

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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ORIGINAL

Certiorari to Kershaw County

Honorable Jocelyn J. Newman, Circuit Court Judge

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S.C. SUPREME COURT

DARRIN GRAHAM,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-002427

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JOHNSON PETITION FOR WRIT OF CERTIORARI

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Laura R. Baer  
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ATTORNEY FOR PETITIONER

**INDEX**

INDEX..... i

ISSUE PRESENTED.....1

STATEMENT OF THE CASE.....2

ARGUMENT.....5

CONCLUSION.....7

PETITION TO BE RELIEVED AS COUNSEL.....8

### **ISSUE PRESENTED**

Whether the PCR court erred in finding that Petitioner was not entitled to a belated direct appeal under White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974), where plea counsel failed to file a notice of appeal on Petitioner's behalf following his guilty plea and sentencing hearing, despite indicated to Petitioner that he would do so?

## STATEMENT OF THE CASE

On June 12, 2012, the State Grand Jury returned a multi-count indictment against Petitioner Darrin Graham and several co-defendants. The charges against Graham included one count of conspiracy to traffic cocaine over 400 grams and three counts of trafficking cocaine, 28 to 100 grams. App. 89.

On January 7, 2013, Petitioner Darrin Graham appeared before the Honorable Paul Burch, along with three of his co-defendants, and entered guilty pleas to counts one and two of the indictment. That is, one count of conspiracy to traffic cocaine, but reduced to 28 to 100 grams, and one count of trafficking cocaine, 28 to 100 grams. App. 1-3; App. 6, l. 15 – 7, l. 4; App. 12, l. 1 – 13, l. 24. Graham was represented by Jason Kirincich, and the state was represented by assistant attorney general Cary Nicholas Goings. App. 1. Sentencing was deferred, expected to occur on March 18, 2013. Meanwhile, Graham and his co-defendants were released on their continued bonds. App. 8, ll. 5-17.

Two years later, on January 15, 2015, Graham appeared before Judge Burch for sentencing. Graham was again represented by Jason Kirincich, and the state was represented by assistant attorney general Joshua Underwood. App. 10. AAG Underwood noted that while Graham was willing to speak with law enforcement, he was unwilling to testify. Thus, he asked that Graham “be sentenced accordingly when taken together with other individuals who provided substantial assistance.” App. 15, ll. 14-16. Plea counsel noted Graham was a teenager when the majority of the incidents took place and influenced by his familial relationship to two of his co-defendants. He argued that Graham had significantly less involvement than his other co-defendants and no significant criminal record. App. 15, l. 20 – 17, l. 16. Graham addressed the court: “I know I was wrong for what I did, but I have changed since this happened. I just ask for

mercy. I will just take the seven years. I hope I can get less, but I'll just take the seven." App. 17, l. 24 – 18, l. 3. Judge Burch sentenced Graham to concurrent terms of ten years incarceration, noting: "Well, compared to others, he does not have a serious criminal record. But he didn't help." App. 18, ll. 7-11.

On January 12, 2016, Graham filed his application for post-conviction relief ("PCR"). App. 20. The state filed its return and motion to dismiss on March 7, 2017. App. 27. On March 8, 2017, Graham filed a response to the state's motion to dismiss through PCR counsel, Kristy Goldberg. App. 31. PCR counsel filed two amended PCR applications on April 13, 2016, and August 9, 2016. App. 33; App. 35.

On September 1, 2016, an evidentiary hearing was held before the Honorable Jocelyn J. Newman. Graham was represented by Kristy Goldberg, and the state was represented by assistant attorney general Ivory Narcisse. App. 37. Graham and plea counsel Jason Kirincich both testified at the hearing. Graham testified that while they were in the courtroom following his sentencing hearing, plea counsel told him that he would file a notice of appeal on his behalf. He later learned that no appeal was ever filed. App. 47, l. 21 – 48, l. 16; App. 58, l. 3 – 59, l. 10; App. 60, ll. 18-25. Plea counsel did not recall any conversation with Graham regarding the appellate process in the courtroom. Rather, he said that the first time he heard of Graham's desire to appeal was when Graham's mother came to see him at his office after the ten-day window for appeal. Plea counsel purportedly advised her that Graham should file an application for post-conviction relief. App. 70, l. 14 – 72, l. 8.

On November 28, 2016, Judge Newman filed an Order of Dismissal, denying Graham's PCR application. App. 80. Judge Newman found that plea counsel's testimony was "credible and persuasive on all matters." App. 83. Regarding the failure to file the notice of appeal

specifically, the PCR court noted the differences in the testimony from Graham and plea counsel. App. 86. The court further noted that “[a]lthough counsel could not affirmatively state whether he informed Applicant of the time delay for filing a notice of appeal, he did testify that he did not see any appealable issues.” App. 86. Thus, the court found that Graham failed to present sufficient evidence to overcome the presumption that plea counsel rendered “adequate assistance” and failed to demonstrate any resulting prejudice. App. 86 – 87.

This appeal follows.

## ARGUMENT

**The PCR court erred in finding that Petitioner was not entitled to a belated direct appeal under White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974), where plea counsel failed to file a notice of appeal on Petitioner's behalf following his guilty plea and sentencing hearing, despite indicated to Petitioner that he would do so.**

Graham testified that plea counsel told him that he would file a notice of appeal in Graham's case. App. 47, l. 21 – 48, l. 16; App. 58, l. 3 – 59, l. 10; App. 60, ll. 18-25. Graham was not required to make an additional request to counsel in order to assert his right to appeal. Plea counsel's testimony that he did not recall having such a conversation with Graham was not a sufficient basis upon which to deny Graham's application for post-conviction relief. While there is a presumption that counsel acted reasonably, Graham's burden of proof at the PCR hearing was only a preponderance of the evidence. Rule 71.1(e), SCRPC. His testimony and the other evidence contained in the record were sufficient to meet that burden.

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. CONST. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984). "Where allegations of ineffective assistance of counsel are made, the question becomes, 'whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.' " Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (quoting Strickland, 466 U.S. at 686). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668).

First, the applicant must demonstrate that counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687–88. "Under this prong, '[t]he proper measure of attorney performance remains simply reasonableness under

prevailing professional norms.” Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688). Second, the applicant must demonstrate he was prejudiced by counsel’s performance in such a manner that, but for counsel’s error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Id.

In Weathers v. State, 319 S.C. 59, 61, 459 S.E.2d 838, 839 (1995), this Court held “absent extraordinary circumstances, there is no constitutional requirement that a defendant be informed of the right to a direct appeal from a guilty plea.” In Roe v. Flores-Ortega, 528 U.S. 470, 476-77 (2000), the United States Supreme Court held that the Strickland test is applicable where a defendant asserts that counsel was constitutionally ineffective for failing to file a notice of appeal. The Court held that “counsel has a constitutionally imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing.” 528 U.S. at 480. In making that determination, the court “must take into account all the information counsel knew or should have known.” Id. While the Court noted that entry of a guilty plea can indicate that a defendant desires an end to judicial proceedings, the Court cautioned:

Even in cases when the defendant pleads guilty, the court must consider such factors as whether the defendant received the sentence bargained for as part of the plea and whether the plea expressly reserved or waived some or all appeal rights. Only by considering all relevant factors in a given case can a court properly determine whether a rational defendant would have desired an appeal or that the particular defendant sufficiently demonstrated to counsel an interest in an appeal.

Id. In Turner v. State, 384 S.C. 451, 456 n. 6, 682 S.E.2d 792, 795 n. 6 (2009), this Court noted the subsequent decision in Flores–Ortega, but found that “the Weathers analysis is compatible with the Flores–Ortega analysis and remains good law.”

In the present case, Graham was exceedingly honest about his interactions with plea counsel, admitting that he understood that there was no guarantee that he would receive a seven year sentence but that counsel hoped for such a result. App. 43, ll. 4-21. Graham was likewise forthright that he was willing to speak with police but would not testify because of the danger it would pose not only to himself but to his mother. Graham said: “I wouldn’t have testified because – the person who my cousin said he was going to testify on, he burn his house down, shoot his house up and all. I was staying with my momma. I didn’t want nothing to happen to my momma. I did told them something, but I told them I wasn’t going testify.” App. 44, l. 17 – 45, l. 5.

While the sentencing judge recognized Graham’s lack of a serious criminal record, his view of Graham’s failure to “help” was what prompted him to sentence Graham to ten years rather than the mandatory minimum of seven years. See App. 18, ll. 7-11. Graham was obviously not expecting such a sentence, in light of his comment at the sentencing hearing that he would “just take the seven years. I hope I can get less, but I’ll just take the seven.” App. 17, l. 24 – 18, l. 3. Plea counsel knew or should have known that Graham did not receive the sentence that he expected, especially in light of Graham’s view that he had been cooperative despite his refusal to testify against his co-defendants. Thus, plea counsel was required to advise Graham of his appellate rights. Based on the testimony at the PCR hearing, either plea counsel failed to advise Graham of his rights, or he failed to follow through with filing the appeal after stating he would do so. In either circumstance, plea counsel’s conduct was deficient. As a result, Graham

never received review of his conviction and sentence on direct appeal. Graham was accordingly entitled to a belated direct appeal under White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974), because he did not knowingly and intelligently waive his right to appeal.

**CONCLUSION**

Based on the foregoing, Petitioner Darrin Graham respectfully requests that this Court grant the petition for writ of certiorari

A handwritten signature in cursive script that reads "Laura R. Baer". The signature is written in black ink and is positioned above a horizontal line.

Laura R. Baer  
Appellate Defender

ATTORNEY FOR PETITIONER

This 24th day of May, 2017.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Kershaw County

Honorable Jocelyn J. Newman, Circuit Court Judge

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PETITION TO BE RELIEVED AS COUNSEL

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Counsel for Darrin Graham states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
2. She has reviewed the record of petitioner's trial before Judge Jocelyn J. Newman, which was held on September 1, 2016, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She 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 her as counsel for Darrin Graham.

Respectfully Submitted,



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Laura R. Baer

Appellate Defender

ATTORNEY FOR PETITIONER

This 24<sup>th</sup> day of May, 2017.

**CERTIFICATE OF COUNSEL**

The undersigned certifies that to the best of her 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."



Laura R. Baer  
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ATTORNEY FOR PETITIONER

This 24<sup>th</sup> day of May, 2017.

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PETITIONER

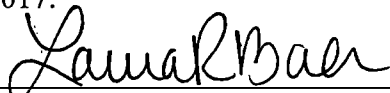
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STATE OF SOUTH CAROLINA,

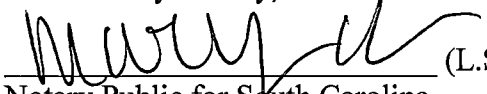
RESPONDENT

—————  
CERTIFICATE OF SERVICE  
—————

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 Megan Harrigan Jameson, 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 Darrin Graham, at Ridgeland Correctional Institution, PO Box 2039, Ridgeland, SC 29936, this 24<sup>th</sup> day of May, 2017.

  
\_\_\_\_\_  
Laura R. Baer  
Appellate Defender  
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me  
this 24th day of May, 2017.

 (L.S)  
\_\_\_\_\_  
Notary Public for South Carolina  
My Commission Expires: May 12, 2027