

VOLUME II OF II

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to Horry County

Honorable Deadra L. Jefferson, Circuit Court Judge

JOHN KEHBORN,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2024-002166

APPENDIX

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1 constant communication, correct?

2 A: There had been.

3 Q: When you said -- and then you listed telephone calls, and
4 emails, and things like that, right?

5 A: I don't think I went into the telephone calls or emails
6 about your specific question. I mentioned an email from the
7 client prior to the trial date and the original trial date,
8 I'm sorry, the trial date that I had with him in front of
9 Judge John where he did not show. And then I also mentioned
10 the phone call from the brother. But I am telling you that
11 there were additional communications and that those things are
12 noted. And there were also communications with me, him, and
13 Clay when I first began meeting with him. So the idea and the
14 notion that he suggests that we have not communicated is
15 completely mendacious.

16 Q: Well I'm just trying to get -- you said constant
17 communication, and then it seems like you qualified that just
18 here with maybe one call before the actual trial date and then
19 a call from the brother several, possibly several months
20 later.

21 A: I don't believe that is what I said.

22 Q: Well what is your definition of constant communication?

23 A: Meaning that we are in regular communication and contact
24 leading up to the trial of this case. Meaning that there were
25 multiple, either in-office, by phone, or --- actually multiple

1 in-office meetings at that point because at the time that I
2 came on to the case and I became the attorney of record, I
3 took over -- let me back up. When Clay Pinkerton still had
4 this case, I felt that an expert was necessary. I felt that
5 it was needed before this case went to trial to try to help
6 Mr. Kehborn.

7 **MR. HALL:** Objection, Your Honor, relevance.

8 **THE COURT:** I'm going to give her a little latitude if
9 she wants to explain her answer.

10 You may continue.

11 **MS. WILSON:** Thank you, Your Honor.

12 **BY MR. FOWLER:**

13 A: I actually went to my boss because of the late date, we
14 didn't even have time to get funding from SCCID. I went to my
15 boss to ask for in-office funding, out of office pocket
16 funding, to get an expert in this case. That was the very
17 beginning of my time representing Mr. Kehborn or having some
18 real input into the preparation of the defense for his trial.
19 I told Mr. Kehborn, I went through -- and it was a DNA expert
20 because apparently that was something that was really big. I
21 think that he thought that the DNA said something other than
22 what it actually said. And I wanted to make sure that we were
23 all on the same page before he risked trial in this case where
24 he could go to prison for such a lengthy period of time. And
25 despite the evidence, despite what the experts said, he still

1 wanted to have a trial, so I was going to make sure I was
2 prepared to have it. And that meant actually communicating
3 with my client about the things in the discovery that didn't
4 match up. If there was some inconsistency, if there was a
5 problem, if I couldn't make sense of something given the
6 timeline. Those are the kinds of communications we were
7 having.

8 Q: Okay. Well I just wanted to be clear on this. A couple
9 of times at least you've mentioned constant communication, and
10 then I think you qualified it just a moment ago saying that
11 there was just a limited amount of communication between
12 September and the trial date. And then you went on to say
13 that there was in-person and phone calls and what have you.
14 So what was -- how do you define constant communication before
15 trial on this with the applicant?

16 A: Well I guess I don't understand what you mean about I
17 said it was constant and then I said it was limited because I
18 don't recall saying that. Maybe you can explain to me what
19 you think limited is and I can answer.

20 Q: You've mentioned that there were in-person
21 communications, you said emails on your time on the stand, and
22 I'm just wondering if you did have limited communication with
23 him, then what's -- you mean constant on other cases, or with
24 Pinkerton, or what?

25 A: Who said it was limited? I did not tell you that it was

1 limited.

2 Q: Okay.

3 A: I think my phrasing was constant. And constant to me
4 means that at no point in time in my preparation for this
5 trial was he unable to reach me, have an unreturned phone
6 call, sent me an email communication that I did not address
7 with him, none of those things happened.

8 Q: Okay. So Clay Pinkerton, did you get his file on this
9 case when you took over the case?

10 A: Yes.

11 Q: Okay. Was there -- in your opinion, was there constant
12 communication with Pinkerton and ---

13 A: I'm not going to comment on something that Mr. Pinkerton
14 did. I'm talking about the time that I represented him.

15 Q: Okay. What's your office policy on filing appeals in
16 general sessions cases?

17 A: If the client is told about the appeal, which in this
18 case Mr. Kehborn was prior to the unsealing of the sentence,
19 they are told that we will file it. And I specifically tell
20 my clients, all you have to do is call the front desk at the
21 office. If you don't see me and tell me, you don't need to
22 leave me a message about your appeal. The timeframe for an
23 appeal is finite, and if you miss your time you will miss the
24 appeal period. If he had told me before that appeal, I mean
25 before the unsealing that he wanted an appeal filed, we just

1 would have done it. He never said that. At no point in time
2 is it reflected in any of my notes that he ever called the
3 office, not one time. The first contact that I had from
4 anyone about an appeal regarding Mr. Kehborn's case was his
5 brother Ben, and that was through a staff member who noted
6 that the brother was saying that Mr. Kehborn didn't know how
7 to reach me about an appeal.

8 Q: So there's no office policy about automatically filing an
9 appeal, correct?

10 A: Not on any case that's not a murder.

11 Q: Okay. Is there on a murder case?

12 A: I don't know if it's automatic, but as a rule if someone
13 is convicted of a murder and it's, you know, 30 years to life,
14 I mean generally I think, yeah, they might go ahead and file
15 it. But on other cases we advise the client of their right
16 because it is their choice.

17 **MR. FOWLER:** Can I have a moment, please?

18 **THE COURT:** Uh-huh. (Affirmative response)

19 **BY MR. FOWLER:**

20 Q: So in this case it's your understanding that an appeal
21 would be filed if he requested it?

22 A: It is our practice, and I have not missed it yet, that I
23 advise a client of their right to an appeal. And if they tell
24 me they want an appeal, I will file it. And to be clear, when
25 I say I will file it, I don't physically go out and file it.

1 The staff files that. It's a form, I sign it, and it goes
2 off. If the client does not tell me before I leave the
3 courthouse that day, there is a good chance they're not going
4 to reach me, which is why I have the policy of telling clients
5 is all you have to do is call the front desk and tell the
6 front desk that you want the appeal, they will get it filed,
7 don't leave me a message so you're not waiting possibly ten
8 days while I'm in two weeks of court or whatever may happen.
9 But the point is, he never requested it of me before I left
10 the courthouse. I don't recall speaking to him after the
11 unsealing of the sentence, and there is no note saying it,
12 just that we spoke before.

13 Q: All right.

14 **MR. FOWLER:** Just a moment, Your Honor, please. Your
15 Honor, after speaking with my client, no further questions.

16 **THE COURT:** Any redirect? I got a frog in my throat, I
17 apologize. Any redirect?

18 **MR. HALL:** Nothing further from the State, Your Honor.

19 **THE COURT:** You may step down, Ms. Wilson.

20 **MS. WILSON:** Thank you, Your Honor.

21 **THE COURT:** Anything further from the State? Anything
22 further from the State?

23 **MR. HALL:** I'm sorry, Your Honor.

24 **THE COURT:** That's okay.

25 **MR. HALL:** No further witnesses from the State.

1 **THE COURT:** Any rebuttal witnesses from the applicant?

2 **MR. FOWLER:** Just a moment, Your Honor. Your Honor,
3 nothing else from the applicant after discussion from him.

4 **THE COURT:** I'll be glad to hear arguments.

5 **MR. FOWLER:** Would the State go first, Your Honor?

6 **THE COURT:** You have the burden of proof.

7 **MR. FOWLER:** Your Honor, based on the testimony provided
8 today we feel like he did provide communication, based on his
9 testimony, to Ms. Wilson. You know, this is something that is
10 very important. This is his one bite at the apple with a PCR,
11 Your Honor. And we would like for the Court to take into
12 account his testimony, what he has stated, Your Honor, and our
13 cross examination of Ms. Wilson. So we'd ask for a ruling in
14 our favor, Your Honor.

15 **THE COURT:** Would the State like to respond?

16 **MR. HALL:** Your Honor, the testimony from Ms. Wilson
17 reflects that she advised Mr. Kehborn of his right to an
18 appeal. She indicated that at no point after she advised him
19 of that did Mr. Kehborn indicate his desire to file an appeal.
20 She also testified that her records and notes indicate that
21 there is no communication from Mr. Kehborn regarding his
22 desire to an appeal except communication from his brother
23 which occurred eight months after the sentencing date, which
24 would have been outside the ten day appeal period, which
25 counsel testified that she was aware of.

1 Your Honor, to site case law, Turner v State 380 SC 223,
2 a 2008 Supreme Court case. The Supreme Court stated that
3 following a trial counsel is required to make certain a
4 defendant is fully aware of their right to an appeal. Ms.
5 Wilson testified that she advised him of his right to an
6 appeal, and if Mr. Kehborn had indicated that he wished to
7 appeal, she would have done that. So, Your Honor, we would
8 ask that you deny his application and deny his request for a
9 belated appeal.

10 **THE COURT:** Anything further from the applicant?

11 **MR. FOWLER:** Just a moment, Your Honor.

12 **THE COURT:** Uh-huh. (Affirmative response)

13 And I assume the State has read the record of this trial.
14 And I assume Mr. Fowler has read it, and I'll ask that
15 question once he's done talking to his client.

16 **MR. FOWLER:** Nothing else, Your Honor, after consulting
17 with my client.

18 **THE COURT:** I've read the record and I'm trying to figure
19 out what, other than an Anders brief, would be filed in an
20 appeal in this case?

21 **MR. FOWLER:** I don't know right off, Your Honor.

22 **THE COURT:** You need to look at -- you don't just file an
23 appeal to file it. There needs to some ground. I've read the
24 record. The TIA issue was thoroughly covered. He was clearly
25 advised of his right for trial in his absence. He fled the

1 state; he absconded. He had to be extradited. The breadth of
2 the record -- and Ms. Wilson frankly did an exemplary job in
3 his absence of arguing and advocating on his behalf. Just
4 reading the transcript I'm trying to figure out what issues
5 are there to be appealed other than -- other than an appeal
6 being filed and Indigent Defense reviewing the record and
7 sending in an Anders brief.

8 **MR. FOWLER:** Your Honor, I have no response to that. My
9 scope is on the PCR and what my client has told me and the
10 research that goes with that, so I do not know about the
11 underlying ---

12 **THE COURT:** You haven't read the transcript?

13 **MR. FOWLER:** I've read the transcript, Your Honor, but I
14 do not know to adequately answer that question sufficiently at
15 this time because I was not his counsel on the underlying
16 case, Your Honor.

17 **THE COURT:** Would you like to add anything, Mr. Hall?

18 **MR. HALL:** No, Your Honor. We would just argue that, I
19 mean, I'm not sure what appellate defense would have raised in
20 this case, but the purposes of this PCR is Ms. Wilson
21 performed her duties in accordance with reasonable ---
22 performed her duties reasonably under prevailing professional
23 norms.

24 **THE COURT:** And I understand, I was just curious if after
25 you all read the transcript in this case whether there was

1 anything viable in it. Because my next question would be, if
2 there was something viable what prejudice is there to the
3 State in allowing him to file a belated appeal. That's why I
4 asked the question, it wasn't random. You know we don't file
5 appeals just for the exercise of it and if it's going to be
6 futile. That's why I asked if y'all read the transcript as I
7 did, not meaning as I did like interpreting it, but reading
8 it, just reading it.

9 **MR. HALL:** I'm sorry, Your Honor.

10 **THE COURT:** Either one of you. I just wanted to you to
11 know the logic and why I asked that question.

12 **MR. HALL:** Yes, Your Honor. And from the State's
13 perspective, again, it would depend on what appellate defense
14 decides to raise based on their research.

15 **THE COURT:** Well it would have to be something that was
16 preserved.

17 **MR. HALL:** Yes, ma'am.

18 **THE COURT:** All right. Anything further from the
19 applicant?

20 **MR. FOWLER:** Nothing else, Your Honor.

21 **THE COURT:** Anything further from the State?

22 **MR. HALL:** nothing from the State, Your Honor.

23 **THE COURT:** I've listened to the testimony of the
24 parties. I find Ms. Wilson's testimony credible, as well as
25 dispositive of this issue. I do not find Mr. Kehborn's

1 testimony credible. I think he has testified to the best of
2 his recollection, but it lacks significantly any specifics
3 regarding his attempts to contact Ms. Wilson.

4 Ms. Wilson is a senior trial lawyer with the Public
5 Defender's Office who has had her licenses and practiced law,
6 according to her testimony, for 20 years and it has all been
7 in the General Sessions Court. This Court is hard pressed to
8 believe that Ms. Wilson did not know, especially under the
9 circumstances of a trial in a person's absence, after having
10 ardently argued in the transcript for a continuance and that
11 being denied based on the documentation that was presented to
12 not have advised her client to his right of a direct appeal,
13 and to have advised him of the timeline that is required for
14 that appeal to be filed in writing.

15 I find credible her testimony that based on the demands
16 of her schedule that she advises her clients to simply call
17 the front desk at the office because of the finite time to
18 file an appeal. That they don't have to speak with her, they
19 don't have to leave a message, just simply advise the front
20 desk that they would like an appeal and that that process
21 would be put into motion and completed.

22 I find credible her testimony that the only documentation
23 from the public defender's office, and just for the record the
24 applicant --- counsel questioned whether it was a business
25 record, Ms. Wilson clearly testified that there is a system in

1 place in their office to document when messages are received,
2 the date and time and otherwise. And she testified that a
3 call came into her office at 10:54a.m. which is documented by
4 the records regularly kept by her office by their front desk
5 on 2/28/23, which was eight months after the unsealed sentence
6 was implemented, from the defendant's brother Ben asking about
7 an appeal and articulating that his brother did not know how
8 to get in touch with her.

9 Of course we know that the timeframe for an appeal is ten
10 days, and the Court finds credible Ms. Wilson's testimony that
11 Mr. Kehborn did not exercise his right for the appeal to be
12 filed. And even more importantly, there is nothing that
13 prevented him at the time of his sentencing from simply asking
14 Ms. Wilson to file the appeal, and there's no evidence in the
15 record that he did that, or that he subsequently did it within
16 the ten days of the implementation of sentence.

17 And while he has testified that he had some paranoia, my
18 words not his, regarding any communication at the jail, phone
19 conversations at the jail are privileged, while they are
20 documented I don't know what the procedure is here, but even
21 if they are inadvertently recorded no one can access them.
22 And I fail to see what would be incriminatory in a phone
23 conversation asking simply that an appeal be filed. It's just
24 simply not credible. It just doesn't logically make sense in
25 the continuum of events, especially something as significant

1 as you having gone through the extradition process saying that
2 you lost your paperwork. The (inaudible) of having been
3 sentenced to 20 years, it would seem to me that the
4 significance and the profundity of that event would be a
5 catalyst to immediately saying I want an appeal filed. Even
6 if you were in a bit of a fog, you would have called.
7 Certainly you have access to a telephone. There's no
8 testimony that he was precluded from using telephones at the
9 detention center, at SCDC, or otherwise and he simply could
10 have, the same way he had his brother call eight months later,
11 could have called that day or he himself could have called the
12 next day or at least within that ten day timeframe.

13 So I believe that perception is reality, and I believe
14 that is his recollection of the events, but it simply is not
15 consonant with the record in this case that has been presented
16 to the Court, nor consistent with the credible testimony of
17 his seasoned trial attorney.

18 So the Court finds that he has failed to meet his burden
19 of proof and the request for a belated appeal is denied. And
20 I'm asking that the Attorney General provide the Court with a
21 proposed order within five days of today making all findings
22 of fact and conclusions of law consistent with the record and
23 that Mr. Fowler be copied on that correspondence at the same
24 time that it is transmitted to the Court, and that should be
25 sent to DJeffersonSC@sccourts in Word format. And of course,

1 again, Mr. Fowler should be copied on that correspondence.

2 **MR. FOWLER:** And just for the record, could the Attorney
3 General email me a copy of that?

4 **THE COURT:** I would assume he would do it by the same
5 method that he sends it to the Court and that you'd be copied
6 on that.

7 **MR. FOWLER:** Very good. Thank you, Your Honor.

8 **THE COURT:** You're welcome. Thank you very much.

9 **(END OF TRIAL)**

STATE OF SOUTH CAROLINA)
 COUNTY OF HORRY)
)
 John P. Kehborn, Jr., SCDC #388160,)
)
 Applicant,)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 FOR THE FIFTEENTH JUDICIAL CIRCUIT

Case No. 2023-CP-26-03861

ORDER OF DISMISSAL

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S. SUPREME COURT

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Presiding Judge: Hon. Deadra L. Jefferson
 Applicant's Attorney: Steven W. Fowler, Esq.
 Respondent's Attorney: Bryan T. Hall, Esq.
 Trial Counsel: Kia T. Wilson, Esq.
 Date of Hearing: July 31, 2024
 Court Reporter: Sallie Beth Todd

This matter is before the Court pursuant to an application for post-conviction relief ("PCR") filed by John P. Kehborn, Jr., ("Applicant") on June 20, 2023 challenging whether knowingly and voluntarily waived his right to a direct appeal. The State of South Carolina ("Respondent") filed its Return on April 25, 2024, and moved to dismiss the application for failure to comply with the statute of limitations.

On July 31, 2024, an evidentiary hearing convened before this Court on the sole issue of whether Applicant knowingly and voluntarily waived his right to a direct appeal pursuant to *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974). Applicant was present and represented by Steven W. Fowler, Esquire. Assistant Attorney General Bryan T. Hall represented Respondent. At the hearing, Applicant testified on his own behalf. Respondent called as a witness Kia T. Wilson, Esquire, Applicant's Trial Counsel. Following a thorough review of the trial transcript, the records to the Horry County Clerk of Court, the PCR application, the Respondent's Return thereto, and the testimony and evidence presented at the evidentiary hearing, this Court finds Applicant did not

10/10
 [Signature]

meet his burden of proof and is not entitled to a belated appeal pursuant to *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974). Thus, this Court denies relief and dismisses this application with prejudice.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections ("SCDC") serving a twenty (20) year sentence. In August 2020, the Horry County Grand Jury indicted Applicant for criminal sexual conduct with a minor – second degree (victim aged 11 to 14 years) (2020-GS-26-02911).¹ On February 14-16, 2022, Applicant proceeded to a jury trial before the Honorable Steven H. John. Assistant Solicitors George H. Martin, III, Esquire and Leigh A. Waller, Esquire prosecuted the case. Applicant was represented at trial by Kia T. Wilson, Esquire ("Counsel"). The Applicant was not present at the call of his trial and the proceeding continued in his absence. On February 16, 2022 the applicant was convicted as indicted and his sentence was sealed. On June 15, 2022, Judge Steven H. John sentenced Applicant to twenty (20) years for criminal sexual conduct with a minor – second degree and ordered that Applicant be placed on the child abuse and sex offender registry. Applicant did not appeal.

FACTS GIVING RISE TO THE CONVICTION

The incident occurred on May 26, 2020 at approximately 4:00 AM. The victim was thirteen (13) years old at the time of the incident. The Victim was home with her two (2) brothers and stepfather, the Defendant, while her mother was working overnight. The Defendant went into the Victim's room, turned her on her stomach, and had sexual intercourse with her. The Victim went into the bathroom and texted her brother. While the Victim and her brother were in the bathroom

¹ The offense of criminal sexual conduct with a minor – second degree (victim aged 11 to 14 years) is a violent, most serious felony punishable by imprisonment for not more than twenty years in the discretion of the court. *See* S.C. CODE ANN. § 16-3-655 (2015); S.C. CODE ANN. § 16-1-60 (2015); S.C. CODE ANN. § 17-25-45 (2014).

they were able to call their mother and father. The Victim's mother called law enforcement and then headed home. The Victim was taken to the Medical University of South Carolina where DNA was collected. DNA processed at the South Carolina Law Enforcement Division determined that the Defendant's DNA was located in the crotch of the Victim's underwear.

CURRENT APPLICATION

On June 20, 2023, the Applicant filed a PCR application alleging he "was denied effective assistance of counsel after trial due to my attorney not filing my direct appeal after I requested her to do so." The Applicant asserts that his Sixth and Fourteenth Amendment rights were violated pursuant to the United States Constitution.

Respondent filed a Return and moved to dismiss the application for failure to comply with the statute of limitations. At the evidentiary hearing, this Court ruled on Respondent's motion and limited the scope of the evidentiary hearing solely to the issue of whether Applicant knowingly and voluntarily waived his right to a direct appeal. *Wilson v. State*, 348 S.C. 215, 559 S.E.2d 581 (2002) (holding the statute of limitations for filing a PCR application does not bar an evidentiary hearing on the issue of whether an applicant knowingly and voluntarily waived his right to a direct appeal).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Before this Court are the Horry County Clerk of Court records of the subject conviction; Applicant's records from SCDC; the trial transcript; and the records of the current PCR action. This Court has had the opportunity to review the trial transcript in its entirety and has heard the testimony at the PCR hearing. This Court has had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility, and weigh their testimony. After a

careful review based on the *Strickland* standard set forth below, this Court finds Applicant has failed to carry his burden of proof. Below are this Court's findings of facts and conclusions of law as required by section 17-27-80 of the South Carolina Code (2017).

SUMMARY OF RELEVANT PCR EVIDENTIARY TESTIMONY

APPLICANT'S TESTIMONY

The Applicant testified on his own behalf. On direct examination the Applicant testified that his attorney in the underlying case was Kia Wilson, Esq. of the Horry County Public Defender's Office. The Applicant testified that his underlying charge is Criminal Sexual Conduct with a Minor. The Applicant testified that he is a combat veteran, has severe anxiety, PTSD and severe depression. The Applicant testified that he was not present at his trial and was found guilty at the conclusion of his trial. Applicant testified that he was aware there was supposed to be a trial in his case. The Applicant further testified that there was not a lot of communication between himself and Attorney Wilson prior to trial except for the time immediately preceding trial. Applicant testified that he was not at trial because he did not feel represented. Applicant testified that he did not appear for his trial. The Applicant testified that he often emailed Attorney Wilson, but would not receive a response. The Applicant testified that while present at his June 15, 2022, sentencing hearing, he asked Attorney Wilson to file a direct appeal. The Applicant testified that Attorney Wilson told him to call and remind her. The Applicant testified that he called the office the same day but did not speak with Attorney Wilson directly and was under the impression that a direct appeal would be filed. The Applicant testified that his brother also called Attorney Wilson regarding the Applicant's appeal. The Applicant testified that he had his brother call on his behalf before the one-year deadline, because the Applicant does not like to use the phone at the correctional facility as the calls are recorded. The Applicant testified that he believes the time in which an appeal must be filed is one (1) year. The Applicant further testified that he and his brother



contacted Attorney Wilson within a year of his sentencing to request that a direct appeal be filed. The Applicant testified that Attorney Wilson told him what to do in order for his appeal to be filed and he took the necessary action.

On cross examination the Applicant testified that calls are logged and recorded at the correctional facility, however he does not have a log or recording showing when he called Attorney Wilson. The Applicant further testified that he does not know the exact date that his brother called Attorney Wilson. The Applicant confirmed that Attorney Wilson does not represent his brother. The Applicant further testified that he has lost most of his notes.

On re-direct examination, the Applicant testified that he is not employed at the prison system and does not know how records are kept at the correctional facility. The Applicant testified that he expected Attorney Wilson to file his direct appeal since he asked her to do so and she is employed to represent her clients. The applicant reiterated that he lost his notes during the course of transport from Texas to Kershaw and had to ship some back.

Kia T. Wilson, Esq. testified on behalf of the State. She was trial counsel for the Applicant. On direct examination Wilson testified that she has been practicing law for twenty (20) years. Wilson testified that the totality of her twenty (20) years of practice has been devoted to criminal law. Wilson testified that she is a Senior Trial Attorney with the Horry County Public Defender's Office and was working in that capacity in February, 2022. Wilson testified that the Applicant's underlying case was originally assigned to Clay W. Pinkerton, Esq. of the Horry County Public Defender's Office. Wilson testified that James C. Galtmore, III, Esq. of the Horry County Public Defender's Office was originally sitting second chair on the case with Pinkerton. Galtmore became ill approximately two (2) months before trial and Wilson stepped in. Wilson testified that the trial was scheduled for September 20, 2021 however Pinkerton went home sick on that date and the

trial was continued. At some point Wilson took over as the lead attorney and the case went to trial on February 14, 2022 through February 16, 2022.² Wilson testified that she had constant communication with Applicant up to the time of trial through email, phone and in person. She further testified that one week prior to trial the Applicant was panicked and communicated that to her through email. Wilson testified that the Applicant never asked her to file a direct appeal. Wilson testified that the Applicant was convicted, his sentence was sealed on February 17, 2022, and a bench warrant was issued. Wilson testified that the Applicant had fled, was subsequently located, the sentence was unsealed and the Applicant was sentenced by Judge John on June 15, 2022. Wilson further testified that she and Applicant spoke in person prior to the sentencing but doesn't recall speaking to the Applicant following his sentencing on June 15, 2022. Wilson testified that the Horry County Public Defender's Office keeps a log of calls. Wilson testified that no call is logged from the Applicant following his sentencing. Wilson testified that eight (8) months after sentencing on February 2, 2023 at 10:54 a.m., the Horry County Public Defender's Office received a call from the Applicant's brother advising that the Applicant wanted an appeal but didn't know how to get in contact with his attorney. Wilson testified that the time period to file an appeal after a conviction is ten (10) days. Wilson testified that she advised the Applicant of his right to an appeal prior to his sentencing. Wilson further testified that she advised the Applicant that the time period in which an appeal must be filed is ten (10) days. Wilson testified that she never told the Applicant that the time period in which an appeal must be filed is one (1) year. Wilson testified that it is her standard practice to file an appeal whenever a client asks. Wilson testified that she does not file an appeal unless a client asks. Wilson testified that if the Applicant requested that an appeal be filed, she would have filed an appeal on the Applicant's behalf.

² Pages 67 through 79 of the trial transcript detail the trial in absentia procedure conducted by the trial court, Judge Steven H. John.

On cross examination, Wilson testified that she did not have a second chair in the Applicant's underlying trial. Wilson testified that she was a Senior Trial Attorney at the time of the trial and did not need a second chair. Wilson testified that the original trial date was September 20, 2021 and the actual trial dates were February 14 – 16, 2022. Wilson testified that she had constant communication and multiple meetings with the Defendant. Wilson testified that she fully explored the issue of a DNA expert and funding for the Applicant's case. She further testified of the Applicant's insistence on trial in spite of the weight of evidence against him and his misinterpretation of the existing scientific evidence. Wilson testified that all clients are told that she will file an appeal if the client wants one. Wilson further testified that she tells clients to inform the front office if the client wants an appeal. Wilson advises clients against trying to leave a message or voicemail with their attorney because the time limit for an appeal is so finite. Wilson testified that there is not an automatic appeal policy at the Horry County Public Defender's Office. Wilson further testified that sometimes automatic appeals are filed for murder cases. Wilson testified that it is her practice that if a client wants an appeal she will file it and she hasn't missed that practice yet. She testified that to date she has not missed a request to file an appeal to date. She further testified that her only notice was the call from the Applicant's brother eight (8) months after the sentencing. She testified that the Applicant "never" called and "never" requested an appeal be filed. There was no re-direct examination of Wilson.

Ineffective Assistance of Counsel

In a PCR action, an applicant bears the burden of proving the allegations. Rule 71.1(e), SCRPC; *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). An applicant alleging ineffective assistance of counsel must prove "counsel's conduct so undermined the proper functioning of the



adversarial process that the trial cannot be relied upon as having produced a just result." *Strickland v. Washington*, 466 U.S. 668 (1984); *Butler*, 286 S.C. at 441, 334 S.E.2d at 813. "The test for effective assistance of counsel is whether the representation was within the range of competence demanded of attorneys in criminal cases." *Watson v. State*, 287 S.C. 356, 357, 338 S.E.2d 636, 637 (1985). Courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Butler*, 286 S.C. at 441, 334 S.E.2d at 813. An applicant must overcome this presumption to receive relief. *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989). To establish ineffective assistance of counsel, a PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness and (2) the applicant sustained prejudice as a result of counsel's deficient performance. *Strickland*, 466 U.S. at 687-88; *Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625.

Waiver of Direct Appeal

Following a trial, counsel is required to inform a defendant of their right to an appeal. *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974). Absent an intelligent waiver by the defendant, counsel must either initiate an appeal or comply with the procedures of *Anders v. California*, 386 U.S. 738 (1967). *Turner v. State*, 380 S.C. 223, 670 S.E.2d 373 (2008). The PCR judge determines whether an applicant knowingly and voluntarily waived his right to a direct appeal from his trial. *White*, 263 S.C. 110, 208 S.E.2d 35; *Johnson v. State*, 294 S.C. 310, 364 S.E.2d 201 (1988).

As a matter of general impression, this Court finds Counsel's testimony at the evidentiary hearing credible and persuasive, where she presented well-recollected testimony of relevant background, facts, and discussions leading up to and during the Applicant's trial and sentencing. This Court finds Applicant's testimony at the evidentiary hearing lacks credibility. This Court finds Counsel's performance and advice regarding Applicant's right to an appeal was reasonable under

prevailing professional norms. This Court finds credible Counsel's testimony that she has practiced criminal law for over twenty (20) years. This Court finds credible Counsel's testimony that she advised Applicant of his right to a direct appeal after trial. This Court finds credible Counsel's testimony that she was aware that the deadline to file a notice of appeal is ten (10) days. This Court finds credible that Counsel advised Applicant to communicate his decision regarding an appeal to the front desk of her office if he could not reach her because Counsel recognized the finite timeframe to file an appeal. This Court finds credible Counsel's testimony that after advising Applicant of his right to an appeal, Applicant did not communicate to Counsel any desire to file an appeal. This Court also finds credible Counsel's testimony that the phone call log from the Horry County Public Defender's office, business records kept in the ordinary course of business, did not indicate that Applicant contacted Counsel's office to inform her of his desire to appeal. This Court further finds there is no evidence in the record that Applicant was prevented from communicating with Counsel via telephone while incarcerated. This Court finds credible Counsel's testimony that the only notification she received regarding Applicant's desire to appeal was from Applicant's brother in February 2023, approximately eight (8) months after Applicant's sentence.

This Court finds Applicant's failure to notify Counsel after being advised of his right to an appeal constituted an intelligent waiver of his right to an appeal. This Court does not find credible Applicant's testimony that after his sentencing, he informed Counsel in person and via telephone that he wished to appeal. Therefore, this Court finds Applicant failed to meet his burden of proving he did not knowingly and voluntarily waive his right to an appeal, and Applicant is not entitled to a belated appeal pursuant to *White v. State*.



ALL OTHER ALLEGATIONS

As to any and all allegations that were raised in the application and not specifically addressed in this Order, this Court finds the Applicant failed to present any evidence or testimony in support of the claims. Accordingly, this Court deems these allegations abandoned by the Applicant. Therefore, they are hereby denied and dismissed.

CONCLUSION


Based on the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant relief. Thus, this application is **DENIED AND DISMISSED WITH PREJUDICE**.

Should Applicant wish to secure appellate review, he must file and serve a notice of appeal within thirty (30) days of receipt by counsel of written notice of entry of judgment. See Rule 203, SCACR. Applicant has the right to an appellate counsel's assistance in seeking review of the denial of PCR. *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991). If an applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on applicant's behalf. Rule 71.1(g), SCRCF. Applicant's attention is directed to South Carolina Appellate Court Rules 203, 206, and 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. This application for PCR is denied and dismissed with prejudice; and
2. Applicant must be remanded to and remain in the custody of the State.

AND IT IS SO ORDERED THIS 10th day of December, 2024.


HON. DEANDRA L. JEFFERSON
 Presiding Judge
 Fifteenth Judicial Circuit

Charleston, South Carolina
 At Chambers

Copy of Order/ _____
 Mailed 12-17-24
 Initials YAW

