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JUL 13 2017

S.C. SUPREME COURT

ALAN WILSON
ATTORNEY GENERAL

PCR DIVISION: 803.734.3737
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July 13, 2017

Via Hand Delivery

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

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JUL 13 2017

S.C. SUPREME COURT

RE: Eric Spratt v. State of South Carolina
Circuit Court Case No: 2014-CP-46-0952
Appellate Case No.: 2016-001346

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the Return to the Petition for Writ of Certiorari in the above matter for filing in your office. By copy of this letter I am serving opposing counsel with this return today.

Sincerely,

Justin J. Hunter
Assistant Attorney General

JJH/jaj
Enclosures

cc: John H. Strom, Esquire (w/enclosure)

STATE OF SOUTH CAROLINA
In The Supreme Court

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CERTIORARI TO YORK COUNTY
Court of Common Pleas

JUL 13 2017

The Honorable Alison Renee Lee, Circuit Court Judge

S.C. SUPREME COURT

Appellate Case No. 2016-001346

ERIC SPRATT,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
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JUSTIN J. HUNTER
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SC Bar # 101254

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ATTORNEYS FOR RESPONDENT

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The PCR Court correctly found that Counsel was not ineffective for failing to argue to the sentencing court that Spratt did not have the right to counsel at his 1998 plea hearing since the sentencing court determined that Spratt was advised of his right to counsel by Judge Hayes and he waived his right under a proper *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975) inquiry after a separate hearing to reconstruct the record of the 1998 plea10

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RESPONDENT'S ISSUE PRESENTED

- I. Where probative evidence from the sentencing hearing supports the PCR Court's conclusion that Counsel was not ineffective in her argument at the remanded sentencing hearing because Spratt was advised of his rights at the 1998 guilty plea and waived his right to counsel. Spratt's speculative assertion that Spratt was not advised of a right to counsel is without factual support. Since Spratt was advised that he had a right to counsel in 1998 and received *Faretta* warnings, the fact that *Alabama v. Shelton* was decided subsequent to the 1998 plea has no impact on Judge Alford's findings.

STATEMENT OF THE CASE

Relevant Prior History

Spratt was indicted by the York County Grand Jury in 1998 for possession of crack cocaine (1998-GS-46-2715). He pled guilty as indicted on September 22, 1998, before the Honorable John C. Hayes, III, and was sentenced to five years' incarceration and a \$5,000 fine suspended upon three years of probation. Spratt was not represented by an attorney during the plea.

Subsequently, on April 26, 1999, Spratt waived presentment to the grand jury and pled guilty to possession with intent to distribute crack cocaine before Judge Thomas W. Cooper, Jr., on 1999-GS-46-1028. He was sentenced to four years imprisonment. At the same time, Spratt's probation on the possession of crack cocaine conviction was revoked for six months, and he was incarcerated; probation was to continue upon his release. Spratt was represented by counsel from the Public Defender's office during the plea and the probation revocation hearing.

Current Convictions

Spratt is currently incarcerated pursuant to orders of commitment from the York County Clerk of Court. Spratt was indicted by the May 2006 term of the York County Grand Jury for Trafficking in ice, crank or crack cocaine (2006-GS-46-1625) and Possession of Marijuana, 2nd offense (2006-GS-46-1626). Melissa Inzerillo, Esquire, represented Spratt at trial. On June 6, 2006, Spratt proceeded to a jury trial *in absentia* pursuant to which he was found guilty of both charges. The Honorable J. Derham Cole issued a sealed sentence. On May 25, 2007, Spratt appeared before the Honorable Clifton B. Newman for the unsealing of the sentence. Judge Newman sentenced Spratt to confinement for thirty years for trafficking crack cocaine, third offense, and one year, concurrent, for possession of marijuana.

Spratt immediately moved for a reconsideration of the sentence on the basis that the trafficking crack cocaine conviction should not be treated as a third offense. Judge Newman granted the motion and reduced the Spratt's sentence to ten years, finding the conviction to be a second offense rather than a third offense. Judge Newman found that Spratt's prior uncounseled 1998 guilty plea before Judge Hayes, which resulted in incarceration due to a subsequent violation of probation when he pled guilty to PWID crack in 1999, should not have been used to enhance his present trafficking in crack cocaine conviction to a third offense .

The State filed a notice of appeal on June 4, 2007. The South Carolina Court of Appeals reversed Judge Newman and remanded the case for additional proceedings with respect to the issue of waiver of counsel during Spratt's 1998 guilty plea. *State v. Spratt*, 383 S.C. 212, 678 S.E.2d 266 (Ct. App. 2009).

Re-sentencing Hearing on Remand

On June 6-7, 2011, Spratt appeared before the Honorable Lee S. Alford for a hearing consistent with the remand from the South Carolina Court of Appeals. At the hearing, Counsel made a motion to the court to find that Spratt's 1998 conviction was uncounseled and could not be used to enhance his trafficking charge. App. 12, ll. 14-18. Counsel argued that the uncounseled conviction where Spratt was actually incarcerated could not be used for further enhancement since he did not waive his right to counsel. App. 13, ll. 16-21.

At the remanded sentence hearing Spratt admitted to numerous arrests as a juvenile. He also admitted that he appeared at juvenile hearings in family court prior to the 1998 guilty plea in question. App. 19, l. 20 – 22, l. 10; 29, l. 2 – 30, l. 4. He felt certain that he had counsel present at the family court proceedings and speculated that his mother would not likely allow him to proceed without the assistance of counsel. App. 21, ll. 2-15. Spratt stated that he was represented

by members of the Public Defender's Office in the family court proceedings without the necessity of requesting counsel. App. 33, ll. 2-6, 21-24. He admitted that he appeared in Family Court with counsel on July 20, 1998, nine days before he was arrested possession of crack cocaine that resulted in the 1998 guilty plea in question. App. p. 33, ll. 2-9.

Spratt acknowledged that, in relation to the drug charge that led to the 1998 plea, he signed Attorney Representation and Notice of Initial Appearance forms on July 29, 1998 in which he was informed that he should secure a private attorney prior to his initial appearance if he did not qualify for a public defender. App. 24, l. 1 - 26, l. 16. However, Spratt testified that the forms did not inform him that it would be in his best interest to have counsel to assist with his defense App. 32, ll. 10-17.¹

At the remanded sentencing hearing, Judge Alford asked Spratt if he remembered Judge Hayes telling Spratt at the 1998 plea that he had a right to an attorney and asking if he wanted an attorney; Spratt answered he did not remember. App. 37, ll. 10-19. Spratt also stated that he did not remember waiving presentment to the grand jury, and Judge¹ Alford showed him the indictment where Spratt gave a signature indicating that he wished to waive presentment. App. 38, l. 10 – 39, l. 9. After hearing Spratt's testimony and judging his credibility, Judge Hayes noted that Spratt had a "convenient memory" when recollecting the events around his 1998 plea. App. 36, ll. 8-14; 45, ll. 20-21.

Judge Alford informed the parties that he had the opportunity, during his thirteen years on the bench, to witness Judge Hayes' guilty pleas and read his plea colloquies, including those where waiving one's right to an attorney was the issue. App. 44, l. 21 – 45, l. 4. Judge Alford

¹ The State would ask this Court to take judicial notice of the Attorney Representation form, signed by Spratt. This form was introduced at the remanded sentencing hearing that notified him of the Public Defender's office and that he may secure a private attorney if he does not qualify for a public defender. This form was introduced at the remanded sentencing hearing and is found on Page 77 of the Record on Appeal of case State v. Eric Spratt, 2011-193948.

stated that he had never seen one case where Judge Hayes did not advise a defendant of his right to have an appointed attorney if he wanted one. App. 45, ll. 4-9.

Assistant Solicitor E.B. Springs testified at the remanded sentence hearing that he has been an assistant solicitor since 1998. He could not recall if he was present during Spratt's 1998 plea but testified that that he has witnessed Judge Hayes conduct guilty pleas many times, including with pro se defendants. App. 50, l. 19 – 51, l. 3. He testified that in thirteen years, he has heard Judge Hayes use the same routine of giving the proper *Faretta*² warnings. App. 51, ll. 8-13. Mr. Springs testified he has not heard a single pro se plea where Judge Hayes failed to explain the dangers of self-representation and obtain a waiver of the right to counsel from a pro se defendant.

At the conclusion of the remanded hearing, the re-sentencing court found that Spratt did not meet his burden of proving that he was not advised of and did not waive the right to counsel at the 1998 plea. App. 30, ll. 4-8; 68, ll. 10-19. Judge Alford found Spratt's testimony to be completely not credible. App. 65, ll. 16-17. Judge Alford found that Spratt remembered no details whatsoever about what occurred during the 1998 guilty plea proceeding but merely speculated that he would not have rejected the assistance of counsel if the right to counsel had been discussed. Judge Alford also acknowledged that Judge Hayes' routine practice and procedure as testified to by Assistant Solicitor Springs and as observed by the sentencing court always included *Faretta* warnings and the waiver of right to counsel before a pro se defendant is allowed to enter a guilty plea. App. 63, l. 3 - 65, l. 15. Judge Alford thereafter sentenced Spratt to the mandatory minimum sentence of twenty-five years for a third offense. The 1998 guilty plea was used to enhance the offense from a second to a third. App. 68, ll. 20-23.

² *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975).

Spratt appealed Judge Alford's ruling and sentence. The State argued that Spratt failed to present credible evidence that his 1998 conviction was the result of a violation of his right to counsel to overcome the findings of the sentencing court that Spratt was given his *Faretta* warnings before the 1998 plea and he waived those rights. The State argued that the presumption of regularity attaches to final judgments, even on the question of right to counsel. The South Carolina Court of Appeals affirmed his conviction in an unpublished decision. *State v. Spratt*, 2013 WL 8508095, (Ct App. May 8, 2013). The Remittitur was issued on June 4, 2013.

Post-Conviction Relief Application

On March 19, 2014, Spratt filed an application for post-conviction relief alleging that defense counsel was ineffective and that his 1998 un-counseled guilty plea was involuntary. On June 24, 2014, the State filed a Return. An evidentiary hearing into the matter was convened on November 20, 2014, at the Moss Justice Center in York, South Carolina before the Honorable Alison Lee. Spratt was present at the hearing and represented by Tommy Thomas, Esquire. Rutledge Johnson, Esquire, of the South Carolina Attorney General's Office represented the State. At the hearing, Spratt testified on his own behalf. Spratt's trial counsel, Melissa Inzerillo, Esquire, (hereinafter "Counsel") testified. By an Order of Dismissal signed April 22, 2016 and filed April 27, 2016, the PCR Court denied and dismissed Petitioner's application with prejudice.

Petitioner filed a timely notice of appeal. The Petition for Writ of Certiorari was submitted, dated January 20, 2017. This Return to the Petition for Writ of Certiorari 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 post-conviction relief proceeding, the Petitioner bears the burden of proving the allegations in their application. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985).

ARGUMENT

The PCR Court correctly found that Counsel was not ineffective in her argument to Judge Alford at the remanded sentencing that Spratt did not waive his right to counsel. The PCR Court found that Counsel argued at the remanded sentencing hearing that Spratt did not waive his right to counsel before the 1998 plea and found that Spratt failed to show how a different argument would have overcome Judge Alford's findings that Spratt did receive *Faretta* warnings and waived his right to counsel at his 1998 plea.

Relevant Law

In a PCR action, the petitioner bears the burden of proving the allegations in his application. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the petitioner must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 2064 (1984); *Butler, supra*.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Strickland, supra*. Petitioner must overcome this presumption in order to receive relief. *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel. *Id.* at 117, 386 S.E.2d at 625. First, Petitioner must prove counsel's performance was deficient. *Id.* Under this prong, the Court measures counsel's performance by its "reasonableness under prevailing professional norms." *Id.* (citing *Strickland*, 466 U.S. at 688).

Second, counsel's deficient performance must have prejudiced Petitioner such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625.

I. The PCR Court correctly found that Counsel was not ineffective for failing to argue to the sentencing court that Spratt did not have the right to counsel at his 1998 plea hearing since the sentencing court determined that Spratt was advised of his right to counsel by Judge Hayes and he waived his right under a proper *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975) inquiry after a separate hearing to reconstruct the record of the 1998 plea.

A. Counsel's Argument at the Remanded Sentencing Hearing

After Spratt was convicted of trafficking crack cocaine, third offense, he made a motion to reconsider and was re-sentenced to trafficking, second offense. On appeal, the Court of Appeals remanded the case for a re-sentencing and ordered that the re-sentencing court must determine whether Spratt waived his right to counsel at his 1998 plea before determining whether it could be used as a prior offense. The Court of Appeals held that "[a] prior uncounseled conviction is not constitutionally defective or invalid when the defendant knowingly, voluntarily, and intelligently waived his right to counsel." *State v. Spratt*, 383 S.C. 212, 213-14, 678 S.E.2d 266, 267 (Ct. App. 2009). Spratt appeared for the remanded sentencing hearing on June 6-7, 2011 before Judge Alford to determine the constitutionality of his 1998 uncounseled guilty plea.

At the remanded sentencing hearing, Counsel made a motion to the court to find that Spratt's 1998 conviction was uncounseled and could not be used to enhance his trafficking charge. App. 12, ll. 14-18. Counsel argued that an uncounseled conviction where Spratt was actually incarcerated could not be used for further enhancement. App. 13, ll. 16-21. Counsel argued that Judge Hayes never advised Spratt of his right to an attorney and Spratt would have

agreed to an attorney had he been informed of his rights. App. 42, ll. 8-14. She argued that because Spratt was incarcerated for possession of crack, he had standing to challenge the use of that conviction to enhance. App. 55, ll. 2-4. Counsel again argued during her closing argument to Judge Alford that Spratt was the only person to present testimony who was actually in the courtroom for the 1998 plea and he unequivocally did not receive his *Faretta* warnings or the right to counsel. App. 55, ll. 8-12.

B. Counsel's Explanation at the PCR Hearing

Spratt filed a PCR application, challenging his 2006 conviction for trafficking of crack cocaine, third offense. He alleged that Counsel was ineffective in her argument to Judge Alford at the remanded sentencing hearing which caused Judge Alford to use Spratt's 1998 plea as a prior offense to enhance his trafficking of crack conviction to a third offense instead of a second offense. Spratt's main argument at the PCR hearing was that Counsel was ineffective for failing to argue at the remanded sentencing hearing that any *Faretta* warnings that he received in 1998 would not have included informing him that he had the right to appointed counsel; therefore, his 1998 uncounseled plea could not be used to enhance his trafficking charge.

At the PCR hearing, Counsel explained the rationale behind her argument at the remanded sentencing hearing. She testified that she argued to Judge Alford that under *Shelton*³ she believed Spratt's 1998 conviction was uncounseled, and because he did serve actual prison time, it could not be used for enhancement. App. 126, ll. 17-25. Counsel testified that in her argument to Judge Alford, she had to show that the uncounseled plea could not be used to enhance under *Alabama v. Shelton* and its progeny and also had to show whether or not he was given his *Faretta* warnings at the 1998 plea. App. 131, ll. 10-15. Counsel testified that she disagreed with Spratt's statement that he did not have a right to counsel at the 1998 plea because

³ 535 U.S. 654, 122 S.Ct. 1764, 152 L.Ed.2d 888 (2002).

Alabama v. Shelton had not been decided yet. App. 133, ll. 2-4. She explained that Spratt had the right to counsel under the Sixth and Fourteenth Amendments and testified "*Alabama versus Shelton* doesn't give you right to counsel. *Alabama versus Shelton* gives the ability to determine whether a prior uncounseled plea and parameters of that plea can be used in your current case to enhance." App. 129, ll. 20-21; App. 133, ll. 6-10, 20-23. Counsel explained that her interpretation of what *Shelton* allows the court to do is to review a prior conviction and decide that "if it was an uncounseled plea with no waiver then it shouldn't be used against him now." App. 142, ll. 9-14.

C. PCR Court's Findings and Ruling

The PCR Court found Judge Alford made affirmative findings that Judge Hayes advised Spratt of his right to counsel at the 1998 plea and Spratt waived his rights after the appropriate *Faretta* inquiry. The PCR Court found that Counsel's argument concerning *Alabama v. Shelton* would not have overcome Judge Alford's findings that Spratt properly waived his right to counsel. The PCR Court dismissed Spratt's allegations and found that Judge Alford's findings at the remanded hearing were crucial. App. 154. The PCR Court noted that Judge Alford made an affirmative finding that the plea judge did advise Spratt of the right to counsel and required Spratt to waive the right prior to accepting the plea. App. 154. The PCR Court further noted that Judge Alford's findings were not based simply on the presumption of regularity, but on testimony from the solicitor about the plea judge's practices and from Judge Alford's own knowledge and personal experience of the plea judge's practices. App. 154. The PCR Court found that Spratt failed to show how a different argument by Counsel would have overcome Judge Alford's findings on the issue. App. 154. The PCR Court found that Spratt's assertion that he would not have had the right to counsel at the 1998 plea is erroneous and agreed with Counsel that Spratt

possessed the right to counsel. App. 155. The PCR Court found that Spratt did not meet his burden of proving that Judge Alford's findings would have been different had Counsel argued that he did not have the right to counsel at the 1998 plea.

Analysis

The PCR Court correctly found that Counsel was not ineffective in her argument to Judge Alford at the remanded sentencing hearing that Spratt did not waive his right to counsel at the 1998 plea and it could not be used as a prior offense to enhance his 2006 trafficking charge. The PCR Court correctly determined that Spratt's speculation that a different argument of *Alabama v. Shelton* would not undermine the findings of Judge Alford that the proper *Faretta* warnings were given. App. 154-156.

Counsel was not deficient in her argument to Judge Alford that Spratt did have the right to counsel prior to the entry of his 1998 plea. See *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) (in which the Supreme Court held that the Sixth Amendment's guarantee of the right of an indigent defendant to appointed counsel applies to state criminal prosecutions through the Fourteenth Amendment). The PCR Court agreed with Counsel that Applicant had a right to counsel at his 1998 plea and further found that an argument to the contrary would not make a difference in Spratt's plea because he was told of his right to counsel and waived the right. App. 155. Spratt's argument that he did not have the right to counsel at his 1998 hearing because *Shelton* was not decided until 2002 is a red herring and was rejected by the PCR Court. App. 154-155. The PCR Court disregarded this argument because Spratt did waive his right to counsel, given Judge Alford's affirmative findings that Judge Hayes gave the *Faretta* warnings and Spratt waived his right to counsel before the 1998 plea. As *Shelton* was made

retroactive by *Talley v. State*,⁴ Judge Alford would have been aware in 2011 of *Shelton* and its holding. Spratt's plea to possession of crack cocaine in General Sessions court resulted in a sentence of five years' incarceration suspended upon three years' probation. Although now disputed, the record of the remanded hearing and findings are that he was advised of his right to counsel and waived the right at his 1998 plea hearing. Sentencing courts do not wait until the sentence is imposed to then analyze whether a defendant should have had counsel during the hearing. Spratt faced up to five years imprisonment for possession of crack in 1998, and thus he would have had the right to counsel and would have had to waive that right to proceed pro se. *Shelton* did not suddenly give defendants the right to have counsel at a criminal proceeding, but analyzed when uncounseled convictions may be used to enhance.

The PCR Court relied on probative evidence from the lower court in making its findings. In its Order of Dismissal, the PCR Court, bound by Judge Alford's remand findings, found based on evidence in the record before it that Judge Hayes did give Spratt the *Faretta* warnings at the 1998 plea and Spratt waived these rights. App. 154-155. The PCR Court found:

Judge Alford's finding was not based on a normal presumption of regularity that such was required. Instead, it was based on testimony from an assistant solicitor about the plea judge's practices during the time period in question, as well as, Judge Alford's own personal knowledge of the plea judge's practices based upon his review of Judge Hayes' plea colloquies.

App. 154.

South Carolina courts have held no person may be imprisoned for an offense unless represented by counsel, absent a knowing and intelligent waiver of the right to counsel. *Glaze v. State*, 366 S.C. 271, 621 S.E.2d 655 (2005), citing *Argersinger v. Hamlin*, 407 U.S. 25 (1972). However, an accused has the constitutional right to waive counsel and to proceed pro se as long as the waiver is knowing, voluntary, and intelligent. See *Faretta v. California*. The decision

⁴ 371 S.C. 535, 640 S.E.2d 878 (2007).

made by the accused to waive the right to counsel must be honored as long as the waiver is knowing, voluntary, and intelligent. *Id.*; see also *State v. Brewer*, 328 S.C. 117, 119, 492 S.E.2d 97, 98 (1997). The trial judge must ensure the defendant is informed of the dangers and disadvantages of self-representation. *Id.* A conviction obtained in the absence of counsel but after a knowing, voluntary, and intelligent waiver of the right to counsel is not constitutionally infirm and an accused who validly waives the right to counsel may not later claim the conviction was obtained in violation of the right to counsel.⁵

In the present case, Spratt incorrectly alleges that Counsel's argument at the remanded sentencing hearing was in error because in 1998 the *Faretta* warnings would not have included the right to counsel because he did not receive immediate imprisonment. However, because Spratt faced a sentence of up to five years imprisonment under the statute, he had a constitutional right to counsel. "[T]o waive the right to counsel, the accused must be (1) advised of his right to counsel and (2) adequately warned of the dangers of self-representation." *Gardner v. State*, 351 S.C. 407, 411, 570 S.E.2d 184, 186 (2002) (citing *Faretta v. California*). These rights are explained at the beginning of the proceeding because the hearing itself cannot go proceed if a pro se defendant does not waive his right to counsel. For Spratt's argument to be true, any time a plea judge is faced with a pro se defendant he will, at the beginning of the hearing, have to be clairvoyant and correctly predict if the sentence he will eventually impose includes actual imprisonment and tailor his *Faretta* warnings to include the right to counsel. Since this

⁵ See *Alabama v. Shelton*, (stating that absent a knowing and voluntary waiver, a person may not be imprisoned unless represented by counsel); *Argersinger v. Hamlin*, 407 U. S. 25, 92 S.Ct. 2006 (1972) (stating that absent a knowing and voluntary waiver, no person may be imprisoned for any offense, whether felony or misdemeanor, unless represented by counsel); *Scott v. Illinois*, 440 U.S. 367 (1979) (stating, absent a valid waiver, an indigent defendant convicted without counsel cannot be sentenced to a term of imprisonment); *Glaze v. State*, 366 S.C. 271, 621 S.E.2d 655 (2005) (stating that the defendant has neither waived the right to counsel nor been afforded the right to counsel).

interpretation is not the law in South Carolina, Counsel's argument that Spratt had the right to counsel at his 1998 hearing was proper.

The PCR Court correctly found that even if *Faretta* warnings were not required at Spratt's 1998 plea, Judge Alford found that Applicant was still informed of his right to counsel and waived that right. App. 154. There is probative evidence before the PCR Court and the reconstructed record before Judge Alford that Judge Hayes did give *Faretta* warnings at the 1998 plea and Spratt specifically waived his right to counsel. The PCR Court's findings are supported by the assistant solicitor's uncontradicted testimony regarding Judge Hayes' formulaic, routine colloquy and Judge Alford's lengthy holding regarding his experience hearing Judge Hayes' plea colloquies and reading them in transcripts on post-conviction relief. App. 50, l. 8 – 51, l. 22; 63, l. 6 – 65, l. 15; 154. Judge Alford's findings were definitive as he stated he had "not seen one single plea where Judge Hayes did not give his colloquy, the same colloquy to the defendant." App. 64, ll. 10-13. Judge Alford further found that in his lengthy personal experience reviewing Judge Hayes' pleas, he has never seen a pro se plea before Judge Hayes where Judge Hayes did not give the *Faretta* warnings about self-representation, advise the defendant of his right to an attorney, and have a defendant waive his right to have an attorney representing him before he would accept that plea as being freely and voluntarily made. App. 64, ll. 15-20.

The only evidence to the contrary was Spratt's testimony at the remanded sentencing hearing and the PCR hearing. Both Judge Alford and the PCR Court found Spratt's testimony to be not credible. App. 65, ll. 16-17; 154. Where matters of credibility are involved, the Court gives great deference to a judge's findings, because the Court lacks the opportunity to directly observe the witnesses. See *Drayton v. Evatt*, 312 S.C. 4, 13, 430 S.E.2d 517, 522 (1993) (finding great deference is given to the PCR judge's findings on the credibility of witnesses); see also

Menne v. Keowee Key Prop. Owners' Ass'n, Inc., 368 S.C. 557, 567, 629 S.E.2d 690, 696 (Ct. App. 2006) ("Because the appellate court lacks the opportunity for direct observation of the witnesses, it should accord great deference to trial court findings where matters of credibility are involved."). Judge Alford found that Spratt had a "convenient memory" as he was unable to remember any details about any aspect of the plea hearing except for the fact that he was not told about his right to counsel. App. 36, ll. 8-14; 45, ll. 20-25. Thus, the PCR Court correctly found that Spratt presented no credible evidence that would undermine Judge Alford's affirmative findings. App. 155.

The PCR Court correctly found that Spratt did not meet his burden of proving that he was prejudiced by Counsel's argument at the remanded sentencing hearing. Spratt presented no credible evidence that Judge Alford's findings would have been different had Counsel argued that Judge Hayes' *Faretta* warnings would not have included the right to counsel. Such an argument would not have overcome the affirmative findings by Judge Alford that *Faretta* warnings, which include the right to counsel, were given. Therefore, because the PCR Court's findings were based on probative evidence, Spratt's Petition should be denied as certiorari is not warranted in this case.

CONCLUSION

For the reasons stated above, this Court should deny the Petition for Writ of Certiorari and affirm the PCR Court's ruling. Should this Court grant Certiorari, the Respondent requests permission under the rules to brief the issue discussed above fully.

Respectfully submitted,

ALAN WILSON
Attorney General

JUSTIN J. HUNTER
Assistant Attorney General
S.C. Bar # 101254

By: 
ATTORNEYS FOR RESPONDENT

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July 13, 2017

STATE OF SOUTH CAROLINA
In The Supreme Court

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JUL 13 2017

CERTIORARI TO YORK COUNTY
Court of Common Pleas

S.C. SUPREME COURT

The Honorable Allison Renee Lee, Circuit Court Judge

Circuit Case No.: 2014-CP-46-0952
Appellate Case No.: 2016-001346

ERIC SPRATT,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

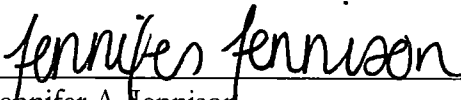
Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Return to the Petition for Writ of Certiorari** has been served upon the applicant by mailing one (1) copy in the United States mail, postage prepaid, addressed to:

John Harrison Strom, Esquire
S.C. Commission on Indigent Defense
1330 Lady Street, Suite 401
Columbia, SC 29201

This 13th day of July, 2017.


Jennifer A. Jennison
Legal Assistant for Petitioner