

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BARNWELL COUNTY
Court of Common Pleas

Honorable J. Mark Hayes, II, Circuit Court Judge

App. Case No.: 2018-0266

MICHAEL C. KENNEDY,

RESPONDENT,

V.

THE STATE,

PETITIONER.

RETURN TO PETITION
FOR WRIT OF CERTIORARI

RECEIVED

MAY 03 2019

S.C. SUPREME COURT

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STATEMENT OF ISSUES ON APPEAL

The PCR court erred in granting post-conviction relief on grounds that Kennedy was denied effective assistance of counsel and the relief granted to him by the South Carolina Supreme Court where Kennedy was given the proper relief granted to him and Resentencing Counsel was not ineffective for failing to object to the resentencing hearing.

The PCR court erred in granting post-conviction relief on grounds that Resentencing Counsel was not ineffective for failing to address a conflict of interest, failing to prepare for the resentencing hearing, and failing to make meaningful argument on his client's behalf where there was neither deficiency nor prejudice in any of Resentencing Counsel's actions

RESTATEMENT OF ISSUES ON APPEAL

The lower court properly found that Respondent was ordered a new sentencing hearing by the South Carolina Supreme Court and was not provided effective assistance at the mere resentencing hearing, which resulted in prejudice to Respondent.

The lower court properly held that Respondent is entitled to a belated direct appeal pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974).

STATEMENT OF THE CASE

Respondent is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Barnwell County Clerk of Court. Respondent was indicted during the May 2007 term of the Barnwell County Grand Jury for Armed Robbery Degree (2007-GS-06-0144) and Assault and Battery with Intent to Kill (ABWIK) (2007-GS-06-0145).

On May 7, 2007, Respondent appeared in front of the Honorable Thomas A. Russo for a bond reduction hearing. Respondent was represented by Franchot A. Brown, Esquire. Judge Russo denied Respondent's request for bond reduction.

Later the same day, Respondent appeared in front of the Honorable Thomas A. Russo and entered a plea as indicted. Respondent was sentenced to a term of thirty years for armed robbery and a consecutive term of twenty years, suspended to a probation term of three years following the service of ninety days, for ABWIK.

Respondent filed for reconsideration, and a reconsideration hearing was held on January 26, 2007. At the conclusion of the hearing, Judge Russo denied Respondent's request for reconsideration.

Thereafter, a timely Notice of Appeal was filed, and the appeal was perfected by M. Celia Robinson, Esquire, of the South Carolina Office of Appellate Defense. After the filing of an Anders brief, the South Carolina Court of Appeals dismissed the appeal by Order dated January 25, 2011. The Remittitur was issued on February 10, 2011.

On February 22, 2011, Respondent filed an Application for Post Conviction Relief in Barnwell County (2011-CP-06-0088). Petitioner filed a Return on August 4, 2011. On July 8, 2013, Respondent appeared in front of the Honorable R. Ferrell

Cothran, Jr. for an evidentiary hearing. Respondent was represented by Melissa J. Armstrong, Esquire. Respondent testified, along with Franchot A. Brown, Esquire. By written order filed August 23, 2013, Judge Cothran denied and dismissed the Application.

A timely Notice of Appeal was filed. The appeal was perfected by Wanda H. Carter, Esquire, of the South Carolina Office of Appellate Defense. A Petition for Writ of Certiorari was filed on September 10, 2014. Petitioner filed a Return on November 26, 2014. By Order dated January 22, 2015, the South Carolina Supreme Court held: “We grant the petition, dispense with further briefing, reverse the order denying the PCR Application, and grant petitioner a new sentencing hearing.” App. p. 146.

Following the issuance of the Order, a hearing was held in front of the Honorable Thomas A. Russo on May 14, 2015 in Saluda County. Respondent was present and represented by Franchot A. Brown, Esquire. At the conclusion of the hearing, Judge Russo ordered Respondent’s sentences were to be run concurrently, removing the term of probation and suspended sentence.

Respondent filed an Application for Post Conviction Relief on May 16, 2016. On June 8, 2017, Respondent, through counsel, submitted an Amendment to Application for Post Conviction Relief, which was made to clarify his Application, and alleged as follows:

1. Applicant was denied the relief granted by the South Carolina Supreme Court, “ a new sentencing hearing,” when prior plea counsel represented Applicant and the Honorable Thomas A. Russo resided over Applicant’s mere resentencing, which failed to cure the bias that tainted the prior sentencing hearing.
2. Ineffective assistance of resentencing hearing counsel (Franchot Brown, Esquire) for failing to address the conflict that resulted from Applicant successfully getting PCR relief from his prior representation, failing to

prepare with Applicant prior to his resentencing hearing, and failing to make any meaningful argument on Applicant's behalf.

The State filed a Return and Partial Motion to Dismiss on August 31, 2007. In response, Respondent filed an additional Amendment to Application for Post Conviction Relief on September 8, 2017, which stated:

In general, Applicant would allege that his rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, as well as pursuant to Article I, Section 14 of the South Carolina Constitution, were violated. Applicant would further amend his Application for Post-Conviction Relief to contain the following specific allegations:

1. Applicant was denied effective assistance of counsel and a new sentencing hearing as ordered by the South Carolina Supreme Court when prior plea counsel represented Applicant and the Honorable Thomas A. Russo resided over Applicant's mere resentencing, which failed to cure the issue raised on appeal that resulted in the order for a new sentencing hearing.¹
2. Ineffective assistance of resentencing hearing counsel (Franchot Brown, Esquire) for failing to address the conflict that resulted from Applicant successfully getting PCR relief from his prior representation, failing to prepare with Applicant prior to his resentencing hearing, failing to make meaningful argument on Applicant's behalf, and failure to file an appeal.

An evidentiary hearing was conducted on September 22, 2017 in front of the Honorable J. Mark Hayes, II, at the Aiken County Courthouse. Respondent was present and represented by Tricia A. Blanchette, Esquire. Petitioner was represented by Julie A. Coleman, Esquire. Respondent testified, and his counsel also called Franchot A. Brown, Esquire, to the stand. The lower court had before him a copy of the filings from the underlying Application, Respondent's SCDC records, the transcript from the May 14,

¹ Issue raised on PCR appeal: Trial counsel erred in failing to object to the personal opinions of a former circuit court judge who appeared at all three of petitioner's court proceedings and acted in the role of a solicitor by opposing petitioner's bond reduction and resentencing requests and asking for harsh sentencing as punishment for the criminal acts perpetrated upon a beloved local icon in order to gain community redemption and send a community message of zero tolerance for crime because such participation by the former judge was improper and the majority of the information submitted by the former judge was irrelevant to sentencing.

2015 hearing (hereinafter “2015 hearing”), and the following records from Appellate Case No. 2013-002334: the Petition for Writ of Certiorari, Return, Appendix, Supplemental Appendix and Order of the South Carolina Supreme Court dated January 22, 2015. After hearing argument from both sides, Judge Hayes took the matter under advisement.

On October 25, 2017, Judge Hayes issued an Order Granting Application for Post Conviction Relief, which was filed on November 3, 2017. Thereafter, Petitioner filed a Motion Pursuant to Rule 59(e), SCRCR, on November 27, 2017. At the lower court’s request, Respondent filed a response on January 3, 2018. Judge Hayes issued an Order denying Petitioner’s motion on January 22, 2018, which was filed on February 5, 2018.

On February 21, 2018, Petitioner filed a Notice of Intent to Appeal. On April 30, 2018, Tricia A. Blanchette moved for substitution and was substituted in as counsel via Order of this Court dated June 12, 2018. On October 17, 2018, the Petition for Writ of Certiorari and Appendix were filed. On October 25, 2018, a Motion Regarding Cross-Appeal was filed, and an Order granting Respondent’s Motion was issued on January 11, 2019. On February 12, 2019, Petitioner filed a Supplemental Appendix. On April 4, 2019, Petitioner filed a Second Supplemental Appendix, from which this Return to Petition for Writ of Certiorari and a Brief follow.

STANDARD OF REVIEW

In a Post Conviction Relief Appeal, great deference is given to the lower court's findings of fact but deference is not given to conclusions of law. Smalls v. State, 810 S.E.2d 836 (2018). The existence of "any evidence" of probative value is sufficient to uphold the lower court's ruling on findings of fact. Webb v. State, 281 S.C. 237, 314 S.E.2d 839 (1984). Questions of law are reviewed *de novo*, and the appellate court "will reverse the decision of the PCR 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 lower court properly found that Respondent was ordered a new sentencing hearing by the South Carolina Supreme Court and was not provided effective assistance at the mere resentencing hearing, which resulted in prejudice to Respondent.

By way of the Petition for Writ of Certiorari, it appears Petitioner is seeking to dissect the lower court's straightforward and cohesive ruling into segmented arguments in an attempt to get a reversal of the relief originally ordered by the South Carolina Supreme Court in 2015 that Respondent still has not been afforded. In doing so, the State misapprehends the lower court's ruling and the State appears to concede the primary concern voiced by the lower court – that the mere “resentencing” was a simple review of the sentencing hearing proceedings found unfair and requiring a new sentencing hearing.²

The lower court properly held:

After careful review of the record and consideration of the evidentiary hearing testimony, this Court finds that Applicant was ordered “a new sentencing hearing” by the South Carolina Supreme on January 22, 2015 and he was not provided effective assistance at the mere resentencing hearing conducted on May 14, 2015. This Court further finds, as will be addressed in detail below, that Applicant was severely prejudiced as a result of counsel's ineffective assistance.

App. p. 248.

In reaching this finding, the lower court examined the record and the testimony before him. As addressed in the lower court's order, the place to begin in the record is the finding of the South Carolina Supreme Court that resulted in the hearing, called a resentencing hearing by Petitioner, on May 14, 2015. By Order dated January 22, 2015, the South Carolina Supreme Court held: “We grant the petition, dispense with further

² In the State's Petition and at the evidentiary hearing, the sentencing hearing was repeatedly called a resentencing. Additionally, at the evidentiary hearing, Petitioner stated “the Supreme Court obviously found a violation of due process based on the victim's testimony at the hearing.” App. p. 241, lns. 18-20.

briefing, reverse the order denying the PCR Application, and grant petitioner a new sentencing hearing.” App. p 146.

Petitioner argues the lower court “misinterpreted” the Supreme Court’s order and erred in finding that Respondent was not afforded the relief granted by the Supreme Court. When the lower court’s ruling is properly read, the lower court did not simply rule that Respondent was not afforded the relief ordered by the Supreme Court, but he addressed the primary issue before him as to “whether Applicant was afforded effective representation at the hearing conducted on May 14, 2015.” App. p. 248. Respondent submits there is ample evidence in the record to support the lower court’s ruling that Respondent was not provided effective assistance and suffered resulting prejudice.

As addressed by the lower court, the Sixth and Fourteenth Amendments to the United States Constitution guarantee criminal defendants the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984). As conceded by the State at the evidentiary hearing, this guarantee of effective assistance carries through to sentencing and/or a resentencing hearing. App. pp. 203-7. Where an application for post conviction relief 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 the trial cannot be relied upon as having produced a just result." Id. 466 U.S. at 686; see Butler v. State, 286 S.C. 441 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 691. The applicant must overcome this presumption in order to receive relief. Bell

v. State, 321 S.C. 238 (1996); see also Cherry v. State, 300 S.C. 238 (1989); Rule 71.1(e), SCRPC.

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117 (citing Strickland, 466 U.S. at 688). 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.

Despite repeatedly calling the hearing a resentencing, Petitioner seems to argue that Respondent was afforded the relief ordered and received effective assistance since there was no input from Judge Peeples, counsel argued vigorously on Respondent's behalf and counsel did not have a conflict in representing Respondent. As a result, Petitioner argues for reversal. On the other hand, Respondent argues that Petitioner has improperly dissected the lower court's ruling, which is supported by the record, so it is necessary to review the record relied upon by the lower court in making his findings to see why the lower court must be upheld.

As a threshold matter, the lower court considered that the South Carolina Supreme Court summarily granted the Writ of Certiorari from the denial of the 2011 PCR Application and granted a "new" sentencing hearing without further briefing or arguments.³ As a result, the lower court found the Petition for Writ of Certiorari

³ The Order reads as follows: "We grant the petition, dispense with further briefing, reverse the ordering denying the PCR Application, and grant petitioner a new sentencing hearing." App. p. 146.

(hereinafter "Petition) was material to his decision. By way of the Petition, the following issue was raised:

Trial counsel erred in failing to object to the personal opinions of a former circuit court judge who appeared at all three of petitioner's court proceedings and acted in the role of a solicitor by opposing petitioner's bond reduction and resentencing requests and asking for harsh sentencing as punishment for the criminal acts perpetrated upon a beloved local icon in order to gain community redemption and send a community message of zero tolerance for crime because such participation by the former judge was improper and the majority of the information submitted by the former judge was irrelevant to sentencing.

App. p. 126.

As was argued in the Petition, the lower court noted that former Circuit Court Judge Rodney Peeples (hereinafter "Judge Peeples") was present and actively involved at Respondent's bond reduction hearing, plea proceeding and resentencing hearing in front of the Honorable Thomas A. Russo. At the bond reduction hearing, Judge Peeples seemed to take over the proceeding by questioning the police officer before strongly voicing his objection to the request for a lower bond. App. p. 12 - 16. The hearing ended with the reduction being denied and Judge Peeples recommending that the case be called to trial that week. App. p. 21.

Somehow, later the same day, Respondent appeared in front of Judge Russo to enter a plea to all charges. As was addressed in the Petition, Judge Peeples "argued solicitor style to the effect that petitioner should receive a stiff sentence for the crimes perpetrated upon Richardson, who was their community icon, as proper retribution and as a way to send a message to the community that such conduct would not be tolerated." App. pp. 49-53, 126.

Immediately after Judge Peeples' extensive comments, the court handed down a sentence of thirty years for armed robbery and a consecutive term of twenty years, suspended to a probation term of three years following the service of ninety days, for ABWIK. App. pp. 54-59. The court stated: "I can just tell you that what Judge Peeples asked me to do is what I have to do and that is do what I believe is right.. for the community, for the individuals who are standing before me, and just, you know, hope and pray that that ends up being right." App. p. 54, lns. 10-16.

Thereafter, counsel filed a motion for reconsideration. App. p. 61. At the hearing held on June 26, 2007, Judge Peeples was present. When Attorney Brown began speaking he was interrupted by Judge Peeples. 2nd Supp. p. 13. Attorney Brown provided argument regarding the sentence received by an attorney in Richland County and provided the federal sentencing guidelines. 2nd Supp. p. 18. He was again interrupted by Judge Peeples who stated the argument was "highly inappropriate and irrelevant." 2nd Supp. p. 19. Thereafter, counsel stated that he respected Judge Peeples and noted his representation of the family at no cost. 2nd Supp. p. 22. After a brief response from the Solicitor, Judge Peeples again took over the proceeding. 2nd Supp. pp. 24-33. The court refused counsel's request to respond to Judge Peeples comments. 2nd Supp. p. 33. In making his ruling denying Respondent's motion for reconsideration, the court noted that "people" would say that Judge Peeples influenced his decision, and he clarified that he respected him, along with defense counsel, but he was not influenced. 2nd Supp. p. 36, lns. 1-6. It is apparent that this Court's prior ruling shows lack of satisfaction with this explanation and that the court, himself, was recognizing the impropriety of the proceedings, whereby he

issued a sentence and denied reconsideration following Judge Peeples' involvement, which included his factual conclusions that lacked evidentiary support.

At the 2011 PCR hearing, Attorney Brown explained his belief that Respondent's sentence should have been between ten to fifteen years and his reasoning for filing the motion for reconsideration. Supp. App. p. 30, Ins. 10-15, p. 33, Ins. 17-20, p. 34, ln. 9. Attorney Brown also made it clear that he was greatly concerned with Judge Peeples' involvement and comments, and he should have objected. Supp. App. p. 36, ln. 14 – p. 37, ln. 5.

Following the denial of the PCR Application, as addressed above, the Petition for Writ of Certiorari contained the following argument:

Had trial counsel objected to Judge Peeples' personal request for severe sentencing for petitioner as redemption for Richardson and his rally cry per the conscious of the community goal at petitioner's sentencing, then a reasonable probability exists that the sentence petitioner received would have been different. Counsel was aware that his inaction resulted in petitioner's receipt of an unfair sentence, which is why he filed a sentencing reconsideration motion, after which time a sentencing reconsideration hearing was held in the case.

App. p. 131. The Petition further addressed how Judge Peeples "sales pitch became flat-out inflammatory and laced with character attacks" at the reconsideration hearing. App. p. 131.

After only considering the Petition and Return, this Court ordered a "new sentencing hearing." App. p. 146. On May 14, 2015, Respondent appeared with Attorney Brown in front of Judge Russo. At the beginning of the hearing, Judge Russo confirmed that everyone understood that they were all present "for another sentencing hearing." App. p. 152. Thereafter, the State argued: "The Supreme Court, I realize, gave it back to

you for you to reconsider, but I don't believe anything's changed that you should reconsider." App. p. 158, lns. 12-15.

Defense counsel began his presentation by stating: "I know I would waste the Court's time to try to re-argue the case." App. p. 153, ln. 13-14. Then, he reminded the court of his arguments at the reconsideration hearing and addressed the time Respondent had spent incarcerated. App. pp. 153-55. He concluded by asking the court to consider removing the restitution and a reduction in sentence. App. p. 155.

During the hearing, Judge Russo made several references to his review of the transcripts of the prior proceedings before reaching his decision to run the sentences concurrent, citing restitution as his reasoning. App. pp. 151, 157, 160-1. Specifically, Judge Russo stated:

I have the transcript from the plea. And I have reviewed it, not once but twice. And I realize that maybe this is just semantics but I guess that from what I read from the Supreme Court's order, this isn't a reconsideration of the sentence. It is a remanding it back for a re-sentencing hearing.

And the only reason I point that out is, is, Mr. Brown, you mentioned that the Court – what other reason would the Court possibly have to send it back for me to reconsider but to reduce it since it was the maximum sentence to begin with.

App. p. 160, lns. 11-23.

In response, counsel did not raise any concern with Judge Russo's reliance on the record, which the Supreme Court reviewed and was the basis for ordering a "new" sentencing hearing, nor did counsel pick up on Judge Russo's comments that it was a re-sentencing hearing. By way of the Petition, the argument is advanced that counsel vigorously argued on Respondent's behalf for a lighter sentence since his previous arguments were reviewed by Judge Russo at the "resentencing." Petition pp. 15-16.

Respondent submits that that this argument affirms the lower court's concern, as addressed herein, that Judge Russo relied upon the prior proceedings during the mere resentencing hearing.

At the evidentiary hearing on the underlying application, Mr. Brown was called to the stand, and he acknowledged that he recalled his representation of Respondent. App. p. 208. As to Mr. Brown's credibility, the lower court found him credible on the matters he could recall. App. p. 248.

After being shown the transcript from the prior evidentiary hearing and being asked about his prior admission that he should have objected to Judge Peeples involvement, he explained why he was concerned as follows:

Because Judge Peeples was overwhelming, and he acted as though he was the prosecuting attorney, as opposed to an outsider. He was no longer a circuit court judge. And he just literally took over the courtroom. And – and he intimidated – I feel as though he intimidated Judge Russo. I – I – I – can't feel any different about that. I – I – I felt it then, and I felt it now. And I raised on the – I think, the resentencing hearing. I think I asked the – I think I raised it. I know I raised it before Judge Russo, but he denied that that was, in fact, had any influences on him. But I found it very difficult to that.

App. p. 210, ln. 1 – p. 211, ln. 3. As reflected in the transcript and noted by the lower court, Mr. Brown did not raise his concern, as he mistakenly thought, at the hearing. App. pp. 153-55.

When asked about how he ended up representing Respondent at the hearing following an evidentiary hearing where he admitted his failure to object and the matter of his ineffective assistance being before the Supreme Court, he responded: "I was advised to be present. And I did think it was a resentencing. And the whole thing proceeded as though it was a resentencing hearing." App. p. 212, lns. 18-20. He continued:

And I read the comments by everybody. Everybody's on the page for resentencing. It was supposedly – if it was, in fact – if you are correct and it should've been a new sentencing hearing, then it was not a new sentencing hearing.

App. p. 212, ln. 22 – p. 213, ln. 1.

He testified that he was unaware of the appeal and Supreme Court's Order. App. pp. 213-14. He further testified that if he had been found ineffective for his prior representation he would have raised a concern with continuing to represent Respondent.⁴ App. pp. 213-14.

On cross-examination, Respondent asked Mr. Brown about the facts of the case and Respondent's sentence. App. pp. 217-19. He responded he did not know what Judge Russo found, but he was “overwhelmed by the sentence. I just thought it was way out of line. And – I still feel that way today.” App. p. 219, ln. 20 – p. 220, ln. 3. He further responded:

That's just how I feel. Now, was it racial bias or – but I really think, in my heart, Judge Peebles was saying to Judge Russo and – nonverbally but by all of his actions in the Court, when you come up for – for reappointment, I'm going to be there to speak against you. That's how I felt. And Judge Russo just moved the way Judge Peebles – that he thought Judge Peebles wanted him to rule.

App. p. 220, lns. 10-16.

⁴ The Petition for Writ of Certiorari argues at length that the lower court should be reversed since counsel's representation of Respondent did not amount to a conflict of interest. This argument is prime example of the lower court's order being improperly dissected. The lower court reasoned that counsel was not aware of the argument that was presented on appeal or that a “new sentencing hearing” had been ordered by the South Carolina Supreme Court. At no point did the lower court make a finding regarding a conflict of interest but merely addressed counsel's testimony that he would not have proceeded with representing Respondent had he known what had transpired. App. pp. 251-3. Furthermore, as addressed below, Respondent was concerned that it was a conflict for Attorney Brown to appear as his counsel following the PCR proceedings. App. pp. 229-30. As addressed herein, the lower court ruled on the matters of effective assistance and prejudice not as to whether counsel's representation amounted to a conflict of interest under the controlling case law.

When Respondent took the stand, he explained the events that took place in 2015. App. p. 225. He was moved from Lieber to the county facility, and he believed he was there “for the new sentencing hearing ordered by the Supreme Court.” App. p. 225, Ins. 10-15. He recalled seeing Mr. Brown the day of the hearing, and asking him what he was doing there. App. p. 225. Mr. Brown informed him that he had been ordered to be there the day before at noon. App. p. 225. After consulting with the Solicitor, Mr. Brown informed him that the Judge was going to take away the probation and restitution. He explained that he did not have an opportunity to raise his concern with Mr. Brown representing him or that he was not being given a new sentencing hearing to Mr. Brown or the court. App. pp. 228-30. He testified that he did not want Mr. Brown to represent him following the PCR addressing his ineffective assistance. App. pp. 229-30.

After considering the applicable case law, the record and the evidentiary hearing transcript the lower court held:

Based upon the record before this Court and the testimony offered at the evidentiary hearing, this Court finds that counsel rendered ineffective assistance, which allowed the sentencing court to once again deny Applicant a fair sentencing hearing. The 2015 hearing transcript and the evidentiary hearing establishes that counsel was not aware nor advocating for the relief ordered by the South Carolina Supreme Court. Counsel’s representation was not reasonable under professional norms.

App. p. 253.

Turning to prejudice, the lower court reasoned:

Here, the resulting prejudice is evident from the record of the mere resentencing hearing conducted in May 2015. The South Carolina Supreme Court ordered that Applicant receive a “new” sentencing hearing, yet Judge Russo, without objection from counsel, simply reviewed Applicant’s sentence in conjunction with the prior tainted record, not only once but twice. Hearing Transcript p. 13, Ins. 12-14. Therefore, the prejudice suffered by Applicant in the May 2015 hearing was even greater

than the prejudice present when the South Carolina Supreme Court granted a “new” not more prejudicial sentencing hearing.

App. pp. 253-4.

The lower court made additional findings of prejudice based upon the record and concluded:

Therefore, this Court is compelled to find that Applicant be granted a new sentencing hearing in front of a circuit court judge that has not reviewed or relied upon the prior unconstitutional proceedings. See Locklear v. Harvey, 273 S.C. 58, 254 S.E.2d 293 (1979).

App. p. 254.

Respondent submits there is ample evidence in the record to support the lower court’s finding that his mere resentencing hearing resulted in prejudice that was even greater than the prejudice present when the Supreme Court granted a new sentencing hearing. Recently, in Frierson, this Court addressed the prejudice analysis in a case stemming from a guilty plea and noted: “The crux of the inquiry is whether counsel’s ineffective performance affected the outcome of the plea process, not whether the defendant would have been successful had he gone to trial. Alexander v. State, 303 S.C. 539, 542, 402 S.E.2d 484, 485 (1991).” Id. In affirming as modified, this Court held:

Because the prejudice inquiry in a case involving a guilty plea is so limited, it was error for the court of appeals to conduct an overwhelming evidence analysis in this case. See Smalls, 422 S.C. at ___, 810 S.E.2d at 843-47 (surveying cases that discuss overwhelming evidence - all of which involved a conviction obtained at trial).

Id. Here, counsel’s ineffective assistance directly impacted Respondent’s plea process, specifically his sentencing, which was not cured by the mere resentencing hearing in May 2015. As a result, the ruling of the lower court should be upheld.

- II. The lower court properly held that Respondent is entitled to a belated direct appeal pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974).

The lower court properly held that Respondent is entitled to a belated direct appeal pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974). By way of his Order the lower court held:

Based upon the record and testimony offered at the evidentiary hearing, this Court finds that a belated appeal should be granted, but this Court is concerned that the appeal would be taken from a proceeding with constitutionally deficient counsel advocating for Applicant. Therefore, this Court finds that the granting of belated appeal from the 2015 hearing is superseded by the granting of a new sentencing hearing. Nevertheless, this Court finds that if Respondent chooses to appeal this Order, Applicant may pursue a belated appeal through the filing of a notice of cross-appeal or by following the proper procedure with the South Carolina Supreme Court.

App. p. 255.

In Jones v. State, 382 S.C. 589, 596, 677 S.E.2d 20, 23 (2009), the South Carolina Supreme Court cited to Roe v. Flores-Ortega, 528 U.S. 470, 480 (2000) and held:

[C]ounsel has a constitutionally imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are non-frivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing.

The Supreme Court also noted that absent extraordinary circumstances, there is no constitutional requirement that a defendant be informed of the right to a direct appeal from a guilty plea. Jones, 382 S.C. at 596, 677 S.E.2d at 23 (citing Turner v. State, 380 S.C. 223, 224, 670 S.E.2d 373, 374 (2008)). “One extraordinary circumstance which would require counsel to advise a defendant of the right to appeal from a guilty plea would arise when the defendant inquires about an appeal.” Jones, 382 S.C. at 596, 677 S.E.2d at 23 (quoting Weathers v. State, 319 S.C. 59, 61, 459 S.E.2d 838, 839 (1995)).

At the evidentiary hearing, Mr. Brown could not recall if he had advised Respondent of his right to appeal the sentencing hearing in 2015. App. pp. 214-15. When pressed by the State, he stated: "I'm going to have to say that I did not do that. And I feel that's truly an honest answer." App. p. 222, lns. 21-23. As the lower court correctly noted, the sentencing court did not advise Respondent about his right to appeal.

When asked, Respondent recalled Mr. Brown wishing him the best of luck, but not discussing his right to appeal. App. p. 231. Since an appeal was not filed, he filed a PCR Application to address what transpired following the Supreme Court's Order. App. pp. 231-2.

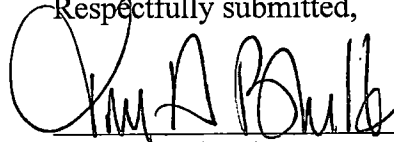
As the lower court's order correctly indicates, Petitioner did not oppose Respondent's request for a belated appeal from the hearing held in May 2015. App. p. 254.

Respondent submits that the lower court correctly found that he should be allowed to pursue a belated appeal. Counsel's testimony establishes that he did not discuss an appeal with Respondent and Respondent testified that he wanted the hearing reviewed but he only knew how to file a PCR Application. Furthermore, Petitioner did not oppose this form of relief. Therefore, this Court should uphold the alternative relief granted by the lower court in the form a belated appeal pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974).

CONCLUSION

Based upon the foregoing, Respondent respectfully requests that this Court uphold the relief granted by the lower court in the form of a new sentencing hearing and/or find the alternative relief of a belated appeal was proper and order a new sentencing hearing thereby.

Respectfully submitted,



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May 1, 2019

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

APPEAL FROM BARNWELL COUNTY
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S.C. SUPREME COURT

Honorable J. Mark Hayes, II, Circuit Court Judge

App. Case No.: 2018-000266

MICHAEL C. KENNEDY,
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THE STATE,
PETITIONER.

CERTIFICATE OF SERVICE

I, Tricia A. Blanchette, Attorney for Respondent, hereby certify that a copy of the Return to Petition for Writ of Certiorari and Brief of Respondent were hand delivered this 3rd day of May 2019 to Megan Harrigan Jameson, Senior Assistant Deputy Attorney General, addressed as follows:

Office of the Attorney General
ATT: Megan Harrigan Jameson, Sr. Asst. Deputy AG
1000 Assembly Street, 5th Floor
Columbia, SC 29201



Tricia A. Blanchette
S.C. Bar No. 74904
PO Box 2147
Leesville, SC 29070
(803) 908-3266

May 3, 2019

LAW OFFICE OF
TRICIA A. BLANCHETTE

May 3, 2019
VIA HAND DELIVERY

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

RECEIVED

MAY 03 2019

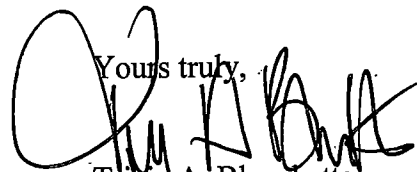
S.C. SUPREME COURT

RE: Michael Kennedy v. State; Appellate Case No.: 2018-0266

Dear Sir:

For filing the above referenced PCR appeal, please find an original and six copies of the Return to Petition for Writ of Certiorari, Brief of Respondent and Certificate of Service.

Thank you for your assistance with this matter. Please contact me if any additional information is needed.

Yours truly,

Tricia A. Blanchette
Attorney at Law

cc: Megan Harrigan Jameson, Office of the Attorney General
Michael Kennedy