

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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May 23 2025

S.C. SUPREME COURT

On Petition for Writ of Certiorari
Anderson County
Honorable R. Lawton McIntosh, Plea Judge
Honorable Perry H. Gravely, Circuit Court Judge

Appellate Case No. 2024-001225

JACOB NATHANIEL LANCE, SCDC # 375653

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S QUESTIONS PRESENTED

- I. Whether the post-conviction relief court correctly found petitioner is entitled to belated appeal pursuant to *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974)?
- II. 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?

RESPONDENT'S COUNTERSTATEMENT OF QUESTIONS PRESENTED

- I. Whether the post-conviction relief court properly found petitioner is entitled to belated appeal pursuant to *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974)?
- II. Whether the post-conviction relief court properly found that plea counsel was not constitutionally ineffective for deciding not to file a motion to reconsider because plea counsel articulated a legitimate reason for not making one, and Petitioner has not met his burden of proving that the result of the proceedings would have been different since Petitioner presented no mitigating factors to the post-conviction relief court that the plea judge had not already considered?

STATEMENT OF THE CASE

Jacob N. Lance (Petitioner) is presently confined in the South Carolina Department of Corrections pursuant to the orders of commitment of the Anderson County Clerk of Court. During its May 2016 term, the Anderson County Grand Jury indicted Petitioner for Murder (2016-GS-04-862), Burglary, First Degree (2016-GS-04-860), and two counts of Arson, Third Degree (2016-GS-04-861, -863). Kurt Tavernier, Esquire (Plea Counsel) represented Petitioner. Assistant Solicitor Lauren Davis Price of the Tenth Circuit Solicitor's Office prosecuted the case.

On March 14, 2018, Petitioner appeared before the Honorable R. Lawton McIntosh and pled guilty to the lesser-included offense of Voluntary Manslaughter and as indicted to the remaining three charges without recommendation from the State as to sentencing. Judge McIntosh sentenced Petitioner to concurrent sentences of thirty years imprisonment for Voluntary Manslaughter, fifteen years imprisonment for First Degree Burglary, and fifteen years imprisonment for each count of Arson.

Plea Counsel subsequently filed a Notice of Appeal on Petitioner's behalf, however, the notice of appeal was not filed within ten days after sentencing. By Order dated April 15, 2018, the South Carolina Court of Appeals dismissed the case for failure to timely serve the notice of appeal pursuant to Rule 203(b), SCACR. *State v. Lance* (S.C. Ct. App. filed August 10, 2018). The Remittitur was returned to the circuit court on April 25, 2018.

Petitioner filed an application for post-conviction relief on March 14, 2019. Respondent, the State of South Carolina, filed its Return on November 12, 2019, requesting an evidentiary hearing to resolve the claims set forth in the application. On March 1, 2023, an evidentiary hearing was held at the Anderson County Courthouse before the Honorable Perry H. Gravely. Petitioner was present and represented by Linda Vallar Whisenhunt, Esquire. Assistant Attorney General C.

Whitney O'Kelly, represented Respondent. At the conclusion of the hearing, the Court denied the application in full.

On March 24, 2023, a conference call was held with Respondent and Petitioner's attorney, Ms. Whisenhunt. Petitioner was not present on the conference call. By consent of the parties, Judge Gravely granted Petitioner's request for a belated appeal pursuant to *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974). In an order of dismissal filed May 15, 2024, Judge Gravely granted belated appellate review pursuant to *White v. State* and dismissed all other allegations with prejudice. Petitioner then timely filed a notice of appeal of the decision.

STATEMENT OF THE FACTS

On November 13, 2015, Petitioner and his brother went to the home of Todd Cantlay (Victim). App. p. 12, ll. 3-4. Once there, they struck Victim in the head with a baseball bat several times and stabbed him in the neck with a knife. App. p. 12, ll. 5-7. After Victim died, they set his body on fire. App. p. 12, ll. 7-10. The two brothers then took items from the home with them, including two guitars, an Xbox 360, a television set, and a .22 caliber rifle. App. p. 12, ll. 12-14. Victim's 17-year-old son, Brooks Cantlay (Cantlay), was upstairs at the time of this killing. App. p. 12, ll. 15-16. He told law enforcement he heard three loud bangs but thought it was his father banging the TV remote on a table in the home. App. p. 12, ll. 16-19. Cantlay said he woke up to the smell of smoke and discovered his father, doused Victim's body with bowls of water and then dialed 9-1-1. App. p. 12, ll. 19-22. When the Anderson County Sheriff's Office arrived, Cantlay told them he believed that Petitioner might be responsible for the incident. App. p. 12, ll. 23-25. Cantlay said that Petitioner was his drug dealer and that Victim and Petitioner had recently been texting each other, and that Victim had called Petitioner complaining that Petitioner was "shorting" Cantlay by not giving him enough drugs for the money he was paying. App. p. 13, ll. 1-6. Cantlay told law enforcement that they would find texts on his phone between the two and phone calls, which they did. App. p. 13, ll. 6-8. After taking Victim's belongings from the house, the brothers also took Victim's car, a black BMW, and drove it to a wooded area where they attempted to burn it. App. p. 13, ll. 9-12. At the time of this incident, Petitioner was seeing the mother of his child, Alissa Martin (Martin). App. p. 13, ll. 12-14. After the killing, he called her and told her he had killed a man by hitting him with a baseball bat and that his brother, Oscar, had stabbed the man in the neck. App. p. 13, ll. 14-18. Then they had stolen items, including a car, and set the car on fire. App. p. 13, ll. 18-20. Martin called law enforcement after hearing this. App. p. 13, ll. 19-20. Search warrants were executed at the homes of the defendants at 101 and 106 Saddle Trail. App. p. 13, ll.

21-22. Both the defendants were apprehended at that time. App. p. 13, ll. 22-23. The two stolen guitars were found in Petitioner's vehicle, while the bloody baseball bat and .22 caliber rifle were found behind Oscar's home. App. p. 13, l. 25, p. 14, ll. 1-2. In Oscar's home, they found the TV and an Xbox that had been hidden inside a recliner in the home. App. p. 14, ll. 3-6. Petitioner and his co-defendant gave statements to law enforcement. App. p. 14, ll. 7-8. Petitioner gave a statement to law enforcement implicating his brother in the killing. App. p. 14, ll. 8-9. Oscar then gave a statement to law enforcement implicating Petitioner as the killer. App. p. 14, ll. 10-11. Shortly before this killing took place, Cantlay told law enforcement he had given his home address to a mutual acquaintance of Petitioner. App. p. 14, ll. 12-16, 18-22. Martin, who was the mother of Petitioner's child, also told law enforcement she was aware of the threatening phone calls made by Victim to the Petitioner before this incident. App. p. 15, ll. 13-16. The autopsy report in this case said the cause of death was blunt force trauma injury with resultant cerebral lacerations, contusions and diffused axonal injury. App. p. 15, ll. 20-23. When law enforcement discovered Victim's vehicle, there was a burn rag in the gas tank where the vehicle had been set on fire. App. p. 15, ll. 24-25, p. 16, l. 1. At the scene, a steak knife was found next to the victim's body, along with a can of Zippo Lighter Fluid that had been punctured. App. p. 16, ll. 2-5.

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 (2018). On appellate review, courts give great deference to a post-conviction relief court's finding of fact and will uphold them if there is any evidence in the record to support them. *Id.* at 179, 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); *Caprood v. State*, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. *Id.* Appellate courts will 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

I. The post-conviction relief court properly found petitioner is entitled to belated appeal pursuant to *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974).

Respondent concedes that Petitioner is entitled to relief pursuant to *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974). 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, 224-25, 670 S.E.2d 373, 374 (2008) (internal citations omitted). 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.* South Carolina's Appellate Courts have no jurisdiction to entertain appeals when the notice of appeal is not timely given and served. *White*, 263 S.C. 110, 119, 208 S.E.2d 35, 40 (1974). Nevertheless, if a post-conviction relief court finds that a petitioner has been denied his right to direct appeal from trial due to counsel's errors, his request for post-conviction relief may be denied, but he may be permitted to seek belated review of trial errors in conjunction with his appeal of the order dismissing his application for post-conviction relief. *Id.*

At the post-conviction relief hearing, Plea Counsel testified he was notified by Petitioner that he desired to appeal, but Plea Counsel was out of the office when he was notified. App. p. 93, ll. 21-23. Plea Counsel testified he filed the appeal once he was back in the office, but the timing did not allow him to accomplish it in a timely manner. App. p. 94, ll. 1-5. On cross-examination, Plea Counsel testified he was surprised when he received a last second request from Petitioner that he desired to appeal. App. p. 102, ll. 18-19.

Respondent concedes that Petitioner did not waive his right to an appeal and that Petitioner is entitled to relief pursuant to *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974).

II. The post-conviction relief court properly found that plea counsel was not constitutionally ineffective for deciding not to file a motion to reconsider because he articulated a legitimate reason for not making one, and Petitioner has not met his burden of proving the result of the proceedings would have been different since Petitioner presented no mitigating factors to the post-conviction relief court that the plea judge had not already considered.

The post-conviction relief court properly denied relief because Petitioner failed to prove prejudice from Plea Counsel's decision not to file a motion to reconsider Petitioner's sentence. Petitioner has presented no new mitigating factors that Plea Counsel could have presented or argued to cause the plea judge to change the sentence. Given the record, the post-conviction relief court properly found Plea Counsel was not deficient, and that Petitioner failed to show resulting prejudice from the decision not to file a motion to reconsider.

Pursuant to the first prong of the *Strickland* analysis, Petitioner must prove counsel's performance was deficient. *Strickland v. Washington*, 466 U.S. at 686 (1984); *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). To show deficiency, Petitioner must prove by a preponderance of the evidence that counsel's actions fell outside of the zone of "reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688. *See also* Rule 71.1(e), SCRPC ("The [petitioner] has the burden of establishing his entitlement to relief by a preponderance of the evidence"). Reasonableness is determined by the "variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how to best represent a criminal defendant." *Id.* at 689. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003) (citing *Strickland*, 466 U.S. at 690). Judicial scrutiny of counsel's performance remains highly deferential towards defense counsel with a strong presumption that counsel acted competently, because competent representation may be executed in virtually "countless" ways.

Strickland, 466 U.S. at 688-89. The benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the result cannot be relied upon as being just. *Id.* 466 U.S. at 686. Even if there is reason to think counsel’s conduct was far from exemplary relief may still be denied so long as counsel did not take an approach that no competent lawyer would have taken. *Dunn v. Reeves*, 141 U.S. 2405, 2410 (2021).

Second, counsel’s deficient performance must have prejudiced the petitioner so that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Cherry*, 300 S.C. at 117-18. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694. The court makes this determination based upon the totality of the evidence. *Id.* at 695. Realistically, this is found “only in the rarest case” because “[t]he likelihood of a different result must be substantial, not just conceivable.” *Harrington v. Richter*, 562 U.S. 86, 111-12 (2011) (quoting *Strickland*, 466 U.S. at 697). In examining whether an applicant has proven prejudice, courts should consider the specific impact counsel’s error had on the outcome. *Smalls v. State*, 422 S.C. 174, 188, 810 S.E.2d 836, 843 (2018).

Because the Sixth Amendment right to counsel also applies to a defendant entering a guilty plea. *Hill v. Lockhart*, 474 U.S. 52 (1985), extended the two-part *Strickland* test to challenge guilty pleas based on ineffective assistance of counsel. *See Padilla v. Kentucky*, 559 U.S. 356, 373 (2010) (recognizing that the guilty plea process is a “critical phase of litigation” for purposes of the Sixth Amendment right to effective assistance of counsel). The analysis of counsel’s performance under the first prong of *Strickland* remains unchanged, the applicant must show that counsel’s representation fell below an objective standard of reasonableness demanded of attorneys in

criminal cases. *Hill*, 474 U.S. at 58-59; *accord Thompson v. State*, 340 S.C. 112, 115, 531 S.E.2d 294, 296 (2000).

Prior to sentencing, Plea Counsel asked the plea court to consider Petitioner's lack of prior record. App. p. 22, ll. 22-23. Petitioner spoke on his own behalf at his guilty plea, expressing remorse. App. p. 23, ll. 14-22. Petitioner also brought to the plea court's attention that he had a two year old daughter at the time of the plea and wished to be a father to her. App. p. 24, ll. 6-9. After mitigation by Petitioner, the plea court inquires as to the age difference between Petitioner and his brother, Oscar, then Oscar informs the plea court that he is thirteen years older than Petitioner. App. p. 24, ll. 4-7. The plea court stated that Petitioner and Petitioner's brother were equally culpable for what had occurred, noting that "the hand of one is the hand of all". App. p. 28, ll. 10-13. The plea judge then sentenced Petitioner to concurrent terms of thirty years for manslaughter, thirty years for first degree burglary, fifteen years for arson, and fifteen years for third degree arson. App. p. 29, ll. 17-23. Petitioner's brother received the same sentence. App. p. 29, ll. 24-25, p. 30, l. 1-7.

At the post-conviction relief hearing, Plea Counsel testified that he did not consider filing a motion to reconsider as he believed Petitioner received a favorable sentence given that the evidence showed Petitioner was the more culpable of the two codefendants. App. p. 103, ll. 23-25, p. 104, l. 1. Furthermore, Plea Counsel testified that he would file a motion to reconsider if the judge failed to consider something that may have occurred. App. p. 103, ll. 15-17. Plea Counsel also testified he felt, at sentencing, that Petitioner receiving a concurrent rather than consecutive sentence was a good outcome. App. p. 93, ll. 15-17. The post-conviction relief judge stated he saw no basis for relief, and that it appeared Plea Counsel "did a stellar job in

the fact that he got his deal at all.” App. p. 109, ll. 6-8, 13-15. The post-conviction relief court, in its Order of Dismissal, found Plea Counsel’s testimony at the hearing credible. App. p. 131.

Although Petitioner’s appellate issue relates solely to Plea Counsel’s decision not to file a motion for reconsideration of the sentence imposed, Petitioner primarily seeks a reversal of his convictions along with a remand for a new trial through his request for relief on appeal. The requested relief would only be appropriate if Petitioner established there was a reasonable probability he would not have pled guilty but for defense counsel’s deficient performance. *Hill*, 474 U.S. at 59 (“[I]n order to satisfy the ‘prejudice’ requirement [in a challenge to a guilty plea based on ineffective assistance of counsel], the defendant must show that there is a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.”). Since Petitioner has instead alleged there was a reasonable probability his sentence would have been different but for defense counsel’s failure to file a post-plea motion, Petitioner could not possibly be entitled to or lawfully receive the primary relief he is now seeking.¹

Concerning the post-conviction relief judge’s finding as to deficiency, Petitioner does not argue that he told Plea Counsel to file a motion to reconsider the sentence, rather Petitioner argues

¹ See *United States v. Morrison*, 449 U.S. 361, 364 (1981) (“Cases involving Sixth Amendment deprivations are subject to the general rule that remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests.”); cf. *Boan v. State*, 388 S.C. 272, 277, 695 S.E.2d 850, 852 (2010) (“Because Petitioner’s only argument on appeal is the error in sentencing regarding the offense of criminal sexual conduct with a minor first degree, we remand for resentencing only as to that offense.”); *Rolen v. State*, 384 S.C. 409, 414, 683 S.E.2d 471, 474 (2009) (“[W]e hold that counsel was ineffective for failing to move to withdraw [Rolen]’s guilty plea. However, we find that granting [Rolen] the relief of an entire new plea hearing is inappropriate. Once the plea judge found that [Rolen]’s plea was voluntary and supported by a factual basis and formally accepted the plea of guilt, [Rolen] forfeited his ability to withdraw the plea as a matter of right. Accordingly, we remand the case to the point in the guilty plea proceeding in which counsel should have sought to withdraw the plea. In our view, this tailored relief remedies the precise prejudice resulting from plea counsel’s deficient performance.” (citations omitted)).

that Plea Counsel should have asked the plea court to reconsider the sentence because the plea court considered improper factors when sentencing Petitioner to thirty years. As stated above, Plea Counsel articulated his rationale for not filing a motion to reconsider because he felt it was a “pretty good deal”. App. p. 104, l. 1. In fact, Plea Counsel testified he was “not really surprised” that Petitioner received a thirty year sentence, given the nature of the crime. App. p. 91, l. 20. Additionally, Plea Counsel testified that he felt that Petitioner was more culpable than his codefendant. App. p. 103, l. 24.

As stated above, Plea Counsel presented mitigation prior to sentencing and specifically mentions Petitioner’s lack of prior record as something that ought to be considered. App. pp. 19-22. Petitioner also presented mitigation on his own behalf, reading a statement to the plea court. App. p. 23, l. 14- p. 24, l. 11. Shortly after, Petitioner’s brother informs the plea court that he is thirteen years older than Petitioner. App. p. 25, ll. 4-7. Representations made by defendants, counsel, and prosecutors at a guilty plea, along with any findings made by the judge accepting the plea, constitute a “formidable barrier in any subsequent collateral proceedings.” *Blackledge v. Allison*, 431 U.S. 63, 73-74 (1977). Here, the plea judge was provided with all the information that reasonably bore on the proper sentence for Petitioner prior to sentencing. *See In re M.B.H.*, 387 S.C. 323, 326, 692 S.E.2d 541, 542 (2010). As a result, Plea Counsel did not have viable or compelling grounds upon which to ask the plea judge to reconsider his sentencing decision in Petitioner’s case and could not have been deficient for failing to file a motion simply repeating the same request for more leniency that had already been advanced to the plea judge.

There was no basis to move for reconsideration of the sentence when Petitioner was considered equally as culpable as his brother, pursuant to the theory of accomplice liability. At no time during the guilty plea did Petitioner object to Solicitor Price’s version of the facts of the case.

Petitioner pled guilty to the same charges as his brother, the codefendant. The plea court found that Petitioner had an equal level of culpability in the crime, citing the “hand of one is the hand of all” theory. App. p. 28, ll. 10-11. The plea judge described petitioner and his brother as equally culpable, and this was proper under the theory of accomplice liability. Accordingly, Petitioner—just as the post-conviction relief judge correctly concluded—failed to establish defense counsel was deficient for not filing a motion for reconsideration of the sentence imposed.

Concerning the post-conviction relief judge’s finding as to prejudice, Petitioner argues that he would have received a shorter sentence had the Court considered his culpability in isolation², along with his age and lack of a prior criminal record. This argument does not support a finding that Petitioner was prejudiced by the lack of a motion to reconsider because it is not reasonably likely these arguments would have resulted in a reduced sentence. The sentencing of an offender is entirely within the purview of the sentencing judge, who has broad discretion within the statutory limits. *State v. Warren*, 392 S.C. 235, 237-38, 708 S.E.2d 234, 235 (Ct. App. 2011). The plea judge here imposed a lawful sentence within the statutory guidelines³ *after having heard* about Petitioner’s age, lack of criminal record, and individual culpability. Under such circumstances, there were no legitimate or meritorious objections that could have been raised to Petitioner’s sentence. *See Garrett v. State*, 320 S.C. 353, 356, 465 S.E.2d 349, 350 (1995) (“A sentence is not excessive if it is within statutory limitations and there are no facts supporting an allegation of prejudice against respondent.”); *State v. Dozier*, 263 S.C. 267, 271, 210 S.E.2d 225, 226 (1974)

²In support of this point, Petitioner cites *State v. White*, 140 S.W. 1059, 1060 (Tenn. 1911). This case is non-binding before this Court. In it, the Tennessee Supreme Court discusses joint sentencing and rules that each defendant be sentenced to at least the minimum statutory sentence for the crimes they committed, so as not to permit the division of the single verdict unfairly among multiple defendants. The decision ensured that each defendant is answerable to their own offenses, and severally subject to their own treble damages. This is not at issue in the present case.

³ *See* S.C. Code Ann. §§ 16-3-50, 16-11-110, 16-11-311.

(explaining a South Carolina appellate court “has no jurisdiction on appeal to correct a sentence alleged to be excessive when it is within the limits prescribed by statute”); *see also Mayo v. State*, 347 S.C. 422, 426, 556 S.E.2d 380, 382 (2001) (recognizing defense counsel cannot be constitutionally ineffective for failing to object when “there was no sustainable objection” that could have been raised).

Since Petitioner has pointed to factors that were already before the plea court during sentencing, Petitioner has not satisfied his burden of establishing there was a reasonable likelihood the outcome of the proceedings would have been different had his defense counsel filed a motion for reconsideration that simply called the plea judge’s attention to information that he had already considered for sentencing purposes. *See Brooks v. State*, 325 S.C. 269, 272, 481 S.E.2d 712, 713 (1997) (“A sentence is not excessive if it is within statutory limitations and there are no facts supporting an allegation of prejudice against a defendant.”); *see also United States v. Rangel*, 781 F.3d 736, 746 (4th Cir. 2015) (“Rangel points to no argument or factor that his counsel should have raised that the district court failed to consider and which might have changed its view. He accordingly fails to establish prejudice to support his claim that his trial counsel rendered ineffective assistance at sentencing by failing to object to the drug weight finding”).

Because Plea Counsel’s act of not filing a motion seeking reconsideration of the sentence under the circumstances involved did not constitute objectively unreasonable representation and because Petitioner did not suffer any actual prejudice as a result of Plea Counsel’s actions, the post-conviction relief judge correctly concluded Petitioner failed to meet his required burden of proof, and the ruling in that regard was neither unsupported by the evidence appearing in the record nor clearly erroneous. Therefore, the post-conviction relief court was correct in finding that Plea Counsel was not deficient, and that Petitioner did not meet his burden in proving that the plea court

would have granted a motion to reconsider Petitioner's sentence. See *Strickland*, 466 U.S. at 700 ("Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim."). Accordingly, the Petition for Writ of Certiorari should be denied.

CONCLUSION


For the reasons stated above, this Court should affirm the post-conviction relief court's order. Should this Court grant Certiorari, Respondent requests permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

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