

STATE OF SOUTH CAROLINA  
In the Supreme Court

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S.C. SUPREME COURT

CERTIORARI TO FLORENCE COUNTY  
Roger E. Henderson, Plea Judge  
Michael G. Nettles, Post-Conviction Relief Judge

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Appellate Case No. 2018-000543

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ANTHONY LAMONT WILSON,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

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**RETURN TO PETITION FOR WRIT OF CERTIORARI**

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**TABLE OF CONTENTS**

STATEMENT OF ISSUE.....ii

STATEMENT OF THE CASE.....1

STANDARD OF REVIEW.....4

ARGUMENT.....5

The post-conviction relief court properly determined Petitioner failed to establish plea counsel was constitutionally ineffective in advising Petitioner to enter into a written plea agreement waiving his right to challenge his pleas through post-conviction relief where counsel explained to the terms of the plea agreement to Petitioner, including what post-conviction relief was and what the waiver entailed, and Petitioner made a knowing, voluntary, and intelligent decision to waive post-conviction relief in exchange for a favorable negotiated sentence disposing of all pending State Grand Jury charges. ....5

CONCLUSION.....11

## **PETITIONER'S STATEMENT OF ISSUE**

Whether the PCR court erred in denying Petitioner's application, where a conflict of interest prevented Petitioner's waiver of post-conviction relief contained in his plea agreement from being either knowing or voluntary, where plea counsel neither got a conflict waiver in writing nor allowed Petitioner to confer with independent counsel to determine if he wished to waive the conflict?

## **RESPONDENT'S STATEMENT OF ISSUE**

Did the post-conviction relief court properly determined Petitioner failed to establish plea counsel was constitutionally ineffective in advising Petitioner to enter into a written plea agreement waiving his right to challenge his pleas through post-conviction relief where counsel explained to the terms of the plea agreement to Petitioner, including what post-conviction relief was and what the waiver entailed, and Petitioner made a knowing, voluntary, and intelligent decision to waive post-conviction relief in exchange for a favorable negotiated sentence disposing of all pending State Grand Jury charges?

## STATEMENT OF THE CASE

Petitioner Anthony Lamont Wilson is presently confined in the South Carolina Department of Corrections following his guilty plea in Florence County to State Grand Jury indictments. On October 22, 2015, the State Grand Jury indicted Petitioner for one count of trafficking heroin greater than 28 grams (conspiracy) and two counts of distribution of heroin (2015-GS-47-0022), as part of a multi-count, multi-defendant indictments stemming from an investigation into a heroin trafficking ring. Justin M. Kata, Esquire, represented Petitioner. Assistant Attorney General David Fernandez of the South Carolina Attorney General's Office, prosecuted the case.

On August 2, 2016, Petitioner entered into a written plea agreement, in which he agreed to "fully and truthfully cooperate with the Office of the Attorney General of South Carolina, and any local, state and federal law enforcement agents in their investigation of importation, possession, and distribution of controlled substances and related unlawful activities," in exchange for a recommended sentence range of an aggregate fifteen to twenty years imprisonment. As part of this plea agreement, Petitioner expressly waived his right to both a direct appeal and post-conviction relief action. ("The Defendant, Anthony Lemont Wilson, agrees that as a part of the consideration for this plea he will not appeal his plea of guilty or any sentence he receives in General Sessions Court in South Carolina. The Defendant, Anthony Lemont Wilson, acknowledges that he understands that he has a right of direct appeal of his guilty plea or sentence and that he knowingly, voluntarily and expressly waives this right of direct appeal. Additionally, the Defendant, Anthony Lemont Wilson, understands that he has a right to file a post-conviction relief (PCR) action in this case but agrees to knowingly and voluntarily waive any post-conviction relief action except for claims that directly attack the

effectiveness of advice to agree to this waiver.”) Petitioner initialed each page of this written plea agreement and signed this plea agreement. Petitioner’s counsel similarly initialed and signed the plea agreement.

The same day (August 2<sup>nd</sup>), Petitioner appeared in the Florence County Court of General Sessions before the Honorable Roger E. Henderson, circuit court judge, and pursuant to the signed plea agreement, pled guilty to two counts of distribution of heroin as indicted, and to the lesser-included trafficking in heroin (4-14 grams) (conspiracy). Judge Henderson accepted Petitioner’s plea and deferred sentencing.

On November 16, 2016, Applicant again appeared before Judge Henderson alongside counsel for a sentencing proceeding. At this hearing, Judge Henderson sentenced Petitioner to an aggregate fifteen years imprisonment. Petitioner did not pursue a direct appeal.

On March 20, 2017, Petitioner filed a *pro se* application for post-conviction relief (2017-CP-21-0724), alleging “Brady/Rule 5 violations render plea involuntary/unintelligently made” and noting that he would amend his application at a later date. The application was never amended to include any specific grounds for relief. On October 6, 2017, Respondent served its return to the application and made a partial motion to dismiss, seeking summary dismissal of all claims beyond whether counsel was ineffective for advising him to enter the written plea agreement waiving his rights to challenge his conviction through post-conviction relief pursuant to the written plea agreement. Applicant did not respond to Respondent’s motion to dismiss. An evidentiary hearing was convened February 2, 2018, at the Florence County Courthouse before the Honorable Michael G. Nettles, circuit court judge. Petitioner was present at the hearing and represented by Michael C. Abbott, Esquire. Senior Assistant Deputy Attorney General Megan

Harrigan Jameson from the South Carolina Attorney General's Office appeared on behalf of the State. Testimony was taken from Petitioner and plea counsel Kata.

Following testimony, Judge Nettles denied the application from the bench. A written order of dismissal was filed on March 20, 2018, finding counsel's credible testimony established he advised Petitioner adequately of the terms of the plea agreement, including the waiver of post-conviction relief on all ground other than whether counsel was ineffective in advising him to enter into the plea agreement. Both Judge Nettles' oral and written rulings make specific findings that counsel's testimony on the issues before the court were credible and dispositive while Petitioner's testimony was not credible.

## STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839 (2018). When reviewing factual findings, the appellate courts defer to the post-conviction relief court's factual findings and will uphold them if there is probative evidence in the record to support them. Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018); Smalls, 422 S.C. at 180-81, 810 S.E.2d at 839-40 (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Smalls, 422 S.C. at 180-81, 810 S.E.2d at 839-40. Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

## ARGUMENT

**The post-conviction relief court properly determined Petitioner failed to establish plea counsel was constitutionally ineffective in advising Petitioner to enter into a written plea agreement waiving his right to challenge his pleas through post-conviction relief where counsel explained to the terms of the plea agreement to Petitioner, including what post-conviction relief was and what the waiver entailed, and Petitioner made a knowing, voluntary, and intelligent decision to waive post-conviction relief in exchange for a favorable negotiated sentence disposing of all pending State Grand Jury charges.**

On appeal, Petitioner argues the post-conviction relief court erred in finding Petitioner knowingly and voluntarily waived his right to pursue post-conviction relief against plea counsel on all claims other than whether counsel was ineffective in advising him to enter into the plea agreement based on an inherent conflict of interest that was neither waiver in writing nor subject to advise of independent counsel. In support of this argument, Petitioner cites a number of authority from other jurisdictions, including a number of Advisory Opinions from other states, and appears to be urging this Court to adopt a standard that before a criminal defendant can enter into a plea agreement with the State limiting (but critically—not entirely precluding) his ability to seek collateral review, a criminal defense attorney must obtain a waiver in writing from the defendant as to any conflict of interest after the defendant has conferred with independent counsel. However, such a standard has not been adopted in South Carolina and was not the standard upon which counsel's performance or Petitioner's waiver was reviewed by the post-conviction relief court or this Court. Instead, the post-conviction relief court properly found plea counsel correctly advised Petitioner as to what post-conviction relief was, what the waiver entailed, and that Petitioner knowingly, intelligently, and voluntarily waived his right to pursue most post-conviction relief claims in exchange for a favorable negotiated sentence from the State. The post-conviction relief court's findings are supported by probative evidence and the record and do not constitute an error of law. This Court should deny certiorari.

Petitioner, like all other defendants, has a right to the assistance of effective counsel as provided by the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008). Petitioner has the burden of proving the allegations in his post-conviction relief action, and when alleging that trial counsel was constitutionally ineffective, he must prove that “counsel’s conduct so undermined the proper functioning of the adversarial process that it cannot be relied upon as having produced a just result.” Strickland, 466 U.S. at 686

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668. First, Petitioner must prove that counsel’s performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney’s performance by its “reasonableness under prevailing professional norms.” Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). “Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” Id. (citing Strickland, 466 U.S. at 690). Petitioner must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. 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.” Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, the applicant must show that there is a reasonable probability that, but for counsel’s

alleged errors, he would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52 (1985).

“A guilty plea is a solemn, judicial admission of the truth of the charges against an individual; thus, a criminal inmate’s right to contest the validity of such a plea is usually, but not invariably, foreclosed.” Dalton v. State, 376 S.C. 130, 137, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing Blackledge v. Allison, 431 U.S. 63, 74 (1977)). “Indeed, where a thorough colloquy is conducted, courts must exercise caution in setting aside the guilty plea.” Garren v. State, 423 S.C. 1, 12, 813 S.E.2d 704, 712 (2018); see Jamison v. State, 410 S.C. 456, 469-71, 765 S.E.2d 123, 129-30 (2014) (observing that “guilty plea[s] must be treated as final in the vast majority of cases” and instructing that caution must be exercised so as not to “undermine the solemn nature of a guilty plea and the finality that generally attaches to a guilty plea”).

Under South Carolina law, a criminal defendant can choose to waive his right to collateral review of his conviction so long as the waiver is knowingly and voluntarily made. Spoone v. State, 379 S.C. 138, 665 S.E.2d 605 (2008) (holding that a waiver of appellate rights is valid and enforceable as long as it is knowing and voluntary). Plea agreements in general operate under contractual principles, and are upheld when each party receives the benefit of the bargain. State v. Thrift, 312 S.C. 282, 292, 440 S.E.2d 341, 347 (1994).

However, while appellate and collateral waivers are enforceable, a criminal defendant who has waived his appellate and collateral review is still entitled to proceed forward with a post-conviction relief action on the very narrow issue of challenging his attorney’s conduct in advising him to enter into the waiver. Sanders v. State, 412 S.C. 611, 617, 773 S.E.2d 580, 583 (2015) (“Consequently, we hold that although a defendant may waive his right to collateral

review, he is nevertheless still entitled to challenge whether the advice he received in agreeing to that waiver was constitutionally defective.”).

In footnote in Sanders, this Court expressed concern over potential ethical implications that could arise from waivers of ineffective assistance of counsel claims. Sanders, 412 S.C. at 616 n. 2, 773 S.E.2d at 582 (2015) (“Furthermore, we express our concern with the ethical implications of a waiver of ineffective assistance of counsel claims.”). In the same footnote, this Court elaborated, “We find this practice especially troubling where, as here, the defendant enters into the agreement prior to a trial, which allows significantly more potential for error than a guilty plea.” Id. However, this Court nonetheless held a defendant may waive his right to collateral review so long as he or she can proceed forward on the narrow issue of whether he or she received ineffective assistance of counsel in being advised to enter into the plea agreement. Id. This Court did not place any additional restrictions on these types of agreements, including any requirements that these agreements include a written waiver after the defendant consults with an independent attorney on the waiver.

In the present case, Petitioner chose to plead guilty and agreed to waive his appellate and post-conviction relief rights (beyond the limited issue of counsel’s advice in entering to the plea agreement) in exchange for a favorable negotiated sentence. Both parties received a benefit of the bargain, and this agreement is valid under contractual law. Moreover, Petitioner was afforded an opportunity to present evidence and otherwise argue plea counsel was ineffective for advising him to enter into this plea agreement.

At the evidentiary hearing, plea counsel testified his first meeting with Petitioner was quite lengthy, lasting five-and-a-half hours, and during this meeting, they reviewed all

discovery.<sup>1</sup> (App. 90-91). Counsel testified he advised Petitioner he was facing a mandatory minimum sentence of twenty-five years imprisonment if convicted of trafficking heroin and that by accepting the State's plea agreement, he was able to significantly reduce his sentence exposure and avoid that mandatory minimum sentence. (App. 91). Counsel testified he advised Petitioner of what a post-conviction relief action was, although he did not provide hypothetical examples of particular claims, and that the plea agreement would create some challenges for Petitioner if he wanted to pursue post-conviction relief based on the provision waiving his right to pursue such an action on almost all grounds other than whether counsel was ineffective for advising him to enter into the agreement. (App. 82-83, 92-94). He testified that after these discussions, Petitioner indicated he wanted to enter into the plea agreement (including the waiver of post-conviction relief to all claims other than whether counsel was ineffective in advising him to enter into the plea agreement) to accept the favorable offer from the State. (App. 93-94).

In stark contrast, Petitioner testified he only met with counsel one time for fifteen minutes and counsel did not show him any discovery or evidence against him. (App. 95-96, 98-99). He testified counsel never explained any terms of the plea agreement with him, including his waiver of post-conviction relief for all allegations other than whether counsel was ineffective for advising him to waive his right to post-conviction relief. (App. 96-98). However, he later

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<sup>1</sup> Petitioner's current counsel appears to take issue with plea counsel's specific recollection that the meeting lasted five-and-a-half-hours, speculating counsel did not refer to his notes or file in an apparent attempt to attack the veracity of plea counsel's testimony. However, there is absolutely nothing in the record to support such an assertion that counsel had not reviewed his file either on the witness stand or in preparation for the hearing. Respondent would also note when plea counsel was subpoenaed to appear and render testimony at this hearing, he was (just as all witnesses are) instructed to bring his criminal defense file to the hearing. The post-conviction relief court's findings that counsel was credible are likely due in part to counsel's thorough review of his file and preparation for the hearing. Petitioner's apparent suggestion that counsel's testimony should be disbelieved because he was able to provide specific details of his representation should be rejected by this Court.

testified on cross-examination that counsel showed him the plea agreement and tried to explain it to him. (App. 99). Petitioner also testified he thought the plea agreement was for a seven year sentence despite the plea agreement clearly indicating the negotiated sentence range was for fifteen to twenty years imprisonment. (App. 99).

After listening to the testimony of plea counsel and Petitioner, the post-conviction relief court denied the application from the bench. In the written order of dismissal that followed, the post-conviction relief court specifically found counsel's testimony was credible and established he advised Petitioner adequately of the terms of the plea agreement, including the waiver of post-conviction relief on all grounds other than whether counsel was ineffective in advising him to enter into the plea agreement. Conversely, the court found Petitioner's testimony was not credible. These findings are supported by the record and should be afforded great weight. See Frierson v. State, 423 S.C. 257, 262, 815 S.E.2d 433, 435 (2018) (“[W]e afford great deference to a PCR court's credibility findings.”).

Moreover, counsel was under no constitutional or statutory duty to have Petitioner waive any possible conflict of interest from any future malpractice claims in writing nor was he required to have Petitioner consult with independent counsel before entering into the plea agreement. The post-conviction relief court did not err in rejecting these claims from Petitioner.

Ultimately, Petitioner's entering into the favorable plea agreement with the State induced not by any purported misadvice by counsel or any lack of knowledge as to what post-conviction relief was and the implications of the waiver, but by his own desire to secure a favorable plea offer for the lowest term of imprisonment possible. His decision to enter into the plea agreement was knowing, voluntary, and intelligent. The post-conviction relief court properly determined

Petitioner failed to establish any constitutional deprivations warranting relief and these findings are supported by the record. This Court should deny certiorari.


**CONCLUSION**

Because the post-conviction relief court properly determined Petitioner failed to establish any constitutional deprivations, this Court should deny certiorari. Should this Court grant certiorari, Respondent requests the opportunity to fully brief the issues raised, particularly in light of Petitioner's arguments asking this Court to extend the requirements for counsel when advising defendants entering in to plea agreements with waivers of collateral claims.

Respectfully submitted,

ALAN WILSON  
Attorney General

MEGAN HARRIGAN JAMESON  
Senior Assistant Deputy Attorney General  
S.C. Bar No. 100108

By:   
ATTORNEYS FOR RESPONDENT

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April 1, 2019

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Roger E. Henderson, Plea Judge  
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S.C. SUPREME COURT

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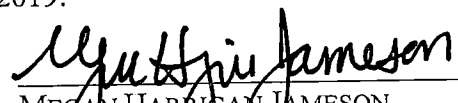
PROOF OF SERVICE

I, Megan Harrigan Jameson, certify that I have served the within **Return to Petition for Writ of Certiorari** on Petitioner by depositing two copies of the same in the interagency mail to be delivered to Petitioner at the address below:

Appellate Defender Taylor D. Gilliam  
South Carolina Commission on Indigent Defense—Division of Appellate Defense  
P.O. Box 11589  
Columbia, South Carolina 29211-1589

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

This 1<sup>st</sup> day of April, 2019.

  
MEGAN HARRIGAN JAMESON  
Senior Assistant Deputy Attorney General  
S.C. Bar No. 101260  
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S.C. SUPREME COURT

ALAN WILSON  
ATTORNEY GENERAL

April 1, 2019

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

Re: Anthony L. Wilson v. State of South Carolina  
Appellate Case No. 2018-000543

Dear Mr. Shearouse:

Enclosed please find the original and six copies of the Return to Petition for Writ of Certiorari in the above-referenced post-conviction relief appeal for filing with the Court. By copy of this letter, I am also serving opposing counsel.

Please let me know if anything else is needed as to this matter.

Sincerely,

Megan Harrigan Jameson  
Senior Assistant Deputy Attorney General  
SC Bar No. 100108

MHJ/cc  
Enclosures

cc: Taylor D. Gilliam, Esquire (2 copies)