

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

**RECEIVED**

MAR 31 2015

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Certiorari to Pickens County  
Robin B. Stilwell, Circuit Court Judge  
2012-CP-39-00177

**S.C. Supreme Court**

Appellate No.: 2014-001608

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JOHN FORREST HAM, JR., #240615,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

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**RETURN TO PETITION FOR WRIT OF CERTIORARI**

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ALAN WILSON  
Attorney General

ASHLEY A. McMAHAN  
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ATTORNEYS FOR PETITIONER

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## QUESTION PRESENTED

**Did the PCR Court err in dismissing Petitioner's application and enforcing the written plea agreement where the Petitioner waived his rights to direct appeal and post-conviction relief?**

## STATEMENT OF THE CASE

The Petitioner is presently incarcerated with the South Carolina Department of Corrections pursuant to orders of commitment of the State Grand Jury Clerk of Court. Petitioner was indicted at the October 2008 term, with a Superseding Indictment at the Jun 2009 term of the State Grand Jury for: Count 3 - trafficking methamphetamine, 400 or more grams (conspiracy); Count 13 - distribution of methamphetamine; Count 14 - trafficking methamphetamine (400 or more grams); Count 15 – simple possession of marijuana; Count 16 - trafficking methamphetamine (28-100 grams); and Count 17 - trafficking cocaine (10-28 grams) (2008-GS-47-0011). R. Mills Ariail, Jr., Esquire represented the Applicant.

On April 9, 2010, Petitioner pled guilty to Count 1 – trafficking methamphetamine, 28-100g (conspiracy); Count 13 - distribution of methamphetamine; Count 14 - trafficking methamphetamine, 28-100g; Count 15 – simple possession of marijuana; Count 16 - trafficking methamphetamine, 28-100g; and Count 17 - trafficking cocaine (10-28 grams). On September 1, 2010, the Honorable G. Edward Welmaker sentenced the Applicant to concurrent terms of fifteen (15) years for trafficking methamphetamine, 28-100 grams (conspiracy), fifteen (15) years for distribution of methamphetamine, fifteen (15) years for two counts of trafficking methamphetamine (28-100 grams), thirty (30) days for simple possession of marijuana, and ten (10) years for trafficking cocaine (10-28 grams). The Applicant did not appeal his conviction and sentence.

Petitioner filed an Application for Post-Conviction Relief on February 7, 2012. The Return was filed on or about Jul 31, 2012. Respondent filed an Amended Return and Motion to Dismiss on or about May 13, 2014. The Respondent's Motion to Dismiss was granted on or about July 6, 2014. The Notice of Appeal was filed on July 20, 2014. Petitioner filed his Petition for a Writ of Certiorari on March 4, 2015. This Return follows.

## STANDARD OF REVIEW

The proper standard of review of a post-conviction relief evidentiary hearing is whether “any evidence of probative value” exists to sustain the post-conviction relief judge's findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). In a PCR proceeding, the applicant bears the burden of establishing that he is entitled to relief. Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000). The reviewing Court “gives great deference to the post-conviction relief (PCR) court's findings of fact and conclusions of law.” Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005). A PCR court's findings will be upheld on appeal if there is “any evidence of probative value sufficient to support them.” Id. The appellate court must reverse where there is no probative evidence to support the findings. Pierce v. State, 338 S.C. 139, 144, 526 S.E.2d 222, 225 (2000).

## ARGUMENT

**The PCR Court did not err in dismissing Petitioner's application and enforcing the written plea agreement where the Petitioner waived his rights to direct appeal and post-conviction relief.**

Petitioner claims that he did not voluntarily waive his right to a PCR. The record refutes this assertion. A waiver of appellate and PCR rights will be held effective only if it is knowing and voluntary. Spoone v. State, 379 SC 138, 142, 665 SE2d 605, 607 (2008). In order to determine whether a waiver of the right to appeal and PCR is voluntarily, knowingly, and intelligently made, it is necessary to look at the particular facts and circumstances of the case including: 1. The background, experience, and conduct of the accused, 2 the text of the plea agreement, and 3 the transcript of the plea hearing. Id. at 143, 608.

Petitioner graduated from high school and was familiar with the court system at the time of this plea. *See* App. p. 5, lines 10-13; Supp. App. p. 1-2; Supp. App. p. 23, lines 4 – 12; Supp. App. p. 50, lines 12-18. Certainly someone that has graduated from high school and has admitted that he can read, write, and speak the English language is intelligent enough to know what type of agreement he is entering into and what that agreement entails. *See* Supp. App. p. 23, lines 16-25. Secondly, the text of the plea agreement is straightforward. It reads in pertinent part: "...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." Supp. App. p. 7, subpart 12. The agreement was signed by the Petitioner and his attorney. Supp. App. p. 8.

As for the third prong, the Court questioned the Petitioner about plea agreement:

THE COURT: Now I have before me an agreement that's been signed by

you and your attorney and the State. Are you – do you understand this agreement?

MR. HAM: Yes, sir.

THE COURT: And you've gone over it with your attorney?

MR. MICKELL: Yes, sir.

THE COURT: And you understand it's binding upon you if I accept this plea?

MR. HAM: Yes, sir.

App. p. 6, lines 3-11. Furthermore, trial counsel stated that the Petitioner signed the plea agreement voluntarily and that he discussed all parts with the Petitioner. App. p. 167, line 18 – p. 168, line 12. Based on the foregoing, Petitioner's waiver of the right to file a PCR was done knowingly and voluntarily and the PCR Court did not err in dismissing the application.

### *Ineffective Assistance of Counsel*

Whether or not trial counsel was ineffective is not preserved for appellate review because the order of dismissal does not address ineffective assistance of counsel. "In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge. Issues not raised and ruled upon in the trial court will not be considered on appeal." State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 69, 693-941 (2003). *See also* Summersell v. S.C. Dep't of Pub. Safety, 337 S.C. 19, 22, 522 S.E.2d 144, 145-46 (1999) ("The circuit court did not specifically address the issue, and where an issue presented to the circuit court in a civil case is not explicitly ruled upon in the final order, the issue must be raised by an appropriate post-trial motion to be preserved for appellate

review.” (*citing* Summer v. Carpenter, 328 S.C. 36, 492 S.E.2d 55 (1997)); *See also* Staubes v. City of Folly Beach, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000) (“It is well-settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved for appellate review.”)

Accordingly, ineffective assistance of counsel is now being raised for the first time and is not preserved for review by this Court. As such, this Court should affirm the lower court’s ruling.

However, Petitioner claims that trial counsel was ineffective because his federal and state sentences are running consecutively. The record shows that trial counsel diligently tried to have the sentences run concurrently but the Bureau of Prisons ruled that Petitioner was not in federal custody at the time of his federal plea.

To establish a claim of ineffective assistance of counsel, the PCR applicant must prove: (1) counsel's performance fell below an objective standard of reasonableness, and (2) counsel's deficient performance prejudiced the defendant's case. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Cherry, 300 S.C. at 117, 386 S.E.2d at 625. To establish prejudice, the defendant is required “to show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” Id. at 694, 104 S.Ct. 2052.

The District Court of South Carolina, Greenville Division addressed this issue in *United States of America v. John Forrest Ham*, Cr. No. 6:10-46-TMC. Supp. App. p. 138-151. The Honorable Timothy M. Cain noted in his order:

The Bureau of Prisons (BOP) apparently concluded that Ham could not serve his state and federal sentences concurrently while in a federal facility because the BOP determined that Ham was not in federal custody when he was sentenced in federal court. [D]efense

counsel states that he had explained the situation to the [federal] sentencing judge and the judge was willing to re-sentence Ham, which would have allowed Ham to serve his sentences concurrently. (citations omitted.) Ham...had to first dismiss his pending direct appeal. [H]am, however, chose not to be re-sentenced. ...Ham's failure to withdraw his appeal and be re-sentenced was his decision...

Supp. App. p. 150. Furthermore, trial counsel testified that he "couldn't give him any guarantees or say [concurrent sentences] is going to be for certain because I've been to federal court and most of the judges, the time you're over there, say we can't tell the Bureau of Prison to do anything." App. p. 161, lines 22-25. "[The federal public defender] though [it] was going to work to try to get him into the Bureau of Prisons" App. p. 162, lines 1-3.

Even assuming *arguendo* that trial counsel was ineffective, Petitioner can't meet the second prong of Strickland, that the outcome would have been different. Based on trial counsel's testimony, Petitioner wasn't going to not plead guilty. App. p. 164, lines 6-9. The outcome would have still been the same. Petitioner still would have pled guilty and still would have been sentenced accordingly. In fact, it was in Petitioner's hands as to how to get his federal and state sentences to run concurrently – by dismissing his 4<sup>th</sup> Circuit appeal and being re-sentenced in federal court. Petitioner chose not to do this. See Supp. App. p. 134 – 136. The fault lies with the Petitioner, not with trial counsel.

## CONCLUSION

For the reasons stated above, this Court should affirm the PCR Court's Order and deny the Petition for Writ of Certiorari. However, if this Court grants certiorari, the Respondent requests permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

ALAN WILSON  
Attorney General

ASHLEY A. McMAHAN  
Assistant Attorney General

By:

  
ATTORNEYS FOR RESPONDENT

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March 31, 2015

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Certiorari to Pickens County  
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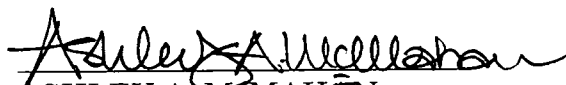
CERTIFICATE OF SERVICE

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I, Ashley A. McMahan, certify that I have served the within Return to Petition for Writ of Certiorari and Motion to Strike, Motion to Supplement, and Motion to Reclassify on Petitioner by delivering copies of the same addressed to:

Tiffany L. Butler  
Appellate Defender  
SC Commission on Indigent Defense  
PO Box 11589  
Columbia, SC 29211-1589

I further certify that all parties required by Rule to be served have been served.  
This 31<sup>st</sup> day of March, 2015.

  
ASHLEY A. McMAHAN  
Assistant Attorney General  
Office of Attorney General  
Post Office Box 11549  
Columbia, SC 29211



ALAN WILSON  
ATTORNEY GENERAL

RECEIVED

MAR 31 2015

S.C. Supreme Court

March 31, 2015

The Honorable Daniel E. Shearouse  
Clerk, Supreme Court of South Carolina  
Post Office Box 11330  
Columbia, SC 29211

RE: John Forrest Ham, #240615 v. State of South Carolina  
2012-GS-39-00177  
Appellate Case No.: 2014-001608

Dear Mr. Shearouse:

Please find enclosed an original and six copies of the Respondent's Return to the Petition for Certiorari. Also enclosed is a Motion to Strike, Motion to Supplement, and Motion to Reclassify along with the Supplemental Appendix, and a Certificate of Service.

Should you have any questions you can contact me at the number listed below.

Best regards,

Ashley A. McMahan  
Assistant Attorney General

cc: Appellate Defender Tiffany L. Butler