

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Greenville County

The Honorable J. Derham Cole, Circuit Court Judge

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**S.C. SUPREME COURT**

JAKOBE GERMAN,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

Appellate Case No. 2024-001469

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**RETURN TO PETITION FOR WRIT OF CERTIORARI**

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**The PCR Court properly considered the totality of the circumstances of Petitioner’s plea such as the State’s dismissal of additional charges, Petitioner’s avoidance of life imprisonment, and the weight of the State’s evidence against Petitioner and properly found that plea counsel did not act deficiently by failing to inform Petitioner of his right to appellate review when plea counsel did not identify any nonfrivolous grounds for appeal.....7**

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## **PETITIONER'S STATEMENT OF THE ISSUE**

Did the PCR court err in finding plea counsel had no obligation to explain and advise petitioner on the impact of a guilty plea on appellate review of the transfer of a minor from Family Court to General Sessions under S.C. Code Ann. § 63-19-1210?

## **RESPONDENT'S COUNTER STATEMENT OF THE ISSUE**

Did the PCR Court properly consider the totality of the circumstances of Petitioner's plea such as the State's dismissal of additional charges, Petitioner's avoidance of life imprisonment, and the weight of the State's evidence against Petitioner in finding that plea counsel did not act deficiently by failing to inform Petitioner of his right to appellate review when plea counsel did not identify any nonfrivolous grounds for appeal?

## STATEMENT OF THE CASE

Applicant was 15 years old at the time he participated in multiple crimes with his co-defendants. Initial proceedings began in Family Court. Alexander Kornfeld, Esq., represented Applicant. On June 19, 2015, after presiding over a contested waiver hearing, the Honorable Usha J. Bridges issued an order granting the prosecution's motion to waive Applicant to the Court of General Sessions. Judge Bridges concluded "that there is little likelihood that Jakobe T. German, can be rehabilitated in the Juvenile Justice System," and that "[i]t is in the best interest of Jakobe T. German, and the public, that he be waived to the Court of General Sessions for proceedings on the charges alleged in Petitions ...." (App., p. 116). Mr. Kornfeld was again appointed as counsel for the General Sessions proceedings and continued representation. (App., p. 8)

Among other charges, the Greenville County Grand Jury indicted Applicant for two counts of armed robbery (2015-GS-23-06101A; -06107A) and two counts of 1<sup>st</sup> burglary (2015-GS-23-06106A; -06111A) during its July 2015 term. (App., pp. 19-20; pp. 22-23; pp. 25-26; pp. 28-29). On August 22, 2016, Applicant appeared before the Honorable Judge D. Garrison Hill to plead guilty to these four charges. The State made no recommendation as to the sentence and dismissed four counts of kidnapping, four counts of assault and battery 1<sup>st</sup> degree, two additional counts of burglary 1<sup>st</sup> degree, burglary 2<sup>nd</sup> degree, and four counts of armed robbery. (App., p. 10). Judge Hill sentenced Petitioner to 17 years for each count of burglary 1<sup>st</sup> degree, and 10 years for each armed robbery, with credit for time served, to be served concurrently. (App., 16-17). Petitioner did not appeal his conviction or sentence.

On September 6, 2017, Petitioner filed a *pro se* application for post-conviction relief, and amended, through counsel, the allegations on November 3, 2021. (App., p. 31; p. 39). Petitioner made the following allegations of error:

1. Ineffective assistance of counsel and Involuntary Guilty Plea:

- a. Applicant did not knowingly and intelligently waive his right to an appeal.
- b. Plea counsel failed to inform Applicant of his right to appeal the sentence and conviction. The court also did not inform Applicant of his right to appeal the conviction.
- c. Plea counsel nor the court informed Applicant of his right to appeal the family court waiver would not be preserved if Applicant pled guilty.
- d. Plea counsel failed to discuss the potential appealable issues from the family court waiver hearing, or the process with Applicant.
- e. That the above actions by counsel do not meet the standard of effective assistance of counsel under current professional norms, and there is a reasonable probability that but for the above listed errors by counsel the outcome of the proceeding would have been different.

(App., 39-40).

On November 9, 2022, an evidentiary hearing was convened before the Honorable J. Derham Cole. Applicant was present and represented by counsel, Scarlett B. Moore, Esq. Assistant Attorney General Lilly Meadows represented Respondent, the State. At the close of the hearing the decision was taken under advisement. By a civil action Form 4 order issued on November 29, 2022, this Court denied relief and directed Respondent's counsel to prepare and submit a proposed order. On August 9, 2024, Judge Cole issued an Order of Dismissal denying and dismissing the application with prejudice. (App., p. 106).

Petitioner filed a Notice of Appeal on September 9, 2024. The Petition and Appendix was submitted, and Respondent's Return now follows:

## RESPONDENT'S STATEMENT OF FACTS

The State provided the following recitation in support of a factual basis for the charges at Petitioner's guilty plea hearing:

On September 2nd of 2014, just before 10:00 p.m., officers responded to a robbery at a residence on Evelyn Drive in Greenville County.

One of the victims described that she was on the front porch of the home when four to six masked individuals approached her and struck her in the head with a handgun before dragging her into the home as they forced their way inside. The intruders attacked three other victims in the home before taking cash, purses, phones, and keys to the two cars, which they used to flee the scene.

At least, one co-defendant has given a statement to police admitting their own involvement in the home invasion. In statements not only from that co-defendant but others, they described that this - the robbery was [Petitioner's] idea and that the group walked to the victim's home. [Petitioner] struck the victim outside on the front porch before he and others kicked open the door and forced their way inside.

The next day, on September 3rd of 2014, just before 9:00 p.m., officers with the sheriff's office responded to a shooting at a residence on East Parker Road. The shooting victim told police he was outside with a second victim when the two observed, at least, five masked individuals approach the home bearing firearms.

The attackers demanded money from the victims and struck each of the two victims with handguns several times. One of the attackers then fired shots at the victims and struck one of those victims several times in the leg. Other gunmen fired shots into the door of the home and forced their way inside. A third victim was injured during that forced entry.

At least, two co-defendants have given statements to police admitting their involvement in this robbery. The co-defendants identified [Petitioner] as one of the gunmen and described how the 10 involved defendants planned and executed the robbery of what the defendants believed was a ticket house where cash could be found.

The defendants further identified [Petitioner] as a leader, or organizer, or, at least, some high-ranking member in each of - in the Cross Tracks street gang, which is involved in each of these indictments.

## STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. *Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836, 839 (2018). When reviewing factual findings, the appellate courts defer to the post-conviction relief court's factual findings and will uphold them if there is probative evidence in the record to support them. *Buckson v. State*, 423 S.C. 313, 320, 815 S.E.2d 436,440 (2018); *Smalls*, 422 S.C. at 180-81, 810 S.E.2d at 839-40 (citing *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); *Jordan v. State*, 406 S.C. 443,448, 752 S.E.2d 538, 540 (2013)). However, pure questions of law will be reviewed de novo without deference to the lower court. *Smalls*, 422 S.C. at 180-81, 810 S.E.2d at 839-40. Appellate courts will only reverse the decision of the post-conviction relief court when it is controlled by an error of law. *Goins v. State*, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

## ARGUMENT

**The PCR Court properly considered the totality of the circumstances of Petitioner’s plea such as the State’s dismissal of additional charges, Petitioner’s avoidance of life imprisonment, and the weight of the State’s evidence against Petitioner and properly found that plea counsel did not act deficiently by failing to inform Petitioner of his right to appellate review when plea counsel did not identify any nonfrivolous grounds for appeal.**

Petitioner alleges that the PCR Court erred in finding that plea counsel had no obligation to advise and explain that entering a guilty plea waives appellate review of the transfer of the juvenile from Family Court to General Sessions. Petitioner takes issue that the PCR Court analyzed the ineffective assistance of counsel claim pursuant to *Roe v. Flores-Ortega*, 528 U.S. 470,480 (2000) in which the Supreme Court recognized “that counsel 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.” Specifically, Petitioner argues that the inquiry should be narrowed to address whether the juvenile is entitled to be informed by plea counsel that his decision to enter a guilty plea waives appellate review of the transfer of his case to General Sessions.

Even if narrowed, the conclusion is unchanged. Whether plea counsel specifically informed Petitioner that he would be waiving appellate review of the transfer of his case to General Sessions does not outweigh the ample other considerations Petitioner weighed in entering his plea. Where a guilty plea was entered, “[t]he bare assertion that a defendant was not advised of appellate rights is insufficient to grant relief.” *Weathers v. State*, 319 S.C. 59, 61, 459

S.E.2d 838, 839 (1995). Petitioner offers nothing more than the assertion that he would not have pled guilty had he been advised he was waiving appellate review of the Family Court's decision to transfer his case, and in light of Petitioner's understanding that entering the guilty plea was considered final, and that plea counsel was not asked to appeal, nor did he see reason for doing so, Petitioner's bare assertion does not satisfy the showing of prejudice required.

The PCR Court found, as an initial matter, that plea counsel was not ineffective for failing to immediately appeal the transfer order to General Sessions. A transfer order is interlocutory and not immediately appealable. *See Sanders v. State*, 281 S.C. 53, 314 S.E.2d 319 (1984) (citing *State v. Lockhart*, 267 S.E.2d 720 (S.C. 1980)). Therefore, the PCR Court considered Petitioner's claim as to whether counsel was ineffective in failing to advise of the right to appeal following the guilty plea. Such is a reasonable analysis considering Petitioner could only appeal the transfer after his conviction and sentencing.

While the transcript of the waiver hearing is unavailable, plea counsel testified at the PCR evidentiary hearing that the waiver was keenly contested, but he saw no basis for a challenge to the family court's conclusion on waiver. (App., pp. 64-65). He recalled that he discussed the waiver with Petitioner and advised that 'we could possibly make arguments to that, but they would be unsuccessful.' (App., p. 79). However, counsel did not discuss "the waiver hearing at the time of the plea." (App., pp. 79-80).

Applicant testified that counsel did not tell him about the right to an appeal after the guilty plea. (App., p. 82). He also testified that he understood the finality of the plea, and that he could not continue to present facts and defenses. (App., p. 82, ('I thought once you go to court, you never have a chance to go back and argue it again'; and p. 88, "I thought that was final, that was all.")). He also recalled counsel's advice that had he gone to trial, "it could have been a lot

more severe than the actual plea that I was given.” (App., p. 85). The testimony supports the conclusion that plea counsel discussed the facts of the case, the evidence against Petitioner, and the likely outcomes with Petitioner. The alternative choice Petitioner faced was to proceed to trial facing a maximum sentence of life imprisonment on the burglary 1<sup>st</sup> charge alone, which Petitioner also told Judge Hill at the plea that he understood. (App., p. 9).

Petitioner partially cites to *Rice*, which notes that “[t]he dissent laments how unfair it would be to require this juvenile to proceed to trial and forgo the favorable plea offer to preserve his right to challenge the transfer from family court to the court of general sessions.” *State v. Rice*, 401 S.C. 330, 333, 737 S.E.2d 485, 486 (2013). However, Petitioner disregards the justification as it applies to our laws: “Yet, that is the essence of our law disallowing conditional pleas, and it applies equally to juveniles and adults.” *Id.*

Petitioner made a choice, an undisputably difficult choice, however a voluntary and informed choice, nonetheless. Petitioner chose to enter a guilty plea on the understanding that his plea was final, that additional charges against him would be dismissed, and that he would avoid risking life imprisonment. The PCR Court noted that Petitioner did not rely on an incorrect understanding that he could appeal the family court waiver. Further, that understanding of finality was precisely the point of the extensive and detailed colloquy with Judge Hill. (*See generally* App., p. 6, [Applicant affirmatively represented the understanding that he was waiving defenses, if any, by entering plea]). Clearly, Applicant had no expectation of any other result. *See generally State v. Patterson*, 278 S.C. 319, 322, 295 S.E.2d 264, 265 (1982) (“A plea of guilty is more than an admission of conduct; it is a conviction which leaves only the punishment to be determined.”).

The PCR Court took into account that plea counsel credibly testified the evidence against Applicant was overwhelming. Plea counsel testified that he expected two of Petitioner's co-defendants would testify against him at trial; noted that Petitioner did not have an alibi; and also noted that there was video evidence matching Petitioner's description in addition to the victims identifying Petitioner. (App., 68-69). Considering the totality of the circumstances, the PCR Court found that plea counsel was not ineffective for failing to inform Petitioner of his right to a direct appeal following the plea.

Even so, Petitioner has not shown "a rational defendant would want to appeal" such as knowledge of "nonfrivolous grounds for appeal" as suggested in *Roe v. Flores-Ortega*, *supra*. Critically, the appeal possible would be an appeal of the guilty plea itself, not the family court waiver. However, to the extent Petitioner applies the appeal to the family court waiver, plea counsel testified that he and Petitioner discussed the waiver order and plea counsel opined that the waiver order would likely be upheld if challenged. (App., p. 79). Though appealability of the transfer order was not specifically discussed at the plea, the likelihood of success was discussed with Petitioner and only weighs in favor of the PCR Court's finding that Petitioner was adequately informed of his options prior to entering the plea.

Applicant neither attempted to, nor could he legally, condition his plea on the ability to appeal the waiver. On this point, the PCR Court credits plea counsel's testimony that he was well-aware that South Carolina does not allow conditional guilty pleas. (App., pp. 71-71). *See, e.g., State v. Truesdale*, 278 S.C. 368, 370, 296 S.E.2d 528, 529 (1982) ("expressly disapprov[ing]" attempts to place a "condition or qualification" finding if such qualification is offered, the plea must be rejected"). Attempting to attach a condition to the plea would result in the plea either falling apart or being reversed on appeal. *Id. See also State v. Peppers*, 346 S.C.

502, 505, 552 S.E.2d 288, 290 (2001) (vacating a plea accepted with assurances that a motion to quash the indictment was preserved). In short, the PCR Court concluded that it would be contrary to Petitioner's interest in securing the plea bargain had plea counsel tried to preserve the issue.

Petitioner acknowledges the sentence imposed in light of the multitude of charges and overwhelming evidence of guilt. The 17-year sentence, though certainly a significant term of years, was concurrent and only slightly beyond the minimums possible. Yet, Petitioner contends that the outcome would have been more favorable had he not been transferred from family court. Such a contention does not establish prejudice, but only supports that the facts of Petitioner's crimes warrant scrutiny in General Sessions rather than Family Court.

As such, Petitioner has identified no error in the PCR Court's applicability of *Strickland* to his case. Because Petitioner is unsuccessful in identifying law to support a finding that plea counsel acted deficiently, and the record supports the PCR court's findings, the PCR court properly found that trial counsel was not deficient in failing to advise Petitioner regarding appellate review of his conviction and sentence.

**CONCLUSION**

Based on the foregoing reasons, Respondent respectfully requests this Court to deny the Petition for Writ of Certiorari.

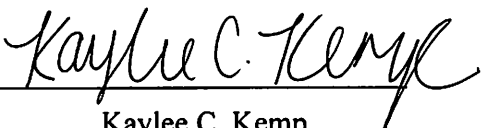
Respectfully submitted,

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