

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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S.C. SUPREME COURT

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Certiorari to Charleston County

Honorable Michael G. Nettles, Circuit Court Judge

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DARRYL JERARD MUNGIN,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-000441

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PETITION FOR WRIT OF CERTIORARI  
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## ISSUES PRESENTED

- I. Did the PCR court correctly granted Petitioner a belated appeal pursuant to White v. State, 263 S.C. 110, 108 S.E.2d 35 (1974), where the undisputed evidence showed he never knowingly and voluntarily waived his right to a direct appeal, where plea counsel was out of the office and did not timely file the notice of appeal?
  
- II. Did the PCR Court err in denying Petitioner relief, where plea counsel provided ineffective assistance by failing to withdraw the guilty plea after Petitioner indicated that he desired a jury trial, where prior vacillation existed regarding a plea versus trial, and where the complainant recanted prior remarks and outright stated that Petitioner did not harm her?

## STATEMENT

Darryl Mungin was indicted for burglary in the first degree, domestic violence in the second degree, and obtaining goods under false pretenses by a Charleston County grand jury during its February 2016 term of court. App. 119 – 124. Represented by Michael Loignon, he appeared before the Honorable Thomas L. Hughston Jr. for a guilty plea under North Carolina v. Alford<sup>1</sup> on May 31, 2016. App. 1. Andrew Evans appeared on behalf of the State.

Petitioner pled to burglary in the second degree, domestic violence in the second degree, and obtaining goods under false pretenses. App. 4 l. 20 – App. 6 l. 14. The State dismissed a separate criminal domestic violence charge of a high and aggravated nature charge. App. 6 ll. 6 – 9. Judge Hughston sentenced Petitioner to ten years' incarceration on the burglary second charge, suspended on the service of five years with five years' probation to follow. App. 20 ll. 16 – 23. Petitioner was also sentenced to five years concurrent on the obtaining goods under false pretenses charge and one year on the domestic violence charge. Id.

Petitioner filed an application for post-conviction relief on or about December 7, 2016. App. 23 – 29. Through counsel, he subsequently filed an Amended Application on or about November 28, 2017. App. 30 – 31. Among other claims, Petitioner alleged that he received ineffective assistance of counsel when he was deprived of a direct appeal and when counsel failed to withdraw his guilty plea.

The State made its Return on or about June 21, 2017. App. 32 – 39. An evidentiary hearing was held before the Honorable Michael Nettles on December 5, 2017. App. 40. Justin

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<sup>1</sup> 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (U.S. 1970).

Hunter appeared on behalf of the State, and Rodney Davis represented Petitioner. Petitioner and plea counsel testified at the hearing.

An Order of Dismissal and Grant of Appellate Review Pursuant to White v. State was filed on February 1, 2018. App. 107. The PCR court dismissed Petitioner's ineffective assistance of counsel claims, finding that Petitioner failed to prove deficient conduct and prejudice. The PCR court did, however, grant a belated direct appeal.

Petitioner now files this petition simultaneously with a brief addressing the direct appeal issue(s), as required by Rule 243, SCACR.

## ARGUMENT

I. The PCR court correctly granted Petitioner a belated appeal pursuant to White v. State, 263 S.C. 110, 108 S.E.2d 35 (1974), where the undisputed evidence showed he never knowingly and voluntarily waived his right to a direct appeal, where plea counsel was out of the office and did not timely file the notice of appeal.

The State consented to a belated direct appeal. App. 101 ll. 18 – 20. Plea counsel testified about the events surrounding the notice of appeal: Petitioner requested that counsel file a motion to reconsider, which he did. App. 83 l. 17 – App. 84 l. 12. The plea judge denied the motion, and the signed order was received by counsel’s office while he was attending the national criminal defense trial college. Id. Upon his return, he filed the notice of appeal, but it was denied as untimely. Id.

“To waive a direct appeal, a defendant must make a knowing and intelligent decision not to pursue the appeal.” Simuel v. State, 390 S.C. 267, 271, 701 S.E.2d 738, 739-740 (2010). “In the absence of an intelligent waiver by the defendant, counsel must either initiate an appeal or comply with the procedure in [Anders].” Id. (quoting Turner v. State, 380 S.C. 223, 224, 670 S.E.2d 373, 374 (2008)).

“The appropriate scope of review of this Court is that any evidence of probative value is sufficient to uphold the PCR judge’s findings.” Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989).

The PCR judge’s ruling is supported by commentary from the State at the evidentiary hearing as well as Petitioner’s direct appeal at the South Carolina Court of Appeals, Appellate Case No. 2016-001636. As Judge Nettles found, there was no evidence of an intelligent and voluntary waiver of Edwards’ right to an appeal. The evidence supports the PCR judge’s conclusion that Petitioner is entitled to a belated appeal pursuant to White, supra.

II. The PCR Court erred in denying Petitioner relief, where plea counsel provided ineffective assistance by failing to withdraw the guilty plea after Petitioner indicated that he desired a jury trial, where prior vacillation existed regarding a plea versus trial, and where the complainant recanted prior remarks and outright stated that Petitioner did not harm her.

Prior to being appointed Michael Loignon, Petitioner was represented by Meagan Gentry. App. 53 l. 12 – App. 54 l. 9. During the pendency of either’s representation, no discussions took place regarding trial strategy or potential defenses; Petitioner was coerced into a plea from the start. App. 54 l. 16 – App. 55 l. 10; App. 64 ll. 3 – 13. Likewise, Petitioner was never advised of the elements of each charge, and there were not any conversations concerning what the State would have to prove in order to convict Petitioner at trial. App. 58 ll. 16 – 22. Petitioner felt pressured into pleading guilty even though he wanted a jury trial and indicated as such at the plea. App. 60 l. 24 – App. 63 l. 9. Asked a second time, Petitioner answered in the affirmative when the inquiry was made regarding a jury trial. App. 5 ll. 11 – 13. He made this assertion even without having been advised of his right to confront witnesses or challenge evidence.

Following a brief colloquy wherein Petitioner’s plea was hastily accepted without a finding on the record that it was supported by a factual basis, the plea judge heard from Clarissa Butler, the woman whom Petitioner allegedly harmed.<sup>2</sup> App. 8 l. 24 – App. 11 l. 21. Butler, within seconds of the assistant solicitor remarking that Petitioner “basically physically assaulted her... and then dragged her on the porch and continued the assault on the porch,” challenged the notion that Petitioner hit her: “I don’t know where the punching in the stomach, and this and that, you know, came from. Other than that, I would be bruised. I would have been in the hospital.

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<sup>2</sup> The indictment for burglary indicated that Petitioner allegedly “caused physical injury” to a person who was not a participant in the crime. App. 120.

There's no hospital records." App. 10 ll. 10 – 19. Butler, according to the State, was seven months pregnant at the time of the altercation. App. 7 ll. 12 – 18.

Plea counsel similarly argued that the State's portrayal was inaccurate based upon the information provided to him by Petitioner:

From the beginning of my representation of Mr. Mungin, he has maintained the whole time that this was not a physical fight. There was an argument that occurred, but this was not a physical fight.

Furthermore, the house that he's alleged to have broken into is his landlord's house that's right next door, that he has been in and out of many times to help her with various things around the yard, around the house. So the - - you know, this is ... not some stranger breaking in to steal things.

So ... Ms. Butler, the alleged victim here, has been trying to drop these charges from the beginning. She - - she went to the Solicitor's Office to fill out a drop charge form, and she was told to think about it for a while.

She filled out a statement at my office saying that this didn't happen. And as Your Honor heard here today, she's saying it didn't happen as well.

App. 13 l. 19 – App. 14 l. 11.

Petitioner was never told by plea counsel that he could withdraw his plea. App. 69 ll. 18 – 21. He was wholly unaware such a maneuver was even a possibility. App. 77 ll. 14 – 19. Petitioner spoke at the evidentiary hearing and indicated that he had been professing his innocence to the State. App. 70 ll. 6 – 21. Counsel should have stepped in and moved to withdraw the plea. App. 74 ll. 4 – 11. Petitioner testified that if given the opportunity a second time, he would have asked for a jury trial. App. 77 l. 20 – App. 78 l. 2.

A PCR court's findings of fact will be upheld if there is any evidence of probative value in the record to support them. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). However, appellate courts review questions of law de novo. Id. Moreover, "this Court will reverse the decision of the PCR court when it is controlled by an error of law." Gonzales v. State,

419 S.C. 2, 10, 795 S.E.2d 835, 839 (2017) (citing Terry v. State, 383 S.C. 361, 371, 680 S.E.2d 277, 282 (2009) ).

“There is a two-prong test for evaluating claims of ineffective assistance of counsel. First, a PCR applicant must show that his counsel's performance was deficient such that it falls below an objective standard of reasonableness.” Suber v. State, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007) (citing Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Alexander v. State, 303 S.C. 539, 541, 402 S.E.2d 484, 485 (1991) ). “Second, an applicant must show there is a reasonable probability, but for counsel's unprofessional errors, the result of the proceeding would have been different.” Id. (citing Strickland, 466 U.S. at 687, 104 S.Ct. 2052; Alexander, 303 S.C. at 541–42, 402 S.E.2d at 485).

In order for a defendant to knowingly and voluntarily plead guilty, he must have a full understanding of the consequences of his plea. Boykin v. Alabama, 395 U.S. 238, 241, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). When determining issues relating to guilty pleas, the Court will consider the entire record, including the transcript of the guilty plea, and the evidence presented at the PCR hearing. Anderson v. State, 342 S.C. 54, 57, 535 S.E.2d 649, 650 (2000).

“[W]hen a [petitioner] claims that his counsel's deficient performance deprived him of a trial by causing him to accept a plea, [he] can show prejudice by demonstrating a ‘reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.’ ” Lee v. United States, — U.S. —, 137 S.Ct. 1958, 1965, 198 L.Ed.2d 476 (2017) (quoting Hill v. Lockhart, 474 U.S. 52, 59, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985)).

Within the last decade, this Court has considered at least one case with similar circumstances. In Rolen v. State, 384 S.C. 409, 683 S.E.2d 471 (2009), Rolan likewise wavered

between trial and a plea after he was charged with murder. Id. at 411, 683 S.E.2d 473. He initially requested a trial, but following jury selection opted to plead guilty. Id. Rolan told the plea judge that “he voluntarily [confessed] and admitted to committing the murder.” Id. The plea judge accepted the plea “as voluntary and having a substantial factual basis.” Id. However, following remarks from the decedent’s family, Rolan recanted. Id. Counsel did not move to withdraw the plea. Id.

Rolan testified at his PCR hearing that he pled guilty because counsel advised him that the jury would likely find him guilty. Id. at 412, 683 S.E.2d at 473. This Court found that counsel was deficient in failing to move to withdraw Rolan’s guilty plea:

Petitioner requested a jury trial and only decided to plead guilty after counsel advised him that the impaneled jury would likely find him guilty. Petitioner repeatedly asserted his innocence during the plea hearing before the plea judge sentenced him. In our view, at this point in the hearing, it was clear that Petitioner wanted to withdraw his guilty plea.

Id. at 413, 683 S.E.2d at 474. Prejudice was found “because due to counsel’s failure to make such a motion, the plea judge was not able to exercise his discretion.” Id. at 414, 683 S.E.2d at 474.

Much like Rolan, Petitioner in the matter *sub judice* mostly maintained his innocence. He pled guilty under Alford, and the complainant from the domestic violence charge, Clarissa Butler, testified under oath that Petitioner never punched her.

The date of the plea, plea counsel was under the impression that Petitioner was going to reject the offer and proceed to trial. App. 81 ll. 4 – 19. Recognizing Petitioner’s multiple prior invocation of the right to a jury trial, coupled with the complainant’s recantation, plea counsel should have immediately moved to withdraw the plea. Petitioner was potentially not under oath,

he had not been given the entire litany of warnings regarding the rights he was waiving, and he felt coerced.

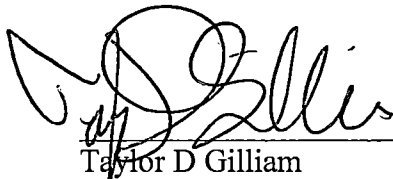
“A guilty plea is a solemn, judicial admission of the truth of the charges against an individual; thus, a criminal inmate's right to contest the validity of such a plea is usually, but not invariably, foreclosed.” Dalton v. State, 376 S.C. 130, 137, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing Blackledge v. Allison, 431 U.S. 63, 74, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977) ). Indeed, where a thorough colloquy is conducted, courts must exercise caution in setting aside the guilty plea. See Jamison v. State, 410 S.C. 456, 469–71, 765 S.E.2d 123, 129–30 (2014) (observing that “guilty plea[s] must be treated as final in the vast majority of cases” and instructing that caution must be exercised so as not to “undermine the solemn nature of a guilty plea and the finality that generally attaches to a guilty plea”).

A guilty plea may not be accepted unless it is voluntarily and understandingly made. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). In order for a defendant to knowingly and voluntarily plead guilty, he must have a full understanding of the consequences of his plea and of the charges against him. Simpson v. State, 317 S.C. 506, 455 S.E.2d 175 (1995). In State v. Hazel, 275 S.C. 392, 271 S.E.2d 602 (1980), this Court held that defendant's plea was not knowing because it was entered without an understanding of the mandatory punishment for the offense to which he was pleading. Accordingly, the plea was entered in ignorance of its direct consequence and was therefore invalid. Similarly, in Dover v. State, 304 S.C. 433, 405 S.E.2d 391 (1991), this Court held that the defendant's guilty plea was made in ignorance of its consequences where the trial judge never asked the defendant any factual questions, nor questioned him about the possibility of a severe sentence, and it was never established that the defendant understood the severity of the crimes or the sentences they carried.

The adequacy of a guilty plea proceeding is reviewed de novo. See United States v. Damon, 191 F.3d 561, 564 n. 2 (4th Cir.1999). It is not evident from the record that Petitioner knew he was afforded the opportunity to cross-examine witnesses or challenge evidence. See United States v. Goins, 51 F.3d 400, 403 (4th Cir.1995) (holding that trial court's failure to correctly inform defendant of mandatory minimum sentence was reversible error). His plea to three charges, entered in accordance with North Carolina v. Alford, was the result of ineffective assistance of counsel. Likewise, counsel failed to move to withdraw the plea.

**CONCLUSION**

Petitioner respectfully requests this Court affirm the PCR court's decision that he is entitled to a belated direct appeal. Petitioner likewise requests that this Court grant his petition for writ of certiorari and allow full briefing on this issues, reverse the charges against him, and remand the case for a new trial.

  
Taylor D Gilliam  
Appellate Defender

ATTORNEY FOR PETITIONER

This 7th day of September, 2018.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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S.C. SUPREME COURT

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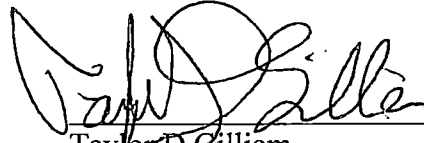
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STATE OF SOUTH CAROLINA,

RESPONDENT

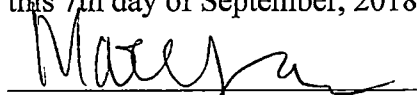
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CERTIFICATE OF SERVICE  
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The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Benjamin Limbaugh, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Darryl Jerard Mungin, at P.O. Box 796, , Ravenel, SC 29470, this 7th day of September, 2018.

  
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Taylor D. Gilliam  
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me  
this 7th day of September, 2018.

 (L.S)  
\_\_\_\_\_  
Notary Public for South Carolina  
My Commission Expires: 5/12/2027