

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to Oconee County  
Honorable Edgar W. Dickson, Circuit Court Judge (PCR)  
Honorable R. Lawton McIntosh, Circuit Court Judge (Plea)

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Appellate Case No. 2016-000082

TYSON T. WATT,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

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**RETURN TO PETITION FOR WRIT OF CERTIORARI**

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ALAN WILSON  
Attorney General

LINDSEY A. MCCALLISTER  
Assistant Attorney General

Post Office Box 11549  
Columbia, SC 29211  
(803) 734-3737

ATTORNEYS FOR RESPONDENT

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<sup>1</sup> 263 S.C. 110, 208 S.E.2d 35 (1974)

<sup>2</sup> 528 U.S. 470 (2000)

<sup>3</sup> 319 S.C. 59, 459 S.E.2d 838 (1995)

## RESPONDENT'S QUESTIONS PRESENTED

- I. Did the PCR court err in finding that Petitioner was entitled to a belated direct appeal of his guilty plea pursuant to White v. State<sup>4</sup> where Petitioner failed to prove the existence of extraordinary circumstances under Roe v. Flores-Ortega<sup>5</sup> and Weathers v. State<sup>6</sup> which would have required Counsel to advise Petitioner of his right to an appeal and where Petitioner never indicated a desire to appeal?
  
- II. Did the PCR court correctly find Counsel did not render ineffective assistance in failing to appeal Petitioner's case on the issue of whether Petitioner was entitled to credit for time served on house arrest, when the law at the time of Petitioner's plea did not entitle him to such credit?

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<sup>4</sup> 263 S.C. 110, 208 S.E.2d 35 (1974)

<sup>5</sup> 528 U.S. 470 (2000)

<sup>6</sup> 319 S.C. 59, 459 S.E.2d 838 (1995)

## STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections (SCDC) pursuant to orders of commitment of the Oconee County Clerk of Court. Petitioner was indicted at the September 2011 term of the Oconee County Grand Jury for attempted murder and possession of a weapon during the commission of a violent crime (2011-GS-37-0815). App. 189-190. He was represented by Scott D. Robinson, Esquire. App. p. 1. On October 15, 2012, Petitioner proceeded to trial before the Honorable R. Lawton McIntosh and a jury. Id. On October 16, 2012, Petitioner decided not to continue with the trial and instead entered a guilty plea to the lesser-included offense of assault and battery of a high and aggravated nature (ABHAN) and to the firearms provision as indicted. App. pp. 87-110. Judge McIntosh sentenced him to confinement for a period of twenty years imprisonment for ABHAN, provided that the balance was to be suspended upon the service of fifteen years' imprisonment and five years of probation. App. p. 109. Judge McIntosh sentenced Petitioner to five years' imprisonment on the weapons charge, to be served concurrently. Id. Petitioner did not appeal his conviction or sentence. App. p. 179.

Petitioner filed an application for post-conviction relief (PCR) on December 20, 2012. App. pp. 112-121. An evidentiary hearing into the matter was convened on July 28, 2014, at the Oconee County Courthouse before the Honorable Edgar W. Dickson. App. p. 130. Petitioner was present and was represented by Hugh W. Welborn, Esquire. App. pp. 130-131. Respondent was represented by Walt Whitmire, Esquire, of the South Carolina Attorney General's Office. App. p. 130. In an order dated December 7, 2015, Judge Dickson denied Petitioner's application for relief on the basis of ineffective assistance of counsel, but granted Petitioner's request for a

belated appeal pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974). App. pp. 178-

188. Petitioner appealed and filed a Petition for Writ of Certiorari on October 17, 2016.

## ARGUMENT

- I. The PCR court erred in granting Petitioner a belated appeal pursuant to White v. State<sup>7</sup> because Petitioner failed to prove extraordinary circumstances existed under Roe v. Flores-Ortega<sup>8</sup> and Weathers v. State.<sup>9</sup> Although there is probative evidence in the record to support the PCR judge's finding that Petitioner was not informed of his right to a direct appeal from his guilty plea, no objection was made to the entry of the guilty plea or sentence that would have required Counsel to give such advice, and Petitioner never indicated a desire to appeal.

The PCR court erred in granting Petitioner a belated appeal pursuant to White v. State because Petitioner failed to prove extraordinary circumstances existed to warrant a belated appeal, as required by Roe v. Flores-Ortega and Weathers v. State.<sup>10</sup> The PCR court concluded that Petitioner "did not knowingly and intelligently waive his right to appeal." App. p. 187. However, that conclusion does not end the inquiry, and the PCR court failed to make the additional required finding that circumstances existed which would have required Counsel to inform Petitioner of his right to appeal. The PCR Court did not find extraordinary circumstances existed in which the advice should have been given because no such circumstances existed on the record. App. pp. 187-188. Petitioner made no objection to the plea or sentence or indicated to Counsel his desire to appeal. Therefore, the PCR Court erred as a matter of law.

The Supreme Court of the United States has specifically "reject[ed] a bright-line rule that counsel must always consult with the defendant regarding an appeal." Roe v. Flores-Ortega, 528 U.S. 470, 480 (2000). When a conviction arises out of a guilty plea, Counsel has "a constitutionally imposed duty to consult with defendant about an appeal when there is reason to think either (1) that rational defendant would want to appeal, or (2) that this particular defendant

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<sup>7</sup> 263 S.C. 110, 208 S.E.2d 35 (1974)

<sup>8</sup> 528 U.S. 470 (2000)

<sup>9</sup> 319 S.C. 59, 459 S.E.2d 838 (1995)

<sup>10</sup> See footnotes 7-10, *supra*.

reasonably demonstrated to counsel that he was interested in appealing.” Id. In making this determination, courts must take into account all the information Counsel knew or should have known at the time of the plea. Id. The Supreme Court has further noted that “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.” Id.

Further, the Supreme Court of South Carolina has expressly stated that “[a]bsent extraordinary circumstances, there is no constitutional requirement that a defendant be informed of the right to a direct appeal from a guilty plea.” Turner v. State, 380 S.C. 223, 224, 670 S.E.2d 373, 374 (2008). Extraordinary circumstances arise when a defendant inquires about an appeal, and counsel has a duty to advise him in that instance. See Weathers v. State, 319 S.C. 59, 61, 459 S.E.2d 838, 839 (1995). However, “[t]he bare assertion that a defendant was not advised of appellate rights is insufficient to grant relief. Instead, there must be proof that extraordinary circumstances exist such that the defendant should have been advised of the right to appeal.” Jones v. State, 382 S.C. 589, 596, 677 S.E.2d 20, 23-24 (2009) (quoting Weathers, 319 S.C. at 61, 459 S.E.2d at 839).

In this case, Petitioner testified that he was not aware of his right to appeal, and Counsel did not dispute that he never informed Petitioner of his right to an appeal because he felt there were no meritorious issues to be raised. App. pp. 139, 170.<sup>11</sup> Moreover, no probative evidence exists in the record to support a finding of extraordinary circumstances so as to impose a

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<sup>11</sup> This testimony contradicts Petitioner’s assertion in his PCR application that he was “inform[ed] by attorney not to appeal[] because [he] can’t win” and because “appealing the judge’s decision was [a] good thing to do.”

constitutional duty on Counsel to inform Petitioner of his right to appeal from his guilty plea.<sup>12</sup> Therefore, Petitioner's case is not one contemplated by Weathers or the second prong of the test set out in Flores-Ortega. Petitioner failed to offer any testimony as to the existence of circumstances that would have led Counsel to believe that Petitioner would want to appeal or any viable issues he wished to raise on appeal. See Turner, 380 S.C. at 225, 670 S.E.2d at 374 (finding that the PCR judge erred in finding Petitioner was entitled to belated appellate review of his guilty plea when "[t]here was no evidence at the PCR hearing that petitioner was entitled to be advised of his right to a direct appeal from his guilty plea and was not advised of that right, nor was there evidence petitioner requested counsel file an appeal."). Counsel testified that he felt there was no meritorious basis for an appeal because the plea judge's colloquy with Petitioner was thorough and because Petitioner received a sentence of active time below the maximum and well within the sentencing range. App. p. 174. Additionally, Petitioner pleaded to a lesser-included offense, which reduced the maximum sentence he could receive by ten years. Id. Thus, Petitioner is only entitled to belated direct appeal if Petitioner demonstrated that particularized extraordinary circumstances existed that would lead Counsel to believe Petitioner wanted to appeal, and Petitioner failed to articulate any such circumstances in the PCR Court.

Petitioner's assertion alone that he was not informed of his right to appeal is insufficient to grant relief. Jones, 382 S.C. at 596, 677 S.E.2d 20, at 24. "Without evidence of extraordinary circumstances, the PCR judge erred in finding petitioner was entitled to a belated appellate review of his guilty plea." Turner, 380 S.C. at 225, 670 S.E.2d at 374. Therefore, the PCR judge

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<sup>12</sup> The PCR court did not make any finding that extraordinary circumstances existed that would have required Counsel to inform Petitioner of his right to appeal or to cause Counsel to believe that a rational defendant in Petitioner's position would want to appeal. App. pp. 187-188.

in this case also erred in finding Petitioner was entitled to pursue a belated appellate review of his guilty plea.<sup>13</sup>

**II. The PCR court correctly found that Counsel did not render ineffective assistance because Petitioner was not entitled to credit for the time he served on monitored house arrest under the law in effect at the time of Petitioner's sentence.**

Petitioner argued in his PCR action that he was entitled to credit for time served for the period he spent on monitored house arrest before his guilty plea and that Counsel was ineffective for not requesting such credit. App. p. 182. The PCR court rejected this claim, finding that the allegation was without merit. App. p. 183. The PCR court found that Counsel did in fact raise the issue in mitigation, and that, regardless, "a request by [C]ounsel for credit for time spent on monitored house arrest would not have been supported by law." App. p. 183.

**A. Petitioner's argument in this Court regarding Counsel's failure to appeal the house-arrest credit is not preserved for review because the same claim was never raised to the PCR court. Petitioner only raised Counsel's failure to request such credit at sentencing, which was rejected by the PCR court.**

Petitioner's contention that Counsel should have filed an appeal specifically on the house-arrest credit issue is not preserved for review because it was never raised and ruled upon to the PCR court. Arguments not presented to nor ruled upon by trial court are not preserved for appellate review. See, e.g., Madison ex rel. Bryant v. Babcock Center, Inc., 371 S.C. 123, 144, 634 S.E.2d 650, 661 (2006). Additionally, in order to be preserved, an issue must be sufficiently clear to bring into focus the precise nature of the alleged error so that it can be reasonably understood by the judge. Herron v. Century BMW, 395 S.C. 461, 466, 719 S.E.2d 640, 642 (2011).

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<sup>13</sup> Petitioner's appellate counsel has followed the procedure set forth in Anders v. California, 386 U.S. 738 (1967), indicating that she does not believe there are any meritorious issues to be raised. As such, Respondent is not required to file a response. SCRAP, Rule 243(i)(1).

Petitioner never argued Counsel should have filed an appeal, only that the PCR court should find Counsel ineffective because Petitioner was not given sentencing credit for his house-arrest and Counsel “should have made the motion at some point.” App. pp. 135-136. The PCR Court rejected the claim that Counsel was ineffective “for failing to request [Petitioner] receive credit for time served on house arrest.” App. p. 182. Therefore, the PCR court ruled on the issue as it was presented at the PCR hearing. Petitioner did not make a post-trial motion asking the PCR court to clarify its ruling or to rule on the specific issue of whether Counsel should have filed an appeal. Accordingly, the issue is not preserved for this Court’s review. See Marlar v. State, 375 S.C. 407, 653 S.E.2d 266 (2007) (holding that issues were not preserved for appellate review where defendant failed to file motion asking trial court to make specific findings of fact and conclusions of law on his allegations). Petitioner cannot now make a new argument on appeal. State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003). Respondent submits that this issue should have been raised in Petitioner’s brief pursuant to White v. State.<sup>14</sup> However, the issue on the merits would have been barred because there was no objection or ruling by the trial court upon the request.

**B. Even if the Court treats this issue as preserved, Petitioner’s argument fails because it is undisputed that the law at the time of Petitioner’s guilty plea did not require time-served credit for house arrest, and even after the statutory change went into effect, the issue is left to the sentencing judge’s discretion, so there was no error to appeal.**

Without waiving Respondent’s procedural objection outlined above, Respondent submits the PCR court correctly found that Counsel rendered effective assistance on the issue of the house-arrest credit because the law at the time of Petitioner’s plea did not contemplate credit for monitored house arrest. App. p. 183. Petitioner pleaded guilty on October 16, 2012. App. p. 87.

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<sup>14</sup> 263 S.C. 110, 208 S.E.2d 35 (1974)

He filed his PCR application on December 20, 2012. App. p. 112. The statutory change giving trial courts *discretion* to award time spent under house arrest as time served did not go into effect until June 7, 2013. See S.C. Code Ann. § 24-13-40 (2016) (“The 2013 amendment added ‘and *may* be given for any time spent under monitored house arrest’ to the end of the third sentence.”) (emphasis added). It was undisputed at the PCR hearing that the change in the law occurred after Petitioner’s plea and after the PCR application was filed. App. pp. 175-176.

Petitioner asserts Counsel “properly preserved the time served issue for appellate review,” presumably because Counsel did in fact ask the court to take Petitioner’s house arrest time into consideration during sentencing. PWC p. 5. However, Counsel stated: “I ask the Court to take into consideration ... the time in jail is the only time the Court can really do, but I would ask the Court to think about that in *mitigation* as far as him being on monitoring and working full time.” App. p. 105 (emphasis added). Regardless, because the statute at the time of the plea only contemplated credit for time actually spent in custody, there was no “error” for Counsel to preserve or any legal basis on which Counsel could have framed an appeal. See S.C. Code Ann. § 24-13-40 (2012). Courts must “‘judge the reasonableness of counsel’s conduct on the facts of the particular case, viewed as of the time of counsel’s conduct.’” Flores-Ortega, 528 U.S. at 470 (quoting Strickland, 466 U.S. at 690). “This Court has never required an attorney to anticipate or discover changes in the law, or facts which did not exist, at the time of the trial.” Thornes v. State, 310 S.C. 306, 309-10, 426 S.E.2d 764, 765 (1993). Counsel argued in mitigation for his client to receive credit for the house-arrest time, and though the judge chose to give credit only for the time Petitioner actually spent in jail, that decision comports with the discretionary nature of the amended statutory language. App. p. 104. See also S.C. Code Ann. § 24-13-40 (2016). Accordingly, the PCR judge did not err in finding Counsel was not ineffective, and probative

evidence exists to support the post-conviction relief court's findings that Counsel did not render deficient performance in his handling of Petitioner's eligibility for time-served credits. There is no dispute that the statutory amendment was not in effect at the time of Petitioner's plea, and because the change does not require credit be given, but merely allows it, so there was no error on which Counsel could base a direct appeal. App. pp. 104-105, 175-176. Additionally, Petitioner has failed to show prejudice because Counsel did in fact raise the house-arrest time-credit argument on Petitioner's behalf during Counsel's mitigation argument to the plea judge, and even under the revised statute, the judge has discretion whether to give that credit or not. App. pp. 104-105. See also S.C. Code Ann. § 24-13-40 (2016). The record fully supports the PCR judge's finding that Petitioner failed to show Counsel's performance was deficient or that Petitioner was prejudiced by any alleged deficient conduct. Therefore, this Court should deny the petition.

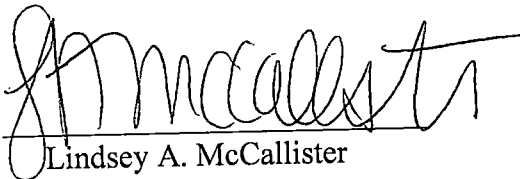
### **CONCLUSION**

For all the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied. However, if this Court grants certiorari, Respondent requests the opportunity to fully brief the issues discussed above.

Respectfully submitted,

ALAN WILSON  
Attorney General

LINDSEY A. MCCALLISTER  
Assistant Attorney General

BY:   
Lindsey A. McCallister

Office of the Attorney General  
Post Office Box 11549  
Columbia, SC 29211  
(803) 734-3737  
#79054

ATTORNEYS FOR RESPONDENT

3/13, 2017

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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On Writ of Certiorari to the Court of Appeals  
Certiorari to Oconee County  
Honorable Edgar W. Dickson, Circuit Court Judge (PCR)  
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TYSON T. WATT,

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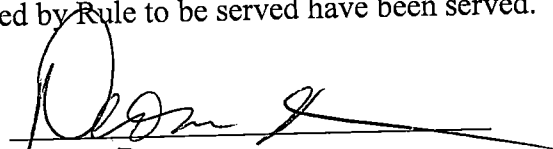
**PROOF OF SERVICE**

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I, Deonna Rogers, certify that I have served the within Return to Petition for Writ of Certiorari on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Wanda H. Carter, Esquire  
S.C. Commission on Indigent Defense  
Division of Appellate Defense  
Post Office Box 11589  
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served.  
This 13<sup>th</sup> day of March, 2017.

  
Deonna Rogers  
Legal Assistant

Office of the Attorney General  
Post Office Box 11549  
Columbia, SC 29211  
(803) 734-3737

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Oconee County  
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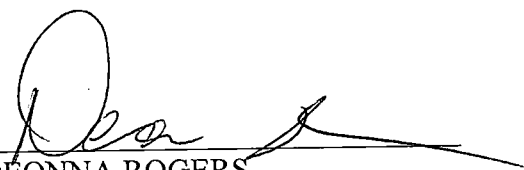
**CERTIFICATE OF SERVICE**

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The undersigned hereby certifies that a true copy of the Return to Petition for Writ of Certiorari, has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

**Wanda H. Carter, Esquire**  
**S.C. Commission on Indigent Defense**  
**PO Box 11589**  
**Columbia, SC 29211**

This 13<sup>th</sup> day of March, 2017

  
DEONNA ROGERS  
LEGAL ASSISTANT