ALAN WILSON
ATTORNEY GENERAL

September 24, 2012

LaNelle C. DuRant, Esquire
South Carolina Commission on Indigent Defense
Office of Appellate Defense
P.O. Box 11589
Columbia, South Carolina, 29211

Re: The State v. Eric Spratt
Appellate Court Case No: 2011-193948

Dear Ms. DuRant:

Enclosed please find two (2) copies of the Final Brief of Respondent along with proof of service in the above-referenced case.

Sincerely,

Salley W. Elliott
Senior Assistant Deputy Attorney General
S.C. Bar No: 1871

SWE/ab
Enclosures:

cc: The Honorable Jenny W. Kitchings
(original & 9 enclosed)
Ms. Trisha Allen - with enclosure

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From York County
Honorable Lee S. Alford, Circuit Court Judge

Appellate Case No: 2011-193948

THE STATE,

Appellant,

vs.

ERIC SPRATT,

Respondent.

FINAL BRIEF OF RESPONDENT

ALAN WILSON
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STATEMENT OF ISSUE ON APPEAL

Did the sentencing court err in considering Appellant's prior drug conviction for sentence enhancement purposes when Appellant failed to establish by credible evidence that the conviction stemmed from a violation of his right to counsel?

STATEMENT OF THE CASE

Appellant, Eric Spratt, was tried *in absentia* and found guilty of trafficking crack cocaine and possession of marijuana. (06-GS-46-1625 &-1626). On June 6, 2006, the Honorable Derham Cole issued a sealed sentence. On May 25, 2007, Appellant appeared before the Honorable Clifton Newman. The sealed sentence was opened and published. Appellant was sentenced to thirty (30) years and a $50,000 fine for trafficking crack cocaine, and one (1) year, concurrent, for possession of marijuana. Appellant immediately moved for reconsideration of the sentence. Judge Newman granted the motion and reduced the sentence to ten (10) years and a $50,000 fine finding the conviction to be a second rather than third offense.

The State filed and served notice of appeal on June 4, 2007. The South Carolina Court of Appeals reversed Judge Newman and remanded the matter for additional proceedings respecting the waiver of the right to counsel during a 1998 guilty plea. State v. Spratt, 383 S.C. 212, 678 S.E.2d 266 (Ct.App. 2009). Appellant's Petition for Rehearing was denied by the South Carolina Court of Appeals. His Petition for Writ of Certiorari was granted by the South Carlina Supreme Court. Following submission of briefs and oral argument by the parties, the South Carolina Supreme issued an order filed January 31, 2011 denying the petition for writ of certiorari as improvidently granted. State v.Spratt, Op. NO. 2011-UP-MO-005 (S.C.S.Ct. Filed January 31, 2011).

On June 6 - 7, 2011, Appellant appeared before the Honorable Lee S. Alford on remand consistent with the opinion issued by the South Carolina Court of Appeals. After convening a hearing, Judge Alford determined Appellant failed to meet his burden of showing that he was not advised of and did not waive the right to counsel at a 1998 guilty

plea. The 1998 conviction was thereafter used to enhance the trafficking conviction from a second to a third offense. Judge Alford sentenced Appellant to twenty-five (25) years imprisonment with credit for time served. Appellant appealed. This appeal follows.

ARGUMENT

The sentencing court properly considered Appellant's prior drug conviction for sentence enhancement purposes when Appellant failed to establish by credible evidence that the conviction stemmed from a violation of his right to counsel.

Appellant, Eric Spratt, was tried in absentia, was convicted, and sentenced to thirty (30) years and a $50,000 fine for trafficking crack cocaine, third offense. He was also sentenced to one (1) year, concurrent, for possession of marijuana. The sentence was sealed. (ROA. p. 84, lines 18-25). On May 25, 2007, Appellant appeared before the Honorable Clifton Newman. The sealed sentence was opened and published. (ROA. p. 84, line 3-15). The State offered documents to Judge Newman establishing that Appellant was convicted in 1998 for possession of crack cocaine and in 1999 for possession with intent to distribute crack cocaine. (ROA. p. 85, lines 4-8; R. pp. 131-136; 142-146). Immediately after sentencing, Appellant moved Judge Newman to reconsider the sentence on the ground the 1998 conviction was the result of a guilty plea entered without counsel or the knowing and voluntary waiver of the right to counsel and could not be used by the court to enhance the sentence. (ROA. p. 86, lines 14 - p. 87, line 20) (ROA. p. 85, lines 14-17)

Defense counsel stated that Appellant's "memory's a bit faulty, but (Appellant) does not feel that he knowingly waived his right to counsel at that time. He feels very sure that had he been aware of that, he would have certainly have halted any plea and retained counsel." (ROA. p. 87, lines 7-12). Defense counsel also argued that the clerk's file contained no documentation of Appellant's waiver of the right to counsel at the time of the 1998 guilty plea. (ROA. p. 86, lines 4 - 11).

The State opposed Appellant's request to disregard the 1998 conviction for sentence

enhancement purposes, arguing that a presumption of regularity attached to the 1998 conviction as a final judgment and that the bare assertion by defense counsel that Appellant did not waive the right to counsel is insufficient to establish that the prior conviction was obtained in violation of Appellant's right to counsel. (ROA. p. 88, lines 12-22; p. 90, lines 3-8). Judge Newman determined that Appellant established the 1998 conviction was uncounseled and refused to use it for sentence enhancement purposes. Judge Newman declined to consider whether Appellant waived the right to counsel. Appellant was re-sentenced for trafficking crack cocaine, second offense, rather than third offense. (ROA. p. 96, line 24 - p. 97, line 23). The State renewed its objection. (ROA. p. 118, lines 20-22).

The State appealed and this Court determined that Judge Newman erred when he failed to consider the issue whether Appellant waived the right to counsel during the prior uncounseled guilty plea proceeding. The case was remanded for a hearing to reevaluate Appellant's sentence after considering evidence regarding whether Appellant waived the right to counsel during his prior uncounseled guilty plea.

On remand, the Honorable Lee S. Alford (sentencing court) conducted a hearing during which Appellant again opposed the use of his1998 guilty plea for sentence enhancement purposes because it was uncounseled, he was actually incarcerated for the conviction, and he did not knowingly and voluntarily waive the right to counsel. Appellant offered his own testimony in support of his argument.

In his testimony on remand, Appellant stated that he entered a guilty plea to possession of crack cocaine before the Honorable John Hayes in 1998, that he received a probationary sentence, and that his probation was later revoked when he was convicted in 1999 for another drug offense. (ROA. p. 15, line 22 - p. 17, line 6). Appellant stated that he was seventeen at

the time of the 1998 plea and was appearing in general sessions court for the first time. Appellant recalled appearing for the guilty plea in 1998 before Judge Hayes and testified that he did not sign a paper waiving his right to counsel. (ROA. p. 17, line 7 - 24). Appellant testified that he recalled speaking with a lady thought to be the prosecutor before the plea, that the lady recommended probation and that the lady brought him before the judge and Appellant accepted probation. (ROA. p. 17,lines 17 - 23; p. 19, lines 2 - 13; p. 26, line 24- p. 27, line 9; p. 28, lines 8 - 13). Appellant denied that Judge Hayes explained the right to counsel during the 1998 plea proceeding. Appellant did not believe that he would not have rejected the assistance of an attorney if the offer had been made to him. (ROA. p. 18, lines 3 - 7; p. 17, line 22 - p. 19, line 1; p. 27, lines 4 - 6; p. 34, lines 6 - 10).

However, Appellant 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. (ROA. p. 18, lines 8 - 12; p. 19, line 20 - p. 22, line 10; p. 29, lines 2 - p. 30, line 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. (ROA. p. 21, lines 2 - 15). He stated that he was represented by counsel in the family court proceedings without the necessity of requesting counsel. (ROA. p. 11;p. 32, line 22 - p. 33, line 6). He admitted that he appeared in family court with counsel on July 20, 1998 and was arrested nine days later for the crack possession charge that resulted in the 1998 guilty plea in question. (ROA. p. 33, line 2 - 9).

Appellant believed the drug charge for the 1998 plea arose when drugs were found on him at the city jail. (ROA. p. 22, line 6 - p. 24, line). Appellant 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 wished to have an attorney represent him. (ROA. p. 24, line 1 - 26, line 16; State's Exhibits 1 & 2; (ROA. p. 29, lines 2 - 24; p. 32, line 22 - p. 33, line 13).) Specifically, the portion of the form circled indicated that, if he did not qualify for the services of the public defender, he should retain private counsel. (State's Exhibits # 1 & 2). He further conceded that he signed the forms mentioning appointment of a public defender and indicating he should retain counsel if he wanted counsel and did not qualify for the services of a public defender. (ROA. p. 33, lines 10 - 24; p. 24, line 1 - p. 26, line 7; pp. 77-78 [State's Exhibits 1 & 2]). However, Appellant testified that the forms did not inform him that it would be in his best interest to have counsel to assist with his defense. (ROA. p. 32, lines 10 - 17).

Appellant testified that he did not recall the specific date of the 1998 guilty plea or the details of what transpired during the plea except the discussions with the prosecutor and the probationary sentence. (ROA. p. 26, line 18 - p. 28, line 10; p.33, line 25 - p. 34, line 24). While he denied that Judge Hayes informed him of the right to counsel or asked if he wished to have counsel represent him, he did so based upon speculation that he now believes he would not have waived the right to counsel if counsel had been offered to him. At the same time, he admitted to having no recollection of a colloquy with Judge Hayes about waiver of presentment to the grand jury despite the fact that his signature on the indictment indicates a waiver. (ROA. p. 36, line 8 - p. 40, line 3). He later conceded Judge Hayes would have reviewed waiver of presentment to the grand jury with him as indicated by his signature on the indictment. (ROA. p. 38, lines 4 - 25). He also conceded that he pled guilty to get probation and knew there was a recommendation of probation before he appeared before Judge Hayes

to enter the plea. (ROA. p. 34, line 3 - p. 36, line 4 ; p. 41, lines 1 - 19).

Upon being questioned by the sentencing court at the remand hearing, Appellant also denied that the 1998 plea colloquy included a discussion about his right to a jury trial and equivocated on whether it covered the right to remain silent. He conceded that the prosecutor presented a factual basis for the plea to Judge Hayes. ROA. p. 40, line 2 - p. 41, line 12). Appellant acknowledged that he entered the guilty plea to get out of jail on probation. (ROA. p. 41, lines 11 - 19).

Assistant Solicitor E.B. Springs also testified. He stated that he has worked as a prosecutor for the Sixteenth Judicial Circuit since before Appellant's 1998 guilty plea and has had occasion to witness many guilty pleas conducted by Judge Hayes involving pro se defendants and that, in pro se pleas, Judge Hayes has a routine and practice of providing Faretta warnings. (ROA. p. 50, line 9 - p. 51, line 22). Springs 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. (ROA. p. 53, lines 1 - 8).

Springs could not recall whether he was present during Appellant's 1998 guilty plea and, therefore, could not state with certainty whether Judge Hayes provided Faretta warnings to Appellant. (ROA. p. 52, lines 9 - 17). However, Springs stated that in all the years during which he has been present when Judge Hayes accepted a pro-se guilty pleas, Judge Hayes always explained the right to counsel and dangers of self-representation and secured a waiver of the right to counsel. (ROA. p. 53, lines 1 - 8).

At the conclusion of the remand hearing, the sentencing court found that Appellant failed to meet his burden of proving he was not advised of and did not waive the right to counsel at the 1998 guilty plea. (ROA. p. 68, lines 10 - 19). (ROA. p. 63, lines 4 - 8). In

reaching this determination, the sentencing court found Appellant's testimony to be completely lacking in credibility. The court found that Appellant remembered nothing about the details of 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. The court found that Appellant's testimony that he did not waive the right to counsel to be lacking in credibility noting that the drugs that gave rise to the 1998 plea in question were found on Appellant at the jail leaving him with little defense, that Appellant was being held in jail until such time as he entered the 1998 plea when he was released to probation, and that a request for counsel would have delayed disposition of the charge rather than allowing Appellant to immediately accept a favorable guilty plea and secure his release from jail. (ROA. p. 67, line 23 - p. 68,line 9). The sentencing court found that Appellant knew when he appeared in court for the 1998 plea that he would receive a sentence of probation. (ROA. p. 65, line 16 - p. 67, line 22; see also p. 26, line 18 - p. 27, line 6).

The sentencing court 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.. (ROA. p. 63, lines 3 - p. 65, line 15). The sentencing court thereafter sentenced Appellant to the mandatory minimum sentence of twenty-five (25) years for a third offense. The 1998 guilty plea was used to enhance the offense from a second to a third. (ROA. p. 68,lines 20 - 23; p. 75, lines 8 - 14).

Appellant argues the sentencing court erred in finding that he failed to meet his burden of proving that he did not waive the right to counsel at the 1998 pro se guilty plea and, therefore, improperly used the conviction to enhance his subsequent trafficking conviction to

a third offense. He also argues for the first time on appeal that, after he established that his rights were violated at the 1998 plea, the burden of proof shifted to the State to affirmatively prove the conviction was entered in a way which protected his rights. He argues that this Court's decision in Payne respecting the burden of proof is incorrect.

The Sixth and Fourteenth Amendments to the United States Constitution prohibit a prior conviction for a misdemeanor resulting in a sentence of imprisonment or for a felony obtained in violation of the right to counsel to be used to enhance the punishment of a subsequent conviction. State v. Payne, 332 S.C. 266, 269, 504 S.E.2d 335, 337 (1998), citing Nichols v. U.S., 511 U.S. 738 (1994) and State v. Chance, 304 S.C. 406, 405 S.E.2d 375 (1991). The constitutional right to counsel attaches in all felony prosecutions and when a defendant receives a misdemeanor sentence that may "end up in the actual deprivation of a person's liberty." Alabama v. Shelton, 535 U.S. 654, 658(2002), see also Scott v. Illinois, 440 U.S. 367 (1979); Argersinger v. Hamlin, 407 U.S. 25 (1972). Talley v.State, 371 S.C. 535, 640 S.E.2d 878 (2007). "[O]nly those proceedings 'resulting in immediate actual imprisonment' trigger the right to state-appointed counsel," id. at 663, and not the threat of imprisonment. Scott v. Illinois, 440 U.S. 367, 373-74 (1979); see also State v. Wickenhauser, 309 S.C. 377, 423 S.E.2d 344 (1992).

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. Farretta v. California, 422 U.S. 806 (1975). The decision 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. See Alabama v. Shelton, 535 U.S. 654 (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 (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).

A presumption of regularity attaches to final judgments, even on the question of right to counsel. State v. Payne, 332 S.C. 266, 504 S.E.2d 335 (Ct. App. 1998); see also Harris v. Commonwealth, 497 S.E.2d 165 (Va.App. 1998); State v. Jordan, 621 S.E.2d 229 (N.C.App. 2005). Our appellate courts have determined that the defendant bears the burden of proof when the defendant collaterally attacks a prior conviction that the State seeks to use under a sentence enhancement statute. State v. Sosbee, 371 S.C. 104, 637 S.E.2d 571 (2006); id.; see also Parker v. State Highway Dep't, 224 S.C. 263, 78 S.E.2d 382 (1953); State v. McAbee, 220 S.C. 272, 67 S.E.2d 417 (1951); Parke v. Raley, 506 U.S. 20 (1992); see also Harris v.

Commonwealth, 497 S.E.2d 165 (Va.App. 1998). "When the State is prosecuting a person for an offense that carries an enhanced penalty for a conviction of a second or subsequent offense, the State is not required to prove the legality of the prior conviction, nor does it have to show the facts surrounding the conviction. It is only necessary for the State to prove that a previous conviction exists, that the conviction was for an offense which occurred prior to the commission of the offense for which the defendant is being tried, and that the defendant was the subject of that prior conviction." Id. at 338, 504 S.E.2d at 372, citing DeWitt v. S.C. Dep't of Highways and Pub. Transp., 274 S.C. 184, 262 S.E.2d 28 (1980). Thereafter, the defendant must establish by a preponderance of the evidence that the prior uncounseled conviction occurred in violation of his right to counsel when he objects to the use of the prior conviction to enhance the punishment of a subsequent conviction. State v. Sosbee, 371 S.C. 104, 637 S.e.2d 571 (Ct. App. 2006) citing State v. Payne, 332 S.C. 266, 269, 504 S.E.2d 335, 336 (Ct. App. 1998).

Appellant first argues on appeal that the sentencing court erred in failing to properly assess the burden of proof for the issue presented at the remand hearing. He argues that after he established that his right to counsel was violated at the 1998 plea, the burden of proof shifted back to the State to affirmatively prove the conviction was entered in a way which protected his rights. He complains that the sentencing court erred when it failed to shift the burden of proof to the State. However, at the hearing on remand, Appellant twice advanced to the sentencing court that he had the burden of proving by a preponderance of the evidence that the 1998 plea conviction was defective after the State established the existence of the conviction. He never challenged the assignment of the burden of proof or this Court's earlier decision on appeal respecting his burden of proof. Because Appellant did not present the

argument that he now makes on appeal to the sentencing court and because the sentencing court was not given an opportunity to rule on the issue, it is not available for appellate review. State v. Johnson, 363 S.C. 53, 609 S.E.2d 520 (2005); State v. Freiburger, 366 S.C. 125, 620 S.E.2d 737 (2005); I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000). In fact, Appellant twice conceded to the sentencing court that the burden of proof being applied was correct. He cannot now claim the assessment of the burden of proof by the sentencing court was erroneous. (See ROA. p. 44, lines 3 - 13; p. 53, line 21 - p. 56, line 21).

Nevertheless, the State submits that this Court has previously reviewed the authority upon which Appellant relies respecting the assessment of the burden of proof when the validity of a prior conviction is collaterally attacked and has determined that the "State is not required to prove the legality of the prior conviction, nor does it have to show the facts surrounding the conviction. It is only necessary for the State to prove that a previous conviction exists, that the conviction was for an offense which occurred prior to the commission of the offense for which the defendant is being tried, and that the defendant was the subject of that prior conviction." State v. Payne, 332 S.C. 266, 271, 504 S.E.2d 335, 338 (1991). This Court has specifically held that once the State has proven the prior conviction exists, Appellant has the burden of proving the conviction is constitutionally defective or otherwise invalid. Id. Appellant conceded this at the hearing on remand.

Appellant offers Parke v. Raley, 506 U.S.20 (1992) as authority for the new position he is taking on appeal. However, in Parke, the United States Supreme Court held that the Due Process Clause does not require a State to adopt one procedure for assessing the burden of proof over another on the basis that it may produce more favorable results for the defendant. The Court recognized that state courts have allocated the burden of proof in collateral attack

cases differently and approved the state practice of assigning the entire burden of proof to the defendant once the government establishes the existence of the conviction. Therefore, Appellant's argument is without merit even if this Court were to conclude it is proper for consideration on appeal.

In this case, the State properly established that Appellant was convicted in 1998 for possession of crack cocaine and 1999 for possession with intent to distribute crack cocaine. The State also established that the convictions occurred prior to the commission of the offenses for which Appellant was tried in his absence. Therefore, the State properly met its burden of establishing the predicate for sentence enhancement based upon the two prior drug convictions. The presumption of regularity attached to the final judgement of conviction and, pursuant to established precedent and Appellant's concessions at the hearing on remand, the burden of proof then shifted to Appellant to show the conviction was constitutionally defective or otherwise invalid by a preponderance of the evidence. Id.

The State submits that the sentencing court properly determined that Appellant failed to meet this burden of proving the 1998 guilty plea was entered in violation of his right to counsel. Specifically, the sentencing court correctly determined that Appellant failed to establish by credible evidence that he was not advised of the right to counsel, was not provided Faretta warnings and did not knowingly and voluntarily waive the right to counsel when he entered the 1998 guilty plea. The sentencing court made factual findings that Appellant was not credible when he testified that he was not informed of and did not waive the right to counsel in connection with the 1998 plea. The State submits there is evidence in the record to support those credibility findings rendering the findings are binding on this Court on appeal. See State v. Smith, 383 S.C. 159, 167-168, 679 S.E.2d 176, 181 (2009) ("Clearly, the trial

judge was in the best position to assess the credibility of the witnesses that testified at the hearing on the motion for a new trial."); State v. Cutro, 332 S.C. 100, 117, 504 S.E.2d 324, 332 (1998) ("The trial judge, not this Court, is in the best position to be arbiter of [the witness'] credibility."); State v. Tutton, 354 S.C. 319, 325, 580 S.E.2d 186, 190 (Ct. App. 2003) ("The determination of a witness's credibility must be left to the trial judge who saw and heard the witness and is therefore in a better position to evaluate his or her veracity.").

The record reflects that, despite being unable to recall any specific details about the 1998 plea proceeding other than that the factual basis for the plea was presented and he was offered and received a probationary sentence, Appellant denied that he was given Faretta warnings or that he waived the right to counsel. Appellant denied these matters based upon his belief at the time of the remand hearing that he would not have refused the assistance of counsel. However, Appellant also denied that he waived presentment to the grand jury at the 1998 plea until he was presented with the indictment showing his signature waiving that right. He also denied an understanding of the right to counsel despite prior arrests and juvenile proceedings where he was represented by counsel and despite his signature on forms acknowledging information about representation by counsel in connection with the charge resulting in the 1998 plea.

Appellant contended he did not recall being asked any of the routine guilty plea questions and merely speculated that Faretta warnings and waiver of counsel did not occur during the 1998 guilty plea colloquy merely on his belief, in retrospect, that he would not have refused an offer of assistance of counsel. However, this testimony is vague, self-serving and lacking in credibility in view of the fact that Appellant now faces a significantly greater sentence if the 1998 guilty plea conviction can be used for sentence enhancement purposes.

The testimony presented at the hearing shows that Appellant clearly understood the right to counsel as he had been represented by counsel in family court proceedings in numerous occasions before and signed documents acknowledging that information about the representation by counsel was provided to him in connection with the charge that he ultimately disposed of with the 1998 guilty plea. .

The record also shows that the charge for which Appellant entered the 1998 guilty plea arose when crack cocaine was found on Appellant at the jail. Appellant was held in jail for that charge of possession of crack cocaine until he entered the 1998 guilty plea. Appellant entered the plea with the understanding that he would receive a probationary sentence and would released from jail. He would have had little defense to offer based upon the manner in which the charge arose. Appellant admitted that he entered the 1998 plea so that he could get out of jail. It is not credible that he would have waited for the assistance of counsel and risked delay in his release from incarceration when that is the only reason he entered the guilty plea.

Moreover, evidence of Judge Hayes' habit and routine practice when conducting a guilty plea colloquy established that Judge Hayes always advised pro se defendants of the right to counsel, provided Faretta warnings and secured a proper waiver of the right to counsel before permitting a pro se defendant to proceed with a guilty plea. See Rule 406, SCRE; see also Lucas v. U.S., 2020 WL 412554 (D. S.C. 2010).

Ultimately, Appellant was not credible in his testimony and failed to present sufficient evidence to meet his burden of proving by a preponderance of the evidence that the 1998 guilty plea was entered without Faretta warnings or the waiver of the right to counsel. Appellant's mere speculation is insufficient to overcome the presumption of regularity given to final judgments. The sentencing court properly used the 1998 guilty plea for enhancement purposes

and must be affirmed. U.S. v. Jones, 977 F.2d 105 (4th Cir. 1992).

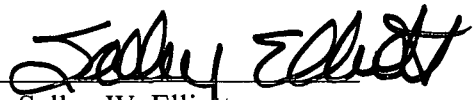
CONCLUSION

For all of the foregoing reasons, the sentence given on remand must be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

SALLEY W. ELLIOTT
Senior Assistant Deputy Attorney General

BY: 
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ATTORNEYS FOR APPELLANT

September 24, 2012

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From York County
Honorable Lee S. Alford, Judge

Appellate Case No. 2011-193948

THE STATE,

Respondent,

vs.

ERIC SPRATT,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR.

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Attorney General

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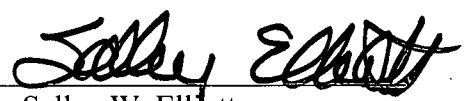
S.C. Bar No: 1871

By: 
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ATTORNEYS FOR RESPONDENT

September 24, 2012

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From York County
Honorable Lee S. Alford, Judge

Appellate Case No. 2011-193948

THE STATE,

Respondent,

vs.

ERIC SPRATT,

Appellant.

PROOF OF SERVICE

I, Angela Bennett, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record, LaNelle C. DuRant, South Carolina Commission on Indigent Defense, Office of Appellate Defense, P.O. Box 11589, Columbia, South Carolina, 29211.

I further certify that all parties required by Rule to be served have been served.

This 24th day of September, 2012.

ANGELA BENNETT
Administrative Assistant
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