STATE OF SOUTH CAROLINA

IN THE SUPREME COURT



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Certiorari to Greenville County

G. Edward Welmaker, Circuit Court Judge

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EDDIE PILCHER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-000807

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# PETITION FOR WRIT OF CERTIORARI

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## ISSUES PRESENTED

I. Did the PCR judge err in failing to grant Petitioner a belated direct appeal where the record revealed the plea judge failed to advise Petitioner of his right to appeal and plea counsel equivocated on whether he advised Petitioner of his right to appeal?

II. Did the PCR judge err in denying Petitioner relief where the record revealed plea counsel was ineffective in failing to obtain the audio recording of Petitioner's statement to law enforcement showing Petitioner was guilty only of being an accessory and not as a principal?

## STATEMENT

Petitioner was charged with kidnapping (2012-GS-23-2620), armed robbery (2012-GS-23-2619), and burglary in the first degree (2012-GS-23-2620) in Greenville County. App. 107 – 109; App. 110 – 111; App. 113 – 114. Petitioner's charges were not presented to the grand jury, but he waived presentment during the guilty plea. App. 7, line 20 – App. 8, line 7. Petitioner entered guilty pleas to all charges on June 26, 2012 before the Honorable Edward W. Miller. L. Mark Moyer represented the state, and John Erwin, Jr., represented Petitioner. App.1. Pursuant to the state's recommendation, Judge Miller sentenced Petitioner to fifteen years in prison on all charges to be served concurrently. App. 24, lines 19 – 20; App. 109; App. 112; App. 115. No notice of appeal was filed on Petitioner's behalf.

On November 14, 2012, Petitioner filed an application for post-conviction relief (PCR). App. 32 – 46. On February 19, 2014, the matter proceeded to an evidentiary hearing before the Honorable G. Edward Welmaker. Mills Ariail represented Petitioner, and Karen Ratigan represented the state. App. 53. By an order filed April 9, 2014, Judge Miller denied Petitioner relief. App. 97 – 106.

Petitioner filed a timely notice of appeal. This petition for a writ of certiorari follows.

## ARGUMENT

I. The PCR judge erred in failing to grant Petitioner a belated direct appeal where the record revealed the plea judge failed to advise Petitioner of his right to appeal and plea counsel equivocated on whether he advised Petitioner of his right to appeal.

**Relevant Facts**

The plea transcript reveals no advisement by the plea judge to Petitioner of his right to appeal his convictions and sentences following his guilty plea. During the PCR hearing, Petitioner testified that neither the plea judge nor plea counsel advised Petitioner of his right to appeal. App. 77, line 11 – 18. Further, Petitioner testified that he would have appealed and that he asked plea counsel to file an appeal on his behalf. App. 78, lines 9 – 16.

Plea counsel equivocated when asked if he had advised Petitioner of his right to appeal:

> I don't remember if we did or not. I know that, I know that he didn't tell me he wanted an appeal. I know that I probably would have told him that he had the right to appeal his guilty plea. Again, it's been a while. I couldn't tell you for certain that we did. I'm pretty sure I would have, and I know for a fact he didn't ask me to.

App. 93, lines 10 – 16. Although plea counsel claimed he would have filed a notice of appeal if Petitioner had requested one, plea counsel claimed there were no "appealable issues." App. 93, lines 17 -22.

Although the PCR judge acknowledged that Petitioner testified he requested plea counsel to file a notice of appeal, the PCR judge found Petitioner failed to meet his burden of proving that he asked for an appeal or that plea counsel had a reason to think he would have wanted an appeal. App. 100; App. 102 – 103.

**Discussion**

Petitioner was denied his "one fair bite at the apple" because he did not voluntarily or intelligently waive his right to a direct appeal. Wilson v. State, 348 S.C. 215, 218, 559 S.E.2d 581, 582 (2002) (providing that "[a] defendant has the procedural right to one fair bite at the apple. That is, every defendant has a right to file a direct appeal."); Legge v. State, 349 S.C. 222, 562 S.E.2d 618 (2002) (providing that a defendant has the right to a belated direct appeal when he did not knowingly an intelligently waive his right to a direct appeal). "To waive a direct appeal, a defendant must make a knowing and intelligent decision not to pursue the appeal." Wilson v. State, 348 S.C. 215, 217, 559 S.E.2d 581, 582 (2002)(citing Davis v. State, 288 S.C. 290, 342 S.E.2d 60 (1986) and White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974)). "[A]bsent extraordinary circumstances, there is no constitutional requirement that a defendant be informed of the right to a direct appeal from a guilty plea." Weathers v. State, 319 S.C. 59, 61, 459 S.E.2d 838, 839 (1995). This Court has advised that an example of an extraordinary circumstance is when the defendant inquires about an appeal. Id. In 2000, the United States Supreme Court explained that extraordinary circumstances include when a rational defendant would want to appeal and when the defendant expressed an interest in appealing. Roe v. Flores-Ortega, 528 U.S. 470 (2000).

"[A] lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable." Id. at 477. "This is so because a defendant who instructs counsel to initiate an appeal reasonably relies upon counsel to file the necessary notice. Counsel's failure to do so cannot be considered a strategic decision; filing a notice of appeal is a purely ministerial task, and the failure to file reflects in attention to the defendant's wishes." Id. Even more basic than the filing of the notice is the consultation with the defendant by the lawyer regarding the advantages and disadvantages of taking an appeal. Id. at 478. The lawyer

must make a reasonable effort to discover the defendant's wishes. Id. When counsel fails to consult, the question is whether counsel's failure to consult constitutes deficient performance. Id.

Although the Supreme Court refused to hold "as a constitutional matter, that in every case counsel's failure to consult with the defendant about an appeal is necessarily unreasonable, and therefore deficient," the Court held that "counsel has a constitutionally imposed duty to consult with the defendant about an appeal when there is either reason to think either (1) that a rational defendant would want to appeal, or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing." Id. at 479-480. Concerning prejudice, the defendant must show "that there is a reasonable probability that, but for counsel's deficient failure to consult with him about an appeal, he would have timely appealed." Id. at 485.

The PCR judge erred in denying Petitioner a belated direct appeal. As an initial matter, the PCR judge relied exclusively on plea counsel's claim that no issue for appeal existed. However, controlling Supreme Court precedent requires the PCR judge to review that record to determine whether a rational defendant would want to appeal. Roe v. Flores Ortega, 528 U.S. 470, 480 (2000). The PCR judge simply failed to undertake this inquiry as required.

Had the PCR court engaged in the mandated inquiry, he would have determined a rational defendant would want to appeal the guilty plea based upon the record's clear demonstration of Petitioner's lack of understanding of the guilty plea. Very early in the plea colloquy, Petitioner revealed he suffered from serious psychiatric issues, which required powerful medication. App. 3, lines 6 – 19. When the court inquired into the medication's effect of Petitioner, he responded, "I don't think." App. 3, lines 20 – 24. When the judge made further inquiries into Petitioner's ability to make a knowing and voluntary plea, Petitioner admitted he did not "fully understand." App. 4,

lines 1 – 14. As a result, the judge refused to accept Petitioner's plea at that time. App. 4, lines 17 – 22.

Later that day, Petitioner entered a guilty plea before the same judge. Again the plea judge questioned Petitioner's understanding:

> The Court: Does it limit your ability to understand what's goin' on here?
>
> The Defendant: No, sir.
>
> The Court: You've had an epiphany since this morning?
>
> The Defendant: No, sir.
>
> The Court: No?
>
> The Defendant: I don't know what that means.
>
> (Laughter)
>
> The Court: You you got it all together, you understand what's happenin'. This morning you said - - -
>
> The Defendant: Yes, sir.
>
> The Court: - - - you didn't - - -
>
> The Defendant: Yes, sir.
>
> The Court: - - - know what was goin' on.
>
> The Defendant: Yes, I know what's goin' on.

App. 6, lines 11 – 25.

Several times during the plea, the judge indicated concerns with Petitioner's comprehension. For example, when the judge asked Petitioner about waiving presentment of the indictments to the grand jury, the judge questioned whether the answer was Petitioners or his lawyer's. App. 8, lines 5 – 6. When the plea judge asked Petitioner about the factual basis as recited by the prosecutor, Petitioner responded with confusion. App. 17, line 11 – App. 19, line 13. In fact, the judge refused

to accept the plea yet again. App. 19, line 14 –App. 20, line 1. The judge finally accepted the plea when plea counsel stated:

> Your Honor, I think Mr. Pilcher we reviewed the discovery and I think that we agree that he would be more than likely convicted if this was put in front of a jury. I think the crucial parts of the statement that he made he would affirm and would admit that's what happened. Perhaps we got a little, case of a little bitta stage fright but, um,--

App. 22, lines 19 – 24. In fact, the judge was so concerned about Petitioner's mental health and capacity that he offered a mental evaluation on the spot. App. 22, lines 1 – 7.

Plea counsel met with Petitioner only twice despite the very serious charges. App. 90, line 11 – App. 91, line 1. Therefore, it was no surprise that he did not learn of Petitioner's mental health issues until the guilty plea itself. App. 92, lines 13 – 20. At the PCR hearing, plea counsel claimed Petitioner's obvious lack of understanding at the guilty plea proceeding was due to Petitioner having been on a hunger strike. Plea counsel, nevertheless, went forward with the guilty plea after Petitioner ate lunch. App. 89, lines 3 – 24. However, a review of the guilty plea proceeding after lunch demonstrated Petitioner's continued lack of comprehension.

Had the PCR judge examined the record to determine whether a rational defendant would want an appeal, as required by the United States Supreme Court, the PCR judge would have discovered the obvious concerns with Petitioner's competency and mental health. This issue was clear and entitled Petitioner to an appeal. Thus, the PCR judge erred in denying Petitioner a belated direct appeal.[1]

[1] Pursuant to Rule 243(i)(2), SCACR, Petitioner is submitting a "Statement of Issue on Appeal" with this certiorari petition.

II. The PCR judge erred in denying Petitioner relief where the record revealed plea counsel was ineffective in failing to obtain the audio recording of Petitioner's statement to law enforcement showing Petitioner was guilty only of being an accessory and not as a principal.

**Relevant facts**

During the guilty plea, Petitioner expressed disagreement with the factual basis given by the state. App. 17, line 11 – App. 21, line 9. When the prosecutor told the plea judge that the factual basis recited was the product of Petitioner's audio recorded statement to police, Petitioner disputed this. App. 21, line 18 – App. 22, line 17; App. 23, lines 15 – 21.

Petitioner testified at the PCR hearing that plea counsel informed him that the police claimed Petitioner admitted committing the crimes. App. 65, line 19 – 25. However, plea counsel never obtained the audio recording of Petitioner's statement or even informed Petitioner of its existence. App. 66, lines 6 – 14. Petitioner was unaware of the audio recording because the officer surreptitiously recorded the conversation. App. 66, lines 18 – 24. Petitioner learned of the recording when he obtained a copy of the discovery after the guilty plea. App. 66, line 25 – App. 67, line 16; App. 90, line 4 – 7. Had Petitioner known of the recording, he would not have pled guilty because the recording demonstrated Petitioner's guilt as an accessory only. App. 66, lines 13 – 14; App. 69, lines 2 – App. 70, line 11.

Plea counsel admitted he never obtained a copy of the audio recording despite his awareness of its existence. App. 84, lines 5; App. 86, lines 6 – 22. In fact, plea counsel never even listened to the tape despite the solicitor's offer to make it available. App. 85, line 12. Instead, plea counsel relied upon the supplemental report discussing the statement prepared by the officer. App. 84, lines 5 – 12.

The PCR court found Petitioner failed to meet his burden of proving the plea counsel should have obtained the audio recording made by the police prior to the guilty plea. App. 101 – 102. Further, the PCR court found plea counsel credible. App. 102. However, the PCR court held Petitioner failed to demonstrate he would have gone to trial if plea counsel had obtained the recording. App. 102

**Discussion**

The Sixth Amendment to the United States Constitution guarantees a criminal defendant the right to effective assistance of counsel. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984). "In order to establish a claim of ineffective assistance of counsel, a PCR applicant must prove: (1) that counsel failed to render reasonably effective assistance under prevailing professional norms; and (2) that the deficient performance prejudiced the applicant's case." Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). "Where allegations of ineffective assistance of counsel are made, the question becomes, 'whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.'" Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (quoting Strickland, 466 U.S. at 686).

The Due Process Clause of the Fourteenth Amendment requires that a defendant knowingly and voluntarily enter a plea of guilty. Boykin v. Alabama, 395 U.S. 238, 242 (1969). The Supreme Court has expressly held that the actions of defense counsel may render a plea involuntary and thus violate of due process. Hill v. Lockhart, 474 U.S. 52, 56 (1985). As to the first prong, "[i]n the context of a guilty plea, . . . [the] inquiry turns on whether the plea was voluntarily, knowingly, and intelligently entered." Taylor v. State, 404 S.C. 350, 360, 745 S.E.2d 97, 102 (2013) (citations omitted). "'The second, or "prejudice," requirement . . . focuses

on whether counsel's constitutionally ineffective performance affected the outcome of the plea process.'" Id. (quoting Hill v. Lockhart, 474 U.S. 52, 59 (1985)). Stated differently, to demonstrate prejudice, "the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Hill, 474 U.S. at 59.

The PCR court erred in denying Petitioner relief. The undisputed evidence demonstrated that Petitioner would not have pled guilty if he had been aware of the audio recording. No evidence countered this position. Further, the PCR court made no credibility finding regarding Petitioner's testimony on this point.

Additionally, the plea transcript indicated Petitioner's disagreement with the facts as rendered by the state, which were the same facts contained within the police officer's supplemental report. Quite simply, the only information Petitioner ever received concerning his statement to police was an officer's interpretation of his statement. The audio recording revealed multiple discrepancies with the factual recitation given by the prosecution at the guilty plea and provided potential legal avenues to challenge the admissibility at trial.

The recording showed that the police officer did not advise Petitioner of his Miranda[2] rights until over eight minutes after the recording started. The recording is clear the officer spoke to Petitioner at length on the recording and prior to the initiation of the recording implicating Missouri v. Seibert, 542 U.S. 600 (2004) and State v. Navy, 386 S.C. 294, 688 S.E.2d 838 (2010). It was not until almost twenty-five minutes into the recording that Petitioner agreed to sign the waiver of rights. Thus, for well over ten minutes, the officer worked to convince Petitioner to waive his rights, including a discussion of how much time Petitioner would likely receive and the ability to

[2] Miranda v. Arizona, 384 U.S. 436 (1996).

run sentences concurrently. The officer warned that if Petitioner did not talk now and evidence surfaced later, when Petitioner was being released from prison on unrelated charges, then Petitioner would have to go back to prison.

Additionally, during the recorded statement, Petitioner admitted he was an accessory, but denied being a principal in the crime. This contradicted the factual recitation at the guilty plea. During the interrogation, the officer showed Petitioner a video or photographs and accused Petitioner of being the person shown in the video or photographs. Petitioner repeatedly denied that he was in the video or photographs.

Had Petitioner been aware of the audio recording, Petitioner would not have entered a guilty plea. At a minimum, plea counsel was required to listen to the recording and advise Petitioner accordingly. Plea counsel's failure to listen to the recording or obtain a copy of the recording in order to advise Petitioner concerning the guilty plea resulted in deficient performance prejudicial to Petitioner.

## CONCLUSION

As to Issue I, Petitioner respectfully requests this Court grant the petition for writ and permit him the opportunity to file a belated direct appeal concerning the issue contained in his statement of issue on appeal. As to Issue II, Petitioner respectfully requests this Court grant the petition for writ and permit full briefing on the issue presented.

Respectfully submitted,

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 5th day of November, 2014.

## STATEMENT OF ISSUE ON APPEAL

Pursuant to Rule 243(i)(2), Petitioner presents the following statement of issue on appeal in light of the PCR judge's denial of Petitioner's request for a belated direct appeal:

Did the plea judge err in accepting Petitioner's guilty plea where the record demonstrated Petitioner's lack of understanding of the terms of the guilty plea and the constitutional rights he was waiving?

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CERTIFICATE OF SERVICE

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I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Karen Ratigan, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Eddie Pilcher #303616, at Lee Correctional Institution, 990 Wisacky Highway, Bishopville, SC 29010, this 5th day of November, 2014.

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 5th day
of November, 2014.

_____ (L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.