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STATE OF SOUTH CAROLINA
In The Court of Appeals

CERTIORARI TO YORK COUNTY
Court of Common Pleas

The Honorable Alison Renee Lee, Circuit Court Judge

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SC Court of Appeals

Appellate Case No. 2016-001346

ERIC SPRATT,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

BRIEF OF RESPONDENT

ALAN WILSON
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ATTORNEYS FOR RESPONDENT

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PETITIONER'S ISSUE PRESENTED

The PCR court erred in ruling that counsel was not ineffective where counsel failed to argue to the sentencing court on remand that, in 1998, South Carolina did not recognize the right of an accused to be represented by appointed counsel in misdemeanor cases that did not result in the immediate deprivation of a person's liberty and therefore, any Farretta warnings regarding the disadvantages of self-representation given during Petitioner's 1998 guilty plea to misdemeanor possession of marijuana would not have informed Petitioner that he could have counsel appointed at the expense of the State.

RESPONDENT'S ISSUE PRESENTED

The PCR court correctly found Counsel was not ineffective for failing to argue Petitioner was not entitled to counsel during his guilty plea for a felony possession of crack cocaine, first offense[2] because Petitioner was entitled to counsel during that proceeding based on his Sixth and Fourteenth Amendment rights. Additionally, the PCR court properly found Petitioner was provided his Faretta[3] warnings during his guilty plea and subsequently waived his right to counsel knowingly and intelligently before entering his guilty plea *pro se*.

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[2] In 1998, S.C. Code Ann. §44-53-0375(A), Drugs / Possession of less than one gram of ice, crank, or crack cocaine, first offense was a felony.

[3] Faretta v. California, 422 U.S. 806 (1975).

STATEMENT OF THE CASE

Relevant Prior History

Eric Spratt (Petitioner) 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 incarceration for five years and a $5,000 fine suspended upon three years of probation. Petitioner was not represented by an attorney during the plea.

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

Current Convictions

Petitioner is currently incarcerated pursuant to orders of commitment from the York County Clerk of Court. During the May 2006 term, the York County Grand Jury indicted Petitioner for trafficking in ice, crank or crack cocaine (2006-GS-46-1625) and possession of marijuana, second offense (2006-GS-46-1626). Assistant Public Defender Melissa Inzerillo of the Sixteenth Circuit Public Defender's Office (Counsel) represented Petitioner at trial. On June 6, 2006, Petitioner proceeded to a jury trial *in absentia* and he was found guilty of both charges. The Honorable J. Derham Cole issued a sealed sentence. On May 25, 2007, Petitioner appeared before the Honorable Clifton B. Newman for the unsealing of the sentence. Judge Newman

sentenced Petitioner to confinement for thirty years for trafficking crack cocaine, third offense, and one year, concurrent, for possession of marijuana.

Petitioner 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 Petitioner's sentence to ten years, finding the conviction to be a second offense rather than a third offense. Judge Newman found Petitioner's prior uncounseled 1998 guilty plea before Judge Hayes, which resulted in his 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's decision and remanded the case for additional proceedings with respect to the issue of waiver of counsel during Petitioner's 1998 guilty plea. State v. Spratt, 383 S.C. 212, 678 S.E.2d 266 (2009).

Re-sentencing Hearing on Remand

On June 6-7, 2011, Petitioner 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 Petitioner's 1998 uncounseled conviction could not be used to enhance his trafficking charge. App. 12. Counsel argued the uncounseled conviction, which eventually led to Petitioner's incarceration, could not be used for further enhancement since he did not waive his right to counsel. App. 13.

At the remanded sentence hearing Petitioner 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, 29. Petitioner testified he felt certain 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. Petitioner testified he was convicted in family court on July 20, 1998 for driving without a license and was represented by Assistant Public Defender B.J Barrowclough at that time. App. 33. Petitioner testified that conviction was just nine days before he was arrested possession of crack cocaine, which led to the 1998 guilty plea in question. App. 33.

Petitioner testified 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 - 26. However, Petitioner 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.[4]

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

[4] The State would ask this Court to take judicial notice of the Attorney Representation form, signed by Petitioner. 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.

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 defendants have waived their right to an attorney. App. 44 – 45. Judge Alford stated he had never seen one case where Judge Hayes failed to advise a defendant of his right to have an appointed attorney if he wanted one. App. 45.

Assistant Solicitor E.B. Springs (Springs) testified at the remanded sentence hearing that he has been an assistant solicitor since 1998. Springs testified he could not recall if he was present during Petitioner's 1998 plea but testified that he had witnessed Judge Hayes conduct guilty pleas many times, including pleas involving pro *se* defendants. App. 50 – 51. Springs testified in thirteen years, he has heard Judge Hayes use the same routine of giving the proper Faretta warnings. App. 51. 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 Petitioner did not meet his burden of proving he was not advised of his right to counsel and, further, that he did knowingly and intelligently waive the right to counsel during his 1998 guilty plea. App. 30, 68. Judge Alford found Petitioner's testimony was not credible. App. 65. Judge Alford found Petitioner had a "pretty convenient memory" in that he did not remember any details about what occurred during the 1998 guilty plea proceeding, however, was certain he was not advised of his right to counsel and did not waive his right to counsel. App. 36. Judge Alford also acknowledged that Judge Hayes' routine practice and procedure as testified to by Springs and 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 - 65. Judge Alford

thereafter found the 1998 guilty plea was properly used to enhance Petitioner's offense and sentenced Petitioner to the mandatory minimum sentence of twenty-five years. App. 68.

Petitioner appealed Judge Alford's ruling and sentence. The State argued Petitioner 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 Petitioner was given his Faretta warnings before the 1998 plea and he waived those rights. The State argued 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, S.C. Ct. App. Order dated May 8, 2013. The Remittitur was issued on June 4, 2013.

Post-Conviction Relief Application

On March 19, 2014, Petitioner filed an application for post-conviction relief alleging ineffective assistance of Counsel and his 1998 guilty plea was involuntary. On June 24, 2014, the State filed its return. An evidentiary hearing into the matter was convened on November 20, 2014, at the Moss Justice Center before the Honorable Alison Lee. At the outset of the hearing, Petitioner enumerated three issues he was proceeding on for post-conviction relief, which were: 1) Counsel was ineffective in her argument before Judge Alford on Petitioner's waiver of counsel, 2) Counsel failed to object to the introduction of opinion, and 3) Counsel failed to obtain a transcript of Petitioner's plea hearing before Judge Hayes. Petitioner was present at the hearing and represented by Tommy Thomas, Esquire. Assistant Attorney General Rutledge Johnson of the South Carolina Attorney General's Office represented the State. At the hearing, Petitioner testified on his own behalf. Counsel also testified. By an order filed April 27, 2016, the PCR Court denied and dismissed Petitioner's application with prejudice. The PCR court found Counsel was not ineffective for failing to argue Petitioner was not entitled to counsel during his

1998 guilty plea hearing before Judge Hayes because he was entitled to counsel pursuant to the Sixth and Fourteenth Amendments and Gideon v. Wainwright, 372 U.S. 335 (1963). The PCR court found Counsel was not ineffective for failing to object to opinion remarks from Judge Alford because she believed having the basis of his opinion on the record would be helpful for appellate review. Counsel also did not object to testimony from Springs because did not believe it was very credible as Springs admitted on cross-examination he did not have personal knowledge of Petitioner's specific guilty plea proceedings.

Petitioner filed a timely notice of appeal. The petition for writ of certiorari was submitted on January 20, 2017, by Appellate Defender John H. Strom of the South Carolina Commission on Indigent Defense. The return to the petition for writ of certiorari was filed on July 13, 2017. On September 10, 2018, this Court granted certiorari and instructed the parties to file briefs as provided by Rule 243(i), SCRCR.

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).

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.

ARGUMENT

The PCR court correctly found Counsel was not ineffective for failing to argue Petitioner was not entitled to counsel during his guilty plea for a felony possession of crack cocaine, first offense[5] because Petitioner was entitled to counsel during that proceeding based on his Sixth and Fourteenth Amendment rights. Additionally, the PCR court properly found Petitioner was provided his Faretta[6] warnings during his guilty plea and subsequently waived his right to counsel knowingly and intelligently prior to entering his guilty plea *pro se*.

Right to Counsel

Petitioner alleges the PCR court erred in finding Counsel not constitutionally ineffective for failing to argue that Petitioner was not entitled to counsel during his 1998 guilty plea because, at that time, South Carolina did not recognize the right of an accused to be represented by appointed counsel in misdemeanor cases where a suspended sentence was imposed. However, as the PCR court properly found, Petitioner was entitled to counsel during his 1998 guilty plea to a *felony* possession of crack cocaine, first offense charge under the Sixth and Fourteenth Amendments, as well as Gideon, 372 U.S. 335.

"The Sixth Amendment right to counsel attaches when adversarial judicial proceedings have been initiated and at all critical stages." State v. George, 323 S.C. 496, 508, 476 S.E.2d 903, 911 (1996) (citations omitted). "The Sixth Amendment, which in enumerated situations has been made applicable to the States by reason of the Fourteenth Amendment." Argersinger v. Hamlin, 407 U.S. 25 (1972) (citing Duncan v. Louisiana, 391 U.S. 145 (1968), Washington v. Texas, 388 U.S. 14 (1967), Klopfer v. North Carolina, 386 U.S. 213 (1967), Gideon v. Wainwright, supra, and In re Oliver, 333 U.S. 257 (1948)).

As an initial matter, Petitioner's charge in 1998 was a felony, not a misdemeanor. In 1998, S.C. Code Ann. §44-53-375(A) read in part, "A person possessing or attempting to possess

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[5] In 1998, S.C. Code Ann. §44-53-0375(A), Drugs / Possession of less than one gram of ice, crank, or crack cocaine, first offense was a felony.

[6] Faretta v. California, 422 U.S. 806 (1975).

less than one gram of ice, crank, or crack cocaine as defined in Section 44-53-110, is guilty of a felony and, upon conviction of first offense, must be imprisoned not more than five years and fined not less than five thousand dollars." S.C. Code Ann. §44-53-375(A) (Supp. 1993.) This language was retired on June 7, 2005, when this offense became a misdemeanor. Petitioner's argument that he was not entitled to counsel in South Carolina at that time because he was facing a misdemeanor that would not result in immediate imprisonment is meritless. BOP 16.

Notwithstanding Petitioner's misstatement regarding his charge, the issue of whether Petitioner's charge was a misdemeanor or felony is not dispositive to the issue of whether he was entitled to counsel during his guilty plea in 1998. In Argersinger, the United States Supreme Court held, "No accused may be deprived of his liberty as the result of any criminal prosecution, whether felony or misdemeanor, in which he was denied counsel." Argersinger, 407 U.S. at 25. The Court goes on to state, "Beyond the problem of trials and appeals is that of the guilty plea, a problem which looms large in misdemeanor as well as in felony cases. Counsel is needed so that the accused may know precisely what he is doing, so that he is fully aware of the prospect of going to jail or prison, and so that he is treated fairly by the prosecution" Id. at 34.

Here, Petitioner was facing a felony charge, which upon conviction could lead to a five year sentence and a significant fine. Petitioner absolutely had a right to counsel under the Sixth Amendment and Fourteenth Amendment and Gideon as the PCR court properly found.

Petitioner further argues because he received a suspended sentence he was not entitled to counsel. In support of his argument, Petitioner cites to the holding of Argersinger and interprets the holding to limit the scope of the right to appointed counsel to misdemeanor cases that actually lead to imprisonment. BOP 14. However, the holding of Argersinger does not limit the scope of appointment of counsel, rather it limits the lower courts from being able to impose a

sentence on defendants who are not represented by counsel. Specifically, the Supreme Court held, "Under the rule we announce today, every judge will know when the trial of a misdemeanor starts that no imprisonment may be imposed, even though local law permits it, unless the accused is represented by counsel." Argersinger, 407 U.S. at 40. The Court further held, "The run of misdemeanors will not be affected by today's ruling. But in those that end up in the actual deprivation of a person's liberty, the accused will receive the benefit of 'the guiding hand of counsel' so necessary when one's liberty is in jeopardy." Id. at 40.

Petitioner's case is distinguishable on several points. First, Petitioner's 1998 conviction for possession of crack cocaine was a felony at that time, so Petitioner's argument that he would have been slighted the benefit of counsel because he was charged with a misdemeanor is without merit. Second, regardless of whether he was charged with a misdemeanor or a felony, his liberty was in jeopardy. Petitioner was facing a potential sentence of five years in prison when he pled guilty, the fact that he received a suspended sentence did not remove the potential for "actual imprisonment" in his case. Finally, Petitioner was *actually* imprisoned in this case based on the suspended sentence he received during his 1998 guilty plea, which confirms the point that his liberty was actually in jeopardy at the time of his guilty plea.

Petitioner misinterprets the holding in Argersinger to mean the person charged with a misdemeanor would have to receive an immediate active sentence in order to be eligible for appointed counsel, which is not what the Court held. The Court clarified this point in Alabama v. Shelton, 535 U.S. 654 (2002). In Shelton, the Court held,

> The Sixth Amendment does not permit activation of a suspended sentence upon an indigent defendant's violation of the terms of his probation where the State did not provide him counsel during the prosecution of the offense for which he is imprisoned. . . . This is precisely what the Sixth Amendment, as interpreted by Argersinger and Scott, does not allow.

> . . . The dispositive factor in Gagnon and Nichols was not whether incarceration occurred immediately or only after some delay. Rather, the critical point was that the defendant had a recognized right to counsel when adjudicated guilty of the felony for which he was imprisoned. Here revocation of probation would trigger a prison term imposed for a misdemeanor of which Shelton was found guilty without the aid of counsel, **not for a felony conviction for which the right to counsel is unquestioned.**

Id. at 654-655, (emphasis added) (internal citations omitted).

Notwithstanding the fact that Petitioner's charge was a felony for which the right to counsel is unquestioned, Petitioner's suspended sentence was activated when he pled to a felony PWID crack cocaine charge in 1999. That guilty plea triggered Petitioner's suspended sentence because it violated his probation for his 1998 possession of crack cocaine charge. Petitioner was sentenced to six months in jail on the revocation of probation and an additional four years for the 1999 PWID charge. App. 16-17. Pursuant to the Sixth Amendment, Petitioner would not have been eligible for any imposition of an active jail sentence had he not been afforded an opportunity to have counsel at the time of his guilty plea in 1998.

Although Petitioner testified during the resentencing hearing before Judge Alford and during the PCR hearing before Judge Lee that he was not afforded the ability to have counsel at his 1998 guilty plea before Judge Hayes, his testimony was properly assessed by both Judge Alford and Judge Lee as not credible. Petitioner was charged with a felony and was pleading guilty to a felony that carried a potential five year sentence. Based on Petitioner's constitutional rights and well-established case law, he was without a doubt entitled to counsel in 1998. The PCR court properly found Counsel was not constitutional deficient for failing to raise the argument that Petitioner was not entitled to counsel during the resentencing hearing before Judge Alford and this ruling should not be disturbed.

Waiver of Representation

Petitioner alleges he was not afforded the opportunity to have appointed counsel by Judge Hayes during his guilty plea and, therefore, could not have waived his right to appointed counsel. Petitioner argues Counsel was deficient because she did not argue that "any Faretta warnings given by Judge Hayes in 1998 would not have included an explanation to Petitioner that he had the right to have counsel appointed to represent him if he could not afford a private attorney." BOP. 17. However, Petitioner's contention that the Faretta warnings he received prior to his plea would not have included his right to counsel is premised on the incorrect assertion that he pled guilty to a misdemeanor charge. Petitioner's charge was a felony in 1998 and the right to appointed counsel, as stated in the previous section, is unquestioned.

Petitioner further asserts his case is "almost identical" to the petitioner in Shelton. BOP. 17. Shelton was charged with a *misdemeanor* assault and faced a $2,000 fine and up to one year imprisonment. Although Shelton was warned repeatedly about the issues of self-representation, the court did not offer Shelton appointed counsel. After representing himself in an Alabama Circuit Court, Shelton received a suspended sentence of thirty days in jail, and an active sentence of two years unsupervised probation. An Alabama Court of Appeals held Shelton was not entitled to counsel because he received a suspended sentence and therefore his Sixth Amendment right was not triggered. Shelton, 535 U.S. at 659. The United States Supreme Court held, "A defendant who receives a suspended or probated sentence to imprisonment has a constitutional right to counsel." Id, 535 U.S. at 674.

Here, the fact that Petitioner's 1998 charge for possession of crack cocaine was a felony distinguishes his case from Shelton on the most decisive element, whether he was entitled to counsel. Although Petitioner's charge was a felony, the holding in Shelton still applies to

Petitioner's circumstance as he also received a suspended sentence and, regardless of whether his charge was a misdemeanor or felony, the holding in Shelton makes it clear Petitioner would have been entitled to counsel pursuant to the Sixth Amendment.

Having established Petitioner was entitled to appointment of counsel during his 1998 plea, the issue turns to whether he knowingly and intelligently waived his right to counsel before Judge Hayes. 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, 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, 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.[7]

In the present case, Petitioner incorrectly alleges that Counsel's argument at the remanded sentencing hearing was in error because in 1998 the Faretta warnings he would have

[7] 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 (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).

received from Judge Hayes would not have included the right to counsel because he did not receive immediate imprisonment. However, because Petitioner was charged with a felony and 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 guilty plea proceeding because the hearing itself cannot proceed if a *pro se* defendant does not waive his right to counsel. For Petitioner'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 Counsel has no duty to be clairvoyant, Counsel's argument that Petitioner had the right to counsel at his 1998 hearing was proper.

At the conclusion of the remand hearing, Judge Alford made affirmative findings that Judge Hayes advised Petitioner of his right to counsel at the 1998 plea and Petitioner waived his rights after the appropriate Faretta inquiry. Although Judge Alford did not have the benefit of a transcript of the proceeding, Judge Alford made an affirmative finding that Judge Hayes did advise Petitioner of his right to counsel and required Petitioner to waive the right prior to accepting the plea. App. 154. This finding was based 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. "In the absence of evidence to the contrary, the regularity of the proceedings of a court of general jurisdiction will be assumed." Pringle v. State, 287 S.C. 409,

339 S.E.2d 127 (1986). The PCR Court dismissed Petitioner's allegations and found that Judge Alford's findings at the remanded hearing were crucial. App. 154.

Additionally, during the PCR hearing, Judge Alford asked Petitioner several questions including whether he recalled waiving his right to presentment to the grand jury during his plea hearing. App. 38. Petitioner testified he did not waive his right to presentment and Judge Alford confronted Petitioner with a signed document showing he in fact did waive this right. App. 38. Petitioner also signed an Attorney Representation form which stated, "If you would like an attorney to represent you on your pending charges you should secure such attorney prior to your Initial Appearance as listed on your bond." Directly below that initial paragraph is information on public defenders and retaining private counsel.

The only evidence indicating Petitioner had not been advised of his right to counsel was Petitioner's testimony at the remanded sentencing hearing and the PCR hearing, which both Judge Alford and the PCR court found not credible. App. 65, 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 Petitioner 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, 45. Thus, the PCR Court correctly found

that Petitioner presented no credible evidence that would undermine Judge Alford's affirmative findings that Petitioner knowingly and intelligently waived his right to counsel. App. 155.

The PCR Court correctly found Petitioner did not meet his burden to show how he was prejudice by Counsel's argument during the remanded sentencing hearing. Petitioner's argument that Judge Hayes' Faretta warnings would not have included advising him of his right to counsel is meritless as Petitioner had an absolute right to counsel. Judge Alford's finding that Petitioner was advised of his right to counsel and thereafter waived that right is not only based on a presumption of regularity, but also on the Attorney Representation form signed by Petitioner and the assessment of Petitioner's credibility during the remanded sentencing hearing. Therefore, Petitioner's conviction and sentence should be affirmed.

CONCLUSION

For the reasons stated above, this Court should affirm the post-conviction relief court's denial of his application for relief.

Respectfully submitted,

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5/13, 2019

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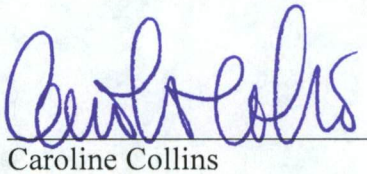
CERTIFICATE OF SERVICE

I, Caroline Collins, certify that I have today served the within **Brief of Respondent** upon Petitioner by depositing a copy of the same for hand delivery, addressed to:

Taylor D. Gilliam, Esquire
SC Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia SC 29211-1589

I further certify that all parties required by Rule to be served have been served. This 13th day of May, 2019.



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