THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Eugene C. Griffith, Jr., Circuit Court Judge

Appellate Case Number: 2015-001439

Frank Daniel Simpson, Respondent,

v.

State of South Carolina, Petitioner.

Return to State's Petition for Writ of Certiorari

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Did the PCR judge err in finding Respondent would not have pled guilty but for plea counsel's advice?

MR. SIMPSON'S STATEMENT OF QUESTION PRESENTED

Should this court deny *certiorari* and leave undisturbed the post-conviction relief court finding that guilty plea counsel's performance was both deficient and prejudicial, in degradation of the Sixth Amendment of the United States Constitution and Article I, §§ 3 and 14 for the South Carolina Constitution, when plea counsel advised Mr. Simpson to plead guilty to trafficking second offense and request a sentence suspended to be served on house arrest, even though neither a suspended sentence nor house arrest was an available sentencing option for trafficking second offense?

STATEMENT OF THE CASE

As a result of a traffic stop on March 24, 2011, the State charged the respondent, Frank Daniel Simpson, with trafficking methamphetamine, 28-100 grams, second offense. On February 13, 2013, the State called Mr. Simpson's case before the Honorable Letitia H. Verdin for a guilty plea.[1] Joyce L. Monts represented the State. Cameron G. "Bozzie" Boggs represented Mr. Simpson. Judge Verdin sentenced Ms. Simpson to nine (9) years imprisonment. Appendix (hereinafter "A.") 1-34, 143.

On January 28, 2014, Mr. Simpson filed this application for post-conviction relief. A. 36-40.

By written order dated March 18, 2014, the Honorable Edward W. Miller reduced Mr. Simpson's sentence "from a term of nine (9) years to seven (7) years" pursuant to S.C. Code Ann. §17-25-65.

On December 17, 2014, the Honorable Eugene C. Griffith, Jr. convened a post-conviction relief hearing. E. Charles Grose, Jr. represented Mr. Simpson. Karan Ratigan represented the State. A. 46-82. By written order dated February 10, 2015, Judge Griffith dismissed Mr. Simpson's application for post-conviction relief. Supplemental Appendix (hereinafter "Suppl. A.") 18-26. Judge Griffith amended the order of dismissal on March 6, 2015. A. 83-90.

On March 30, 2015, Mr. Simpson served his Rule 59(e), SCRCP motion to alter or amend the judgment. Suppl. A. 27-65. On April 1, 2015, the State responded to the motion. A. 108-10. On May 7, 2015, Judge Griffith convened a hearing on Mr. Simpson's Motion. A. 111-34.

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[1] At the same time, the State called four other unrelated cases for guilty pleas.

By written order dated June 2, 2016, Judge Griffith reconsidered the amended order of dismissal and granted Mr. Simpson's application for post conviction relief. A. 135-42. Without filing a Rule 59(e), SCRCP motion, the State appealed.

By written order dated August 27, 2015, the Honorable Robin B. Stilwell granted Mr. Simpson an appeal bond.

On January 13, 2016, the State filed a petition for writ of *certiorari*. This response follows.

STATEMENT OF FACTS

A. Guilty Plea Record.

The following occurred during the guilty plea colloquy:

> **The Court:** And Mr. Simpson, you are here today to plead to Trafficking in Methamphetamine less than 100 grams, but greater than 28 grams second offense. That carries a minimum sentence of seven years up to 30 years and it's a violent offense and a serious offense. Is that your understanding?
>
> **Mr. Simpson:** Yes, ma'am.
>
> **The Court:** Okay. And a violent offense means that any active jail sentence you receive, you'll serve a greater percentage than it [sic] if were non-violent. You understand that?
>
> **Mr. Simpson:** Yes, ma'am.
>
> The Court: And serious means that if you were to get two other serious offenses, on the third, the State could seek life without the possibility of parole against you. You understand that?
>
> **Mr. Simpson:** I do.

A. 7, line 9 – 8, line 2. The guilty plea judge never advised Mr. Simpson that state law prohibited her from suspending the minimum sentence.

The Solicitor summarized the factual background, provided Mr. Simpson's prior record, and recommended "a cap of 15" years. A. 18, lines 1 – 19, 23.

Plea counsel provided the Court the Defendant's Sentencing Memorandum and another document "entitled Mitigating Factors and Extenuating Circumstances." A. 20, lines 9-18. *See also* Applicant's Ex. 1, Suppl. 13-17. During his presentation to the Court, plea counsel argued:

> Judge, I know there's a statutory minimum, but just as a point of reference, as you know, there's an annotated statutory provision that said any sentence can be suspended by a judge even though this says no suspended sentence. I'm not – I'm not trying to insult your intelligence in any way, Judge. He can do house arrest, Judge. He can make it. He would want it. Obviously, who wouldn't.

A. 26, lines 11-18. The plea judge neither advised Mr. Simpson that house arrest was not an available sentencing option nor corrected counsel's assertion that the minimum sentence could be suspended.

Mr. Simpson's mother, Ida Simpson who is "in her 80s" addressed plea judge. A. 22, lines 14-23; 27, line 14 – 29, line 22. Mr. Simpson's fraternal twin, Robert Simpson, addressed the plea judge and requested:

> Right now, my wife and I have a small daughter. I can't help my parents as they grow older. I really need Frank to help out. If this happened 10 years ago, I would not be here today. I would let him do the time and let him live his own debt. But right now, he's – I really need help.

A. 30, lines 17-23. Mr. Simpson addressed plea judge. A. 31, line 4 – 33, line 9.

The plea judge sentenced Mr. Simpson to nine (9) years imprisonment and returned the Sentencing Memorandum to counsel. A. 34, lines 13-23.

B. Evidence Presented at the Post-Conviction Hearing.

Guilty plea counsel testified at the evidentiary hearing. He identified the Sentencing Memorandum he prepared for the guilty plea judge. A. 50-51, Applicant's Ex. 1, Suppl. 13-17. Section II of the Sentencing Memorandum, at Suppl. A. 15, is captioned, "A Federal-esque 'Variance' is appropriate in this case." The memorandum argues, "In the federal system, a variance, or reduction, from a statutory sentence is

available to the defendants based on various factors set forth in 18 U.S.C. §3553(a)."[2] After reviewing a number of justifications for treating Mr. Simpson with mercy, the Sentencing Memorandum, at Suppl. A. 17, concludes:

> Even when mandatory sentencing levels exist, this Court, like the federal courts across the country and in this very state, should be able to treat those before them as individuals. . . . If federal laws and cases dictate that a Court should impose a sentence that is "sufficient, but not greater than necessary," then all sentencing courts should have greater latitude to impose a sentence that fits not only the crime, but the person before the court. Therefore, Frank [Simpson] respectfully submits that a sentence of house arrest, would be a sentence that is "sufficient, but not greater than necessary."

Post-conviction counsel asked plea counsel whether he believed the mandatory minimum sentence could be suspended. Plea counsel testified:

> I believe the statute says it cannot. But in the real world, I believe it has been before. And I know that the only way you get something that's not on the books, so to speak, is to ask for it.

A. 52, line 18 – 53, line 1. Plea counsel explained that in South Carolina "a new statute had come out akin to the federal variance statute or akin to cooperation—I guess downward departure that you would seek in federal court."[3] A. 54, lines 2-12. Plea counsel testified "a judge can do what they want," A. 54, lines 17-19, claiming, "I've had a judge tell me they can do what they want." A. 55, lines 19-25.

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[2] This section of the United States Code sets forth factors to be considered by a federal judge before imposing sentence.

[3] The only statute plea counsel could have been referencing is S.C. Code Ann. § 17-25-65, effective June 2, 2010, providing that ***"[u]pon the state's motion*** . . . the court may reduce a sentence if the defendant" provided substantial assistance or aid as described in the statute (emphasis added). This statute, therefore, is inapplicable on its face.

Plea counsel confirmed that he told the plea judge "she had the authority to suspend the sentence" and that he asked for house arrest under the Home Detention Act. Counsel knew Mr. Simpson's family had the means to pay a substantial fine. Counsel recalled Mr. Simpson's twin brother, Robert Simpson, being present in the courtroom and willing to pay the fine. Counsel further acknowledged telling Mr. Simpson that it was a possibility that the sentencing judge would allow him to pay a fine and serve a suspended sentence on house arrest. A. 56, line 25 – 58, line 60, line 9.

Mr. Simpson testified:

> [T]he first time I met with Mr. Boggs after I was put in the Greenville jail, he met me in the Pro V section of the old jail. And he said, I've got good news. [Solicitor] Walt Wilkins doesn't think you belong in prison. And he asked me can my family pay fines of $50,000 to a $100,000.

Mr. Simpson confirmed his family has the financial means to pay that kind of fine. A. 67, lines 13 – 68, line 1.

Mr. Simpson testified about his discussions with plea counsel about available sentencing options:

> [O]ne persist theme in our discussions was what Mr. Boggs called creative sentences. And that was the – he had brought up that he thought the appropriate sentence to ask for would be a split sentence with three years house arrest and three years GPS monitor.

"Several times" plea counsel informed Mr. Simpson that "any sentence [is] suspendible [sic] by a General Sessions judge." Based on plea counsel's advice about the possibility of home detention, Mr. Simpson looked into having a place to live in Greenville County. A. 68, line 2 – 72, line 1.

Based on plea counsel advice that a fine, suspended sentence, and home detention was possible, Mr. Simpson arranged for his brother to be present during the guilty plea to be ready to pay the fine. A. 71, line 5 – 72, line 17.

Mr. Simpson further testified he relied on plea counsel's advice that he could pay a fine, get less than the minimum sentence, and serve any sentence on house arrest. Counsel's advice influenced him to plead guilty. But for counsel's deficient advice Mr. Simpson would not have plead guilty and would have gone to trial. A. 73, lines 4-16.

Robert Simpson, Mr. Simpson's fraternal twin, testified and confirmed that he was present in the courtroom for his brother's guilty plea and prepared to pay a substantial fine. A. 78, line 23 – 80, line 21.

C. Rule 59(e), SCRCP Motion and Hearing.

The post-conviction court's initial order stated:

> This Court finds plea counsel explained the sentencing scheme to the Applicant, as well as his strategy to ask the plea judge to depart from that scheme (as happens in federal court) in order to receive a sentence of house arrest. The Court finds plea counsel articulated a valid reason that he asked for a departure for the mandatory minimum sentence in this case.

Suppl. A. 22.

Prior to receiving notice of the written order singed on February 10, 2015 and filed on March 16, 2015, by email dated February 12, 2015, counsel for Mr. Simpson objected to the proposed order:

> I have had a chance to review the proposed order, which appears to address the issues raised at the PCR hearing. Because we plan to appeal, I will have to make a Rule 59(e) motion.
>
> I also want to make sure this order really reflects Your

Honor's view of the facts. Specifically, I call your attention to this portion of page five:

> This Court finds plea counsel explained the sentencing scheme to the Applicant, as well as his strategy to ask the plea judge to depart from that scheme (as happens in federal court) in order to receive a sentence of house arrest. Plea counsel testified he had seen this particular judge depart from mandatory sentences in the past and that he prepared a sentencing memorandum to help persuade the plea judge to do so in this case. Plea counsel testified that you cannot receive such a sentence unless you request it. The Court finds plea counsel articulated a valid reason that he asked for a departure for the mandatory minimum sentence in this case.

This portion is essentially a finding of fact that Judge Verdin violated in the past (and might do so again in the future) Rule 501, Cannon 3(B)(2) of the Code of Judicial Conduct, which provides, "A judge shall be faithful to the law and maintain professional competence in it. A judge shall not be swayed by partisan interests, public clamor or fear of criticism."

I am concerned this finding of fact might have consequences for Judge Verdin. I want to be on record as objecting to this finding because I don't think there is any credible evidence to support a belief that she would ignore enactments of the General Assembly.

Suppl. App. 55.

On March 5, 2015, the Court, through its administrative assistant, made the following request of the Attorney General's Office:

> Judge Griffith is requesting an Amended order for the above styled case. Please remove the following language, located on page 5, from the proposed order:
>
> > Plea counsel testified he had seen this particular judge depart from mandatory sentences in the past and that he prepared a

> sentencing memorandum to help persuade the plea judge to do so in this case. Plea counsel testified that you cannot receive such a sentence unless you request it.
>
> If you should have any questions please contact me.

Suppl. A. 54. The amended order of dismissal, accordingly, removed this language. *Compare* Suppl. A. 22 *with* A. 87.

Mr. Simpson moved the post-conviction court to alter and amend the judgment pursuant to Rule 59(e), SCRCP. Suppl. A. 27-65. The post-conviction court convened a hearing on the motion on May 7, 2015. Post-conviction counsel explained:

> When – when we went to the hearing, I was kind of expecting to prove that Mr. Simpson's plea counsel was misinformed about the law and – and had made an error. And what we actually, if – if you accept his testimony, he contended that he knew that there was a mandatory minimum that couldn't be suspended, but yet he advised Mr. Simpson that it was possible to have it suspended. And we know this from the guilty-plea transcript because he asked for house arrest and probationary – suspended sentence.
>
> But we know it from the sentencing memorandum that did not make it into the trial court record but did make it into the PCR record where not only did he ask for the suspended sentence, you know, he asked to essentially apply some federal law, which I contend wasn't even correctly stated in the memorandum. We know from his trial counsel – plea counsel's testimony that he was told that he could get a suspended sentence that could be served on house arrest.

A. 115, lines 4-23.

Post-conviction counsel further explained that plea counsel's strategy overlooked "the specific statute for trafficking, which says that the sentence cannot be suspended. It overlooks the specific statute involving house arrest, which excludes drug cases like" Mr.

Simpson's. Referring to plea counsel's testimony that a Circuit Court Judge could "do anything that he or she wants to," post-conviction counsel pointed out the strategy of asking a judge not to follow the law "overlooks [the plea judge's] cannon of ethics, where she has an obligation to follow the law." A. 116, line 13 – 117, line 8.

Post-conviction counsel argued, "[P]lea counsel was asking for an illegal sentence." Mr. Simpson's argued defense counsel "advising somebody to plead guilty with the hopes of a judge who's obligated to follow the law is going to issue a[n] illegal sentence is – is not reasonable. Mr. Simpson requested that the record be "more developed" to explain "why this particular strategy, under the statues" involved was "a reasonable strategy for a criminal defense lawyer to adopt," "recommend," and "pursue in the sentencing hearing." A. 121, line 5 – 122, line 24. The State never offered such an explanation; nor could it.

Regarding the second prong of *Strickland, infra,* post-conviction counsel referenced case law requiring plea counsel to make sure clients understand the mandatory minimum sentence. Additional case law finds prejudice when counsel affirmatively misadvises a client about the consequences of a criminal sentence. A. 122, line 25 – 126, line 13.

The post-conviction judge took the motion under advisement, reconsidered the amended order of dismissal, and granted Mr. Simpson's application for post-conviction relief. A. 133, 135-42.

STANDARD OF REVIEW

Under the first prong of *Strickland v. Washington*, the defendant "must show that counsel's representation fell below an objective standard of reasonableness," which must be judged under "prevailing professional norms." 466 U.S. 668, 688 (1984). "The first prong—constitutional deficiency—is necessarily linked to the practice and expectations of the legal community: The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010) (internal quotations omitted). Publications of the American Bar Association, the National Legal Aid and Defender Organization, public defender organizations, and state bar associations "are guides to determining what is reasonable." *Id.* at 366-68. "Although they are only guides and not inexorable commands, these standards may be valuable measures of the prevailing professional norms of effective representation, especially as these standards have been adapted to deal with . . . modern criminal prosecutions." *Id.* at 367.

Once the defendant asserting ineffective assistance of counsel has established counsel's failure to comply with the prevailing professional norms, under the second prong of *Strickland*, he must affirmatively prove that this deficiency has prejudiced him. Specifically:

> The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Id. at 694.

"[T]here exists a right to counsel during sentencing in both noncapital and capital cases. Even though sentencing does not concern the defendant's guilt or innocence, ineffective assistance of counsel during a sentencing hearing can result in *Strickland* prejudice because any amount of [additional] jail time has Sixth Amendment significance." *Lafler v. Cooper*, ___ U.S. ___, 132 S.Ct. 1376, 1385-86 (2015).

"If the State contends the alleged deficiency resulted from a strategic decision made at trial, counsel must articulate a valid reason for employing a certain strategy." *Freiburger v. State*, 413 S.C. 243, 247, 775 S.E.2d 391, 393 (Ct. App. 2015). *And see Ingle v. State*, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002) ("Counsel must articulate a **valid** reason for employing a certain strategy to avoid a finding of ineffectiveness." (emphasis supplied by court)).

"In reviewing the PCR judge's decision, an appellate court will uphold the PCR court if any evidence of probative value supports the decision." *Smith v. State*, 386 S.C. 562, 565, 689 S.E.2d 629, 631 (2010). *And see Smith v. State,* 369 S.C. 135, 138, 631 S.E.2d 260, 261 (2006) and *Cherry v. State,* 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989).

ARGUMENT

In his application for post-conviction relief, Mr. Simpson contended he "was denied the right to effective assistance of counsel during his guilty plea, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution" because "[p]lea counsel failed to prepare for Applicant's guilty plea" by "inaccurately advis[ing him] about entering his guilty plea, the applicable penalties, and the authority of the sentencing judge." PCR Application ¶¶ 10 and 11. A. 37. As discussed below, the record supports the post-conviction court finding that guilty plea counsel's performance was both deficient and prejudicial when plea counsel advised Mr. Simpson to plead guilty to trafficking second offense and request a sentence suspended to be served on house arrest, even though neither a suspended sentence nor house arrest was an available sentencing option for trafficking second offense

1. The record in this case supports the post-conviction court finding that trial counsel did not advise Mr. Simpson of the mandatory minimum sentence that cannot be suspended.

The record is clear. Guilty plea counsel advised his client that the mandatory minimum sentence for second offense trafficking could be suspended when, in fact, it cannot be suspended. Counsel expressed this belief to the sentencing judge in the written sentencing memorandum and during the sentencing hearing. Counsel's strategy of seeking a suspended sentence induced Mr. Simpson to plead guilty.

Plea counsel's strategy was contrary to the relevant, controlling statutes. Trafficking methamphetamine, 28-100 grams, second offense,[4] carries "a term of imprisonment of not less than seven years nor more than thirty years, no part of which may be suspended nor probation granted, and a fine of fifty thousand dollars." S.C. Code Ann. §44-53-375(C)(2)(b). Because of this specific prohibition, the plea court's general power to suspend sentences, pursuant to S.C. Code Ann. §24-21-410, does not apply. *Compare State v. Tisdale*, 321 S.C. 153, 467 S.E.2d 270 (Ct. App. 1996) (by using language "the service of the minimum sentence is mandatory," legislature intended for someone convicted third-offense DUI to serve actual imprisonment of at least 60 days) *with State v. Thomas*, 372 S.C. 466, 642 S.E.2d 724 (2007) (held that statute prohibiting distribution of controlled substance within proximity of school contained no provision prohibiting the suspension of a sentence imposed pursuant to the statute, and thus, trial judge had the general authority to suspend the minimum sentence). Plea counsel, therefore, was deficient for advising Mr. Simpson to seek a fine and suspended sentence, which is not available under state law for this offense.

Defense counsel affirmatively misadvised his client. Based on the plea counsel's presentation in the sentencing memorandum and during the sentencing hearing, plea counsel very likely believed, incorrectly, that S.C. Code Ann. §24-21-410 allowed the sentencing judge to suspend the minimum sentence. If he did not understand the law, then "counsel made no tactical 'choice,' unless a failure to become informed of the law affecting his client can be so considered." *Luchenburg v. Smith*, 79 F.3d 388, 392-93 (4th

[4] The amended order of dismissal, drafted by the State, at A. 86, stated, "Plea counsel testified that he was able to negotiate a reduction of the second offense to a first offense." This statement is simply not accurate. Ms. Simpson plead guilty to a second offense. A. 7.

Cir. 1996). If plea counsel's testimony is accepted—that he understood that the statute prohibited suspended the minimum sentence—then he breached his duty to "render candid advice." Rule 407, SCACR, Rule 2.1, RPC.

Regardless of whether plea counsel understood the law, he affirmatively advised Mr. Simpson to seek an illegal sentence. Counsel's advice that affirmatively misstates the law "falls below the level of competence reasonably expected of attorneys in criminal cases." *Hinson v. State*, 297 S.C. 456, 458, 377 S.E.2d 338, 339 (1989) (counsel incorrect advice about parole eligibility warranted granting post-conviction relief). *And see Alexander v. State*, 303 S.C. 539, 402 S.E.2d 484 (1991) (held that petitioner's testimony that he would not have pled guilty if trial counsel had not misinformed him that he would face a potential life sentence if he proceeded to trial satisfied "prejudice" requirement of ineffective assistance of counsel claim) and *Ray v. State*, 303 S.C. 374, 375, 401 S.E.2d 151, 152 (1991) (held defense counsel ineffective for erroneously advising client "he would be subject to a sentence of life without parole . . . if he went to trial and was convicted of the two armed robbery charges").

For a plea to be voluntary, intelligent, and knowing, "a defendant entering a guilty plea must be aware of the nature and crucial elements of the offense, the maximum and ***any mandatory minimum penalty***, and the nature of the constitutional rights being waived." *Pittman v. State*, 337 S.C. 597, 599, 524 S.E.2d 623, 624 (1999) (emphasis added). Here, trial counsel did not advise Mr. Simpson that the minimum sentence is ***mandatory*** and cannot be suspended. The plea judge did not correct trial counsel's erroneous advice.

2. The record in this case supports the post-conviction court both that plea counsel was ineffective in requesting a suspended sentence to house arrest and that he failed to articulate a valid strategic reason he requested such a sentence.

Plea counsel's advice to Mr. Simpson and purported strategy cannot be valid under an objective standard of reasonableness because the advice and strategy are contrary to law. *See Freiburger* and *Ingle, supra.* As seen, either because of not understanding the law or intentionally misrepresenting the law to his client and the plea court, counsel argued, incorrectly, that the sentence for second offense trafficking could be suspended. Additionally, the sentencing court was without authority to impose house arrest. Our General Assembly has enacted a "Home Detention Act." S.C. Code Ann. §24-13-1510, *et. seq*. The "Home Detention Act," however, does not apply to "charges of violating, the illicit narcotic drugs and controlled substances laws of this State which are classified as Class A, B, or C felonies." S.C. Code Ann. §24-13-1590. Trafficking methamphetamine, 28-100 grams, second offense is a Class A felony. S.C. Code Ann. §16-1-90(A). Plea counsel, therefore, was ineffective for advising Mr. Simpson to seek house arrest, when the "Home Detention Act" expressly excludes that sentence in this situation.

A strategy of advocating for a judge to nullify valid statues enacted by the General Assembly can ***never*** be reasonable. In addition to violating the law, this strategy violates Rule 501, SCACR, Cannon 3(B)(2) of the Code of Judicial Conduct, which provides, "A judge shall be faithful to the law and maintain professional competence in it. A judge shall not be swayed by partisan interests, public clamor or fear of criticism." The post conviction-court obviously agreed with counsel for Mr. Simpson that there is no credible evidence to support a belief that the plea judge would ignore enactments of the

General Assembly. The absence of any credible evidence that any circuit court judge would intentionally ignore the legislatively enacted sentencing requirements makes the objectively unreasonable strategy appear even more unreasonable.

Plea counsel, furthermore, was ineffective for advising Mr. Simpson to seek "a federal-esque variance," when no such variance is available under our state's law. The Sentencing Memorandum incorrectly relies on federal authority. The memorandum, at Suppl. A. 15, cites 18 U.S.C. §3553(a), which lists facts for a federal court judge to consider prior to imposing sentence. *Koon v. United States,* 518 U.S. 81 (1996), cited in the memorandum at Suppl. A. 17, reviewed a downward departure under the Federal Sentencing Guidelines and ***not*** a state court judge's authority to ignore statutory, mandatory minimum sentences. The authority cited in the memorandum does not authorize even the federal court to ignore mandatory minimum sentences. In our state, it is well settled, "A trial judge is allowed broad discretion in sentencing ***within statutory limits."*** *Brooks v. State*, 325 S.C. 269, 271, 481 S.E.2d 712, 713 (1997) (emphasis added).

3. The record in this case supports the post-conviction court finding Mr. Simpson would not have pled guilty but for plea counsel's advice.

Regarding guilty pleas, this Court has observed:

> In *Hill v. Lockhart,* 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985), the Supreme Court applied the two part standard adopted in *Strickland* to guilty plea challenges bottomed on ineffective assistance of counsel. The Court reiterated that the defendant must show first that counsel's representation fell below the standard of reasonableness; and, that there was a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. 106 S.Ct. at 370. Specifically, the Court stated that the defendant 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." 106 S.Ct. at 370.

Jordan v. State, 297 S.C. 52, 54, 374 S.E.2d 683, 684 (1988). *See also Thompson v. State*, 340 S.C. 112, 115, 531 S.E.2d 294, 296 (2000) ("A defendant who pleads guilty on advice of counsel may only attack the voluntary and intelligent character of a plea by showing that counsel's representation fell below an objective standard of reasonableness demanded of attorneys in criminal cases and there is a reasonable probability that, but for counsel's errors, defendant would not have pled guilty and would have insisted on going to trial."). *And see Hinson, Alexander*, and *Ray, supra.* "In reviewing the PCR judge's decision, an appellate court will uphold the PCR court if any evidence of probative value supports the decision." *Smith*, 386 S.C. at 565, 689 S.E.2d 629, 631 (2010).

At the evidentiary hearing, Mr. Simpson testified he relied on plea counsel's advice that he could pay a fine, get less than the minimum sentence, and serve any sentence on house arrest. Counsel's advice influenced him to plead guilty. But for counsel's deficient advice Mr. Simpson would not have plead guilty and would have gone to trial. A. 73, lines 4-16. In the order granting post-conviction relief, the court below expressly found:

> Having concluded that plea counsel's strategy to ask for a suspended sentence and house arrest is contrary to law, the Court also concludes that this strategy is objectively unreasonable. Mr. Simpson was prejudiced by plea counsel's deficient performance. The erroneous advice was material to his decision to plead guilty. ***Mr. Simpson testified credibly that he would not have plead guilty but for the erroneous advice.*** Plea counsel's deficient performance, therefore, rendered Mr. Simpson's guilty plea involuntary. *Lockhart, Jordan, Thompson,* and *Pittman, supra.* Because plea counsel's performance was both deficient and prejudicial, Mr. Simpson is entitled to a new trial.

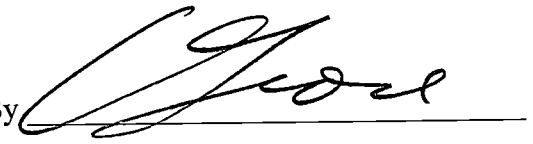
A. 142 (emphasis added). Under the standard of review, this Court may not "usurp the authority of the trial court by attempting to judge the credibility of witnesses. The determination of credibility must be left to the trial judge who saw and heard the witnesses and is therefore in a better position to evaluate their veracity." *State v. Cutro*, 332 S.C. 100, 117, 504 S.E.2d 324, 333 (1998). *See also Shirley v. Shirley*, 342 S.C. 324, 329, 536 S.E.2d 427, 429 (Ct. App. 2000) ("Because the appellate court lacks the opportunity for direct observation of witnesses, it should accord great deference to trial court findings where matters of credibility are involved.").

The record, therefore, supports the post-conviction relief court's order.

CONCLUSION

The evidence in this case supports the post-conviction court granting relief. Because the record supports the post-conviction relief court granting Mr. Simpson post-conviction relief, this Court should deny the writ.

Respectfully Submitted,

By 

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May 31, 2016

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Eugene C. Griffith, Jr., Circuit Court Judge

Appellate Case Number: 2015-001439

Frank Daniel Simpson Respondent,

v.

State of South Carolina, Petitioner.

Certificate of Service

I certify that I have served a copy of this pleading on the State of South Carolina by placing a copy in the United States Mail, postage prepaid, on date reflected below, addressed as follows:

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May 31, 2016
Greenwood, South Carolina