STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM EDGEFIELD COUNTY
Court of Common Pleas

Edgar W. Dickson, Circuit Court Judge

Appellate Case No. 2014-000591
Lower Court Case No. 2012-CP-19-0304

FREDY DELEON, #304977,

RESPONDENT-PETITIONER,

v.

STATE OF SOUTH CAROLINA,

PETITIONER-RESPONDENT.

RESPONDENT-PETITIONER'S PETITION FOR WRIT OF CERTIORARI

JEREMY A. THOMPSON
Attorney and Counselor at Law

Law Office of Jeremy A. Thompson, LLC
P.O. Box 12891
Columbia, SC 29211
(803) 779-2555
(803) 779-2556 FAX

ATTORNEY FOR RESPONDENT-PETITIONER.

INDEX

QUESTIONS PRESENTED

I.

Whether appellate counsel was ineffective for failing to argue that the trial court erred in denying the Respondent-Petitioner's motion for a directed verdict?

II.

Whether the PCR court properly granted the Respondent-Petitioner a second belated appeal pursuant to White v. State, 263 S.C. 110, 108 S.E.2d 35 (1974), for a claim of ineffective assistance of appellate counsel?

STATEMENT OF THE CASE

The Respondent-Petitioner (hereinafter referred to as "Respondent"), Fredy DeLeon, was indicted in Edgefield County for one count of trafficking marijuana more than 100 pounds but less than 2,000 pounds. The Respondent's three co-defendants, Raphael Hernandez, Honorio Guerrero, and Alfredo Avila–Arjona, were also each indicted for trafficking marijuana. On March 23-25, 2004, the Respondent and his co-defendants proceeded to a joint trial by jury. This trial ended in a mistrial. On June 28-July 6, 2004, the Respondent and his co-defendants again proceeded to a joint trial by jury. The Respondent was represented at both trials by Jacque Hawk, Esquire, and Martin Puetz, Esquire. At the conclusion of the trial, the jury found all defendants guilty as charged. The Honorable William P. Keesley, presiding circuit judge, sentenced the Petitioner to twenty-five years' imprisonment.

The Respondent did not file a direct appeal following his trial; however, each of his co-defendants did. In a published opinion filed May 26, 2009, this Court reversed the co-defendants' convictions and found that Judge Keesley should have granted their motions for a directed verdict. State v. Hernandez, 382 S.C. 620, 677 S.E.2d 603 (2009).

On August 31, 2005, the Respondent filed his first Application for Post-Conviction Relief. He was represented on this application by Michael Waddington, Esquire (hereinafter "appellate counsel"). On February 16, 2007, the Honorable R. Knox McMahon, filed an order granting the Respondent a belated direct appeal pursuant to White v. State, 263 S.C. 110, 108 S.E.2d 35 (1974).

On appeal from the Respondent's first PCR application, the Respondent was initially represented by appellate counsel, but Tricia A. Blanchette, Esquire was substituted as counsel late in the appellate process. On September 9, 2011, the Court of Appeals issued an unpublished opinion which granted a belated appeal pursuant to White v. State, and affirmed the Respondent's

conviction and sentence. DeLeon v. State, Op. No. 2011-UP-418 (S.C. Ct. App. filed Sep. 9, 2011).

On September 19, 2012, the Respondent filed his second Application for Post-Conviction Relief with the Edgefield County Clerk of Court's Office, alleging ineffective assistance of White v. State counsel. The State initially filed a Return requesting a hearing, which was dated May 16, 2013. However, the State subsequently served a Return and Motion to Dismiss on July 9, 2013. A hearing was held on the second PCR application on August 12, 2013, before the Honorable Edgar W. Dickson. The Respondent was represented by Jeremy A. Thompson, Esquire, at this proceeding. By order filed November 26, 2013, Judge Dickson granted the PCR application, finding appellate counsel ineffective, and granting the Respondent a second belated appeal pursuant to White. Both parties filed motions pursuant to Rule 59(e), SCRCP, to alter or amend the order. A hearing was held on these motions on January 17, 2014. By order filed March 6, 2014, Judge Dickson denied both Rule 59(e) motions.

Notice of appeal was timely served and filed. The Respondent now seeks a writ of certiorari.

STATEMENT OF FACTS

On May 14, 2002, border patrol authorities in El Paso, Texas, discovered an "anomaly" in a shipment of wooden furniture bound for South Carolina that was being shipped on a tractor trailer. Upon opening the trailer, the authorities found large amounts of marijuana hidden inside wooden chimneys. Instead of seizing the drugs in El Paso, the authorities decided to deliver the drugs to their destination in South Carolina to effectuate a controlled delivery. App. pp. 771-774. The manifest indicated that the furniture was to be delivered to the Respondent's grocery store located in Edgefield County.

On the morning of May 18, 2002, the authorities drove the tractor trailer to the Respondent's grocery store. There, they, along with the Respondent and two other individuals, unloaded one chimney and several other pieces of furniture into a small storeroom at the store. The authorities were then directed to follow the two unidentified individuals, who were in a Thunderbird, to another location called Billy's Super Store, which was located down the road from the Respondent's business. App. p. 857-863.

After waiting approximately twenty-five to thirty minutes, the authorities in the tractor trailer were approached by the individuals in the Thunderbird and the Respondent's co-defendants, who were driving a Ryder truck. The three vehicles then formed a convoy, with the Thunderbird leading, the Ryder truck in the middle, and the tractor trailer bringing up the rear. As they traveled down a dirt road, the Ryder truck became stuck in a ditch and they were unable to dislodge the truck. The authorities then decided to end the controlled delivery. The Respondent's co-defendants were arrested on the dirt road; however, the individuals in the Thunderbird fled and were never apprehended. App. pp. 863-876.

When the decision was made to end the operation, the authorities also entered the Respondent's business. They entered the storeroom and seized the furniture contained there, including the chimney, which contained twenty bundles of marijuana. App. pp. 780-782. The total weight of all of the marijuana seized was approximately 892 pounds; each bundle weighed approximately 2.2 pounds. App. p. 1250, lines 15-23; p. 1269, lines 9-13.

ARGUMENT

Standard of Review

The Sixth and Fourteenth Amendments to the United States Constitution guarantee every criminal defendant the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984). This guarantee includes the effective assistance of counsel in the defendant's direct appeal. Evitts v. Lucey, 469 U.S. 387 (1985). In order to prove a claim of ineffective assistance of trial counsel, the moving party must show that defense counsel (1) failed to provide him with reasonable professional assistance of counsel under the prevailing standards for attorneys representing clients in criminal matters; and (2) that he was prejudiced by the errors and omissions of counsel such that he was deprived of a fair trial. Id. In other words, the Petitioner must show that but for counsel's errors and omissions, there is a reasonable probability that the result at trial would have been different. Id. In the context of an allegation of ineffective assistance of appellate counsel, the operative question becomes whether but for appellate counsel's errors and omissions, the result on appeal would have been different. Smith v. Murray, 477 U.S. 527 (1986).

On appeal, a PCR court's findings will be upheld if there is any evidence of probative value supporting them. Cherry v. State, 300 S.C. 155, 386 S.E.2d 624 (1989). "The appellate court will reverse the PCR court only where there is either no probative evidence to support the decision or the decision was controlled by an error of law." Edwards v. State, 392 S.C. 449, 455, 710 S.E.2d 60, 64 (2011).

I. Appellate counsel was ineffective for failing to raise the denial of the Respondent's direct verdict motion on appeal.

A. How the Issue Arose Below

1. The Trial Proceedings

At the conclusion of the State's case, the Respondent moved for a directed verdict, arguing that "there has been no proof of the essential element of knowledge." App. p. 1283, lines 17-20. The Respondent argued that the evidence showed that the authorities "had no reason to believe that Fredy DeLeon knew that he was receiving anything other than furniture, that [they] had no reason to believe that Fredy DeLeon had any knowledge that there was marijuana in the chimney, and that the chimney itself was sealed." App. p. 1283, line 23-p. 1284, line 2; see also App. p. 1286, lines 3-4 ("This stuff looks like furniture; it smells like furniture; it feels like furniture.") The Respondent also argued that he had no way of storing or taking possession of all of the furniture and that he didn't even select any particular piece of furniture that was offloaded at his business. App. p. 1284, line 17-p. 1285, line 2. With regard to the manifest, the Respondent argued that "[t]here's no proof at all that he provided his name and address or anything to those particular folks." App. p. 1284, lines 10-11. Finally, the Respondent argued that there was no evidence connecting him to drug dealings of any kind. App. p. 1285, line 22-p. 1286, line 2. The trial court denied the motion, concluding that "there is evidence to submit these matters to the jury." App. p. 1290, lines 1-2. The motion was renewed at the close of the Respondent's case, and was denied again. See App. p. 1323, line 12-p. 1324, line 15.

2. Appellate Counsel's Representation[1]

The Respondent retained appellate counsel to represent him on his first PCR application, and then again on appeal from the order granting him a belated appeal pursuant to White v. State, *supra*. It soon became readily apparent that appellate counsel had no understanding of South Carolina's appellate practices and procedures. As noted in this Court's letter to appellate counsel dated February 15, 2008, appellate counsel's first round of filings contained numerous errors: (1) the brief and certiorari petition that he filed did not comply with the South Carolina Appellate Court Rules;[2] (2) he made incorrect statements of fact regarding the procedural history in the case in those documents; (3) the certiorari petition argued direct appeal error; and (4) he failed to file an Appendix. See Supp. App. pp. 3-5. In response to this letter, appellate counsel filed nothing, which resulted in the dismissal of the Respondent's appeal on March 27, 2008. See App. pp. 1613-1614. Appellate counsel then had to file a motion to reinstate the appeal, which this Court granted with a reminder that appellate counsel had to "serve and file a petition for a writ of certiorari **and** a brief addressing the direct appeal issues ... along with an appendix." App. p. 1617 (emphasis in original).

Unfortunately, appellate counsel's troubled filings did not end there. Appellate counsel filed an amended certiorari petition that reads in full:

QUESTIONS PRESENTED

1. Did the petitioner knowingly and intelligently waive his right to direct appeal?

STATEMENT OF THE CASE

[1] The Respondent's discussion of appellate counsel's representation here is largely the same as the discussion presented in his return to the Petitioner's certiorari petition. The discussions are alike because the facts and legal inquiries involved are similar.

[2] The brief, like the notice of appeal, was initially filed in the Court of Appeals. The brief contained a designation of matter. See App. p. 1605.

On July 6, 2004, the jury found the defendant guilty and sentenced him to imprisonment for twenty-five years. { Insert waiver of appeal facts here }

{Procedural History – Jacque }

On July 6, 2004, petitioner was convicted and was sentenced to twenty-five years imprisonment.

Petitioner then brought this action seeking post-conviction relief in August 3, 2005. He alleged that trial counsel failed to file a perfect [sic] an appeal of the original conviction and sentence after being instructed to do so. The court denied the application on February 14, 2007, and a notice of appeal was served on February 15, 2007, and an Amended notice of appeal was served on December 5, 2007. Petitioner now seeks a writ of certiorari to review this denial.

ARGUMENT

1. PETITIONER DID NOT KNOWINGLY AND INTELLIGENTLY WAIVE THE RIGHT TO DIRECT APPEAL.

{Insert Argument for above }

App. p. 1620. Even this brief amount of text contains an error: the first PCR was granted, not denied. Appellate counsel's White brief raised two issues, both pertaining to allegations of juror misconduct. The juror misconduct hearing was held after the trial concluded. The White brief, however, does not contain a single reference to the record. Appellate counsel did not reference the record because he did not have the juror misconduct transcript when he wrote the brief. Instead, he wrote the brief based on conversations he had with trial counsel regarding the events of the transcript. See App. p. 1750, line 2-p. 1751, line 13. Years later, Attorney Blanchette actually secured the transcript and provided it to the Court of Appeals. See App. p. 1744, line 12-p. 1745, line 10.

Appellate counsel also had a strained and contentious relationship with the Respondent. Appellate counsel initially informed the Respondent that he planned to raise three issues on appeal: (1) the juror misconduct claim, which was actually raised; (2) the Fourth Amendment claim, which the PCR court granted relief on below; and (3) the denial of the directed verdict motion, which is the subject of this petition. See Supp. App. pp. 6-8. Appellate counsel, however, only filed a brief challenging the juror misconduct claim. In a subsequent letter to the Respondent, appellate counsel informed the Respondent that he did not present the Fourth Amendment or directed verdict arguments because the Respondent's co-defendants presented those claims on their appeals, that they had lost, and that their arguments on those claims were stronger than the Respondent's. See Supp. App. p. 9. This letter contains two significant errors. First, the Respondent's co-defendants did not present the Fourth Amendment claim on appeal. Second, the Respondent's Fourth Amendment claim was significantly stronger than any claim his co-defendants could have made because he was the only individual with an expectation of privacy in his business. Additionally, while appellate counsel was correct at the time he wrote the letter that the Respondent's co-defendants had lost on their directed verdict claims, they eventually succeeded on appeal to this Court.

On March 25, 2008, appellate counsel wrote the Respondent a letter enclosing "the appeal with the issue of the search and seizure added." Supp. App. p. 10. Notably, the Respondent's appeal would be dismissed two days later by this Court due to appellate counsel's failure to comply with the South Carolina Appellate Court Rules and this Court's letter to him dated February 15, 2008. In the March 25 letter, appellate counsel stated that he had raised the Fourth Amendment claim at the Respondent's insistence. No such argument was ever raised in any appellate filing. In a letter to the Respondent dated April 15, 2011, appellate counsel again maintained that he had

filed a brief that included the Fourth Amendment claim. See Supp. App. p. 13. The Respondent testified at the PCR hearing that he never saw a brief with the Fourth Amendment claim included, though he thought that one had been filed based upon appellate counsel's letters. App. p. 1772, lines 6-12; p. 1774, line 24-p. 1775, line 2.

Over the course of the representation, the Respondent requested that appellate counsel be relieved as his attorney; however the Court of Appeals denied these requests. See App. p. 1775, lines 3-11. In the April 15, 2011, appellate counsel noted that the Respondent did not want him as his attorney, and he informed the Respondent that he was closing his practice to move to Puerto Rico in June 2011. Supp. App. p. 12. Appellate counsel told Attorney Blanchette that "he wasn't too concerned about the letters and the orders that had been issued by the Court of Appeals of South Carolina because he was moving to Puerto Rico and they would have no power over him there." App. p. 1746, line 25-p. 1747, line 4. Appellate counsel in fact moved to Puerto Rico before the substitution process was completed. See App. p. 1743, lines 3-22; see also App. pp. 1873-1874.

3. The PCR Proceedings

In his PCR application below, the Respondent alleged that appellate counsel was ineffective for failing to raise the denial of his directed verdict motion on appeal. See App. p. 1695. Following the evidentiary hearing, the PCR court concluded that appellate counsel was ineffective for failing to present the Fourth Amendment claim on appeal and that the Respondent was entitled to a new belated direct appeal. See App. pp. 1804-1821. With regard to the question of deficient performance, the PCR court found that "[a]ppellate counsel's performance was abysmal, totally inadequate, and a complete abdication of a lawyer's duty to his client." App. p. 1812. The PCR court declined to rule on any of the Respondent's other allegations, including the

directed verdict issue, because it concluded that the Respondent would be able to present that claim on the new belated direct appeal.

The Petitioner filed a Rule 59(e), SCRCP, motion which argued that the PCR court should have ruled on all of the Respondent's claims, including the directed verdict claim. See App. pp. 1822-1830. The Respondent also filed a Rule 59(e) motion, similarly arguing that the remedy granted was inappropriate and that the PCR court should have ruled on all of the Respondent's claims. See App. pp. 1899-1902. Following a hearing, the PCR court denied both motions and reaffirmed its earlier findings. App. pp. 1935-1939. The Respondent now contends that the PCR court should have ruled on his directed verdict claim and should have granted relief.

B. Discussion

As with any claim of ineffective assistance of counsel, a reviewing court must determine whether or not counsel was deficient and whether or not that deficient conduct prejudiced his client. See Strickland, *supra*. The Respondent submits that the PCR court's findings on deficient conduct apply in equal force to his claim of ineffective assistance of appellate counsel for failure to raise the directed verdict claim on appeal. The Respondent also submits that he was prejudiced by appellate counsel's deficient performance because there is a reasonable probability that had the directed verdict claim been raised on appeal, then he would have succeeded on that claim just as his co-defendants did. Accordingly, the Respondent respectfully requests that this Court grant his certiorari petition on this issue.

1. Appellate Counsel's Performance Was Deficient

As demonstrated above, appellate counsel's performance was appalling. His filings routinely failed to comply with the South Carolina Appellate Court Rules. His failure to comply with the rules resulted in the Respondent's appeal being dismissed, requiring reinstatement. The

allegations that he raised were filed without the benefit of the transcript upon which he based his argument, and it fell to Attorney Blanchette, more than three years after the brief was filed, to supply that transcript. The arguments that he did raise in his brief were unsupported by the record, as the primary assertion of error was the trial court's refusal to ask questions propounded by trial counsel when in fact trial counsel never made any such requests. Compare App. pp. 1624-1636 (Brief of Appellant) with pp. App. pp. 1546-1563 (colloquy at post-trial hearing regarding additional questions to be asked). His letters to the Respondent include egregiously incorrect statements of fact and law, including, but not limited to: (1) not knowing what claims were raised in the co-defendants' appeal; (2) not understanding fundamental Fourth Amendment principles such as privacy interests in property; and (3) misleading the Respondent as to what claims were presented on appeal. After this horrific performance, appellate counsel abandoned the Respondent and informed the Respondent that he was closing his law practice and moving to Puerto Rico. Short of an appellate attorney not filing any documentation and the case being dismissed, the Respondent submits that it is difficult to envision an appellate attorney performing in a more indefensible manner than appellate counsel performed in this case. The PCR court found deficient conduct based on these facts, and those findings should apply equally to this claim. The Respondent respectfully submits that he has met his burden of showing deficient conduct.

2. Appellate Counsel's Deficient Performance Prejudiced the Respondent

"A case should be submitted to the jury when the evidence is circumstantial 'if there is any substantial evidence which reasonably tends to prove the guilt of the accused or from which his guilt may be fairly and logically deduced.'" State v. Bostick, 392 S.C. 134, 139, 708 S.E.2d 774, 776 (2011) (quoting State v. Mitchell, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000)). "This Court has repeatedly affirmed the principle that when the State fails to produce substantial

circumstantial evidence that the defendant committed a particular crime, the defendant is entitled to a directed verdict." State v. Odems, 395 S.C. 582, 586, 720 S.E.2d 48, 50 (2011).

"In drug cases, the element of knowledge is seldom established through direct evidence, but may be proven circumstantially." State v. Hernandez, *supra*, 382 S.C. at 624, 677 S.E.2d at 605 (2009) (citing State v. Attardo, 263 S.C. 546, 550, 211 S.E.2d 868, 869 (1975)). "Knowledge can be proven by the evidence of acts, declarations, or conduct of the accused from which the inference may be drawn that the accused knew of the existence of the prohibited substances." Id.

The Respondent submits that the trial court erred in failing to grant the Respondent's directed verdict motion. Initially, the Respondent would note that this Court overturned the denial of his co-defendants' directed verdict motions in its opinion in Hernandez. While the Respondent's case is not on all fours with his co-defendants' case, the Respondent believes that several important comparisons can be drawn. This Court concluded in the Respondent's co-defendants' opinion that there was no evidence that the co-defendants knew that the tractor trailer contained drugs. Similarly, there was a similar dearth of evidence with regard to the Applicant's knowledge of the existence of the drugs. There were no "acts, declarations, or specific conduct" presented at trial that showed that the Applicant knew that drugs were concealed in the furniture. Hernandez, *supra*, 382 S.C. at 625, 677 S.E.2d at 605. The furniture looked like ordinary furniture, and the Respondent did not direct that any particular piece of furniture be unloaded at his business. App. p. 899, lines 8-13. The State did not present any evidence that the Respondent had any prior dealings with the individuals in the Thunderbird, or that he even knew them in any way. See id. ("The State claims that it is 'nonsensical' to find that the Thunderbird occupants did not know Petitioners prior to this transaction. However, the State failed to present any evidence such as acts, declarations, or specific conduct to support this inference, and thus, we find that the conclusion

that Petitioners knew the Thunderbird occupants and therefore had knowledge of the drugs in the tractor trailer is mere speculation.") The State had no evidence of any conversations the Respondent had with anyone in Mexico, other than the fact that his name was on the manifest. See App. p. 1127, line 4-p. 1128, line 14. The State presented no evidence that the Respondent knew his other co-defendants. See App. p. 1128, line 22-p. 1129, line 6. The State did not find any other circumstantial evidence that the Respondent engaged in drug dealings. The Respondent did not open up the chimney or ever actually possess the marijuana; in fact, he left soon after the delivery was completed. See App. p. 1205, lines 13-25. The Respondent did not travel with his co-defendants or with the other individuals in the Thunderbird.

In short, the only evidence that the State had that the Respondent was involved in this conspiracy was the fact that his name was on the manifest and the fact that some furniture was offloaded at his business. This evidence simply does not constitute substantial circumstantial evidence of guilt. Although this Court overturned the Court of Appeals' decision in the Respondent's co-defendants' case, the Respondent believes that it is instructive to consider what the Court of Appeals found was persuasive evidence of guilt: "[t]he Appellants' behavior and actions while at Billy's Super Store were markedly suspicious, and the ensuing course of events was inconsistent with what a reasonable delivery of furniture would entail." State v. Hernandez, 2007 WL 8327480, *3, 2007-UP-183 (S.C. Ct. App. filed April 18, 2007). Whereas the Respondent's co-defendants acted unusually, the unloading of the furniture at the Respondent's business is *exactly* "what a reasonable delivery of furniture would entail." Id. There are no circumstances present in this case to distinguish the delivery of the furniture to the Respondent's business on May 18, 2002, than from a normal delivery of furniture from Rooms to Go. The tractor trailer arrived, it unloaded furniture, and it left. Accordingly, the Respondent submits that the trial

court clearly erred in denying his motion for a directed verdict, and that he has shown that appellate counsel's failure to raise this claim on appeal prejudiced him. This Court should grant certiorari on this issue.

II. The PCR court improperly granted the Respondent a second belated appeal pursuant to White v. State, 263 S.C. 110, 108 S.E.2d 35 (1974).[3]

A. How the Issue Arose Below

In its order granting relief, the PCR court concluded that appellate counsel was ineffective pursuant to both prongs of Strickland. Instead of granting a new trial, the PCR court granted the Respondent a second belated appeal because "appellate counsel's ineffectiveness only impacted the validity and reliability of the outcome of the appeal." App. p. 1821. Both parties filed Rule 59(e), SCRCP, motions challenging the remedy, and both parties agreed that the appropriate remedy was a new trial. See App. pp. 1831-1832 (Petitioner's Rule 59(e) motion); pp. 1899-1901 (Respondent's Rule 59(e) motion). These positions were reiterated at the Rule 59(e) hearing. See App. p. 1909, lines 12-20 (Petitioner); p. 1916, line 6-p. 1919, line 13 (Respondent). In its order denying the Rule 59(e) motions, the PCR court reaffirmed its conclusion that the appropriate remedy was a second belated appeal:

> [T]his Court does not believe the granting of a new trial would be the "appropriate order" in this case, which was very well-tried and produced no claims of ineffective assistance of counsel at the trial level. ... It would be a waste of judicial resources to order a new trial in a complex case which was tried (twice) a decade ago, and has bounced up and down the South Carolina appellate and trial courts since. Surely, the law cannot require this case to be rest to zero and re-litigated from scratch. ... The Court orders that Applicant be allowed to reinstitute his appeal so that the meritorious issues he wished to raise in his belated appeal, and which Mr. Waddington represented to him would be raised, may be competently argued so that Applicant will have a fair shake at his constitutionally ensure appeal.

[3] As with the discussion of appellate counsel's performance above, the discussion of this issue is largely unchanged from that presented in the Respondent's return to the Petitioner's certiorari petition because the inquiry is largely the same.

App. p. 1938. The Respondent now contends that the PCR court erred with regard to this issue, and respectfully requests that this Court grant certiorari to review this claim.

B. Discussion

"White v. State is limited to situations where the PCR applicant did not knowingly and intelligently waive his right to a direct appeal." Douglas v. State, 369 S.C. 213, 215, 631 S.E.2d 542, 543 (2006). Where a claim of ineffective assistance of appellate counsel for failure to raise a claim on an appeal that was actually taken is brought, the reviewing court applies Strickland. See Southerland v. State, 337 S.C. 610, 615-616, 524 S.E.2d 833, 836 (1999). In Ezell v. State, 345 S.C. 312, 548 S.E.2d 852 (2001), this Court "granted th[e] petition for a writ of certiorari to determine the appropriate remedy for the ineffective assistance of appellate counsel" and concluded that "the appropriate remedy is a new trial." 345 S.C. at 313, 548 S.E.2d at 852. This Court found that this remedy was appropriate because to conclude that Strickland's second prong had been met, a reviewing court must conclude that there was a reasonable probability that the result of the appellate proceeding would have been different. Id. at 315-316, 548 S.E.2d at 853-854. This Court had reached similar conclusions in Southerland, *supra*, and in Simpkins v. State, 303 S.C. 364, 401 S.E.2d 142 (1991). Indeed, in Ezell, this Court held that its result was "controlled by Southerland." 345 S.C. at 315, 548 S.E.2d at 853.

Despite the clear language used by Ezell, as well as the outcomes of Southerland and Simpkins, the PCR court concluded that "[i]t appears that the Supreme Court purposefully limited the Ezell holding to the facts of that case, and did not establish a bright line rule for all ineffective assistance of appellate counsel claims." App. p. 1937. This finding is simply incorrect as a matter of law. This Court specifically stated it accepted certiorari to create a bright-line rule in Ezell, and the bright-line rule announced was that meritorious allegations of ineffective assistance of

appellate counsel warrant new trials. The PCR court should have applied that rule to this case. Furthermore, there are no decisions of this Court or of the Court of Appeals where a belated appeal has been granted as the appropriate remedy; instead, this Court has consistently granted a new trial in such circumstances, as seen in Ezell, Southerland, and Simpkins.[4] The PCR court implicitly acknowledged this fact when it reached to other jurisdictions to support its remedy. See App. p. 1938 (citing decisions in Kentucky, Massachusetts, and the Seventh Circuit Court of Appeals). The law of those jurisdictions, however, is not the law of South Carolina. The PCR court's failure to apply the prevailing law in this state constitutes an error of law and should be reversed. See Edwards v. State, *supra*, 392 S.C. at 455, 710 S.E.2d at 64 ("The appellate court will reverse the PCR court only where ... the decision was controlled by an error of law.") The Respondent respectfully requests that this Court his certiorari petition on this issue and order that a new trial, and not a new White v. State appeal, is the appropriate remedy for a claim of ineffective assistance of appellate counsel.

[4] In its letter to appellate counsel regarding his multitudinous errors in his filings, this Court noted that the existence of a direct appeal "would most likely destroy his right to relief under White," which demonstrates that White relief only exists when a direct appeal has never been taken. Supp. App. p. 4.

CONCLUSION

For the reasons stated, the Respondent asks this Court to grant the petition and to allow full briefing on these issues.

Respectfully submitted,

JEREMY A. THOMPSON
Attorney and Counselor at Law

Law Office of Jeremy A. Thompson, LLC
P.O. Box 12891
Columbia, SC 29211
803-779-2555
803-779-2556 FAX
jeremyatlaw@yahoo.com

ATTORNEY FOR RESPONDENT-PETITIONER.

This 12th day of February, 2015.

STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM EDGEFIELD COUNTY
Court of Common Pleas
Edgar W. Dickson, Circuit Court Judge

Appellate Case No. 2014-000591
Lower Court Case No. 2012-CP-19-0304

FREDY DELEON, #304977,

RESPONDENT-PETITIONER,

v.

STATE OF SOUTH CAROLINA,

PETITIONER-RESPONDENT.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the following documents in the above-captioned action have been served upon opposing counsel, J. Walter Whitmire, Assistant Attorney General, Office of the Attorney General, P.O. Box 11549, Columbia, SC 29211, by hand-delivery, this 12th day of February, 2015:

1. Two copies of the Return to the Petitioner-Respondent's Petition for Writ of Certiorari;
2. Two copies of the Respondent-Petitioner's Petition for Writ of Certiorari;
3. One copy of the Supplemental Appendix;
4. One copy of the Motion to File Supplemental Appendix;
5. One copy of the Motion to Exceed Page Limitations; and

6. One copy of the Motion to Relax Rule 243(i), SCACR.

JEREMY A. THOMPSON
ATTORNEY FOR RESPONDENT-PETITIONER

SWORN TO BEFORE me this 12th day
of February, 2015.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: 7/10/2022