

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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APPEAL FROM SPARTANBURG COUNTY  
Court of Common Pleas

Honorable J. Derham Cole, Circuit Court Judge

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Appellate Case No. 2017-002556

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KENDEAL ONEAL JONES,

**RECEIVED**

NOV 02 2018

S.C. SUPREME COURT

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

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**RETURN TO PETITION FOR WRIT OF CERTIORARI**

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**II. Because Counsel’s decision not to object to evidence of Petitioner’s flight did not constitute deficient performance nor did it prejudice Petitioner, the PCR court properly denied relief.**

**III. Because Counsel’s incorrect statement of the State’s burden of proof during opening statement did not prejudice Petitioner, the PCR court properly denied relief.**

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## STATEMENT OF THE ISSUES

- I. Did the PCR court properly grant relief in the form of belated appellate review, pursuant to White<sup>1</sup>?
- II. Did the PCR court properly deny relief for ineffective assistance of counsel where Counsel did not object to evidence of flight by Petitioner?
- III. Did the PCR properly deny relief for ineffective assistance of counsel where Counsel misstated the burden of proof during the opening statement, but stated the correct burden of proof during closing argument?

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

## STATEMENT OF THE CASE

On June 11, 2009, Petitioner Kendeal Jones (“Petitioner”) arrived at the Cammie Claggett Apartments located in Spartanburg County, South Carolina. (App. p. 31). Petitioner approaches the apartment of Rhashawn Middleton and her family (“Victims”), who he knows personally. (App. p. 31). Petitioner is allowed inside the apartment after asking for change for a five dollar bill. (App. p. 31). Immediately after Petitioner enters the apartment, two other men come through the front door with masks and a firearm. (App. p. 31). After taking items and money from Victims, Petitioner and the other men leave the apartment. (App. p. 33). Petitioner leaves out the backdoor of the apartment and drives away. (App. p. 33). Petitioner was arrested around seven months after the incident. (App. p. 319).

During its May 2010 term, the Spartanburg County Grand Jury indicted Petitioner for burglary, 1<sup>st</sup> degree (2010-GS-42-2629), and three counts of armed robbery (2010-GS-42-2630). (App. p. 346). Petitioner was represented by Max B. Singleton (“Counsel”).<sup>2</sup> (App. p. 1). Assistant Solicitor Derrick Balsa of the Seventh Circuit Solicitor’s Office represented the State of South Carolina. (App. p. 1). On March 9, 2011, Petitioner’s case was called to trial before a jury and the Honorable J. Mark Hayes, II.<sup>3</sup> (App. p.1). The jury found Petitioner guilty on all charges. (App. p. 264). Judge Hayes sentenced Petitioner to twenty-five years of incarceration for each charge, to run concurrent. (App. p. 273).

Following trial, Counsel served a Notice of Appeal on Respondent on March 21, 2011. (App. p. 347). Counsel failed to properly file the Notice of Appeal and an appeal of Petitioner’s conviction was never perfected. (App. p. 347).

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<sup>2</sup> As of the filing of this Return, Mr. Singleton is on disciplinary suspension from the South Carolina Bar.

<sup>3</sup> Petitioner was tried with his co-defendant, Mr. Chavis Pullen.

On December 9, 2011, Petitioner filed an application for post-conviction relief, alleging ineffective assistance of counsel. (App. p. 279). Specifically, Petitioner alleged his trial counsel provided ineffective assistance for:

- a. "Counsel failed to file a timely Notice of Appeal"
- b. "Counsel failed to investigate"

Respondent made its Return on November 27, 2012, requesting an evidentiary hearing. (App. p. 296). An evidentiary hearing was conducted on October 2, 2013, before the Honorable J. Derham Cole, in Spartanburg County, South Carolina. (App. p. 298). Petitioner was represented by Charles L. Rollins, II., Esquire. (App. p. 298). Assistant Attorney General Suzanne H. White of the South Carolina Attorney General's Office appeared on behalf of Respondent. (App. p. 298). Petitioner testified on his own behalf. (App. p. 299).

At this hearing, Respondent consented to a belated appellate review of any direct appeal issues resulting from Petitioner's conviction, pursuant to White. (App. p. 301). Petitioner amended his application and added three new allegations<sup>4</sup>:

- a. "Counsel misstated the correct burden of proof twice during opening statements as the 'preponderance of the evidence'."
  - b. "Counsel failed to object to inadmissible evidence of an explained flight. See State v. Robinson, 360 S.C. 187 (2004)."
- (App. p. 347).

Petitioner testified on his own behalf. Petitioner testified he arrived at Victim's apartment to buy marijuana. (App. p. 311). Petitioner testified that he was buying five dollars' worth of marijuana from Victim when two armed men ran into the apartment to rob everyone. (App. p. 311). Petitioner testified that as soon as the two armed men left, he ran out the back door, "assuming that I had warrants on me from - - from previous charges." (App. p. 311). Petitioner testified that the previous

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<sup>4</sup> Petitioner raised a third new allegation, "Counsel failed to object to inadmissible testimony of [witness]," but has not challenged the PCR court's denial of relief on this ground in the Petitioner for Writ of Certiorari.

charges were for traffic tickets, but also an outstanding drug charge. (App. p. 311). Petitioner testified he retained Counsel before trial and met with him only once or twice. (App. p. 315). Petitioner testified Counsel informed him that “[I] was looking at 25 years.”<sup>5</sup> (App. p. 316). Petitioner testified he did not come forward to police after the robbery, because he believed he would be arrested for traffic tickets and a drug charge. (App. p. 318). However, Petitioner also admitted he did not know about this drug charge until after his conviction for armed robbery and burglary, 1<sup>st</sup> degree. (App. p. 317). Petitioner testified he raised the issue of not wanting to get in trouble with police with Counsel, but Counsel did not address it. (App. p. 318). Petitioner testified that he left out the back door, because he didn’t want to get arrested when the police came to investigate the burglary. (App. p. 320). Petitioner testified that Counsel informed him that in order to explain his reasoning for running from the police, he would have to take the stand and testify at trial. (App. p. 323). Petitioner testified he knew his prior criminal record would likely come out during his trial testimony and that he made the decision not to testify. (App. p. 323).

On January 22, 2014, a second evidentiary hearing was conducted before Judge Cole in Spartanburg County, South Carolina. (App. p. 329). The only person to testify was Counsel. (App. p. 331). Counsel testified that he it was a mistake to tell the jury during opening statements the incorrect burden of proof. (App. p. 333). Counsel testified he met with Petitioner close to ten times to discuss his case. (App. p. 333). Counsel testified Petitioner informed him that the reason he left the house was his outstanding warrants. (App. p. 334). Counsel testified Petitioner did not want to testify at trial. (App. p. 335). Counsel testified he did not ask the arresting officer if Petitioner had outstanding warrants. (App. p. 335). Counsel testified that he would not the fact that his client had previous charges brought out during trial testimony. (App. p. 339). Counsel testified that he

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<sup>5</sup> Armed Robbery carries a maximum sentence of thirty years. Burglary, 1<sup>st</sup> degree carries a sentencing range of fifteen years to life in prison. (S.C. Code Ann. §§ 16-11-330(A) and 16-11-311(B))

attempted to cross-exam a victim on her statements that Petitioner was there to get change for a five dollar bill. (App. p. 340). This was to point it was “ludicrous” and give weight to Petitioner’s claim he was buying drugs from Victim, according to Counsel’s testimony. (App. p. 340).

By written order submitted on December 12, 2017, Judge Cole granted relief in the form of a belated appeal, pursuant to White. (App. p. 346). Judge Cole denied all other allegations for Petitioner failing to meet his burden of proof. (App. p. 346).

## STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839 (2018). On appellate review, courts defer to a post-conviction relief court's findings of fact and will uphold them if there is any evidence in the record to support them. Smalls, 810 S.E.2d at 839-40 (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Id. Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

## ARGUMENT

**I. Because Petitioner did not knowingly and voluntarily waive his right to appeal his conviction and Respondent consented to belated appellate review pursuant to White, the PCR court properly granted relief.**

Petitioner asserts he did not knowingly and voluntarily waive his right to appeal following his conviction for armed robbery and burglary, 1<sup>st</sup> degree. Respondent agreed and consented to the granting of post-conviction relief, only in the form of a belated appellate review pursuant to White.

This Court held even though a post-conviction court finds an applicant did not voluntarily and intelligently abandon his right to direct appeal of his criminal conviction, the Court has no jurisdiction to grant a belated appeal. White v. State, 263 S.C. at 119, 208 S.E.2d at 39 (1974). In the absence of an intelligent waiver by the defendant, counsel must either initiate an appeal or comply with the procedure required by Anders.<sup>6</sup> Id. Where the PCR judge determines that the applicant did not freely and voluntarily waive their appellate rights, the applicant may petition the South Carolina Supreme Court for review of direct appeal issues pursuant to White. See Rule 243(i)(1), SCACR; Davis v. State, 288 S.C. 290, 291, 342 S.E.2d 60, 60 n.1 (1986).

Respondent consented to the granting of belated review for Petitioner's direct appeal issues pursuant to White. Therefore, the PCR court properly granted relief.

**II. Because Counsel's decision not to object to evidence of Petitioner's flight did not constitute deficient performance nor did it prejudice Petitioner, the PCR court properly denied relief.**

Petitioner asserts "Counsel's error in failing to address the flight issue constituted deficient legal representation in violation of the Sixth Amendment, and but for the error, a reasonable probability exists that the outcome of Petitioner's trial would have been different." It is unclear, based on the Petition for Writ of Certiorari, whether the alleged error was Counsel's failure to

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<sup>6</sup> Anders v. California, 386 U.S. 738 (1967).

object to “evidence of flight” or Counsel’s failure to present evidence that Petitioner’s flight was unrelated to the armed robbery.

In a post-conviction relief proceeding, the petitioner bears the burden of proving the allegations in his or her application. Rule 71.1(e), SCRPC; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the applicant must prove that “counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result.” Strickland v. Washington, 466 U.S. 668 (1984); Butler, at 442, 334 S.E.2d at 814.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, at 442, 334 S.E.2d at 814. The applicant must overcome this presumption to receive relief. Cherry, at 118, 386 S.E.2d at 625.

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove counsel’s performance was deficient. Under this prong, attorney performance is measured by its “reasonableness under professional norms.” Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel’s deficient performance must have prejudiced the applicant such that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

Petitioner contends that the reason he fled the apartment was to avoid arrest for possible outstanding warrants for traffic tickets and a prior drug charge. Petitioner asserts his flight was unrelated to the armed robbery and this evidence would have prevented the State from presenting

evidence of flight. Petitioner reaches this conclusion relying on State v. Robinson, 360 S.C. 187, 600 S.E.2d 100 (2004).

In Robinson, the trial court admitted evidence of the defendant's flight from police while he was helping police look for a weapon used in an armed robbery. Robinson, 360 S.C. at 194, 600 S.E.2d at 103, 104 (2004). Defendant objected, claiming he fled only when he was told by police that he was a suspect in an unrelated crime and that evidence of his flight was irrelevant to his armed robbery trial. Id. The Court held that evidence of flight should be excluded when the flight is **clearly linked to a separate offense for which the defendant is not on trial**. (emphasis added) Robinson, 360 S.C. at 195, 600 S.E.2d at 104 (2004). In reviewing a challenge to the admissibility of such evidence, the inquiry must be an objective one. Id. The Court rejected the defendant's claim that his own statement of why he fled from police was dispositive on the question of admissibility of the flight evidence. Id. The Court held that objectively viewed, the defendant's keen knowledge of the armed robbery created a sufficient nexus between his flight and the armed robbery charge to affirm the admission of flight evidence. Id. 360 S.C. at 196, 600 S.E.2d at 104 (2004).

Petitioner asserts that Counsel erred in failing to object to evidence of his flight from the apartment following the armed robbery. Petitioner relies only on his own statement of why he fled, out of fear of unrelated arrest warrants, in arguing the evidence of flight was inadmissible. This is the same reasoning this Court rejected in Robinson. Petitioner's statement of why he fled is not dispositive to the question of admissibility for the evidence of his flight. Objectively viewed, Petitioner was keenly aware of the armed robbery he was convicted of. The testimony from Victims that it was odd for Petitioner to be at their home, Petitioner's actual presence at the home

during the crime, and Petitioner relationship with the accused gunmen, are all evidence of Petitioner's knowledge of the charge he stood trial for.

Counsel was not deficient in not objecting to the evidence of Petitioner's flight, because the evidence was admissible at trial. Petitioner was not prejudiced by any failure to object to the flight evidence, as there is not a reasonable probability that the outcome of the trial would have been different. Therefore, the PCR court properly denied relief and certiorari should be denied.

**III. Because Counsel's incorrect statement of the States burden of proof during his opening statement did not prejudice Petitioner, the PCR court properly denied relief.**

Petitioner asserts Counsel erred in twice misstating the burden of proof in a criminal trial during his opening statement. Petitioner asserts "[a] statement to the jury announcing a different standard other than the proper burden of proof than what is required violates due process and cannot be considered harmless error." Petitioner does not cite to any authority to substantiate this claim, but compares it to the United States Supreme Court's decision in Cage v. Louisiana, 498 U.S. 39 (1990). Petitioner failed to meet his burden of proof.

Appellate courts should be "careful and critical" in finding allegedly improper statements of counsel to reversible error, and "[e]very case must necessarily depend upon its own particular circumstances." State v. Gilstrap, 205 S.C. 412, 415, 32 S.E.2d 163, 164 (1944).

The PCR court recognized the error of Counsel's incorrect statement of the burden of proof, during his opening statement to the jury. However, the PCR court correctly found that Petitioner was not prejudiced by this error. During his opening charge to the jury, Judge Hayes correctly stated the State's burden of proof was "beyond a reasonable doubt." (App. p. 26). Judge Hayes instructed the jury "[w]hat the attorneys tell you during their opening statement is not evidence in the case. It is only their contention as to what the issues are." (App. p. 29). Petitioner's co-

defendant's attorney stated the correct burden of proof during his opening statement. (App. p. 35). Judge Hayes instructed the jury just prior to closing arguments "you should disregard any remark, statement or argument which is not supported by the evidence presented during trial **or the law that I will explain to you after the arguments.**" (App. p. 215). Petitioner's co-defendant's attorney reminded the jury during closing arguments that the burden of proof for the state is, again, beyond a reasonable doubt. (App. p. 222, 231). Counsel corrected himself when he told the jury "assumption is not equal to beyond reasonable doubt." (App. p. 33, 239). Judge Hayes instructed the jury that the law states "unless guilt has been proven by evidence satisfying you of that guilt beyond a reasonable doubt" and further explains "reasonable doubt." (App. p: 243 - 247).

The PCR court properly found the misstated burden of proof by Counsel in his opening statement was an error, but there was no reasonable likelihood Counsel's mistake affected the outcome of Petitioner's trial. Over a two-day trial, it is unreasonable to assert that without Counsel's mistakenly stated burden of proof during opening statements, the outcome of trial would have been different. The PCR court properly denied relief and certiorari should be denied.

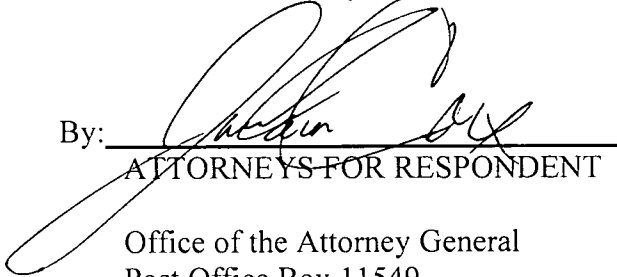
**CONCLUSION**

For the foregoing reasons, this Court should deny this Petition for a Writ of Certiorari.  
Should this Court grant the petition, the State seeks permission to more fully brief the issues herein.

Respectfully submitted,

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October 30, 2018

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**S.C. SUPREME COURT**

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CERTIORARI TO SPARTANBURG COUNTY  
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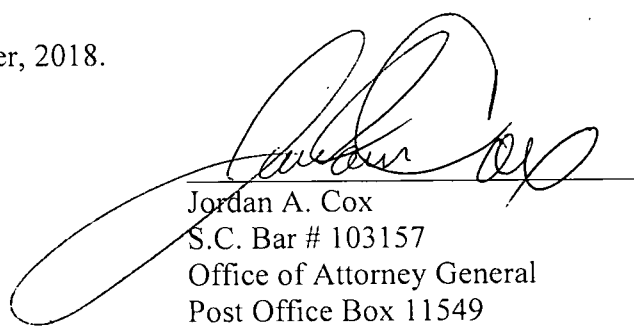
State of South Carolina,.....Respondent.

**CERTIFICATE OF SERVICE**

I, Jordan A. Cox, certify that I have today served the within **Return to Petition for Writ of Certiorari** upon Appellant by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

**Wanda H. Carter, Esquire**  
**South Carolina Commission on Indigent Defense**  
**Division of Appellate Defense**  
**Post Office Box 11589**  
**Columbia South Carolina 29211-1589**

This 30<sup>th</sup> day of October, 2018.



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