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 this Court finds Applicant's plea agreement is valid under contractual law. This Court also finds Counsel's testimony on this issue to be credible. Counsel is experienced in handling similar plea agreements based on his significant criminal defense experience. Counsel's credible testimony established that he adequately and fully explained all portions of the plea agreement to Applicant including the waiver of Applicant's direct appeal and post-conviction relief remedies, and Applicant knowingly and voluntarily waived his rights after these conversations with Counsel. This Court find Counsel was prepared and competent n his representation of Applicant generally. Therefor, the allegation Counsel was constitutionally ineffective in advising Applicant to enter into the waiver provision is denied and dismissed with prejudice.

(App. pp. 185-186).

The PCR judge erred. Plea counsel was ineffective in generally advising Petitioner he would get credit for jail time served but failing to specifically advise Petitioner he would not receive jail time credit for the trafficking charge. Plea counsel was additionally deficient in failing to explain that Petitioner was not entitled to a backdated sentence. Petitioner relied on a backdated sentence and credit for time served when he entered the plea and agreed to waive collateral review. The waiver of collateral review was rendered involuntary by plea counsel's deficient performance. The issue was raised at the PCR hearing, ruled on by the PCR judge, and is preserved for appellate review.

In Sanders v. State, 412 S.C. 611, 617, 773 S.E.2d 580, 583 (2015), the South Carolina Supreme Court agreed with a number of federal jurisdictions and held, “. . . [T]hat 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.” The Court also expressed concerns about the ethical implications of a waiver of ineffective assistance of counsel claims writing in a footnote, “Furthermore, we express our concern with the ethical implications of a waiver of ineffective assistance of counsel claims. A number of jurisdictions have acknowledged the conflict of interest that arises when an attorney counsels his client to waive the right to challenge his representation.” Sanders v. State, 412 S.C. 611, 616, 773 S.E.2d 580, 582, n. 2 (2015) (citations omitted). Also in Sanders, the South Carolina Supreme Court quoted the Seventh Circuit Court of Appeals writing:

Justice dictates that a claim of ineffective assistance of counsel in connection with the negotiation of a cooperation agreement cannot be barred by the agreement itself—the very product of the alleged ineffectiveness. To hold otherwise would deprive a defendant of an opportunity to assert his Sixth Amendment right to counsel where he had accepted the waiver in reliance on delinquent representation. Jones v. United States, 167 F.3d 1142, 1145 (7th Cir.1999).

Sanders v. State, 412 S.C. 611, 615–16, 773 S.E.2d 580, 582 (2015). Unlike in Sanders, an evidentiary hearing was held in the present case. At the evidentiary hearing Petitioner showed that he accepted the waiver in reliance on delinquent representation. The PCR judge erred in finding that the waiver of post-conviction relief was valid.

Despite a knowing and voluntary waiver, a plea agreement that waives the right to collaterally attack a conviction and sentence is unenforceable with respect to an ineffective assistance of counsel claim that challenges the voluntariness of the plea. United States v.

Johnson, 410 F.3d 137, 151 (4<sup>th</sup> Cir. 2005)(“[E]ven if the court engages in a complete plea colloquy, a waiver ... may not be knowing and voluntary if tainted by the advice of constitutionally ineffective trial counsel.”); see also, United States v. Attar, 38 F.3d 727, 732 (4<sup>th</sup> Cir. 1994)(holding “a defendant’s agreement to waive appellate review of his sentences is implicitly conditioned on the assumption that the proceedings following entry of the plea will be conducted in accordance with constitutional limitations”).

In Johnson, the Fourth Circuit explained that an appeal waiver pursuant to a plea agreement “cannot be knowing and voluntary when the plea agreement itself is the result of advice outside the range of competence demanded of attorneys in criminal cases.” Johnson, 422 F.3d at 151 (internal quotations omitted); see also Washington v. Lampert, 422 F.3d 864, 871 (9<sup>th</sup> Cir. 2005)(holding that a plea agreement that waives the right to file a federal habeas petition pursuant to 28 U.S.C. § 2254 is unenforceable with respect to an ineffective assistance of counsel claim that challenges the voluntariness of the waiver); United States v. White, 307 F.3d 336, 339 (5<sup>th</sup> Cir. 2002)(holding that a waiver of a right to file a petition for federal habeas corpus does not apply to a claim that the waiver was tainted by ineffective assistance of counsel); United States v. Cockerham, 237 F.3d 1179, 1183-1184 (10<sup>th</sup> Cir. 2001)(holding although a waiver of collateral review rights is generally enforceable, such a waiver is unenforceable against a claim of ineffective assistance in connection with the negotiation of the waiver itself because it would deprive the defendant the opportunity to assert his Sixth Amendment right to counsel where he had accepted the waiver in reliance on delinquent representation); DeRoo v. United States, 223 F.3d 919 (8<sup>th</sup> Cir. 2000)(“A defendant’s plea agreement waiver of the right to seek section 2255 post-conviction relief does not waive defendants’ right to argue, pursuant to that section, that the decision to enter into the plea was not knowing and voluntary because it was the result of

ineffective assistance of counsel.”); Jones v. United States, 167 F.3d 1142, 1145 (7<sup>th</sup> Cir. 1999)(“Justice dictates that a claim of ineffective assistance of counsel in connection with the negotiation of a cooperation agreement cannot be barred by the agreement itself – the very product of the alleged ineffectiveness.”); United States v. Henderson, 72 F.3d 463, 465 (5<sup>th</sup> Cir. 1995)(holding that a dismissal of an appeal based on a waiver in the plea agreement was improper where the motion to withdraw the plea incorporated a claim that the defendant’s waiver of appeal was tainted by ineffective assistance of counsel).

In United States v. Cockerham, 237 F.3d 1179, 1187 (10<sup>th</sup> Cir. 2001)(n. 4 omitted), a case cited by the South Carolina Supreme Court in Sanders v. State, 412 S.C. 611, 617, 773 S.E.2d 580, 583 (2015), and cited above, the Tenth Circuit Court of Appeals wrote:

In light of these statements by the Supreme Court in Broce, there appear to be two critical components to determining whether the right to collateral relief survives a waiver. The first is whether there is any basis for a claim of ineffective assistance of counsel, and the second is whether that ineffectiveness claim pertains to the validity of the plea. As a result, subject to the same exceptions that apply to waivers of the right to direct appeal, it is consistent with Supreme Court precedent to enforce a waiver of § 2255 rights expressly contained in a plea agreement when the collateral attack does not challenge counsel’s representation in negotiating or entering the plea or the waiver. As noted above, “[a] plea of guilty and the ensuing conviction comprehend all of the factual and legal elements necessary to sustain a binding, final judgment of guilt and a lawful sentence.” Broce, 488 U.S. at 569, 109 S.Ct. 757. Based on this reasoning, 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.

In the present case there is a basis for a claim of ineffective assistance of counsel and that claim pertains to the validity of the guilty plea. The disfavored waiver of post-conviction relief included in the plea agreement is not valid.

Petitioner presented evidence that plea counsel failed to advise him in connection with entering into the plea agreement that any time served would not apply to the trafficking charge. Petitioner presented evidence that plea counsel failed to advise Petitioner that he was not entitled to a backdated sentence. Counsel's failure to advise that any time served would not apply to the trafficking charge and failure to advise that he was not entitled to a backdated sentence constituted ineffective assistance of counsel and rendered the plea agreement and the waiver of collateral review involuntary and unknowing. The PCR judge erred in refusing to find counsel ineffective with regard to his advice about entering the plea agreement.

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668, 104 S.Ct. 2052). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687–88, 104 S.Ct. 2052. “Under this prong, ‘[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.’” Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. 2052. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Id.

The Strickland test operates similarly when an applicant claims counsel was ineffective in the context of a guilty [Alford] plea. Hill v. Lockhart, 474 U.S. 52, 58, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). A guilty plea may not be accepted unless it is voluntarily and understandingly made. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). “To find a guilty plea is voluntarily and knowingly entered into, the record must establish the defendant had a full understanding of the consequences of his plea and the charges against him.” Roddy v. State, 339 S.C. 29, 33, 528 S.E.2d 418, 421 (2000). “A defendant's knowing and voluntary waiver of the constitutional rights which accompany a guilty plea ‘may be accomplished by colloquy between the Court and the defendant, between the Court and defendant's counsel, or both.’ ” Pittman v. State, 337 S.C. 597, 599, 524 S.E.2d 623, 625 (1999) (quoting State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993)). “The longstanding test 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.’ ” Hill, 474 U.S. at 56, 106 S.Ct. 366 (quoting North Carolina v. Alford, 400 U.S. 25, 31, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970)).

In Frierson v. State, 423 S.C. 257, 262, 815 S.E.2d 433, 436 (2018), the South Carolina Supreme Court wrote:

To establish a claim of ineffective assistance of counsel, the defendant has the burden of proving “(1) counsel failed to render reasonably effective assistance under prevailing professional norms; and (2) counsel's deficient performance prejudiced the applicant's case.” McKnight v. State, 378 S.C. 33, 40, 661 S.E.2d 354, 357 (2008). In order to establish prejudice when challenging a guilty plea, a defendant must prove “there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty, but would have gone to trial.” Harden v. State, 360 S.C. 405, 408, 602 S.E.2d 48, 49 (2004). The crux of the inquiry is whether counsel's ineffective performance affected the outcome of the plea process, not whether the defendant would have been successful had he gone to trial. Alexander v. State, 303 S.C. 539, 542, 402 S.E.2d 484, 485 (1991). As the United States Supreme Court stated in Hill v. Lockhart, 474 U.S. 52, 59,

106 S.Ct. 366, 88 L.Ed.2d 203 (1985), “[I]n order to satisfy the ‘prejudice’ requirement, the defendant must show there is a reasonable probability that, but for counsel's errors, he would not have pled guilty and would have insisted on going to trial.”

Trial counsel was ineffective in failing to advise Petitioner in connection with entering into the plea agreement that any time served would not apply to the trafficking charge and that he was not entitled to a backdated sentence. There is a reasonable probability that if Petitioner knew that the time he served from the arrest for PWID and possession of a controlled substance on October 16, 2014, to the time of his plea to ABHAN on September 30, 2015, would not count toward the trafficking charge, Petitioner would not have pled guilty and would have insisted on going to trial. The disfavored waiver of collateral review in this case is invalid because it was based on inaccurate advice by plea counsel with regard to time served and backdated sentencing. The deficient performance by plea counsel rendered both the plea and the waiver involuntary. Petitioner is entitled to relief in the form of a new trial. Alternatively, as the waiver of collateral review is invalid, this Court should remand the case to the PCR court to determine other instances of ineffective assistance of counsel that did not affect the plea agreement and waiver, including the fact that plea counsel did not make the judge aware of the credit Petitioner served on the Pickens County arrest for PWID and possession of a controlled substance from October 16, 2014, until September 30, 2015, when he entered the plea to ABHAN.

In arguing that the issue is not preserved, Respondent overlooks the fact that counsel's inaccurate advice about sentencing affected both the plea and the waiver as the waiver was made a part of the plea agreement by the State. The preservation argument made by Respondent misapprehends the holding in Sanders where the Court wrote:

Consequently, 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.

412 S.C.at 617, 773 S.E.2d at 583. The advice Petitioner received in connection with entering the plea agreement and waiver of post-conviction relief was constitutionally defective. The PCR ruled on the issue and erred in refusing to find that counsel's advice with regard to the plea and waiver was deficient rendering both involuntary. The issue is preserved.

### CONCLUSION

Based on the above argument, this Court should find that counsel's deficient advice rendered both the waiver of post-conviction relief and the guilty plea invalid. This Court should reverse the finding of the PCR judge and remand for a new trial. Alternatively, this Court should remand to the PCR court for further findings with regard to ineffective assistance of counsel.

  
Kathrine H. Hudgins  
Appellate Defender

ATTORNEY FOR PETITIONER

This 20<sup>th</sup> day of September, 2023.