

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Florence County

Honorable D. Craig Brown, Circuit Court Judge

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JUSTIN J. LEWIS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2020-000998

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BRIEF OF PETITIONER

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**RECEIVED**

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S.C. SUPREME COURT

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## **ISSUE PRESENTED**

Whether the post-conviction relief court erred when it summarily dismissed Petitioner's post-conviction relief application where the court found that because Petitioner proceeded *pro se* at his trial he was barred from raising ineffective assistance of counsel claims regarding defense counsel's pretrial conduct?

## STATEMENT

In June of 2017, the Florence County Grand Jury indicted Petitioner, Justin Jamal Lewis, for distribution of heroin, indictment #2017-GS-21-00764. (App. pp. 366 – 67). On September 4 – 5, 2018, Petitioner proceeded, *pro se*, to a bench trial before the Honorable Thomas A. Russo. Petitioner represented himself, with Wallace H. Jordan acting as standby counsel. Todd S. Tucker represented the State. Judge Russo found Petitioner guilty and sentenced him to fifteen (15) years imprisonment as a second offense. (App. p. 279, lines 23-25; p. 284, line 19 – 285, line 1). Petitioner moved for reconsideration of his sentence and a reconsideration hearing was held on October 3, 2018. (App. p. 332, lines 2 – 19). On December 17, 2018, Judge Russo reconsidered Petitioner’s sentence and reduced the sentenced from fifteen (15) to twelve (12) years imprisonment. (App. pp. 304-307; p. 368). Petitioner did not appeal his sentence or conviction.<sup>1</sup>

On February 21, 2019, Petitioner filed an application for post-conviction relief (PCR). (App. pp. 288 – 310). On September 18, 2019, the State filed a return. (App. pp. 311 – 320). On October 20, 2019, Petitioner’s PCR counsel filed an amended application for post-conviction relief. (App. pp. 321-323). The State filed an amended return and motion to dismiss on December 13, 2019, arguing that because Petitioner represented himself at trial, he should not be able to raise ineffective assistance of counsel claims, even as to pretrial ineffective assistance. (App. pp. 324 – 329).

On December 16, 2019, Petitioner appeared before the Honorable D. Craig Brown. (App. pp. 330 – 343). Overture Walker represented Petitioner. Lindsey McCallister represented the State. Before evidence could be presented or testimony given, the State moved for summary dismissal

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<sup>1</sup> A letter from Petitioner was filed with the Florence County Clerk of Court on October 29, 2018, requesting an appeal. (App. p. 303).

of Petitioner's PCR case. (App. p. 332, line 3 – p. 333, lines 1-.15). The PCR court decided to allow both sides to file memoranda of law to support their position by January 15, 2020, and adjourned the hearing. (App. pp. 341 – 42). On January 13, 2020, PCR counsel filed a memorandum in opposition of respondent's motion to dismiss. (App. pp. 344 – 346). On February 14, 2020, the State filed a memorandum in support of the motion to dismiss. (App. pp. 347 – 355).

On June 11, 2020, the PCR court summarily dismissed Petitioner's PCR application . (App. pp. 356 – 365). A timely notice of intent to appeal was filed on July 12, 2020. The petition for writ of certiorari was filed on March 22, 2021. The return was filed on August 9, 2021. On June 7, 2022, this Court granted the petition for writ of certiorari. This brief of petition follows.

## **STANDARD OF REVIEW**

“Our standard of review in PCR cases depends on the specific issue before us. We defer to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016) (citing Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013) ). We review questions of law de novo, with no deference to trial courts. Sellner, 416 S.C. at 610, 787 S.E.2d at 527 (citing Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014) ).” Smalls v. State, 422 S.C. 174, 180–81, 810 S.E.2d 836, 839–40 (2018)

## ARGUMENT

**The post-conviction relief court erred when it summarily dismissed Petitioner's post-conviction relief application where the court found that because Petitioner proceeded *pro se* at his trial he was barred from raising ineffective assistance of counsel claims regarding defense counsel's pretrial conduct.**

Counsel was appointed to represent Petitioner and that representation continued until the day of trial when the judge relieved counsel to allow Petitioner to proceed *pro se*. Counsel acted as standby counsel during the course of the trial. In the PCR applications Petitioner asserts that counsel's performance prior to being relieved was deficient. (App. p. 290, p. 322). Additionally, Petitioner asserts in the PCR application that he was denied the right to a direct appeal. (App. p. 290, p. 322). The PCR application presents genuine issues of material fact requiring a hearing. The PCR judge erred as a matter of law in granting the State's motion for summary dismissal without a full evidentiary hearing.

### **Trial**

The State indicted Petitioner for distribution of heroine. (App. pp. 366-367). On Tuesday, September 4, 2018, the State called the case for trial. Petitioner moved to relieve appointed counsel, Wallace H. Jordan. (App. pp. 5-55). Defense counsel Jordan told the trial judge he was prepared to proceed to trial. (App. p. 11, lines 10 – 15). Counsel admitted, however, that he had not viewed the video evidence until the Thursday before trial. (App. p. 11, lines 16-21). The prosecutor told the judge that the State provided a still photo from the video that Petitioner had seen. (App. p. 23, lines 1-8). Petitioner informed the court of the many disputes he and Jordan had regarding the handling of his case. (App. pp. 5 – 10). Petitioner specifically told the court that because of Jordan's ineffective assistance, "I don't -- I never know anything. I - - I don't know what's going on. I try to reach out to him. I'm patient. I come and I wait, and I wait." (App.

p. 9, lines 17-19). Additionally, Petitioner told the court, “I – I’m lost on my case. Like I don’t know anything that’s going on with my case.” (App. p. 10, lines 10- 11).

Petitioner explained to the trial court that earlier in the week before trial he tried to relieve Mr. Jordan as defense counsel. (App. p.17, line 23 - p. 18, lines 1-19). Petitioner testified that defense counsel Jordan told Petitioner he needed to appear before a judge to formally move for Mr. Jordan to be relieved as his defense counsel. (App. p. 18, lines 1-2; p. 18, line 25 – p. 19, lines 1-2). Petitioner testified that he waited in court to relieve Mr. Jordan as defense counsel, but Jordan never appeared. (App. p. 18, lines 2-4; p. 19, lines 1-4).

Defense counsel Jordan and another public defender who was present at Petitioner’s trial, Mr. Floyd<sup>2</sup>, disagreed with Petitioner’s account. (App. p. 17, lines 7 – 24). Mr. Floyd was also present for the conversation between Petitioner and Mr. Jordan where Petitioner told Mr. Jordan he was “fired.” (App. p. 18, lines 10-19). Mr. Floyd testified that Petitioner came back to Mr. Jordan’s office the next day and had a second conversation where he told Jordan, “that he was not fired.” (App. p. 18, lines 21-24). Mr. Jordan also stated that Petitioner indicated that he did not wish to relieve counsel. (App. p. 19, lines 16-21).

Petitioner disagreed that he ever changed his mind about relieving counsel. (App. p. 18, line 25 – p. 19, lines 1-4; p. 19, line 22 – p. 20, lines 1-11; p. 29, lines 6-24). Petitioner explained that he meant Mr. Jordan was not “fired” *yet*, only because Petitioner could not officially relieve Jordan as defense counsel until he went in front of a court and moved to relieve him. (App. p. 44, lines 1 – 15). This is supported by the fact that Petitioner went to court after their conversation to have Mr. Jordan relieved as counsel, but Mr. Jordan never appeared at the hearing to be relieved.

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<sup>2</sup> Mr. Floyd’s first name was never used during the PCR hearing. He was referred to only as “Mr. Floyd.”

(App. p. 18, lines 2-4; p. 19, lines 1-4). Accordingly, Petitioner maintained his desire to relieve Jordan as defense counsel, but never had the opportunity to relieve him until the day of trial. (App. p. 28, lines 21-25).

Petitioner told the judge that he wanted to hire his own attorney. (App. p. 16, lines 1-2). The judge, however, denied Petitioner's request and informed Petitioner, repeatedly, that the case would not be continued. (App. p. 16, lines. 1 – 10; p. 43, line 6 – p. 44, lines 1- 14). This left Petitioner with either Mr. Jordan remaining as defense counsel or proceeding *pro se* as his only options. (App. p. 28, line. 21 – 25). Forced into that no-win situation, Petitioner told the judge he would like to represent himself. (App. p. 33 line 12). Petitioner told the judge he wished to go forward with "legal assistance." (App. p. 34, lines 6-7). The judge told Petitioner that Mr. Jordan would act as standby counsel. (App. p. 34, lines 8-18). Petitioner elected a bench trial instead of a jury trial. (App. p. 50, lines 4 – 5; p. 52, lines 21 – 22). Petitioner proceeded, *pro se*, with the bench trial. (App. pp. 57-287). There was no discussion of the discovery material provided to Petitioner by his prior counsel, Mr. Jordan prior to the start of the trial.

At trial Investigator Jason Pate with the Florence County Sheriff's Office testified that on February 3, 2017, Petitioner sold heroin to confidential informant David Daniels. (App. pp. 66 – 72). Investigator Pate and Investigator Rollins Rhodes put a video recording device on Daniels and had him conduct a "controlled buy" of heroin. (App. p. 67, line 19 – p. 68, lines 1-25). Investigator Pate testified that before they sent confidential informant Daniels to conduct the "controlled buy" they searched his person and his car for the presence of other drugs and found none. ( App. p. 67, line 17 – p. 68, lines 1- 5).

Investigator Rhodes testified that he gave Daniels seventy-five dollars to buy the drugs and five dollars to buy gas. (App. p. 204, lines 4 – 8). Rhodes asserted that when Daniels returned to

them, he no longer possessed the money given to him, but had a small bag of drugs instead. (App. P. 150, lines 2-25). The informant Daniels testified that he bought drugs from Petitioner during the “controlled buy.” (App. p. 89, lines 1 – 25). On cross-examination Daniels admitted that when he stopped to get gas on his way to meet Petitioner that he left the video recording device sitting in the car. (App. p. 117, lines 5-12). During cross examination Petitioner asked Investigator Pate, “So in between Mr. Daniels getting out of his car – I’m assuming he went into a store, came back out, and pulled the latch to pump his gas. Is it possible that in between the time that he was off camera and off of audio that things could have transpired in in between that he could’ve maybe purchased drugs from somebody in that time period?” (App. p. 75, line 21-p. 76, lines 1-2). The investigator answered, “Anything is possible, but - - is that good enough?” (App. p. 76, line 11).

On cross-examination Daniels was forced to admit that the video never actually showed a transfer of drugs or money between he and Petitioner. (App. p. 116, line 1 – p. 117, lines 1- 4). Daniels testified, “It [the video] shows there was money in my hand, and it shows there was not – after you left, there was not any money in my hand and there were bags in my hand.” (App. p. 117, lines 2-4). Daniels admitted that he used heroin the night before the alleged “controlled buy.” (App. p. 135, lines 9-14; p. 226, lines. 8-10). After Daniels’ testimony during the State’s case, the State asked that Daniels be released from his subpoena. (App. p. 136, lines 1-2). Petitioner indicated that he wished to call Daniels during the defense case and the judge excused Daniels for the day with the understanding that he needed to come back the next day. (App. p. 136, lines 6-25).

Lieutenant Michael Hansen from the Florence County Sheriff’s Office testified as an expert in chemical analysis. (App. pp. 185-198). Lieutenant Hansen confirmed that he tested the substance associated with Petitioner’s case. (App. p. 190, line 8 – p. 191, lines 1-2). Lieutenant

Hansen testified that the substance he tested came back positive for .09 grams of heroin. (App. p. 193, lines 1-12). The chemical analysis report was admitted as State's exhibit #4 without objection. (App. p. 192, lines 14-25). In the memorandum in support of PCR Petitioner notes that counsel did not provide Petitioner with the chemical analysis report or chain of custody documents. (App. p. 298). In the amended PCR application Petitioner asserts that counsel was ineffective in failing to request/procure the chemical analysis report and chain of custody documents. (App. p. 322).

During the defense case Petitioner recalled Investigator Rhodes. (App. pp. 199-209). Petitioner attempted to recall Investigator Pate. (App. pp. 210-213). The State explained that Petitioner did not indicate he wanted to recall Investigator Pate and he was now on vacation. (App. p. 210, lines 10-11). Petitioner argued that Investigator Pate had not been released from his subpoena<sup>3</sup>. (App. p. 210, lines 12-16; p. 212, lines 11-13). The Court explained that Petitioner did not advise the Court that he wanted to recall Investigator Pate and he was not ordered to come back to Court like Daniels. (App. p. 210, lines 17-19; p. 212, lines 14-24). Petitioner was unable to recall Investigator Pate. (App. pp. 213-218). Petitioner was able to recall Daniels. (App. pp. 218-231).

Petitioner testified in his own defense at his trial. (App. pp. 232-256). Petitioner did not dispute getting into the car with Daniels on the day of the alleged incident. (App. p. 240, lines 15 – 18). Petitioner explained that he called Daniels for a ride because he had been arguing with his girlfriend and needed someone to pick him up. (App. pp. 234 – 237). When Daniels arrived to give Petitioner a ride, Petitioner told Daniels that he had pills, not to sell to Daniels, but to give to him as payment for the ride. (App. p. 237, line 17 – 238, lines 1- 16; p. 253, lines 1 – 12).

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<sup>3</sup> It is unclear if Investigator Pate was under subpoena.

Judge Russo found Petitioner guilty. (App. pp. 274-276). Petitioner made a post-trial motion for a new trial with the assistance of standby counsel. (App. p. 277, lines 1-23). The judge denied the motion. (App. p. 277, line 24 – p. 278, 279, lines 1-10).

### **Post-Conviction Relief**

On February 21, 2019, Petitioner filed a timely PCR application alleging that counsel failed to investigate and challenge admissibility of evidence pre-trial, that evidence was withheld from the defendant that damaged the defense and that defendant was denied appeal rights<sup>4</sup> and due process rights were violated. (App. p. 290). In the memorandum in support of post-conviction relief Petitioner notes that counsel failed to provide Petitioner with a complete discovery packet. (App. p. 296). Additionally, in the memorandum Petitioner notes that counsel did not provide Petitioner with the chemical analysis report or chain of custody documents. (App. p. 298). The judge did not question counsel or Petitioner about discovery prior to relieving counsel and allowing Petitioner to proceed *pro se*. The State filed a return on September 19, 2019, requesting an evidentiary hearing. (App. pp. 311-320).

PCR counsel filed an amended PCR application on October 10, 2019. In the amended PCR application Petitioner states, “Applicant asserts ineffective assistance of counsel on the grounds that trial/plea counsel failed to request or procure a copy of the chemical analysis report for establishing the physical evidence and sworn affidavits/statements from witnesses in the chain of custody for purposes of establishing the same pursuant to Rule 6 of the South Carolina Rules of Criminal Procedure.” (App. p. 322). Additionally in the amended application Petitioner states, “Applicant asserts ineffective assistance of counsel on the ground that trial/plea counsel failed to

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<sup>4</sup> It does not appear that the right to a direct appeal was discussed on the record with Petitioner following the bench trial. It appears that on October 29, 2018, Petitioner filed a letter with the Florence County Clerk of Court requesting paperwork to file an appeal. (App. p. 303).

advise him of his right to appeal and/or provide him with the necessary information for filing a Notice of Appeal.” (App. p. 322). The State filed an amended return and motion to dismiss on December 13, 2019. (App. pp. 324-329). Although the State initially requested an evidentiary hearing in the original return, in the amended return the State requested summary dismissal writing, “Respondent moves to summarily dismiss the application with prejudice as the record and applicable case law clearly refute all of Applicant’s allegations, and there is no genuine issue of material fact alleged in the application upon which relief may be granted pursuant to S.C. Code §17-27-70.” (App. p. 329).

On December 16, 2019, Petitioner appeared before the Honorable D. Craig Brown. The State moved to dismiss Petitioner’s PCR application and argued, “Your Honor, the state has filed an amended return and a motion to dismiss. And the basis of that motion is the fact that Mr. Lewis proceeded pro se at trial, and so the State would argue that any – any of his claims that involve conduct at trial are improper in a PCR because he would essentially be asking for relief against himself.” (App. p. 332, line 21 – p. 333, line 1). With regard to pre-trial conduct, the State argued, “. . . [I]n this particular case when Mr. Lewis decided to represent himself and essentially assumed representation of the – of the file, he assumed responsibility for those pretrial issues, and he in fact waived them when he went forward with trial without requesting a continuance to do any – he charges failure to investigate, but he told the Court he was ready.” (App. p. 333, lines 2-10).

PCR counsel asked the judge to deny the State’s motion to dismiss. (App. pp. 333 – 337).

PCR counsel argued:

We think that is properly before the Court this morning and believe that the motion should be denied. And, Judge, you know, he references – well, we reference, rather, in – it’s paragraph four where my client says that his attorney failed to procure a copy of the Chemical Analysis Report for establishing the physical evidence, as well as sworn affidavits and statements from the witnesses in the chain of custody. Again, that is something that his attorney would have or should have procured

through discovery. My client, you know, has made it clear to me that he never saw a Chemical Analysis Report, never has the opportunity to review it, and again, this is something that would have been done prior to the trial counsel being relieved.

(App. p. 336, line 23 – p. 337, lines 1-11).

The PCR court allowed both parties to submit additional memoranda to the court explaining their positions on summary dismissal. (App. pp. 338-342). Both parties submitted memoranda. (App. pp. 344-355). In a written order filed on June 11, 2020, the PCR judge summarily dismissed Petitioner's PCR application. (App. 356 – 365). The PCR judge erred.

### **Argument**

The PCR judge erred in summarily dismissing the application that presented genuine issues of material fact requiring a hearing. S.C. Code §17-27-70(b) and (c) provide:

(b) When a court is satisfied, on the basis of the application, the answer or motion, and the record, that the applicant is not entitled to post-conviction relief and no purpose would be served by any further proceedings, it may indicate to the parties its intention to dismiss the application and its reasons for so doing. The applicant shall be given an opportunity to reply to the proposed dismissal. In light of the reply, or on default thereof, the court may order the application dismissed or grant leave to file an amended application or direct that the proceedings otherwise continue. Disposition on the pleadings and record is not proper if there exists a material issue of fact.

(c) The court may grant a motion by either party for summary disposition of the application when it appears from the pleadings, depositions and admissions and agreements of fact, together with any affidavits submitted, that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.

“When considering the State's motion for summary dismissal of an application for PCR, a judge must assume facts presented by an applicant are true and view those facts in the light most favorable to the applicant. Al-Shabazz v. State, 338 S.C. 354, 363, 527 S.E.2d 742, 747 (2000).”  
Wilson v. State, 348 S.C. 215, 217, 559 S.E.2d 581, 582 (2002).

Petitioner asserts that counsel failed to request or procure a copy of the chemical analysis report for establishing the physical evidence and sworn affidavits/statements from witnesses in the chain of custody for purposes of establishing the same pursuant to Rule 6 of the South Carolina Rules of Criminal Procedure. (App. p. 322). Petitioner asserts that he never saw the report. (App. p. 337, lines 7-9). Trial counsel had a duty to obtain this discovery material and review the documents with his client prior to counsel being relieved on the day the trial started. Petitioner's choice to proceed *pro se* on the day of trial should not preclude the allegation of pre-trial ineffective assistance of counsel. The issue presents a question of material fact requiring a hearing.

Defense counsel's failure to conduct a reasonable investigation constituted ineffective assistance of counsel that prejudiced Petitioner's ability to represent himself at trial. App. 335, ll. 5 – 10. The Sixth Amendment's guarantee of effective assistance of counsel applies to pretrial conduct because once the adversary judicial process has been initiated, the Sixth Amendment guarantees a defendant the right to have counsel present at all "critical" stages of the criminal proceedings. Montejo v. Louisiana, 129 S. Ct. 2079, 2085 (2009) (citing United States v. Wade, 87 S.Ct. 1926 (1967); and Powell v. Alabama, 53 S.Ct. 55 (1932)).

To establish ineffective assistance of counsel, the Petitioner must satisfy the two-prong test set forth in Strickland v. Washington, 466 U.S. 668 (1984). "First, a defendant must show that counsel's performance was deficient. Under this prong, [t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989) (internal citations omitted). "The second prong of the Strickland test requires a showing that the deficient performance prejudiced the defendant to the extent that there was a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. The defendant is required to overcome the

presumption that counsel was effective in order to receive relief.” Id. at 118, 386 S.E.2d at 625 (internal citations omitted). Therefore, where ineffective assistance of counsel is alleged as a ground for PCR relief, the applicant must prove that “counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result.” Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (quoting Strickland, 466 U.S. at 692).

The United States Supreme Court has held that “counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” Strickland, 466 U.S. at 691; See Wiggins v. Smith, 539 U.S. 510, 527 (2003) (noting “[i]n assessing the reasonableness of an attorney’s investigation, . . . a court must not only consider the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further”). This Court has also held that trial counsel has a duty “to discover all reasonably available mitigation evidence and reasonable available evidence tending to rebut any aggravating evidence introduced by the State.” McKnight v. State, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008); See Lounds v. State, 380 S.C. 454, 460, 670 S.E.2d 646, 649 (2008) (finding “while the scope of a reasonable investigation depends on a number of issues, at a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case”) (internal quotations omitted); see also Ard v. Catoe, 372 S.C. 318, 642 S.E.2d 590 (2007) (holding defense counsels’ “failure to discuss the gunshot residue analysis with the state’s expert witness during pretrial investigation was unreasonable, and thus, was deficient.”).

The United States Supreme Court held in Faretta v. California, 95 S.Ct. 2525 (1975) that a *pro se* defendant cannot raise ineffective assistance of counsel claims regarding the quality of his

own defense. Faretta, at 2541 n. 46. However, in Faretta the Court did not prohibit a *pro se* litigant from raising ineffective assistance of counsel claims regarding a defense counsel's conduct prior to the defendant relieving defense counsel and proceeding *pro se*. The determination of whether a *pro se* litigant can raise ineffective assistance of counsel claims against pretrial counsel is a matter of first impression in South Carolina. Based on the facts of this case, Petitioner should be able to raise ineffective assistance of counsel based on pretrial failures prior to being relieved as counsel.

The State's reliance on the Ninth Circuit Court of Appeals' decision in Cook v. Ryan, 688 F.3d 598 (2012), is misplaced. The Ninth Circuit's decision did not create an absolute bar on *pro se* litigants from raising ineffective assistance of counsel claims regarding a defense counsel's pretrial conduct. The holding in Cook barring *pro se* litigants from raising pretrial ineffective assistance of counsel claims is limited to where the *pro se* litigant *had the opportunity to correct defense counsel's errors before trial*. Cook, at 609.

An examination of the decision in Cook illustrates the limited situation where a *pro se* litigant is foreclosed from raising ineffective assistance of counsel claims. Cook's claim of ineffective assistance of pretrial counsel regarded his attorney's failure to develop mitigation evidence for sentencing purposes. Cook, at 601. The mitigation evidence that Cook wanted his counsel to develop regarded Cook's prior mental health issues and "troubled childhood". Id.

The Ninth Circuit determined that pretrial counsel did not provide ineffective assistance of counsel because Cook could have corrected his pretrial counsel's alleged errors. Id. Cook already knew "much, if not all," of the information he faulted his counsel for failing to develop. Cook, at 609 n. 11. "Even if [Cook] was not completely aware of [his] mental impairments... he was plainly aware of his [own] troubled childhood and adolescence. Yet Cook apparently never told his pretrial

or PCR counsel about that mitigation information.” Id. Accordingly, Cook failed to “set forth a *substantial* claim that his pretrial counsel preformed deficiently.” Id. at 612. (emphasis added)

The Ninth Circuit Court of Appeals specifically emphasized that the justifications for its decision were grounded in the facts of Cook’s case. The Ninth Circuit stated, “A unique feature of this case, and one that informs much of our analysis, *is that Cook's pretrial counsel ceased to represent Cook after seven months*, at which point Cook decided to represent himself.” Id. (emphasis added) Furthermore, during the limited period of defense counsel’s representation, Cook’s pretrial procured two mental evaluations and a hearing on Cook’s competence to stand trial. Id. Lastly, and perhaps most importantly, “in Cook’s waiver of counsel hearing, Cook stated that his lawyer “*has worked hard for my defense; [he] cares about the outcome of my trial.*” Id. (emphasis added)

Petitioner’s case is easily distinguished from Cook. First, Cook relieved his counsel in April of 1988, but his trial did not begin until late June of 1988. Cook, at 609; State v. Cook, 170 Ariz. 40, 50, 821 P.2d 731, 741 (1991). Therefore, the argument that Cook had the opportunity to correct his pretrial counsel’s mistakes was much more forceful in Cook’s case than it was here because Cook had at over two months to address his counsel’s pretrial failures. Whereas here, Petitioner was represented by Jordan until moments before his trial. App. 50, ll. 4 – 5; App. 52, ll. 21 – 22. Accordingly, Petitioner did not have the opportunity to correct his defense counsel’s pretrial errors.

The State argued:

Here, Applicant argues he should be allowed to proceed on his claims of pretrial ineffective assistance of counsel because if Jordan had done more thorough investigation and preparation, Applicant would have felt more comfortable proceeding with Jordan as counsel or he would have been better able to defend himself. In this case, however, Applicant explicitly told Judge Russo he was not asking for a continuance. Tr. pp. 43, 45. Therefore, he cannot complain now of

counsel's alleged lack of pretrial investigation or failure to review discovery. Applicant assumed responsibility for those tasks when he elected to represent himself, and if Applicant needed more time to ensure he had received and reviewed all evidence and properly prepared his defense, he should have requested a continuance.

(App. pp. 353-354). The State's argument that Petitioner could have requested a continuance is refuted by the record. (App. pp. 42-45).

After relieving defense counsel Jordan, Petitioner requested that the trial court allow him to hire a new attorney, but the trial court *repeatedly* told Petitioner that the case would not be continued. (App. p. 16, lines 1 – 10; pp. 42-45). The court stated that it would have denied Petitioner's motion for a continuance even if it was made a week earlier when Petitioner initially tried to relieve Jordan, but Jordan failed to appear in court. (App. p. 43, lines 15-24). Petitioner proceeded *pro se* and did not ask for a continuance to conduct a proper investigation because he knew it would have been denied. State v. Passmore, 363 S.C. 568, 584, 611 S.E.2d 273, 282 (Ct. App. 2005) (“[O]ur courts have developed the doctrine of futility, which recognizes that in circumstances where it would be futile to raise an objection to the trial judge, failure to raise the objection will be excused.”) (citing State v. Pace, 316 S.C. 71, 74, 447 S.E.2d 186, 187 (1994) (finding “[a]s to counsel's failure to raise an objection, the tone and tenor of the trial judge's remarks concerning her gender and conduct were such that any objection would have been futile.”)). The trial court was clear: this case would not be continued.

Another difference between Cook and the present case was that the historical information Cook wanted his attorney to develop was already known to Cook and he simply chose not to disclose it to his attorney. Cook, at 609 n. 11. Accordingly, Cook had every opportunity to correct the “pretrial failures,” even while he was still being represented.

Here, Petitioner did not already possess the information he wanted defense counsel to develop and was forced to rely on defense counsel's investigation to reveal it. (App. pp. 9 – 10). Petitioner was left not knowing the results of the drug analysis report to challenge the admission of the drug evidence due to gaps in the chain of custody or the methodology used to test the drugs. Accordingly, Petitioner was not afforded the opportunity to correct defense counsel's pretrial errors, such that Petitioner's ineffective assistance of counsel claim should not have been summarily dismissed. Cook, at 609.

The final important distinction from Cook to the present case was Cook's comments to the court during the waiver of counsel hearing. Id. Cook told the court that his attorney "worked hard for my defense; [he] cares about the outcome of my trial." Id. In the present case Petitioner maintained his desire to relieve Jordan as defense counsel throughout the proceedings. He consistently complained of pretrial errors and never asserted that defense counsel provided effective assistance of counsel.

It is also important to note that the Ninth Circuit's decision in Cook did not create a per se bar on all *pro se* litigants from making claims of pretrial ineffective assistance of counsel. Cook, at 612. The Ninth Circuit held that due to the "unique" facts of Cook's case, he did not raise a "substantial" claim of ineffective assistance of counsel. Id. Consequently, the Ninth Circuit's decision in Cook would still allow for *pro se* litigants to raise claims of ineffective assistance of pretrial counsel if the allegation was "substantial." Id. Based on the holding in Cook, a "substantial" claim of ineffective assistance of pretrial counsel would arise where the *pro se* litigant did not have the opportunity to correct the errors of pretrial counsel. Accordingly, the Ninth Circuit's decision in Cook should not control the disposition of the present case because Petitioner


presented substantial claims of pretrial ineffective assistance of counsel and did not have the opportunity to correct defense counsel's pretrial errors.

Additionally, although not involving pretrial ineffective assistance of counsel, in the PCR application Petitioner asserts that he was denied the right to a direct appeal. (App. p. 290). In the amended application Petitioner states, "Applicant asserts ineffective assistance of counsel on the ground that trial/plea counsel failed to advise him of his right to appeal and/or provide him with the necessary information for filing a Notice of Appeal." (App. p. 322). A letter from Petitioner was filed with the Florence County Clerk of Court on October 29, 2018, requesting an appeal. (App. p. 303). This issue also presents a question of material fact requiring a hearing.

"A defendant has the procedural right to one fair bite at the apple. That is, every defendant has a right to file a direct appeal and one PCR application." Wilson v. State, 348 S.C. 215, 218, 559 S.E.2d 581, 582-83 (2002)(n. 3 omitted). Petitioner should not be deemed to have waived his procedural right to one fair bite at the apple on direct appeal because he chose to proceed *pro se*. "To waive a direct appeal, a defendant must make a knowing and intelligent decision not to pursue the appeal. Davis v. State, 288 S.C. 290, 342 S.E.2d 60 (1986); White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974)." Wilson v. State, 348 S.C. 215, 217, 559 S.E.2d 581, 582 (2002). Petitioner did not make a knowing and intelligent decision to waive direct appeal. The judge did not advise Petitioner of his appeal rights. Petitioner asserts that standby counsel did not advise him of his appeal rights. The letter Petitioner wrote to the Clerk of Court supports that Petitioner did not wish to waive the right to direct appeal. Petitioner is entitled to a direct appeal pursuant to White v. State. Both the direct appeal issue and the pretrial ineffective assistance of counsel issue present questions of material fact requiring a hearing. The PCR judge erred in summarily dismissing the PCR application.

**CONCLUSION**

Based on the above argument this Court should reverse the summary denial by the PCR judge and remand for an evidentiary hearing.

  
Kathrine H. Hudgins  
Appellate Defender

ATTORNEY FOR PETITIONER

This 5<sup>th</sup> day of August, 2022.