

STATE OF SOUTH CAROLINA
In The Supreme Court

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CERTIORARI TO EDGEFIELD COUNTY
Court of Common Pleas

S.C. SUPREME COURT

The Honorable Edgar W. Dickson, Circuit Court Judge

Appellate Case No. 2014-00591

Fredy Deleon,..... Respondent/Petitioner,

v.

State of South Carolina,..... Petitioner/Respondent.

**PETITION FOR
WRIT OF CERTIORARI**

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QUESTION PRESENTED

1. Is Certiorari warranted to review whether the PCR Judge committed an error of law in denying the State's motion to dismiss Deleon's PCR Application?
2. Is Certiorari warranted to review whether the PCR Judge erred as a matter of law in adjudicating White v. State counsel deficient and ineffective.
3. Did the PCR Judge's failure to make the requisite findings of fact and conclusions on the remainder of Deleon's substantive allegations necessitate the case to be remanded for further rulings?
4. If the PCR Judge even held the authority to grant a Deleon a new appeal, did his ruling constitute an abuse of discretion?

STATEMENT OF THE CASE

Deleon is currently confined at the Broad River Correctional Institution in the South Carolina Department of Corrections pursuant to orders of commitment from the Clerk of Court for Edgefield County. Deleon was indicted by the Edgefield County Grand Jury during the March 2004 Term of the Edgefield County Court of General Sessions for one count of Trafficking in Marijuana (2004-GS-19-140). He was represented by Jacques Hawke, Esq. and Martin Puetz, Esq.. The State was represented by Assistant Solicitors Ervin Maye, Esq., and Joseph P. Mizzell, Jr., Esq., both of the Eleventh Judicial Circuit. Petitioner and his three co-defendants were initially tried by a jury before the Honorable William P. Keesley, Circuit Court Judge on March 23-25, 2004. That trial ended in a mistrial. Deleon and his co-defendants were subsequently retried by a jury before Judge Keesley on June 28-July 6, 2004. Deleon was convicted of trafficking marijuana 100 pounds or more but less than 2000 pounds. Judge Keesley sentenced Deleon to twenty-five (25) years confinement for the conviction.

On July 14, 2004, Deleon and his co-defendants jointly filed a motion to reconsider the denial of the motion for a new trial. On July 15, 2004, Judge Keesley filed and entered an Order to reconsider the convictions and sentences imposed in Deleon and his co-defendants' cases based upon a post-trial conversation he had with a juror. Two hearings were held regarding the motion. The first was held on November 22, 2004 at the Edgefield County Courthouse before Judge Keesley. The second hearing was held on April 14, 2005 at the Edgefield County Courthouse before Judge Keesley.). In an Order filed April 15, 2005, Judge Keesley denied the Motion for a New Trial. Deleon did not

appeal his sentence or conviction.

On August 31, 2005, Deleon filed an Application for Post-Conviction Relief (PCR) (2005-CP-19-190), alleging claims of ineffective assistance of trial counsel. Specifically, Deleon asserted his retained attorney failed to file a timely notice of appeal to the South Carolina Court of Appeals despite Deleon's request that he do so. Deleon further contended that he believed his case had been appealed and was waiting to hear from his appellate counsel when he learned that the appeal had not been sought. Deleon subsequently served his first amended Application for Post-Conviction Relief on April 24, 2006. In the amended Application, Deleon asserted the same claim.

The State served its Return on April 28, 2006. During the post-conviction relief action, Deleon was initially represented by David Miller, Esq., Michael Waddington, Esq., 'White v. State counsel' was substituted as counsel on June 16, 2006. The State was initially represented by Assistant Attorney General Sabrina Todd, Esq., but was later represented by Assistant Attorney General Daniel E. Grigg, Esq., when the PCR matter concluded. In lieu of an evidentiary hearing, the parties agreed to the entry of a Consent Order of Dismissal with Prejudice and Findings of Facts pursuant to White v. State, 263 S.C. 110, 108 S.E.2d 35 (1974). That Order was filed by the Honorable R. Knox McMahon, Circuit Court Judge on February 16, 2007.

Deleon served and filed a notice of appeal on February 15, 2007. On appeal, Deleon was initially represented by Michael S. Waddington, Esq. Initially, Deleon filed a Brief of Appellant. In the Brief, Petitioner raised two arguments. First, he contended the trial judge erred in refusing to grant a new trial based on external juror misconduct when

one juror conducted internet research into possible sentences and then brought this external information to the deliberation room, thereby causing prejudice to the Deleon. Second, Deleon argued the trial judge erred in refusing to ask probative questions and by forbidding Deleon from asking questions concerning the impact of external juror misconduct on the verdict and therefore denied Deleon his Constitutional right to due process and fundamental fairness. By letter dated January 2, 2008, the South Carolina Supreme Court advised Deleon that he needed to file a Petition for Writ of Certiorari to seek review of the PCR Court's Order and to have the direct appeal issues reviewed.

Deleon subsequently filed a Petition for a Writ of Certiorari. First, he contended the court erred in refusing a new trial based upon juror misconduct. Second, Deleon contended the court erred in its finding that juror misconduct did not cause prejudice to him. By letter dated February 15, 2008, the Supreme Court advised Deleon of errors in his filings and requested that those errors be corrected.

Deleon subsequently filed an Amended Petition for a Writ of Certiorari. The State filed its Return to the Amended Petition for Writ of Certiorari and its Brief of Respondent. Deleon appeal was subsequently transferred to the South Carolina Court of Appeals. Attorney Blanchette was substituted on the case for White v. State counsel.

By Order filed November 1, 2010, the South Carolina Court of Appeals granted the petition for writ of certiorari. In an unpublished Opinion filed September 9, 2011, the South Carolina Court of Appeals affirmed Deleon's conviction. In the Opinion, the Court of Appeals noted that on appeal, Deleon asserted the trial court erred in refusing to grant a new trial based on an allegation of juror misconduct due to an external influence.

Petitioner subsequently filed a Petition for Rehearing and a Petition for Rehearing

En Banc. In the Petition, Petitioner argued as follows:

The Petitioner submits that this ruling fails to address under which subsection of Rule 220(b) (1), SCACR, the Court is making its ruling. Furthermore, this ruling fails to address the "Transcript of Hearing RE Juror Questioning from Trial", which was submitted to the Court on August 15, 2011. Due to the recent submission of this Transcript, Petitioner is concerned that points may have been overlooked or misapprehended by this Court. For these reasons, the Petitioner respectfully requests that this Court address the merits of the issue raised on appeal in consideration of the recently submitted Transcript.

In an Order filed December 2, 2011, the South Carolina Court of Appeals denied the Petition for Rehearing. In the Order, the Court of Appeals stated that after a careful consideration of the Petition for Rehearing and the Petition for Rehearing En Banc, it was unable to discover that any material fact or principle of law had been either overlooked or disregarded and hence, there was no basis for granting a rehearing. It was, therefore ordered that the Petition for Rehearing be denied. The Remittitur was issued on January 10, 2012.

Second PCR Action

On September 19, 2012, Deleon filed his second Application for Post-Conviction Relief (2012-CP-19-304), asserting claims of ineffective assistance of belated direct appeal counsel. Deleon was represented by Jeremy Thompson, Esq. The State filed its return May 16, 2013. On July 9, 2013, the State filed its amended return and motion to dismiss. An evidentiary hearing convened at the Lexington County Courthouse on August 12, 2012, before the Honorable Edgar W. Dickson. Deleon was present and was represented by undersigned counsel. The State was represented by Assistant Attorney

General Walt Whitmire, Esq. Deleon and substituted counsel, Attorney Blanchette testified. The parties presented the PCR Judge with memoranda of law in support of their respective positions. Judge Dickson granted Deleon's PCR Application, yet created a new remedy by granting him a "new appeal" instead of a trial in an order November 26, 2013. The parties each filed post-trial motions to alter or amend the judgment. Judge Dickson convened a hearing on January 17, 2014, at the Orangeburg County Courthouse on the matter. Judge Dickson denied the post-trial motions in an order dated March 6, 2014. The State's appeal follows.

STANDARD OF REVIEW

The proper standard for review of a PCR evidentiary hearing is whether “any evidence of probative value” exists to sustain the post-conviction relief judge’s findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). In a post-conviction relief proceeding, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

ARGUMENT

I.

Certiorari is warranted to review whether the PCR Judge grossly erred as a matter of law in denying the State's motion to dismiss Deleon's PCR Application where the legislature has not expanded the PCR Act to provide a forum for an Applicant to collaterally challenge a White v. State attorneys performance. Furthermore, the common law writ of habeas is the proper avenue for Deleon to bring his complaint.

The PCR Judge erred as a matter of law in finding that an ineffective assistance of White v. State counsel allegation to be *per se* cognizable in this jurisdiction. This Court, in Kelly v. State recently held that “we hereby recognize that the holding in Martinez is limited to federal habeas corpus review and is not applicable to state post-conviction relief actions.” Kelly v. State, 404 S.C. 365, 745 S.E.2d 377 (2013). This Court has remained silent on whether the Post-Conviction Relief Act allows an allegation of ineffective assistance of White v. State counsel to be litigated in PCR court. See S.C. Code Ann. § 17-27-110 (“The Supreme Court may adopt such rules as it shall deem necessary to effectuate the purposes of this chapter.”). S.C. Code Ann. § 17-27-90 provides that “[a]ny ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application.” Therefore the Code renders the present allegation incognizable.

The State challenges the PCR Judge's denial of its motion to dismiss Deleon's Application solely on the lower court's gross misapprehension of the legislature's proscribed procedural limitations. Judicial economy dictates that PCR must not further

morph into a revolving door of endless inmate litigation outside of the strict confines of its statutory D.N.A. This Court has a rich history in firmly denouncing attempts to turn PCR into a conduit for frivolous litigation. See Aice v. State, 305 S.C. 448, 451, 409 S.E.2d 392, 394 (1991) (holding that an allegation that prior PCR counsel was ineffective is not *per se* a sufficient reason allowing for a successive PCR application).

It is of significant note that South Carolina already provides an alternative forum where may already plead this allegation. See Simpson v. State, 329 S.C. 43, 46, 495 S.E.2d 429, 431 (1998) (“We acknowledge we have stated that habeas corpus is available once the petitioner has exhausted all post-conviction remedies.”).

II.

The PCR Judge again grossly erred as a matter of law in finding White v. State counsel’s performance deficient on matters wholly outside of the established scope of review in adjudicating the constitutional sufficiency of an appellate attorney’s performance. Furthermore, the PCR Judge erred as a matter of law in finding White v. State counsel was ineffective for brief the issue that “extended border search” doctrine purportedly did not authorize a warrantless search of Deleon’s business in violation of the Fourth Amendment

The PCR Judge erred in finding White v. State counsel’s performance deficient on matters well outside the confines of the lower court’s inquiry concerning an ineffective assistance of appellate counsel allegation. For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel’s ineffective performance. See Strickland v.

Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). In order to prove prejudice, an applicant must show “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Cherry v. State, 300 S.C. at 117-18, 386 S.E.2d at 625. “A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial.” Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984)).

“Courts apply the Strickland test to determine if appellate counsel was deficient for failing to raise an issue and whether the defendant was prejudiced from the failure to raise the issue.” Southerland v. State, 337 S.C. 610, 616, 524 S.E.2d 833, 836 (1999); Smith v. Robbins, 528 U.S. 259, 288, 120 S. Ct. 746, 765 (2000) (“Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome.”). Appellate counsel is not ineffective for not filing “kitchen sink briefs.” Smith v. Stewart, 140 F.3d 1267, 1274, n. 4 (9th Cir. 1998). An attorney's refusal to raise an issue on appeal at the request of appellant was not ineffective in Smith v. South Carolina, 882 F.2d 895 (4th Cir. 1989), even without considering the merits of the claim. And failure to identify issues that should have been raised makes the claim deficient. Odle v. Calderon, 884 F.Supp. 1404, 1433 (N.D. Cal.1995), rev'd on other grounds, Odle v. Woodford, 238 F.3d 1084 (9th Cir. 2001).

“Unlike claims of failure to advise of the right to appeal at all, claims of ineffective counsel on appeal require a showing of prejudice, i.e., whether, but for counsel's errors, petitioner would have prevailed on appeal.” Miller v. Keeney, 882 F.2d

1428, 1434, fn. 9 (9th Cir. 1989). “Performance is about picking the battles; prejudice looks at whether winning the battle would have made a difference in the outcome of the war.” Howard v. Gramley, 225 F.3d 784, 791 (7th Cir. 2000). An omitted issue must be clearly stronger than included issues to meet the performance standard and the prejudice standard requires that the result of the appeal would be different. Suggs v. U.S., 513 F.3d 675 (7th Cir. 2008).

A.

The PCR Judge abused his discretion in making numerous irrelevant findings regarding White v. State’s counsel’s administrative incompetence. However, the Record clearly shows that White v. State counsel ultimately perfected Deleon’s appeal and provided the full record of the lower court’s proceedings to the reviewing appellate court. McKenna v. McDaniel, 65 F.3d 1483, 1494 (9th Cir. 1995) (“It is not how an appellate brief was prepared, but its adequacy”).

However, the PCR Judge’s finding that White v. State counsel abandoned Deleon during the course of his representation was wholly inaccurate in light of the fact that counsel voluntarily entered into a consent order of substitution with Attorney Blanchette. Lost in translation, White v. State counsel’s conduct did not deny Deleon meaningful access to the appellate courts. Despite Deleon’s consternation on the matter, the reviewing appellate court considered the merits of the appeal with the post-trial hearing transcript at the court’s disposal. Deleon’s presented his case in a surreptitious manner that created unnecessary confusion. The State further submits that White v. State counsel’s unavailability does not negate the presumption of constitutionally effective

performance. See Chandler v. U.S., 218 F.3d 1305, 1314 n. 15 (11th Cir. 2000) (en banc) (An ambiguous or silent record cannot disprove the strong and continuous presumption of competence.). Therefore, the only inquiry of consequence was whether White v. State counsel's performance was objectively unreasonable in failing to brief and present a meritorious issue that would have won the day on the appeal.

B.

The PCR Judge erred in granting relief based on a finding that White v. State counsel was ineffective for failing to brief and present an argument to the reviewing appellate court that the tremendous amount of narcotics seized constituted the fruits of an illegal search and seizure.

The State submits this Court's finding that White v. State counsel was deficient for not pursuing the issue of whether the search of Tienda Deleon was illegal and constituted an error of law. First, The Trial Judge correctly ruled the extended boarder search was valid. As the Fourth Circuit has explained, the "realization that important national security interests are at stake has resulted in courts giving the broadest interpretation compatible with our constitutional principles in construing the statutory powers of customs officials." United States v. Ickes, 393 F.3d 501, 505 (4th Cir. 2005). "Accordingly, no warrant or probable cause requirement applies to border searches of persons or property, including, but not limited to, cars, luggage, containers, and parcels." United States v. Ramsey, 431 U.S. 606, 611, 97 S. Ct. 1972 (1977). Importantly, the Supreme Court recognized that border searches "may in certain circumstances take place not only at the border itself, but at its functional equivalents as well." United States v.

Napan, 769 F. Supp. 2d 969, 973 (E.D. Va. 2011); see also United States v. Bilir, 592 F.2d 735, 740 (4th Cir. 1979) (holding that a search less four miles from the border was a border search where the vehicle was searched seven hours after crossing the United States border from Mexico but continuously surveilled during those seven hours). “To determine whether an extended border search is reasonable courts consider whether: (1) there is a reasonable certainty that a border crossing has occurred; (2) there is a reasonable certainty that no change in condition of the luggage has occurred since the border crossing; and (3) there is a reasonable suspicion that criminal activity has occurred.” United States v. Yang, 286 F.3d 940, 945 (7th Cir. 2002). The border search and seizure of the narcotics was supported by reasonable suspicion. Customs agents testified they maintained constructive control and kept a constant surveillance on the tractor trailer during the cross-country trip and controlled delivery.

Second, Deleon’s expectation of privacy in Tienda Deleon was substantially diminished. See Minnesota v. Carter, 525 U.S. 83 (1998) (“Property used for commercial purposes is treated differently for Fourth Amendment purposes than residential property, and expectation of privacy in commercial premises is different from, and indeed less than, a similar expectation in an individual’s home.”). Deleon did not have a reasonable expectation of privacy in decoy furniture housed with narcotics. See United States v. Thomas, 257 F. Supp. 2d 494, 497 (D.P.R. 2003) (“The search could also be upheld under the standard of a controlled delivery.”); United States v. Singh, 811 F.2d 758, 761 (2d Cir. 1987); Illinois v. Andreas, 463 U.S. 765, 766, 103 S. Ct. 3319, 3321, 77 L. Ed. 2d 1003 (1983).

Third, Deleon directed the undercover agent to place one of the chimneys, that contained nearly twenty lbs. of narcotics, during the controlled delivery in his tienda. Therefore, the entry into Tineda Deleon constituted an exigent circumstance under the plain view exception to the warrant requirement. See State v. Abdullah, 357 S.C. 344, 592 S.E.2d 344, (S.C. Ct. App. 2004). Fourth, officers testified that the entry into the store and seizure of the chimney was also necessitated because the increased foot traffic into the store from unknown persons, thereby creating a concern for public safety. Thus, the entry and seizure was also valid under the officer safety exception to the warrant requirement. See Brigham City, Utah v. Stuart, 547 U.S. 398, 126 S.Ct. 1943, (2006).

Fifth, the admission of the narcotics from the one chimney seized in Tienda Deleon would have at most constituted harmless error in light of the actions taken by Deleon to assert dominion over the more than eight hundred lbs. of narcotics seized separately from the tractor trailer. See Singh, 811 F.2d at 762. Numerous state and federal officers testified to contents and composition of the chimneys prior to the controlled delivery. In finding that Applicant's co-defendant's were entitled to directed verdicts, this Court distinguished their innocuous involvement from the Deleon's certain guilt.

“The State failed to present evidence connecting Petitioners to the tractor-trailer or to **[Deleon]** or evidence that Petitioners had knowledge of the contents of the tractor-trailer.” State v. Hernandez, 382 S.C. 620, 625, 677 S.E.2d 603, 605 (2009) (emphasis added). The bill of lading named Deleon as the recipient of nearly one-thousand lbs. of narcotics. Deleon directed the undercover officer where to place the chimney and told him where to drive tractor trailer for the next stop. Deleon was one of the principle

offenders in the operation as a whole notwithstanding the one chimney of narcotics located and seized from his grocery store. Notably, when undersigned counsel for the State questioned Deleon at the PCR hearing why he ordered suspect wooden furniture from Mexico, Deleon responded, “**because they told me to.**” (emphasis added).

Certainly, Deleon had knowledge of the narcotics and conducted cartel level trafficking in Edgefield County. In relevant part, South Carolina's definition of trafficking marijuana includes: “Any person ... who is knowingly in actual or constructive possession or who knowingly attempts to become in actual or constructive possession” of ten pounds or more of marijuana.” Hernandez, 382 S.C. at 624, 677 S.E.2d at 605 (citing S.C. Code Ann. § 44–53–370 (Supp.2006)).

The State submits the record shows PCR appellate counsel excised reasonable discretion in presenting the juror misconduct issue on the White appeal. The issue troubled Judge Keesley enough to cause him to subpoena the jurors to testify in the post-trial hearing. Judge Keesley issued an extensive order on the matter in finding that the possible juror conduct did not warrant a mistrial. Notably, none of Deleon's co-defendants presented Fourth Amendment arguments on appeal. Therefore, the State submits the PCR Judge committed plain error in granting relief.

Accordingly, Deleon failed to prove the first prong of the Strickland test – that White v. State counsel failed to render reasonably effective assistance under prevailing professional norms. Similarly, Deleon also failed to prove the second prong of Strickland – that he was prejudiced by White v. State counsel's performance.

C.

The PCR Judge's error in finding White v. State counsel was further deficient compounded when he employed a cumulative error analysis in finding prejudice. The Court alternatively rejects Deleon's argument that this Court should employ a cumulative prejudice analysis to ineffectiveness claims, such as employed in Brady cases. See Kyles v. Wheatly, 514 U.S. 419 (1985). In Green v. State, 351 S.C. 184, 196-97, 569 S.E.2d 318, 324-25 (2002), the Court expressly declined to address whether a PCR applicant is entitled to relief based upon the supposed cumulative effect of trial counsel's alleged errors. See also Simpson, 367 S.C. at 604, 627 S.E.2d at 710 (recognizing that "[w]hether several errors, which are independently found not to be prejudicial, may cumulatively warrant relief is an unsettled question in South Carolina" and holding that "[b]ecause the PCR court found that only one of Simpson's allegations had merit, there was no need to conduct a cumulative-error analysis"). This Court finds that such an analysis is not constitutionally required and declines to employ that analysis.

Before an alleged error may be considered as a factor contributing to cumulative prejudice, a court first must find that the alleged error is, in fact, constitutional error. Only then can the cumulative prejudice arising from the error be considered. To hold otherwise is to conclude that even non-deficient performance might result in reversal of a conviction. Such a conclusion is manifestly contrary to the analysis set forth in Strickland, 466 U.S. at 687 ("Unless a defendant makes both showings [i.e., deficient performance and prejudice] it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable").

Even in the absence of a cumulative prejudice analysis, a reviewing court, quite

properly, analyzes the same class of errors together, such as the failure to present adequate evidence of mitigation. Yet, it is inappropriate to consider the cumulative prejudice from various alleged errors that are not related, such as the failure to request a jury charge and the failure to introduce certain testimony. This is especially true where, as in this case, White v. State counsel's performance was determined not to be deficient on most of the individual claims that Deleon wishes to aggregate, and there was no prejudice on any Ground. To hold otherwise is to conclude that even non-deficient performance under Strickland might result in reversal of a conviction, a conclusion that is manifestly contrary to the analysis set forth in Strickland. See Strickland, 466 U.S. at 687 ("Unless a defendant makes both showings [i.e., both deficient performance and prejudice] it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable").

III.

The PCR Judge's failure to rule on the remainder of Deleon's substantive allegations of White v. State counsel's purported failure to raise meritorious issues on appeal necessitates a remand for further rulings.

The State submits this Court's decision not to rule upon all five of Deleon's allegations that were raised and timely presented at constitutes an error of law. S.C. Code Ann. § 17-27-80 ("The court shall make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented."); Pruitt v. State, 310 S.C. 254, 255-56, 423 S.E.2d 127, 128 (1992) ("We take this opportunity to express our concern with the increasing number of orders in PCR proceedings that fail to address the merits of the

issues raised by the applicant. Not only does this deprive the parties of rulings on the issues raised, but it makes review by the appellate court more difficult and ultimately increases the work load of all involved where, as in this case, a new hearing is required to secure the rulings which should have been made initially.”). Therefore, the State submits that the case be remanded for specific findings of fact and conclusions concerning whether Deleon met his burden to prove the following allegations:

1. Whether White v. State counsel was ineffective for failing to argue that the trial court improperly denied his motion to a directed verdict?
2. Whether White v. State counsel was ineffective for failing to argue that Deleon’s conviction was barred due to double jeopardy in violation of the Deleon’s rights under the Fifth and Fourteenth Amendments inasmuch as Deleon’s first trial ended in a mistrial due to prosecutorial misconduct?
3. Whether White v. State counsel was ineffective for failing to argue that defense counsel did not open the door to testimony from Investigator Roosevelt Young that the Deleon was a drug trafficker and explain how he came to that conclusion?
4. Whether White v. State counsel was ineffective for failing to argue that that the court erred in refusing to grant Deleon’s motion for a mistrial based on Investigator Young’s testimony?

The State submits that in accordance with this Court’s jurisprudence, the PCR Judge’s error in declining to rule on all the substantive issues at bar, necessitates the remand Deleon’s case. See also Starkweather v. Smith, 574 F.3d 399, 402 n.1 (7th Cir. 2009) (appellate challenges to trial counsel effectiveness are typically best left for post-conviction counsel and it would be unusual indeed to find appellate ineffective assistance).

IV.

The PCR Judge committed certain error and abused his

discretion in granting non-existent relief.

The State submits that the relief granted by this Court is invalid. This Court in White stated, “Defendant contends that the court instead should have either granted him ‘a new trial or the immediate right to a full appeal.’ We know of no authority for the hearing judge granting defendant a full right of appeal and he cites none.” White, 263 S.C. at 118-19, 208 S.E.2d at 39. “As to a belated appeal to this Court from the conviction and sentence, which counsel was directed to attempt, it is well settled that in the absence of a notice of appeal having been given and timely served this Court has no jurisdiction over such an appeal.” State v. Wright, 228 S.C. 432, 90 S.E.2d 492. A defendant’s right to appeal is only triggered when a notice of appeal is filed ten days subsequent to conviction. “Notice of intent to appeal was not given within ten days of the rising of the court as required by Section 7-405 of the South Carolina Code of Laws, 1962 which was necessary to give this Court jurisdiction of an appeal from the convictions and sentences.” State v. Lawrence, 266 S.C. 423, 424, 223 S.E.2d 856, 857 (1976).

In White, our Supreme Court held that “where a PCR judge determines an applicant did not freely and voluntarily waive his direct appeal rights, the applicant may petition the South Carolina Supreme Court for review of direct appeal issues to determine if there was reversible error.” White, 263 S.C. at 118-19, 208 S.E.2d at 39–40.

Instead, our courts have long recognized it is the providence of this Court to rule on whether an appellate attorney was deficient under Strickland’s first prong for presenting meritorious issues of error from the trial court. Also, it is the providence of this Court to determine the alleged issue(s) constituted prejudice under Strickland’s

second prong, e.g., would the presentation of the ignored issue result in reversal and/or remand from the appellate court. See Reddic v. Cartledge, 8:12-CV-00232-DCN, 2013 WL 1010327 (D.S.C. Mar. 14, 2013); Crawley v. Catoe, 257 F.3d 395 (4th Cir.2001); S.C. Code Ann. § 17-27-20(B) (“This remedy is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of direct review of the sentence or conviction.”).

Even relief by way granting Deleon another discretionary appeal is not justified where the competing interest of finality, prejudice to the Deleon in continued incarceration, and to the State in having to untimely re-prosecuting does not warrant second discretionary bite at an appeal. See Davie v. State, 381 S.C. 601, 614, 675 S.E.2d 416, 423 (2009) (“Remedies for ineffective assistance of counsel “should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests.”). Davie v. State, 381 S.C. 601, 614, 675 S.E.2d 416, 423 (2009). This Court’s relief granted opens up a Pandora’s box of protracted collateral litigation.

As Deleon failed to meet this burden of proving ineffective assistance of White v. State counsel on this issue, the PCR judge erred in granting the PCR application. See Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (“The burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.”).

CONCLUSION

For the foregoing reasons, the State submits this Court should grant the Writ of Certiorari to review the PCR Judge’s erroneous findings and remand Deleon’s case back to the lower court so that it may comply S.C. Code Ann. § 17-27-80. If this Court grants

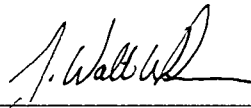
certiorari, Respondent requests the opportunity to fully brief the issue discussed above.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

Aug 8th, 2014

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO EDGEFIELD COUNTY
Court of Common Pleas

The Honorable Edgar W. Dickson, Circuit Court Judge

Appellate Case No. 2014-000591

Fredy Deleon,.....Respondent,

v.

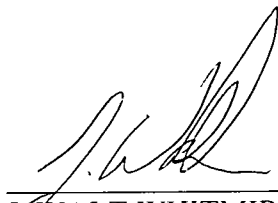
State of South Carolina,.....Petitioner.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the **Petition for Writ of Certiorari** has been served upon the applicant by mailing one (1) copy in the United States mail, postage prepaid, addressed to Petitioner's counsel:

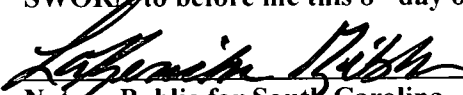
Jeremy A. Thompson, Esquire
Post Office Box 12891
Columbia SC 29211

This 8th day of October, 2014.



J. WALT WHITMIRE
SC Bar #100793
ATTORNEY FOR PETITIONER

SWORN to before me this 8th day of October, 2014.



Notary Public for South Carolina.
My Commission Expires: June 29, 2020



RECEIVED

ALAN WILSON
ATTORNEY GENERAL

October 8, 2014

OCT 10 2014

S.C. SUPREME COURT

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

Re: Fredy Deleon v. State of South Carolina
Appellate Case No: 2014-000591

Dear Mr. Shearouse:

Enclosed for filing please find an original and six (6) copies of the **Petition for Writ of Certiorari** in the above-referenced case. The Appendix will be forwarded tomorrow.

Sincerely,

J. Walt Whitmire
Assistant Attorney General
SC Bar #100793

JWW/lg
Enclosures

cc: Jeremy A. Thompson, Esquire
Trisha Allen, Victim Services Counselor