

 ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Richland County

Clifton Newman, Circuit Court Judge

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CICHEY L. MAYO,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-000520

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JOHNSON PETITION FOR WRIT OF CERTIORARI

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ATTORNEY FOR PETITIONER

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**ISSUE PRESENTED**

Did the PCR judge err in finding that petitioner was not entitled to a belated appeal pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974)?

**STATEMENT OF ISSUE ON APPEAL**

Pursuant to the reasoning in Miller v. Alabama, --U.S.--, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012), is the forty seven year sentence imposed for a crime committed when petitioner was seventeen years of age unconstitutional as a violation of the Eighth Amendment prohibition against cruel and unusual punishment?

## STATEMENT

In September 2001, the Richland County Grand Jury indicted Mayo for murder, assault and battery with intent to kill, armed robbery and two counts of attempted armed robbery, indictments #2001-GS-40-6648, 6649, 6650, 6651 and 6696. On June 4, 2002, Mayo appeared before the Honorable L. Henry McKellar and pled guilty as charged. Attorney Charlie J. Johnson, Jr. represented Mayo at the plea. Judge McKellar sentenced Mayo to forty seven (47) years for murder, thirty (30) years concurrent for armed robbery, twenty (20) years concurrent for both attempted armed robbery charges and twenty (20) years concurrent for assault and battery with intent to kill. A notice of intent to appeal was filed but dismissed by the South Carolina Supreme Court on October 28, 2002, as untimely filed.

On October 3, 2011, Mayo filed an application for post conviction relief seeking a belated direct appeal pursuant to White v. State, 263 S.C. 110, 108 S.E.2d 35 (1974). On October 10, 2011, the State filed a return and motion to dismiss as untimely filed pursuant to S.C. Code §17-27-45(a). On April 24, 2012, the Honorable James R. Barber, III signed a conditional order of dismissal, allowing thirty day for petitioner to file objections to the conditional order of dismissal. On May 15, 2012, Mayo filed objections to the conditional order of dismissal. Judge Barber then ordered an evidentiary hearing to address the issue of the belated appeal. Attorney Wilson P. Davis was appointed to represent Mayo at the evidentiary hearing. On October 18, 2012, an evidentiary hearing was held before the Honorable Clifton B. Newman. Attorney Davis represented Mayo at the evidentiary hearing. Attorney Rob A. Corney was present on behalf of the State. In a written order filed March 4, 2013, Judge Newman denied relief and dismissed the application. A timely notice of intent to appeal was served on March 12, 2013. This appeal follows.

## ARGUMENT

The PCR judge erred in finding that petitioner was not entitled to a belated appeal pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974).

On the date of the shooting, August 22, 2001, petitioner was seventeen years old. (App. p. 70, lines 13-15). The Richland County Grand Jury indicted petitioner, and three other individuals, for charges stemming from the shooting and robbery of two men from the United States Attorney's Office in Chicago who were attending a conference at the National Advocacy Center in Columbia. On June 4, 2002, Petitioner pled guilty to murder, assault and battery with intent to kill, armed robbery and two counts of attempted armed robbery. The transcript of the guilty plea is not available. (App. p. 1). The judge sentenced petitioner to an aggregate sentence of forty seven (47) years.

On October 3, 2011, petitioner filed an application for post conviction relief seeking a belated direct appeal pursuant to White v. State, 263 S.C. 110, 108 S.E.2d 35 (1974). During the evidentiary hearing petitioner testified that after being sentenced to 47 years he turned to plea counsel and asked, "What do we do next?" (App. p. 68, lines 21-24; p. 69, line 20 – p. 70, lines 1-3). Petitioner testified that he had learning disabilities and was emotionally disabled and unable to control his impulses. (App. p. 70, lines 6-12). Petitioner testified that at the time of the shooting he was in the eleventh grade but enrolled in classes for the learning disabled and the emotionally handicapped because it took him longer to grasp things. (App. p. 70, lines 18-21). Petitioner testified that he learned of his appellate rights "[a]pproximately, probably not even a year ago." (App. p. 72, line 20). When asked how he learned of his appellate rights ten years after the fact, petitioner testified, "By going to the law library every chance I get and communicating with elder individuals that know a little more about law than I do." (App. p. 72, lines 15-17).

Plea counsel admitted that he did not advise petitioner about the right to appeal. (App. p. 62, lines 5-7). Plea counsel testified, “I never advised that he had a right to appeal.” (App. p. 61, lines 16). When asked if petitioner indirectly asked him to file an appeal plea counsel testified, “Yeah. I mean, I knew he wanted me to file an appeal because we all was kind of shocked about the sentence that he received. But, as I said, the first thing I did was try to file a motion to, to reconsider sentence.” (App. p. 62, lines 19-22).

Plea counsel filed a motion to reconsider sentence. Petitioner testified he was unaware that plea counsel had filed the motion to reconsider sentence. (App. p. 68, lines 19-20). Plea counsel testified that he filed the notice of intent to appeal without petitioner’s knowledge. (App. p. 62, lines 8-10). According to plea counsel the appeal was denied because counsel neglected to include the date the motion to reconsider sentence was denied. (App. p. 63, lines 2-15). Plea counsel also testified that petitioner filed a *pro se* motion to waive his appeal and counsel did nothing to correct that filing.<sup>1</sup> (App. p. 62, lines 1-4). Plea counsel conceded error in failing to perfect the appeal. (App. p. 61, lines 16-25).

In the order of dismissal the PCR judge wrote:

Therefore, it is clear that regardless of his knowledge about the right to appeal directly following his plea, applicant was aware of his right to appeal when he submitted the *pro se* notice of withdrawal on December 16, 2002. Therefore, the current allegation is untimely raised by applicant as the current claim for a belated appeal would have had to be raised within one year of when he discovered the right to appeal, i.e. December 17, 2003. See S.C. Code §17-27-45(c). The current action was filed on October 3, 2011, nearly eight (8) years after the time to bring such a claim had expired. Therefore, the current action is untimely filed and raised, as Applicant failed to exercise due diligence in pursuing the requested relief.

Finally, this Court finds the current claim must be denied as it is barred under the equitable doctrine of laches.

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<sup>1</sup> State’s Exhibits #1 and #2 appear to be *pro se* captioned “NOTICE BY THE APPELLANT TO WITHDRAW THE APPEAL PENDING IN THIS CASE PENDING BEFORE THIS HONORABLE COURT.”

(App. pp. 89-90).

The PCR judge erred. Mayo did not freely and voluntarily waive his right to direct appeal and is entitled to a belated direct appeal. The doctrine of laches should not bar granting the belated direct appeal based on Mayo's age and disabilities. Pursuant to the reasoning in Miller v. Alabama, --U.S.--, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012), Mayo should, in a belated direct appeal, be able to challenge the forty seven year sentence imposed for a crime that took place when Mayo was seventeen years old.

In Weathers v. State, 319 S.C. 59, 61-62, 459 S.E.2d 838, 839 (1995), the South Carolina Supreme Court addressed counsel's duty to advise of appellate rights following a guilty plea and wrote:

This Court has never addressed the issue of whether a defendant must be advised of the right to appeal following a guilty plea. We now adopt the holding of the majority of courts that, absent extraordinary circumstances, there is no constitutional requirement that a defendant be informed of the right to a direct appeal from a guilty plea. See Laycock v. New Mexico, 880 F.2d 1184 (10th Cir.1989); Marrow v. United States, 772 F.2d 525 (9th Cir.1985); Davis v. Wainwright, 462 F.2d 1354 (5th Cir.1972); Carey v. Leverette, 605 F.2d 745 (4th Cir.), cert. denied, 444 U.S. 983, 100 S.Ct. 488, 62 L.Ed.2d 411 (1979); Farrington v. North Carolina, 391 F.Supp. 714 (M.D.N.C.1975); Younger v. Cox, 323 F.Supp. 412 (W.D.Va.1971). The bare assertion that a defendant was not advised of appellate rights is insufficient to grant relief. Instead, there must be proof that extraordinary circumstances exist such that the defendant should have been advised of the right to appeal. Younger v. Cox, supra. One extraordinary circumstances which would require counsel to advise a defendant of the right to appeal from a guilty plea would arise when the defendant inquires about an appeal. Laycock v. New Mexico, supra; Marrow v. United States, supra.

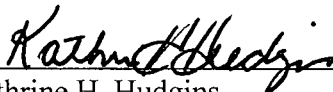
"[C]ounsel has a constitutionally imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing." Roe v. Flores-Ortega, 528 U.S. 470, 480, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000).

In the present case extraordinary circumstances existed that required plea counsel to advise Mayo of the right to appeal from the guilty plea. Plea counsel testified that he knew Mayo wanted him to file the appeal because of the forty seven year sentence imposed. (App. p. 62, lines 19-22). Plea counsel, however, failed to properly file the direct appeal and the Court dismissed the appeal. Plea counsel admitted that he did not advise Mayo of his appellate rights. (App. p. 62, lines 5-7). Plea counsel was ineffective in failing to advise Mayo of his appellate rights and in failing to properly file the notice of intent to appeal. Mayo did not freely and voluntarily waive his right to appeal through the *pro se* notice filed because counsel never advised Mayo of his appellate rights. Pursuant to the reasoning in Miller v. Alabama, --U.S.--, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012), there is a non-frivolous issue for appeal. Mayo is entitled to a belated appeal.

**CONCLUSION**

Based on the above argument this Court should reverse the PCR judge's ruling denying the belated appeal and order briefing on the direct appeal issue.

Respectfully submitted,

  
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Kathrine H. Hudgins  
Appellate Defender

ATTORNEY FOR PETITIONER

This 20th day of February, 2014.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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CERTIORARI TO RICHLAND COUNTY  
CLIFTON NEWMAN, CIRCUIT COURT JUDGE

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CICHEY L. MAYO,

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PETITION TO BE RELIEVED AS COUNSEL

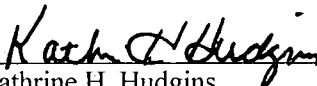
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Counsel for Cichey L. Mayo states:

1. She is an Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent petitioner.
2. She has reviewed the records and transcript of petitioner's post-conviction relief hearing which was held on October 18, 2012. In her opinion seeking certiorari from the order of dismissal is without merit.
3. She has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed the one arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve her as counsel for Cichey L. Mayo.

Respectfully submitted,

  
Kathrine H. Hudgins  
Appellate Defender  
ATTORNEY FOR PETITIONER

This 20th day of February, 2014

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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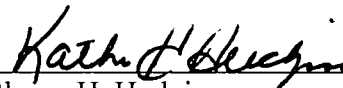
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CERTIFICATE OF SERVICE

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I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on Megan Harrigan, Esquire at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Cichey L. Mayo, #284692, at Allendale Correctional Institution this 20th day of February, 2014.



Kathrine H. Hudgins  
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 20th day  
of February, 2014.



(L.S.)

Notary Public for South Carolina  
My Commission Expires: July 24, 2022.