



ALAN WILSON  
ATTORNEY GENERAL

May 27, 2014

**RECEIVED**

MAY 27 2014

**S.C. Supreme Court**

Honorable Daniel E. Shearouse  
Clerk of the Supreme Court of South Carolina  
Post Office Box 11330  
Columbia, South Carolina 29211

**RE: Darren A. Simmons v. State of South Carolina**  
**Appellate Case No. 2013-000204**

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the Return to Petition for Writ of Certiorari to the South Carolina Supreme Court in the above matter for filing in your office. By copy of this letter we are serving opposing counsel with this Return to Petition for Writ of Certiorari.

With highest regards,

Ashleigh R. Wilson  
Assistant Attorney General

ARW/arh  
Enclosures

cc: LaNelle Durant, Esquire

**RECEIVED**

MAY 27 2014

**S.C. Supreme Court**

OF SOUTH CAROLINA  
IN THE SUPREME COURT

---

Appeal from Charleston County  
The Honorable R. Markley Dennis, Jr., Circuit Court Judge

---

Appellate Case No. 2013-000204

DARREN SIMMONS,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

---

**RETURN TO PETITION FOR WRIT OF CERTIORARI**

---

ALAN WILSON  
Attorney General

ASHLEIGH R. WILSON  
Assistant Attorney General

Post Office Box 11549  
Columbia, SC 29211  
(803) 734-3737  
#100269

ATTORNEYS FOR RESPONDENT

## TABLE OF CONTENTS

TABLE OF AUTHORITIES .....	ii
QUESTION PRESENTED .....	1
STATEMENT OF THE CASE.....	2
ARGUMENT.....	5
CONCLUSION.....	11

## TABLE OF AUTHORITIES

### Cases:

<u>Butler v. State</u> , 286 S.C. 441, 334 S.E.2d 813 (1985).	7
<u>Cherry v. State</u> , 300 S.C. 115, 386 S.E.2d 624 (1989).	7, 8
<u>Herron v. Century BMW</u> , 395 S.C. 461, 719 S.E.2d 640 (2011).	8
<u>Roe v. Flores-Ortega</u> , 528 U.S. 470 (2000).	5
<u>State v. Gee</u> , 262 S.C. 373, 204 S.E.2d 727 (1974).	8
<u>State v. Rikard</u> , 371 S.C. 295, 638 S.E.2d 72 (2006).	9, 10
<u>State v. Watts</u> , 321 S.C. 158, 467 S.E.2d 272 (1996).	8
<u>Strickland v. Washington</u> , 466 U.S. 668 (1984).	7, 8
<u>Turner v. State</u> , 380 S.C. 223, 670 S.E.2d 373 (2008).	5
<u>White v. State</u> , 263 S.C. 110, 108 S.E.2d 35 (1974).	5, 6
<u>Wolfe v. State</u> , 326 S.C. 158, 485 S.E.2d 369 (1997).	8

## QUESTION PRESENTED

I. Did the PCR Court correctly grant review pursuant to White v. State when the Petitioner never indicated he wanted an appeal or expressed an interest in appealing his guilty plea?

II. Did the PCR Court err by finding plea counsel was ineffective for failing to timely object during the State's asking for an active sentence when this issues is not preserved for appellate review, the Petitioner pled guilty straight up, and the State's request for an active sentence was not improper?

## STATEMENT OF THE CASE

For purposes of this Return, the Respondent adopts the Petitioner's Statement with the exception that the Petition was accompanied by a brief on the merits pursuant to White v. State and not an Anders brief.

## ARGUMENT

### **I. The lower court erred by granting appellate review pursuant to *White v. State* when the Petitioner presented no evidence he indicated to counsel he wanted an appeal or demonstrated an interest in appealing his guilty plea or motion to reconsider.**

The Respondent submits the lower court improperly granted review of the Petitioner's guilty plea and motion to reconsider. The record reflects during the Petitioner's evidentiary hearing the lower court *sua sponte* raised the issue of counsel's failure to advise the Petitioner of the right to appeal the denial of his motion to reconsider. (App. 102:21-103:9). After raising the issue *sua sponte*, the Court gave the Petitioner the opportunity to orally amend his application to raise the issue during his evidentiary hearing. (App. 103:11-23). Over the State's objection, the Court granted the Petitioner an appeal pursuant to *White v. State*. (App. 104-105). The Respondent submits the lower court erred by granting a belated appeal when the Petitioner provided no evidence that he asked counsel to file a direct appeal of his guilty plea or motion to reconsider.

Counsel has a constitutionally-imposed duty to consult with defendant about appeal when there is reason to think either (1) that rational defendant would want to 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 (2000). Following a trial, counsel is required to make certain the defendant is fully aware of the right to appeal. *Turner v. State*, 380 S.C. 223, 224-25, 670 S.E.2d 373, 374 (2008). However, the standard for a guilty plea differs. *Id.* Absent extraordinary circumstances, such as when there is reason to think a rational defendant would want to appeal or when the defendant reasonably demonstrated an interest in appealing, there is no constitutional requirement that a defendant be informed of the right to a direct appeal from a guilty plea. *Id.*

The record reflects the Petitioner was advised of his right to appeal his guilty plea by both the plea court and counsel. The Court advised the Petitioner during his guilty plea that “if convicted, you have the right to appeal.” (App. 5:9). Plea counsel testified during the evidentiary hearing that she discussed with the Petitioner his right to appeal his guilty plea and advised him he would be unable to make any motions to challenge the State’s evidence after pleading guilty. (App. 81:1-18).

The Respondent submits the lower court’s granting of an appeal was improper. The Petitioner has failed to present any evidence to show that he wanted an appeal or demonstrated to counsel an interest in appealing his guilty plea or motion to reconsider. The Respondent submits the record is void of any testimony from the Petitioner or from plea counsel indicating the Petitioner expressed a desire to appeal his guilty plea. The Respondent submits an appeal pursuant to White v. State is not warranted simply because the lower court felt the Petitioner failed to carry his burden of proving counsel provided ineffective assistance of counsel. The record reflects the Court’s granting of a an appeal pursuant to White v. State was not actually based on the evidence presented by the Petitioner, but by the Court’s desire to have the appellate court review the issue of whether or not the State violated the terms of the Petitioner’s plea agreement. (App. 104-105). The Respondent submits there is no probative evidence to support the lower court’s granting the Petitioner an appeal pursuant to White v. State and this Court should deny this Petition.

**II. The issue of whether or not counsel was ineffective for failing to object when the State requested an active sentence is not preserved for appellate review and the solicitor's request for an active sentence was not improper or objectionable.**

The Petitioner asserts counsel was ineffective for failing to timely object to State's request for an active sentence during the Petitioner's guilty plea. The Respondent submits this allegation is without merit and the petition should be denied and the appeal dismissed.

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Applicant must prove that "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, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland. Second, counsel's deficient performance must have prejudiced the Applicant such 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, 386 S.E.2d at 625. The Respondent submits that the Applicant cannot satisfy either requirement of the Strickland test.

On appeal, this Court must affirm the circuit court's denial of post-conviction relief when there is probative evidence to support the findings of the circuit court. Wolfe v. State, 326 S.C. 158, 485 S.E.2d 369 (1997); Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

As an initial matter, the Respondent submits the issue of whether or not counsel was ineffective for failing to object when the State requested an active sentence was never raised to or ruled upon by the lower court. It is well settled that an issue that has not been presented to or passed upon by trial judge will not be considered on appeal. State v. Gee, 262 S.C. 373, 204 S.E.2d 727 (1974). If an issue is raised but not ruled upon, it is not preserved for appeal. State v. Watts, 321 S.C. 158, 467 S.E.2d 272 (1996). An issue cannot be raised for the first time on appeal. Herron v. Century BMW, 395 S.C. 461, 719 S.E.2d 640 (S.C. 2011). Issue preservation rules are meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments. Id.

The Respondent submits the Petitioner did not raise this allegation in his application for post-conviction relief. While counsel for the Petitioner questioned plea counsel about the guilty plea agreement during his evidentiary hearing, the Petitioner never amended his application during the hearing to allege counsel was ineffective for failing to timely object when the State requested an active sentence.

The Respondent also submits the lower court never ruled on the issue of whether or not counsel was ineffective for failing to timely object during the State's request for an active sentence in its Order of Dismissal. The Petitioner also failed to file a Motion to Alter or Amend

pursuant to SCRCP 59(e) to secure a ruling on the issue. Therefore, the Respondent submits this issue is not preserved for appellate review.

If this Court is inclined to grant review of this issue, the Respondent submits counsel was not ineffective for failing to object during the State's request for an active sentence. The record reflects the Petitioner pled guilty to burglarizing storage containers in the back of a gun shop. (App. 9-10). During the plea proceeding the solicitor told the Court "[b]ecause of what they came with and what they were trying to do, the State wants active time one each of these defendants." (App. 11:19-21). Counsel for the Petitioner then argued for a suspended Youthful Offender Act sentence. (App. 21:15-18). Ultimately, the Petitioner was sentenced to fifteen years, suspended to ten year active time, followed by five years probation for burglary, five years for possession of the tools of a crime, and one year for unlawful carrying of a pistol. (App. 24:13-18). Plea counsel for the Petitioner subsequently filed a motion to reconsider claiming the solicitor agreed to make the no recommendation with regard to sentencing and then violated the agreement by asking the Court to impose an active sentence at sentencing. (App. 115).

The Respondent submits there was no basis for counsel to object to the State's request for an active sentence when the State's request for an active sentence was not improper. The record reflects the Petitioner was pleading straight up without any recommendation or negotiations from the State. (App. 141-143). The Petitioner asserts his sentencing sheets indicate the State would make no recommendation as to sentencing and that the State's request for an active sentence was a violation of the Petitioner's plea agreement.

The Respondent submits there was no agreement between the State and the Petitioner as to sentence and the State's request for an active sentence was not objectionable. The Respondent submits further the South Carolina Court of Appeals decision in State v. Rikard is dispositive on

this issue. 371 S.C. 295, 638 S.E.2d 72 (2006). In Rikard, the defendant alleged the State failed to abide by its representation on the sentencing sheet not to recommend a sentence. Id. at 302, 638 S.E.2d at 76. Rikard pled guilty and was advised by the Court that her plea was “straight up” and without any recommendations or negotiated sentence from the State. Id. at 299, 638 S.E.2d at 74. The solicitor requested the maximum sentence during sentencing. Id. The Court held Rikard’s reliance on the sentencing sheet was not dispositive. The Court went on to hold “[t]he sentencing sheet offers three alternatives to designate the nature or status of the plea. Those alternatives provided that the plea is: (1) without negotiations or recommendation; (2) a negotiated sentence; or (3) a recommendation by the State. In this instance, the option of “without negotiations or recommendation” was selected by the solicitor, Rikard, and Rikard’s counsel. It is axiomatic that the phrase “without negotiation or recommendation” means the State and the defendant have not agreed to sentencing. Therefore, either party is free to request a favorable sentence.” Id. at 306, 638 S.E.2d at 76.

The Petitioner, like Rikard, pled guilty straight up and relies on the sentencing sheet’s indication that the guilty plea was “without negotiations or recommendation” in support of his claim that the State violated a plea agreement. Also like in Rikard, the solicitor made a request to the Court with regard to the defendant’s sentence. Because the facts in Rikard are almost factually identical to the facts in this case, this Court should follow Rikard’s holding that when a sentencing sheet indicates a plea is “without negotiations or recommendation” the State and the defendant have not agreed to sentencing and **either party** is free to request a favorable sentence.

The record reflects there was no agreement between the parties with regard to sentence and both the State and the Petitioner made requests to the Court with regard to sentencing. (app. 11:19-21, 21:17-18). The Petitioner’s sentencing sheets indicating the plea was “without

negotiations or recommendation” did not preclude the State from requesting an active sentence and the State’s request was not objectionable. The Respondent submits the Petitioner has failed to carry his burden of proving counsel’s failure to object to the State’s request for an active sentence resulted in ineffective assistance of counsel.

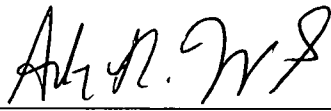
**CONCLUSION**

For all the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

ALAN WILSON  
Attorney General

ASHLEIGH R. WILSON  
Assistant Attorney General

BY:   
\_\_\_\_\_  
Ashleigh R. Wilson

Office of the Attorney General  
Post Office Box 11549  
Columbia, SC 29211  
(803) 734-3737

ATTORNEYS FOR RESPONDENT

May 27, 2014

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

---

Appeal From Charleston County  
The Honorable R. Markley Dennis, Jr. Circuit Court Judge

---

DARREN SIMMONS

Petitioner,

v.

STATE OF SOUTH CAROLINA,

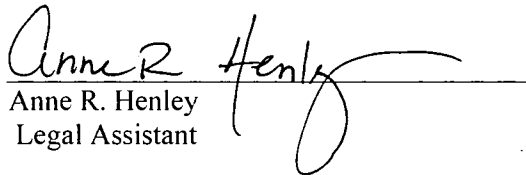
Respondent.

---

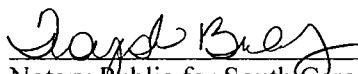
CERTIFICATE OF SERVICE

---

The undersigned hereby certifies that a true copy of the Respondent's Return to the Petition to Writ of Certiorari to The SC Supreme Court has been served upon opposing counsel, LaNelle Durant, this 27th day of May 2014.

  
Anne R. Henley  
Legal Assistant

SWORN to before me this  
27th day of May, 2014.

 (L.S.)  
Notary Public for South Carolina.  
My Commission Expires: 8/22/2022