

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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On Petition for Writ of Certiorari  
to Fairfield County  
Brian Gibbons, Plea Judge  
Walton McLeod, IV, PCR Judge

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Appellate Case No. 2021-001518

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**RECEIVED**

**Dec 28 2022**

S.C. SUPREME COURT

DONALD V. STEVENSON, JR.,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

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**RETURN TO PETITION  
FOR A WRIT OF CERTIORARI**

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## **QUESTIONS PRESENTED**

### **Petitioner's Questions**

1. Whether the PCR court erred in denying relief, where the plea court never explained the rights Petitioner was waiving by pleading guilty, where the plea judge incorrectly advised Petitioner about the maximum sentence he was facing, and where plea counsel did not object at any point?
2. Whether the PCR court erred in denying Petitioner a belated appeal pursuant to White v. State<sup>1</sup> where the evidence showed Petitioner never knowingly and voluntarily waived his right to a direct appeal?

### **Respondent's Counterstatement of Questions**

1. Does probative evidence support the PCR court's finding that Petitioner understood the constitutional rights he was waving and the maximum sentence he faced, rendering Petitioner's plea knowing and voluntary and negating any reason for plea counsel to object?
2. Did the PCR court properly find Petitioner failed to prove extraordinary circumstances such that he would be entitled to a belated appeal from a guilty plea?

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<sup>1</sup> 263 S.C. 110, 108 S.E.2d 35 (1974).

## STATEMENT OF THE CASE

### *Procedural History*

Petitioner Donald V. Stevenson is presently confined in the South Carolina Department of Corrections serving a fifteen-year sentence. In April 2016, the Fairfield County Grand Jury indicted him for distribution of methamphetamine. This charge arose from a controlled purchase by a confidential informant on December 16, 2015, that was captured on audio and video.

On February 22, 2017, Petitioner pled guilty as indicted before the Honorable Brian Gibbons. Pursuant to Petitioner's request and the State's consent, Judge Gibbons deferred sentencing until April 17, 2017, so Petitioner could finalize his father's estate. Rather than appearing for sentencing, however, Petitioner absconded. Approximately a year later, he was apprehended in Florida and extradited to South Carolina for sentencing. On May 14, 2018, Petitioner appeared before Judge Gibbons for sentencing. Judge Gibbons sentenced him to the maximum sentence of fifteen years' imprisonment. Petitioner did not file a direct appeal.

On April 3, 2019, Petitioner filed an application for post-conviction relief (PCR). On February 3, 2021, an evidentiary hearing convened before the Honorable Walton J. McLeod, IV. On July 23, 2021, Judge McLeod issued an order denying Petitioner's PCR application. Petitioner filed a motion to reconsider pursuant to Rule 59(e), which was denied on August 19, 2021.

### *Guilty Plea*

At the beginning of the plea hearing, the solicitor recommended a three-year sentence. (App. 3). The solicitor further relayed that as part of the negotiation, the State had agreed to defer sentencing until April 17, 2017. (App. 3, 5). Importantly, the solicitor stated, "If he violates the conditions [of bond] or does anything else wrong, the recommendation of the State can change **and he can be facing up to a maximum of 15 years.**" (App. 6, emphasis added). Plea counsel

stated, “He knows that if he gets out on this bond and he does anything in violation of the law that the deal is off the table.” (App. 6). Thereafter, the Court stated,

I haven’t sentenced you yet, and that’s significant because it means that **I can sentence you anywhere from zero to 15 years, okay?** Now, part of this sentencing—I’m going to defer sentencing to allow you to wrap up your father’s estate . . . . **You’ll be under a \$10,000 surety bond with the following conditions. You’ll show up on April 17<sup>th</sup> at 9:00 a.m. to be sentenced on this.** You’ll be under house arrest with GPS active monitoring. No criminal behavior. Be a good neighbor. Be able to leave home only for attorneys, church and to manage your father’s estate, okay? Do you understand those conditions and restrictions?

(App. 7, emphasis added). Applicant indicated he did. Thereafter, the Court stated,

[I]f you violate any of these restrictions or conditions some bad things can happen, okay? First of all you could be picked up for violating your bond, okay? And there’s an automatic arrest provision on there as well. That means you can be picked up and detained if they see you in violation of this bond, okay? Then that bond can be withheld and then you can be sitting in jail the way you’ve been doing the past five, six months . . . . **The most significant thing, however, is since I’ve accepted your guilty plea, if you mess up while you’re out prior to you showing up that’s going to significantly impact what I do as far as your sentence is concerned, okay?**

. . . .

I’m telling you right now, **if you don’t cooperate and you violate any of the terms and conditions of this bond** or if you get into anymore trouble between now and then there’s a **pretty good chance I’m going to max you out.**

(App. 7-8, emphasis added). Petitioner indicated he understood. (App. 8). The plea court advised Petitioner that if he cooperated with the bond conditions and did not get in any trouble, “there’s a very good chance [the court would] go along with the recommendation, or maybe even less than that.” (App. 8-9). Petitioner again indicated he understood. (App. 9).

Petitioner did not appear for sentencing. He was subsequently apprehended in Florida and

extradited to South Carolina, and he appeared before Judge Gibbons for sentencing on May 14, 2018. At that time he admitted to the Court that he had absconded to Florida. (App. 15-16). Due to Petitioner's failure to appear for sentencing, the State recommended the maximum sentence of fifteen years. (App. 14). The plea court sentenced Petitioner to fifteen years. (App. 18).

#### *PCR Testimony*

At the PCR hearing, Petitioner (through counsel) conveyed he would be proceeding on allegations that plea counsel was ineffective for (1) not adequately explaining constitutional rights Petitioner was waiving by pleading guilty, (2) not filing a direct appeal, and (3) not explaining to Petitioner his right to appeal.

Petitioner testified it was plea counsel's idea for Petitioner to plead guilty. (App. 45-46). He explained he had not made bond because he was arrested for a second violent offense (assault and battery of high and aggravated nature) while detained for distribution of methamphetamine. (App. 46-47). Petitioner stated he needed to make bond so he could prevent his estranged wife from stealing from his father's estate, and plea counsel suggested he needed to plead to one of the charges to do so. (App. 44, 46-47). Petitioner testified he "wanted to fight the whole thing," but his "hands were tied" and he "had no choice but to get out of jail at any cost." (App. 48-49).

When asked whether plea counsel advised him of his right to remain silent, Petitioner replied, "No. That's something the police would have told me when they arrested me but not my attorney." (App. 49). When asked whether plea counsel explained that he had the right to a jury trial, Petitioner responded, "Yes. I had a choice. But the jury trial would have been me sitting in jail for however long." (App. 49). Petitioner denied being informed of his right to cross-examine witnesses or that the State "would have to bring witnesses and have a trial in open court." (App. 49-50). When asked if he would have pled guilty if he had understood these rights, he stated,

“Knowing all those things that I had to know, I probably would not have. I didn’t want to really do anything. I wanted to just—only course was getting me out of there.” (App. 50). Petitioner averred he was told the plea would have a five-year cap. (App. 55). He acknowledged he absconded to Florida and “didn’t stop until [he] hit Key West and crawled into a bottle of whiskey.” (App. 51). Petitioner stated he was extradited to South Carolina in April 2018—more than a year after his guilty plea. (App. 51).

Regarding his claim for a belated direct appeal, Petitioner testified the instant “the gavel dropped” at his plea hearing, he “spun on [plea counsel] and said, ‘Appeal this.’” (App. 52). He testified he mentioned an appeal again to plea counsel “probably two months later,” but counsel told him it was too late to appeal. (App. 52). When asked whether counsel explained to him his right to appeal, Petitioner replied, “No, sir. No.” (App. 52).

Plea counsel testified he met with Petitioner five to ten times, maybe more. (App. 57). He described Petitioner as savvy and explained Petitioner had “been in the system a lot” and “knows the system.” (App. 57). Plea counsel recalled Petitioner had not been able to make bond, and the circuit court had denied a bond reduction. (App. 58). He averred the State’s offer to recommend three years was a good deal based on Petitioner’s prior record. (App. 58).

Plea counsel stated he explained to Petitioner all of the constitutional rights he was waiving. (App. 59). He did not recall discussing Petitioner’s right to a direct appeal or Petitioner asking him to file an appeal immediately after the hearing. (App. 59). However, he stated his practice is to file an appeal if a client asks him to, and he would have filed an appeal if Petitioner had asked. (App. 59). Plea counsel recalled Petitioner asking him to file an appeal a few months later, but he stated the time to appeal had expired. (App. 60). He testified he did not see any meritorious issues to an appeal, but he would have appealed if he had seen any meritorious issues. (App. 60). He

did not recall the State offering a cap of five years. (App. 63).

The PCR court found Petitioner was aware of and understood the rights he was waiving, and thus freely and voluntarily pled guilty. (App. 75). The PCR court found credible plea counsel's testimony that (1) plea counsel explained the constitutional rights Petitioner was waiving and (2) Petitioner understood the system. (App. 76). The PCR court found not credible Petitioner's testimony in this regard. (App. 76). The PCR court found the plea court "thoroughly explained the potential exposure [Petitioner] faced if he did not show up on the date of the sentencing hearing," and "any misconception [Petitioner] had about the sentence he would receive was cured by the colloquy." (App. 78).

Regarding Petitioner's claim that he was entitled to a belated appeal, the PCR court found credible plea counsel's testimony that (1) Petitioner did not request an appeal or show an interest in appealing "until months later, when it was too late," and (2) plea counsel saw no appealable issues with Petitioner's plea hearing. (App. 82). The court thus found Petitioner failed to prove he was entitled to a belated appeal.

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## STANDARD OF REVIEW

The standard of review for post-conviction relief depends on the specific issue before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839 (2018). When reviewing factual findings, appellate courts defer to the PCR court's factual findings and will uphold them if any probative evidence in the record supports 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. However, pure questions of law will be reviewed *de novo* without deference to the PCR court. Id. Appellate courts will reverse the decision of the PCR 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

**I. Probative evidence supports the PCR court's finding that Petitioner understood the constitutional rights he was waiving and the maximum sentence he faced, rendering Petitioner's plea knowing and voluntary and negating any reason for plea counsel to object.**

Petitioner asserts plea counsel was ineffective for not objecting at the plea when the plea court failed to adequately explain the rights Petitioner was waiving and incorrectly advised Petitioner of the maximum sentence he faced. (Pet. 4-9). Petitioner further contends plea counsel neglected to advise him of the constitutional rights he was waiving, rendering his plea involuntary. (Pet. 8-9). He argues the plea court inaccurately told him he faced a maximum sentence of three years' imprisonment for distributing methamphetamine. (Pet. 4). Petitioner avers his case is akin to Pittman v. State, 337 S.C. 597, 524 S.E.2d 623 (1999), where this Court affirmed PCR based on an unknowing and involuntary guilty plea. (Pet. 6-7). Contrary to Petitioner's argument, however, probative evidence supports the PCR court's finding that Petitioner was aware of and understood the constitutional rights he was waiving and the potential sentence he faced, and thus freely and voluntarily pled guilty. (App. 75, 78). Further, Petitioner's case is distinguishable from Pittman because the PCR transcript here cured any alleged deficiency in the plea colloquy regarding the constitutional rights Petitioner was waiving, and the plea court correctly advised Petitioner that he faced up to fifteen years for distribution of methamphetamine.

“There is a strong presumption trial counsel provided adequate assistance.” Green v. State, 351 S.C. 184, 192, 569 S.E.2d 318, 322 (2002). To prove ineffective assistance of counsel, an applicant must overcome this presumption and show counsel was deficient, and that deficiency prejudiced the applicant. Strickland v. Washington, 466 U.S. 668, 687 (1984). In other words, “the applicant must show trial counsel's performance fell below an objective standard of reasonableness and, but for counsel's errors, there is a reasonable probability the result at trial

would have been different.” Green, 351 S.C. at 192, 569 S.E.2d at 322. “A reasonable probability is one sufficient to undermine confidence in the trial's outcome.” Id.

In the context of a guilty plea, a petitioner must show a reasonable probability that but for counsel’s alleged errors, he would not have pled guilty but would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 59 (1985). Because a guilty plea is a solemn, judicial admission of the truth of the charges, the right to contest the validity of a plea is usually foreclosed. See Blackledge v. Allison, 431 U.S. 63, 73-74 (1977) (“Solemn declarations in open court carry a strong presumption of verity. The subsequent presentation of conclusory allegations unsupported by specifics is subject to summary dismissal, as are contentions that in the face of the record are wholly incredible.”). Statements made during a guilty plea should be considered conclusive unless a petitioner presents valid reasons why he should be allowed to depart from the truth of his statements. Dalton v. State, 376 S.C. 130, 137-38, 654 S.E.2d 870, 874 (Ct. App. 2007). To be knowing and voluntary, a petitioner must be aware of the consequences of his plea, including the constitutional rights he is waiving and the sentence he faces. Boykin v. Alabama, 395 U.S. 238, 243-44 (1969); Dover v. State, 304 S.C. 433, 434, 405 S.E.2d 391, 392 (1991); Anderson v. State, 342 S.C. 54, 57, 535 S.E.2d 649, 651 (2000).

Here, probative evidence supports the PCR court’s finding that Petitioner understood the constitutional rights he waived by pleading guilty. Although the plea court did not elaborate on the specific rights Petitioner was waiving, testimony from the PCR hearing shows Petitioner understood the constitutional rights he was waiving. See Harres v. Leeke, 282 S.C. 131, 318 S.E.2d 360 (1984) (providing it is proper to consider the guilty plea transcript **as well as the evidence presented at the PCR hearing** when determining guilty plea issues). Plea counsel testified he reviewed the constitutional rights with Petitioner, Petitioner was savvy, and Petitioner

had “been in the system a lot” and “knows the system. (App. 57, 59). The PCR court found the foregoing testimony from plea counsel credible, and this Court should defer to that finding. See Solomon v. State, 313 S.C. 526, 529, 443 S.E.2d 540, 542 (1994) (“We give great deference to a judge’s findings when matters of credibility are involved since we lack the opportunity to directly observe the witnesses.”), overruled on other grounds by State v. Cheeks, 401 S.C. 322, 737 S.E.2d 480 (2013). (App. 76). Notably, although Petitioner averred plea counsel did not explain the constitutional rights he was waiving, he himself acknowledged he understood he had the right to remain silent based on his testimony that law enforcement advised him of that when he was arrested. (App. 49). Likewise, when asked whether plea counsel explained that he had the right to a jury trial, Petitioner responded, “Yes. I had a choice. But the jury trial would have been me sitting in jail for however long.” (App. 49). Based on the foregoing, ample, probative evidence supports the PCR court’s finding that Petitioner understood the constitutional rights he was waiving by pleading guilty.

Likewise, probative evidence shows Petitioner understood the sentence he faced. Initially, Petitioner’s contention that he did not understand the maximum sentence he faced is unpreserved. At the PCR hearing, Petitioner’s testimony focused on his allegation that he did not understand the constitutional rights he was waiving. Regarding the sentence, Petitioner merely asserted he was promised a five-year cap—a contention plea counsel denied. (App. 55, 63). Petitioner never asserted—prior to this petition for writ of certiorari—that he did not understand the maximum sentence for distribution of methamphetamine, rendering this argument unpreserved.

On the merits, probative evidence shows Petitioner understood the sentence he faced. Although the plea court misspoke early in the plea and informed Petitioner he faced up to three years imprisonment, the solicitor corrected that mistake by noting on the record that Petitioner

faced up to fifteen years for distribution of methamphetamine. (App. 6). Thereafter, the plea court informed Petitioner he faced up to fifteen years' imprisonment, and Petitioner—rather than interjecting and stating he believed the maximum sentence was less than fifteen years—told the plea court he understood. (App. 7). Importantly, the plea court advised Petitioner that if he did not appear for sentencing, he would receive the maximum sentence. (App. 7-8). Plea counsel testified he reiterated to Petitioner the importance of appearing for sentencing and the fact he would likely receive the maximum sentence if he did not appear. (App. 63). Based on the foregoing, the overwhelming evidence shows Petitioner understood the sentence he faced and supports the PCR court's finding in this regard.

Finally, contrary to Petitioner's argument, the facts here are distinguishable from Pittman. Although the Pittman Court found the plea transcript alone supported a finding that the plea was involuntary, in analyzing whether Pittman understood the nature of the constitutional rights being waived, the Pittman Court also reviewed the PCR transcript. 337 S.C. at 600, 524 S.E.2d at 625. Here, a review of the PCR transcript shows Petitioner understood the constitutional rights he was waiving. Specifically, Petitioner himself acknowledged he understood his right to remain silent and his right to a jury trial. (App. 49). Further, the PCR court found credible trial counsel's testimony that he explained the constitutional rights to Petitioner, including—specifically—Petitioner's right to cross-examine witnesses and the State's burden of proof. (App. 59, 76). Additionally, unlike the plea court in Pittman, the plea court here advised Petitioner of the minimum and maximum sentence he faced. (App. 7). Thus, this case is distinguishable from Pittman.

Here, probative evidence supports the PCR court's finding that Petitioner knowingly and voluntarily pled guilty. Thus, this Court should deny certiorari.

**II. The PCR court properly found Petitioner failed to prove extraordinary circumstances such that he would be entitled to a belated appeal from a guilty plea.**

Petitioner contends the PCR court erred in denying him a belated appeal pursuant to White v. State because evidence showed Petitioner never knowingly and voluntarily waived his right to a direct appeal. (Pet. 10-13). He further avers he demonstrated an interest in appealing, and “extraordinary circumstances should have caused plea counsel to file a notice of appeal.” However, Petitioner has failed to prove extraordinary circumstances such that he is entitled to a belated appeal from a guilty plea. Thus, the PCR court properly found Petitioner failed to prove he is entitled to a belated appeal.

“Absent extraordinary circumstances, such as when there is reason to think a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal) or when the defendant reasonably demonstrated an interest in appealing, there is no constitutional requirement that a defendant be informed of the right to a direct appeal from a guilty plea.”). Turner v. State, 380 S.C. 223, 224, 670 S.E.2d 373, 374 (2008)

Here, Petitioner failed to establish extraordinary circumstances that would entitle him to appeal his guilty plea. Although Petitioner testified he requested an appeal following the plea hearing, plea counsel did not recall Petitioner requesting an appeal until much later, when it was too late to appeal. (App. 52, 59-60). Plea counsel further testified that had Petitioner requested an appeal at the hearing, plea counsel would have filed a notice of appeal. (App. 59). The PCR court found the foregoing testimony by plea counsel credible, and this Court should defer to that finding. See Solomon, 313 S.C. at 529, 443 S.E.2d at 542 (“We give great deference to a judge's findings when matters of credibility are involved since we lack the opportunity to directly observe the witnesses.”), overruled on other grounds by Cheeks, 401 S.C. at 322, 737 S.E.2d at 480.

Additionally, plea counsel testified there were no meritorious grounds for appeal, and Respondent submits a review of the plea transcript supports that testimony. (App. 60). Because Petitioner failed to establish extraordinary circumstances that would entitled him to appeal his guilty plea, the PCR court properly denied him a belated appeal. Contra Turner, 380 S.C. at 225, 670 S.E.2d at 374 (“Without evidence of extraordinary circumstances, the PCR judge erred in finding petitioner was entitled to a belated appellate review of his guilty plea.”). Thus, this Court should deny certiorari.

**CONCLUSION**

Based on the foregoing, this Court should deny the Petition for Writ of Certiorari.

Respectfully Submitted,

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This 28<sup>th</sup> day of December, 2022