

**RECEIVED**

**Oct 03 2023**

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

---

S.C. SUPREME COURT

Certiorari to Spartanburg County

Honorable William A. McKinnon, Circuit Court Judge

---

BRIAN FOSTER,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2023-000724

---

PETITION FOR WRIT OF CERTIORARI

---

SARAH E. SHIPE  
Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589  
(803) 734-1330

ATTORNEY FOR PETITIONER

**INDEX**

INDEX ..... i

ISSUE PRESENTED ..... 1

STATEMENT ..... 2

ARGUMENT

The PCR court correctly granted petitioner a belated appeal pursuant to *White v. State*, 263 S.C. 110, 108 S.E.2d 35 (1974), where the undisputed evidence showed petitioner never knowingly, voluntarily, and intelligently waived his right to a direct appeal...... 4

CONCLUSION..... 6

**ISSUE PRESENTED**

Whether the PCR court correctly granted petitioner a belated appeal pursuant to *White v. State*, 263 S.C. 110, 108 S.E.2d 35 (1974), where the undisputed evidence showed petitioner never knowingly, voluntarily, and intelligently waived his right to a direct appeal?

## STATEMENT

On May 14, 2018, a Spartanburg County grand jury indicted petitioner for murder, possession of a firearm or ammunition by a person convicted of a violent crime, three counts of attempted murder, and four counts of possession of a weapon during a violent crime. App. 13, l. 25-15, l. 12; 667-74. Petitioner's case was called to trial before the Honorable J. Derham Cole and a jury on April 8, 2019. App. 1. Petitioner was represented by Beverly Jones and the state was represented by assistant solicitors, Spenser Smith and Candace Clark. App. 1.

The jury convicted petitioner of murder, attempted murder, two counts of possession of a weapon during the commission of a violent crime, and possession of a firearm or ammunition by a person convicted of a violent crime. App. 550, l. 9-551, l. 1. The jury found petitioner was not guilty of two counts of attempted murder and two counts of possession of a weapon during a violent crime. App. 550, l. 9-551, l. 1. Judge Cole sentenced petitioner to life imprisonment for murder, thirty years' imprisonment for attempted murder, and five years' imprisonment for both gun charges. App. 572-73.

Defense counsel filed an untimely notice of appeal on April 23, 2019, and the Court of Appeals dismissed the appeal. App. 575-77. On June 26, 2019, counsel filed a motion to reinstate the appeal, which was denied by written order. App. 578-79. The remittitur was issued October 3, 2019. App. 580.

Thereafter, petitioner filed an application for PCR. App. 581-86. On June 7, 2022, an evidentiary hearing was held before the Honorable William A. McKinnon. App. 594-649. Petitioner was represented by Rodney Richey and the state was represented by Chelsey Marto. App. 594.

On March 22, 2023, Judge McKinnon signed an order granting belated appellate review pursuant to *White v. State*, and denied PCR as to all other claims. App. 652-65. Judge McKinnon found petitioner was entitled to belated review of his conviction where counsel assumed responsibility for her failure to timely file and serve the notice of appeal. App. 664. Judge McKinnon found this failure denied petitioner an opportunity to seek appellate review of his convictions and that he had not knowingly, voluntarily, and intelligently waived that right. App. 664.

Petitioner now files this petition simultaneously with a brief addressing the direct appeal issue, as required by Rule 243, SCACR.

## ARGUMENT

The PCR court correctly granted petitioner a belated appeal pursuant to *White v. State*, 263 S.C. 110, 108 S.E.2d 35 (1974), where the undisputed evidence showed petitioner never knowingly, voluntarily, and intelligently waived his right to a direct appeal.

### **Relevant facts**

Petitioner testified during the evidentiary hearing that he wanted to appeal his convictions and sentences but his appeal was dismissed because defense counsel missed the deadline. App. 610, l. 24-611, l. 5. Petitioner asked the PCR court to grant belated review of his case. App. 611, ll. 6-8; 615, l. 25-616, l. 1.

Defense counsel testified that she planned to appeal petitioner's convictions and sentences. App. 625, ll. 11-14. Counsel admitted she was "totally responsible" for the failure to timely file petitioner's appeal due to a miscalculation. App. 579; 625, ll. 16-19. She tried to rectify the error but it did not work. App. 625, ll. 19-24. Counsel testified that after that she contacted petitioner and explained he was entitled to a delayed appeal and that the error was her fault. App. 626, ll. 1-5.

At the close of testimony, PCR counsel argued petitioner was entitled to belated review based on counsel's testimony. 644, ll. 21-25. Regarding the *White* issue, attorney for the state conceded petitioner should have a belated review where counsel admittedly filed an untimely appeal. App. 648, ll. 5-14. The court ruled on the record it would grant relief pursuant to *White* and deny all other allegations raised. App. 649, ll. 20-21.

### **Discussion**

"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); *Clark*

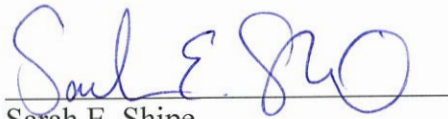
*v. State*, 396 S.C. 164, 719 S.E.2d 708 (2011). “In the absence of an intelligent waiver by the defendant, counsel must either initiate an appeal or comply with the procedure in *Anders v. California*, 386 U.S. 738 (1967).” *Simuel* at 270.

“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).

Judge McKinnon’s ruling is supported by the testimony from the evidentiary hearing. As Judge McKinnon found, there was no evidence of a knowing, intelligent, and voluntary waiver of petitioner’s right to an appeal. The evidence supports Judge McKinnon’s conclusion that petitioner is entitled to belated review of his conviction pursuant to *White*.

**CONCLUSION**

Petitioner respectfully requests this Court affirm the PCR court's decision that he is entitled to a belated direct appeal. Petitioner likewise requests that this Court grant his petition for writ of certiorari and allow full briefing on this issue, reverse the charges against him, and remand the case for a new trial.

  
Sarah E. Shipe  
Appellate Defender

ATTORNEY FOR PETITIONER

This 3rd day of October, 2023.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

---

Certiorari to Spartanburg County

Honorable William A. McKinnon, Circuit Court Judge

---

BRIAN FOSTER,

PETITIONER

v.

STATE OF SOUTH CAROLINA,

RESPONDENT

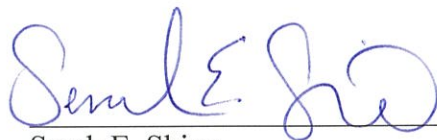
APPELLATE CASE NO. 2023-000724

---

CERTIFICATE OF SERVICE

---

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Petition for Writ of Certiorari and Appendix in the above-referenced case has been served upon Suzanne Shaw, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), this 3rd day of October, 2023.



Sarah E. Shipe  
Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589  
(803) 734-1330

ATTORNEY FOR PETITIONER

**RECEIVED**

**Oct 03 2023**

**S.C. SUPREME COURT**