

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO RICHLAND COUNTY
Court of Common Pleas

The Honorable L. Casey Manning, Circuit Court Judge

Case No. 2008CP4004869

Frank Furtick, Jr.,..... Petitioner,

v.

State of South Carolina,..... Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

WHETHER THE PETITIONER IS ENTITLED TO A “BELATED DIRECT APPEAL” PURSUANT TO WHITE V. STATE WHEN THE RESPONDENT CONCEDED THAT TRIAL COUNSEL DID NOT FILE A TIMELY NOTICE OF APPEAL?

STATEMENT OF THE CASE

Petitioner Frank Furtick was found guilty of murder, one count of kidnapping, two counts of armed robbery, and two counts of assault and battery of a high and aggravated nature during the October 2007 term of the Richland County General Sessions Court before the Honorable G. Thomas Cooper, Judge. Petitioner was sentenced to life imprisonment on the murder conviction, thirty years imprisonment on each armed robbery conviction, and ten years on each aggravated assault conviction. App. 1-841. Petitioner was represented at trial by Danielle Payne and Lauren Mobley. Petitioner did not enjoy the benefit of a direct appeal in the case.

On July 7, 2008, petitioner filed a PCR application with the Richland County Office of the Clerk of Court. App. 843-848. A hearing was convened on April 1, 2009, at the Richland County General Sessions Court before Judge L. Casey Manning. App. 849-856. During the hearing, the issue of petitioner's request for a belated direct appeal was addressed. App. 849-856. On April 26, 2009, Judge Manning issued a consent order granting petitioner a belated direct appeal per White v. State, 263 S.C. 110,208 S.E.2d 35 (1974). App.858-861. Petitioner was represented at the PCR hearing by Tara Dawn Shurling. At the PCR hearing, the Respondent – based on discussions with trial counsel - indicated a willingness to concede to the only pending issue, i.e. a belated direct

appeal. App. 851 L. 13, p. 854 L. 23 – p. 855 L. 20. At the PCR hearing, the Petitioner's substitute PCR attorney (Ms. Tara Dawn Shurling) was relieved based the Petitioner's dissatisfaction with her representation related to a prior PCR (from a different conviction [96CP4003207]). App. 852. There were never any amended allegations filed and the Petitioner's only stated claim was a belated direct appeal. App. 844 – 847.

Petitioner filed a Rule 59(e) motion, but Judge Manning denied that motion. App. 862-865. The Petitioner filed a Petition for Writ of Certiorari on June 20, 2011. This return follows.

STANDARD OF REVIEW

The Uniform Post-Conviction Procedure Act requires the Applicant to "specifically set forth the grounds upon which the application is based." S.C. Code § 17-27-50. The proper standard of review of a post conviction relief evidentiary hearing is whether "any evidence of probative value" exists to sustain the post-conviction relief judge's findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). In a post-conviction relief proceeding, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). "Following a trial, counsel is required to make certain the defendant is made fully aware of the right to appeal. White v. State, [263 S.C. 110, 208 S.E.2d 35 (1974)]. 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, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967)." Turner v. State, 380 S.C. 223, 224, 670 S.E.2d 373, 374 (2008).

ARGUMENT

THE PETITIONER IS ENTITLED TO A “BELATED DIRECT APPEAL” PURSUANT TO WHITE V. STATE WHEN THE RESPONDENT CONCEDED THAT TRIAL COUNSEL DID NOT FILE A TIMELY NOTICE OF APPEAL

After discussing the PCR allegation with trial counsel there remained no genuine issue of fact; trial counsel explained that the Petitioner had requested that they appeal the conviction/sentence but that the notice of appeal was not timely/properly filed – and that even if the Petitioner had not expressed a desire to appeal she would have done so simply because of the fact that this was a life without the possibility of parole case. App. 856 L. 11 – 13. There was no good-faith reason to oppose the only claim specifically made in the PCR application, i.e. belated direct appeal. App. 844 – 847. The PCR court correctly agreed with the concession and issued an order addressing the only claim ever specifically presented. Rule 71.1(d), SCACR; S.C. Code § 17-27-80; S.C. Code § 17-27-90.

CONCLUSION

For the reasons stated above, this Court should affirm the PCR Court's Order regarding whether the Petitioner was denied the opportunity to timely file a notice of appeal following his conviction and sentencing. The Respondent's reply to the actual White v. State issue(s) are addressed in the accompanying *Brief of Respondent* (pursuant to White v. State).

Respectfully submitted,

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By: 

ATTORNEYS FOR THE RESPONDENT

Columbia, South Carolina
August 3, 2011

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal From Richland County
Honorable L Casey Manning, Circuit Court Judge

Frank Furtick, Jr., 231663,

Petitioner,

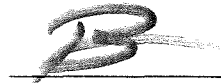
v.

STATE OF SOUTH CAROLINA,

Respondent.

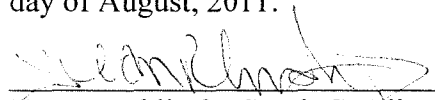
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Return to Petition for Writ of Certiorari has been served upon opposing counsel, Wanda H. Carter by mailing two (2) copies addressed to: South Carolina Office of Appellate Defense; 1330 Lady Street, Suite 401; Columbia, SC 29211; with postage prepaid, this 4th day of August, 2011.



BRIAN T. PETRANO
ATTORNEY FOR RESPONDENT

SWORN to before me this 4th
day of August, 2011.

 (L.S.)
Notary Public for South Carolina.

My Commission Expires: **My Commission Expires**
January 30, 2013