

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Beaufort County

James R. Barber, III, Circuit Court Judge

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APR 6 2015

S.C. Supreme Court

OSIEL NARCISO,

RESPONDENT,

V.

STATE OF SOUTH CAROLINA,

PETITIONER

APPELLATE CASE NO. 2014-001327

RETURN TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF QUESTION PRESENTED

Did the lower court err by finding the Respondent's waiver of all other post-conviction relief claims was not entered knowingly and voluntarily when post-conviction relief counsel fully advised the Respondent of the rights he was waiving, the Respondent signed and initialed a written waiver of rights form drafted by counsel, and at the time of the waiver the Respondent had no other post-conviction relief claims he wished to pursue?

COUNTER-STATEMENT OF QUESTION PRESENTED

Whether the remand court's findings that Narciso's waiver of all other post-conviction relief claims was not knowing, intelligent, voluntary and fails the tests outlined in Brannon v. State, 345 S.C. 437, 548 S.E.2d 866 (2001) and Spoone v. State, 370 S.C. 138, 665 S.E.2d 605 (2008) were supported by "any evidence" presented at the remand hearing?

COUNTER-STATEMENT OF THE CASE

Respondent Oriel Narciso was indicted by the Beaufort County grand jury for trafficking cocaine. On January 16-18, 2007, he was tried before the Honorable Howard P. King and a jury. Narciso was represented by Donald Colongeli, Esquire. He was convicted and sentenced to 25 years incarceration.

PCR Application, PCR Hearing, and Consent Order

On August 1, 2007, Narciso filed an Application for Post-Conviction Relief alleging ineffective assistance of counsel for failing to file a timely appeal. App. 1. On May 15, 2008, the State filed its Return. App. 10. On August 26, 2008, the parties appeared before the Honorable J. Cordell Maddox. Narciso was represented by Philip John Rios and the State was represented by Assistant Attorney General Matthew J. Friedman. No testimony or colloquy took place on the record; the transcript only reflects that an off-the-record bench conference took place. App. 22. The parties executed a Consent Order Granting Belated Direct Appeal, which was approved by the court and filed August 26, 2008. App. 27. The Consent Order contained the following: “The Applicant understands that he must proceed on all PCR claims at this time and anything not raised now is waived. The Applicant wishes to waive all other PCR claims and proceed with a belated direct appeal.” Thus, the Order directed that “Applicant waived his right to raise any other PCR allegations.” App. 28.

Petition for Certiorari

On July 14, 2009, appellate defender Elizabeth Franklin-Best filed a Petition for Certiorari and Brief of Appellant pursuant to White v. State¹ on behalf of Narciso. On December 16, 2010,

¹ 263 S.C. 110, 208 S.E.2d 35 (1974).

this Court granted the petition for writ of certiorari and ordered further briefing with respect to Petitioner's Question II: "Narciso signed a Consent Order Granting Belated Direct Appeal and 'waived his right to raise any other PCR allegations.' Narciso respectfully asks this Court to remand his case to determine whether that waiver was entered into knowingly and voluntarily." Ms. Franklin-Best filed the Brief of Petitioner on March 21, 2011, followed by an Amended Brief of Petitioner on August 11, 2011. App. 29. The State, represented by Assistant Attorney General Matthew Friedman, filed its Brief of Respondent on September 12, 2011. App. 38. On March 14, 2012, this Court issued its opinion affirming the circuit court's denial of Narciso's motion to suppress but remanding the case for a determination as to whether Petitioner's waiver of his PCR allegations was in accordance with the Court's waiver jurisprudence. App. 47; Narciso v. State, 397 S.C. 24, 723 S.E.2d 369 (2012).

Remand Hearing and Order Granting Relief

An evidentiary hearing on the remanded issue was held before the Honorable James R. Barber, III on February 20, 2014. Narciso was represented by Carol C. Ruff and Harley D. Ruff, and the State was represented by Assistant Attorney General Ashleigh R. Wilson. App. 92. Narciso's counsel filed a Petitioner's Brief in Support of Finding PCR Waiver Invalid, along with exhibits. App. 59 – 88. The witnesses included Rebecca McCann, the Spanish interpreter at Narciso's PCR hearing; Donald Colongeli, original trial counsel; Phillip Rios, PCR counsel; and Narciso.

On June 27, 2014, Judge Barber issued an Order granting Petitioner's request to bring a PCR application. App. 138. In support of this decision, Judge Barber stated:

Based on the facts that (1) Petitioner is a non-English speaker who could not read the Consent Order, (2) there was no colloquy whatsoever with the judge at the PCR hearing to establish that

Petitioner understood the Consent Order and/or his waiver of PCR rights, and (3) Petitioner may have been entitled to an appeal anyway without having to waive his PCR rights under the case of White v. State, 263 S.C. 110, 208 S.E.2d 35 (1975), the record does not adequately demonstrate that Petitioner's waiver was knowing, intelligent and voluntary, and accordingly the PCR wavier fails the tests outlined in Brannon and Spoone.

App. 143.

The State filed its Petition for Writ of Certiorari on December 22, 2014. This Return follows.

ARGUMENT

The remand court's findings that Narciso's waiver of all other post-conviction relief claims was not knowing, intelligent, and voluntary and fails the tests outlined in Brannon v. State, 345 S.C. 437, 548 S.E.2d 866 (2001) and Spoone v. State, 379 S.C. 138, 665 S.E.2d 605 (2008) were supported by "any evidence" presented at the remand hearing.

- A. There was ample evidence to support the remand court's findings that Narciso's waiver of his other PCR claims was not knowing, intelligent, and voluntary where the Consent Order signed by Narciso was not read or translated into Narciso's native language of Spanish, there was no colloquy on the record at the PCR hearing regarding Narciso's understanding of the Consent Order and/or his waiver of PCR rights, and the granting of his belated direct appeal pursuant to *White v. State* was not incumbent upon the waiver of any other PCR claims.

There was no incentive for Narciso to waive any other PCR allegations because he was entitled to file a belated White v. State appeal even without the State's consent. This case illustrates how the State can take advantage of an unknowing defendant and PCR attorney, resulting in a serious deprivation of rights. The sole issue on remand was whether Narciso's waiver of his PCR allegations was in accordance with this Court's waiver jurisprudence. App. 56. The remand court² applied the correct law to the facts of the case and determined that the waiver was not knowing, intelligent and voluntary and not in compliance with the requirements of Brannon and Spoone. In support of this determination, the court cited the facts that Narciso is a non-English speaker who could not read the Consent Order and the original PCR hearing contained "no colloquy whatsoever with the judge" regarding Narciso's waiver of his PCR rights. The court also found that Narciso may have been entitled to a belated direct appeal even without having to waive his PCR rights. App. 140. Narciso should not be in any worse position because his trial attorney fumbled the filing of the notice of intent to file a direct appeal.

² For ease of reference, when referring to the August 26, 2008 proceedings, Respondent uses "PCR hearing" and "PCR court" and when referring to the February 20, 2014 proceedings, Respondent uses "remand hearing" and "remand court."

Upon appellate review, this Court gives great deference to the PCR court's findings of fact and conclusions of law. Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005). This court also "gives great deference to a PCR court's findings where matters of credibility are involved." Simuel v. State, 390 S.C. 267, 270, 701 S.E.2d 738, 739 (2010). It is well settled that "[i]n reviewing the PCR court's decision, an appellate court is concerned only with whether any evidence of probative value exists to support that decision." Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013); Davie v. State, 381 S.C. 601, 675 S.E.2d 416 (2009); Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). Accordingly, the Court will affirm if *any evidence* of probative value in the record exists to support the finding of the PCR court. Cherry, 300 S.C. at 119, 386 S.E.2d at 626. In the present case, there was far more evidence supporting the remand court's findings than the minimal amount required for this Court to affirm. The State's contention that there is "no evidence" to support the Court's finding is baseless. Pet. for Cert., 6.

1. Failure to Translate Consent Order into Spanish

The remand court found that Narciso's native language is Spanish and that he "does not speak or read English adequately enough to understand legal proceedings or his statutory and constitutional rights." App. 139. This finding was supported by Narciso's testimony that he is a native of Mexico and does not understand written or spoken English. App. 125, l. 7 – 126, l. 2. Nonetheless, his attorney allowed him to sign a Consent Order written in English, whereby he waived his rights to pursue any other PCR claims beyond the failure of trial counsel to file a timely notice of direct appeal. Additionally, contrary to the State's contention in its prior Return to the Petition for Certiorari, Narciso's PCR attorney, Rios, is not fluent in Spanish and could not communicate with Narciso in his native language without aid of a court interpreter or a translator at

his office. Compare App. 44 -- 45 (State's Return to Cert., Sept. 12, 2011) with App. 107, ll. 15-16; App. 108, ll. 1-6; App. 109, ll. 9-12; App. 114, ll. 20-24.

The court found that the Consent Order was never translated into Spanish and that its contents were not read to Narciso in Spanish on or off the record. App. 139. Additionally, because neither the Consent Order nor its terms were read into the record, the Spanish interpreter present at the PCR hearing gave no interpretation of the document or its terms on the record. These findings are supported by interpreter McCann's inability to confirm that she ever translated the Consent Order for Narciso and Narciso's testimony that the document was never read to or translated for him. App. 102, ll. 16-21; App. 126, l. 8 – 127, l. 2.

In response to the court's question regarding whether PCR counsel had any document that indicated that he advised his client that he would be waiving his rights forever, that he's only given one application for PCR, and that it could affect his rights in the future on any habeas matter, PCR counsel pointed to a handwritten document contained in his case file. App. 112, l. 23 – 113, l. 12. While PCR counsel initially called the document "the consent order" he then described the document as being handwritten, indicating that he was not referring to the Consent Order actually executed by the parties and approved by the Court but rather a document only signed by Narciso. App. 113, 8-10; App. 89 – 91 (State's Ex. 1). However, he later stated that both the Consent Order and handwritten list were presented to Narciso together. App. 118, ll. 20-24. The interpreter testified that she believed that she was set to arrive at the courthouse on the morning of the hearing at 8:45 a.m. and does not recall translating the Consent Order for Narciso. App. 104, l. 1-3; App. 124, ll. 1-20. Thus, her testimony does not corroborate PCR counsel's testimony that the translator met him at the detention center between 7:30 and 8:30 a.m. and assisted in his communication with Narciso regarding the Consent Order and handwritten checklist. App. 116, l. 17 – 117, l. 4. It was

the duty of the remand court to weigh the evidence, such that it could believe or disbelieve all or a part of any of the witness testimony. Thus, the evidence presented at the remand hearing supported the court's finding that the Consent Order signed by Narciso was not read or translated into Narciso's native language of Spanish. This meets the low threshold of "any evidence" required for affirmance of the remand court.

2. Failure to Conduct Any "On the Record" Colloquy

In addition to the failure to translate the Consent Order or even read the Consent Order to Narciso, the remand court cited the fact that there was no colloquy between the judge and Narciso or his attorney of a waiver of Narciso's PCR rights. App. 145 – 146. Though the State provides no authority to support its position, it contends that "a formal colloquy between the Court and the defendant is not the only way to establish a valid waiver of rights." Pet. for Cert., 7. However, the State makes no attempt to reconcile this with the mandate of Brannon v. State, that "[a] defendant's knowing and voluntary waiver of statutory or constitutional rights *must* be established by a complete record, and may be accomplished by colloquy between court and defendant, between court and defendant's counsel, or both." 345 S.C. 437, 439, 548 S.E.2d 866, 867 (2001) (emphasis added). Further, even if the lack of colloquy alone is not sufficient to render the waiver invalid, the other evidence before the remand court supported its finding that Narciso's waiver was not knowing, intelligent, and voluntary.

Though Spoone dealt with the waiver of collateral review subject to a plea agreement, it is instructive regarding how to evaluate the circumstances surrounding a waiver of the right to pursue allegations in PCR. See Narciso v. State, 397 S.C. 24, 723 S.E.2d 369 (2012) ("The State argues that Petitioner's case is distinguishable from Spoone because in that case the issue was 'whether the right to appellate review and post-conviction review may be waived by a written plea

agreement ...,' and that '[Petitioner] proceeded to trial and was convicted.' This is a distinction without a difference. The key issue in Spoone and in Petitioner's case is the circumstances surrounding the waiver of the right to appeal PCR allegations."'). However, Narciso's conviction after a trial is important to the extent that this Court distinguishes between the advisement of rights regarding appeal required after a trial versus after a guilty plea. See Turner v. State, 384 S.C. 451, 456, 682 S.E.2d 792, 794-95 (2009)). This distinction is at least in part to the far greater potential for viable issues on direct appeal following a trial rather than a guilty plea. Roe v. Flores-Ortega, 528 U.S. 470, 120 S.Ct. 1029 (2000) ("Although not determinative, a highly relevant factor in this inquiry will be whether the conviction follows a trial or a guilty plea, both because a guilty plea reduces the scope of potentially appealable issues and because such a plea may indicate that the defendant seeks an end to judicial proceedings.'). There is likewise a greater potential for viable issues in post-conviction relief proceedings following a trial.

In Spoone, the Court noted that the waiver of a right to collateral review is much the same as the waiver of any other constitutional or statutory rights. 379 S.C. at 142, 665 S.E.2d at 607. "[S]uch a waiver will be held effective only if it is knowing and voluntary." Id. The Court recognized that in determining the effectiveness of a waiver in the Fourth Circuit, "the court examines the particular facts and circumstances surrounding the case, including the background, experience and conduct of the accused." Id. at 143, 665 S.E.2d at 607. Applying that principle in Spoone's case, the Court determined that it must evaluate "(1) the background, experience and conduct of the accused, (2) the text of the plea agreement, and (3) the transcript of the plea hearing." Id. at 143, 665 S.E.2d at 608. Though noting that Spoone had only a ninth grade education, in finding that Spoone's waiver was effective, the Court cited the straightforwardness of the written plea agreement and the plea colloquy in which the trial court specifically asked

Spoone about the waiver both in the language of the plea agreement and in plain language. Id. at 143-44, 665 S.E.2d at 608. Spoone was also represented by two attorneys who signed the plea agreement, which Spoone also signed.

In United States v. Wessells, 936 F.2d 165 (4th Cir. 1991), the defendant challenged the waiver of his right to direct appeal of his sentence, which was included in his written plea agreement. 936 F.2d at 167. The Fourth Circuit found the waiver unenforceable, however, because the plea court did not question the defendant “specifically concerning the waiver provision of the plea agreement” and the defendant “himself gave no indication of the degree to which he understood the waiver's import.” Id. at 168. In distinguishing Spoone from Wessells, this Court found that in Spoone “the trial court did specifically question petitioner about the waiver provision more than one time and in more than one manner.” 379 S.C. at 144 n. 5, 665 S.E.2d at 608 n. 5.

Like the Fourth Circuit, this Court requires that the record establish a knowing and voluntary waiver of statutory right, stating that such can be accomplished by a colloquy between the court and either the defendant, defense counsel, or both. Brannon, 345 S.C. at 439, 548 S.E.2d at 867. In Brannon, the PCR court informed Brannon at the evidentiary hearing that he wanted a reduction in sentence, which the court advised it did not have the authority to order. Id. at 438, 548 S.E.2d at 867. PCR counsel then indicated that Brannon wished to withdraw his PCR application, and the motion was granted without further discussion. Id. Though the written order stated that Brannon was questioned to ensure that the withdrawal of his PCR application was free and voluntary, the record did not reflect that any such questioning took place. Id. This Court found that there was nothing in the record to support the PCR court's finding that the withdrawal of the PCR application was knowing and voluntary. Id. at 439, 548 S.E.2d at 867.

The case was remanded for an evidentiary hearing on whether Brannon's withdrawal was knowing and voluntary, with instructions that if the court found in the negative that Brannon may proceed with his PCR application. Id.

In applying the factors announced in Spoone to the present case, the court correctly evaluated the background and experience of Narciso as a Spanish speaking defendant without the benefit of translation or interpretation. It also noted the failure of the Consent Order itself or the PCR transcript to indicate that the waiver was knowing and voluntary. Unlike Spoone, the content of the Consent Order was not straightforward, as it gives no explanation as to why Narciso was being made to bring any and all other PCR claims at that time when he was entitled to a belated direct appeal regardless of the waiver. It also fails to address how the waiver would apply to any PCR issues not apparent until after the direct appeal, such as error preservation issues. Moreover, Narciso testified that no one explained to him why he had to give up his PCR rights in order to get a direct appeal or the fact that he was giving up his chance to raise any other claims by signing the Consent Order. App. 128, ll. 10-14; App. 130, ll. 21-23. He further testified that he was told that the only way to go back to court was by signing the Consent Order. App. 128, ll. 15-19; App. 130, ll. 9-20.

Additionally, unlike Spoone, neither the record of the PCR hearing nor the testimony at the remand hearing reflected any colloquy with the court regarding Narciso's waiver. Rather, like Brannon and Wessells, there was nothing on the record in the present case to support any finding that Narciso's waiver of his PCR rights was knowing and voluntary. The record of the PCR hearing itself reflected only that an off-the-record bench conference was held, with no indication that Narciso was present at the bench or had any sworn interpreter assisting him. App. 371. There was *no evidence* presented at the remand hearing that Narciso was present at the off the

record bench conference and questioned by the court as to his understanding of the nature and consequences of the waiver or that the court questioned PCR counsel about his discussions and advisements to Narciso regarding the waiver.

Therefore, the evidence at the remand hearing supported the court's finding that there was no colloquy whatsoever with the judge at the PCR hearing to establish that Petitioner understood the Consent Order and/or his waiver of PCR rights. The Court also considered the other relevant circumstances and determined that they did not point to a knowing and voluntary waiver either. This meets the low threshold of "any evidence" required for affirmance of the remand court.

3. Lack of Any Benefit of the Bargain to Narciso

Lastly, the Court found that Petitioner may have been entitled to an appeal anyway without having to waive his PCR rights under the case of White v. State, 263 S.C. 110, 208 S.E.2d 35 (1975). App. 146. In Spoone, the court noted that with respect to plea bargains generally, South Carolina has recognized and followed federal precedent. 379 S.C. at 142, 665 S.E.2d at 607. This includes the fact that a plea bargain rests on contractual principles such that "each party should receive the benefit of the bargain." Id. In the present case, there was no benefit to Narciso from the waiver of all other PCR claims such that he gained ***nothing*** from signing the Consent Order other than the belated appeal to which he was ***already entitled***.

Trial counsel testified the he filed an appeal on Narciso's behalf. However, the appeal was not filed timely. App. 105, ll. 14-15. He took responsibility for the error and did everything that he could to try to correct his error. App. 105, ll. 16-20. Trial counsel believed that had he filed the appeal timely, then Narciso would have retained his PCR rights as well as his appellate rights. App. 106, ll. 13-15.

While there is currently no avenue for Narciso to allege ineffective assistance of PCR counsel, it is difficult to fathom under what circumstance PCR counsel would affirmatively advise his client to dismiss all other PCR allegations with prejudice. This is especially true in light of the fact that the direct appeal itself may reveal problems with trial counsel's representation, such as a ruling that a direct appeal issue was not properly preserved. There was no need to have the State's consent to the belated to direct appeal if they were unwilling to give it without a waiver of any other PCR allegations. Rather than entering into sort of consent agreement, PCR counsel could have insisted on a brief PCR hearing, at which trial counsel's testimony would undoubtedly have resulted in the granting of Narciso's belated appeal. If the Attorney General convinced the PCR court that all PCR allegations should have to be raised at the hearing, PCR counsel had have, at the very least, requested a continuance to prepare to go forward on other PCR claims.

While PCR counsel confirmed that it was not necessary for Narciso to give up any and all other PCR claims, his testimony as a whole reflects his belief that if Narciso did not amend his application to include other allegations that day he could not pursue them later. App. 110, ll. 14-23. The Consent Order itself, signed by both the Attorney General and PCR counsel, also stated "[t]he Applicant understands that he *must* proceed on all PCR claims at this time and anything not raised now is waived." App. 28 (emphasis added). Further, PCR counsel could not recall whether he had any conversation with Narciso advising that he should preserve his PCR rights. App. 121, ll. 17-20. This is likely because PCR counsel seemed to be under the misapprehension that if the PCR issues were not addressed at the PCR hearing they could not be dismissed without prejudice.

Moreover, the PCR court did not believe PCR counsel's testimony that the State's consent to the belated appeal was not contingent upon the waiver of any other PCR allegations. It instead found that "the Attorney General offered Petitioner the opportunity to appeal his conviction, but

only if Petitioner waived his right to PCR.” App. 139 (emphasis added). If PCR counsel’s averment that the State’s consent to the belated appeal was not contingent upon the waiver were true, then dismissal without prejudice should have been a viable option. A waiver made without proper counsel from his attorney regarding all of his options can certainly not be found to be knowing.

Thus, the language of the Consent Order itself, along with Narciso’s testimony that he thought he had to sign the Consent Order to go back to court and common sense, are enough to support the court’s findings that the Attorney General’s consent to the belated appeal was offered “only if Petitioner waived his right to PCR” and that Narciso may not have had to make such a waiver in order to pursue the belated appeal. This especially true where trial counsel admits that he mishandled the appeal, making a belated direct appeal pursuant to White v. State inevitable. This meets the low threshold of “any evidence” required for affirmance of the remand court.

Based on the foregoing, there was more than the minimal required evidence at the remand hearing to support the court’s findings that Narciso’s waiver was not knowing, intelligent, and voluntary and was not in compliance with this Court’s jurisprudence. Therefore, the State’s Petition for a Writ of Certiorari should be denied.

B. Neither PCR counsel’s testimony and admission of the executed handwritten checklist nor the executed Consent Order are sufficient to reflect that Narciso was fully advised of the nature of the rights being abandoned by his waiver.

Despite the ample evidence to support the remand court’s findings, see discussion supra Part A, the State points to PCR counsel’s alleged advisement accompanied by the execution of a handwritten checklist, along with the “plain language” of the Consent Order signed by Narciso, as evidence that the waiver was knowing, intelligent, and voluntary. The Attorney General goes so

far as to state that “a *colloquy* took place between the Respondent and his initial post-conviction relief counsel.” Pet. for Cert. 7 (emphasis added). The State further contends that PCR counsel’s use of a Spanish translator or interpreter in his communications with Narciso “should quiet any of this Court’s concerns about the Respondent’s limited command of the English language.” Pet. for Cert. 9.

Importantly, “the validity of a defendant’s waiver does not turn on his communication with counsel, but rather on the presence of a record supporting the validity of that waiver.” Moore v. State, 399 S.C. 641, 732 S.E.2d 871 (2012). In Moore, this Court found that both the trial and PCR courts conducted a deficient analysis of the petitioner’s waiver of his right to jury trial and observed the State’s “fundamental misunderstanding of what this Court’s waiver jurisprudence commands.” Id. at 641, 732 S.E.2d at 874. The Moore majority found that trial counsel’s testimony did not necessitate affirmance because it “illustrates a trial strategy, and decision-making process, incompatible with the demands of this Court’s waiver jurisprudence.”³ Id. at 641 n.2, 732 S.E.2d at 875 n.2. Thus, this Court stated that “[t]he bare fact that this testimony exists, does not mean that this testimony constitutes evidence of a valid waiver, even under a deferential standard of review.” Id. This Court further noted in Moore that “[a] ‘colloquy’ is defined as ‘any formal discussion, such as an oral exchange between a judge, the

³ In Moore, the majority found that the record was “devoid of any evidence to support the PCR court’s finding that trial counsel’s discussions regarding the waiver were at ‘length’ or ‘detailed.’” 399 S.C. at 641, 732 S.E.2d at 874. Trial counsel could not testify that he definitely explained to Moore the differences between a jury trial and a bench trial or whether he had any questions regarding that distinction. Id. However, he was “inexplicably able to testify that Petitioner definitely wanted to move forward with a bench trial.” Id. Further, there was *no* colloquy between the court and trial counsel or Moore regarding the waiver. Id. The Court also considered that Moore completed only the seventh grade, cannot read or write, and testified that he did not know ahead of time that he was going to have a bench trial and not a jury trial but wanted a jury trial. Id. at 641, 732 S.E.2d at 874-75.

prosecutor, the defense counsel, and a criminal defendant in which the judge ascertains the defendant's understanding of the proceedings and of the defendant's rights.” Id. at 641 n.1, 732 S.E.2d at 874 n.1. It found that the exchange in Moore did not meet “even a banal definition of colloquy, and falls far short of the ‘high-level serious discussion’ necessary to support the waiver of a defendant’s constitutional right to a jury of his peers.” Id.

Thus, contrary to the State’s assertions, PCR counsel’s testimony and admission of the handwritten checklist are not the dispositive. See App. 113, ll. 8-16; App. 116, l. 11 – 117, l. 4. The checklist does not reflect a “colloquy,” which requires formality and the court’s determination that the waiver is knowing, intelligent, and voluntary. See Moore, 399 S.C. at 641 n.1, 732 S.E.2d at 874 n.1. Further, though Narciso confirmed that his initials and signature appear on the document, he further testified that he thought by signing the document that he was “going to go to court.” App. 127, ll. 9 – 128, l. 4; App. 130, ll. 6-16. Thus, his initials next to each line fail to demonstrate the content of what actual discussion, if any, was held. Notably, the document does not indicate that PCR counsel had any discussion with Narciso about preserving his PCR rights, but rather indicates that Narciso understands that he is “forever waiving my right to raise any other allegations of ineffective assistance of counsel against Mr. Colangeli and am raising my right and agreeing to a belated appeal only.” App. 89. As more fully discussed supra in Part A.3, PCR counsel’s testimony and the checklist establish that PCR counsel failed to advise Narciso of the importance of preserving his PCR rights because PCR counsel was under the misapprehension that his client had to pursue any and all PCR allegations other than the belated appeal that day.

The State further contends that the plain language of the Consent Order signed by Narciso is evidence of the knowing and voluntary waiver. However, as discussed more fully supra in Part A.1, the remand court properly found that the Consent Order was not translated for Narciso or read to

him in Spanish. Moreover, while the failure to communicate to Narciso in Spanish is important, the paramount concern is the content of what was communicated to Narciso, which was never confirmed on the record and did not include any advice to preserve any other PCR claims.

The Consent Order itself is no more a reflection of a knowing and voluntary waiver than the signing of any other document. Otherwise, Narciso's signature alone would have been sufficient such that no remand would have been necessary to determine if his waiver was knowing, intelligent, and voluntary. The Consent Order did not even contain a statement that Narciso was questioned to ensure that the withdrawal of his PCR application was free and voluntary. See Brannon, 345 S.C. at 439, 548 S.E.2d at 867 (finding that the PCR court erred in failing to ascertain the voluntariness of Brannon's withdrawal prior to dismissing his application with prejudice where the order stated that such questioning took place but the record revealed that "there was no inquiry conducted to ascertain the voluntariness of the withdrawal, nor was Brannon advised his withdrawal would result in a dismissal with prejudice"). Rather, the content of the Consent Order only indicates that Narciso understands that all PCR claims must be brought "at this time" and wishes to waive all other PCR claims and proceed with a belated direct appeal. Thus, it misrepresents that Narciso had no option to preserve any other PCR allegations.

Therefore, the PCR court properly weighed the evidence and focused on that which is probative of whether Narciso's waiver was in accordance with South Carolina's waiver jurisprudence. Moore makes clear that off-the-record discussions between an attorney and his client do not constitute a "colloquy" such that neither PCR counsel's testimony regarding such discussion nor the handwritten checklist never introduced at the PCR hearing can overcome the absence of any formal colloquy with the PCR court. The Consent Order likewise is not a sufficient

substitute for the required “on the record” colloquy. Thus, the State’s contentions fail to overcome the low threshold for affirmance required in this matter and its Petition for a Writ of Certiorari should be denied.

C. Neither Narciso’s assertion of only the belated direct appeal allegation in his PCR application nor his failure to amend his application to include any additional allegations bear on the validity of his waiver, and judicial economy does not favor a requirement that an applicant immediately waive or pursue any other PCR claims where the State consents to the belated appeal.

The State suggests that Narciso’s failure to include any PCR allegations in his application beyond the failure to timely file a notice of appeal is further evidence that his waiver was voluntary. Pet. for Cert. 10. However, Narciso’s inclusion of only the belated appeal allegation in his PCR application and failure to amend is of little consequence in this case, especially in light of his inability to read or speak English and PCR counsel’s failure to effectively advise him. Moreover, the existence and legitimacy of any other PCR allegations is a matter to be considered by a subsequent PCR court, as the remand court had only the matter of whether Narciso’s waiver was in accordance with this Court’s waiver jurisprudence to decide. The Attorney General also contends that Narciso was not required to bargain away his PCR rights in exchange for the State’s consent to the belated direct appeal. Pet. for Cert. 10. If that were truly its position, it is unclear why the State filed its Petition for Writ of Certiorari rather than allowing Narciso to proceed with his PCR application pursuant to the remand court’s Order. It is because the State maintains that, though its consent was *not dependent* on the waiver, any other PCR claims *must* be heard at the 2008 PCR hearing. Pet. for Cert. 10. This is the same misapprehension under which PCR counsel operated at the PCR hearing. The language of the Uniform Post-Conviction Relief Act allows an applicant to retain his or her rights to raise any further PCR allegations in the future and just proceed with the

belated direct appeal, a procedure supported by the interests of judicial economy. See S.C. Code Ann. § 17-27-90.

Though PCR counsel testified that he wrote to Narciso and asked him if he wished to amend his application, there is no indication that PCR counsel advised him of what types of allegations could be raised or that Narciso understood the content of the letters. App. 111, ll. 3-10; App. 113, ll. 17-25; App. 118, ll. 13-16. Despite PCR counsel's testimony that he did not see any additional allegations to raise, appellate counsel noted several potential PCR allegations in her brief including ineffective assistance of counsel related to an initial plea offer, failure to object to extensive hearsay, failure to object to a *Doyle*⁴ violation, and failure to raise a claim under S.C. Const. Art. 1, § 10 with respect to the search and South Carolina's "right to privacy." See App. 111, ll. 11-14; App. 121, ll. 23-25; App. 34 (Amended Brief of Petitioner Aug. 11, 2011). Such allegations can be difficult to ascertain by any defendant, much less one like Narciso with limited legal experience and no understanding on the English language. That is why a PCR applicant is appointed an attorney, whose responsibility it is to review the transcript and assist the applicant in identifying any other PCR allegations. Additionally, some PCR allegations may not be apparent from review of a transcript, as they often relate to deficiencies such as a failure to investigate, failure to request or review discovery, failure to call a particular witness, failure to fully advise the defendant regarding his constitutional rights, or even affirmative coercion by counsel toward the defendant. These matters can only be discovered through a thorough discussion of the client's case, not by simply asking a defendant if there is anything else he would like to amend his application to raise any additional allegations. Despite this, PCR counsel testified that his discussions with Narciso did not

⁴ Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240 (1976).

focus on other potential PCR allegations. App. 111, ll. 14-16. Narciso should not be prejudiced by PCR counsel's unskilled representation.

While PCR counsel testified that the waiver of Narciso's PCR rights was not done in "exchange" for the State's consent to the belated appeal, this testimony was obviously not believed by the remand court which found that "the Attorney General offered Petitioner the opportunity to appeal his conviction, but only if Petitioner waived his right to PCR." App. 108, ll. 9-19; App. 139. The PCR Court's finding was supported by an overall view of the facts and and Narciso's testimony that he thought he had to sign those documents in order to go back to court. App. 128, ll. 15-19. Additionally, the Consent Order itself said "[t]he Applicant understands that he *must* proceed on all PCR claims at this time and anything not raised now is waived" App. 28 (emphasis added). As discussed supra in Part A.3, if PCR counsel's averment that the State's consent to the belated appeal was not contingent upon the waiver were true, then dismissal without prejudice should have been a viable option and would have been the best option due to the potential that a PCR allegation may not be evident until after the Court's ruling on direct appeal. Depending on the result of the direct appeal a hearing on the other PCR allegations may not even be necessary, for instance if a new trial were granted. Moreover, whether the consent and waiver were contingent does not affect the reality that per the terms of the Consent Order Narciso waived his right to raise any other PCR allegations and such a waiver must be knowing, intelligent, and voluntary.

Further, both PCR counsel and the State seem to be under the misapprehension that Narciso had to pursue any other PCR claims on the day of the hearing. This is not what South Carolina law requires. See S.C. Code Ann. § 17-27-90 ("All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental or amended application. Any 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, *unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental or amended application.*”) (emphasis added). Though Rule 243(i)(1), SCACR, provides for review of a PCR court’s finding that the right to direct appeal was not knowingly and intelligently waived along with all other post-conviction relief issues petitioner seeks to have reviewed, this is not an affirmative requirement that all potential PCR issues be reviewed by the PCR court at the same time as the White v. State issue. Rather, as S.C. Code Ann. § 17-27-90 indicates, there may be sufficient reason to delay consideration of the remaining PCR allegations. Rule 243(i)(1) simply requires that all allegations that were considered by the PCR court and that petitioner wishes to have reviewed be raised in the petition for writ of certiorari along with the White v. State issue.

Beyond the factual inaccuracy of the Consent Order that Narciso was required to “proceed on all PCR claims at this time and that anything not raised now is waived,” such a requirement where the State consents to the filing of a belated appeal is inefficient. Under the State’s suggested procedure, even where the State consents to the filing of a belated appeal, a PCR applicant is required to raise any other allegations against trial counsel in his PCR application or an amendment thereto and proceed to a hearing on those allegations immediately. Consequently, if the applicant is unsuccessful on any of his other PCR allegations, then the subsequent Petition for Certiorari would have to include both the issue of whether the applicant was entitled to a belated direct appeal and any other denied PCR issues. See Rule 243(i)(1), SCACR (“When the post-conviction relief judge has affirmatively found that the right to a direct appeal was not knowingly and intelligently waived, the petition shall contain a question raising this issue along with all other post-

conviction relief issues petitioner seeks to have reviewed.”). Appellate counsel would also file a White v. State brief on the direct appeal issue along with the Petition for Certiorari. Id. (“At the same time the petition is served, petitioner shall serve and file a brief addressing the direct appeal issues.”).

This procedure results in the pendency of the belated direct appeal and review of the other PCR allegations simultaneously. If the PCR court were to grant relief on one of the other PCR issues, such could potentially result in the granting of a resentencing hearing or new trial, this would further muddy the waters as to when the new trial should occur vis-a-vis resolution of a belated direct appeal issue that may result in acquittal, i.e. a directed verdict issue. Additionally, the applicant should undoubtedly be permitted to file a subsequent PCR application alleging either ineffective assistance of trial counsel based on failure to preserve an issue for appellate review were such revealed in the direct appeal decision or ineffective assistance of appellate counsel, at which point another PCR hearing would be held followed by another potential Petition for Certiorari. In a circumstance where the State contests the granting of a belated direct appeal, this may be the best alternative, but such is not the case where the State consents, leading to the almost inevitable grant of certiorari and review of the direct appeal.

Conversely, if only the belated appeal issue were addressed at the PCR hearing, appellate counsel would need only file the Petition for Certiorari on the issue of whether the applicant was entitled to a belated direct appeal and the White v. State brief on the direct appeal issue. If certiorari were granted, which it likely would be if the State consents, the Court would then address the direct appeal issue. Upon final resolution of the direct appeal and any subsequent proceedings necessitated as a result of the decision, an applicant could then file a PCR application alleging claims regarding his original trial, any subsequent new trial, plea, or re-sentencing, and his appeals,

all as a part of one application to be addressed at one evidentiary hearing. This is a much more efficient procedure and decreases the likelihood of successive PCR applications which are disfavored.

There could be a fear that the State would be less inclined to consent to a belated appeal if the PCR applicant preserves his or her PCR rights, but professional judgment will likely be unaffected in those cases where the State would be willing to consent based on trial counsel's admission that the failure to timely file for an appeal was his own and not the fault of the applicant. Any delay in the resolution of any other PCR allegations is minimal considering that the Uniform Post-Conviction Relief Act requires:

An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision upon an appeal, whichever is later.

S.C. Code Ann. § 17-27-45(A). The delay would be only the time it takes to file the PCR application based on White v. State and execute the consent order granting belated appeal, a process which effective PCR counsel can help accelerate.

Thus, the content of Narciso's original PCR application and failure to amend his application are not relevant to the question of whether his waiver of any other allegations was in accordance with this State's waiver jurisprudence. Further, a PCR applicant should not be forced to go forward on his or her other PCR claims where the State consents to the filing of a belated appeal because judicial economy supports preservation of any remaining PCR issues until completion of the direct appeal process.

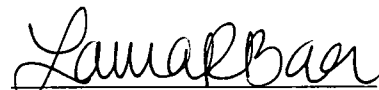
The waiver required of Narciso at the PCR hearing was the result of the Attorney General taking advantage of a foreign defendant and inexperienced PCR attorney. Had Narciso understood

that he gained no benefit by waiving any additional PCR allegations, there is no question that he would have chosen to preserve them. Unfortunately, he was a Spanish speaking applicant with no meaningful legal representation, resulting in his signature on a document that he did not understand. Beyond the obvious injustice of allowing Narciso to be put into a worse position merely because his trial attorney admittedly failed to timely file his direct appeal, is the more the basic fact that the remand court's findings are supported by far beyond the "any evidence" required for affirmance. Therefore, the State's Petition for a Writ of Certiorari should be denied.

CONCLUSION

For the reasons set forth herein, Respondent Osiel Narciso requests this Court to deny the State's Petition for a Writ of Certiorari.

Respectfully submitted,



Laura R. Baer
Appellate Defender

ATTORNEY FOR RESPONDENT.

This 6th day of April, 2015.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Beaufort County

James R. Barber, III, Circuit Court Judge

OSIEL NARCISO,

RESPONDENT,

V.

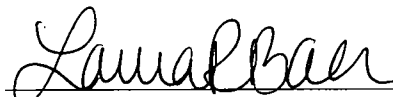
STATE OF SOUTH CAROLINA,

PETITIONER

APPELLATE CASE NO. 2014-001327

CERTIFICATE OF SERVICE


I certify that a true copy of the return to petition for writ of certiorari in this case have been served on Ashleigh R Wilson, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Osiel Narciso at McCormick Correctional Insitution, 386 Redemption Way, McCormick, SC 29899, this 6th day of April, 2015.



Laura R. Baer
Appellate Defender

ATTORNEY FOR RESPONDENT

SWORN TO BEFORE ME this 6th day
of April, 2015.

 (L.S.)

Notary Public for South Carolina
My Commission Expires: October 24, 2021