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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Anderson County

Honorable Perry H. Gravely, Circuit Court Judge

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JACOB NATHANIEL LANCE,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2024-001225

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PETITION FOR WRIT OF CERTIORARI

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## **ISSUES PRESENTED**

1. Whether the PCR court correctly found petitioner is entitled to belated appeal pursuant to *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974)?
2. Whether plea counsel was ineffective by failing to file a motion to reconsider Lance's sentence where the sentence was based on improper factors, specifically a belief that Lance and his co-defendant were "equal" despite their disparate circumstances?

## STATEMENT

On March 14, 2018, Jacob Lance pleaded guilty to voluntary manslaughter, first degree burglary, and two counts of third-degree arson. App. 10:2-20. Judge Lawton McIntosh took the plea and petitioner was represented by Kurt Tavernier. App. 1. Lauren Price represented the state. App. 1. On the same day, the plea court sentenced petitioner's co-defendant and brother, Oscar Lance,<sup>1</sup> who is thirteen years older than petitioner. App. 25:1-9, 29:24-30:7. Oscar previously pleaded guilty to the same charges and was awaiting sentencing while petitioner's case proceeded. App. 3:11-19. The plea court issued petitioner and Oscar Lance identical sentences: thirty years in prison for both voluntary manslaughter and burglary first, and fifteen years for each count of arson, all to run concurrently. App. 29:16-7. On March 27, 2018, Tavernier served a notice of appeal on Lance's behalf, but it was dismissed as untimely. App. 35.

Lance filed an application for post-conviction relief on March 14, 2019, and a supplemental application on January 22, 2021, with Linda Whisenhunt as counsel. App. 44, 64-66. Judge Perry Gravely held an evidentiary hearing on March 1, 2023. App. 67. In his application and at the hearing Lance presented four claims:

- (1) Counsel was ineffective for failing to inform Lance of the plea agreement.
- (2) Counsel was ineffective for failing to file a timely direct appeal.
- (3) Counsel was ineffective for failing to review and produce certain discovery.
- (4) Counsel was ineffective for failing to file a motion to reconsider the sentence.

App. 122-32. At the hearing the PCR court requested an order be drafted dismissing all of Lance's claims. App. 109:5-16. However, on March 24, 2023, the parties spoke with the PCR court again,

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<sup>1</sup> Oscar was represented at the hearing by Gregory Cole. App. 1.

and the state consented to Lance's request for a belated *White v. State* appeal. App. 114. The PCR court then entered an order granting belated appellate review and dismissing Lance's other claims. App. 113-14.

This petition for a writ of certiorari and accompanying brief follow, pursuant to *Davis v. State*, 288 S.C. 290, 342 S.E.2d 60 (1986) (mem.), and Rule 243(i), SCACR.

## ARGUMENT

**I. The PCR court correctly granted petitioner belated appellate review pursuant to *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974), because counsel was informed of petitioner's desire to appeal and failed to do so timely.**

The parties below agreed petitioner is entitled to a belated appeal. "To waive a direct appeal, a defendant must make a knowing and intelligent decision not to pursue the appeal." *Sheppard v. State*, 357 S.C. 646, 651, 594 S.E.2d 462, 465 (2004) (citing *Davis*, 288 S.C. at 290, 342 S.E.2d 60). While a defendant need not be advised of his right to appeal a guilt plea "absent extraordinary circumstances," one such extraordinary circumstance "arise[s] when the defendant inquires about an appeal." *Weathers v. State*, 319 S.C. 59, 61, 459 S.E.2d 838, 839 (1995) (citations omitted).

Here, Lance asked plea counsel to appeal his convictions after the plea but before the ten-day limitation expired. App. 82:6-11, 93:18-94:8. Plea counsel testified at the PCR hearing that he was out of the office at the time of Lance's request and did not actually see it until the ten days had elapsed. App. 93:18-94:8. He nonetheless filed a notice of appeal, but it was dismissed as untimely. App. 32, 35, 94:1-8. On a conference call with PCR counsel and the PCR court, the state agreed Lance is entitled to *White v. State* review. App. 114. The PCR court then correctly entered an order granting belated review. App. 113-14, 127-28.

In *Davis v. State* this Court ordered that where the PCR court finds a defendant did not knowingly and intelligently waive his right to direct appeal, "the applicant must petition this Court for a *White v. State* review." 288 S.C. at 291 n.1, 342 S.E.2d 60. The PCR court cannot itself grant relief by ordering belated appellate review. *Id.* The order further directed: "On the date the Petition is served, Petitioner shall also serve and file a brief addressing all direct appeal issues." 288 S.C. at 291, 342 S.E.2d 60.

Given the state's concession Lance did not waive his right to direct appeal, the untimely notice, and plea counsel's testimony at the PCR hearing, the PCR court properly entered an order finding Lance has a right to belated *White* review under *Davis*. Lance now requests this Court grant relief and also serves his brief for the direct appeal.

**II. The PCR court erred in finding plea counsel was not deficient for failing to file a motion to reconsider the sentences where the court improperly considered factors unrelated to him.**

The plea court gave Lance and his older brother identical sentences. But Lance and his brother were not identically situated. The plea court erred in treating them exactly the same, and plea counsel was ineffective for failing to attempt to correct this.

"A judge must be permitted to consider any and all information that reasonably might bear on the proper sentence for a *particular* defendant." *In re M.B.H.*, 387 S.C. 323, 326, 692 S.E.2d 541, 542 (2010) (emphasis added) (citing *State v. Hicks*, 377 S.C. 322, 325, 659 S.E.2d 499, 500 (Ct. App. 2008)); *see also State v. Miller*, 187 S.C. 271, 197 S.E. 310, 311 (1938) ("Where left to his discretion by the law, the presiding judge, in the exercise of a wise judgment, determines what sentence, within the law, would be just and proper in any *particular* case." (emphasis added)).

In hearing final arguments prior to sentencing, the plea court improperly focused on its belief the brothers were "equally culpable" and "equally as guilty as the other one is." App. 28:12-17. The plea court proceeded to give them precisely identical sentences on all four charges. That fact indicates the court treated them as the same person and sentenced them according to the culpability of *both* defendants rather than as individuals. This was error, and reasonable counsel would have objected because considering the factors weighing against Oscar very likely led the plea court to impose a heavier sentence on Lance than had it considered his culpability in isolation. Oscar Lance is thirteen years older than Lance. Lance was just nineteen at the time of the crime and he had no prior record. App. 25:2-7, 80:24-81:17. Their different circumstances merited

different sentences. Nonetheless plea counsel expected the court to "feed them both out of the same spoon" and accepted that result. App. 91:23.

Reasonable counsel would have asked the plea court to reconsider the sentences so that only those factors relevant to Lance were considered. While the sentencing court "is allowed broad discretion in sentencing within statutory limits," *Garrett v. State*, 320 S.C. 353, 356, 465 S.E.2d 349, 350 (1995) (citing *State v. Sidell*, 262 S.C. 397, 398, 205 S.E.2d 2, 3 (1974)), there are certain factors the court cannot consider—specifically, the culpability of a co-defendant.

Every defendant is criminally liable as an individual and should be sentenced as such. *See* 16 Corpus Juris, *Criminal Law* § 3024, at 1277 n.75[a] (1918) (explaining the reason for the rule that criminal defendants cannot be sentenced jointly: "The guilt of one neither enhances nor mitigates that of the others. Every one is answerable for his own offense." (quoting *State v. White*, 140 S.W. 1059, 1060 (Tenn. 1911))). In sentencing both brothers identically, the plea court chose to disregard the individual circumstances of each defendant and instead evaluated them as a unit, something it cannot do because it necessarily means factors relevant to Oscar alone contributed to Petitioner's sentence.


Plea counsel was ineffective in failing to request the court reconsider these sentences because the "equal" treatment—and therefore impermissibility—should have been apparent: the court did indeed "feed them both out of the same spoon." At the PCR hearing, plea counsel testified he typically files a motion to reconsider a sentence where "there are factors that the judge did not take into account." App. 103:12-22. The imposition of identical sentences necessarily implies consideration of such factors, yet plea counsel failed to file such a motion.

Plea counsel explained he decided not to file a motion to reconsider because he felt Lance "got a pretty good deal." App. 103:23-104:1. That reason for not filing the motion is invalid given

Lance's decision he wanted to appeal the conviction and sentences, and it cannot support this failure. *See Ingle v. State*, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002) ("Counsel must articulate a **valid** reason for employing a certain strategy to avoid a finding of ineffectiveness." (citing *Roseboro v. State*, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995); *Stokes v. State*, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992))). Lance ultimately did not want to be bound by the plea, and plea counsel should have taken all available steps to achieve that end. For him to conclude otherwise based on his belief the sentence was "a pretty good deal" is to disregard the wishes of the client who actually has to serve the sentence imposed. Additionally, given that the plea court sentenced Lance to the maximum extent possible for three of the four charges (albeit to be served concurrently),<sup>2</sup> it was not reasonable to conclude Lance could do no better. Had the court properly considered Lance's culpability in isolation, give his age and lack of a prior record, there is a reasonable probability he would have received a shorter sentence.

### CONCLUSION

Lance requests this Court grant his petition for a writ of certiorari to review the decision of the PCR court and find plea counsel was ineffective. He also requests the Court grant him belated appellate review as the state agrees he is entitled.



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Jordan Wayburn  
Appellate Defender

ATTORNEY FOR PETITIONER

This 7th day of January, 2025.

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<sup>2</sup> *See* S.C. Code Ann. § 16-11-110(C) (maximum sentence of fifteen years for third-degree arson); § 16-3-50 (maximum sentence of thirty years for manslaughter); § 16-11-311 (maximum sentence for first-degree burglary is life imprisonment).