

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Orangeburg County

Honorable Maite Murphy, Circuit Court Judge  
\_\_\_\_\_

CHRISTOPHER ROBERTS,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-001422  
\_\_\_\_\_

JOHNSON PETITION FOR WRIT OF CERTIORARI  
\_\_\_\_\_

John H. Strom  
Appellate Defender

South Carolina Commission on Indigent Defense  
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ATTORNEY FOR PETITIONER

ORIGINAL

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DEC 16 2016

S.C. SUPREME COURT  
PETITIONER

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**ISSUE PRESENTED**

Did the PCR court err in finding plea counsel provided effective assistance of counsel where plea counsel did not consult with Petitioner about whether he wanted to file an appeal after entering his guilty plea?

## STATEMENT

### **Indictment and Guilty Plea**

Petitioner was indicted in January, 2014 by the Orangeburg County Grand Jury for criminal sexual conduct, second degree, and unlawful neglect of child or helpless person. App. 75 - 78. The charges arose out of complaints against Petitioner filed by his parents that alleged Petitioner sexually abused his daughter over a period of months. App. 21 - 30. This abuse was routinely witnessed by Petitioner's son, whom the State claimed Petitioner physically abused. Both children were prepared to testify against Petitioner. *Id.*

On May 19, 2014, Petitioner pled guilty as indicted to both counts before the Honorable Diane S. Goodstein. Petitioner was represented by Douglas Mellard. Assistant Solicitor Ashley B. Cornwell represented the State. Judge Goodstein sentenced Petitioner to twenty years imprisonment suspended on the service of ten years. App. 34. At the guilty plea hearing, Judge Goodstein informed Petitioner that he had ten days to appeal his sentence. App. 31 - 32.

### **PCR Application and Evidentiary Hearing**

Petitioner filed an application for post-conviction relief on May 21, 2015 alleging multiple grounds on ineffective assistance of counsel, including that counsel failed to file a timely notice of appeal. App. 37 - 43. The State filed a Return and Partial Motion to Dismiss on November 19, 2015. App. 44 - 48

An evidentiary hearing was held on February 23, 2016 before the Honorable Maite Murphy. App. 49 - 68. Jonathan Waller represented Petitioner. Assistant Attorney General J. Clayton Mitchell represented the State.

Petitioner conceded that his PCR application was untimely as it had been filed two days after the one year statute of limitations. However, Petitioner maintained that he was entitled to

seek a belated direct appeal because plea counsel failed to inform of his right to appeal the guilty plea.

Petitioner stated that he had unsuccessfully attempted to file a belated *pro-se* notice of appeal. App. 53 - 59. Petitioner further testified that he was unable to contact anyone outside of SCDC while he was undergoing intake at Kirkland Reception and Evaluation Center in Columbia. Thus, he could not contact counsel during the ten day period following his guilty plea. Petitioner intimated that his untimely *pro-se* notice of appeal was an attempt to correct counsel's error.

On cross-examination, Petitioner conceded that he never asked counsel to file a notice of appeal. App. 60. Petitioner further recalled that counsel asked him if he wanted to file an appeal, but advised him that an appeal would be unsuccessful. App. 58. Petitioner could not remember his response to counsel because - in the aftermath of being sentenced to ten years imprisonment and a lifetime on the sex offender registry - "I was lost to it." *Id.*

Counsel claimed that he did not remember whether Petitioner had asked him to file an appeal. App. 64 - 65. Counsel stated that he typically goes over a "checklist" with clients who are about to plead guilty that includes information on their right to file an appeal. *Id.* He assumed that he went through the checklist with Petitioner because it was his usual practice. *Id.*

### **Order of Dismissal**

Judge Murphy denied Petitioner's application in a written order of dismissal issued on May 23, 2016. App. 69 - 74. The PCR court concluded that Petitioner had failed to file an application within the one year statute of limitations and so any claims of ineffective assistance of counsel were barred. App. 71 - 73.

The court also found that Petitioner was not entitled to a belated direct appeal. *Id.* The court specifically held that Petitioner presented no evidence that he asked counsel to file an appeal or that he was not informed of his right to appeal. App. 73.

This petition follows.

## ARGUMENT

### **Did the PCR court err in finding plea counsel provided effective assistance of counsel where plea counsel did not consult with Petitioner about whether he wanted to file an appeal after entering his guilty plea?**

Although Petitioner did not explicitly instruct plea counsel to file his appeal, Petitioner was denied his “one fair bite at the apple” because he did not voluntarily or intelligently waive his right to a direct appeal and plea counsel never conferred with Appellant after the guilty plea regarding whether Appellant wanted to file an appeal. App. 73; *Wilson v. State*, 348 S.C. 215, 218, 559 S.E.2d 581, 582 (2002) (provides 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.”); *See Legge v. State*, 349 S.C. 222, 562 S.E.2d 618 (2002) (provides that a defendant has the right to a belated appeal when the applicant did not knowingly and intelligently waive his right to a direct appeal.); *see also Davis v. State*, 288 S.C. 290, 342 S.E.2d 60 (1986).

Accordingly, the PCR court erred in finding plea counsel provided effective assistance of counsel, and Petitioner is entitled to a belated direct appeal of his guilty plea pursuant to *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974) (provides that a criminal defense attorney must make certain that his client is fully aware of his right to appeal and in the absence of an intelligent waiver by the client, must either pursue an appeal or file a brief under *Anders v. California*, 386 U.S. 738 (1967)). *See Strickland v. Washington*, 466 U.S. 668, 692 (1984).

### **PCR Relief – Petitioner is entitled to a belated direct appeal of his guilty plea**

In a PCR action, “[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.” *Frasier v. State*, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRCP). Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Bulter v.*

*State*, 286 S.C. 441, 334 S.E.2d 813 (1985). Thus, the applicant must overcome this presumption to receive relief. *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989).

In *Hill v. Lockhart*, 474 U.S. 52 (1985), the United States Supreme Court adopted the two-part standard in *Strickland v. Washington*, 466 U.S. 668 (1984), and applied the *Strickland* standard to guilty plea challenges based on ineffective assistance of counsel. Consequently, to prove ineffective assistance of counsel from a guilty plea, the defendant must show that counsel's representation fell below the objective standard of reasonableness and that there is reasonable probability that, but for counsel's unprofessional errors, result of proceeding would have been different. *Hill*, 474 U.S. at 57-58.

### **Deficient Performance**

In this case, plea counsel's performance was constitutionally deficient, as it fell well below an objective standard of reasonableness when plea counsel failed to inform Petitioner of his appellate rights and failed to ask Petitioner whether he wished to file an appeal. App. 71 - 73; *see Hill*, 474 U.S. at 57-58. Specifically, plea counsel's performance is deficient because he failed to speak with Petitioner after the guilty plea about whether - now having been sentenced - Petitioner wanted to file an appeal. App. 58 - 65.

At a minimum, counsel should have consulted with Petitioner in the days following his eve-of-trial guilty plea. Failing to meaningfully confer in a timely fashion with a client who has recently pled guilty and received a multi-year sentence constitutes deficient performance. Post-guilty plea consultation with the client is particularly important when the client has no prior experience with the criminal justice system and pled guilty under the stress of an impending trial.

Therefore, plea counsel's performance was constitutionally deficient, as it fell below an objective standard of reasonableness. *See Hill*, 474 U.S. at 57-58; *cf. Brady v. United States*, 397

U.S. 742, 758 (1970) (the United States Supreme Court has held that “[g]uilty pleas are no more foolproof than full trials to the court or jury. Accordingly, we take great precautions against unsound results.”).

### **Prejudice**

Here, the record demonstrates that there is a reasonable probability that but for plea counsel’s deficient performance; Petitioner would not have been denied his “one fair bite at the apple” because he did not voluntarily or intelligently waive his right to a direct appeal. *See Hill*, 474 U.S. at 57-58; *see also Legge*, 349 S.C. 222, 562 S.E.2d 618 (provides that a defendant has the right to a belated appeal when the applicant did not knowingly and intelligently waive his right to a direct appeal.). Petitioner attempted to remedy plea counsel’s deficient performance by filing a belated *pro-se* notice of appeal. App. 58. However, his efforts were no substitute for competent representation by counsel.

Accordingly, the PCR court erred in holding that plea counsel provided effective assistance of counsel because Petitioner is entitled to a belated direct appeal of his guilty plea pursuant to *White v. State*, 263 S.C. 110, 208 S.E.2d 35. *See Hill*, 474 U.S. at 57-58; *see also Wilson v. State*, 348 S.C. at 218, 559 S.E.2d at 582.

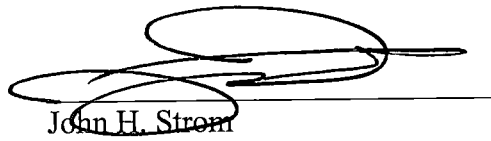
**STATEMENT OF THE ISSUE ON APPEAL**

Pursuant to *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974), the issue to be raised on a belated direct appeal is provided as follows: Did the plea judge err by accepting Petitioner's guilty plea where Petitioner was not fully advised of the collateral consequences of pleading guilty to criminal sexual conduct, second degree, including that it was a most serious offense and would result in lifetime placement on the sex offender registry?

**CONCLUSION**

Based on the foregoing reasons, Christopher Roberts' petition for writ of certiorari should be granted, and pursuant to *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974), Petitioner is entitled to a belated direct appeal.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "John H. Strom", is written over a horizontal line. The signature is stylized with several loops and a long horizontal stroke.

John H. Strom  
Appellate Defender

ATTORNEY FOR PETITIONER

This 16<sup>th</sup> day of December, 2016.

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---

PETITION TO BE RELIEVED AS COUNSEL

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Counsel for Christopher Roberts states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
2. He has reviewed the record of petitioner's trial before Judge Maite Murphy, which was held on February 23, 2016, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed an arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve him as counsel for Christopher Roberts.

Respectfully Submitted,



John H. Strom

Appellate Defender

ATTORNEY FOR PETITIONER

This 16<sup>th</sup> day of December, 2016.

**CERTIFICATE OF COUNSEL**

The undersigned certifies that to the best of his ability this Johnson Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."



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ATTORNEY FOR PETITIONER

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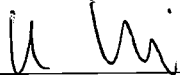
CERTIFICATE OF SERVICE

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The undersigned hereby certifies that a true copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Ruston Neely, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix have been served on Christopher Roberts, #360090, at Allendale Correctional Institution, PO Box 1151, Hwy. 47, Fairfax, SC 29827, this 16<sup>th</sup> day of December, 2016.

  
\_\_\_\_\_  
John H. Strom  
Appellate Defender  
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me  
this 16<sup>th</sup> day of December, 2016.

  
\_\_\_\_\_  
(L.S)  
Notary Public for South Carolina  
My Commission Expires: 5/12/2025