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**Jan 18 2024**

**S.C. SUPREME COURT**

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Jasper County

Honorable Roger L. Couch, Circuit Court Judge

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BREON ALEXANDRE,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2022-001654

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PETITION FOR WRIT OF CERTIORARI PURSUANT TO AUSTIN V. STATE

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1.

The PCR court properly granted Petitioner a belated appeal from the denial of his application for post-conviction relief (hearing date August 27, 2013) pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991), where Petitioner wanted to appeal but PCR counsel did not timely serve notice of intent to appeal, and where the State agreed Petitioner was entitled to belated appellate review .....6

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The PCR court incorrectly ruled Petitioner was not entitled to a belated appeal from his guilty plea (hearing date April 12, 2010) pursuant to *White v. State*, 236 S.C. 110, 108 S.E.2d 35 (1974), where Petitioner wanted to appeal but plea counsel did not serve notice of intent to appeal.....7

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## ISSUES PRESENTED

1.

Whether the PCR court properly granted Petitioner a belated appeal from the denial of his application for post-conviction relief (hearing date August 27, 2013) pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991), where Petitioner wanted to appeal but PCR counsel did not timely serve notice of intent to appeal, and where the State agreed Petitioner was entitled to belated appellate review?

2.

Whether the PCR court incorrectly ruled Petitioner was not entitled to a belated appeal from his guilty plea (hearing date April 12, 2010) pursuant to *White v. State*, 236 S.C. 110, 108 S.E.2d 35 (1974), where Petitioner wanted to appeal but plea counsel did not serve notice of intent to appeal?

## STATEMENT

### ***Procedural history***

On April 12, 2010, Petitioner pleaded guilty to murder, armed robbery, and first-degree burglary before the Honorable J. Ernest Kinard. He was sentenced to concurrent terms of imprisonment of forty years, thirty years, and forty years, respectively. Petitioner was represented by Stephen Plexico. Duffie Stone prosecuted the case.<sup>1</sup>

No direct appeal was taken, and on March 29, 2012, Petitioner filed his first application for post-conviction relief (PCR). The State made its return and partial motion to dismiss on December 28, 2012. A PCR hearing was held on August 27, 2013, before the Honorable Deadra L. Jefferson. Gerald Kelly represented Petitioner. Ashleigh Wilson represented the State. On October 31, 2013, the PCR court issued an order of dismissal. However, PCR counsel did not timely serve notice of intent to appeal the order of dismissal, and Petitioner's pro se attempt to do so was found to be deficient—this Court dismissed the appeal. The remittitur was issued on January 22, 2014.<sup>2</sup>

On September 10, 2014, Petitioner filed a second PCR application. The State made its return and motion to dismiss all claims except *Austin* review on August 19, 2015. On October 20, 2015, a hearing was convened on the matter before the Honorable Roger L. Couch. James Falk represented Petitioner. Alicia Olive and J. Rutledge Johnson represented the State. The State agreed Petitioner was entitled to *Austin* review, and the court ruled Petitioner was so entitled. However, Judge Couch retired before an order was signed.<sup>3</sup>

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<sup>1</sup> App. 1; App. 3, ll. 9-18; App. 29, ll. 1-3; App. 140 – 142.

<sup>2</sup> App. 31 – 40; App. 41 – 46; App. 47 – 56; App. 57 – 69.

<sup>3</sup> App. 70 – 76; App. 77 – 83; App. 84; App. 87, l. 24 – 88, l. 17; App. 90.

On October 14, 2022, the Honorable Bentley Price issued a consent order granting Petitioner belated appellate review of his 2013 PCR hearing pursuant to *Austin*. Unfortunately, due to the lapse of time, no transcript of the 2013 PCR hearing could be obtained. Petitioner therefore moved to remand the case to reconstruct the record of his original PCR hearing. On April 21, 2023, this Court issued an order remanding the matter to reconstruct the 2013 PCR hearing.<sup>4</sup>

On August 8, 2023, a reconstruction hearing was convened before the Honorable Deadra L. Jefferson, via WebEx. Petitioner was represented by undersigned counsel. Danielle Dixon represented the State. The court took testimony and concluded the record was reconstructed.<sup>5</sup>

***Relevant facts***

*A. Austin v. State review*

As discussed in the procedural history, the first PCR court (Judge Jefferson) signed its order of dismissal on October 28, 2013. The order was filed October 31, 2013. Petitioner, pro se, filed a notice of intent to appeal on November 20, 2013, but the proof of service was defective. This Court contacted PCR counsel (Kelly), on December 5, 2013. Kelly then filed a notice of intent to appeal on December 18, 2013. This Court found proof of service was not timely and dismissed the appeal.<sup>6</sup>

After Petitioner filed a second PCR application, the parties appeared before the second PCR court (Judge Couch) on October 20, 2015. The court was informed of Petitioner's unsuccessful pro se attempt to appeal his PCR denial. The State conceded Petitioner was entitled

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<sup>4</sup> App. 90 – 94; App. 95 – 96.

<sup>5</sup> App. 97 – 100; App. 104, l. 17.

<sup>6</sup> App. 47; App. 56; App. 57 – 60; App. 61 – 62; App. 63 – 66; App. 67 – 68.

to *Austin* review: “[T]he State does not contest that he’s entitled to an *Austin* review . . . We agree that he’s entitled to an *Austin* review.” The PCR court then orally ruled Petitioner was entitled to *Austin* review.<sup>7</sup>

Because Judge Couch retired without signing an order, the third PCR court (Judge Price), issued an order in which it noted that “both parties consent that Applicant is entitled to seek belated appellate review of the denial of his first post-conviction relief proceeding,” and found “Applicant has established he is entitled to seek belated appellate review of the denial of his first post-conviction relief proceeding.” The PCR court also found that “both parties consent to the denial of all claims in Applicant’s application for post-conviction relief except Applicant’s allegation he is entitled to a belated PCR appeal pursuant to *Austin v. State*. Therefore, this application for post-conviction relief is granted only as to Applicant’s right to seek a belated appeal of his previous application for post-conviction relief and is denied and dismissed as to all other claims for relief.”<sup>8</sup>

#### B. *White v. State* review

The focus of Petitioner’s 2013 PCR hearing was his allegation that plea counsel provided deficient representation when he failed to file a direct appeal from the guilty plea. At that hearing, Petitioner testified that he met with plea counsel after the guilty plea and asked plea counsel to file an appeal. Petitioner said plea counsel agreed to appeal. Petitioner also recalled he signed a form that advised him of his rights in connection with the plea. Plea counsel testified that he went over an advice of rights form with Petitioner, and he advised Petitioner of his right to appeal. Plea counsel testified Petitioner never asked him to file an appeal. Plea counsel said had Petitioner so

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<sup>7</sup> App. 84; App. 87, l. 19 – 88, l. 17.

<sup>8</sup> App. 91; App. 93.

asked, he would have filed the appeal. Plea counsel did not remember whether or not he met with Petitioner after the plea.<sup>9</sup>

The PCR court found no deficiency by plea counsel. The order of dismissal stated that the court found counsel properly advised Petitioner of his right to appeal and Petitioner failed to indicate his desire for an appeal. The PCR court found Petitioner's testimony not credible and plea counsel's testimony credible. The court found plea counsel's testimony was credible that Petitioner never indicated he wanted to appeal, and that there were no meritorious issues for appeal. Therefore, the PCR court found Petitioner had not met his burden of proof to show he was entitled to a belated direct appeal pursuant to *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974).<sup>10</sup>

This *Austin* petition for writ of certiorari follows.<sup>11</sup>

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<sup>9</sup> App. 101, l. 21 – 102, l. 14; App. 112, l. 21 – 113, l. 11; App. 117, l. 5 – 120, l. 2; App. 50.

<sup>10</sup> App. 54; App. 52; App. 53; App. 53 – 54.

<sup>11</sup> Pursuant to Rule 243(i)(2), SCACR, Petitioner has included a statement of issue on direct appeal, at page 10 below, as part of this *Austin* petition for writ of certiorari.

## ARGUMENT

1.

**The PCR court properly granted Petitioner a belated appeal from the denial of his application for post-conviction relief (hearing date August 27, 2013) pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991), where Petitioner wanted to appeal but PCR counsel did not timely serve notice of intent to appeal, and where the State agreed Petitioner was entitled to belated appellate review.**

The PCR court properly granted Petitioner a belated appeal from the denial of his first application for post-conviction relief pursuant to *Austin v. State*. In *Austin*, this Court framed the question as whether the PCR applicant “requested and was denied an opportunity to seek appellate review.” *Austin*, 305 S.C. at 454, 409 S.E.2d at 396. The proper scope of review of the PCR court’s ruling is whether there is any evidence of probative value to uphold the PCR court’s findings. *Webb v. State*, 281 S.C. 237, 238, 314 S.E.2d 839 (1984).

In *Austin*, this Court recognized that the right to seek appellate review of the denial of PCR is expressly authorized by S.C. Code Ann. § 17-27-100. *Austin*, 305 S.C. at 454, 409 S.E.2d at 396. Under *Austin*, the PCR court correctly ruled that Petitioner was entitled to an appeal and no notice of appeal was timely served. As seen, Petitioner unsuccessfully attempted to serve a notice of appeal himself. App. 57 – 60. This attempt was found deficient, but it demonstrated Petitioner’s desire to appeal his PCR denial. The State conceded Petitioner was entitled to belated appellate review. App. 87, ll. 21-22. Respectfully, under the “any evidence” standard of review of *Webb*, this Court should hold that the PCR court’s ruling was correct, grant certiorari, and grant Petitioner a belated appeal from the denial of his original application for post-conviction relief.

**The PCR court incorrectly ruled Petitioner was not entitled to a belated appeal from his guilty plea (hearing date April 12, 2010) pursuant to *White v. State*, 236 S.C. 110, 108 S.E.2d 35 (1974), where Petitioner wanted to appeal but plea counsel did not serve notice of intent to appeal.**

The Sixth Amendment to the United States Constitution guarantees an accused the right to effective assistance of counsel. U.S. CONST. amend. VI; *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The United States Supreme Court has established a two-pronged test to evaluate allegations of ineffective assistance of counsel. Petitioner must prove “that counsel’s performance was deficient” and fell below reasonable professional norms, and the deficient performance prejudiced the petitioner. *Id.*

The decision to plead guilty must be a voluntary and intelligent choice among the alternative courses of action open to the defendant. *Hill v. Lockhart*, 474 U.S. 52, 56 (1985). “A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of a plea by showing that counsel’s representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel’s errors, the defendant would not have pled guilty, but would have insisted on going to trial.” *Rolen v. State*, 384 S.C. 409, 413, 683 S.E.2d 471, 474 (2009) (citing *Hill v. Lockhart*, *supra*). “The crux of the inquiry is whether counsel’s ineffective performance affected the outcome of the plea process, not whether the defendant would have been successful had he gone to trial.” *Frierson v. State*, 423 S.C. 257, 262, 815 S.E.2d 433, 436 (2018).

“Following a trial, counsel is required to make certain the defendant is made fully aware of the right to appeal.” *Turner v. State*, 380 S.C. 223, 224, 670 S.E.2d 373, 374 (2008) (citing

*White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974)). “To waive a direct appeal, a defendant must make a knowing and intelligent decision not to pursue the appeal.” *Wilson v. State*, 348 S.C. 215, 217, 559 S.E.2d 581, 582 (2002). “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).

However, “[a]bsent extraordinary circumstances, there is no constitutional requirement that a defendant be informed of the right to a direct appeal from a guilty plea, and the bare assertion that a defendant was not advised of appellate rights is insufficient to grant relief.” *Rolen v. State*, 384 S.C. at 415, 683 S.E.2d at 474–75 (citing *Weathers v. State*, 319 S.C. 59, 61, 459 S.E.2d 838, 839 (1995)). “[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 (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing.” *Jones v. State*, 382 S.C. 589, 596, 677 S.E.2d 20, 23 (2009), *overruled on other grounds by Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018) (quoting *Roe v. Flores-Ortega*, 528 U.S. 470, 480 (2000)). “[A] lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable.” *Roe v. Flores-Ortega*, 528 U.S. at 477. *Accord Kinard v. State*, 418 S.C. 478, 481, 795 S.E.2d 15, 16 (2016). “To prove deficient performance, a defendant can rely on evidence that he sufficiently demonstrated to counsel his interest in an appeal.” *Roe v. Flores-Ortega*, 528 U.S. at 486.

South Carolina does not recognize conditional guilty pleas. *State v. Rice*, 401 S.C. 330, 331, 737 S.E.2d 485, 485 (2013). A guilty plea is a “waiver of nonjurisdictional defects and claims of violations of constitutional rights.” *Id.* The defendant has waived the right to trial and the

constitutional guarantees that go with it. In other words, a conditional plea may not be accepted, and thus any plea conditioned on the right to appeal should not be accepted. Per Rule 203(d)(1)(B)(iv), SCACR:

If the appeal is from a guilty plea . . . a written explanation showing that there is an issue which can be reviewed on appeal [must accompany the notice of appeal]. This explanation should identify the issue(s) to be raised on appeal and the factual basis for the issue(s) including how the issue(s) was raised below and the ruling of the lower court on that issue(s). If an issue was not raised to and ruled on by the lower court, the explanation shall include argument and citation to legal authority showing how this issue can be reviewed on appeal. If the appellant fails to make a sufficient showing, the notice of appeal may be dismissed . . .

Thus, as demonstrated by Rule 203(d)(1)(B)(iv), there are circumstances under which a guilty plea may be appealed.

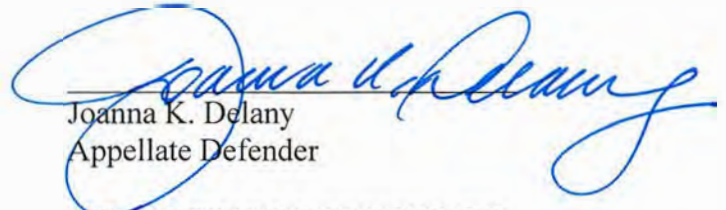
In this case, plea counsel admitted he told Petitioner he had the right to appeal. App. 117, ll. 6-22. Petitioner testified at the PCR hearing that he asked counsel to file an appeal. Petitioner recalled that plea counsel agreed to file an appeal. App. 112, l. 21 – 113, l. 9. Counsel should have timely filed and served notice of appeal. Had Petitioner known counsel would not appeal the plea, or had he been advised that any appeal would be dismissed in the ordinary course, he would not have pleaded guilty. Petitioner has therefore shown deficiency and prejudice, and the PCR court's decision was error. *Strickland v. Washington*, 466 U.S. at 687; *Hill v. Lockhart*, 474 U.S. at 56; *Roe v. Flores-Ortega*, 528 U.S. at 477-86.

## **STATEMENT OF ISSUE ON APPEAL**

Whether Petitioner's guilty pleas were not freely and voluntarily entered where plea counsel advised Petitioner he had the right to appeal his guilty pleas, and where relief is not possible on direct appeal when there is no preserved issue, since this made the guilty pleas impermissible conditional pleas?

**CONCLUSION**

Petitioner respectfully requests this Court grant the *Austin* petition for certiorari and affirm the lower court's determination that Petitioner is entitled to belated appellate review of his PCR denial. Petitioner also respectfully requests this Court grant relief pursuant to *White v. State*.

  
Joanna K. Delany  
Appellate Defender  
ATTORNEY FOR PETITIONER

This 18th day of January, 2024.