

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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**May 01 2023**

S.C. SUPREME COURT

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Certiorari to Pickens County

Honorable Eugene C. Griffith, Circuit Court Judge

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RICHARD ANDREW HAGINS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2022-001317

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

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## ISSUE PRESENTED

### I.

Did the PCR court err 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?

### II.

Did the PCR court err in finding that plea counsel provided effective representation where counsel did not independently investigate the case or interview witnesses prior to advising Petitioner to plead guilty rendering Petitioner's guilty plea unknowing and involuntary?

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

## STATEMENT OF THE CASE

On August 26, 2016, Petitioner confronted Jeff Chandler over \$190.00 in late rent that Chandler owed him. Chandler, along with his girlfriend, rented a room<sup>2</sup> from Petitioner. The two men argued over the course of the day with Chandler ultimately refusing to pay the owed rent. Petitioner informed Chandler he would have to leave the home if he was not going to pay the rent. The argument eventually turned into a physical fight between the two men. During the fight, Chandler's girlfriend witnessed Petitioner stab Chandler multiple times. By the time law enforcement arrived on scene, Chandler had succumbed to his injuries. In total, there were ten stab wounds, six to Chandler's front and four to his back. One stab wound punctured Chandler's heart and was the cause of death. App. 7, l. 5-App. 8, l. 20.

Petitioner was indicted during the January 2018 term of the Pickens County grand jury for one count of murder and one count of possession of a weapon during the commission of a violent crime. App. 22-25. On December 19, 2018, Petitioner appeared before the Honorable Letitia H. Verdin to enter a guilty plea to the lesser included offense of voluntary manslaughter. App. 1; App. 4, ll. 1-5. The State was represented by Shannon Odom. Petitioner was represented by John DeJong. App. 1. The plea court engaged in a plea colloquy during which Petitioner was advised of the rights he was waiving, the potential sentence the State was recommending, and that he had ten days to appeal his guilty plea. App. 4, ll. 6-9; App. 5, l. 1-App. 6, l. 21. The plea court also confirmed that Petitioner was satisfied with the services Counsel DeJong had provided, that he had enough time to speak with Counsel DeJong about the case, that he was not under the influence of any drugs or alcohol, and that he had not been forced or coerced to plead guilty. App. 4, ll. 11-25.

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<sup>2</sup> Another male also rented a room from Petitioner and was at the home the day of the incident. App. 7, ll. 17-19.

Petitioner was sentenced to twenty-five years imprisonment with credit for 846 days served. App. 20, ll. 4-5. No direct appeal was taken from the guilty plea. On January 22, 2020, Petitioner filed a *pro se* application for post-conviction relief. App. 27-35. The State made its return and partial motion to dismiss on June 17, 2020, arguing that all of Petitioner's claims other than his claim for belated appellate review, should be dismissed as untimely. App. 36-43. An evidentiary hearing was convened via WebEx before the Honorable Eugene C. Griffith, Jr., on March 22, 2022. Petitioner was represented by PCR Counsel Don A. Thompson. The State was represented by Taylor Smith. App. 44. Petitioner, plea counsel DeJong, and Solicitor Odom testified at the hearing. App. 45.

At the start of the hearing, the State moved to dismiss Petitioner's application as untimely. In response, Counsel Thompson conceded that Petitioner's PCR application was filed approximately one month past the statute of limitations and that he had informed Petitioner he did not think there was a defense to the statute of limitations. App. 46, l. 13-App. 47, l. 14. Petitioner stated that he had not filed his PCR application because Counsel DeJong had informed him that he would appeal his guilty plea and consequently Petitioner believed his appeal was pending. App. 47, l. 23-App. 48, l. 5. Counsel Thompson argued that the PCR court should hear Petitioner's claim for a belated appeal because the failure to file a direct appeal was not barred by the statute of limitations. Additionally, Counsel Thompson argued that Petitioner's belief his direct appeal was pending could be a reason to toll the statute of limitations. App. 48, ll. 8-25.

The PCR court took testimony from Petitioner regarding his reasons for filing his PCR application late. Petitioner testified that whenever he had received a sentence over fifteen years that a direct appeal had been filed and that Counsel DeJong had told him he would file a direct appeal if Petitioner received a sentence of more than fifteen years. App. 50, ll. 5-18. Petitioner

expected Counsel DeJong to file an appeal. App. 50, ll. 19-20. After a year had passed without information, Petitioner researched PCR actions in the law library and filed his *pro se* application. However, Petitioner always believed that his direct appeal had been filed and was pending. App. 51, ll. 1-8. On cross-examination, Petitioner again testified that Counsel DeJong had promised him he would file an appeal. App. 53, ll. 18-20. The State conceded that, for the purposes of the motion, the PCR court was required to take Petitioner's statements as true and that his testimony was sufficient to defeat a motion for summary dismissal. App. 54, l. 4-App. 55, l. 25. The PCR court denied the motion to dismiss and allowed the evidentiary hearing to move forward. App. 55, l. 16- App. 56, l. 11.

Petitioner testified that Counsel DeJong only met with him a few times and advised him not to talk about his case in the jail because there were listening devices and informants. When Petitioner went to Counsel DeJong's office to review the discovery, he was only shown a single video of himself in the back of a police car. App. 59, ll. 3-17. Petitioner testified that in retrospect he did not really understand his conversations with Counsel DeJong about the case and wondered why counsel did not ask him any questions about the incident. He also testified that he wanted Counsel DeJong to interview the two witnesses that were at the house the day of the incident but that he never did. App. 60, ll. 7-25. Petitioner stated that he made the decision to plead guilty on the recommendation of Counsel DeJong. He reiterated that he had requested Counsel DeJong file a direct appeal because he had received a sentence of more than fifteen years imprisonment. App. 64, l. 25-App. 65, l. 13.

On cross-examination, Petitioner testified that he filed his PCR application because although he believed his direct appeal was pending, someone had told him something about a one year statute of limitations. App. 65, l. 20-App. 66, l. 2. He stated that he did not remember a

lot of what happened during his plea hearing but remembered Counsel DeJong stating he would not get more than a fifteen-year sentence. App. 66, l. 18-App. 67, l. 23. He testified that he thought the plea court advised him he had ten days to appeal but stated that it was Counsel DeJong's responsibility to file the appeal. App. 69, ll. 4-13.

Counsel DeJong testified that he did not have a record of how many times he met with Petitioner, but he knew he had met with him twice in his office and other times in person at the jail. App. 73, ll. 16-24. The meetings would last anywhere from fifteen minutes to two hours. App. 76, ll. 5-9. He stated that when Petitioner was brought to his office it was to review the videos, 911 call, and other recordings in the case. App. 74, ll. 3-9. Counsel DeJong explained that he told Petitioner not to speak about his case on the phone or to others in the jail but that he did not inform him there were listening devices in the jail. App. 74, l. 16-App. 75, l. 9. Counsel DeJong admitted that he did not do any independent investigation into the case because it was not a case that was scheduled for trial. He testified he did not see a need to speak with the witnesses because he had their written statements. App. 77, ll. 13-23. Counsel DeJong testified that they discussed Petitioner's rights and that Petitioner indicated he did not want to risk going to trial and potentially having to serve a life sentence. App. 78, ll. 1-9.

Counsel DeJong could not recall if he spoke with Petitioner about filing a direct appeal. However, he admitted that he did not routinely speak to clients about their right to appeal from a guilty plea. He did not remember any conversations with Petitioner about filing a direct appeal and did not recall Petitioner asking him to file an appeal. He also stated that he would never make the filing of an appeal contingent on the length of a sentence. App. 83, ll. 3-20. Counsel DeJong denied Petitioner requested that he file an appeal. He confirmed that he would have filed

an appeal had Petitioner requested one but that he did not have any reason to believe that a rational defendant in Petitioner's case would want to appeal. App. 84, ll. 2-15.

On cross-examination, Counsel DeJong again admitted that he did not speak with his clients about appealing guilty pleas and stated he probably did not speak with Petitioner about his right to appeal. He clarified that if he had thought there was an appealable issue arising from the plea, he would have filed an appeal. However, he did not see anything from the plea hearing that would have been appealable. App. 87, ll. 10-24. He maintained that Petitioner did not request that he file an appeal and that he did not tell Petitioner he would file an appeal. App. 87, l. 25-App. 88, l. 7. During a brief re-direct examination, Counsel DeJong affirmed that it was his practice to file an appeal if a client requested one. App. 88, ll. 22-25.

Solicitor Odom testified solely about the plea negotiations in the case. She admitted that Counsel DeJong was able to negotiate a concession from the standard circuit practice wherein she would recommend twenty-five years imprisonment, but he could argue for less time. App. 90, l. 25-App. 92, l. 7. She stated she had no knowledge of any private communications between Petitioner and Counsel DeJong. App. 92, ll. 14-17.

The PCR court took the matter under advisement. App. 92, ll. 21-24. An order of dismissal was filed on September 9, 2022. App. 95-114. The PCR court found that Petitioner was not entitled to a belated appeal. The court ruled that Petitioner had not proven that he did not knowingly and voluntarily waive his right to a direct appeal because he has failed to prove 1) that plea counsel was required to inform him of his right to appeal, 2) that plea counsel actually informed him of his right to appeal, 3) that he gave any indication to plea counsel that he wanted to appeal. App. 98-101. The PCR court ruled that Counsel DeJong had performed adequate pre-trial investigation. The court stated that counsel had done everything Petitioner requested of him

or if he did not, he had a justifiable reason for failing to do so. Further, the court held that Petitioner had not proven he would have gone to trial but for Counsel DeJong's failure to investigate and prepare because Petitioner did not want to risk receiving a life sentence. App. 101-108. Additionally, the PCR court ruled in a footnote that all of Petitioner's claims, except for his claim for belated appellate review, were barred as a matter of law because the application was filed outside of the statute of limitations. App. 101.

## ARGUMENT

### I.

The PCR court erred in denying Petitioner a belated appeal pursuant to *White v. State* where the evidence showed Petitioner never knowingly and voluntarily waived his right to a direct appeal.

“[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 “all defendants who have been found guilty of a crime have a right to be informed of the possibility of appeal and the method for taking an appeal.” *Frasier v. State*, 306 S.C. 158, 161, 410 S.E.2d 572, 574 (1991). 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). “However, when a criminal defendant requests an appeal, but counsel fails to file an appeal, counsel is deemed deficient. In such a case, the defendant is entitled to a belated appeal without showing the appeal would likely have had merit.” *Fleming v. State*, 399 S.C. 380, 381, 731 S.E.2d 889 (2012) *citing* *Roe v. Flores–Ortega*, 528 U.S. 470 (2000); *Rodriquez v. United States*, 395 U.S. 327 (1969).

There is no evidence in the record to support a finding that Petitioner made a knowing and intelligent decision not to pursue an appeal. The PCR court found credible Counsel DeJong's testimony that Petitioner did not ask for any appeal and that he had no reason to think Petitioner wanted to appeal. However, there must still be probative evidence of a knowing waiver, even considering a PCR judge's credibility findings. See *Simuel v. State*, 390 S.C. 267, 271, 701 S.E.2d 738, 739-740 (2010).

Petitioner testified that he told Counsel DeJong to file an appeal and that Counsel DeJong promised to file an appeal if the sentence was over fifteen years. Petitioner's testimony was unwavering and consistent. Counsel DeJong could only testify that he probably did not advise Petitioner about his right to appeal and could not recall conversations about Petitioner's appellate rights. Petitioner was informed of his right to appeal by the plea court and there is nothing in the record to indicate he knowingly and intelligently waived that right, despite Counsel DeJong's failure to discuss his appellate rights.

Counsel DeJong testified that he did not think a reasonable defendant in Petitioner's case would want to file an appeal of his guilty plea and sentence. However, both Counsel DeJong and Petitioner testified that Petitioner pled guilty to avoid a life sentence. As the plea judge noted, a twenty-five-year sentence at Petitioner's age all but guarantees that he would never be released from prison. It logically follows then that Petitioner would want to appeal the result of an effective life sentence when his sole motivation for pleading guilty was to be able to eventually be released from prison. Counsel DeJong's testimony is refuted by the record and Petitioner should be granted a belated appeal.

## II.

The PCR court erred in finding that plea counsel provided effective representation where counsel did not independently investigate the case or interview witnesses prior to advising Petitioner to plead guilty rendering Petitioner's guilty plea unknowing and involuntary.

“A criminal defense attorney has a duty to investigate, but this duty is limited to reasonable investigation.” *Thompson v. Wainwright*, 787 F.2d 1447, 1450 (11th Cir.1986); *see also Strickland v. Washington*, 466 U.S. 668, 691 (1984). When evaluating the reasonableness of counsel's conduct, “the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case.” *Strickland v. Washington*, 466 U.S. at 690. Therefore, “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.” *Ard v. Catoe*, 372 S.C. 318, 331–32, 642 S.E.2d 590, 597 (2007) (emphasis in original).

“The longstanding test for determining the validity of a guilty plea is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.” *Hill v. Lockhart*, 474 U.S. 52, 56 (1985). An applicant may attack the voluntary, knowing, and intelligent character of a guilty plea entered on the advice of counsel by demonstrating that counsel's representation was below an objective standard of reasonableness. *Porter v. State*, 368 S.C. 378, 383-84, 629 S.E.2d 353, 356 (2006); *Roscoe v. State*, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001). The “prejudice,” requirement focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process. *Hill v. Lockhart*, 474 U.S. at 59 (1985). In other words, the applicant must prove prejudice by showing that, but for counsel's inadequacy, there is a reasonable probability he would not have pled guilty

and, instead, would have insisted on going to trial. *Suber v. State*, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007).

The failure to investigate can support the contention that a defendant's plea was involuntary. In *Hill, supra*, the United States Supreme Court addressed the analysis to be used in addressing such ineffective assistance claims. The Court explained,

“Where the alleged error is failure to investigate or discover potentially exculpatory evidence, the determination whether the error “prejudiced” the defendant by causing him to plead guilty rather than to go to trial will depend on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea. This assessment, in turn, will depend in large part on a prediction whether the evidence likely would have changed the outcome of a trial.”

*Hill* at 59.

Counsel DeJong admitted that he did not do any independent investigation into the case and that he did not interview the witnesses simply because the case was not in a trial posture. However, nothing relieves counsel of the duty to investigate simply because the case will resolve in a guilty plea. In fact, counsel must first conduct a reasonable investigation into the facts and circumstances of the case to determine whether to recommend that a defendant plead guilty or proceed to trial.

Petitioner did not testify as to what evidence could have been discovered had Counsel DeJong investigated the cases. Nor did Petitioner state he would have proceeded to trial had Counsel DeJong performed a reasonable investigation into the cases. However, Petitioner could not make such statements precisely because he never had the benefit of effective counsel who investigated the cases, reviewed discovery with him, or explained any weaknesses or challenges to the evidence that could be brought. Petitioner was merely told he could plead guilty to avoid a life sentence or go to trial and possibly receive a life sentence.

His choice to enter a plea was not a “voluntary and intelligent choice among the alternative courses of action open”<sup>3</sup> to him because those alternative courses of action were never investigated nor discussed with him. While Petitioner cannot point to specific evidence or challenges that could have been brought, he can show that his decision to plead was not a voluntary and intelligent choice among alternative courses of action as no alternative course of action was ever explored or explained by counsel. This was deficient performance and as such renders Petitioner’s guilty plea unknowing and involuntary.

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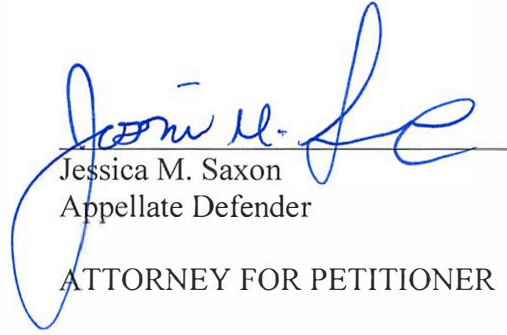
<sup>3</sup> *Hill v. Lockhart*, 474 U.S. 52, 56 (1985)

**STATEMENT OF ISSUE ON APPEAL**

Did the plea judge abuse her broad discretion in sentencing Petitioner to twenty-five-years imprisonment where the court acknowledge that such a sentence would effectively guarantee that Petitioner was never released from prison and where Petitioner only pled guilty to avoid the imposition of a life sentence?

**CONCLUSION**

Based on the foregoing arguments, Petitioner respectfully requests that this Court grant the writ of certiorari to allow full briefing on these issues.



Jessica M. Saxon  
Appellate Defender  
ATTORNEY FOR PETITIONER

This 1st day of May, 2023.

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Counsel for Richard Andrew Hagins states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent petitioner.
2. She has reviewed the record of petitioner's post-conviction relief hearing before Judge Eugene C. Griffith, which was held on March 22, 2022, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She 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 her as counsel for Richard Andrew Hagins.

Respectfully Submitted,



\_\_\_\_\_  
Jessica M. Saxon  
Appellate Defender

ATTORNEY FOR PETITIONER

This 1st day of May, 2023.

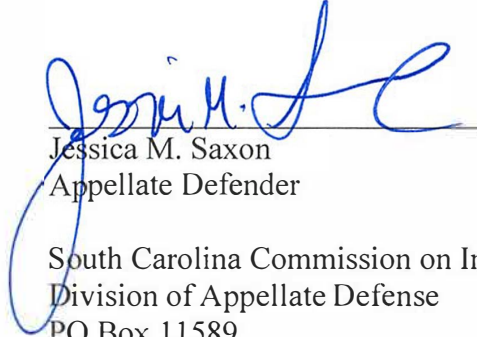
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**May 01 2023**

**CERTIFICATE OF COUNSEL**

**S.C. SUPREME COURT**

The undersigned certifies that to the best of her 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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ATTORNEY FOR PETITIONER

This 1st day of May, 2023.