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STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

S.C. SUPREME COURT

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Certiorari to Lexington County

Honorable R. Lawton McIntosh, Circuit Court Judge

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EMONTE A. BROOKS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2022-000605

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JOHNSON PETITION FOR WRIT OF CERTIORARI

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Taylor D Gilliam  
Appellate Defender

South Carolina Commission on Indigent Defense  
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ATTORNEY FOR PETITIONER

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**ISSUE PRESENTED**

Whether the PCR court erred in denying relief, where Petitioner never knowingly and voluntarily waived his right to a direct appeal?

## STATEMENT

In August 2016, a Lexington County grand jury indicted Petitioner on three different charges: discharging a firearm into a dwelling, attempted armed robbery, and attempted murder. App. 233. Petitioner pled guilty before the Honorable Donald B. Hocker on October 30, 2017. App. 33. Aimee Zmroczek represented Petitioner; Kate Usry and L. McGill Bell, Jr. appeared on behalf of the state.

The facts as alleged by the state were that on January 27, 2016, Petitioner and two co-defendants entered a home in West Columbia with the intent to rob the homeowners. App. 39 l. 16 – App. 46 l. 25. The state averred that Petitioner fired a handgun while in the home. Id.

Judge Hocker found a factual basis for the plea. App. 51 l. 22 – 23. He concluded that Petitioner pled freely, voluntarily, and intelligently. App. 51 ll. 23 – 25.

Judge Hocker sentenced Petitioner to eighteen years on the attempted murder and attempted armed robbery charges. App. 58 ll. 22 – 24. He received an eight-year sentence on the discharge offense. App. 58 ll. 23 – 25. The sentences were crafted to run concurrently. Following a motion to reconsider filed by counsel, Judge Hocker reduced Petitioner's two eighteen-year sentences to fifteen years. App. 62.

Petitioner filed an application for post-conviction relief on July 16, 2018. App. 64. It contained allegations of ineffective assistance of counsel. App. 66; App. 71 – 90. On November 13, 2018, the state made its Return. App. 116.

An evidentiary hearing was held before the Honorable R. Lawton McIntosh on December 13, 2021. App. 130. Ashley McMahan represented Petitioner; Lillian Meadows appeared on behalf of the state. Petitioner and plea counsel testified at the hearing.

Judge McIntosh took the matter under advisement. App. 175 ll. 19 – 21. A forty-seven page Order of Dismissal was filed on April 29, 2022. App. 184.

This petition follows.

## ARGUMENT

**The PCR court erred in denying relief, where Petitioner never knowingly and voluntarily waived his right to a direct appeal.**

### Relevant facts

Defense counsel was appointed to represent Petitioner; she was his second attorney. App. 138 ll. 20 – 24. He testified at the PCR evidentiary hearing that he met with counsel five or six times. App. 139 ll. 5 – 6. During these meetings, the two never spoke about the discovery in Petitioner’s case. App. 139 ll. 11 – 16.

Regarding the issue raised herein, Petitioner testified that he told counsel he wanted to appeal the plea. App. 148 ll. 1 – 3. He claimed it “just never happened.” App. 148 ll. 4 – 11.

Counsel testified she was appointed this case as a conflict case from the public defender’s office. App. 155 ll. 8 – 11. When questioned whether Petitioner asked her to file an appeal, counsel recalled filing a motion to reconsider. App. 167 ll. 1 – 6. She recalled discussing an appeal with Petitioner. Her exact testimony was that “I’m pretty sure he said, no, I don’t want to file an appeal, I just want to go ahead and PCR you.” App. 167 ll. 10 – 11.

In the Order of Dismissal, the PCR court found Petitioner “knowingly and intelligently waived his right to appeal based on the credible testimony of Counsel Zmroczek.” App. 216 – 217. The PCR court believed defense counsel’s testimony that Petitioner “told her he wanted to skip the direct appeal and file an application for post-conviction relief.” App. 217. There were no contemporaneous records or written correspondence to confirm this testimony.

### Discussion

This petition has been prepared in accordance with the South Carolina Appellate Court Rules. According to Rule 243(i)(2), SCACR:

When the post-conviction relief judge has found that the applicant is not entitled to a White v. State review, the petition shall raise the question of waiver of the right to a direct appeal along with all other post-conviction relief issues petitioner seeks to have reviewed. The petition shall also contain a "Statement of Issues on Appeal" listing the issues to be raised if a White v. State review is granted; this statement of issues shall comply with the requirements of Rule 208(b)(1)(B). Briefing of the direct appeal issues will not be allowed unless certiorari is granted on the issue.

“The appropriate scope of review of this Court is that any evidence of probative value is sufficient to uphold the PCR judge’s findings.” Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). When a client is convicted and sentenced, trial counsel has a duty to make certain the client is fully aware of the right to appeal. In re Anonymous Member of the Bar, 303 S.C. 306, 400 S.E.2d 483 (1991); White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974). “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 (1967).” Smith v. State, 309 S.C. 413, 424 S.E.2d 480 (1992).

“[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). In White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974) this Court held that a defendant must knowingly and intelligently waive the right to appeal from his conviction and sentence. Since then, this Court has announced two distinct standards for evaluating ineffective assistance of counsel claims for failure to file an appeal. For convictions following a trial this Court has held that “[i]n 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 (1967).” Turner v. State, 380 S.C. 223, 224, 670 S.E.2d 373, 374 (2008). For guilty pleas, this Court has held that “absent extraordinary

circumstances, there is no constitutional requirement that a defendant be informed of the right to a direct appeal from a guilty plea.” Weathers v. State, 319 S.C. 59, 61, 459 S.E.2d 838, 839 (1995).

“The bare assertion that a defendant was not advised of appellate rights is insufficient to grant relief.” Weathers, 319 S.C. at 61, 459 S.E.2d at 839. In Turner v. State, 380 S.C. 223, 224; 670 S.E.2d 373, 374 (2008) this Court clarified that the standards articulated in Roe v. Flores-Ortega, supra, were examples of extraordinary circumstances that triggered counsel’s duty to consult with a defendant about his direct appeal rights. In Roe v. Flores-Ortega, the United States Supreme Court defined “consult” to mean that counsel advised “the defendant about the advantages and disadvantages of taking an appeal” and made a “reasonable effort to discover the defendant’s wishes.” The Court noted that if counsel had not consulted with the defendant at all then “the court must ask whether that failure itself constitutes deficient performance.” Roe v. Flores-Ortega, 528 U.S. at 471.

“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].” Id. (quoting Turner v. State, 380 S.C. 223, 224, 670 S.E.2d 373, 374 (2008)).

In Simuel v. State, 390 S.C. 267, 271, 701 S.E.2d 738, 740 (2010), this Court found the PCR court erred in denying Simuel a belated appeal pursuant. At the PCR hearing counsel testified that he “normally discusses an appeal with defendants after trials but was not sure whether he did so with Petitioner.” Id. at 270, 701 S.E.2d at 739. He further testified that Simuel never asked him to file an appeal. Id. at 269, 701 S.E.2d at 739. The PCR court found

counsel's testimony credible and Simuel's testimony not credible. The court ruled that based on the testimony of counsel, Simuel was not entitled to a belated appeal because he did not request counsel file an appeal on his behalf. Id.

In reversing the decision of the PCR court and granting Simuel a belated appeal, this Court explained: "To waive a direct appeal, a defendant must make a knowing and intelligent decision not to pursue the appeal." Id. (internal quotations omitted) (quoting Sheppard v. State<sup>1</sup>, 357 S.C. 646, 651, 594 S.E.2d 462, 465 (2004)). "Even considering the PCR judge's credibility findings, there is no *probative evidence* that: (1) Petitioner knowingly waived his right to a direct appeal, and (2) [trial counsel] made certain Petitioner was fully aware of his right to appeal." Id. at 271, 701 S.E.2d 739-40 (emphasis added).

Counsel's assertion that she was "pretty sure" that she discussed with Petitioner the possibility of waiving his direct appeal, when he indicated that he wanted to pursue it, is insufficient to establish a knowing and voluntary waiver. Petitioner is entitled to belated appellate review.

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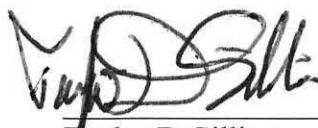
<sup>1</sup> Overruled on other grounds by State v. Burdette, 427 S.C. 490, 832 S.E.2d 575 (2019).

**STATEMENT OF ISSUE ON APPEAL**

Whether the trial judge in sentencing Petitioner too harshly, therefore qualifying as an arbitrary and capricious abuse of discretion, where Petitioner's co-defendants were given lighter sentences?

**CONCLUSION**

Based on the foregoing, Petitioner respectfully requests this Court grant certiorari and allow further briefing on the direct appeal issue.



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Taylor D Gilliam  
Appellate Defender

ATTORNEY FOR PETITIONER

This 24th day of March, 2023.

STATE OF SOUTH CAROLINA

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—————

Counsel for Emonte Antonio Brooks states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
2. He has reviewed the record of petitioner's post-conviction relief hearing before Judge R. Lawton McIntosh, which was held on December 13, 2021, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed an arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve him as counsel for Emonte Antonio Brooks.

Respectfully Submitted,



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Taylor D Gilliam  
Appellate Defender

ATTORNEY FOR PETITIONER

This 24th day of March, 2023.

**CERTIFICATE OF COUNSEL**

The undersigned certifies that to the best of his ability this Johnson Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."



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South Carolina Commission on Indigent  
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ATTORNEY FOR PETITIONER

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CERTIFICATE OF SERVICE

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Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Johnson Petition for Writ of Certiorari and Appendix in the above referenced case have been served upon Taylor Z. Smith, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and on Emonte Antonio Brooks, #364670, at Kershaw Correctional Institution, 4848 Gold Mine Highway, Kershaw, SC 29067-8069, this 24th day of March, 2023.



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Taylor D Gilliam  
Appellate Defender

ATTORNEY FOR PETITIONER