

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Appeal from Aiken County  
Doyet A. Early, III, Circuit Court Judge  
Diane Schafer Goodstein, PCR Judge

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RECEIVED  
JAN 23 2019  
S.C. SUPREME COURT

JAMES WHALEY,

PETITIONER

V.

STATE OF SOUTH CAROLINA

RESPONDENT

APPELLATE CASE NO. 2017-001610

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RETURN TO PETITION FOR A WRIT OF CERTIORARI

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**PETITIONER'S STATEMENT OF ISSUES PRESENTED**

1. Petitioner was entitled to a belated appeal pursuant to *White v. State*, where the state consented to that relief, where his trial attorney was on notice that Petitioner wanted to appeal his conviction, and where trial attorney filed the notice of appeal, but failed to request the trial transcript for the appeal which led to Petitioner's direct appeal being dismissed.
2. The Court should have ordered an evidentiary hearing for Petitioner's PCR claims, or in the alternative, remanded Petitioner's case for a limited hearing on whether his PCR application was time barred.

**RESPONDENT'S COUNTERSTATEMENT OF ISSUES PRESENTED**

3. The State consents to a review of Whaley's direct appeal issues pursuant to *White v. State*.
4. Evidence in the record supports the PCR court's finding that Whaley's allegations, other than his right to a direct appeal pursuant to *White v. State*, are barred by the statute of limitations.

## STATEMENT OF THE CASE

James Whaley was indicted in regard to a series of incidents that occurred from 1996–2010 by the Aiken County Grand Jury for three counts of first-degree criminal sexual conduct (CSC) with a minor, one count of second-degree CSC with a minor, one count of kidnapping, two counts of committing a lewd act on a minor, one count of contributing to the delinquency of a minor, one count of indecent exposure, and one count of disseminating harmful material to minors. (App. 179–80). Whaley proceeded to a bench trial September 10–12, 2013, before the Honorable Doyet A. Early, III. He was represented by Brian Katonak. Assistant Solicitors Ashley Agnew and J. William Weeks prosecuted the case. Whaley was convicted of one count disseminating harmful material to a minor, one count of lewd act, and one count indecent exposure. (App. 179–80, 220–25). The trial court found Whaley not guilty of the seven other charges. (App. 179–80). The trial court sentenced Whaley to serve concurrent terms of imprisonment of ten years imprisonment for disseminating harmful material to a child, and fifteen years for lewd act. The trial court sentenced Whaley to serve three years imprisonment for indecent exposure—consecutive to his concurrent ten and fifteen year sentences for an aggregate term of eighteen years.

Whaley filed a notice of appeal April 10, 2014. Whaley’s direct appeal was not perfected, and the case was remitted April 28, 2014. (App. 202). Whaley commenced a PCR action June 1, 2015, alleging:

1. Ineffective assistance of counsel
  - a. “being that defense attorney or the S.C. Indigent defense office did not order a transcript leading to dismissal of appeal. Appeal was not knowingly, willfully, or intelligently ignored by appellate. Reference *White v. State* 263 S.C. 110, 208 S.E.2d 35 S.C. 1974). I did not get to fully persue (sic) appeal.”
2. “Denied due process/amendment 14§ 1 notes 2644, 2646-2648”
  - a. “Though I do not have a transcript to confirm I state amendment 14, section (1) note 2644 false testimony by prosecution witness, ‘...includes situation in which state,

although not solicitor, false evidence, allows it to go uncorrected when it appears. They were notified C.05/11/15 via clerk of court.”

3. Denied due process/ Ineffective counsel/no counsel (App. 192–200).

An evidentiary hearing was held May 26, 2017, before the Honorable Diane Schafer Goodstein. Aimee Zmroczek was appointed to represent Whaley. At the PCR hearing, the State consented to a direct appeal pursuant to *White v. State*, 263 S.C. 110, 108 S.E.2d 35 (1974); however, the State moved for summary dismissal of Whaley’s other allegations as being barred by the statute of limitations. (App. 209–14). The PCR court granted Whaley’s request for a direct appeal pursuant to *White*, but summarily dismissed with prejudice Whaley’s other allegations as being untimely. (App. 216–19).

Whaley submitted a petition for a writ of certiorari requesting the Court review his direct appeal issues, and the dismissal of his untimely PCR allegations. The State consents to a direct appeal pursuant to *White*. However, the PCR court properly dismissed Whaley’s other PCR allegations as they were barred by the statute of limitations.

## SUMMARY OF THE FACTS

Three minor children (Minor 1, Minor 2, and Minor 3) alleged James Whaley committed various acts either to them or in their presence, between 1996 and 2010. Whaley requested a bench trial on these allegations. The majority of the trial focused on Minor 1's allegations, but the trial court found Whaley not guilty on all charges relating to Minor 1. However, the Court found Whaley guilty on the charges relating to Minor 2 and Minor 3. Below are the facts relevant to the charges linked to Minor 2 and Minor 3.

### Lewd Act on Minor 2

Minor 2 was nineteen years old when she testified at trial. (App. 64, 64–90). Whaley is Minor 2 and Minor 3's uncle—Minor 2 and Minor 3 are sisters. (App. 65). Minor 2 recalled her first inappropriate encounter with Whaley occurred when she was five or six years old. (App. 66). Minor 2 was staying the night at her great-grandmother's house while her mother was at work. (App. 66). Minor 2 was lying on a couch in a bedroom of her great-grandmother's house when Whaley entered the room. Minor 3 was in the room asleep on the bed. (App. 67). Minor 2 recalled, “[Whaley] woke me up and told me to be quiet. And [Whaley] eventually got on top of me and started touching me and humping me.” (App. 67). Minor 2 stated that Whaley was touching her “whole body” with his hands, and the incident seemed to last “forever.” (App. 68). She recalled wearing a “really long t-shirt[]” and “[p]anties.” (App. 68). Minor 2 clarified that Whaley was touching and humping her over her clothes. (App. 68).

### Indecent Exposure to Minor 3

Minor 3 was eighteen years old when she testified at trial. (App. 91, 91–109). She recalled that when she was six years old, circa 2001, Whaley was babysitting herself and Minor 2. While he was babysitting Minor 2 and Minor 3, Whaley exposed his penis to Minor 3. (App. 93). Minor

3 stated Whaley had his penis exposed “[f]or a couple of seconds, then [she] ran away.” (App. 94). Minor 3 stated she told her mother about the incident. (App. 94).

Alecia Powell testified at trial. (App. 110–118). Powell is Minor 2 and Minor 3’s mother, and Whaley’s sister. (App. 110). On cross-examination, Powell recalled Minor 3 disclosing to her in 2001 that Whaley did something inappropriate while he was babysitting. (App. 114). Powell recalled that Whaley babysat Minor 3 in 2001, and that when she came home from work that night, Minor 3 told her, “Mama, don’t ever let [Whaley] watch me again. He’s gross.” Powell stated that she did not call law enforcement, but instead called Whaley to inquire about the incident. (App. 114–15). Powell stated that Whaley claimed the incident was an accident, that he stood up and his pants fell down. Powell explained she did not feel like that was sufficient reason to call law enforcement. (App. 117). Powell further explained, “I didn’t call law enforcement because I didn’t know if a six-year-old [Minor 3] understood what happened compared to a 20-some-year-old [Whaley].” (App. 117).

#### *Dissemination of Harmful Materials to Minor 2 and Minor 3*

Minor 2 and Minor 3 recalled an encounter they had with Whaley that occurred during a Thanksgiving dinner. (App. 72, 96–98). Minor 2 was either twelve, thirteen, or fourteen when the Thanksgiving incident occurred. (App. 72). Minor 3 stated she was in middle school, around twelve years old. (App. 97). During the Thanksgiving dinner, Whaley was showing Minor 2 and Minor 3 pictures from a beach vacation he and his wife had recently taken. (App. 73). While scrolling through the pictures on his phone, Whaley came across a video and stopped scrolling. Whaley played the video for Minor 2 and Minor 3. (App. 73, 98). Minor 2 described the video as, “Of someone sucking [Whaley’s] dick.” (App. 73). Minor 3 described the video as “[s]omeone giving oral sex,” and recognized the person performing the act as Whaley’s wife. (App. 98).

Minor 2 stated that after showing the video, Whaley laughed because Minor 3 saw the video and was asking about the contents of the video. (App. 74). Minor 2 claimed she snatched the phone away from Whaley. (App. 74). Minor 2 explained she did not initially disclose the incidents because, “I was scared what people might think because it was my family.” (App. 75).

Whaley’s question on appeal regards three printouts of Facebook messages—allegedly sent from Whaley to Minor 2, Minor 3, and Powell respectively—the trial court admitted into evidence. (App. 76–78, 99–101, 112–13). While the messages are not contained in the record before the Court, the record does indicate the contents of the messages. Apparently, the messages were alleged apologies from Whaley. (App. 108, 116). The authenticity of these Facebook messages is the subject of Whaley’s *White* appeal.

### **STANDARD OF REVIEW**

In a PCR case, appellate courts will uphold the PCR court's factual findings 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 give no deference to the PCR court's conclusions of law and reviews those conclusions de novo. *Jamison v. State*, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014).

## ARGUMENT

1. The State consents to a review of Whaley's direct appeal issues pursuant to *White v. State*.
2. Evidence in the record supports the PCR court's finding that Whaley's allegations, other than his right to a direct appeal pursuant to *White v. State*, are barred by the statute of limitations.

The PCR court summarily dismissed Whaley's PCR allegations, other than his right to a direct appeal, because Whaley's PCR action was untimely. Evidence in the record supports the PCR court's finding that Whaley's PCR action was untimely. Certiorari should be denied on this issue.

Subsection 17-27-45(a) of the South Carolina Code provides:

An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision upon an appeal, whichever is later.

Our Supreme Court has held that the statute of limitations shall apply to all applications filed after July 1, 1996. *Peloquin v. State*, 321 S.C. 468, 469 S.E.2d 606 (1996). Summary dismissal of a PCR application is appropriate when the application is filed after the statutory filing period. *Leamon v. State*, 363 S.C. 432, 611 S.E.2d 494 (2005). In addition, section 17-27-70(c) of the South Carolina Code authorizes the PCR court to "grant a motion by either party for summary disposition of [an] application when it appears from the pleadings . . . that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law."

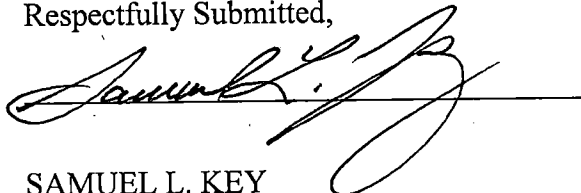
It is undisputed that Whaley was convicted September 12, 2013, he filed a notice of appeal April 10, 2014, his direct appeal was not perfected, and the case was remitted April 28, 2014. (App. 207-14). Whaley had until April 28, 2015 to commence his PCR action; however, Whaley commenced this PCR action June 1, 2015. The PCR found that Whaley's PCR action was untimely. (App. 218). This finding is supported by the record, as Whaley's direct appeal was

remitted April 28, 2014. (App. 211–13). The PCR court asked Whaley’s PCR counsel, “And whether you agree, understand, or confused with what happens at the appellate court, that’s all academic because there was a remittitur.” (App. 213). PCR counsel answered, “Absolutely.” (App. 213). At the PCR hearing, PCR counsel waived Whaley’s other allegations by conceding the issues were barred because they were made untimely. The PCR court’s finding that Whaley’s action was untimely is supported by the record. Certiorari should be denied as to this issue.

**CONCLUSION**

The State consents to a review of Whaley's direct appeal issues pursuant to *White v. State*. Certiorari should be denied as to Whaley's second issue because evidence in the record supports the PCR court's finding that Whaley's action was untimely.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Samuel L. Key", is written over a horizontal line.

SAMUEL L. KEY  
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ATTORNEY FOR RESPONDENT

January 16, 2019

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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CERTIORARI TO AIKEN COUNTY

Honorable Diane Schafer Goodstein, Circuit Court Judge

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Appellate Case No. 2017-001610

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JAMES WHALEY,.....PETITIONER,

v.

STATE OF SOUTH CAROLINA,.....RESPONDENT.

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**CERTIFICATE OF SERVICE**

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The undersigned do hereby certifies that a true copy of the **Return to the Petition for Writ of Certiorari**, has been served upon opposing counsel by mailing two (2) copies of both in the United States mail, postage prepaid:

**Victor R. Seeger, Esquire**  
**SC Commission on Indigent Defense**  
**Post Office Box 11589**  
**Columbia, South Carolina 29211**

I further certify that all parties required by Rule to be served have been served. This 16<sup>th</sup> day of January, 2019.

  
KAITLYN S. SLICE  
LEGAL ASSISTANT



ALAN WILSON  
ATTORNEY GENERAL

RECEIVED  
JAN 22 2019  
S.C. SUPREME COURT

January 16, 2019

The Honorable Daniel E. Shearouse  
Clerk, Supreme Court of South Carolina  
Post Office Box 11330  
Columbia, South Carolina 29211

**Re: James Whaley v. State of South Carolina**  
**Appellate Case No. 2017-001610**

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the **Return to the Petition for Writ of Certiorari** the above-referenced post-conviction relief appeal for filing with the Court. Petitioner is simultaneously being served with a copy of this Return.

Please let me know if I can provide anything additional to the Court on this matter.

Sincerely,

Samuel L. Key  
Assistant Attorney General  
SC Bar #103206

SLK/ks

cc: Victor R. Seeger, Esquire  
Victim Advocacy Division