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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

TRAVIS HINES,

PETITIONER

APPELLATE CASE NO. 2017-002632

Appeal from York County

R. Lawton McIntosh, Circuit Court Judge

Opinion No. 5877

RESPONDENT'S RETURN TO PETITION FOR REHEARING

On December 8, 2021, this Court issued an opinion affirming Petitioner's conviction for Distribution of Heroin finding Petitioner freely and voluntarily waived his right to counsel with a full understanding of his rights and the consequences of self-representation. Further this Court found the State did not violate Petitioner's rights under *Brady v. Maryland*[1], and Rule 5 of the South Carolina Rules of Criminal procedure when the State provided Petitioner with still photographs from a video of a controlled drug purchase, and allowed Petitioner's counsel to view

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[1] *Brady v. Maryland* 373 S.C. 83 (1963).

the video evidence instead of providing Petitioner with a copy of the video. Pursuant to Rule 221(a), SCACR, Petitioner petitioned this Court for rehearing, and this Court requested that Respondent ("the State") file a return to the petition. For the following reasons, Petitioner's petition for rehearing should be denied.

1. **The Court correctly determine that the State did not violate *Brady v. Maryland*, by not providing Petitioner with a copy of the video of a controlled drug buy which was the relevant evidence which lead to Petitioner's guilty plea, as the video is inculpatory evidence and therefore *Brady* is inapplicable, and the State provided Petitioner's counsel Mr. Wellborn with photo images from the video along with an opportunity to view the relevant portions of the video prior to Petitioner's guilty plea.**

Petitioner argues the Court erred in holding that the State did not violate *Brady v. Maryland*, by refusing to show Petitioner the video of the controlled buy until he rejected the State's plea offers and was prepared to go to trial. As an initial matter, Petitioner argues the Court cannot determine if the video was exculpatory *Brady* material because the Court did not view a copy of the video prior to making its decision.

Though Petitioner alleges his counsel was not allowed to view the entire video, the record is clear that Mr. Wellborn was allowed to view the entire video of the controlled drug buy. Petitioner's prior counsel Christopher Wellborn testified at Petitioner's PCR hearing that after signing a protective order, Assistant Solicitor Ryan Newkirk told Mr. Wellborn that he would prepare the "relevant portions" of the video of Petitioner for Mr. Wellborn to view on November 17, 2015. After viewing the video, Mr Wellborn testified that based on his review of the video he believed a jury would be able to convict Petitioner of distribution of heroin. App. p. 39, l. 5- p. 40. l. 24. Mr. Wellborn testified he viewed the video of Petitioner on November 17, 2015, and the video showed the informant walking into Petitioner's house and discussing drugs and drug transactions with Petitioner while Petitioner was at a table doing "something that if the informant

testified, and we expected the informant to testify if they went to trial, the informant would say he was packaging up drugs." App. p. 40, l. 2-11. Petitioner testified he spoke with Mr. Wellborn after November 17, 2015, and learned the video showed Petitioner standing in front of a plastic bag. App. p. 24, l. 1-9. Petitioner further testified he was told it looked like he was messing with drugs during the video, though the video did not directly show a drug exchange occurring. App. p. 24, l. 11-20. Despite Petitioner's assertion, he has failed to present any evidence to suggest that Mr. Wellborn was not allowed to view the entire video. Based on Mr. Wellborn's testimony, the video started prior to the confidential informant entering Petitioner's house, and showed the entire encounter between Petitioner and the confidential informant. Further Petitioner has failed to provide any evidence, including a copy of the video, for the Court to review to determine if Mr. Wellborn was not shown a full copy of the video or whether the video contained exculpatory material. Appellant has the burden of presenting this Court with an adequate record. *Goode v. St. Stephens United Methodist Church*, 329 S.C. 433, 446-447, 494 S.E.2d 827, 834 (1997) (citing *Medlick v. One 1985 Jeep Cherokee*, 322 S.C. 127, 470 S.E.2d 373 (1996); *Germain v. Nichol, 278 S.C. 508, 299 S.E.2d 335 (1983); Vespazianni v. McAlister*, 307 S.C. 411, 415 S.E.2d 427 (Ct. App. 1992)). As Petitioner has failed to present any evidence, including a copy of the video, Petitioner has failed to show this Court that the State modified the controlled drug buy video prior to showing Mr. Wellborn.

Additionally, Petitioner has not submitted any evidence to show that the video has been modified or edited to remove exculpatory materials therefore Petitioner cannot establish that the State has withheld evidence pursuant to *Brady*. 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 *Brady* disclosure rule requires the prosecution to provide to the defendant any evidence in the prosecution's possession that may be favorable to the accused and material to guilt or punishment." *Porter v. State*, 368 S.C. 378, 384, 629 S.E.2d 353, 356 (2006) (internal citation omitted). *Brady* evidence is either favorable exculpatory evidence or favorable impeachment evidence. *Porter*, 368 S.C. at 384, 629 S.E.2d at 356 (*citing United States v. Bagley*, 473 U.S. 667, 676 (1985)). Additionally, the Court in *Gibson v. State* stated that *Brady* disclosure would not apply to inculpatory evidence. "... Petitioner has not proven that the videotape was favorable to him. By all accounts, including defense counsel's testimony, the videotape depicted Petitioner engaged in a drug transaction with a confidential informant. Because the evidence is inculpatory, *Brady* is inapplicable." *Gibson v. State*, 334 S.C. 515, 514 S.E.2d 320, 324 (1999).

Based on the testimony of Mr. Wellborn, the video implicates Petitioner, due to Petitioner's actions in the video, combined with the conversation Petitioner had with the confidential informant. Since the video consisted of footage that would implicate Petitioner, the video should be considered inculpatory, and therefore should not be subject to *Brady* disclosure. Additionally, Petitioner has failed to reference any testimony which would suggest that exculpatory portions of the video were removed. Petitioner merely speculates that the State edited the video to remove favorable evidence prior to Mr. Wellborn's review of the video. As Petitioner has failed to present anything to support his belief that the video contained exculpatory evidence, or that the State manipulated the video prior to showing it to Mr. Wellborn, Petitioner cannot effectively argue the State improperly withheld *Brady* evidence.

Further, Petitioner argues the State failed to comply with Rule 5 SCRCrimP by failing to allow Petitioner to inspect the evidence which the State intended to use during Petitioner's prosecution. However, in *Hyman v. State*, the Court determined that Rule 5 did not require a defendant to personally watch the video of a controlled drug buy. In *Hyman,* the Court determined that through the course of plea negotiations, the State found an "appropriate balance" of the petitioner's desire to view the video, and the State's interest in protecting the identity and safety of their informant, by making the video available for defense counsel to view, while also providing still photographs from the video for the petitioner to review.

> ...the State not only disclosed the existence of the videotape, but also made the evidence available for inspection by defense counsel. The State even took the extra step of generating still photographs to assuage Petitioner's concerns about the contents of the videotape. ...Here, the State struck the appropriate balance by allowing defense counsel to view the videotape and providing Petitioner with stills during negotiations. Therefore, under these circumstances, the manner and extent of disclosure to defense counsel was satisfactory under Rule 5 of the South Carolina Rules of Criminal Procedure.

Hyman v. State, 397 S.C. 35, 47-48, 723 S.E.2d 375, 381 (2012) abrogated by *Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018).

This Court correctly found the State complied with *Brady* and Rule 5 of the South Carolina Rules of Criminal Procedure. As previously stated, the video would not constitute exculpatory evidence, therefore the video was not subject to *Brady* disclosure. Additionally, the State complied with Rule 5 SCRCrimP, despite the State's hesitance to give Petitioner a copy of the video during plea negotiations. Assistant Solicitor Ryan Newkirk indicated the State's policy generally was to not release a video with a confidential informant until the defendant has indicated he will not accept any plea offers from the State. App. p. 56, l. 7-17. Further, Assistant Solicitor Newkirk indicated he had a desire to protect the identity of their confidential informant due to Petitioner's

prior conviction for intimidation of a witness. App. p. 56, l. 12-17. Despite these concerns, the State provided Petitioner with a still photographs from the drug buy video and allowed Petitioner's counsel the opportunity to review the video prior to Petitioner's guilty plea. Therefore, based on the language of *Hyman*, the State properly balanced their concerns with Petitioner's right to be aware of the evidence that will be used against him at trial. The Court correctly found the State did not commit a violation of disclosure rules during plea negotiations with Petitioner.

2. Applicant's plea was voluntarily entered, despite Applicant not receiving a copy of the drug buy video during the course of plea negotiations.

Petitioner further argues his plea was involuntary as a result of the State's failure to provide him with a copy of the video of the drug buy, however the Court properly found Petitioner voluntarily plead guilty. As an initial matter, Petitioner has failed to establish how the State withheld any evidence which it was required to disclose. Petitioner has failed to show how the video of the drug buy was exculpatory evidence which would be subject to *Brady* disclosure. Further, pursuant to *Hyman v. State*, the Court properly found that the State's disclosure of still photographs from the video, along with Mr. Wellborn's opportunity to review the video constituted an "appropriate balance" between the State's need to disclose evidence to the defense, and the State's desire to protect the identity of their confidential informant until Petitioner indicated he would not plead guilty, and would insist on proceeding to trial.

Additionally, Petitioner cannot establish how he was prejudiced by not receiving a copy of the video.

> In many guilty plea cases, the "prejudice" inquiry will closely resemble the inquiry engaged in by courts reviewing ineffective-assistance challenges to convictions obtained through a trial. For example, where the alleged error of counsel is a failure to investigate or discover potentially exculpatory evidence, the determination whether the error "prejudiced" the defendant by causing him to plead guilty rather than go to trial will depend on the likelihood that

> discovery of the evidence would have led counsel to change his recommendation as to the plea. This assessment, in turn, will depend in large part on a prediction whether the evidence likely would have changed the outcome of a trial.

Hyman, 397 S.C. at 48–49, 723 S.E.2d at 382 (citing *Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

Though Petitioner stated during his post-conviction relief hearing that he wanted a new trial and wanted to challenge the State's evidence, Petitioner's actions throughout his prosecution suggest that Petitioner did not desire to proceed to trial, but instead wanted to secure the best possible plea deal so he could return to his family. Petitioner, at his post-conviction relief hearing indicated he spoke with his family prior to pleading guilty, and informed them he had two choices, either plead guilty during the week of December 17, 2015[2], or proceed to trial and possible receive a sentence of life without parole. App. p. 26, l. 23- p. 27, l. 21. During the December 15, 2015, hearing where Petitioner relieved Mr. Wellborn, Petitioner told Judge Hall that he was going to hire Jack Swerling "today." During that same hearing, Petitioner was informed his case would be going to trial in January of 2016. Rather than hiring new counsel as he claimed he intended to do that day, Petitioner pursued Assistant Solicitor Newkirk and entered into plea negotiations immediately following the hearing to relieve Mr. Wellborn. Assistant Solicitor Newkirk testified Petitioner came to him, "after he had relieved [Wellborn] and he had indicated to me that if I could come down at all he would appreciate it. He told me about his family and so I told him, okay, I understand. I will lower the offer to 14 years but to be honest with you that's the best I can do and so we did the paper work and he wanted to spend the evening with his family and he came back the following day in order to enter his guilty plea." App. p. 55, l. 6-14. It is clear Petitioner never intended on hiring new counsel or proceeding to trial on his charges. Petitioner instead chose to

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[2] During a December 15, 2015, hearing Petitioner was informed by Assistant Solicitor Newkirk that the State's fifteen year plea offer would expire at the end of the week. App. p. 117, l. 17-23.

negotiate his own plea deal before the State's offer expired, so he could avoid a possible life sentence. Therefore, Petitioner voluntarily pursued a plea deal. Since Petitioner's actions show he was focused on pleading guilty and receiving the best possible plea deal before the State's offer expired, Petitioner cannot show he would have proceeded to trial if he were allowed to view a copy of the video prior to pleading guilty.

3. **The Court has not sanctioned the ex parte decision of solicitors to withhold evidence in their sole discretion, as the State provided Petitioner with a copy of all necessary evidence through plea negotiations, and allowed Petitioner's counsel an opportunity to review the video of the drug buy prior to Petitioner's guilty plea.**

Though Petitioner has alleged the Court is sanctioning the *ex parte* decision of solicitors to withhold evidence in their sole discretion, the Court has relied on relevant and valid case law to determine that Assistant Solicitor Newkirk properly provided Petitioner with all necessary evidence throughout the case. Mr. Wellborn confirmed he received initial discovery from Assistant Solicitor Newkirk on July 7, 2015 which included still photographs of the drug buy video, and incident report, and a "summary". App. p. 31, l. 19-22. Further Mr. Wellborn indicated he received a copy of the drug report on October 23, 2015, and he was allowed to view the video of the confidential informant on November 17, 2015. App. p. 37, l. 25; p. 39, l. 5- p. 40, l. 10. Assistant Solicitor Newkirk indicated the State's policy generally was to not release a video with a confidential informant until the defendant has indicated he will not accept any plea offers from the State. App. p. 56, l. 7-17. Further, Assistant Solicitor Newkirk indicated Mr. Wellborn informed him that Petitioner knew who the informant was, however Assistant Solicitor Newkirk had a desire to protect the identity of their confidential informant due to Petitioner's prior conviction for intimidation of a witness. App. p. 56, l. 12-17. Though Assistant Solicitor Newkirk did not provide Petitioner with a copy of the video prior to Petitioner rejecting the State's plea offers, Petitioner

and Mr. Wellborn were provided photographs of the drug buy video, and Mr. Wellborn was given an opportunity to review the video prior to Petitioner's guilty plea. The Court has correctly found the State complied with *Brady*, and Rule 5, SCRCrimP.. Petitioner was provided a copy of all evidence outside of the video of the drug buy. Further, Petitioner was made aware of the existence of the video, and was provided still photographs from the video. Mr. Wellborn was given an opportunity to review the video during the course of his representation. Finally, Petitioner has failed to prove the State would have withheld the video from Petitioner if he decided to proceed to a jury trial. Therefore, Petitioner is incorrect in his assertion that the Court has sanctioned ex parte decisions of the solicitor to withhold evidence.

4. The Court was correct when it did not find issue with the post-conviction relief judge's language Counsel advising Petitioner to not plead guilty before reviewing discovery.

Petitioner has also indicated his belief that the Court failed to find the following statement by the Post-Conviction Relief Judge was without evidentiary support:

> This Court finds that Counsel acted reasonably in advising Applicant to see the evidence before pleading guilty. Applicant has failed to show that Counsel was deficient in viewing the evidence in a timely manner as Counsel testified that he received and shared all discovery with Applicant including still from the CI buy.
> App. p. 130.

Despite Petitioner's assertion that the previous statement was without evidentiary support, the statement has evidentiary support in the form of testimony from Mr. Wellborn and Assistant Solicitor Newkirk. Mr. Wellborn testified at Petitioner's post-conviction relief hearing and indicated he received electronic discovery on July 7, 2015, and reviewed the discovery with Petitioner. App. p. 31, l. 10-17. Mr. Wellborn indicated the discovery included photographs from the drug buy video, an incident report, and a "summary". App. p. 31, l. 19-22. Mr. Wellborn further testified he did not feel comfortable suggesting a client plead guilty without looking at all of the

available evidence first. Mr. Wellborn testified he told Petitioner his feelings regarding waiting on the remainder of discovery before accepting a plea, to which Petitioner agreed to postpone accepting any plea offers until Mr. Wellborn could view the videotape. App. p. 32, l. 11-15. Further, Mr. Wellborn testified he received a copy of the drug report on October 23, 2015, and Mr. Wellborn was able to review the video of the drug buy on November 17, 2015. App. p. 37, l. 25; p. 39, l. 5- p. 40, l. 10. Mr. Wellborn testified he discussed the contents of the video with Petitioner after watching the video, and relayed what he saw in the video to Petitioner before advising Petitioner of the likelihood that Petitioner would be convicted if he went to trial. App. p. 40, l. 25- p. 41, l. 10; p. 41, l. 18- p. 42, l. 1. Further, Mr. Wellborn testified he believed it was in Petitioner's best interest to plead guilty following their review of the evidence, and he conveyed this opinion to Petitioner prior to being relieved as counsel. App. p. 48, l. 7-17.Though Petitioner, nor Mr. Wellborn were not provided a copy of the video of the drug buy, Mr. Wellborn credibly testified that he either shared or discussed all the evidence he received with Petitioner. Mr. Wellborn was able to provide specific dates where items were provided, and further explained his discussions with Petitioner regarding the evidence. Though Petitioner asserts Mr. Wellborn did not share all the evidence, Mr. Wellborn provided Petitioner with all of the information he had regarding the State's evidence, and used this information to support his advice to Petitioner. Therefore, the State contends Petitioner's assertion that the Court erred by failing to find the language of the post-conviction relief judge were without evidentiary support are incorrect.

5. Though the Court could have taken judicial notice of the Memorandum by Justice Jean Toal, the Memorandum is not binding legal authority and was superseded by the Court's decision in *Hyman v. State.*

Petitioner is correct in stating that the Court could have taken judicial notice of the Memorandum of Chief Justice Jean Toal on from March 1, 2004. However Petitioner fails to note

that this memorandum is not binding legal authority. While deciding on the appropriate course of action regarding discovery in Petitioner's case, the State correctly relied on *Hyman v. State*, which was the controlling legal precedent for this matter. Therefore, Petitioner has failed to establish any evidence to suggest that the State acted failed to follow their discovery obligations during plea negotiations.

In *Hyman*, the Court determined that the State's refusal to allow a defendant to view the video tape of a drug transactions which formed the basis for his charges did not violate their discovery obligations. In *Hyman*, the State offered Hyman a plea deal for five years that was conditioned on Hyman agreeing to not view the tape of the confidential informant's drug buy prior to accepting the offer. To assuage concerns that Hyman had, the State provided Hyman with still photographs from the video, and allowed Hyman's counsel to view the video prior to pleading guilty. The Court in *Hyman* determined that the video tape was not exculpatory evidence and therefore was not subject to *Brady* disclosure. Further, the Court held that the State's conduct struck an appropriate balance of their interest to protect the identity of their confidential informant while also providing Hyman with notice of all evidence he was entitled to under Rule 5 SCRCrimP.

A similar situation exists in the current case, as Assistant Solicitor Newkirk sought to withhold the video of the drug buy until Petitioner rejected the State's plea offer and indicated he wanted to proceed to trial. Though Petitioner's counsel was ultimately allowed to view the video prior to Petitioner pleading guilty, Mr. Newkirk's conduct conformed to *Hyman*, and made an appropriate balance by providing Petitioner with a photographs from the drug buy video, while not allowing Petitioner to personally view the video prior to rejecting the State's plea offer.

Based on the Court's holding in *Hyman,* the State may at times withhold video footage of a drug buy conducted by a confidential informant throughout the course of plea negotiations, and

though Chief Justice Toal's Memorandum raises concerns with the practice solicitors have used in plea negotiations, the Memorandum has no bearing on the constitutionality of Petitioner's conviction. Therefore, the Court did not need to take judicial notice of the Memorandum by Chief Justice Toal, as it is not binding legal authority, and was ultimately superseded by the Court's decision in *Hyman.*

6. The Court correctly relied on *Hyman* in making the determination that the State properly disclosed evidence during plea negotiations.

Petitioner asserts the Court incorrectly relied on *Hyman v. State* in making their determination that the State complied with *Brady* and Rule 5 disclosures. Petitioner argues that the Court in *Hyman* found the testimony of plea counsel was credible when counsel testified that Hyman would be satisfied with defense counsel viewing the video without Hyman present. In the current case, Petitioner points to testimony from Mr. Wellborn which indicated Petitioner wanted to see the video and that Mr. Wellborn could not recommend his client enter a plea before they saw the video. Though Petitioner is correct by stating that the plea counsel in *Hyman* indicated Hyman had no issue with his counsel viewing the video without him, and the Court found plea counsel's testimony more credible than Hyman, the Court correctly relied on *Hyman* while finding that no *Brady* violation occurred. The circuit court in *Hyman* indicated he was concerned with the practice of withholding evidence from criminal defendants, but found that Hyman could not demonstrate how he was prejudiced because his plea counsel watched the video tape, the State provided Hyman with a copy of photographs from the drug buy video in his case, and the drug video was not exculpatory. The South Carolina Supreme Court affirmed the circuit court's decision, finding that the evidence was not exculpatory, and the State struck an appropriate balance by allowing defense counsel to view the video and by providing Hyman with photographs during plea negotiations.

The facts in this case are nearly identical to *Hyman*. The State provided Petitioner with a copy of still photographs from the drug buy video, and allowed Mr. Wellborn to review the video. Additionally, the video depicted Petitioner discussing drugs and drug sales with the confidential informant while Petitioner was at a table presumably packaging up drugs. Based on the facts presented, the Court correctly compared the case at hand with *Hyman*, and properly ruled that the State did not commit a *Brady* violation by refusing to provide Petitioner with a copy of the video during plea negotiations.

7. The Court correctly found Petitioner waived his right to counsel prior to pleading guilty.

Petitioner asserts the Court erred in finding he waived his right to counsel. Petitioner argues he wanted an attorney and he was not properly advised of his rights to counsel. Further, Petitioner argues the Court erred in finding he waived his right to counsel through a plea waiver form because the plea court did not ask Petitioner about the plea waiver form during his guilty plea in order to make a determination that the form was freely and voluntarily signed. The State believes the Court properly found Petitioner was aware of his right to counsel along with the risks of self-representation, yet Petitioner proceeded to negotiate his own guilty plea instead of seeking counsel to represent him.

An accused has the right to the assistance of counsel. *State v. Justus*, 392 S.C. 416, 418, 709 S.E.2d 668, 670 (2011) (citing U.S. Const. amend. VI; *Gideon v. Wainwright*, 372 U.S. 335 (1963). A defendant may waive his right to counsel, but he must do so knowingly and intelligently. *Faretta v. California*, 422 U.S. 806 (1975). A defendant may waive counsel "by an affirmative, verbal request" or a defendant's actions may constitute a "waiver of counsel." *State v. Roberson*, 382 S.C. 185, 187, 675 S.E.2d 732, 733 (2009). Although a specific inquiry by the judge expressly addressing the disadvantages of a *pro se* defense is preferred, the ultimate test is not the trial

judge's advice but the accused's understanding. *State v. Cash*, 309 S.C. 40, 42, 419 S.E.2d 811, 813 (Ct. App. 1992) (citing *Wroten v. State*, 301 S.C 293, 391 S.E.2d 575 (1990)). In the absence of an inquiry by the judge, courts look to the record to determine if the accused had a sufficient background to understand the disadvantages of self-representation. *Id.* (citing *Bridewell v. State*, 306 S.C. 518, 413 S.E.2d 30 (1992)).

To establish a valid waiver of counsel, *Faretta* requires the accused be: (1) advised of the right to counsel; and (2) adequately warned of the dangers of self- representation. *Bridwell v. State*, 306 S.C. 518, 413 S.E.2d 30 (1992) (citing *Faretta v. California*, 422 U.S. 806; *Prince v. State,* 301 S.C.2d 575, 576 (1990) ("*Faretta* requires that a defendant 'be made aware of the dangers and disadvantages of self-representation so that the record will establish he knows what he is doing and his choice is made with eyes open.'") (citation omitted).

In evaluating the voluntariness of a defendant's waiver of counsel, the only standard is whether the "record demonstrates the defendant's decision to represent himself was made with an understanding of the risks of self-representation, the requirements of a voluntary waiver will be satisfied." *Gardner v. State*, 351 S.C. at 411-412, 570 S.E.2d at 186 (2002) (internal citations omitted).

Petitioner was originally appointed Michael McKinnon, Esquire, from the Sixteenth Circuit Public Defender's Office, however Petitioner relieved McKinnon by hiring Christopher Wellborn. App. p. 116, l. 9-25. On December 15, 2015, Petitioner appeared before the Honorable Daniel Hall to relieve Mr. Wellborn as counsel. App. p. 112, l. 7-21. Petitioner was asked if he was prepared to proceed without a lawyer at this time, and Petitioner confirmed he was. App. p. 113, l. 7-13. Petitioner further stated he intended to hire new counsel before hiring Mr. Wellborn, and once Mr. Wellborn was relieved Petitioner intended to hire new counsel on December 15,

2015. App. p. 113, l. 14-22; p. 114, l. 17-19. Petitioner was informed that his case would be called for trial during the week of January 11, 2016, regardless if Petitioner hired new counsel or not. App. p. 114, l. 1- 16; p. 115, l. 7- p. 116, l. 5. Judge Hall requested Petitioner appear in court during the week of January 4, 2016, to see if Petitioner had hired Mr. Swerling. App. p. 116, l. 9-17. Judge Hall indicated he would give Petitioner until January 4, 2016 to hire an attorney, before further explained the risks of proceeding to trial without an attorney. App. p. 117, l. 5-15. Rather than hiring new counsel as he claimed he intended to do that day, Petitioner pursued Assistant Solicitor Newkirk and entered into plea negotiations immediately following the hearing to relieve Wellborn. At Petitioner's post-conviction relief hearing, Assistant Solicitor Newkirk testified Petitioner came to him, "after he had relieved [Wellborn] and he had indicated to me that if I could come down at all he would appreciate it. He told me about his family and so I told him, okay, I understand. I will lower the offer to 14 years but to be honest with you that's the best I can do and so we did the paper work and he wanted to spend the evening with his family and he came back the following day in order to enter his guilty plea." App. p. 55, l. 6-14.

On December 17, 2015, Petitioner appeared before the Honorable John C. Hayes, III, to plead guilty to distribution of heroin, third offence. App. p. 100, l. 7-16. Assistant Solicitor Newkirk informed Judge Hayes that Petitioner previously had two different attorneys, but was appearing in court as his own counsel on December 17, 2015. App. p. 100, l. 7-24. Assistant Solicitor Newkirk informed Judge Hayes that he spoke with Petitioner and had no questions about his intelligence or understanding of the legal proceedings. App. p. 101, l. 2-3. Further, Assistant Solicitor Newkirk informed Judge Hayes that Petitioner was informed of his right to counsel by Judge Hall on December 15, 2015. App. p. 101, l. 3-5.

Judge Hayes proceeded to question Petitioner about his educational history, his age, and his current employment. App. p. 101, l. 17-p. 102, l. 1. Judge Hayes proceeded to inform Petitioner of his right to have an attorney represent him. The following colloquy occurred during Petitioner's plea hearing:

> **Judge Hayes:** You have a right to have an attorney represent you in regard to this charge and if you cannot afford one the State would be required to appoint an attorney to represent you within some limits. That is you would be appointed an attorney to represent you if you wish. If you could not afford one the limitation being that you are assigned an attorney and that would be your attorney. Its dangerous for you to proceed without an attorney since you're not one and there is a benefit in having an attorney represent you. Do you understand that?
>
> **Petitioner:** Yes, sir.
>
> **Judge Hayes:** Do you wish to have an attorney in regard to this charge or give up that right?
>
> **Petitioner:** I give up that right.
>
> **Judge Hayes:** I find [Petitioner] has freely voluntarily knowingly and intelligently understanding the benefits of counsel and the danger of self representation exercises his right to proceed pro se.
>
> App. p. 102, l. 2-20.

Although Judge Hayes colloquy with Petitioner was not extensive, Petitioner was advised of his right to an attorney, and his right to have an attorney appointed if he were unable to retain counsel on his own. Petitioner was further warned about the dangers of not having a lawyer, as Petitioner was not a lawyer. Two days after Petitioner informed Judge Hall that he intended to hire an attorney, Petitioner made the conscious decision to forgo legal counsel and plead guilty to distribution of heroin. Petitioner was previously represented by two attorneys, Mr. McKinnon, and Mr. Wellborn. Petitioner voluntarily relieved both of these attorneys, and proceeded to negotiate a plea deal on his own. Assistant Solicitor Newkirk testified at Petitioner's post-conviction relief

hearing that Petitioner came to him, "after he had relieved [Wellborn] and he had indicated to me that if I could come down at all he would appreciate it. He told me about his family and so I told him, okay, I understand. I will lower the offer to 14 years but to be honest with you that's the best I can do and so we did the paper work and he wanted to spend the evening with his family and he came back the following day in order to enter his guilty plea." App. p. 55, l. 6-14. Further, at Petitioner's post-conviction relief hearing, Petitioner testified he was advised of his right to counsel by Assistant Solicitor Newkirk, and Judge Hayes, though Petitioner claims he was unaware of the dangers of proceeding without counsel. App. p. 25, l. 23- p. 26, l. 22. Petitioner was clearly aware of his right to Counsel, as Petitioner signed a Plea Waiver Form on December 15, 2015, wherein Petitioner indicated he was aware:

> I have the right to be represented by a lawyer at all stages of the proceedings. I can hire my own lawyer, or the court will appoint a lawyer for me if I cannot afford one. I understand an attorney would be of benefit to me, and since I am not an attorney, there is a danger in my representing myself. Understanding this, I give up this right.

Plea Waiver Form, App. p. 87.

Petitioner has alleged Judge Hayes failed to ask Petitioner about his plea waiver form to determine if the form was freely and voluntarily signed. However, nothing in the record would lead this Court to believe that Petitioner did not freely or voluntarily sign the plea waiver form. Petitioner was questioned about the plea waiver form during his post-conviction relief hearing, and at no point indicated he was forced or coerced into signing the agreement. App. p. 25, l. 4- p. 26, l. 3.

Petitioner, through his own admission, was advised of his right to counsel by both Assistant Solicitor Newkirk, and Judge Hayes prior to Petitioner pleading guilty on December 17, 2015. App. p. 25, l. 23- p. 26, l. 6. Petitioner had the assistance of counsel for nearly one year prior to

relieving counsel and representing himself. Petitioner was arrested on December 26, 2014, and bonded out on December 27, 2014. Petitioner was appointed Mr. McKinnon on December 29, 2014, shortly after bonding out, and Mr. McKinnon represented Petitioner until April 21, 2015 when Petitioner hired Mr. Wellborn. App. p. 10, l. 1-13. Petitioner was then represented by Mr. Wellborn until December 15, 2015, two days prior to Petitioner entering his guilty plea *pro se.* App. p. 10, l. 14- p. 11, l. 4. At Petitioner's post-conviction relief hearing, Mr. Wellborn testified that during the course of his representation, Petitioner was aware of his right to counsel, because Petitioner relieved his appointed counsel and hired Mr. Wellborn to represent him. App. p. 43, l. 13-16. Petitioner, and Mr. Wellborn indicated that Petitioner was aware of his right to Counsel. Additionally, Petitioner was clearly aware of the dangers of self-representation, as Petitioner initially indicated he wanted to hire another attorney during the December 15, 2015 hearing where Mr. Wellborn was relieved. However, Petitioner decided to forgo hiring a third attorney, but instead proceeded to negotiate with Assistant Solicitor Newkirk *pro se*, and ultimately plead guilty two days after relieving Mr. Wellborn.

Additionally, it can be shown that Petitioner had a sufficient background to make a valid waiver of his right to Counsel. In *State v. Cash*, the court listed ten factors that the court will use to determine whether a defendant had sufficient background to make a valid waiver of counsel. Specifically, the court indicated the following factors are considered:

> (1) the accused's age, educational background, and physical and mental health; (2) whether the accused was previously involved in criminal trials; (3) whether he knew of the nature of the charge and of the possible penalties; (4) whether he was represented by counsel before trial or whether an attorney indicated to him the difficulty of self-representation in his particular case; (5) whether he was attempting to delay or manipulate the proceedings; (6) whether the court appointed stand- by counsel; (7) whether the accused knew he would be required to comply with the rules of procedure at trial; (8) whether he knew of legal challenges he could raise in defense to the

> charges against him; (9) whether the exchange between the accused and the court consisted merely of pro forma answers to pro forma questions; and (10) whether the accused's waiver resulted from either coercion or mistreatment.

State v. Cash, 309 S.C. 40, 43, 419 S.E.2d 811, 813 (Ct.App.1992).

Petitioner indicated he was twenty-nine-years old, and was currently enrolled in college. App. p. 101, l. 17-22. Petitioner had previously been involved in criminal proceedings, as Petitioner had two previous drug convictions, which were to be used to enhance Petitioner's current change. App. p. 118, l. 4-15. Petitioner was made aware of the charges he was facing, as Assistant Solicitor Newkirk informed the court of Petitioner's charges both at his December 15, 2015 hearing to relieve counsel, and at Petitioner's guilty plea hearing on December 17, 2015. Additionally, Assistant Solicitor Newkirk informed Petitioner that if he did not accept the State's year plea offer, and proceeded to trial the State would be seeking a sentence of life without the possibility of parole. App. p. 100, l. 9-25; p. 112, l. 4-6; p. 117, l. 17- p. 118, l. 17. Petitioner was represented by two separate attorneys from the time he was arrested until the time he relieved Mr. Wellborn on December 15, 2015. App. p. 10, l. 1- p. 11, l. 1. It appears that Petitioner was not attempting to delay, nor was Petitioner attempting to proceed to trial in this matter, as Mr. Wellborn testified Petitioner had made the decision to plead guilty in November of 2015, and ultimately plead guilty the following month. App. p. 42, l. 15-24. Additionally, Petitioner was aware of the possible defenses he could raise if he went to trial, as Mr. Wellborn testified he discussed these with Petitioner during the course of his representation, and these possible defenses are what lead Mr. Wellborn to suggest Petitioner wait until Mr. Wellborn had seen a copy of the drug buy video prior to Petitioner pleading guilty. App. p. 32, l. 1-15. Though Petitioner may argue he was coerced into pleading guilty without the assistance of counsel, the court advised Petitioner of his right to counsel, whether appointed or retained, however Petitioner voluntarily waived this right prior to

pleading guilty in order to accept the State's plea offer prior to it expiring at the end of the week. App. p. 27, l. 16-19; p. 102, l. 2-20. Petitioner was aware that he could proceed to trial the following month with or without the assistance of counsel, however Petitioner decided it was in his best interest to accept the State's plea offer and avoid a possible sentence of life without parole if he were convicted at trial. App. p. 27, l. 10-19. Based on the record from Petitioner's guilty plea, and the post-conviction relief hearing, Petitioner had a sufficient background to make a valid waiver of counsel and made that decision not only on December 15, 2015 when he relieved Mr. Wellborn and negotiated his own guilty plea, but also on December 17, 2015, when he informed the court that he was forgoing the assistance of counsel and entering his guilty plea *pro se.* Therefore, this Court properly found that Petitioner voluntarily waived his right to counsel when he decided to negotiate his own plea deal instead of hiring another attorney.

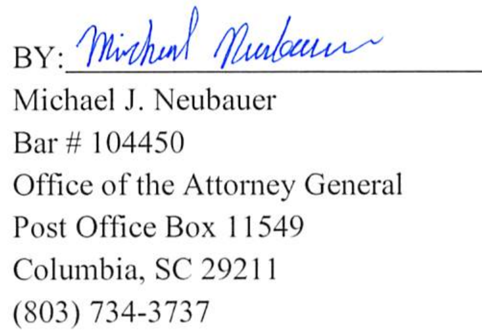
CONCLUSION

Based upon the foregoing, the State respectfully requests that this Court deny rehearing in this case.

Respectfully submitted,

ALAN WILSON
Attorney General

MICHAEL J. NEUBAUER
Assistant Attorney General



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ATTORNEYS FOR RESPONDENT

January 24, 2022

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Jan 24 2022
SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

ON WRIT OF CERTIORARI
Appeal from York County

Appellate Case No. 2017-002632

Opinion No. 5877

Travis Hines,

Petitioner,

v.

State of South Carolina,

Respondent.

PROOF OF SERVICE

Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a true copy of the Return to Petition for Rehearing has been served upon opposing counsel by sending to opposing counsel's primary e-mail address as listed in the Attorney Information System (AIS):

C. Rauch Wise, Esquire
rauchwise@gmail.com

This 24th day of January, 2022.

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RECEIVED
Jan 24 2022
SC Court of Appeals

ALAN WILSON
ATTORNEY GENERAL

January 24, 2022

The Honorable Jenny Abbott Kitchings
Clerk of Court — SC Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211
(by electronic filing)

RE: Travis Hines v. State of South Carolina
Appellate Case No.: 2017-002632

Dear Ms. Kitchings:

Enclosed please find the original Return to Petition for Rehearing in the above matter for filing. Please let me know if anything additional is needed.

Sincerely,

Michael J. Neubauer
Assistant Attorney General
S.C. Bar # 104450

MJN/jmo
Enclosures

cc: C. Rauch Wise, Esquire
Victim Advocacy Division