

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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S.C. SUPREME COURT

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Certiorari to Aiken County

Honorable Robert J. Bonds, Circuit Court Judge  
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MARKESE EAST,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2022-000557  
\_\_\_\_\_

PETITION FOR WRIT OF CERTIORARI  
\_\_\_\_\_

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**INDEX**

INDEX..... i

ISSUE PRESENTED.....1

STATEMENT OF THE CASE.....2

ARGUMENT

    I. The PCR court properly granted Petitioner relief pursuant  
    White v. State, 263 S.C. 110, 108 S.E.2d 35 (1974), where  
    there was uncontested evidence that trial counsel failed to file a  
    Notice of Appeal, and where the State agreed that Petitioner  
    was entitled to belated review.....7

    II. The PCR court erred in finding trial counsel provided effective  
    representation where counsel failed to interview and call  
    Petitioner’s co-defendants to testify during his trial .....8

CONCLUSION.....10

## **ISSUE PRESENTED**

### **I.**

Whether the PCR court properly granted Petitioner relief pursuant *White v. State*, 263 S.C. 110, 108 S.E.2d 35 (1974), where there was uncontested evidence that trial counsel failed to file a Notice of Appeal, and where the State agreed that Petitioner was entitled to belated review?

### **II.**

Did the PCR court err in finding trial counsel provided effective representation where counsel failed to interview and call Petitioner's co-defendants to testify during his trial?

## STATEMENT OF THE CASE

On March 28, 2013, Shane Jones was killed during a home invasion and robbery that occurred during a get together at his house. App. 161, l. 2- 162, l. 17. Raven Williams, a friend of Jones, was also wounded during the incident. App. 226, ll. 19-23. The two men who entered the home were armed with various guns and had masks covering their faces. App. 161, l. 2- 162, l. 17. They stole cellphones, money, and Xanax bars from the residence before fleeing. App. 107, ll. 20-23. Five people were ultimately arrested in connection with the incident: Rashawn Isaac, Brian Morton, Leon Simmons, Trevon Butler, and Petitioner. App. 130, ll. 2-25. All five were charged under a theory of accomplice liability with murder, armed robbery, and burglary first degree.

During the November 2013 term of the Aiken County grand jury, Petitioner was indicted for one count of murder, one count of armed robbery, and one count of burglary first degree. App. 447-448, 453-454, 459-460. On January 5-7, 2016, the State, represented by William Weeks and Cassie Hall, called the case to trial before the Honorable Doyet A. Early, III, and a jury. Petitioner was represented by Kevin Beck and Aaron Walsh. App. 1. Petitioner was ultimately found guilty as indicted and was sentenced to three concurrent terms of thirty-years' imprisonment for each charge. App. 424, l. 21- 425, l. 11; App. 438, ll. 7-14.

No direct appeal was taken from the trial. Petitioner filed a *pro se* application for post-conviction relief on January 26, 2017. Although he did not specifically raise ineffective assistance of counsel for failing to file an appeal, he did respond to question nine<sup>1</sup> that he had advised his attorney to file an appeal, but his attorney had failed to do so. App. 463-469. The State filed a return and motion to dismiss dated March 20, 2017, alleging the PCR application

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<sup>1</sup> Question nine of the PCR application requires the applicant to state the reasons for not appealing the initial conviction and sentence. App. 464.

was not timely filed. App. 471-474. Thereafter, the State received a letter from Counsel Beck admitting his failure in filing the appeal. The State then filed an amended return requesting a hearing on the issue of a belated appeal and requesting all other allegations be dismissed as untimely. App. 475-481.

A hearing was convened before the Honorable J. Cordell Maddox on May 14, 2019. The State was represented by Megan Jameson. Petitioner was represented by Nancy Fennell. App. 482. The hearing was to determine whether Petitioner was entitled to a belated appeal and to address the State's motion to dismiss any other allegations as untimely. App. 486, ll. 22-25. At the hearing, Petitioner testified that after trial he had instructed Counsel Beck to file an appeal, that Counsel Beck said he would, but he never followed through. Petitioner was not aware that his appeal had not been filed until he received a letter from Counsel Beck confirming his failure to file the appeal. App. 487, l. 6- 488, l. 23.

The letter from Counsel Beck explained his mistake in not filing the appeal, accepted responsibility for the error, and included a letter that had been sent to the Office of the Attorney General stating the same information. App. 565-566. Petitioner testified that he believed the appeal had been filed on his behalf and that was why he had not filed his PCR application by the one-year deadline. App. 490, ll. 2-19. Counsel Beck also testified at the hearing that Petitioner had requested he file an appeal and that he did not file it. Counsel Beck further admitted that he did not inform Petitioner of his failure prior to the one-year PCR deadline. He confirmed that he wrote both Petitioner and the Office of the Attorney General regarding his failure to file the appeal and accepted responsibility for the error. App. 491, l. 13- 492, l. 20. Judge Maddox

granted<sup>2</sup> Petitioner's request for a belated appeal. Judge Maddox also determined that Petitioner was entitled to equitable tolling of the PCR statute and could have his other claims heard at a later hearing. App. 493, l. 15-App. 494, l. 14.

Counsel Fennell subsequently filed an amended PCR application alleging ineffective assistance of counsel for failing to file an appeal, for failing to call any of Petitioner's co-defendants to testify during his trial, and for allowing Petitioner's trial to proceed while the co-defendants were present in the courtroom in jail-issued clothing. App. 496-498. A hearing on the amended application was held on February 2, 2022, before the Honorable Robert J. Bonds. Megan Jameson appeared on behalf of the State, and Counsel Fennell appeared on behalf of Petitioner. App. 499. At the start of the hearing, the State conceded that Petitioner was entitled to a belated appeal based on the testimony elicited during the hearing before Judge Maddox. App. 505, ll. 7-22.

At the second PCR hearing, Petitioner acknowledged that he was charged and convicted under the "hand of one, hand of all" theory, but stated that none of his co-defendants ever said he was involved or went into the home. Petitioner asserted he was merely present at the scene on the night the incident occurred. App. 509, l. 5- 510, l. 1. Petitioner contended that based on conversations with Counsel Beck he believed his co-defendants would be called during his trial to testify to their prior statements, because in their statements they all said that Petitioner was not a participant in the crimes. App. 511, l. 1- 512, l. 10. Petitioner and Counsel Beck reviewed the statements given by the co-defendants, and according to Petitioner, Counsel Beck said the statements would be helpful to his case because they were all consistent. Petitioner testified that

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<sup>2</sup> Judge Maddox did not issue a written order in this matter. At Petitioner's subsequent PCR hearing, the parties agreed that Judge Bonds should give effect to Judge Maddox's ruling and include in the final PCR order that Petitioner was entitled to a belated appeal. App. 506, ll. 9-16.

one of the reasons he went to trial was because Counsel Beck told him his co-defendants' statements would be helpful to his defense, but then those statements were never used during his case. App. 514, l. 9- 515, l. 6. Petitioner believed that if his co-defendants had been called during his trial, they would have told the truth about his lack of involvement in the crimes, and the jury would not have found him guilty. App. 518, ll. 15-22.

On cross-examination, Petitioner admitted that he gave two statements to law enforcement in which he implicated three of his co-defendants: Simmons, Morton, and Isaac. Petitioner knew that all three co-defendants had pled guilty prior to his trial, but he did not know that Isaac had plead guilty to voluntary manslaughter. App. 523, l. 4 –525, l. 11. He testified that if they had been called at trial, all three would have testified that they were actively involved in the crimes but that he was just present. App. 526, l. 21- 527, l. 7. Petitioner admitted to having an unloaded weapon, being on scene, and speaking with Jones as he was dying, but he adamantly denied ever going into the home. App. 527, l. 8-App. 527, l. 13.

Counsel Beck testified that Petitioner's first statement was given to law enforcement prior to his being appointed to the case. He believed that Petitioner stated he knew that the robbery was going to occur and admitted to having an unloaded weapon but maintained in the statement that he never went into the home. App. 535, l. 21- 537, l. 14. Counsel Beck acknowledged discussing the possibility of the co-defendants testifying at Petitioner's trial and including them on the witness list. App. 543, ll. 8-17. He stated that he chose not to call them because he did not think their testimony would have helped, and he was concerned they would get on the stand and say things that would only hurt Petitioner's case. App. 545, ll. 14-25.

An order granting Petitioner a belated appeal pursuant *White v. State* and denying his other claims was filed on April 18, 2022. App. 567-582. In denying Petitioner's claim regarding

Counsel Beck's failure to call his co-defendants to testify, the court made two findings. The PCR court found that because Petitioner did not present his co-defendants to testify or otherwise produce evidence of their testimony, that he had failed to meet his burden of proof. Additionally, the court found that Counsel Beck articulated a reasonable trial strategy in electing not to call the co-defendants to the stand because he was concerned that their testimony would be damaging to Petitioner's case.

## ARGUMENT

### I.

The PCR court properly granted Petitioner relief pursuant *White v. State*, 263 S.C. 110, 108 S.E.2d 35 (1974), where there was uncontested evidence that trial counsel failed to file a Notice of Appeal, and where the State agreed that Petitioner was entitled to belated review.

“[C]ounsel has a constitutionally imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal, or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing.” *Roe v. Flores–Ortega*, 528 U.S. 470, 480 (2000). “To waive a direct appeal, a defendant must make a knowing and intelligent decision not to pursue the appeal.” *Simuel v. State*, 390 S.C. 267, 271, 701 S.E.2d 738, 739-740 (2010). “In the absence of an intelligent waiver by the defendant, counsel must either initiate an appeal or comply with the procedure in *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.E.2d 493 (1967).” *Simuel* at 270.

The testimony elicited during the hearing before Judge Maddox made two things clear: one, that Petitioner requested Counsel Beck file his appeal and two, that Counsel Beck failed to follow through with that request. The letters entered in evidence corroborated the testimony. Additionally, the State conceded that Petitioner was entitled to relief pursuant to *White*.

The record clearly reflects that the grant of a belated appeal was warranted in Petitioner’s case. Petitioner, through no fault of his own, was denied an opportunity for appellate review after being convicted of serious felony charges. This defect can only be remedied by granting him the direct appellate review he was denied.

## II.

The PCR court erred in finding trial counsel provided effective representation where counsel failed to interview and call Petitioner's co-defendants to testify during his trial

In a post-conviction proceeding, the burden is on the applicant to prove the allegations in his application. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985), *cert. denied*, 474 U.S. 1094 (1986). As to allegations of ineffective assistance of counsel, the applicant must show his 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. *Strickland v. Washington*, 466 U.S. 668 (1984); *Johnson v. State*, 325 S.C. 182, 480 S.E.2d 733 (1997). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. *Johnson v. State, supra*. This Court must affirm the findings of the PCR judge if they are supported by any evidence in the record. *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989).

Our Supreme Court has repeatedly held a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness's failure to testify at trial. "The applicant's mere speculation what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice." *Bannister v. State*, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998)

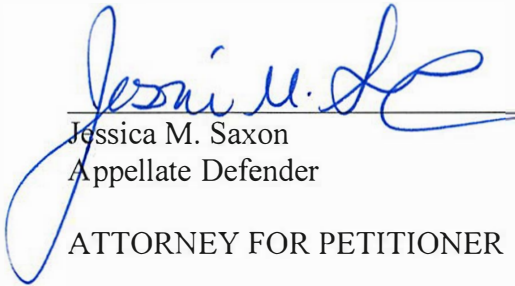
Admittedly, Petitioner's co-defendants did not testify at the PCR hearing. However, the salient points of their testimony that Petitioner wanted before the jury came from the statements that they gave to law enforcement – thus there was not speculation about what their testimony would have been. According to the testimony at the PCR hearing, those statements included that Petitioner was not a party to the home-invasion-turned-murder, but he was merely present on the

scene. That information, along with other information introduced during the trial, could have been enough to sway the jury to Petitioner's version of events that he did not participate in the crimes.

Counsel Beck's decision to not call the witnesses was not strategic. He testified that he did not call Petitioner's co-defendants because he was unsure what they would say, and he believe they would be hostile witnesses. His testimony evinced that he did not interview the co-defendants prior to trial to determine whether their testimony would be averse to Petitioner. Further, even if the co-defendants' testimony had changed and become harmful, Counsel Beck could have impeached them with their prior statements to law enforcement which negated Petitioner's participation in the crimes. Our Supreme Court has held that trial counsel's decision to employ a certain strategy must be sound. A strategy will be deemed unreasonable under the Sixth Amendment if the reasons given for the strategy are not sound. Stone v. State, 419 S.C. 370, 384, 798 S.E.2d 561, 569 (2017). Here, the "reasons" for the strategy were based on fear of what might be said. Counsel Beck merely assumed the co-defendants would provide harmful testimony or would be hostile witness – he did not investigate this fact. An assumption cannot be deemed a sound reason under the Sixth Amendment.

**CONCLUSION**

For the reasons set forth herein, Petitioner respectfully requests this Court grant certiorari as to issue one and affirm the lower court's determination that Petitioner is entitled to belated review, and grant certiorari as to issue two to allow full briefing of the issue.

  
Jessica M. Saxon  
Appellate Defender  
ATTORNEY FOR PETITIONER

This 8th day of March, 2023.