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SC SUPREME COURT

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Charleston County

Larry B. Hyman, Jr., Circuit Court Judge

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DANIEL HAMRICK,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-002164

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PETITION FOR WRIT OF CERTIORARI

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ATTORNEY FOR PETITIONER

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## **ISSUES PRESENTED**

### **I.**

The PCR court correctly granted Petitioner's belated appellate review pursuant to *White v. State*,<sup>1</sup> when Petitioner did not knowingly and voluntarily waive his right to a direct appeal.

### **II.**

The PCR court erred in failing to hold a hearing to determine whether Appellant freely, intelligently, and knowingly waived his right to post-conviction review of his sentence in exchange for the State's consent to a belated direct appeal that Appellant was already constitutionally entitled to.

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

## STATEMENT

### Indictment and Trial

On February 13, 2012, Appellant was indicted by the Charleston County Grand Jury for felony driving under the influence (DUI) with great bodily injury. App. 949 - 950. On October 21-25, 2013, Appellant proceeded to trial before the Honorable Deadra Jefferson and a jury. Appellant was represented J. Scott Bischoff and Donald L. McCune. Assistant Solicitors Culver Kidd and Benjamin Chad Simpson represented the State.

At the conclusion of the trial on October 25, 2013, the jury found Appellant guilty. App. 887, ll. 7-24. The trial court sentenced Appellant to fifteen years imprisonment. App. 950. An untimely notice of appeal was filed on Appellant's behalf on November 7, 2013.

### PCR Application and Belated Appeal Pursuant to *White v. State*<sup>2</sup>

On August 26, 2014, Appellant filed an application for post-conviction relief (PCR) alleging that he was being unlawfully held in custody based on errors made by the trial court. App. 926 - 932. James K. Falk represented Appellant. Assistant Attorney General J. Rutledge Johnson represented the State.

Prior to the scheduled evidentiary hearing, PCR counsel amended Appellant's application to include allegations that defense counsel was ineffective for failing to file a timely notice of appeal. App. 937 - 945. PCR counsel and the State then agreed to a consent "Order of Dismissal and Grant of Appeal Pursuant to *White v. State*." *Id.*

On September 16, 2015, Judge Hyman signed the consent order dismissing Petitioner's PCR application with prejudice and granting Appellant a belated direct appeal. *Id.*

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

## ARGUMENTS

### I.

**The PCR court correctly granted Petitioner's belated appellate review pursuant to *White v. State*,<sup>3</sup> when Petitioner did not knowingly and voluntarily waive his right to a direct appeal.**

In *Wilson v. State*, 348 S.C. 215, 218, 559 S.E.2d 581, 582 (2002), this Court held 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.” In *Legge v. State*, 349 S.C. 222, 562 S.E.2d 618 (2002), this Court further held 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.

Therefore, this Court has reaffirmed the principle 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 *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974).

In this case, the record contains probative evidence supporting the PCR court's ruling that Petitioner did not make a knowing and voluntary waiver of his right to a direct appeal. App. 937 - 945. Specifically, counsel represented Petitioner, and thus, had a duty to protect Petitioner by filing a timely notice of appeal. Counsel failed to do so. App. 941 - 942; *Cf. In Re Anonymous Member of the Bar*, 303 S.C. 306, 308, 400 S.E.2d 483, 484 (1991) (attorney retained solely for the purpose of trial of a non-indigent criminal defendant must serve and file a timely Notice of Appeal as required by Rule 203, SCACR, and continue to represent the client until relieved by Court; counsel is required to take all necessary steps reasonably practicable to protect the client's interests under Rule 1.16 of the Rules of Professional Conduct).

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<sup>3</sup> *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974).

Therefore, the PCR court correctly granted Petitioner belated appellate review pursuant to *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974), when Petitioner did not knowingly and voluntarily waive his right to a direct appeal. App. 127 – 136.

## II.

**The PCR court erred in failing to hold a hearing to determine whether Appellant freely, intelligently, and knowingly waived his right to post-conviction review of his sentence in exchange for the State's consent to a belated direct appeal that Appellant was already constitutionally entitled to.**

### **Discussion**

The PCR court erred by not holding a hearing to determine whether Appellant voluntarily, knowingly, and intelligently waived his right to post-conviction review in exchange for his right to seek a direct appeal of his conviction.

A waiver of the right to seek post-conviction relief must be made knowingly and intelligently. *State v. Sanders*, 412 S.C. 611, 773 S.E.2d 580 (2015). A waiver is an intentional and voluntary relinquishment of a known right. *Maxwell v. Genez*, 350 S.C. 563, 571, 567, S.E.2d 496, 500 (Ct. App. 2002). Courts indulge every reasonable presumption against waiver of fundamental constitutional rights, and do not presume acquiescence in the loss of fundamental rights. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

To determine whether there was a valid waiver, a court must look at “all relevant facts and circumstances surrounding the waiver, including the nature and terms of the agreement and the age, experience, and background of the accused.” *Spoone v. State*, 379 S.C. 138, 665 S.E.2d 605 (2008) (internal citations omitted).

Appellant has a right to a direct appeal of his conviction. *Legge v. State*, 349 S.C. 222, 562 S.E.2d 618 (2002). Appellant is also entitled to a post-conviction review of his sentence. In the normal course of events, Appellant should have been under no duty and under no pressure to waive his post-conviction claims in order to proceed on direct appeal. Therefore, his decision to waive his PCR rights seems inexplicable and gratuitous. *Sanders*, 412 S.C. 611, 773 S.E.2d 580 (ineffective

assistance of counsel claims to proceed despite a previous waiver of collateral review where the challenge directly attacks the effectiveness of the advice to agree to that waiver).

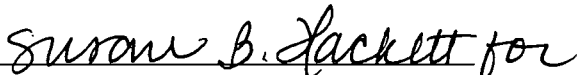
The wording of the consent order and Appellant's affidavit make clear that appointed PCR counsel was the moving force behind the unnecessary decision to waive Appellant's post-conviction rights in exchange for Appellant's right to a belated direct appeal. App. 937 – 945. Given these circumstances it was incumbent upon the trial court to insure that Appellant's waiver was freely and intelligently entered into. *See Sanders*, 411 S.C. at 617, 773 S.E.2d at 584 (“although a defendant may waive his right to collateral review, he is nevertheless still entitled to challenge whether the advice he received in agreeing to that waiver was constitutionally defective.”). The only way to adequately do this was to conduct an on-the-record colloquy with Appellant. *See Spooone*, 349 S.C. at 143-144, 665 S.E.2d at 608.

Accordingly, the PCR court erred in accepting Appellant's gratuitous waiver of his statutory right to post-conviction review without first holding a hearing to determine whether Appellant freely, voluntarily, and intelligently entered into the unnecessary waiver.

**CONCLUSION**

Based on the foregoing reasons, Petitioner respectfully requests that this Court grant his petition for writ of certiorari to allow for additional briefing on Issue II and to allow Petitioner belated appellate review of his conviction pursuant to *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974).

Respectfully submitted,

  
John H. Strom  
Appellate Defender

ATTORNEY FOR PETITIONER

This 2nd day of May, 2016.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

---

Certiorari to Charleston County

Larry B. Hyman, Jr., Circuit Court Judge

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DANIEL HAMRICK,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT


APPELLATE CASE NO. 2015-002164

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CERTIFICATE OF SERVICE

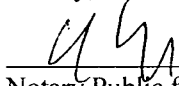
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I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on J. Rutledge Johnson, Esquire at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 2nd day of May, 2016.

  
John H. Strom  
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 2nd day  
of May, 2016.

  
\_\_\_\_\_(L.S.)  
Notary Public for South Carolina

My Commission Expires: May 12, 2025.