ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to Greenville County

Honorable Alex Kinlaw, Jr., Circuit Court Judge

LORGIO D. MORALES,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2019-000072

PETITION FOR WRIT OF CERTIORARI

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ATTORNEY FOR PETITIONER

INDEX

ISSUES PRESENTED

1.

Whether the court erred where it found counsel provided effective representation where counsel did not file a notice of appeal after petitioner's trial, and where there was no evidence petitioner knowingly and intelligently waived his right to appeal, since absent an intelligent waiver by petitioner, counsel was obliged to initiate an appeal or comply with the procedure in *Anders v. California*, 386 U.S. 738 (1967)?

2.

Whether the court erred where it found counsel provided effective representation despite counsel's failure to assert petitioner's right to a speedy trial, where drugs were found in 2012 but the state did not arrest petitioner until 2015 and did not try petitioner until 2018, since the delay violated petitioner's constitutional right to a speedy trial?

STATEMENT

A Greenville County Grand Jury indicted petitioner for the offenses of: trafficking marijuana; manufacturing marijuana; theft of electrical current; and tampering with a utility meter for the purpose of growing a controlled substance. App. 319 – 326. Petitioner was tried before the Honorable Edward W. Miller and a jury, from February 5 – 6, 2018. App. 1. Petitioner retained Scott David Robinson to represent him. App. 1; App. 248, ll. 18-20. Katryna Owens represented the state. App. 1.

The state alleged that petitioner assisted in a large marijuana-growing operation that took place in a rented warehouse. App. 67, ll. 3-24; App. 161, ll. 4-11. After feeling a wave of heat when Duke Power cut off the electricity to the warehouse, police officers entered and found marijuana. App. 56, l. 12 – 59, l. 2; App. 66, l. 25 – 67, l. 24. Ultimately, six hundred and eighty-seven marijuana plants, and one hundred and twenty-five pounds of packaged marijuana were found. App. 154, ll. 2-7; App. 155, ll. 2-6. Thirty fingerprints that matched to petitioner were collected from the living area of the warehouse and from various objects in the warehouse including an electrical panel, air conditioning unit, and lamp hood. App. 85, ll. 12-14; App. 79, l. 23 – 85, l. 3.

Petitioner was convicted as indicted and he was sentenced to concurrent terms of imprisonment for twenty-five years; twenty years; time served; and ten years, respectively. App. 225, ll. 8-12. Petitioner also received a twenty-five thousand dollar fine. App. 225, ll. 8-12. Defense counsel did not file a notice of appeal.

On May 24, 2018, petitioner filed an application for post-conviction relief (PCR), and alleged, inter alia, that counsel provided ineffective assistance when he failed to file a direct appeal and when he failed to move for a speedy trial. App. 228 – 236. A hearing was held before

the Honorable Alex Kinlaw, Jr., on December 17, 2018. App. 244. R. Mills Ariail, Jr., represented petitioner. App. 244. Janell H. Gregory represented the state. App. 244.

Petitioner explained that he wanted to appeal his convictions and sentences. Petitioner said, "I wanted to appeal. But I was in Kirkland [Correctional Institution]. And I had no access to a phone, no access to—to any address of his. There's no way I could have contacted [defense counsel]." App. 265, ll. 14-16.

Critically, defense counsel Robinson never testified that he had discussed the possibility of an appeal with petitioner, and there was no evidence that counsel asked petitioner if he wanted to appeal. Instead, counsel said only that petitioner did not ask him to file an appeal. App. 280, ll. 1-2. Counsel added that "they've got rules now as far as appeals, you can't just file these appeals that are not necessary." App. 280, ll. 10-12. Despite the fact that petitioner had the right to appeal his conviction at trial, counsel said that he did not file a notice of appeal because he (counsel) did not believe there were any meritorious grounds for appeal. App. 280, ll. 6-10. Nevertheless, counsel did not comply with the procedure in *Anders v. California*, 386 U.S. 738 (1967).[1]

Petitioner also told the PCR court that he had "wanted a fast and speedy trial," that there was a three year delay between his arrest and his trial, and it was asserted that counsel was ineffective for failing to move for a speedy trial. App. 262, l. 17 – 263, l. 17. Petitioner also

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[1] *Anders* provides that when counsel believes an appeal to be "wholly frivolous, after conscientious examination of it, he should so advise court and request permission to withdraw." *Anders v. California*, 386 U.S. 738, 744 (1967). However, that request must be accompanied by a "brief referring to anything in the record that might arguably support the appeal." *Id.* A copy of counsel's brief should be furnished to the defendant with time allowed to raise any points that he chooses, whereupon the court should proceed, after full examination of all proceedings, to decide whether the case is wholly frivolous, granting counsel's request to withdraw if it finds the case to be frivolous, and affording assistance of counsel to argue the appeal if it finds legal points arguable on their merits. *Id.*

explained he was in Miami, Florida, prior to arrest but said that he remained in Spartanburg after his arrest and until his trial. App. 262, l. 25 – 263, l. 12.

Counsel agreed that there was a three year delay between the discovery of the marijuana and petitioner's arrest and that there was another three year delay between petitioner's arrest and his trial. Nevertheless, counsel said he did not think petitioner had been prejudiced. App. 282, l. 11 – 283, l. 22. Counsel also claimed petitioner had "several charges in Florida" and had to be extradited to South Carolina. App. 283, ll. 2-17.

When it issued an order of dismissal, the PCR court found that counsel's testimony was credible, and that petitioner's testimony was not credible. App. 309. As to counsel's failure to file an appeal, the PCR court wrote, "This Court finds credible [c]ounsel's testimony that [petitioner] never asked [c]ounsel to appeal his conviction. This Court finds credible [c]ounsel's testimony that he would have filed an appeal on [petitioner's] behalf if such a request had been made." App. 315.

The order of dismissal also addressed petitioner's claim of ineffective assistance based on counsel's failure to move for a speedy trial. App. 311 – 312. The court noted that there was a three year delay between petitioner's arrest and his trial, but found counsel was not deficient "because the delay in [petitioner's] trial was due, at least in part, to his extradition from Miami, Florida." App. 312. The order also stated that petitioner suffered no prejudice because he was "out on bond" until his trial began, and he "failed to provide any testimony showing how the delay affected his ability to prepare and present a defense in his case." App. 312.

This petition for writ of certiorari follows.

ARGUMENT

1.

The court erred where it found counsel provided effective representation where counsel did not file a notice of appeal after petitioner's trial, and where there was no evidence petitioner knowingly and intelligently waived his right to appeal, since absent an intelligent waiver by petitioner, counsel was obliged to initiate an appeal or comply with the procedure in *Anders v. California*, 386 U.S. 738 (1967).

Counsel's failure to file an appeal was deficient performance—he failed to consult with petitioner about an appeal, he failed to file Notice of Appeal, and petitioner had received a twenty-five year term of imprisonment and a twenty-five thousand dollar fine upon his conviction at trial.

A defendant must knowingly and intelligently waive the right to appeal from his conviction and sentence. *White v. State*, 263 S.C. 110, 118, 208 S.E.2d 35, 39 (1974). "**Following a trial, counsel is required to make certain the defendant is made fully aware of the right to appeal. 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)." *Turner v. State*, 380 S.C. 223, 224, 670 S.E.2d 373, 374 (2008) (emphasis added). Here, petitioner was convicted pursuant to a trial—counsel's failure to initiate a direct appeal or comply with *Anders* constituted ineffective assistance of counsel.

After a client is convicted and sentenced, "[c]ounsel should give the client his professional judgment whether an appeal should be taken and ascertain whether the client wishes to appeal." *Matter of Anonymous Member of the Bar*, 303 S.C. 306, 307, 400 S.E.2d 483, 483 (1991). An attorney, even if retained only for purposes of trial, "must serve and file Notice of

Appeal to protect the client's right to appeal." *Id.* "Counsel 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 nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing." *Roe v. Flores-Ortega*, 528 U.S. 470, 480 (2000). Here, counsel's failure to consult with petitioner about his right to appeal was deficient performance. Any rational defendant would want to appeal—petitioner was convicted pursuant to a trial and he received a lengthy term of incarceration and a large fine.

The defendant has the ultimate authority to make certain fundamental decisions regarding his case, including the decision whether to take an appeal. *Jones v. Barnes*, 463 U.S. 745, 751 (1983). Some decisions "are reserved for the client—notably, whether to plead guilty, waive the right to a jury trial, testify in one's own behalf, and forgo an appeal." *McCoy v. Louisiana*, 138 S.Ct. 1500, 1503 (2018). Here, counsel's decision not to file an appeal was an illegitimate one, since it was not counsel's decision to make.

The PCR court erred in denying petitioner a belated appeal since there was no evidence that petitioner knowingly and voluntarily waived his right to appeal. In *Simuel v. State*, 390 S.C. 267, 270, 701 S.E.2d 738, 739 (2010), this Court found the PCR court erred in denying Simuel a belated appeal pursuant to *White v. State*, *supra*, where there was "no probative evidence that [trial counsel] informed Petitioner of his right to a direct appeal, nor [was] there any evidence that Petitioner waived his right to a direct appeal." In *Simuel*, trial counsel "testified at the PCR hearing that he normally informs his clients of their right to appeal after trials. He did not specifically recall informing Petitioner of his right to appeal, but testified that he probably had that discussion with Petitioner." *Id.* at 269, 701 S.E.2d at 738. Trial counsel also testified Simuel

never asked him to appeal. *Id.* at 269, 701 S.E.2d at 739. The PCR court found trial counsel's testimony was credible, Simuel's testimony was not credible, and counsel's testimony showed Simuel never asked counsel to file an appeal. *Id.*

In reversing the decision of the PCR court and granting Simuel a belated appeal, this Court explained: "To waive a direct appeal, a defendant must make a knowing and intelligent decision not to pursue the appeal." *Id.* (internal quotations omitted) (quoting *Sheppard v. State,* 357 S.C. 646, 651, 594 S.E.2d 462, 465 (2004)). "Even considering the PCR judge's credibility findings, there is no probative evidence that: (1) Petitioner knowingly waived his right to a direct appeal, and (2) [trial counsel] made certain Petitioner was fully aware of his right to appeal." *Id.* at 271, 701 S.E.2d 739-40.

Here, as in *Simuel*, even considering the PCR court's credibility findings, there was no evidence in the record that petitioner made an intelligent waiver of his right to appeal, and there was no evidence that counsel made certain petitioner was fully aware of his right to appeal.

The Sixth Amendment to the United States Constitution guarantees an accused the right to effective assistance of counsel. U.S. CONST. amend. VI; *Strickland v. Washington*, 466 U.S. 668 (1984). Since petitioner did not waive his right to appeal, counsel was obliged to pursue an appeal and he did not do so. "When counsel's constitutionally deficient performance deprives a defendant of an appeal that he otherwise would have taken, the defendant has made out a successful ineffective assistance of counsel claim entitling him to an appeal." *Roe v. Flores-Ortega*, 528 U.S. at 484. Where there is no probative evidence that (1) a defendant knowingly waived his right to a direct appeal, and (2) counsel made certain the defendant was fully aware of

his right to appeal, the PCR court should grant an applicant a belated appeal. *Simuel*, 390 S.C. at 271, 701 S.E.2d at 740.[2]

[2] When the PCR court finds that an applicant is not entitled to appellate review pursuant to *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974), the applicant may petition the South Carolina Supreme Court for a writ of certiorari. *Davis v. State*, 288 S.C. 290, 291, 342 S.E.2d 60 (1986). "*Davis* promulgates procedural guidelines for review of PCR cases in which a petitioner's knowing and intelligent waiver of the right to direct appeal is at issue. *White* permits consideration of the full trial record on this issue in conjunction with appellate review of the PCR proceeding under an exception to the prohibition against appellate courts considering appeals in the absence of notice of direct appeal given and timely served." *Smith v. State*, 309 S.C. 413, 414-15, 424 S.E.2d 480, 481 (1992).

2.

The court erred where it found counsel provided effective representation despite counsel's failure to assert petitioner's right to a speedy trial, where drugs were found in 2012 but the state did not arrest petitioner until 2015 and did not try petitioner until 2018, since the delay violated petitioner's constitutional right to a speedy trial.

"The Sixth Amendment to the United States Constitution provides, 'In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial.' U.S. CONST. amend. VI. Similarly, the South Carolina Constitution provides that 'Any person charged with an offense shall enjoy the right to a speedy and public trial.' S.C. Const. art. I, § 14." *State v. Hunsberger*, 418 S.C. 335, 342, 794 S.E.2d 368, 371 (2016). The right to a speedy trial is "fundamental." *Barker v. Wingo*, 407 U.S. 514, 515 (1972).

Some of the factors which courts should assess in determining whether a defendant has been deprived of his right to a speedy trial are: "Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." *Barker*, 407 U.S. at 530.

The "triggering mechanism" of a speedy trial claim is the length of the delay. *State v. Langford*, 400 S.C. 421, 442, 735 S.E.2d 471, 482 (2012). "An accused's speedy trial right begins when he is indicted, arrested, or otherwise officially accused." *Hunsberger*, 418 S.C. at 342 (internal quotations omitted) (quoting *Langford*, 400 S.C. at 442, 735 S.E.2d at 482).

Although there is no fixed time in which a defendant must be tried, the right to a speedy trial may be violated where the delay is "arbitrary and unreasonable." *State v. Waites*, 270 S.C 104, 108, 240 S.E.2d 651, 653 (1978). In *Doggett v. U.S.*, 505 U.S. 647, (1992), "the United States Supreme Court suggested in dicta that a delay of more than a year is 'presumptively prejudicial.'" *State v. Cooper*, 386 S.C. 210, 217, 687 S.E.2d 62, 66 (Ct. App.

2009). *Accord Langford*, 400 S.C. at 442-43, 735 S.E.2d at 482 (twenty-three month delay between arrest and trial was presumptively prejudicial length of time). When the length of time is presumptively prejudicial, it "triggers the remaining *Barker* inquiry." *Id.*

Here, the length of the delay was three years. Petitioner was arrested on February 11, 2015, he was indicted on February 16, 2016, and he was tried February 5 – 6, 2018. App. 282, l. 11 – 283, l. 12; App. 1; App. 319 – 326; App. 262, l. 17 – 263, l. 17. This time frame weighs in favor of petitioner, is presumptively prejudicial and triggers the speedy trial analysis with regard to the remaining three factors: (2) the reason for the delay; (3) the defendant's assertion of the right; and, (4) prejudice to the defendant.

As to the second *Barker* factor, the reason for the delay was unclear. Although counsel said he thought petitioner had charges in Florida and had to be extradited, petitioner explained that while he had been in Florida, he remained in Spartanburg after his arrest and until his trial. App. 283, ll. 2-17; App. 262, l. 25 – 263, l. 12. There was no evidence that petitioner fought extradition. Further, when the solicitor recited petitioner's criminal record at sentencing, his last conviction in Florida was in 2008. App. 222, l. 23 – 223, l. 6. Because counsel did not challenge the state's failure to try petitioner in a timely manner, the record is silent as to any reason the state had to delay trying the case. This factor is neutral and should not weigh against petitioner since the reason for the delay was unclear.

As to the third *Barker* factor—whether the defendant asserted the right—his counsel's failure to assert the right by moving for a speedy trial forms the basis for petitioner's claim of ineffective assistance of counsel.

As to the fourth *Barker* factor, petitioner was prejudiced by the three year delay between arrest and trial. Prejudice to the defendant should be viewed in light of the defendant's interest

"(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired." *Barker*, 407 U.S. at 532. "[E]ven if an accused is not incarcerated prior to trial, he is still disadvantaged by restraints on his liberty and by living under a cloud of anxiety, suspicion, and often hostility." *Id.* at 533.

"The United States Supreme Court also recognized that excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or even identify." *State v. Hunsberger*, 418 S.C. at 351, 794 S.E.2d at 376 (citing *Doggett*, 505 U.S. at 655). Counsel's failure to advocate for a speedy trial on behalf of petitioner likely compromised the trial in ways that are impossible to identify due to temporal remoteness.

The Sixth Amendment to the United States Constitution guarantees an accused the right to effective assistance of counsel. U.S. CONST. amend. VI; *Strickland v. Washington*, 466 U.S. 668 (1984). Appellate courts of other states have found that failure to demand a speedy trial may be ineffective assistance of counsel. *See Brown v. State*, 829 So. 2d 975, 976 (Fla. Dist. Ct. App. 2002); *Hilliard v. State*, 175 So. 3d 554, 559 (Miss. Ct. App. 2015); *Yocum v. State*, 107 So. 3d 219, 224 (Ala. Crim. App. 2011).

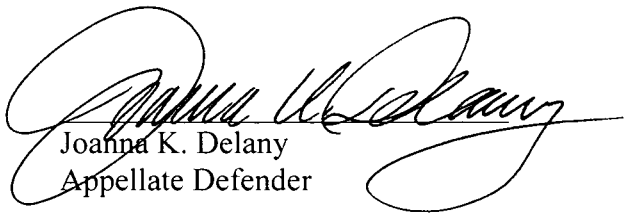
The "severe remedy of dismissal" of the indictment is the "only possible remedy" when the right to a speedy trial has been deprived. *Barker*, 407 U.S. at 522. "The remedy for a speedy trial violation is dismissal of the charges." *Hunsberger*, 418 S.C. at 342, 794 S.E.2d at 371. Here, had counsel asserted petitioner's right to a speedy trial and subsequently moved to dismiss the case, he may well have been successful. Counsel's failure to do so was deficient performance and petitioner was prejudiced as the reliability of his trial was compromised in ways that cannot be identified.

STATEMENT OF ISSUE ON APPEAL

Whether the court erred where it admitted evidence of drugs that were collected by police officers pursuant to a search warrant issued in 2012, where the return was not made until 2015, since S.C. Code Ann. § 17-13-140 requires a search warrant be executed and return made within ten days after it is dated?

CONCLUSION

By reason of the foregoing arguments, petitioner respectfully requests that a writ of certiorari be granted to allow full briefing on the issues.



Joanna K. Delany
Appellate Defender

ATTORNEY FOR PETITIONER

This 4th day of September, 2019.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of her ability this Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

Joanna K. Delany
Appellate Defender

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Janell Gregory, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Lorgio Danilo Morales, #375312, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 4th day of September, 2019.

Joanna K. Delany
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 4th day of September, 2019.

(L.S)
Notary Public for South Carolina
My Commission Expires: July 26, 2028