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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Orangeburg County

Honorable Kristi F. Curtis, Circuit Court Judge

SHELLY FAULLING,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2025-000344

PETITION FOR WRIT OF CERTIORARI

JORDAN WAYBURN
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ISSUES PRESENTED

1. Is Petitioner entitled to belated appellate review of his trial as the state conceded below and the PCR court found?

2. Was Petitioner deprived of his right to be present at trial when he was tried *in absentia* despite being in custody at the local jail?

3. Was trial counsel ineffective for failing to properly preserve an objection that Petitioner was tried in his absence?

4. Are Petitioner's guilty pleas invalid because the record demonstrates he did not understand a motion to reconsider his trial sentence could not affect the negotiated plea he entered?

5. Are Petitioner's guilty pleas and *Faretta* waiver invalid because Petitioner was given extensive advice by the prosecuting attorney who plainly has a conflict of interest?

STATEMENT

On February 2, 2017, Petitioner Shelley Faulling was arrested for possession of methamphetamine. App. 206. On December 6, 2017, he was indicted by the Orangeburg County grand jury for possession of methamphetamine with the intent to distribute. App. 206-07. On December 12, 2017, he was tried in his absence before Judge Edgar Dickson and a jury. App. 18, 44:16-18. Petitioner was in custody at the local jail at this time. App. 47:16-20, 49:17-21. Petitioner was represented by Deborah Butcher, and Ashley Cornwell prosecuted the case. App. 18. Ultimately, the jury convicted him as charged. App. 186:1-6. The trial court sealed its sentence. App. 190:15-20. Two days later, on December 14, 2017, Petitioner was brought before the court and received a sentence of thirty years in prison. App. 193:1-17, 204:1-8. At sentencing, trial counsel was relieved as to his other pending charges. App. 196:10-13, 198:22-199:7.

On January 23, 2017, Petitioner was indicted by the Calhoun County grand jury for failing to stop for a blue light, a second count of possession with intent to distribute methamphetamine, driving on a suspended license, and operating a motor vehicle without proper registration. App. 252-59. He also faced charges in Orangeburg County for failing to stop for a blue light and a third count of possession with intent to distribute methamphetamine. App. 248-51. None of these were brought to trial. App. 23:12-15. Instead, following his conviction at the trial *in absentia*, Petitioner began speaking *pro se* with the solicitor about a plea deal for these other charges. App. 193:18-22, 201:19-25.

On January 11, 2018, Petitioner appeared *pro se* again in Orangeburg County before Judge Dickson. App. 208, 221:17-21. He waived venue on the Calhoun County charges and presentment on the Orangeburg charges. App. 235:4-8, 231:13-25. He pleaded guilty to all six

charges from both Orangeburg and Calhoun Counties. App. 232:5-237:12. The pleas were for negotiated sentences to run concurrently with his trial sentence. App. 233:16-19. The plea court issued the following sentences, all to run concurrently: time served for the driving under suspension and unregistered vehicle charges, three years for both failure-to-stop charges, and thirty years for each of the possession with intent to distribute charges. App. 237:24-238:19.

As was discussed earlier in the hearing, Petitioner then made a motion to reconsider his trial sentence. App. 211:18-212:7, 238:20-25. He asked the court to reconsider his sentence:

> I'm asking the court to reconsider, please. I'm forty-seven years old. I've got kids. My mama's sixty-seven. I'm probably not never going to make it out having no thirty years. I know she ain't make no thirty years.

App. 239:10-14. He asked the court to instead give him a ten-year sentence—"Your Honor, please, I'm begging you," App. 240:10-11—and if it did he assured the court he would not appeal. App. 239:16-22. The state opposed the motion. App. 242:1-5. The court denied the motion but stated, "I am appointing appellate defense to represent you on your appeal." App. 243:12-14. Nonetheless, no attorney ever filed a notice on his behalf. When Petitioner attempted to file a notice of appeal *pro se*, it was dismissed as untimely. App. 264, 268.

On December 10, 2018, Petitioner filed PCR applications challenging his convictions in both Orangeburg and Calhoun Counties. App. 269, 275. The state filed its return to the Orangeburg application in December of 2021 and to the Calhoun application in January of 2022. App. 283, 299-300, 309. At a subsequent PCR hearing, the state conceded Petitioner is entitled to a belated appeal, and the PCR court ruled he was entitled to that appeal. App. 12-13, 329:14-18. Petitioner now files this petition for a writ of certiorari to review the PCR court's decision and an accompanying *White v. State* brief.

Further factual details are addressed below as relevant to each issue raised.

ARGUMENT

I. The PCR court correctly granted petitioner a belated appeal pursuant to *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974), where the parties agree he did not knowingly and voluntarily waive his right to a direct appeal.

"Following a trial, counsel must make certain the defendant is made fully aware of the right to appeal." *Simuel v. State*, 390 S.C. 267, 270, 701 S.E.2d 738, 739 (2010) (citation omitted). "In the absence of an intelligent waiver by the defendant, counsel must either initiate an appeal or comply with the procedure in *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967)." *Id.* "To waive a direct appeal, a defendant must make a knowing and intelligent decision not to pursue the appeal." *Sheppard v. State*, 357 S.C. 646, 651, 594 S.E.2d 462, 465 (2004) (citing *Davis v. State*, 288 S.C. 290, 290, 342 S.E.2d 60 (1986) (mem.)).

In *Davis* this Court ordered that where a PCR court finds a defendant did not knowingly and intelligently waive his right to direct appeal, "the applicant must petition this Court for a *White v. State* review." 288 S.C. at 291 n.1, 342 S.E.2d 60. The PCR court cannot itself grant relief by ordering belated appellate review. *Id.* The order further directed: "On the date the Petition is served, Petitioner shall also serve and file a brief addressing all direct appeal issues." 288 S.C. at 291, 342 S.E.2d 60; *see also* Rule 243(i), SCACR (providing procedure for seeking *White v. State* review).

Trial counsel was relieved during sentencing following the Orangeburg trial, and she did not file a notice of appeal. App. 198:22-199:8, 12-13. Petitioner attempted to file a notice of appeal *pro se*, but it was dismissed as untimely. App. 264, 268. At the PCR hearing, the state conceded Petitioner did not knowingly and intentionally waive his right to appellate review and conceded he is entitled to a belated appeal. App. 381:14-17, 12. The PCR court correctly found he was entitled to a belated *White v. State* appeal of the Orangeburg trial. App. 12-13.

II. Petitioner's right to be present at trial, under the Confrontation and Due Process Clauses and Rule 16, SCRCrimP, was violated when he was tried *in absentia*.

a. Relevant Facts

When the state called Petitioner's case to trial, the trial court selected a jury prior to addressing Petitioner's absence. App. 41:15-42:15, 44:14-22. After removing the jury from the courtroom, trial counsel made a motion for a continuance based on Petitioner's absence. App. 44:12-18. Trial counsel and the solicitor informed the court Petitioner "refused" to attend. App. 44:17-19, 49:17-21. They did not explain the source of this information. Ultimately, the trial court denied the motion for the continuance. App. 50:9-17.

At the PCR hearing, trial counsel could not recall why she believed Petitioner "refused" to attend. App. 361:12-18. She speculated, "perhaps the solicitor told me that he didn't come or the jail informed me." App. 361:14-16. She did know, however, she was not present at the jail when transport officers gathered defendants to bring to the courthouse, so she had no firsthand information. App. 361:5-11. She could not recall even if Petitioner was brought to court for sentencing about his alleged refusal. App. 362:14-18. She agreed Petitioner knew "that trial could proceed in his absence" because that is something she typically addresses when she first meets with clients. App. 365:14-18.

The solicitor, Ashley Cornwell, also testified at the PCR hearing. App. 366:15-23. She testified she warns defendants "in every case" that if they are not present the trial will proceed without them. App. 368:3-14. Cornwell testified she too was not at the jail when defendants were brought over to the courthouse. App. 370:2-4. She testified that when she arrived at the courthouse, someone from the jail—she could not recall who—informed her Petitioner "had not been brought over." App. 370:9-16. She testified that "the transportation person" informed

Judge Dixon in chambers, "we tried to bring him over, he's refused to come over." App. 370:19-371:5. No one involved with transport testified at the hearing.

Petitioner testified he "did not refuse transport" but was instead told he was going to make bond, so he collected his belongings. App. 352:9-14. He testified "no one came to transport" him. App. 352:15-16. This is essentially the same statement he made at sentencing two days after trial:

> I was up front getting bailed out. I was -- she told me one day that we was going -- one day last week and then she said Monday. Next thing I know I'm up front getting bailed out, and they said that was gonna -- that I had to come over here for GPS monitoring. I'm waiting for that there and they said if you -- I mean hell, Mr. Faulling, you already been found guilty.

App. 199:21-200:2. In support of his explanation about bond, Petitioner introduced his Exhibit 1 at the PCR hearing, an order granting him bail the Friday before trial. App. 402-03. He also expressly testified that had he known about the trial he would have been present if it were in his power to make that happen. App. 349:8-12. Petitioner's sister, Sheri Fogle, testified at the PCR hearing that she was trying to bond him out on the day of his trial. App. 355:19-32:9. She had already paid a bondsman. App. 356:10-20.

The PCR court concluded Petitioner's right to be present at trial was not violated. App. 8-10. It found "counsel and the solicitor credibly testified that Applicant was advised on the record of his trial date and that the trial would occur in his absence if he chose not to attend." App. 9. It also ruled the trial court was not obligated to warn him or obtain a waiver from him on the record, even though he was held in custody. App. 9-10. The PCR court noted that, at trial, "trial counsel reminded Judge Dickson about Applicant's prior motion to relieve counsel and the deteriorating relationship between her and Applicant." App. 8.

b. *Analysis*[1]

i. An on-the-record waiver should be required before an in-custody defendant is found to have waived his right to be present at trial.

The PCR court erred because the trial court should have required Petitioner be brought to court for adequate warnings and a personal waiver. As trial counsel noted, "He was at the jail. He, of course, couldn't show up on his own." App. 47:18-19. This fact distinguishes Petitioner's case from every other case where trial was permitted to proceed *in absentia*. All other cases of which counsel is aware have concerned defendants out on bond. *See, e.g.*, *State v. Jackson*, 288 S.C. 94, 95, 341 S.E.2d 375, 375 (1986); *Ellis v. State*, 267 S.C. 257, 259, 227 S.E.2d 304, 305 (1976); *State v. Wrapp*, 421 S.C. 531, 533, 808 S.E.2d 821, 822 (Ct. App. 2017); *State v. Ravenell*, 387 S.C. 449, 453, 692 S.E.2d 554, 556 (Ct. App. 2010). The only other cases concern defendants who waive or forfeit their rights by disruptive conduct during trial. *See, e.g.*, *State v. Patterson*, 367 S.C. 219, 230, 625 S.E.2d 239, 244 (Ct. App. 2006) (citations omitted); *see generally Illinois v. Allen*, 397 U.S. 337, 338 (1970). But defendants in custody clearly present a different circumstance, one where it is not adequate to merely accept the solicitor's or counsel's statement the defendant has refused to appear.

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[1] Petitioner has raised in his *White v. State* brief many of the same issues and arguments regarding the trial proceeding in his absence. He raises those arguments again here—albeit in an abbreviated form—out of an abundance of caution for fear of the state attempting to assert some procedural bar to review in the belated appeal. Petitioner strongly urges the state should not be permitted to do so since it expressly argued below "the issue is preserved" as a basis for precluding PCR. App. 422-23.

Regardless, this issue was raised to and ruled upon by the PCR court. App. 8-11. It is a claim his "conviction . . . was in violation of the Constitution of the United States or the Constitution or laws of this State." S.C. Code Ann. § 17-27-20; *see also Williams v. Ozmint*, 380 S.C. 473, 477, 671 S.E.2d 600, 601 (2008) ("In a PCR proceeding, a defendant collaterally attacks his conviction and may raise any claims of constitutional violations relating to his conviction."). The issue is therefore appropriate to address here if necessary and notwithstanding the duplication.

In such cases where the defendant is in custody and readily accessible, the trial court should be required to obtain a waiver from the defendant personally. This is because the right to be present at one's trial is of such importance—it is "scarcely less important to the accused than the right of trial itself." *Diaz v. United States*, 223 U.S. 442, 455 (1912); *see also Lewis v. United States*, 146 U.S. 370, 374-75 (1892) (describing "the peculiar sacredness of this high constitutional right" to be present at trial, and requiring an on-the-record notation that the defendant is or is not present). This is a longstanding rule: "It is generally held that a waiver of defendant's right to be present during the trial, when permitted, *must be made by him personally*, and that the right cannot be waived by his counsel, unless the defendant expressly authorizes him to do so." 16 Corpus Juris, *Criminal Law* § 2071, at 818 (1918) (emphasis added); *see also Lewis*, 146 U.S. at 372 ("[I]in felonies it is not in the power of the prisoner, either by himself or his counsel, to waive the right to be personally present during the trial."). The Supreme Court in *Diaz* long ago recognized that this general rule distinguishes between those in custody and those not, noting those in custody cannot waive the right to be present "because his presence or absence is not within his own control." 223 U.S. at 455. Here, Petitioner was confined to a cell a few miles from the courthouse, without ability to bring himself to court. Before the law will accept an alleged waiver of a defendant's right to be present, it should hear from the defendant himself that desire and ensure he is warned trial will proceed in his absence if he so chooses.[2]

Other jurisdictions have reached this conclusion: "Where the defendant is in custody, the serious and weighty responsibility of determining whether he wants to waive a constitutional

[2] One additional reason for this rule is that if counsel waives the defendant's right to be present for him, as effectively occurred here, counsel has also waived the defendant's right to testify. This it cannot do. *See Mccoy v. Louisiana*, 584 U.S. 414, 422 (2018) ("[S]ome decisions . . . are reserved for the client—notably, whether to plead guilty, waive the right to a jury trial, *testify in one's own behalf*, and forgo an appeal." (emphasis added)).

right requires that he be brought before the court, advised of that right, and then permitted to make an intelligent and competent waiver." *United States v. Gordon*, 829 F.2d 119, 125 (D.C. Cir. 1987) (internal quotation marks omitted) (quoting *Cross v. United States*, 325 F.2d 629, 631 (D.C. Cir. 1963)). In *Gordon* the D.C. Circuit held that trial counsel could not waive the defendant's right to be present and "the court should have held an on-the-record hearing to advise Gordon of his right to be present at voir dire and obtained a personal waiver in open court." *Id.* That on-the-record hearing is what should have occurred here. The trial court should not have accepted the solicitor's and trial counsel's statements that Petitioner refused to appear as the end of the discussion. It should have ordered Petitioner brought to court regardless. The PCR court erred by concluding otherwise.

ii. The trial court erred by performing jury selection before addressing Petitioner's absence.

A criminal defendant unquestionably has the right to be present for jury selection. *State v. Whaley*, 290 S.C. 463, 465, 351 S.E.2d 340, 341 (1986) (finding error where trial court conducted part of the jury voir dire without defendant present). The "making of challenges" during jury selection is "an essential part of the trial, and . . . one of the substantial rights of the prisoner [is] to be brought face to face with the jurors at the time when the challenges were made . . . ." *Lewis*, 146 U.S. at 376; *see also State v. Rivers*, 294 S.C. 123, 125, 363 S.E.2d 105, 106 (1987) (reversing where defendant was excluded from "voir dire during the course of the trial to determine the jury's continued impartiality"). "[U]nless waiver is permitted and made, defendant must be present at the . . . impaneling and swearing of the jury . . . ." 16 Corpus Juris, *Criminal Law* § 2067, at 814. A defendant's presence and assistance during jury selection may be absolutely critical to the outcome of his trial. *Lewis*, 146 U.S. at 373-74 (quoting *Hopt v. People*, 110 U.S. 574, 578 (1884)); *accord State v. Atkinson*, 40 S.C. 363, 18 S.E. 1021, 1023 (1894).

Here, the trial court made no on-the-record determination or inquiry of Petitioner's absence until after the jury was selected. In fact, there was no acknowledgement of his absence at all. Nonetheless, the trial court later expressly recognized the importance of his presence: "[Y]ou would think, as a defense attorney, it would be helpful to have your client there to help you picking a jury . . . ." App. 50:9-12. The court erred by impaneling the jury without the defendant present and without making the "specific findings" on the record that he "received notice of his right to present" and "was warned he would be tried *in absentia* if he failed to attend." *Wrapp*, 421 S.C. at 536, 808 S.E.2d at 823. That failure violated Petitioner's constitutional right to be present at his trial.

iii. The PCR court failed to appreciate that the trial court failed to make any factual findings as required by Rule 16, SCRCrimP.

"A trial judge must determine a criminal defendant voluntarily waived his right to be present at trial in order to try the defendant in his absence." *Wrapp*, 421 S.C. at 535, 808 S.E.2d at 823 (quoting *State v. Ravenell*, 387 S.C. 449, 455, 692 S.E.2d 554, 557-58 (Ct. App. 2010)). In general, that means the trial court "must make findings of fact on the record that the defendant (1) received notice of his right to be present and (2) was warned he would be tried in his absence should he fail to attend." *Id.* (quoting *Ravenell*, 387 S.C. at 456, 692 S.E.2d at 558); *see also* Rule 16, SCRCrimP (providing parameters for trials *in absentia*). Here, the trial court did not do so but instead denied the motion for a continuance without making any factual findings at all. App. 50:7-20. That is error. *State v. Patterson*, 367 S.C. 219, 229, 625 S.E.2d 239, 244 (Ct. App. 2006) (citations omitted).

Although the *solicitor* addressed the trial court at some length about Appellant's absence and alleged notice, the court itself never expressly accepted those assertions as factual findings. The court stated merely, in response to trial counsel's motion for a continuance, "I'm gonna deny

your motion." App. 50:15. It never found Appellant was in fact notified of his trial or warned he would be tried in his absence. Where these findings are not expressly on the record, it is error to try a defendant in his absence. *State v. Jackson*, 288 S.C. 94, 96, 341 S.E.2d 375, 375 (1986) (citing *State v. Fleming*, 287 S.C. 268, 269, 335 S.E.2d 814, 814 (Ct. App. 1985)).

Because the findings are "required," failure to make them renders the conviction invalid. *State v. Ritch*, 292 S.C. 75, 76, 354 S.E.2d 909, 909 (1987). The trial court's bare-bones denial of the motion for a continuance was insufficient, and the PCR court failed to address this fact. The trial court needed to specifically find on the record Appellant had notice of his right to be present and was warned his absence would waive it. It did not do so, and now Appellant's conviction must be vacated. *Jackson*, 288 S.C. at 96, 341 S.E.2d at 375; *Wrapp*, 421 S.C. at 536, 808 S.E.2d at 823.[3]

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[3] Cornwell explained at the PCR hearing how interconnected the trial and plea were:

> A: . . . I think we specifically indicated that this [plea] was intricately tied to that [trial conviction], so if one thing is granted, we would let him withdraw the plea and start over.
>
> Q: Is it your opinion that if Judge Curtis was to vacate the trial plea, the trial, and overturn that, that the plea should be overturned as well?
>
> A: Yes, or at least be opened to have a sentence reconsidered, because the negotiated 30 years was simply so I could explain to Mr. Faulling, look, we're just doing a negotiated 30, which is what you already have, that way you can't get more time than what you've already been given, and that way it can't run consecutively or anything like that.
>
> It was not my intent to hamstring him to where even if his trial got flipped on appeal, that he would still be stuck with this plea. That was never my intent, and that's what we discussed with the Court.

App. 381:6-24. As the solicitor agreed, if this Court reverses the trial conviction, it should also reverse the guilty pleas without need to address the remaining allegations.

III. Trial counsel was ineffective by failing to object to the trial proceeding in Petitioner's absence.

In the event the Court finds Petitioner's argument about the trial in his absence is unpreserved for purposes of the *White v. State* belated appeal, trial counsel was ineffective for failing to preserve the issue. There was not and could not have been a legitimate strategic reason to request the continuance but not specifically object to the trial proceeding in Petitioner's absence. Reasonable counsel must know how important a defendant's presence at trial can be, as the trial court recognized. App. 50:9-12. Further, they must know preserving this issue would be essential to him obtaining a new trial on this basis. Failure to preserve the issue—if it is unpreserved—was deficient performance that obviously prejudices him because, for the reasons given above and in the *White* brief, Petitioner's claim is meritorious.

The PCR court misunderstood the impact of a preservation issue. It wrote, "it is not reasonably likely a further objection to the Court's ruling would have changed the trial court's decision to proceed in Applicant's absence." App. 11. Petitioner agrees with this statement of fact. Further objection is not likely to have changed the trial court's decision. But further objection *was*—for purposes of argument here—necessary to obtain appellate review. South Carolina appellate courts have consistently held counsel's performance deficient for failing to properly preserve meritorious issues after an initial objection. *See, e.g., McHam v. State*, 404 S.C. 465, 474, 746 S.E.2d 41, 46 (2013) ("[W]e find counsel's failure to renew the Fourth Amendment objection constituted deficient performance that satisfies the first prong of the *Strickland* test."), *abrogated by Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018); *Foye v. State*, 335 S.C. 586, 590, 518 S.E.2d 265, 267 (1999) ("[C]ounsel was deficient because he failed to adequately preserve this issue for review."). Thus, if further objection was necessary to preserve the issue, counsel was deficient for failing to do so.

IV. Petitioner's guilty pleas were involuntary because the record is clear he did not understand the nature of the plea or waiver of counsel.

"[I]n order for a defendant to knowingly and voluntarily plead guilty, he must have a full understanding of the consequences of his plea." *State v. Hazel*, 275 S.C. 392, 394, 271 S.E.2d 602, 603 (1980) (citing *Boykin v. Alabama*, 395 U.S. 238, 242-44 (1969)). "A plea made in ignorance of its direct consequences is entered in ignorance and is invalid." *Burnett v. State*, 352 S.C. 589, 592, 576 S.E.2d 144, 145 (2003) (citing *State v. Hazel*, 275 S.C. 392, 394, 271 S.E.2d 602, 603 (1980)). The question is "whether the record establishes that a guilty plea was voluntarily and understandingly made." *Dover v. State*, 304 S.C. 433, 434, 405 S.E.2d 391, 392 (1991).

This case is in all important respects similar to those in *Hazel*. There, the defendant pleaded guilty under the incorrect advice of counsel that kidnapping carried up to a sentence of life in prison even though, at the time, a life sentence was mandatory. 275 S.C. at 393, 271 S.E.2d at 603. The trial court then similarly misadvised the defendant that he "could" impose the "maximum" of a life sentence. 275 S.C. at 393-94, 271 S.E.2d at 603. Because the defendant did not understand the "direct consequences" of the plea, it was invalid. 275 S.C. at 394, 271 S.E.2d at 603.

In much the same way here, Petitioner did not *actually* have a "full understanding of the consequences of his plea." *Hazel*, 275 S.C. at 394, 271 S.E.2d at 603 (citing *Boykin*, 395 U.S. at 242-44). Importantly, because the question is whether *he* "knowingly" pleaded guilty, the question addresses his subjective understanding of the consequences of his plea. *Id.*; *see also Iaea v. Sunn*, 800 F.2d 861, 864 (9th Cir. 1986) (stating that when evaluating the voluntariness of a guilty plea, courts "primarily focus[] on the underlying factual issue of whether the defendant subjectively understood the consequences of the guilty plea"). Of course, in most instances, the

court's and defendant's statements at the plea hearing will almost conclusively prove his plea was entered knowingly, and a later expression of misunderstanding should not render the plea involuntary. But this is a different case.

The plea hearing itself makes clear Petitioner did not understand the consequences of pleading guilty because he immediately made a motion to reconsider his sentence. He pleaded guilty to a negotiated thirty-year sentence concurrent to his thirty-year sentence from the Orangeburg trial. He then literally begged the court to reconsider the trial sentence, asking for ten years so he has a chance to see his mother again before she dies. No one who understood the meaning of concurrent sentences would ever do such a thing. The only reason to do that is because he believed reducing his trial sentence would have reduced his plea sentences. As Petitioner testified at PCR: "I thought all of this was combined. That's what I understood, that everything would be combined as one." App. 348:14-20. No one explained to him what would happen and how the motion to reconsider would work. App. 348:21-349:7. Only after he had already pleaded guilty did the court state, "I'm hearing this now to essentially extend your appellate time. That's the reason I'm doing this, Okay?" App. 242:21-243:3. Nonetheless, the court did not explain that even if he received his belated appeal, the thirty-year sentence for the pleas would still apply. Thus, he did not truly understand the direct consequences of the plea.

Petitioner did not understand the motion to reconsider would concern only the trial sentence. Petitioner pleaded guilty believing the court could and would at least consider imposing a lesser sentence than the thirty years he "negotiated" *pro se* with the solicitor. Because that is incompatible with a negotiated plea, it is apparent from the record he did not understand the direct consequences of pleading guilty. All of his guilty pleas are therefore invalid.

V. Petitioner's waiver of counsel and guilty pleas were involuntary because they were tainted when the solicitor acted like his attorney.

a. Relevant Facts

At PCR, solicitor Cornwell described her post-trial plea discussions with Petitioner. App. 376:4-378:11. She testified she informed him of his right to an attorney as well as his right to a trial including to present any defenses, and she "went through every page of discovery" with him. App. 376:7-21. She "explained everything" and answered any questions he had. App. 376:22-24. She told him that if he did not plead guilty, she would seek a life without parole sentence under the three-strikes law. App. 376:25-377:12. She agreed that she discussed with Petitioner "everything that a defense lawyer would have advised their client in a similar situation." App. 386:11-16. At the plea hearing, the solicitor informed the court,

> I explained to Mr. Faulling all of his rights, that he did have the right to have an attorney. If he could not afford one, he could have one appointed to him. I also met with him in the courtroom in the back. . . . I did explain to him his right to an attorney and that he had the right to trial, that if he had any defenses that he felt like they should be presented. We also went through all the discovery. He indicated to me that his previous attorney did not share with him some of the discovery. So we did go through page by page, on every page of the incident reports, every page of the drug reports. We went through the vehicle tow records, rap sheets, the driving records. Every piece of paper that I have in my file we went through together. Explained everything. Any questions that he had, I did answer for him.

App. 210:10-211:3. She then continued,

> We also went over the enhancement of everything, the fact that his drug charges can be enhanced with a third, subsequent offense. We also explained that failure to stop for a blue light is also an enhancing crime. It elevates up to a third offense. Finally, we went over his record as far as the drug convictions, showing it is a third subsequent offense. We also went over the strikes and the fact that he does have two prior strikes, and that the State could possibly go forward with life without parole the next time he gets a drug sentence. We will not be going after life without parole on these charges as to this plea.

App. 213:16-214:2. When asked if he understood everything the solicitor told him, Petitioner stated, "I wish she'd been my lawyer instead of my Solicitor. She was very helpful, Your Honor." App. 215:10-13. Petitioner waived presentment because the solicitor "explained that to [him] in detail." App. 231:1313-22.

After the plea court decided to allow Petitioner to proceed *pro se*, it addressed Breen Stevens of the public defenders office to ensure they did whatever was necessary for Petitioner to obtain appellate review. App. 221:22-222:16. Several days later, on January 16, 2018, Stevens wrote letters to both Petitioner and Judge Dickson. App. 260-63. In them he stated Judge Dickson requested Stevens "to review post-plea/post-trial filings, such as a notice of appeal, *that are being drafted for Mr. Faulling by the assistant solicitor.*" App. 262 (emphasis added). Stevens also explained he could not assist Petitioner because of "actual conflicts of interest." App. 262.

Cornwell also testified at the PCR hearing, "I'll tell you that I was very concerned for Mr. Faulling with the trial in his absence." App. 378:17-19. She then described the lengths she went to try and secure Petitioner appellate counsel, including contacting Stevens and arranging for Judge Dixon to entertain the motion to reconsider in order to toll his time to appeal. App. 378:17-13. Cornwell agreed, "the whole reason that I did the plea this way and did the 30 concurrent is because he had gotten 30 at trial" because the sentences "were very intertwined." App. 378:12-17.

b. Analysis

"The burden is on the State to demonstrate the validity of a defendant's waiver of his right to counsel." *State v. Dial*, 429 S.C. 128, 133, 838 S.E.2d 501, 504 (2020) (citing *Brewer v. Williams*, 430 U.S. 387, 404 (1977)). "So important is the right to counsel that the Supreme Court has instructed courts to 'indulge in every reasonable presumption against [its] waiver.'"

Fields v. Murray, 49 F.3d 1024, 1029 (4th Cir. 1995) (alteration in original) (quoting *Brewer*, 430 U.S. at 404). Where a defendant did not "make an informed decision to proceed without counsel," the remedy is a new trial. *Wroten v. State*, 301 S.C. 293, 295, 391 S.E.2d 575, 577 (1990); *Watts v. State*, 347 S.C. 399, 403, 556 S.E.2d 368, 370 (2001) (citation omitted). Where a defendant pleads guilty based on advice tainted by an actual conflicted of interest, that plea is invalid. *Lomax v. State*, 379 S.C. 93, 102-03, 665 S.E.2d 164, 169 (2008) (citing *Thomas v. State*, 346 S.C. 140, 144, 551 S.E.2d 254, 256 (2001)), *abrogated in unrelated part by Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018).

As Petitioner argued in his motion to reconsider the PCR order, the solicitor "took it upon herself to advise and counsel [Petitioner] about every aspect of his guilty plea, both before and during the plea." App. 417. That is the constitutional error. According to Stevens's letter, she was even supposed to *file his notice of appeal.* Although Petitioner knew she was not his actual attorney, App. 216:20-22, the mere technical way that she was not representing him does not alleviate the problem that she *acted* like his attorney. This is something she should not have done because of the clear conflict of interest between a solicitor and a defendant. *See State v. Gregory*, 364 S.C. 150, 152, 612 S.E.2d 449, 450 (2005) ("An actual conflict of interest occurs where an attorney owes a duty to a party whose interests are adverse to the defendants." (citing *Fuller v. State*, 347 S.C. 630, 633, 557 S.E.2d 664, 665 (2001))). The narrow way in which the PCR court concluded there is no concern because Petitioner knew she was not actually his attorney, App. 13, fails to grasp the real dangers Petitioner faced.

Legal ethics rules help explain the known dangers when adverse attorneys interact with *pro se* litigants. These rules are clear: "The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows . . . the

interests of such a person are . . . in conflict with the interests of the client." Rule 4.3, RPC, Rule 407, SCACR. Here, the solicitor's client is the state with interests obviously in conflict with those of Petitioner. Nonetheless, as she agreed at the PCR hearing, "all of the things [she] advised Mr. Faulling before that plea were . . . really everything that a defense lawyer would have advised their client in a similar situation." App. 380:11-16. She was acting like his attorney, which she could not do because "the possibility that the lawyer will compromise the unrepresented person's interests *is so great* that the Rule prohibits the giving of *any advice*, apart from the advice to obtain counsel." Rule 4.3, RPC, Rule 407, SCACR cmt. 2 (emphasis added).

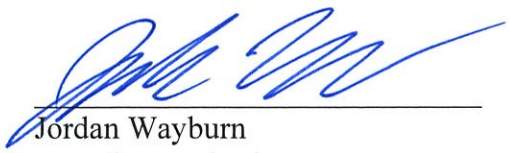
The commentary to Rule 4.3 also explains the conditions in which an attorney is permitted to negotiate with unrepresented people. The attorney "may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations." Rule 4.3, RPC, Rule 407, SCACR cmt. 2. That is perfectly reasonable. Of course a solicitor can discuss a plea agreement with a *pro se* defendant, if the defendant is aware of his right to counsel and choses to proceed alone. However, she can do no more. The solicitor here did far more than "inform the person of the terms on which the lawyer's client will enter into an agreement" and advise him to seek counsel. Instead, she advised him of several of his rights—including presentment and venue—and went over "every page" of his discovery. In doing so, she took two unacceptable risks. One, that she might—intentionally or unintentionally—subvert or devalue his rights and defenses. Two, that Petitioner would be lulled into a belief counsel is not necessary or pleading guilty (to a negotiated thirty-year sentence at the age of forty-seven) would be beneficial. These risks immediately manifested at the plea hearing when, based on her advice, Petitioner waived

his rights to presentment and venue. He decided to proceed unrepresented because the solicitor was "very helpful" as if he did not need someone concerned solely with his rights and interests. In short, the solicitor was playing both sides of the field, so there was no "adversarial challenge to the prosecution" and thus the conviction cannot stand. *Nance v. Ozmint*, 367 S.C. 547, 557, 626 S.E.2d 878, 883 (2006); *see United States v. Cronic*, 466 U.S. 648, 656, 104 S. Ct. 2039, 2045, 80 L. Ed. 2d 657 (1984) ("The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing.").

The risk the solicitor would fail to act in Petitioner's best interests was substantial. For example, Petitioner may have had a viable Fourth Amendment objection. The solicitor reported an officer attempted to perform a traffic stop when Petitioner instead fled in his vehicle and then on foot. App. 225:20-226:9. When he was finally apprehended, the officer found a "black flashlight" on his person, and "[w]hen you open up that flashlight in the battery compartment, there was a plastic bag" that contained methamphetamine. App. 226:11-18. The solicitor did not detail the circumstances of that search, but it is possible counsel—had Petitioner been represented—could have argued the officer needed a warrant before opening the flashlight. *See, e.g.*, *State v. Brown*, 401 S.C. 82, 91, 736 S.E.2d 263, 267 (2012) (quoting *Arizona v. Gant*, 556 U.S. 332, 351 (2009)) (discussing limitations to warrantless searches of automobiles immediately after arrest). If Petitioner had been represented by someone with his interests in mind, perhaps that would have been addressed. Instead, the solicitor led him to believe that all his rights were already accounted for, and so he should just plead guilty. That is not right.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests this Court grant his petition for a writ of certiorari and a belated appeal pursuant to *White v. State*.



Jordan Wayburn
Appellate Defender

ATTORNEY FOR PETITIONER

This 9th day of July, 2025.