

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to Jasper County

Honorable J. Derham Cole, Circuit Court Judge

JONATHAN NIEVES,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2025-000057

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

Whether Petitioner is entitled to belated appellate review as the state conceded below and the PCR court found because appellate counsel failed to properly perfect the appeal?

STATEMENT

Petitioner Jonathan Nieves was indicted by the Jasper County grand jury in 2016 for two counts of murder and one count of possession of weapon during the commission of a violent crime. App. 547, 550, 553, 622. He was tried on October 11, 2021, before Judge Carmen Mullen and a jury. App. 1. He was represented by Joshua Koger, and Sean Thornton prosecuted the case. App. 2. Ultimately, the jury found him guilty of all three charges. App. 525:7-19. The trial court issued two life sentences. App. 538:8-13.

Counsel for Petitioner filed a notice of appeal on October 22, 2021. App. 556. However, his appeal was dismissed by the Court of Appeals on December 14, 2021, for failing to cure a filing deficiency and failing to order the trial transcript. App. 558. On June 8, 2022, he filed his initial PCR application alleging, among other things, the ineffective assistance of counsel for failing to properly secure appellate review and asserting he did not voluntarily waive appellate review. App. 559-63. The state filed its return to the application on December 15, 2023. App. 574-78. Petitioner filed an amended application on April 30, 2024. App. 580-81.

An evidentiary hearing was called before Judge J.D. Cole on May 7, 2024. App. 583. Petitioner was represented by Chelsey Marto, and the state was represented by Danielle Dixon. App. 583. Petitioner testified counsel failed to perfect the appeal and that he "really had no say-so" in the dismissal of his appeal. App. 587:13-24. Counsel Koger testified he unintentionally failed to comply with the Appellate Court Rules which resulted in the dismissal of the appeal. App. 610:1-612:23. The state conceded Petitioner did not voluntarily waive his right to appeal. App. 619:13-17. The PCR court ultimately issued an order finding Petitioner is entitled to belated review under *White v. State*, and dismissing all of his other claims. App. 622.

This petition follows with an accompanying *White* Initial Brief of Appellant.

ARGUMENT

The PCR court correctly granted petitioner a belated appeal pursuant to *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974), where the parties agree he did not knowingly and voluntarily waive his right to a direct appeal.

"Following a trial, counsel must make certain the defendant is made fully aware of the right to appeal." *Simuel v. State*, 390 S.C. 267, 270, 701 S.E.2d 738, 739 (2010) (citation 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, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967)." *Id.* "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 v. State*, 288 S.C. 290, 290, 342 S.E.2d 60 (1986) (mem.)); *see also* 17 Corpus Juris, *Criminal Law* § 3326, at 48 (1919).

In *Davis* this Court ordered that where a 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; *see also* Rule 243(i), SCACR (providing procedure for seeking *White v. State* review).

Here, although trial counsel filed a direct appeal, "the appeal was dismissed for counsel's failure to timely request the transcript." App. 624. As Petitioner testified, he "really had no say-so in the matter." App. 587. The state conceded Petitioner did not voluntarily waive his right to appeal. App. 619:13-17. Therefore, the PCR court correctly determined he did not voluntarily waive his right to appeal. App. 624, 632.

CONCLUSION

Petitioner respectfully requests this Court grant him belated appellate review and consider the issue raised in the accompanying brief.



Jordan Wayburn
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This 13th day of August, 2025.