

ORIGINAL

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Greenville County

JAN 26 2018

John C. Hayes, Circuit Court Judge

S.C. SUPREME COURT

DEMETRIUS SIMMONS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-000057

PETITION FOR WRIT OF CERTIORARI

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ATTORNEY FOR PETITIONER

**INDEX**

INDEX ..... i

ISSUE PRESENTED .....2

STATEMENT .....3

ARGUMENT

The PCR judge erred in denying petitioner’s claim that he did  
not voluntarily waive his right to a direct appeal in the case. ....4

CONCLUSION .....5

**ISSUE PRESENTED**

The PCR judge erred in denying petitioner's claim that he did not voluntarily waive his right to a direct appeal in the case.

## STATEMENT

Petitioner Demetrius Simmons was tried in his absence and convicted of petit larceny, resisting arrest, breaking and entering into a motor vehicle and two counts of first degree burglary per a jury trial held during the December 2013 term of the Greenville County General Sessions Court before Judge C. Victor Pyle. Attorneys Joseph Maxwell and Sarah Henry represented petitioner at trial, and Assistant Solicitor Jennifer Tessitore appeared on behalf of the state. Judge Pyle's sealed sentence was published by Judge Pyle on October 16, 2014, at the sentencing hearing held in the case. Petitioner, Joseph Maxwell, Esquire, and Assistant Solicitor Jennifer Tessitore were present at the sentencing hearing. Petitioner was sentenced to imprisonment for an aggregate period of fifteen years. App. 198-202. Petitioner did not enjoy the benefit of a direct appeal in the case.

On September 17, 2015, petitioner filed a PCR application with the Greenville County Office of the Clerk of Court. App. 204-214. The respondent filed a return dated July 7, 2016, requesting that a hearing be held in response to petitioner's PCR action. App. 215-220.

A PCR hearing was convened on December 9, 2016, at the Greenville County Courthouse before Judge John C. Hayes, III. App, 222-253.

On December 20, 2016, Judge Hayes signed an Order of Dismissal denying PCR relief to petitioner. App. 255-261.

Petitioner appealed Judge Hayes' Order and a Johnson Petition for Writ of Certiorari was filed on his behalf. On November 27, 2017, this Court issue an Order requiring a merit Petition for Writ of Certiorari and brief per White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974) to be filed in the case This petition follows.

## ARGUMENT

The PCR judge erred in denying petitioner's claim that he did not voluntarily waive his right to a direct appeal in the case.

Petitioner was tried in absentia. Only three witnesses testified at trial on behalf of the state: Mr. and Mrs. Tintinger and the arresting police officer. Susanne Tintinger testified that on the morning of January 31, 2013, she entered her car parked in the garage of her home and noticed that her car had been rummaged through ("trashed") after she saw that the console and glove compartment had been opened and that her garage door opener was missing and that the right garage dooe (which had not been operating properly) was partially opened from the bottom. Also, their mountain bike that was parked in the garage was missing. Tintinger stated that she called the police and reported this while driving to work. App. 38, l. 9 – p. 69, l. 11. Kenneth Tintinger (husband) testified that he stayed home on that morning, but shortly thereafter, he heard the garage door go up and looked out to see a male wearing a green hooded sweat top pulling a box out of their garage. He called 911 and shortly thereafter, the perpetrator, who was later identified as petitioner, was apprehended in the neighborhood and arrested. App. 70, l. 22 – p. 108, l. 6; App. 110, l. 4 – p. 121, l. 5.

During the PCR hearing, petitioner testified that he asked trial counsel to appeal the case after the sentencing hearing, but was told by counsel that "he couldn't have one," and that "he had to go down the road and file it there." App. 233, l. 9 – p. 234, l. 18.

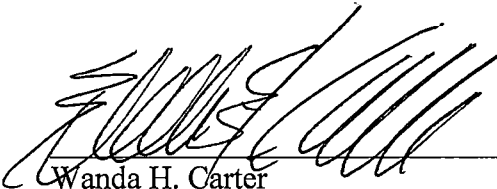
Trial counsel testified at the PCR hearing and stated that he did not recall petitioner's request for an appeal and that there were no appealable issues in the case. App. 248, l. 1-19.

The PCR judge found credible trial counsel's testimony that petitioner did not ask for an appeal and ruled that petitioner failed to carry his burden of proof on this ground. App. 259.

Trial counsel has a duty to make certain a client is fully aware of the right to appeal and ascertain whether his client desires an appeal, and then file an appeal if the client wishes to appeal. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989); Frasier v. State, 306 S.C.158, 410 S.E.2d 572 (1991). Here, trial counsel did not perform his duty with respect to petitioner's appellate rights. A defendant is entitled to an appeal where there has been no intelligent or voluntary waiver of the right to an appeal made by the defendant. White v. State, 263 S.C. 110, 208 S.E.2d 35 (1975). Petitioner desired an appeal of his case and did not voluntarily waive his right to an appeal. Therefore, trial counsel erred in failing to take the appropriate steps to ensure petitioner's right to have his case reviewed on direct appeal. If after an indigent client requesting an appeal the client wishes to appeal, then trial counsel must serve and file a notice of appeal. In Re Anonymous Member of the Bar, 303 S.C. 306, 400 S.E. 483 (1991).

### **CONCLUSION**

Based on the foregoing argument, counsel for petitioner would request that this Court conduct its appellate review of the brief filed pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974) on appeal.



Wanda H. Carter  
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 26th day of January, 2018.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Greenville County

Honorable John C. Hayes, Circuit Court Judge

—————  
DEMETRIUS SIMMONS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

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

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari in the above referenced case has been served upon DeShawn H. Mitchell, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari have been served on Demetrius Simmons, ##283195, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 26th day of January, 2018.

  
Wanda H. Carter

Deputy Chief Appellate Defender  
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me  
this 26th day of January, 2018.

Wanda H. Carter (L.S)

Notary Public for South Carolina

My Commission Expires: July 3, 2023