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**May 12 2025**

**S.C. SUPREME COURT**

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Charleston County

Honorable Maite Murphy, Circuit Court Judge

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ISHMEL J. LEMON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2024-001348

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PETITION FOR WRIT OF CERTIORARI

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**ISSUE PRESENTED**

Did the post-conviction relief (PCR) court err by finding Petitioner is not entitled to a belated direct appeal pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974), when there is no evidence Petitioner knowingly and intelligently waived his right to appeal, rather the evidence establishes Petitioner repeatedly sought a direct appeal from his conviction and sentence?

## STATEMENT OF THE CASE

A Charleston County grand jury indicted Petitioner on March 10, 2014, for first degree burglary. App. 508-509. His case was called to trial on March 2, 2015, before the Honorable W. Jeffrey Young, and a jury. App. 1. Petitioner was tried in his absence after he did not appear for trial. App. 43, l. 23 – 44, l. 3. He was also tried jointly with his codefendant, Antwain Champaigne. Assistant Solicitors David Osborne and Gregory Voight represented the state. James Smiley represented Petitioner. Willie Bradley, Jr. represented Champaigne. App. 1.

On March 4, 2015, the jury found Petitioner guilty as indicted. App. 396, ll. 9-13. Because Petitioner was not present, Judge Young sealed his sentence. App. 401, l. 10.

At the conclusion of the trial, Petitioner's counsel, James Smiley, who was retained, moved to be relieved as counsel. Judge Young granted counsel's motion. App. 411, ll. 15-23.

On December 15, 2015, Petitioner's sealed sentence was opened before the Honorable Kristi Lea Harrington. App. 414. Assistant Solicitor David Osborne represented the state. James Smiley represented Petitioner. App. 414. At the beginning of the hearing, Judge Harrington stated, "Mr. Smiley, procedurally, I understand that Judge Young relieved you. You tried the case. And at the conclusion of the case, he relieved you. I requested that you be here, just I think it makes it cleaner." App. 415, ll. 15-19. However, Judge Harrington told Petitioner, "Mr. Smiley has been relieved. He is no longer your attorney." App. 416, ll. 7-8. The judge then unsealed Petitioner's sentence. He was sentenced to thirty years imprisonment. App. 416, ll. 13-15.

On December 22, 2015, Petitioner filed a motion to reconsider sentence with the assistance of new counsel, Lauren Williams, who was also retained. App. 418-420. The state filed a response in opposition on January 19, 2016. App. 421-424. It is unclear from the record

exactly when a hearing was held on Petitioner's motion to reconsider sentence. However, during Petitioner's subsequent PCR hearing, the parties stipulated that a hearing was held before Judge Young in February 2016. App. 497, ll. 1-18. It is also unclear from the record when Petitioner's motion to reconsider was ruled upon. According to the state, the motion remained outstanding for years.

On February 22, 2016, Petitioner filed a *pro se* notice of appeal. App. 425. By order filed May 18, 2016, the Court of Appeals dismissed the appeal because Petitioner failed to timely serve the state as required by Rule 203(b), SCACR. App. 427. The remittitur was sent on June 14, 2016. App. 428.

On March 29, 2017, Petitioner filed an application for post-conviction relief (PCR) seeking *inter alia* a belated direct appeal pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974). Petitioner alleged that both James Smiley and Lauren Williams were ineffective for failing to timely serve a notice of appeal on his behalf. Petitioner further alleged that he did not knowingly and intelligently waive his right to a direct appeal. App. 429-447. More specifically, Petitioner stated that his motion to reconsider his sentence was denied on February 12, 2015.<sup>1</sup> He said Williams "later informed" him of his right to appeal "in a letter." However, Williams "failed to file a timely notice of intent to appeal" on Petitioner's behalf once the motion to

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<sup>1</sup> It is unclear from the record when a hearing was held on Petitioner's motion to reconsider sentence. However, Petitioner stated in his first PCR application, which was filed in April 2017, that the motion was denied on February 12, 2015. App. 443. Petitioner likely meant February 12, 2016, since his trial only took place in March 2015. Additionally, Petitioner filed his *pro se* notice of appeal on February 22, 2016, which would have been ten days after the motion to reconsider was denied. Petitioner later testified at his PCR hearing that he "attended court" on the motion to reconsider and the judge denied the motion "from the bench." App. 499, l. 17 – 500, l. 4. Regardless, a formal order denying the motion to reconsider was not issued until August 9, 2018, and the state repeatedly alleged until that time that the motion was outstanding. App. 456-457. Throughout this period, Petitioner clearly sought a direct appeal, as evidenced by his *pro se* notice of appeal, and later a belated direct appeal pursuant to White v. State, as shown in both of his *pro se* PCR applications.

reconsider was denied. App. 443. Petitioner asserted that he was denied his “first appeal as of right” as a result of ineffective assistance of counsel. App. 444.

The state filed a return to Petitioner’s application and motion to dismiss without prejudice on February 1, 2018. App. 448-452. The state argued Petitioner’s motion to reconsider sentence remained pending before the trial court and, consequently, “the time to file a notice of appeal remains stayed.” App. 450. On February 16, 2018, Judge Harrington dismissed Petitioner’s PCR application without prejudice finding Petitioner’s post-trial motion was still pending. App. 453-455.

On August 9, 2018, Petitioner’s motion to reconsider sentence was ruled upon in a written order by the Honorable Roger M. Young. Judge Young denied Petitioner’s motion “after thoroughly considering [Petitioner’s] motion and supporting material.” App. 456-457. There is no evidence in the record that Petitioner was served with a copy of the order denying his motion to reconsider sentence or that he actually received notice of the order.

On March 3, 2022, Petitioner filed a second application for post-conviction relief again seeking a belated direct appeal pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974). Petitioner once more argued that he did not knowingly and intelligently waive his right to a direct appeal. Petitioner asserted that James Smiley, his trial counsel, moved to be relieved *before* filing a notice of appeal on Petitioner’s behalf or otherwise perfecting Petitioner’s direct appeal. App. 458-468. The state filed a return to this application on March 28, 2023, and an amended return and partial motion to dismiss on April 7, 2023. App. 469-491.

An evidentiary hearing was held on October 18, 2023, before the Honorable Maite Murphy. Assistant Attorney General Danielle Dixon represented the state. Christopher L. Murphy represented Petitioner. App. 492.

At the beginning of the hearing, the parties stipulated that James Smiley was relieved as counsel at the conclusion of Petitioner's jury trial and did not speak to Petitioner after his trial or his sentencing. The parties further stipulated that Lauren Williams, if called to testify, would testify that there was a hearing on Petitioner's motion to reconsider sentence in February 2016 before Judge Young and Williams provided Petitioner with a *pro se* notice of appeal at that time and told Petitioner "basically, this is what he would need to do if he wanted to appeal." App. 497, ll. 1-18.

Petitioner testified at the evidentiary hearing that James Smiley, who was retained, represented him at trial. Petitioner did not know his case was scheduled for trial because he was "on the run" for a separate offense and "lost touch" with Smiley. After Petitioner was convicted at trial, he never spoke to Smiley. Eventually Petitioner discovered he had been convicted and his sealed sentence was opened. Petitioner explained that after he was sentenced, he hired Lauren Williams to file a motion to reconsider his sentence since Smiley had been relieved. Petitioner testified that a hearing was held on his motion to reconsider, but the judge denied the motion. After the motion was denied, Petitioner said he spoke to Williams "about an appeal" and "expected" her to file a notice of appeal. However, Williams never did so. Petitioner filed a *pro se* notice of appeal despite not knowing "anything about the law." Petitioner has since sought a belated appeal and testified that he wants an appeal. App. 498, l. 13 – 501, l. 10.

By order filed January 18, 2024, the PCR court denied Petitioner relief. App. 503-507. The court found Petitioner was not entitled to a belated direct appeal pursuant to White v. State. The court concluded Petitioner was aware of his right to appeal yet waited more than three years after his motion to reconsider sentence was denied on August 9, 2018, to file the instant action seeking a belated appeal. App. 506. Consequently, the court determined Petitioner "knowingly

and voluntarily” waived his right to appeal. App. 506. Notably, the court did not make any credibility findings.

Because Petitioner did not knowingly and intelligently waive his right to a direct appeal and is plainly entitled to a belated appeal pursuant to White v. State, this petition for writ of certiorari follows.

## ARGUMENT

The post-conviction relief (PCR) court erred by finding Petitioner is not entitled to a belated direct appeal pursuant to *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974), when there is no evidence Petitioner knowingly and intelligently waived his right to appeal, rather the evidence establishes Petitioner repeatedly sought a direct appeal from his conviction and sentence.

There is no probative evidence to support the PCR court's finding that Petitioner knowingly and intelligently waived his right to a direct appeal. Accordingly, this Court should grant certiorari and consider Petitioner's belated direct appeal.

"On appeal, the PCR court's ruling should be upheld if it is supported by any evidence of probative value in the record." *Clark v. State*, 396 S.C. 164, 167, 719 S.E.2d 708, 710 (Ct. App. 2011) (quoting *Simuel v. State*, 390 S.C. 267, 270, 701 S.E.2d 738, 739 (2010)) (internal quotation marks omitted). "However, if there is no evidence to support the PCR court's ruling, the appellate court will reverse." *Id.* (citing *Simuel*, 390 S.C. at 270, 701 S.E.2d at 739).

"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)) (emphasis added). "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)." *Id.* "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, 739-40 (2010) (quoting *Sheppard v. State*, 357 S.C. 646, 651, 594 S.E.2d 462, 465 (2004)).

There is no evidence that James Smiley, who represented Petitioner at trial, informed Petitioner of his right to appeal. Judge W. Jeffrey Young granted Smiley's motion to be relieved as counsel immediately following Petitioner's conviction after his trial *in absentia*.<sup>2</sup> While Judge Harrington requested Smiley be present when the court opened Petitioner's sealed sentence, there is no evidence Smiley informed Petitioner of his right to appeal. Even if Smiley had informed Petitioner of his right to appeal, there is no evidence Petitioner made a knowing and intelligent decision not to pursue an appeal. On the contrary, Petitioner asserted in his first PCR application that he "made it known and clear" to Smiley after he was sentenced that he wanted to appeal. See App. 442. In the absence of an intelligent waiver by Petitioner, Smiley should have initiated an appeal.

Additionally, while there is some evidence Lauren Williams, who filed a motion to reconsider sentence on Petitioner's behalf, informed Petitioner of his right to appeal, there is absolutely no evidence Petitioner made a knowing and intelligent decision not to pursue an appeal. Petitioner asserted in his first PCR application that Williams advised him of his right to appeal in a letter after his motion to reconsider sentence was denied on February 12, 2015.<sup>3</sup> See App. 443. However, Williams never ascertained whether Petitioner wanted to appeal his conviction and sentence nor did she file a notice of appeal on Petitioner's behalf. See Clark v.

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<sup>2</sup> While Petitioner did not appear at his trial, this does not act to waive his right to appeal from his conviction. See Braddock v. State, 344 S.C. 578, 580, 545 S.E.2d 498, 499 (2001).

<sup>3</sup> While Petitioner stated in his first PCR application, which was filed in April 2017, that the motion was denied on February 12, 2015, Petitioner likely meant February 12, 2016, since his trial only took place in March 2015. Additionally, Petitioner filed his *pro se* notice of appeal on February 22, 2016, which would have been ten days after the motion to reconsider was denied. Petitioner later testified at his PCR hearing that he "attended court" on the motion to reconsider and the judge denied the motion "from the bench." App. 499, l. 17 – 500, l. 4. Given this evidence, it is likely a hearing was held on the motion on February 12, 2016, and the judge orally denied the motion at the conclusion of the hearing. Regardless, a formal order denying Petitioner's motion to reconsider sentence was not issued until August 9, 2018. App. 456-457.

State, 396 S.C. 164, 169, 719 S.E.2d 708, 710-11 (Ct. App. 2011) (holding there was no probative evidence that Clark knowingly waived his right to a direct appeal where the testimony showed his trial counsel could not have ascertained whether Clark wanted to appeal his conviction). Williams, as Petitioner's attorney, was *required* to either initiate an appeal or comply with the procedure in Anders v. California, 386 U.S. 738 (1967). See Turner v. State, 380 S.C. 223, 224, 670 S.E.2d 373, 374 (2008).

Petitioner undoubtedly wished to appeal his conviction and sentence. Petitioner filed a *pro se* notice of appeal on February 22, 2016, which was dismissed for failure to timely serve the state as required by Rule 203(b), SCACR. Petitioner testified at his PCR hearing that he tried to appeal himself, but he did not know "anything about the law." See App. 500, ll. 13-19. After this appeal was dismissed, Petitioner filed a timely PCR application seeking a belated direct appeal, but the PCR court dismissed this application without prejudice because the state maintained Petitioner's motion to reconsider sentence was still outstanding.

Because there is no evidence Petitioner made a knowing and intelligent decision not to pursue a direct appeal, respectfully, this Court should grant certiorari and consider Petitioner's belated appeal.

## STATEMENT OF ISSUES ON APPEAL

1.

Did the trial court err by denying Appellant's motion for a directed verdict for the offense of first degree burglary when the state failed to present any direct or substantial circumstantial evidence of an intent to commit a crime in the dwelling at the time of entry, an essential element of the offense?


2.

Did the trial court abuse its discretion by sentencing Appellant to thirty years imprisonment when Appellant's similarly situated codefendant, who was tried jointly with Appellant, was sentenced to only sixteen years imprisonment, and the underlying factual allegations, particularly the fact that no one was injured during the burglary, and Appellant's minimal prior record did not justify a thirty year sentence?

**CONCLUSION**

Based on the foregoing argument, Petitioner respectfully requests this Court grant the petition for writ of certiorari, hold there is no evidence Petitioner knowingly and intelligently waived his right to a direct appeal, and consider Petitioner's belated appeal.

Respectfully submitted,

  
Lara M. Caudy  
Senior Appellate Defender

ATTORNEY FOR PETITIONER

This 12th day of May, 2025.