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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

Appeal from York County Court of Common Pleas
The Honorable J. Mark Hayes, Circuit Court Judge

Case No.: 2018-000883

Jonquay R. McCombs,..Petitioner,

v.

State of South Carolina,...Respondent.

PETITION FOR WRIT OF CERTIORARI

ATTORNEY FOR PETITIONER

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ISSUES PRESENTED

I. WHETHER THE PCR COURT ERRED IN DENYING RELIEF BY FINDING PETITIONER'S GUILTY PLEA NOT UNKNOWINGLY OR INVOLUNTARILY MADE.

A. WHETHER PLEA COUNSEL WAS INEFFECTIVE FOR FAILING TO MOVE TO SUPPRESS EVIDENCE FROM A WARRANTLESS SEARCH.

STATEMENT OF THE CASE

In June 2016, a York County grand jury indicted Petitioner for assault and battery in the first degree (2016-GS-46-1942); unlawful carrying of a pistol (2016-GS-46-1943); and possession of crack with intent to distribute ("PWID") (2016-GS-46-1944). App. pp. 101-102; 105-106; 109-110.

The assault and battery charge arose when an individual, William White, reported gunshots fired at his vehicle to police on May 11, 2016. App. p. 89, ln. 3-4. White told police Petitioner was the individual responsible, and bullet casings were recovered at the scene. App. p. 89, ln. 7-10. Petitioner denied involvement. App. p. 47, ln. 1-7, 24-25. Plea Counsel testified that the State did not conduct ballistics, no DNA or gunshot residue was taken, and no firearm establishing a connection between Petitioner to the gunshots was found. App. p. 117, ln. 17-23; p. 50-51, ln. 1-2.

The unlawful carry of a pistol charge relates to an incident on October 16, 2015. App. p. 89, ln. 11-14. A samaritan had called 911 reporting gunfire and an unknown eyewitness later stated Petitioner was responsible. App. p. 89, ln. 11-16. During a subsequent traffic stop, law enforcement searched Petitioner's vehicle upon claiming to smell marijuana. App. p. 89, ln. 14-16. During the search, law enforcement found a handgun under the driver's seat; no marijuana was found. App. p. 89, ln. 16-18.

In regard to the PWID charge, law enforcement arrived at the Bayside Apartments apartment complex on February 6, 2016 to respond to 911 calls unrelated to Petitioner that were made from an unidentified individual's apartment. App. p. 62, ln. 10-12. Petitioner's girlfriend lived at that same apartment complex and he was visiting her at the time police arrived. App. p. 58, ln. 5-6. The responding officers maintained they smelled marijuana in the open air and acted

on the unsubstantiated suspicion that the smell was coming from Petitioner's car parked in front of a neighboring apartment building. App. p. 89, ln. 20-25; p.42, ln. 2-11; p. 44, ln. 1-10. Even though the officers were there to respond to a 911 call made from another residence, the officers initiated a knock at Petitioner's girlfriend's apartment, and Petitioner answered the door. App. p. 89, 24-25; p. 89, ln. 1-2; p. 42, ln. 17-20; p. 42, ln. 15-17; p. 62, ln. 10-12. While standing in the doorway of the residence, the police inquired about whether the car belonged to Petitioner which Petitioner confirmed. App. p. 90, ln. 1-4; p. 42, ln. 2-11 Police also questioned Petitioner about whether marijuana or any other drugs were inside the vehicle; the officers did not ask for permission to enter or search the home. App. p. 90, ln. 3-7. They asked Petitioner for consent to search the vehicle and he refused. App. p. 44, ln. 11-15. The officers then stated that they would just get a warrant to search the vehicle. App. p. 44, ln. 11-15. According to the incident report, Petitioner eventually admitted that there was crack cocaine inside the car and unlocked the car for the officers. App. p. 90, ln. 4-6. During of the search of the vehicle, the officer seized two grams of crack cocaine and $390.00. App. p. 90, ln. 8-12. Petitioner denied ever giving consent to search vehicle. App. p. 44, ln. 19-25. No marijuana was found.

Represented by Jessica Russo, Esquire ("Plea Counsel"), Petitioner pleaded guilty before the Honorable John C. Hayes, III on July 15, 2016 to PWID second offense, and to the other charges as indicted. App. p. 100, 104, 108. He was sentenced to one (1) year imprisonment for unlawful carrying of a pistol and to ten (10) years imprisonment each for PWID and assault and battery, with all sentences to run concurrent. App. p. 91, ln. 23-2 – p. 92, ln. 1-2, 100, 104, 108. No notice of intent to appeal his conviction or sentence was filed.

Petitioner filed for post-conviction relief on May 31, 2017. App. pp. 20-25. The application alleged ineffective assistance of counsel and that the guilty plea was involuntary and

made in ignorance. App. pp. 22-23. The Respondent, represented by Assistant Attorney General Justin J. Hunter, filed a return to the application and moved for a more definite statement on August 21, 2017. App. pp. 26-31. Petitioner responded to the Respondent's motion on November 7, 2017 providing the following supplementary or amended grounds to the PCR application:

I. Counsel was ineffective for failing to adequately investigate and consequently advise Applicant on the availability of relevant defenses or opportunities to suppress evidence, rendering Applicant's guilty plea not knowingly or intelligently made.

   A. A more thorough review of the discovery would have revealed that grounds existed to challenge the searches of Applicant's vehicle on October 16, 2015 and February 6, 2016. Had Applicant been fully advised on the nature and strength of the State's evidence, as well as the opportunity to suppress the evidence seized from two illegal searches, he would not have pled guilty and instead would have proceeded to trial.

   B. Applicant learned that another individual housed in the same jail for murder, who looked very much like Applicant, was responsible for the gunshots that led to Applicant's arrest for assault and battery first. Applicant had communicated this to counsel but counsel failed to investigate. Had Applicant known that evidence may have existed to support a third-party defense at trial, he would not have pleaded guilty and instead have proceeded to trial.

II. Counsel failed to spend adequate time with Applicant explaining the nature of the charges, the evidence against him, and the possible penalties, thus rendering Applicant's guilty plea not knowingly or intelligently made.

   A. At the time of his guilty plea, Applicant did not understand the elements to each charge. Counsel had also failed to thoroughly review all of the State's evidence with him. Counsel also failed to discuss with Applicant the full range of possible sentences.

   B. Particularly, Counsel had advised Applicant that he would only have to serve three (3) to six and half (6.5) years in prison. Had Applicant known that he would be sentenced to upwards of ten (10) years, he would not have pleaded guilty and instead would have proceeded to trial.

App. pp. 34-36. An evidentiary hearing was held before the Honorable J. Mark Hayes, II on February 1, 2018. Applicant and Plea Counsel were both present and testified at the hearing. App. p. 40-79. The PCR Court dismissed the application. App. pp. 2-15. This appeal follows.

Relevant PCR Hearing Testimony

Petitioner testified he met with Plea Counsel two to three times "at most" before he pleaded guilty to all three charges. App. p. 53, ln. 1-4. Petitioner testified he felt pressured by Plea Counsel. App. p. 48, ln. 12-13; p. 52, ln. 17-20. Petitioner stated that Plea Counsel did not review police reports or any discovery with him prior to pleading guilty. App. p. 48, l. 19-21; p. 49 ln. 4-7. Petitioner testified that his attorney did not answer his questions about the shell casings or explain any possible options to explore the State's inability to link the gunshots to him, as well as any consequent implications on the plea offer. App. p. p. 51, ln. 7-8. Petitioner repeatedly stated that whenever he tried to discuss the investigation and evidence with Plea Counsel, it did not occur. App. p. 51, ln. 12-21; p. 53, ln. 6-13. Instead, Petitioner testified that the only thing Plea Counsel would thoroughly discuss with him was the life without parole (LWOP) sentence that was looming, and that their meetings simply consisted of Plea Counsel urging Petitioner to "'go on here and sign this plea deal." App. p. 48, ln. 23-24. On cross-examination, Petitioner testified that to the extent Plea Counsel discussed the charges or evidence with him, it was not in sufficient detail. App. p. 53, ln. 16-20; p. 55, ln. 1-3. Petitioner also testified that Plea Counsel never sought to obtain other accounts of the events from other witnesses present at the time of the offenses, including Petitioner's girlfriend. App. p. 52, ln. 1-8. Plea Counsel was aware Petitioner's girlfriend and cousin was present for the questioning that led to the discovery of the crack cocaine. App. p. 52, ln. 1-8. Petitioner also testified that he was interested in pursuing the suppression issue, and did not learn his case had meritorious suppression grounds until stumbling upon it in the prison law library. App. p. 78, ln. 12-14, 12-19. Petitioner stated that he wished Plea Counsel had instead pursued the suppression issue. App. p. 78, ln. 20-25 — p. 79, ln. 1-2. Petitioner had also since had the chance to review the discovery

with PCR Counsel. App. 49, ln. 9-15. Petitioner testified that had he been shown or advised on the discovery, he would not have pleaded guilty and instead would have gone to trial. App. 49, ln. 9-15.

At the PCR hearing, Plea Counsel testified she recalled meeting with him at least three times in addition to a few phone calls. App. p. 61, ln. 19-24. Plea Counsel testified that she discussed with Petitioner the charges, discovery, possible sentences, the plea offer, and the consequences of pleading guilty. App. p. 67, ln. 9-25; p. 68, ln. 17-25 – p. 69, ln. 1-2. Plea Counsel also recounted the facts of the search that led to the PWID charge to the best of her recollection and indicated that there was something very amiss in how the officers became so preoccupied with Petitioner's vehicle and their unsubstantiated suspicion that drugs were inside. App. p. 58, ln. 2-13. Plea Counsel went on to further explain the troubling circumstances regarding the search:

> I had some concerns about the search. I did express that to him, and it was very strange how they talked to him and how they said it smelled like marijuana but still wanted to get consent, how there was something written in the report about how he said there was no marijuana in the car, but the way he said it made it sound like there was [in officer's perspective]. There were things in the report that gave me cause for concern, but ultimately, the smell of marijuana in a vehicle is, generally, enough to get officers inside a car without a warrant.

App. p. 59, ln. 7-16. Plea Counsel testified that Petitioner had refused to give consent to the officers to the search the vehicle. App. p. 58, ln. 9; p. 59, ln. 24-25 – p. 60, ln. 1, 12-14. Plea Counsel stated that according to the incident report, he ultimately unlocked the vehicle for the officers after being told the officers would just go get a warrant regardless. App. p. 59, ln. 19-20. Plea Counsel considered filing a suppression motion but that the motion would jeopardize any plea offer then on the table. App. p. 58, ln 21-25; p. 23, ln. 1-2. Plea Counsel testified that due to the risk of losing a plea offer, Petitioner decided he did not want her to pursue suppression. App.

p. 59, ln. 3-4. Plea Counsel also stated that the case presented "better" grounds to support suppressing the evidence. App. p. 61, ln. 6-8. Plea Counsel testified that she explained to Petitioner a guilty plea is a waiver of trial rights, including the opportunity to file a suppression motion, and that Petitioner had expressed he did not wish to go to trial. App. p. 61, ln. 9-15. Plea Counsel testified that she felt advising Petitioner to forego suppression and trial in order to accept the offer of ten (10) years was in his best interests because the State would not drop the assault and battery charge and the drug charge would trigger an LWOP sentence. App. p. 63, ln. 22-25; p. 64, ln. 1-13. Yet Plea Counsel also repeatedly stated that Petitioner had refused consent to search; nonetheless, she believed he did ultimately consent. "[a]t least that would be what the officers would say." App. p. 59, ln. 24-25 – p. 60, ln. 1; p. 60, ln. 12-14; p. 66, ln. 10-12; p.75, ln. 9-13. Plea Counsel acknowledged that the Solicitor at the plea hearing stated Petitioner gave consent to search the vehicle. App. p. 69, ln. 12-15. Plea Counsel testified that she had advised Petitioner before pleading guilty that a plea hearing would entail his acceptance of the facts presented by the State. App. p. 70, ln. 18-25. Plea Counsel also testified she felt she explained to Petitioner his rights regarding the search and possibility of suppressing the evidence. App. p. 76, ln. 19-23. However, Plea Counsel also testified that multiple witnesses were present for the officers' encounter with Petitioner to hear that Petitioner refused consent to search his vehicle. App. p. 70, ln. 13-17. Plea Counsel did not interview these witnesses. App. p. 52, ln. 4-5. Nonetheless, Please Counsel testified that she was unsure whether a suppression motion would have been successful; but later testified that Petitioner had a decent chance of suppressing the drug evidence and explained that to him. App. p. 74, ln. 16-17; p. 77, ln. 1-4. Plea Counsel also subsequently testified that she may not have spent enough time researching the answer to that question. App. p. 75, ln. 18-21.

STANDARD OF REVIEW

The PCR applicant has the burden of proving the allegations of the PCR petition. *Bannister v. State*, 333 S.C. 298, 302, 509 S.E.2d 807, 809 (1998). Upon review, if no probative evidence exists to support the PCR Court's findings, this Court will reverse. *Pierce v. State*, 338 S.C. 139, 144, 526 S.E.2d 222, 225 (2000) (citing *Holland v. State*, 322 S.C. 111, 470 S.E.2d 378 (1996)); *Cherry v. State*, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). The Court will defer to the PCR court's findings on matters of credibility. *Simuel v. State,* 390 S.C. 267, 270, 701 S.E.2d 738, 739 (2010). In contrast, questions of law are reviewed de novo. *Lomax v. State*, 379 S.C. 93, 101, 665 S.E.2d 164, 168 (2008).

ARGUMENT

The grounds raised in Petitioner's application for post-conviction relief all relate to Plea Counsel's errors that rendered Petitioner's guilty plea not knowingly, intelligently, or voluntarily entered. But for these errors, Petitioner would not have pleaded guilty and instead would have proceeded to trial. Thus, the ground raised herein is analyzed under this overarching issue.

I. THE PCR COURT ERRED IN DENYING RELIEF BY FINDING PETITIONER'S GUILTY PLEA NOT UNKNOWINGLY OR INVOLUNTARILY MADE.

A criminal defendant has the right to effective assistance of counsel under the Sixth Amendment of the United States Constitution. U.S. Const. amend. VI. Relief is warranted for its violation when counsel's performance was deficient and the defendant was prejudiced as a result. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064 (1985). Counsel is deficient when his performance falls below an objective standard of reasonableness according to prevailing professional norms. *Id.*at 688, 104 S.Ct. at 2065; *see also Rutland v. State*, 415 S.C. 570, 577, 785 S.E.2d 350, 353 (2016) ("Regarding the deficiency prong, the proper measure of counsel's performance is whether he has provided representation within the range of competence required by attorneys in criminal cases.") (quoting *McHam v. State*, 404 S.C. 465, 474, 746 S.E.2d 41, 46 (2013)). The prejudice prong is satisfied when there is a reasonable probability that but for counsel's errors, the outcome of the proceeding would have been different. *Strickland,* 466 U.S. at 694, 104 S.Ct. at 2068; *see also Johnson v. State*, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) ("A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial.") (citing *Strickland,* 466 U.S. at 694, 104 S.Ct. at 2068).

The longstanding test for determining the validity of a guilty plea is "'whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the

defendant.'" *Hill v. Lockhart*, 474 U.S. 52, 56, 106 S.Ct. 366, 369 (1985) (quoting *North Carolina v. Alford*, 400 U.S. 25, 31, 91 S.Ct. 160 (1970)). "A defendant who pleads guilty usually may not later raise independent claims of constitutional violations." *Gibson v. State*, 334 S.C. 515, 514 S.E.2d 320 (1999) (citing *Rivers v. Strickland*, 264 S.C. 121, 124, 213 S.E.2d 97, 98 (1975) (stating "'[t]he general rule is that a plea of guilty, voluntarily and understandingly made, constitutes a waiver of nonjurisdictional defects and defenses, including claims of violation of constitutional rights prior to the plea'")). However, the admission of guilt in pleading guilty does not foreclose all claims of ineffective assistance of counsel, "only where the applicant is not prejudiced by any allegations of the PCR application because of the admission of guilt." *Craddock v. State*, 327 S.C. 303, 491 S.E.2d 251 (1997) (citations omitted). In *Craddock*, the Supreme Court vacated the PCR Court's order of dismissal, reasoning that petitioner's guilty plea was involuntarily and unknowingly entered due to counsel improperly promising him a twenty-five year sentence, and petitioner would not have pleaded guilty but for counsel's promise. *Id.* at 305, 491 S.E.2d 251-52. *Cf. Whetsell v. State*, 276 S.C. 295, 277 S.E.2d 891 (1981) (holding that review of IAC claim for failing to file suppression motion was unnecessary because petitioner had stated he would have pleaded guilty again regardless of the error). Further, the missed opportunity to file a meritorious suppression motion can form the basis of an IAC claim in this context because "a defendant's decision whether or not to plead guilty is often heavily influenced by his appraisal of the prosecution's case." *Gibson v. State*, 334 S.C. 515, 514 S.E.2d 320 (1999). *Hill v. Lockhart* provides the framework for ineffective assistance of counsel claims in the guilty plea context:

> In many guilty plea cases, the "prejudice" inquiry will closely resemble the inquiry engaged in by courts reviewing ineffective-assistance challenges to convictions obtained through a trial. For example, where the alleged error of counsel is a failure to investigate or discover potentially exculpatory evidence, the

> determination whether the error "prejudiced" the defendant by causing him to plead guilty rather than go to trial will depend on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea. This assessment, in turn, will depend in large part on a prediction whether the evidence likely would have changed the outcome of a trial.

Id. at 59, 106 S.Ct. at 370. "[W]aivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences". *Gustine v. State*, 325 S.C. 123, 127–28, 480 S.E.2d 444, 446 (1997).

In this case, Plea Counsel's ineffective performance rendered Petitioner's guilty plea not knowingly or voluntarily entered. Petitioner would not have pleaded guilty and instead would have pursued suppression and trial had Plea Counsel adequately investigated and moved to suppress the evidence from the February 6, 2016 search, which formed the basis of the PWID charge. Plea Counsel's performance was prejudicial and deficient, in violation of Petitioner's right to the effective assistance of counsel. The PCR Court erred in dismissing his application for post-conviction relief because there is insufficient evidence of probative value in the record to support its findings. Petitioner thus urges this Honorable Court to reverse the PCR Court's Order of Dismissal, vacate his conviction and sentence, and remand for a new trial.

A. PLEA COUNSEL WAS INEFFECTIVE FOR FAILING TO MOVE TO SUPPRESS EVIDENCE FROM A WARRANTLESS SEARCH.

The PCR Court found Plea Counsel not ineffective for failing to move to suppress evidence from the search because the PCR Court would have hypothetically denied the suppression motion based upon the finding that Petitioner gave consent to search. App p. 8. However, the Supreme Court held that "these predictions of the outcome at a possible trial, where necessary, should be made objectively, without regard for the 'idiosyncrasies of the particular decisionmaker.'" *Hill v. Lockhart,* 474 U.S. at 56, 59-60, 106 S.Ct. at 371 (citations

omitted). In addition to the absence of objective reasonableness from the PCR Court's determination, this finding contravenes Fourth Amendment precedent and is an unreasonable determination of the facts in the record.

In light of the great protection provided by the Fourth Amendment and its counterpart in the South Carolina State Constitution, counsel has an obligation—both constitutionally and ethically—as a defendant's zealous advocate to investigate any potential search or seizure issues that would support a suppression motion. *See e.g., Kolle v. State*, 386 S.C. 578, 690 S.E.2d 73 (2010), *abrogated for standard of review issue by Small v. State*, -- S.C. --, 810 S.E.2d 836 WL 736339 (2018); *Edwards v. State*, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011) (holding that criminal defense attorneys have a duty to undertake a reasonable investigation which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts for potential challenges to evidence).

The Fourth Amendment forbids unreasonable searches and seizures. U.S. Const. amend. IV; *see also* S.C. Const. art. 1, § 10. Evidence shall be suppressed if seized as a result of police misconduct in violation of the Fourth Amendment. *See e.g., State v. Adams*, 409 S.C. 641, 763 S.E.2d 341 (2014); *State v. Gamble*, 405 S.C. 409, 747 S.E.2d 784 (2013). A warrantless search is *per se* unreasonable unless it falls under an exception to the warrant requirement and is based upon probable cause. *See e.g., State v. Frielburger*, 366 S.C. 125, 620 S.E.2d 737 (2005). Consent to search is one exception to the warrant and probable cause requirements. *State v. Wallace,* 269 S.C. 547, 238 S.E.2d 675 (1977) (citing *Schneckloth v. Bustamonte,* 412 U.S. 218, 93 S.Ct. 2041, (1973)).

Here, Plea Counsel acknowledged that the police had no warrant to search Petitioner's vehicle. App. p. 59. The officers maintained that they smelled marijuana in the open air in the

apartment complex. . App. p. 89, ln. 20-25; p.42, ln. 2-11; p. 44, ln. 1-10. Plea Counsel found it concerning that the search had occurred while the officers had been responding to an unrelated 911 call and had focused on Petitioner's car which had not been recently occupied or driven. App. p. 59, ln. 7-16; p. 58, ln. 2-13. There is no indication Petitioner had been smoking or in the possession of marijuana at the time, let alone inside the vehicle recently. Petitioner also denied the presence of any marijuana or drugs inside the vehicle to the officers. App. 45, ln. 6-8; p. 47, ln. 2-4; p. 50, ln. 14-16. Further, there was nothing in plain view inside the vehicle that would have given rise to probable cause, and Plea Counsel testified that the officers instead were inexplicably convinced marijuana was located inside an empty Crown Royal liquor bag within the vehicle. App. p. 58, ln. 2-13. Thus, plain view has no applicability here, and there were no other facts or circumstances to support the finding of probable cause let alone a search of Petitioner's vehicle under the automobile exception to the warrant requirement. *See generally. E.g., Arizona v. Hicks*, 480 U.S. 321 (1987) (providing the elements of the plain view doctrine); *Michigan v. Thomas*, 458 U.S. 259, 261 (1982) (upholding search of a vehicle under automobile exception although car was immobilized at the moment of finding probable cause); *United States v. Johns*, 469 U.S. 478 (1985) (upholding warrantless search of sealed package inside vehicle under the automobile exception); *Cardwell v. Lewis*, 417 U.S. 583, 590-91 (1974) (passenger compartment of car falls under plain view). Thus, the search of Petitioner's car was *per se* unreasonable.

Further, from the record and without any other warrant exception justifying the search, it is clear the validity of the search turned on whether Petitioner actually gave consent to search his vehicle. Petitioner always maintained that he at no time gave the officers consent to search the vehicle. App. p. 44, ln. 19-25. Although Plea Counsel stated she believed he did consent to

search or "[a]t least that would be what the officers would say", and otherwise aligned with the incident report's summation, she repeatedly stated that Petitioner had refused consent. App. p. 59, ln. 24-25 – p. 60, ln. 1; p. 60, ln. 12-14; p. 66, ln. 10-12; p.75, ln. 9-13. Also significant is Plea Counsel's testimony that there were meritorious grounds to challenge the search. App. 77, ln. 1-6. Plea Counsel's admission about the potential success of a suppression motion exacerbates the failure to interview Petitioner's girlfriend and cousin for the purposes of testifying to Petitioner's refusal to give consent at a suppression hearing. *See Walker v. State*, 397 S.C. 226, 237, 723 S.E.2d 610, 616 (Ct. App. 2012) ("There is no conception of sound judgment that will permit trial counsel to choose not to investigate the testimony of a witness *whom counsel has reason to believe* could provide an alibi.") (italics added), *reversed on other grounds by Walker v. State*, 407 S.C. 400, 756 S.E.2d 144 (2014). Hence, in light of the absence of any justification of the warrantless search, and Plea Counsel's admission and concern about the police's conduct, the PCR Court erred in finding that: (1) Plea Counsel was not ineffective, (2) the suppression motion would not have been meritorious, and (3) Petitioner's guilty plea was not rendered invalid due to Plea Counsel's errors.

Additionally, although the potential for a pre-trial suppression motion to poison a plea bargain is naturally a matter of opinion and determinative on a case-by-case basis, it is more reasonable to conclude that the State would have had to be more receptive to a more favorable "package" plea agreement had the evidence from the February 6, 2016 search been suppressed. The State would have consequently lost the potential LWOP sentence to use as a bargaining chip, and Petitioner would also have extinguished the charge and LWOP sentence when proceeding to trial, or enjoyed a more flexible and favorable bargaining position to negotiate an

agreement to resolve the remaining charges. *See generally, Kolle*, 386 S.C. at 587-589, 690 S.E.2d at 77-79.

Moreover, despite the PCR Court's finding that Petitioner gave no indication he would rather proceed to trial than plead guilty according to the terms of the agreement (App. p. 5); Petitioner testified that he would have rather proceeded to trial, and upon becoming aware of the meritorious grounds to suppress, he would have wanted Plea Counsel to file a motion to suppress. App. p. 49, ln. 9-15; p. 78, ln. 20-25 – p. 79, ln. 1-2; p. 78, ln. 12-14, 12-19.

Therefore, there is no evidence of probative value in the record to deny Petitioner's post-conviction relief application on this ground. Had Plea Counsel moved to suppress the evidence from the search, the evidence would have likely been suppressed. The officers did not have a warrant to search Petitioner's vehicle, the facts did not rise to probable cause, and two other witnesses would have corroborated Petitioner testimony that he refused consent. Petitioner thus would not have pled guilty and instead would have proceeded to trial.

CONCLUSION

In light of the foregoing, this Court should reverse the PCR Court's Order of Dismissal, vacate Petitioner's conviction, and remand for a new trial.

RESPECTFULLY SUBMITTED THIS 31 DAY OF July 2018.

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PROOF OF SERVICE

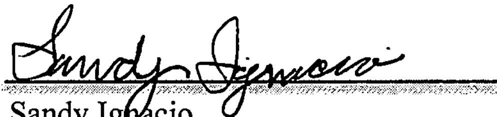
The undersigned hereby certifies that the petition for writ of certiorari and appendix has been mailed for filing to the Honorable Daniel E. Shearouse, Clerk of Court, by depositing it in the United States mail, postage prepaid addressed to:

The Honorable Daniel E. Shearouse
S.C. Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

The undersigned further certifies that a true copy of same has been served upon the Respondent, represented by Assistant Attorney General, Janell Gregory, by depositing one (1) copy by United States mail, postage prepaid addressed to:

The Honorable Alan Wilson, S.C. Attorney General
Attn: Assistant Attorney General Janell Gregory
Post Office Box 11549
Columbia, South Carolina 29211

This 31st day of July, 2018


Sandy Ignacio
Administrative Assistant to William G. Yarborough III

Sworn to before me this 31
day of July, 2018

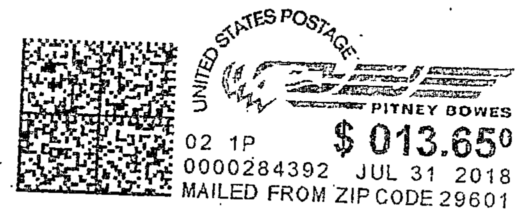
Notary Public for South Carolina

My commission expires: 10/9/23

RECEIVED

AUG 0 9 2018

S.C. SUPREME COURT



WILLIAM G. YARBOROUGH III
ATTORNEY AT LAW
522 North Church Street
Greenville, South Carolina 29601

THE HONORABLE DANIEL E. SHEAROUSE
Clerk of Court for the Supreme Court of South Carolina
Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211