

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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CERTIORARI TO BEAUFORT COUNTY  
Court of Common Pleas  
Post-Conviction Relief  
The Honorable R. Lawton McIntosh, Circuit Court Judge

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S.C. SUPREME COURT

Appellate Case No. 2018-000646

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LEWIS CHISOLM,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

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**RETURN TO PETITION FOR WRIT OF CERTIORARI<sup>1</sup>**

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<sup>1</sup>Petitioner filed both a Petition for Writ of Certiorari and a Petition for Writ of Certiorari Pursuant to White v. State. This Return responds to both Petitions.

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## **STATEMENT OF ISSUES**

- I. **The Post-Conviction Relief Judge properly determined Petitioner failed to establish any constitutional deprivations entitling him to relief because the record established Petitioner knowingly and voluntarily entered a guilty plea with the advice of competent counsel.**
  
- II. **The Post-Conviction Relief Judge properly denied relief because Petitioner failed to establish he was entitled to belated appellate review of his guilty plea pursuant to White v. State.**

## STATEMENT OF THE CASE

During their September 2015 term, the Beaufort County Grand Jury indicted Petitioner Lewis Chisolm for criminal sexual conduct with a minor, second-degree. Jared Newman, Esquire (Trial Counsel), represented Petitioner. Assistant Solicitor Julie Kate Keeney prosecuted the case. Petitioner pled guilty as indicted before the Honorable Eugene C. Griffith, Jr., Circuit Court Judge (Plea Judge) On November 9, 2015, the Plea Judge sentenced Petitioner to imprisonment for ten years, and Petitioner filed a timely notice of appeal. The South Carolina Court of Appeals dismissed the appeal on June 6, 2016, and issued the Remittitur on May 23, 2016.

Thereafter, on July 11, 2016, Petitioner filed an application for post-conviction relief. (Appendix, pp. 119-125). The State (Respondent) served its return on April 17, 2017, moving for a more definite and certain statement of the allegations, and requesting an evidentiary hearing. (Appendix, pp. 127-133). Petitioner amended his application on May 30, 2017. (Appendix, pp. 135-137).

An evidentiary hearing was convened on January 29, 2018, before the Honorable R. Lawton McIntosh, Circuit Court Judge (Post-Conviction Relief Judge). Petitioner was present and represented by Tommy A. Thomas, Esquire. Assistant Attorney General Christian Saville of the South Carolina Attorney General's Office represented the State. At the hearing, Petitioner testified and presented testimony from Trial Counsel and an assistant pastor of the church Petitioner had attended prior to his conviction. By written order filed on March 13, 2018, the Post-Conviction Relief Judge denied and dismissed Petitioner's application. Thereafter, Petitioner filed a timely notice of appeal, and on December 17, 2018, filed a Petition for Writ of Certiorari and a Petition for Writ of Certiorari Pursuant to White v. State.

## 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, 787 S.E.2d 525, 527 (2016) and Jordan v. State, 406 S.C. 443, 752 S.E.2d 538, 540 [2013])

Pure questions of law are 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. The Post-Conviction Relief Judge properly determined Petitioner failed to establish any constitutional deprivations entitling him to relief because the record established Petitioner knowingly and voluntarily entered a guilty plea with the advice of competent counsel.**

Petitioner argues the Post-Conviction Relief Judge erred in denying relief on the ground Petitioner did not freely and voluntarily enter his guilty plea. He asserts Trial Counsel was ineffective by failing to pursue his claim that he only gave a crucial written confession because the State threatened to put his son in the Department of Social Services' custody. He further asserts he only pled guilty because Trial Counsel's ineffective representation led to the written confession being admissible at trial. The record completely belies his assertions.

"A defendant who pleads guilty usually may not later raise independent claims of constitutional violations." Gibson v. State, 334 S.C. 515, 514 S.E.2d 320, 324 (1999) (*citing Rivers v. Strickland*, 264 S.C. 121, 213 S.E.2d 97, 98 [1975])). "[A] defendant's decision whether or not to plead guilty is often heavily influenced by his appraisal of the prosecution's case," and therefore, the waiver of constitutional rights cannot be deemed knowing and voluntary when a defendant lacks knowledge of material evidence in the prosecution's possession. *Id.* (internal citations omitted).

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008). In a post-conviction relief action, an applicant bears the burden of proving the allegations in his or her application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper

functioning of the adversarial process that [it] cannot be relied upon as having produced a just result.” Strickland, 466 U.S. at 688; Butler, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland. First, the applicant must prove that counsel’s performance was deficient. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney’s performance by its “reasonableness under prevailing professional norms.” *Id.* (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 334 S.E.2d at 814. “Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” *Id.* (citing Strickland, 466 U.S. at 690). The applicant must overcome this presumption to receive relief. Cherry, 386 S.E.2d at 625.

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, 386 S.E.2d at 625. With respect to guilty plea counsel, an applicant must show that there is a reasonable probability that, but for counsel’s alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52 (1985).

“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, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing Blackledge v. Allison, 431 U.S. 63, 74 [1977]). “Indeed, where a thorough colloquy is conducted,

courts must exercise caution in setting aside the guilty plea.” Garren v. State, 423 S.C. 1, 813 S.E.2d 704, 710 (2018); *see also* Jamison v. State, 410 S.C. 456, 765 S.E.2d 123, 129-30 (2014) (“guilty plea[s] must be treated as final in the vast majority of cases,” and 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”).

#### Pre-trial & Plea Proceedings

Petitioner’s criminal case was originally called for trial on August 10, 2015, before the Honorable Brooks Goldsmith, Circuit Court Judge, Trial Counsel moved pre-trial to suppress a written statement Petitioner gave during a third interview by police. During the pre-trial hearing, Trial Counsel vigorously cross-examined the detective who took the written statement from Petitioner about the circumstances, including two previous interviews, leading up to the third interview and Petitioner’s written statement. He also specifically addressed the fact Petitioner had an attorney with him during the second interview, as well as Petitioner’s contention the detective threatened to have the Department of Social Services come and take custody of Petitioner’s son if Petitioner did not give the written statement.<sup>2</sup> (Appendix, pp. 12-40).

Petitioner testified at the hearing that when the detective came to Petitioner’s home for the third interview, Petitioner asked to call the attorney who attended the previous interview. He further testified that after he asked about calling the attorney, the detective threatened to call social services to come take Petitioner’s son away if Petitioner did not give him the statement. He

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<sup>2</sup>The detective testified the attorney who attended the second interview specifically told him that he was not representing Petitioner.

claimed he felt coerced into giving the confession reflected in his written statement. (Appendix, pp. 41-51).

Trial Counsel argued the written statement should be suppressed because Petitioner's right to counsel was violated when the detective conducted the third interview without an attorney present, and the statement was not voluntary because of the threats and coercion regarding calling in social services to take custody of Petitioner's son. The circuit court ruled the statement was admissible because Petitioner was not in custody when the detective conducted the third interview at Petitioner's house, and Petitioner's testimony regarding the circumstances of the interview was not credible.<sup>3</sup> (Appendix, pp. 67-76).

On November 9, 2015, Petitioner appeared before the Honorable Eugene Griffin, Circuit Court Judge, (Plea Judge) and pled guilty to criminal sexual conduct with a minor, second degree. Prior to accepting the plea, the Plea Judge questioned Petitioner extensively under oath about his understanding of the underlying facts and the consequences of pleading guilty. The Plea Judge also asked if Petitioner had been threatened or coerced into pleading guilty, and Petitioner stated "no." Petitioner also told the Plea Judge he was satisfied with Trial Counsel's representation, and he was entering the plea knowingly and voluntarily. (Appendix, pp. 82-92). The Plea Judge accepted the plea, and sentenced Petitioner to ten years incarceration. (Appendix, pp. 92-97).

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<sup>3</sup>After the ruling, the circuit court continued the trial because Petitioner had sustained a gunshot wound at some point between when court adjourned after the hearing testimony and when court reconvened the next morning. Trial Counsel indicated Petitioner would not be able to assist in his defense.

### Post-Conviction Relief Proceeding

At the post-conviction relief hearing, Trial Counsel testified about the investigation he conducted in Petitioner's criminal case, and stated he had many discussions with Petitioner regarding whether to go to trial or enter a guilty plea. He stated he was very concerned about the written confession Petitioner gave during the third interview, and he moved to suppress it on several grounds, including the absence of an attorney during the interview, as well as the alleged threats or coercion regarding social services and Petitioner's son. Trial Counsel indicated his investigation revealed the victim was very articulate and had reported the incident immediately after it happened, and her accounts of the incident remained consistent. He stated he believed the admission of the written statement presented an appealable issue, and he did file an appeal on Petitioner's behalf. (Appendix, pp. 147-171).

Petitioner testified Trial Counsel did not properly advise him of the potential sentence he could receive if he pled guilty. He claimed Trial Counsel told him law enforcement had a partial DNA profile, but when he reviewed the discovery after he pled guilty, he discovered there was no DNA evidence. He further claimed Trial Counsel did not tell him the written statement would be admitted at trial until the day he pled guilty. He testified he felt pressured to write the statement because he had two drug charges hanging over his head, and he pled guilty in part because the written statement was going to be admitted at trial. (Appendix, pp. 172-181).

On cross-examination, Petitioner admitted he told the Plea Judge he had understood his discussions with Trial Counsel, and that no one had made promises or threats to induce his plea. He stated he made those statements because Trial Counsel told him before the hearing to just go through the motions before the court. (Appendix, pp. 182-184).

After hearing the testimony and arguments, the Post-Conviction Relief Judge found Petitioner's guilty plea was knowing and voluntary, and Petitioner's testimony regarding the circumstances of his written confession and guilty plea was not credible. The Post-Conviction Relief Judge further found Petitioner's right to appeal from his guilty plea was adequately explained to him at the plea hearing, and Trial Counsel did file an appeal on his behalf, so Petitioner was not entitled to an appeal under White v. State. (Appendix, pp. 188-192). By Order filed March 15, 2018, the Post-Conviction Relief Judge reiterated those findings, and further found Petitioner failed to establish any prejudice because there was overwhelming evidence of his guilt, and no alleged deficiency of Trial Counsel could have reasonably induced Petitioner to plead guilty rather than proceed to trial. (Appendix, pp. 195-205).

It is clear from the record that Trial Counsel thoroughly investigated the State's case against Petitioner, and vigorously sought suppression of the very incriminating written confession on all the grounds Petitioner now asserts Trial Counsel should have been raised, including coercion.<sup>4</sup> It is also clear that facing a trial at which his confession would be admitted, Petitioner freely and voluntarily entered a guilty plea hoping for a more lenient sentence.

As the Post-Conviction Relief Judge found, there was overwhelming evidence of Petitioner's guilt, and particularly in light of his confession, Trial Counsel's advice to plead guilty was reasonable. Further, other than Petitioner's self-serving testimony at the post-conviction relief hearing, which the Post-Conviction Relief Judge found was not credible, Petitioner failed to establish he would not have pled guilty but for Trial Counsel's purported deficiency. Hill v.

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<sup>4</sup>Petitioner's assertion Trial Counsel focused more on the right to counsel argument than the coercion argument is patently belied by the record. Trial Counsel raised both grounds, and very vigorously argued both. (Appendix, pp. 52-61, 68-74).

Lockhart, 474 U.S. 52 (1985) (with respect to guilty plea counsel, an applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial).

Ultimately, the record establishes Petitioner made a knowing, voluntary, and intelligent decision to plead guilty after thoroughly discussing his case, and specifically the circumstances leading to his written confession, with Trial Counsel. Trial Counsel's performance was in accordance with professional standards in all respects, and Petitioner failed to establish any prejudice. Therefore, the Post-Conviction Relief Judge's denial of post-conviction relief based on ineffective assistance of counsel is amply supported by the record, and the Petition for Writ of Certiorari should be denied.

**II. The Post-Conviction Relief Judge properly denied relief because Petitioner failed to establish he was entitled to belated appellate review of his guilty plea pursuant to White v. State.**

Petitioner asserts Trial Counsel was ineffective for failing to take all steps to perfect his appeal, even though Trial Counsel did timely file a direct appeal on his behalf, and was under no contractual obligation to pursue an appeal on Petitioner's behalf. However, the Post-Conviction Relief Judge properly determined Petitioner was not entitled to belated appellate review of his guilty plea pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974).

Following a trial, counsel is required to make certain the defendant is made fully aware of the right to appeal. White, 208 S.E.2d at 39. In the absence of an intelligent waiver by the defendant, counsel must either initiate an appeal, or comply with the procedure in Anders v. California, 386 U.S. 738 (1967). *Id.* The standard for a guilty plea differs, however, and absent extraordinary circumstances, such as when there is reason to think a rational defendant would want to appeal (for example, because there are clear non-frivolous grounds for appeal), or when the defendant reasonably demonstrated an interest in appealing, there is no constitutional requirement that a defendant be informed of the right to a direct appeal from a guilty plea. Turner v. State, 380 S.C. 223, 670 S.E.2d 373, 374 (2008) (*citing* Roe v. Flores-Ortega, 528 U.S. 470 [2000] and Weathers v. State, 319 S.C. 59, 459 S.E.2d 838 [1995]).

In the present case, the Post-Conviction Relief Judge found Petitioner was expressly advised of the right to appeal, and Trial Counsel did file an appeal on Petitioner's behalf. Trial Counsel testified he also sent Petitioner the appellate court notice indicating a written explanation showing the appealable issues associated with an appeal from a guilty plea must be filed with the notice of appeal, even though the notice indicated a copy went directly to Petitioner from the court.

(Appendix . pp. 158-161). *See* Rule 203(B)(iv), SCACR (appeals from guilty pleas require written explanation of appealable issues associated with the appeal). Based on filings in the appellate court record, the Post-Conviction Relief Judge found Trial Counsel in fact filed the required explanation on January 29, 2016, and after reviewing the explanation, the appellate court dismissed the appeal. (Appendix, pp. 201-202).

The record amply supports the Post-Conviction Relief Judge's finding that Petitioner was not denied his right to a direct appeal from his guilty plea, and in fact was afforded a direct appeal with Trial Counsel's assistance. Accordingly, the Petitioner for Writ of Certiorari Pursuant to White v. State should be denied.

**CONCLUSION**

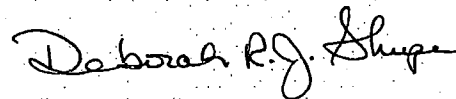
Based on the foregoing, this Court should deny both the Petition for a Writ of Certiorari and the Petition for Writ of Certiorari Pursuant to White v. State. If the Court grants either Petition, the State seeks permission to more fully brief the issues herein.

Respectfully submitted,

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By: \_\_\_\_\_  
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March 18, 2019

STATE OF SOUTH CAROLINA  
In the Supreme Court

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CERTIORARI TO BEAUFORT COUNTY  
Court of Common Pleas  
The Honorable R. Lawton McIntosh, Circuit Court Judge

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Appellate Case No. 2018-000646

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LEWIS CHISOLM, #196380,

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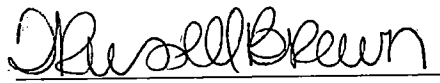
**CERTIFICATE OF SERVICE**

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

**Tommy A. Thomas, Esquire**  
**Law Office of Tommy A. Thomas**  
**Post Office Box 88**  
**Irmo, South Carolina 29063**

This 18<sup>th</sup> day of March, 2019

  
TAMIEKA RUSSELL-BROWN  
LEGAL ASSISTANT



ALAN WILSON  
ATTORNEY GENERAL

**RECEIVED**  
MAR 18 2019  
S.C. SUPREME COURT

March 18, 2019

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

**Re: Lewis Chisolm, #196380 v. State of South Carolina**  
**Appellate Case No. 2018-000646**  
**Lower Court Case No. 2016-CP-07-1560**

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the Return to Petition for Writ of Certiorari. By copy of this letter we are serving opposing counsel today.

Sincerely,

*for* Deborah R.J. Shupe  
S.C. Bar No. 5098  
Assistant Attorney General

DRJS/trb  
Enclosures

cc: Tommy A. Thomas, Esquire (2 copies)