STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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CERTIORARI TO CHARLESTON COUNTY
Donald B. Hocker, Plea Judge
Walton J. McLeod, IV, Post-Conviction Relief Judge

RECEIVED
Apr 30 2020
S.C. SUPREME COURT

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Appellate Case No. 2019-001309

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IVIS AHIMARA REYES YEDRA,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

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**RETURN TO PETITION FOR WRIT OF CERTIORARI**

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## STATEMENT OF THE CASE

Petitioner Ivis Ahimara Reyes Yedra is **not** presently confined in the South Carolina Department of Corrections as she served her sentence and was released from incarceration. On October 15, 2013, Petitioner was indicted by the South Carolina State Grand jury for two counts of trafficking in marijuana pursuant to a multi-defendant, multi-county indictment for unlawful drugs stemming from a large-scale marijuana growing operation throughout the Midlands area (2013-GS-47-0019 Count 1 & Count 4). Petitioner and her companion were residing in a home in North, South Carolina, and growing massive quantities of marijuana as part of a larger marijuana trafficking scheme.

On August 7, 2014, Petitioner appeared before the Honorable Donald B. Hocker, circuit court judge, where she pled guilty to two counts of the lesser-included offense of manufacturing marijuana (first offense). Petitioner was represented by Steven E. Amster of the Florida State Bar, who was admitted *pro hac vice*. Assistant Attorney General Larry Wedekind of the South Carolina Attorney General's Office prosecuted the case. At this plea, Petitioner informed the plea court she wished to waive any potential conflicts of interest resulting from counsel Amster's representation of several co-conspirators. She also advised the plea court she was aware of the immigration consequences of her guilty plea. Pursuant to negotiations entered into between Petitioner and the State, Judge Hocker sentenced Petitioner to concurrent terms of five years' imprisonment. Petitioner did not appeal her conviction or sentence.

On November 7, 2017, nearly three years after her guilty plea, Petitioner, through counsel Ashley A. McMahan, filed an untimely application for post-conviction relief alleging she was entitled to post-conviction relief based on constitutionally ineffective counsel. Specifically, Petitioner alleged her negotiated guilty plea should be vacated for the following reasons:

1. Ineffective Assistance of Counsel
    a. Counsel did not advise Applicant of immigration consequences pursuant to Padilla v. Kentucky, 559 U.S. 356 (2010).
    b. Counsel had a conflict of interest in that counsel represented all co-defendants in this State Grand Jury investigation and failed to discuss or obtain a waiver for Applicant
    c. Counsel failed to discuss the defense of and raise the issue of mere presence with the client and told Applicant that there was no evidence she was involved with a crime
    d. Counsel failed to file an appeal
    e. Counsel informed Applicant she would only have to serve 18 months of her sentence

On May 7, 2018, Respondent filed its return and partial motion to dismiss seeking summary dismissal of all claims beyond whether Petitioner was denied her right to appellate review pursuant to White as barred by the statute of limitations pursuant to S.C. Code Ann. 17-27-45.

An evidentiary hearing into the matter was scheduled for November 7, 2018, at the Lexington County Courthouse before the Honorable Walton J. McLeod, IV, circuit court judge. Petitioner was present at the hearing, alongside counsel McMahon. Respondent was represented by Senior Assistant Deputy Attorney General Megan Harrigan Jameson of the South Carolina Attorney General's Office. At the start of the hearing, Petitioner and Respondent jointly moved to reconstruct the record of Petitioner's plea proceeding after being advised by Court Administration that records from the court reporter were unavailable. Judge McLeod granted this joint motion and ordered the parties attempt to reconstruct the plea proceeding before the plea judge. An order to this effect was filed on November 9, 2018.

On February 20, 2019, the parties convened before Judge Hocker for a reconstruction hearing. Testimony was taken from plea counsel, the prosecutor, and Petitioner. Judge Hocker found the record was sufficiently reconstructed for meaningful appellate and collateral review. An order memorializing these findings was filed on March 6, 2019.

On February 27, 2019, Petitioner, through counsel McMahan, filed an amended application adding the following additional grounds for relief:

> 1. Mr. Amster was ineffective in failing to move to quash the indictment for lack of probable cause against Ms. Reyes Yedra in that the State Grand Jury heard no testimony of her involvement with the underlying investigation and her name was only give to the State Grand Jury when it was read from the indictment as it was being presented.
>
> 2. Mr. Amster was not her attorney in this case, rather it was a Stephen Paul Gant who was admitted *pro hac vice* to represent Ms. Reyes Yedra and the Applicant never spoke to Mr. Gant at all throughout the entire process. She met with Mr. Amster one time prior to her plea, at a hotel.

On April 1, 2019, an evidentiary hearing was held before Judge McLeod. Petitioner was present and was represented by counsel McMahan. Petitioner proceeded forward on the grounds listed in her in original applicant and her amended application.

At the start of the hearing, Respondent renewed its motion to dismiss all allegations beyond whether Petitioner was entitled to belated appellate review of her negotiated guilty plea pursuant to White. Following argument from both parties, Judge McLeod took Respondent's motion to dismiss under advisement and proceeded forward with a full evidentiary hearing. At the hearing, testimony was taken from plea counsel, the prosecutor, one of Petitioner's co-conspirators Osniel Garcia, and Petitioner. At the conclusion of the hearing, Judge McLeod took the matter under advisement.

Thereafter, on June 11, 2019, Judge McLeod issued an order of dismissal denying and dismissing the application in its entirety. In this order, Judge McLeod denied Respondent's motion to dismiss all allegations beyond whether Petitioner was entitled to belated appellate review of her negotiated guilty plea pursuant to White. Specifically, Judge McLeod found:

> In the present case, while the statute of limitations should not be equitably tolled based on the extraordinary circumstances, in consideration of judicial economy and efficiency, this court denies Respondent's motion to dismiss the application

> based on the statute of limitations, even though it may be appropriate, and instead addresses the merits of Applicant's claims below.

The post-conviction relief court then addressed and denied all of Petitioner's seven grounds of ineffective assistance of counsel as set forth in her untimely application, finding Petitioner failed to meet her requisite burden of proof as to each allegation. This order of dismissal was filed and served on both parties on July 11, 2019.

On July 21, 2019, Petitioner served a copy of her "Motion to Alter or Amend Pursuant to SCRCP 59(a) and (e)." Respondent filed a return to this motion and asked it be summarily dismissed. On July 26, 2019, Judge McLeod summarily dismissed the motion to alter or amend and reaffirmed his previously issued order. This appeal follows.

## 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

On appeal, Petitioner argues the post-conviction relief court erred in denying her relief as to six specific claims ranging from a purported conflict of interest to failure to properly explore defenses and properly explain the terms of the plea agreement. However, the post-conviction relief court properly rejected all claims, finding Petitioner failed to meet her requisite burden of proof of establishing constitutional ineffectiveness or any constitutional deprivations as to any of these claims. These findings are not controlled by an error of law and are supported by ample probative evidence in the record. This Court should deny certiorari.

The Sixth and Fourteenth Amendments to the United States Constitution guarantee Petitioner, like all other defendants, the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984); Taylor v. State, 404 S.C. 350, 359, 745 S.E.2d 97, 101 (2013). In a post-conviction relief action, the applicant bears the burden of proving the allegations by a preponderance of the evidence—a mere allegation of ineffective assistance is not sufficient to warrant granting relief. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The reviewing court applies the two-part test outlined in Strickland to determine whether counsel's conduct "was so ineffective as to require reversal" of the applicant's conviction or sentence. 466 U.S. at 687. First, the applicant must show that counsel's performance was deficient; and second, that the deficient performance prejudiced the applicant. Id. at 668; Butler, 286 S.C. at 442, 334 S.E.2d at 814.

The first prong—constitutional deficiency—is "necessarily linked to the practice and expectations of the legal community." Padilla v. Kentucky, 559 U.S. 356, 366 (2010). In order to prove deficient performance, the applicant must show counsel's representation fell below an objective standard of "reasonableness under prevailing professional norms." Cherry v. State, 300

S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814.

Strickland, however, "does not guarantee perfect representation[—]only a 'reasonably competent attorney.'" Harrington v. Richter, 562 U.S. 86, 110 (2011) (quoting Strickland, 466 U.S. at 687). Representation is constitutionally ineffective only if counsel's conduct "so undermined the proper functioning of the adversarial process" that the defendant was denied a fair proceeding. Strickland, 466 U.S. at 686. Just as there is "no expectation that competent counsel will be a flawless strategist or tactician, an attorney may not be faulted for a reasonable miscalculation or lack of foresight or for failing to prepare for what appear to be remote possibilities." Harrington, 562 U.S. at 110.

Accordingly, "[j]udicial scrutiny of counsel's performance must be highly deferential, as it is all too tempting for a defendant to second-guess counsel's assistance after conviction or an adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Strickland, 466 U.S. at 689; see also Yarborough v. Gentry, 540 U.S. 1, 6 (2003) ("The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight."). Unlike a later reviewing court, the attorney observed the relevant proceedings; knew of materials outside the record; and interacted with the client, opposing counsel, and the judge. Thus, the question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom. Id. (quoting Strickland, 466 U.S. at 690).

Thus, a fair assessment of attorney performance requires every effort be made to

eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Id. Because of the difficulties inherent in making such an evaluation, the reviewing court must indulge in a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Butler, 286 S.C. at 445, 334 S.E.2d at 816. The applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625.

Reviewing courts "must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed at the time of counsel's conduct." Strickland, 466 U.S. at 690. An applicant making a claim of ineffective assistance "must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." Id. The reviewing court must then "determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." Id.

The Strickland standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. 466 U.S. at 689-690; see also Harrington, 562 U.S. at 105 (cautioning that an ineffective assistance of counsel claim could potentially function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial). Even under de novo review, the standard for judging counsel's representation is a most deferential one. Harrington, 562 U.S. at 105. Unlike a later reviewing court, the attorney observed the relevant proceedings; knew of materials outside the record; and interacted with the client, opposing counsel, and the judge. Thus, the question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom. Id. (quoting Strickland, 466 U.S. at 690) (emphasis added).

The second, or "prejudice" prong of Strickland is rooted in the very purpose of the Sixth Amendment guarantee of counsel—to ensure a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. Id. at 691–92. In order to prove prejudice, an applicant must demonstrate counsel's deficient performance prejudiced the applicant 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. A reasonable probability is a probability "sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. Thus, it is not enough "to show the errors had some conceivable effect" on the outcome of the proceeding—counsel's errors must be "so serious as to deprive the defendant of a fair trial." Id. at 687 (emphasis added).

Because the Sixth Amendment right to counsel also applies to a defendant entering a guilty plea, Hill v. Lockhart extended the two-part Strickland test to challenge guilty pleas based on ineffective assistance of counsel." Hill, 474 U.S. 52; cf. Padilla, 559 U.S. at 373 (recognizing that the guilty plea process is a "critical phase of litigation" for purposes of the Sixth Amendment right to effective assistance of counsel). A claim of ineffective assistance of guilty plea counsel requires the applicant present evidence satisfying two prongs: first, evidence that counsel's performance was deficient; and second, evidence that counsel's deficient performance prejudiced the defendant by causing him to plead guilty rather than go to trial. Hill, 474 U.S. 52.

The analysis of counsel's performance under the first prong of Strickland remains unchanged—the applicant must show that counsel's representation fell below an objective standard of reasonableness demanded of attorneys in criminal cases. Hill, 474 U.S. at 58–59; accord Thompson v. State, 340 S.C. 112, 115, 531 S.E.2d 294, 296 (2000). An applicant alleging his guilty plea was induced by ineffective assistance of counsel must prove counsel's advice to

plead guilty was not "within the competence demanded of attorneys in criminal cases." Hill, 474 U.S. at 56.

The second, or "prejudice" prong, however, "focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process." Id. at 58–59. Specifically, when an applicant claims counsel's deficient performance caused him to accept a plea, the applicant "must show that there is a reasonable probability that, but for [plea] counsel's [alleged] errors, he would not have pleaded guilty and would have insisted on going to trial." Id. at 59. This inquiry "focuses on a defendant's decisionmaking" and does not turn on the outcome of a defendant's actual criminal proceeding or potential outcome had a defendant chosen to proceed to trial. Lee v. United States, 582 U.S. ___, 137 S. Ct. 1958, 1966 (2017). However, an applicant must convince the court that a decision to reject the plea bargain would have been rational under the circumstances. Padilla, 559 U.S. at 372. The question here is whether the applicant, if correctly informed of circumstances surrounding the plea, would have pleaded guilty—not whether counsel would have still advised him or her to plead guilty. Turner v. State, 335 S.C. 382, 385, 517 S.E.2d 442, 444 (1999).

Surmounting Strickland's high bar is never an easy task, and the strong societal interest in finality has "special force with respect to convictions based on guilty pleas." Lee, 582 U.S. ___, 137 S. Ct. at 1967 (internal citations and quotation marks omitted); cf. Hill, 474 U.S. at 58 ("[R]equiring a 'prejudice' showing from defendants who seek to challenge the validity of their guilty pleas on the ground of ineffective assistance of counsel 'will serve the fundamental interest in the finality of guilty pleas.'"). Reviewing "[c]ourts should not upset a plea solely because of post hoc assertions from a defendant about how he would have pleaded but for his attorney's deficiencies. Lee, 582 U.S. ___, 137 S. Ct. at 1967. Rather, judges should "look to

contemporaneous evidence to substantiate a defendant's expressed preferences. Id. In determining whether a guilty plea was taken in accordance with constitutional standards, the reviewing judge must analyze and consider the entire record, including the transcript of the plea and the evidence presented at the PCR hearing. Harres, 282 S.C. at 134, 318 S.E.2d at 361.

The performance and prejudice standards, however, "do not establish mechanical rules; [t]he ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." Id. at 696. Moreover, "there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one." Id. at 697. The court "need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. Id. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, the court may evaluate the prejudice prong only. Id.

"[I]t is the prerogative of any person to waive his rights, confess, and plead guilty, under judicially defined safeguards, which are adequately enforced." Reed v. Becka, 333 S.C. 676, 685, 511 S.E.2d 396, 401 (Ct. App. 1999). Accordingly, because a criminal defendant waives several constitutional rights by pleading guilty, the Due Process Clause requires that guilty pleas are entered into voluntarily, knowingly, and intelligently. Boykin v. Alabama, 395 U.S. 238 (1969); Pittman v. State, 337 S.C. 597, 524 S.E.2d 623 (1999).

To be intelligent, a plea must be made by a mentally competent defendant who understands both the charges against him or her and the consequences of his or her plea. Brady v. United States, 397 U.S. 742, 748 (1970). To be voluntary, a plea must be free of threats or other coercion that would impermissibly distort the defendant's choice. Id. at 755; see also United

States v. Smith, 440 F.2d 521, 528–529 (7th Cir. 1971) (Stevens, J., dissenting) (explaining that voluntariness relates to the trustworthiness of the admission of guilt and binding character of the waiver of the constitutional protections which would be available to the accused if he elected to stand trial).

Before a court can accept a guilty plea, the defendant must be advised of the constitutional rights he or she is waiving; the right to a jury trial, the right to confront one's accusers, and the privilege against self-incrimination. Boykin, 395 U.S. at 243. Additionally, in order to knowingly and voluntarily plead guilty, the defendant must have a full understanding of the consequences of the plea, including the nature and crucial elements of the offense(s); the maximum and any mandatory minimum penalty; and the nature of the constitutional rights being waived. Pittman, 337 S.C. at 599, 524 S.E.2d at 624.

However, it is "well established that a guilty plea is not rendered invalid because it represents a compromise by defendant, thrusts a difficult judgment upon him, or is motivated by fear of greater punishment." United States v. Cox, 464 F.2d 937, 942 (6th Cir. 1972) (citing Brady, 397 U.S. 742). The State may properly encourage guilty pleas either by being more lenient to those who enter such pleas, Brady, 397 U.S. at 750-753, or by increasing the risks of punishment on those who do not. North Carolina v. Alford, 400 U.S. 25, 37 (1970). The standard 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." Id. at 31.

A defendant's knowing and voluntary waiver of statutory or constitutional rights must be established by a complete record, and "may be accomplished by colloquy between court and defendant, between court and defendant's counsel, or both." State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993); see also Wolfe v. State, 326 S.C. 158, 485 S.E.2d 367 (1997) (guilty

plea not involuntary where the colloquy demonstrated the trial judge asked defendant twice whether he understood there were no promises and that no sentencing recommendations were binding on the judge). To ensure the defendant understands the consequences of his or her guilty plea, the trial judge "usually questions the defendant about the facts surrounding the crime and punishment that could be imposed." Dover v. State, 304 S.C. 433, 434–35, 405 S.E.2d 391, 392 (1991). However, the trial judge "does not have to direct the defendant's attention to every consequence of his plea provided the record reveals affirmative awareness of the consequences of a guilty plea." Carter v. State, 329 S.C. 355, 362, 495 S.E.2d 773, 776 (1998).

The voluntariness of a guilty plea, however, "is not determined by an examination of the specific inquiry made by the sentencing judge alone, but is determined from both the record made at the time of the entry of the guilty plea and the record of the post-conviction hearing." Harres, 282 S.C. at 133, 318 S.E.2d at 361. In evaluating an allegation on PCR that a guilty plea was based on inaccurate advice of counsel, the transcript of the guilty plea hearing will be considered to determine whether any possible error by counsel was cured by the information conveyed at the plea hearing. Wolfe, 326 S.C. at 165, 485 S.E.2d at 370; cf. Rayford v. State, 314 S.C. 46, 443 S.E.2d 805 (1994) (finding that, where the transcript of the guilty plea proceeding refuted applicant's claim that he did not understand the terms of a plea bargain, granting PCR was inappropriate notwithstanding applicant's claim his lawyer misadvised him).

Nonetheless, because a guilty plea is a solemn, judicial admission of the truth of the charges against an individual . . . , 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); see also 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"). Indeed, admissions made during a guilty plea should be considered conclusive unless an applicant presents valid reasons why he should be allowed to depart from the truth of his statements." Id. at 137–38, 654 S.E.2d at 874 (internal citations and quotation marks omitted); cf. Blackledge, 431 U.S. at 73–74 (pointing out that representations made by a defendant, his lawyer, and the prosecutor at a guilty plea hearing, as well as any findings made by the judge accepting the plea, constitute a "formidable barrier in any subsequent collateral proceedings").

An applicant who enters a plea on the advice of counsel may "only attack voluntary, knowing and intelligent character of the plea by showing that plea counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the [applicant] would not have pled guilty, but would have insisted on going to trial." Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001).

In the present case, Petitioner failed to meet her burden of proof and the post-conviction relief court properly denied relief. This Court should deny certiorari.

## I. The post-conviction relief court properly determined Petitioner failed to establish any constitutional depravations entitling her to relief based on a purported conflict of interest where the uncontroverted testimony established Petitioner knowingly, voluntarily, and intelligently waived any possible conflict of interest stemming from counsel's simultaneous representation of Petitioner and her co-conspirators.

Petitioner asserts plea counsel had an actual conflict of interest because counsel represented Petitioner and several of her co-conspirators, and accordingly, she is entitled to post-conviction relief without showing any prejudice. However, the uncontroverted testimony presented to the post-conviction relief court established that Petitioner was advised of the

potential conflict of interest and knowingly, intelligently, and voluntarily waived any possible conflict of interest. The post-conviction relief court properly denied relief.

"A criminal defendant's Sixth Amendment right to effective assistance of counsel includes a right to counsel 'unhindered by a conflict of interest.' " Gonzales v. State, 419 S.C. 2, 9, 795 S.E.2d 835, 839 (2017) (quoting Cuyler v. Sullivan, 446 U.S. 335, 345-50, 355 (1980) and Holloway v. Arkansas, 435 U.S. 475, 483 n. 5 (1978)). When counsel is burdened by an actual conflict of interest, he "breaches the duty of loyalty, perhaps the most basic of counsel's duties." Gonzales, 419 S.C. at 9, 795 S.E.2d at 839 (quoting Strickland, 466 U.S. at 692).

"The mere possibility defense counsel may have a conflict of interest is insufficient to impugn a criminal conviction." Lomax v. State, 379 S.C. 93, 101, 665 S.E.2d 164, 168 (2008) (quoting State v. Gregory, 364 S.C. 150, 152–53, 612 S.E.2d 449, 450 (2005)). Indeed, "until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance." Id. at 102, 665 S.E.2d at 168 (quoting Duncan v. State, 281 S.C. 435, 438, 315 S.E.2d 809, 811 (1984)). "To establish a violation of the Sixth Amendment right to effective counsel due to a conflict of interest arising from multiple representation, a defendant who did not object at trial must show an *actual* conflict of interest adversely affected his attorney's performance." Thomas v. State, 346 S.C. 140, 143, 551 S.E.2d 254, 256 (2001) (emphasis added) (citing Jackson v. State, 329 S.C. 345, 354, 495 S.E.2d 768, 773 (1998)). However, "a defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice to obtain relief." Staggs v. State, 372 S.C. 549, 551–52, 643 S.E.2d 690, 692 (2007). Due to the seriousness of the breach created by an actual conflict of interest and "the difficulty in 'measure[ing] the precise effect on the defense of representation corrupted by conflicting interests,' the Strickland

ineffective assistance of counsel standard is modified in actual conflict of interest cases in that the defendant is not required to show prejudice." Gonzales, 419 S.C. at 9–10, 795 S.E.2d at 839(quoting Strickland, 466 U.S. at 692.

An actual conflict of interest occurs,

> when a defense attorney places himself in a situation inherently conducive to divided loyalties. If a defense attorney owes duties to a party whose interests are adverse to those of the defendant, then an actual conflict exists. The interests of the other client and the defendant are sufficiently adverse if it is shown that the attorney owes a duty to the defendant to take some action that could be detrimental to his other client.

Duncan, 281 S.C. at 438, 315 S.E.2d at 811 (internal marks omitted) (quoting Zuck v. Alabama, 588 F.2d 436, 439 (5th Cir.1979)); see also Thomas, 346 S.C. at 143–44, 551 S.E.2d at 256 (citing Jackson, 329 S.C. at 354, 495 S.E.2d at 773) ("An actual conflict of interest occurs where an attorney owes a duty to a party whose interests are adverse to the defendant's.").

However, a defendant may waive an actual conflict of interest as long as the waiver is made knowingly, intelligently, and voluntarily. Jordan v. State, 406 S.C. 443, 450–51, 752 S.E.2d 538, 541–42 (2013) (citing Thomas, 346 S.C. at 144, 551 S.E.2d at 256 ("To be valid, a waiver of a conflict of interest must not only be voluntary, it must be done knowingly and intelligently."); United States v. Swartz, 975 F.2d 1042, 1048–50 (4th Cir.1992) (holding that a waiver is not knowing, intelligent, and voluntary unless the defendant knows the precise form of the conflict of interest that eventually results); Hoffman v. Leeke, 903 F.2d 280, 289 (4th Cir. 1990)("A defendant cannot knowingly and intelligently waive what he does not know.").

Here, the record establishes Petitioner was aware plea counsel Amster represented Garcia and numerous other co-conspirators, counsel informed her of potential conflict of interest arising from this concurrent representation, and after these conversations, Petitioner knowingly, voluntarily, and intelligently waived this conflict on the record at her plea proceeding. The

uncontroverted testimony from Petitioner, plea counsel, and the prosecutor all firmly establish that Petitioner was advised of a potential conflict arising from plea counsel's representation of her and her co-conspirators. Petitioner knew counsel was actively representing her co-conspirators from the inception of the representation (and it appears this was the planned goal for all co-conspirators, who retained the services of out-of-state counsel in South Florida jointly) and knew that all similarly situated co-conspirators were being offered the same plea deal. Petitioner was advised she could have independent counsel appointed to represent her if she so wished and Petitioner actually sought out the advice of independent counsel before she entered her guilty plea represented by counsel Amster. Petitioner, having been apprised of the precise nature of the conflict of interest and after seeking the advise of independent counsel, made a knowingly, voluntary, and intelligent waiver of any potential conflict arising from the joint representation. See Thomas, 346 S.C. at 144, 551 S.E.2d at 256 ("To be valid, a waiver of a conflict of interest must not only be voluntary, it must be done knowingly and intelligently.") (citing United States v. Swartz, 975 F.2d 1042, 1048–50 (4th Cir.1992) (holding that a waiver is not knowing, intelligent, and voluntary unless the defendant knows the precise form of the conflict of interest that eventually results).

Additionally, the post-conviction relief court squarely rejected Petitioner's claims she purportedly did not understand her what she was doing when she waived the potential conflict. This is a credibility finding that is entitled to this Court's deference on appeal. See Foye v. State, 335 S.C. 586, 589, 518 S.E.2d 265, 267 (1999) (stating the reason appellate courts give great deference to the post-conviction relief court's findings is because the court has the opportunity to directly observe the witnesses). The post-conviction relief court did not err in finding that Petitioner waived any conflict of interest. This Court should deny certiorari.

## II. The post-conviction relief court properly determined Petitioner failed to establish any constitutional ineffectiveness of counsel in his advice regarding the five-year plea offer that Petitioner knowingly, voluntarily, and intelligently accepted in order to avoid a harsher sentence if convicted at trial.

Petitioner asserts plea counsel was constitutionally ineffective in advising Petitioner regarding the plea offer from the State. Specifically, Petitioner alleges counsel improperly advised her that she needed to accept the plea offer or else none of her co-conspirators would reap the benefits of the offer. She claims that this is what induced her plea, as she "felt like she had to take [the plea offer] for everyone else." (PWC 9). However, the post-conviction relief court properly denied relief, as the record firmly establishes Petitioner was induced to plead guilty after she was properly advised of her potential sentence exposure if convicted at trial and she pled guilty to avoid a harsher sentence if convicted at trial. Petitioner failed to establish any constitutional ineffectiveness and was not entitled to relief on this claim.

At the evidentiary hearing, Petitioner testified counsel advised her she faced a twenty-five year sentence if convicted at trial. Both counsel and Petitioner testified they discussed a high probability she would be convicted at trial based on the evidence the State intended to present. Petitioner repeatedly testified she elected to forgo a trial because she wanted to avoid a possible twenty-five-year term of imprisonment if convicted at trial and it was this that induced the plea. (App. 96, 106). Her assertions on appeal that she pled guilty as an act of martyrdom to secure plea offers for her co-conspirators does not reflect the reality of the record—Petitioner pled guilty to avoid a harsher sentence if convicted at trial and this is what induced the plea. Accordingly, she cannot establish she is entitled to relief. See Goins v. State, 397 S.C. 568, 726 S.E.2d 1 (2012) (noting an applicant cannot establish prejudice where the defendant did not choose to plead guilty on basis of erroneous advice, but rather on basis of the State's offer to dismiss two charges and recommend a 10-year sentence); Bennett v. State, 371 S.C. 198, 203–

04, 638 S.E.2d 673, 675 (2006) ("Where there has been a guilty plea, the applicant must prove prejudice by showing that, but for counsel's errors, there is a reasonable probability he would not have pleaded guilty and instead would have insisted on going to trial."). The post-conviction relief properly denied relief. This Court should deny certiorari as to this issue.

## III. The post-conviction relief court properly determined Petitioner failed to establish any constitutional ineffectiveness of counsel regarding immigration consequences of her guilty plea where counsel properly advised Petitioner she faced mandatory deportation as a result of her guilty plea.

Petitioner asserts plea counsel was constitutionally ineffective in advising her as to the immigration consequences of her plea. On appeal, Petitioner improperly portrays counsel as a novice with little immigration experience who affirmatively misadvised Petitioner that she would not be deported as a result of her guilty plea. However, this does not accurately reflect the record—counsel, who was well-versed in handling criminal matters with immigration components—properly advised Petitioner she would receive deportation orders as a result of her guilty plea. The post-conviction relief relied on counsel's credible testimony and properly denied relief. This Court should deny certiorari.

An attorney has a duty to advise a defendant of immigration consequences and presumptive deportation. Taylor v. State, 422 S.C. 222, 810 S.E.2d 862 (2018). Here, counsel properly advised Petitioner regarding the immigration consequences of her guilty plea. Counsel testified he has spent his career handling criminal matters in the south Florida region and the vast majority of his clients has some immigration concerns associated with their pleas. (App. 120). He specifically noted a large percentage of his clients are Cuban nationals like Petitioner. (App. 120). He testified his standard practice is to advise his clients that they will received deportation orders as a result of their pleas or convictions. (App. 120-21). The post-conviction relief court determined this testimony credible and controlling, finding Petitioner was properly advised on

the immigration consequences of her plea. These credibility findings are afforded great weight on appeal. See Foye, 335 S.C. at 589, 518 S.E.2d at 267 (stating the reason appellate courts give great deference to the post-conviction relief court's findings is because the court has the opportunity to directly observe the witnesses). There is evidence of probative value to support the post-conviction relief court's findings and these findings are not controlled by an error of law. This Court should deny certiorari.

## IV. The post-conviction relief court properly determined Petitioner failed to establish any constitutional ineffectiveness of counsel regarding possible defenses where the uncontroverted testimony establishes counsel properly discussed and explored possible defenses with Petitioner and she knowingly, intelligently, and voluntarily waived her right to purse any defenses to accept a favorable plea offer from the State.

Petitioner asserts plea counsel was constitutionally ineffective for failing to discuss viable defenses with her and that his failure to do so induced the plea. Petitioner, again on appeal, reasserts she was merely present and ignorant of the large drug manufacturing operation ongoing at the home she was living in for more than a week. However, this argument properly rejected by the post-conviction relief court. The uncontroverted testimony before the post-conviction relief court established Petitioner and counsel discussed the facts and circumstances surrounding her involvement (or purported lack thereof) in the drug manufacturing ring, discussed the likelihood of conviction at trial, and following these discussions, Petitioner made a knowing, voluntary, and intelligent decision to plead guilty. The post-conviction relief court properly denied relief. This Court should deny certiorari.

Petitioner and counsel both testified they discussed that Petitioner had recently arrived in the country, had been living in the home for a relatively short period of time, and she claimed to have no knowledge of the large-scale marijuana growing operation in the home. Counsel testified he then presented this information to the prosecutor in an attempt to get Petitioner's charges

dismissed and "the prosecutor would not bend." (App. 117-19, 130-31). Counsel elaborated the prosecutor advised him the State was prepared to present numerous law enforcement witnesses who would all testify the smell of marijuana strongly permeated throughout the house and that it was not plausible someone could reside their without knowledge of the drug operation. Counsel and Petitioner both testified he conveyed this information to Petitioner, explained she faced up to twenty-five years of incarceration if convicted at trial, and that he believed there was a strong possibility she would be convicted at trial. (App. 90-92, 107). After these discussions, Petitioner elected to forgo her right to a jury trial and present possible defenses, including mere presence, to accept a favorable, negotiated plea offer from the State. Petitioner's guilty plea was knowingly, voluntarily, and intelligently entered with the advice of competent counsel. The post-conviction relief court properly denied relief. This Court should deny certiorari.

## V. The post-conviction relief court properly determined Petitioner failed to establish any constitutional ineffectiveness of counsel in his advice regarding the actual length of incarceration where counsel never improperly advised or promised Petitioner a specific period of time she would be incarcerated.

Petitioner asserts plea counsel was constitutionally ineffective for promising her she would only be required to serve a fraction of the negotiated, five year sentence pursuant to her plea agreement. She asserts this promise of a shorter term of imprisonment is what induced her plea. However, the post-conviction relief court, relying on testimony from counsel that it deemed credible, found Petitioner was properly advised as to the possible length of her sentence and properly denied this allegation. This Court should deny certiorari.

At the evidentiary hearing, counsel testified he advised Petitioner the State's plea offer was for a sentence of five years' imprisonment. He advised her that she may be eligible for some type of early release, but unequivocally stated he did not guarantee her that she would be released from incarceration early. (App. 122-23). The post-conviction relief court found this

testimony credible and dispositive. These findings should be given great deference on appeal. See Foye, 335 S.C. at 589, 518 S.E.2d at 267 (stating the reason appellate courts give great deference to the post-conviction relief court's findings is because the court has the opportunity to directly observe the witnesses). This Court should deny certiorari.

## VI. The post-conviction relief court properly determined Petitioner failed to establish any constitutional ineffectiveness of counsel for failing to move to quash the indictment where counsel had no good faith basis to challenge the indictment and any such challenge would not have been successful.

Petitioner asserts the State Grand Jury improperly indicted her because there was no evidence of probable cause that she was involved in the drug conspiracy but was merely present. She argues counsel should have moved to quash the indictment on these grounds and was constitutionally ineffective for failing to do so. However, the post-conviction relief court properly denied relief, finding the transcripts of the State Grand Jury proceedings (which were admitted under seal and are being transported for this Court's review) establish there was probable cause to indict Petitioner. Moreover, a motion to quash an indictment based on the sufficiency of the evidence would not have been proper.

The post-conviction relief court properly ruled there was probable cause to indict Petitioner. The transcripts from the State Grand Jury proceedings, introduced under seal as court's Ex. # 1 at the evidentiary hearing, establish the law enforcement officer present for the execution of the search warrant testified before the State Grand Jury that Petitioner was present at the home during the execution of the search warrant and evidence established she appeared to be residing at the home. See Tr. of Special Agent Dennis Tracy on Oct. 15, 2013, p. 12. There was sufficient probable cause for the indictment against Petitioner.

Moreover, any motion to quash the indictment based on the sufficiency of the evidence would not have been proper because the indictment contained the necessary elements of

trafficking in marijuana and sufficiently apprised Respondent of what allegations he was facing. See State v. Crenshaw, 274 S.C. 475, 477, 266 S.E.2d 61, 62 (1980) (explaining an indictment is sufficient if "the offense is stated with sufficient certainty and particularity to enable the court to know what judgment to pronounce, the defendant to know what he is called upon to answer, and acquittal or conviction to be placed in bar to any subsequent conviction"); State v. Smalls, 336 S.C. 301, 307, 519 S.E.2d 793, 796 (Ct. App. 1999) ("[T]he true test of an indictment's validity is not whether it could be made more definite and certain, but whether it contains the necessary elements of the offense intended to be charged and sufficiently apprises the defendant of what he must be prepared to meet."); see also S.C. Code Ann. § 17-19-20 ("Every indictment shall be deemed and judged sufficient and good in law which, in addition to allegations as to time and place, as required by law, charges the crime substantially in the language of the common law or of the statute prohibiting the crime or so plainly that the nature of the offense charged may be easily understood and, if the offense be a statutory offense, that the offense be alleged to be contrary to the statute in such case made and provided."). Under these circumstances, the indictment issued by the State Grand Jury was facially valid and sufficient, and accordingly, the circuit court judge would not have had any authority to dismiss the indictment prior to trial. See United States v. Mills, 995 F.2d 480, 487 (4th Cir. 1993) ("The longstanding rule of law that courts may not 'look behind' grand jury indictments if 'returned by a legally constituted and unbiased grand jury . . .' is the touchstone for any inquiry into the legality of indictments.") (quoting Costello v. United States, 350 U.S. 359, 363 (1956)); State v. Needs, 333 S.C. 134, 146, 508 S.E.2d 857, 863 (1998) ("[A] trial court generally has **no power** to dismiss a properly drawn indictment issued by a properly constituted grand jury before trial unless a statute grants that power to the court." (emphasis added)); State v. Garrett, 305 S.C. 203, 206, 406 S.E.2d 910, 911

(Ct. App. 1991) ("A motion to quash an indictment addresses the sufficiency of the indictment, not the sufficiency of the State's evidence."), overruled on other grounds by State v. Ramsey, 311 S.C. 555, 430 S.E.2d 511 (1993). Accordingly, any motion to quash based on the sufficiency of the indictment based on a lack of probable cause or other evidentiary challenge would not have been proper and no there was valid ground on which counsel could have filed a motion to quash. The post-conviction relief court properly denied relief. This Court should deny certiorari.

## CONCLUSION

Because the post-conviction relief court properly determined Petitioner failed to establish any constitutional depravations, this Court should deny certiorari. Should this Court grant certiorari, Respondent requests the opportunity to fully brief the issues raised.

Respectfully submitted,

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