THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Court of General Sessions

R. Markley Dennis, Jr., General Sessions Judge

Case No. 2022-000472

The State, Respondent,

v.

Bowen Gray Turner, Respondent,

In re: Victim C.B., Appellant.

FINAL REPLY BRIEF OF APPELLANT

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SCOPE OF REPLY ARGUMENT

This case concerns a crime victim's explicit constitutional rights to present and to be heard, S.C. Const. Art. I, § 24(A)(3), (5), and this Court's duty to ensure that constitutional rights have meaning.

Respondents' attempts to reframe the issues are unavailing. Victim is properly before this Court seeking appellate review of a violation of her constitutional rights—regardless of whether the Court elects to treat the avenue used as an "appeal" or a petition for a writ of mandamus. *See* Notice of Appeal, p. 3. The prejudice suffered by Victim occurred when the trial court denied her right to procedural justice by denying her request to be heard *before* acceptance of the guilty plea. *See* S.C. Const. art. I, § 24(A) (stating the purpose of the enumerated rights is "[t]o preserve and protect victims' rights to justice and due process").

The relevant underlying facts are not in dispute: Victim did everything possible to assert her rights in a timely manner. The Court is asked to determine whether "the Constitution itself gives [ ] right[s] which the [courts] may deny by failing or refusing to provide a remedy"—*i.e.*, whether the constitutional provisions at issue are merely "a hollow mockery instead of a safeguard for the rights of [victims]." *Chick Springs Water Co. v. State Highway Dep't*, 159 S.C. 481, 157 S.E. 842, 850 (1931), *overruled on other grounds by McCall by Andrews v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1985). If the answer to either inquiry is "no," this Court must address Victim's constitutional rights to present and to be heard and conclude that trial courts must adopt procedural changes to ensure that South Carolina victims are afforded a meaningful opportunity to exercise their rights.

ARGUMENT

I. The right to present is not disputed

The South Carolina Constitution contains the "Victims' Bill of Rights" which states in pertinent part:

> To preserve and protect victims' rights to justice and due process regardless of race, sex, age, religion, or economic status, victims of crime have the right to: . . . (3) be informed of and present at any criminal proceedings which are dispositive of the charges where the defendant has the right to be present.

S.C. Const. art. I, § 24; S.C. Code Ann. § 16-3-1510 (Supp.2005). This constitutionally protected right to present provides an opportunity for victims to inform the court of their position at the presentation stage of the guilty plea, prior to the Court's acceptance of the recommended plea. This extra information should be helpful to the courts in their exercise of responsibility to determine that the recommended plea is proper. It does not affect the Solicitor's discretion to negotiate freely with defendants.

The initial briefs of Respondents do not address the widespread failure of the Circuit Courts to comply with the Victim's constitutional right to present before the recommended plea is accepted. The State's tacit admission that a victim has a constitutional right to present at a meaningful stage of the plea process is not an oversight. See Initial Brief of State, Footnote 1, p. 5. The State also accedes in that footnote to Victim's proposition that victims have a right to present *before* the plea is accepted or rejected. Respondent Turner also agrees that victims have a right to present, as defined in Appellant's Initial Brief. For example, Respondent Turner frames the issue on appeal as to whether the "Victim's constitutional right to present and be heard were violated by the trial court."

Having acceded to the point that a victim has a constitutional right to present, the State's memorandum and that of Respondent Turner address the mechanism for bringing the issue

before this court: whether a direct appeal or a writ of mandamus is the best vehicle for seeking judicial review of this widespread practice.

II. This appeal was properly filed as a constructive writ of mandamus

Appellant initiated this case with the filing of a Notice of Appeal/Notice of Request for Appellate Review. The Notice explained that the Appellant Victim sought direct judicial review or, in the alternative, "the issuance of a writ of mandamus to require compliance with and enforcement of the Victim's rights, pursuant to S.C. Const. art. I, § 24(A)(3)." Notice of Appeal, p. 3. Because the Notice of Appeal included a request for mandamus as well as a request for direct review, both avenues were fully preserved.

Victim and Respondent State are in agreement that a writ of mandamus is a mechanism to have a violation of victim's rights reviewed. State's Br. 6. Accordingly, under the State's own analysis, this matter is properly filed for review by the simultaneous filing of a Notice of Appeal/Notice of Request for Appellate Review, which incorporated a request for a writ of mandamus.

Respondents point to the Victims' Bill of Rights, S.C. Const. Art. I, § 24(B), for their argument that a writ of mandamus is a victim's only recourse. However, this section, which prohibits civil actions to enforce victim rights, does not say that a mandamus is the exclusive avenue for judicial review and does not even mention appeals. It only says that since there is no right to bring a civil action, a writ of mandamus *may* be appropriate:

> Nothing in this section creates a civil cause of action on behalf of any person against any public employee, public agency, the State, or any agency responsible for the enforcement of rights and provision of services contained in this section. The rights created in this section may be subject to a writ of mandamus, to be issued by any justice of the Supreme Court or circuit court judge to require compliance by any public employee, public agency, the State, or any agency responsible for the enforcement of the rights and provisions of these services contained in this section, and a wilful failure to comply with a

writ of mandamus is punishable as contempt. S.C. Const. art. I, § 24.

Victims rarely seek review of circuit court actions and the mechanism for review is not well established. With this in mind, Victim styled the request for review as a Notice of Appeal/Notice of Request for Appellate Review and included a request for a Writ of Mandamus. Notice of Appeal, p. 3. For this reason, it should be construed as a notice of appeal or, in the alternative, a constructive petition for a writ of mandamus. Victim submits that this filing provides adequate notice of the relief she is seeking.

In another mandamus case, the Supreme Court found that the action was more properly a request for injunctive relief and, despite the caption, "it is the substance of the requested relief that matters" and not the form in which the petition for relief is framed [et al.]. *Sanford v. South Carolina State Ethics Com'n,* 385 S.C. 483, 496, 685 S.C.2d 600 (2009)*, Clarified by Sanford v. South Carolina State Ethics Com'n,* 386 S.C. 274, S.C., Dec. 02, 2009. Likewise, in the instant case, the substance of the Notice of Appeal should be what controls, not the form.

III. The proper timing of a petition for a writ of mandamus is at issue

This case addresses the proper timing for a victim to seek a writ of mandamus. The State claims that a victim seeking redress must seek a writ of mandamus from the South Carolina Supreme Court *before* a right was actually violated. Initial Brief of State, p. 5. Following that approach would force victims to assume the trial judge would not uphold the victim's constitutional rights, or instead face the risk of having waived the option. This approach would also inundate the Supreme Court with petitions.

This case demonstrates the extreme impracticality of the State's suggestion that victims be required to seek a writ of mandamus before the recommended guilty plea is presented. Victim actually filed a Petition for Writ of Mandamus two days after learning that a hearing to

revoke Respondent's bond was scheduled. The petition was filed in the manner that Respondent State suggests is proper and requested that the Second Circuit Solicitor's Office and the South Carolina Law Enforcement Division be required to enforce the bond order and place Defendant into custody for nearly fifty (50) bond violations. Petition for Writ of Mandamus. Victim's counsel learned of the guilty plea offer by email from the Assistant Solicitor on April 5, 2022. Victim filed both the Petition for Writ of Mandamus and the Petition for Rule to Show Cause on the following day, April 6, 2022. Victim filed the Motion to Enforce Victims' Rights and to be Heard Prior to Guilty Plea on April 8, 2022. Although Victim promptly filed the Petition for Writ one day after learning of the guilty plea offer, and two days before the guilty plea hearing, the trial judge denied that motion as untimely filed. R. p. 204, l. 7-11. This process exemplifies the challenges that victims would face if this court required that a writ to address victims' rights violations be filed before a violation happens.

Further, Victim was disadvantaged in filing a writ before the guilty plea hearing because it was scheduled as a bond revocation hearing. Motion to Revoke Bond. Victims were informed that a plea offer had been made and a bond revocation would take place; however, they were not notified that a guilty plea hearing would be held instead. The brief period of time between the offer and guilty plea hearing is typical in criminal cases. This short period of time practically guarantees that crime victims, the overwhelming majority of whom are not represented by counsel, are unable to file a petition for a writ of mandamus before the guilty plea hearing is held. This is an impossible proposition, leaving no remedy for the widespread violations of any victim's constitutional right to present.

Lastly, the State reasons that there is no ability to redress a violation of victims' rights after the guilty plea hearing unless a writ was sought during the trial court hearing. If the court

accepts that approach, then victims would be forever foreclosed from any form of redress for a violation of their right to present because sentencing typically occurs, as in this case, immediately after the presentation stage when the guilty plea is accepted.

IV. Review is necessary to safeguard constitutional rights

Victim is not seeking to veto a guilty plea; she is asking for an opportunity to present: she is seeking to be heard before the Court accepts a recommended plea. The issue at stake is the preservation and upholding of crime victims' constitutional right to present, not veto. This is contrary to Respondent Turner's claim that "our system would completely break down if victims were given a veto power- - including a right to appeal or intervene in an appeal -- any time a prosecutor agrees to allow defendant to plead guilty rather than go to trial." Respondent Turner's Initial Brief, p. 10.

In the hierarchy of our state laws, the South Carolina Constitution is supreme. Appellate review of the trial court's denial of a constitutional right is necessary to safeguard that right. South Carolina courts have frequently found that procedural protections must be afforded to safeguard these rights even when they are not explicitly provided by statute. For example, courts have held that procedural protections are necessary even when not explicitly set out, such as in the right to poll a jury — it is "not in itself a constitutional right but a procedural protection of the defendant's constitutional right to a unanimous verdict." *State v. Pare*, 253 Conn. 611, 755 A.2d 180, 188 (2000). *State v. Wright*, 432 S.C. 365, 369, 852 S.E.2d 468, 470 (Ct. App. 2020), reh'g denied (Jan. 13, 2021), cert. granted (June 28, 2022).

The impossibility of obtaining a writ is further heightened by the "four (4) day rule" which the circuit court mandated as the minimum for consideration. Again, motions move fast in circuit courts, and there is rarely four days between the denial of a motion to be heard and the

entry of the guilty plea.

The Respondents rely on dictum from *Reed v. Becka* that a "victim . . .possesses *no* rights in the appellate process. Nothing in our Constitution or statutes provides the 'victim' standing to appeal the trial court's order…" *Reed v. Becka*, 333 S.C. 676, 683, 511 S.E.2d 396, 400 (Ct. App. 1999). The decision in *Becka* was limited to the victim's rights to discuss the case with the Solicitor and to "be informed of any offers to plea bargain with the defendant." S.C.Code Ann. § 16–3–1530(C)(10), (12) (1985). Even so, *Becka* does not forestall the possibility that other rights could be affected in future cases; as to those, the court continued that, "This Court is desirous of protecting the rights of victims as mandated by the statutory law and by the South Carolina Constitution. Nothing short of full and complete enforceability of these rights should receive this Court's imprimatur." *Reed v. Becka,* 333 S.C. 676, 683, 511 S.E.2d 396, 400 (Ct. App. 1999). Further, *Becka* did not forestall the ability of a victim to seek appellate review through a writ of mandamus as sought in this case by Appellant Victim.

V. Victim was prejudiced by the trial court's refusal to allow her to present before the guilty plea was accepted

Respondent Turner argues that the court's decision to deny Victim the right to present at the guilty plea presentation stage did not cause prejudice because she was heard during the sentencing stage, and the length of probation granted to Respondent Turner was extended as a result. Initial Brief of Respondent Turner, p. 12. The trial court increased the period of sex offender conditions of probation from the two years recommended by the State to five years, after allowing the victims to address the court R. pp. 232, l. 6 – 233, l. 17. However, the legal error had already occurred when the trial court accepted the plea and denied Appellant Victim the right to present. The adjustment of the sentence after acceptance of the guilty plea is a

tainted outcome following that error.

At the point the guilty plea was accepted by the trial court, Victim was prejudiced because the State allowed the Respondent to enter a guilty plea to Assault and Battery - First Degree and not to Criminal Sexual Conduct - First Degree, as originally charged. Sentencing was then limited to the penalty range of the lesser offense to which Respondent entered the guilty plea. The prosecutor's recitation of facts to the trial court supported the charge of Criminal Sexual Conduct - First Degree, not a mere Assault and Battery - First Degree. The prosecutor relayed the following facts to the trial court:

> The victim reported that Turner pulled her behind a truck that was off to the side of the house, pushed her to the ground, pulled her shirt down and exposed her bra. Turner then pulled her pants and underwear off and forced himself sexually on the victim. R. p. 211, l. 16-21.

These facts support the elements of the crime of Criminal Sexual Conduct - First Degree. The inclusion of sex offender supervision and sex offender counseling in the offer reflect that this was a criminal sexual assault. The Assault and Battery - First Degree plea, under the facts of this case, was a fictitious plea. Victim's counsel stated at trial "Your Honor, these victims – and in one of the motions that I presented to Your Honor indicates some of the injuries that these victims sustained. Your Honor, this was not an assault and battery." R. p. 215, l. 20-24. The trial judge himself acknowledged ". . . [a]nd the legislature, and I'm not faulting the legislature, I'm just simply making the observation, have determined that assault and battery charges, and I think all of them with the exception of assault and battery of a high and aggravated nature are nonviolent. I don't understand that. Never have." R. p. 229, l. 1-7.

After the trial court accepted the fictitious plea, the court was restricted in terms of changes that could be made to the plea. If the court had allowed Appellant Victim to present before accepting the guilty plea, the court may have learned further information warranting the

court's rejection of the guilty plea. Victim was denied the opportunity to present her position to the court and to open the possibility that the guilty plea should have been rejected or modified. The denial harmed Victim by depriving her of other potential outcomes had the trial court rejected the fictitious plea. If the guilty plea had been rejected following Appellant being heard, there would have been numerous other potential outcomes, such as an appropriate sentence for Criminal Sexual Conduct - First Degree.

Contrary to Respondent's claim that there was no prejudice to Victim because the trial judge increased Respondent's term of probation from two years to five years after hearing from the Victim's representative, Victim was prejudiced by the reduction of the crime to Assault and Battery - First Degree, allowing for a sentence of probation.

Appellant Victim was prejudiced because these outcomes were foreclosed when the trial court accepted the guilty plea without giving Appellant the opportunity to present.

Other crime victims in South Carolina are likely to be prejudiced and have their constitutional rights violated if the issues of proper form, whether by appeal or writ, and timing to seek review, are not addressed by this Court.

CONCLUSION

Based on the above arguments and Appellant's Initial Brief, this Court should find that the trial court erred by not allowing victims in South Carolina to present before a guilty plea is accepted or rejected.

Respectfully submitted:

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CERTIFICATE OF COUNSEL

The undersigned certified that this Final Reply Brief complies with Rule 211(b), SCACR.

March 10, 2023.

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PROOF OF SERVICE

I certify that I have served the Reply Brief of Appellant by emailing a copy of it on March 10, 2023, to the South Carolina Court of Appeals at ctappfilings@sccourts.org; to Deputy Solicitor for Aiken County, David Miller at DMiller@aikencountysc.gov; to Alan Wilson of the S.C. Attorney General's Office at awilson@scag.gov; to William Blitch of the S.C. Attorney General's Office at wblitch@scag.gov; to Robert Dudek of the S.C. Commission on Indigent Defense at rdudek@sccid.sc.gov; and to and by emailing a copy of it on March 10, 2023, to Respondent Bowen Gray Turner's attorney of record, Bradley Hutto at cbhutto@williamsattys.com.

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