

STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED

Aug 17 2020

CERTIORARI TO LEXINGTON COUNTY
Court of Common Pleas
Edgar W. Dickson, PCR Judge

S.C. SUPREME COURT

RODNEY C. BRYAN

PETITIONER-RESPONDENT

v.

STATE OF SOUTH CAROLINA,

RESPONDENT-PETITIONER

App. Case No. 2019-001887

CROSS-PETITION FOR A WRIT OF CERTIORARI

ALAN WILSON
Attorney General

Samuel L. Key
Assistant Attorney General
S.C. Bar No. 103206

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211

ATTORNEYS FOR
RESPONDENT/PETITIONER

INDEX

STATEMENT OF ISSUE PRESENTED..... 1

STATEMENT OF THE CASE..... 2

STATEMENT OF THE FACTS..... 5

STANDARD OF REVIEW..... 7

ARGUMENT..... 8

The PCR court erred in granting Bryan a belated appeal pursuant to *White v. State* and finding ineffective assistance of appellate counsel for failing to brief whether Bryan knowingly and voluntarily waived his right to testify at trial because the relief granted is not the appropriate remedy for ineffective assistance of appellate counsel; Bryan never raised this issue below; the PCR court failed to acknowledge the deferential standard when assessing appellate counsel’s performance; and the PCR court erred by failing to conduct a prejudice analysis.

1. The relief granted is not the appropriate remedy for ineffective assistance of appellate counsel..... 8

2. Bryan never asserted ineffective assistance of appellate counsel for failing to argue he unknowingly and involuntarily waived his right to testify..... 9

3. The PCR court failed to acknowledge the deferential standard when assessing appellate counsel’s performance as appellate counsel reasonably did not brief the waiver issue because nothing in the record indicated Bryan did not knowingly and voluntarily waive his right to testify and the issue was not preserved..... 10

4. The PCR court erred by failing to conduct a prejudice analysis; Bryan cannot show prejudice because the waiver issue was unpreserved, and the trial court’s colloquy shows Bryan knowingly and voluntarily waived his right to testify..... 13

CONCLUSION..... 15

STATEMENT OF ISSUE PRESENTED

Whether the PCR court erred in granting Bryan a belated appeal pursuant to *White v. State*,¹ and finding ineffective assistance of appellate counsel for failing to brief whether Bryan knowingly and voluntarily waived his right to testify at trial where: (1) the relief granted is not the appropriate remedy for ineffective assistance of appellate counsel; (2) Bryan never asserted ineffective assistance of appellate counsel for failing to argue he unknowingly and involuntarily waived his right to testify; (3) the PCR court failed to acknowledge the deferential standard when assessing appellate counsel's performance as appellate counsel reasonably did not brief the waiver issue because nothing in the record indicated Bryan did not knowingly and voluntarily waive his right to testify and the issue was unpreserved; and (4) the PCR court erred by failing to conduct a prejudice analysis as Bryan cannot show prejudice because the waiver issue was unpreserved, and the trial court's colloquy shows Bryan knowingly and voluntarily waived his right to testify?

¹ 263 S.C. 110, 208 S.E.2d 35 (1974).

STATEMENT OF THE CASE

Petitioner-Respondent Rodney C. Bryan (Bryan) was indicted for criminal domestic violence of a high and aggravated nature (CDVHAN), violating an order of protection, kidnapping, and two counts of spousal sexual assault. App. 807-08; 810-11; 813-14; 716-19. Bryan was represented by Robert “Theo” Williams, Sr. of Williams, Stitely & Brink, PC. App. 1. Assistant Solicitors Shawn Graham and Emily Howard prosecuted the case. App. 1.

Bryan’s case proceeded to a jury trial before Judge R. Knox McMahon on July 14, 2008. App. 1. Bryan’s charges stem from domestic disputes with his wife, Rachel Bryan (Rachel), over the weekend of September 14–16, 2007. The State alleged Bryan assaulted Rachel, violated an order of protection, kidnapped her by not allowing her to leave the home or call for help, and raped her two times over the weekend. A.B. (daughter) and D.B. (son), Bryan and Rachel’s children, testified at trial. Daughter was ten-years-old at trial. Son was seven-years-old at trial. At trial, Bryan, through Counsel, conceded the assault and violation of order of protection charges, but contested the kidnapping and two spousal sexual battery charges. App. 400; 406-07.

The jury convicted Bryan as indicted for CDVHAN, violation of order of protection, kidnapping, and one count of spousal sexual battery. The jury acquitted Bryan of the second count of spousal sexual battery. App. 434; 816-17. Judge McMahon sentenced Bryan to serve concurrent terms of ten years for spousal sexual battery, ten years for CDVHAN, thirty days for violating an order of protection, and twenty-five years for kidnapping. App. 448-49; 809; 812; 815; 820. Bryan appealed.

Appellate Defender Robert Pachak represented Bryan on appeal. Appellate counsel perfected Bryan's appeal by submitting an *Anders*² brief arguing the following issue:

Whether the trial court erred in ruling that two minor children of the victim could testify against [Bryan] without him being physically present in the courtroom?

App. 454. Thereafter, Petitioner submitted a *pro se* brief to the Court of Appeals, presenting the following issues:

1. Did the trial judge abuse his discretion in finding the necessity to conduct an alternative procedure for the testimony of [Bryan's] ten-year-old daughter and seven-year-old son, by invoking S.C. Code Ann. § 16-3-1550(e)?
2. Did the trial judge err by failing to implement the correct procedure to invoke S.C. Code Ann. § 16-3-1550(e) and violate [Bryan's] Constitutional Rights by removing him from the Court Room prior to and during the testimony of [Bryan's] ten-year-old daughter and seven-year-old son?
3. Did the trial judge err in allowing the state[']s Expert Witness to be physically present in the Court Room during the victims['] testimony, for the purpose of the Expert Witness to bolster the victims['] testimony?
4. Did the trial judge err in allowing State's Exhibit No. 8 to be entered as evidence?
5. Did the trial judge abuse his discretion by failing to recuse himself?

App. 462.

The Court of Appeals dismissed the appeal “[a]fter thorough review of the record, [appellate] counsel’s brief, and Bryan’s *pro se* brief. App. 481; *State v. Bryan*, Op. No. 2010-UP-136 (S.C. Ct. App. filed Feb. 22, 2020). Bryan then filed a *pro se* petition for rehearing. App. 482-83. The State made its return to the petition for rehearing on April 5, 2010. App. 484-95. The Court of Appeals denied the petition for rehearing on April 23, 2010. App. 497-98. Bryan then petitioned

² *Anders v. California*, 386 U.S. 738 (1967).

the South Carolina Supreme Court for a writ of certiorari to the Court of Appeals. App. 499-511. The South Carolina Supreme Court dismissed the petition. App. 513-14. The case was remitted back to the circuit court on May 28, 2010. App. 515. Bryan sought review in the United States Supreme Court (USSC). App 516. The USSC denied review on January 10, 2011. App. 569.

Bryan commenced the underlying PCR action on February 17, 2011. App. 570-83. An evidentiary hearing into the matter convened on August 15, 2013, before Judge Edgar W. Dickson. App. 610. Petitioner was present and appeared *pro se*. App. 610. Assistant Attorney General J. Walt Whitmire represented the State. App. 610. The State moved to reconvene the evidentiary hearing to present trial counsel's testimony regarding his discussions with Bryan about Bryan's right to testify. App. 697; 699. The PCR hearing reconvened on November 13, 2014, before Judge Dickson. App. 699. On February 2, 2018, Judge Dickson found Bryan was "entitled to a new appeal as a result of appellate counsel's deficient performance regarding [Bryan's] right to testify," but denied relief on all other grounds. App. 741-53. The State timely moved to alter or amend pursuant to Rule 59(e), SCRE, on February 12, 2018. App. 754-65. Judge Dickson denied the State's motion on October 19, 2019. App. 804-05. On November 6, 2019, Bryan served his notice of appeal. The State served its notice of cross-appeal on November 13, 2019.

STATEMENT OF THE FACTS

On Friday, September 14, 2007, Rodney (Bryan) and Rachel (Rachel) Bryan picked up their children from daycare. Rachel was in the driver's seat, Bryan was in the passenger seat, and their children—Daughter, Son, and their youngest child (Child)—were in the back seat. App. 125; 156. They were sitting in the daycare parking lot, and Rachel was “messing with” Bryan's phone. App. 136-37; 139. Bryan was yelling at Rachel, and Rachel yelled, “Stop.” App. 137. Rachel then “popped” Bryan in the mouth. App. 138. Then, Bryan slapped Rachel, Rachel hit the steering wheel and got a black-eye “and it was swelling real bad.” App. 138; 157. Bryan told Rachel to “Drive.” Rachel drove home. App. 125-26; 157.

When they arrived home, Bryan went to the side of the house with “a wire cutting tool.” App. 127. Rachel and the children went inside. App. 129. Bryan then entered the house, and Rachel put a movie on for the children. Daughter went into her parents' bathroom and heard Rachel crying. Daughter, Son, and Child then went into the bathroom and saw Rachel crying on the ground. Bryan was in the doorway “looking angry at [Rachel].” App. 130. Bryan walked away, and Daughter helped Rachel get up off the floor. After Daughter helped Rachel off the bathroom floor, they all went into the living room. Then, “[Bryan] was trying to hurt [Rachel] in the living room, and then . . . [Bryan] looked at [Daughter] and then [Daughter] tried to call the police.” App. 130-31. Daughter dialed 911, but “for some reason it didn't work.” Daughter then went outside and saw the phone line was cut. Daughter went back inside. App. 131.

Once inside, Daughter got scared, and she, Son, and Child went in the “broken bathroom” because “it's the only bathroom that has a lock.” App. 131-32. After a while, Daughter exited the bathroom and tried to go to the neighbor's house to use the phone. App. 132. However, Daughter tried to leave and Rachel asked if Daughter was coming back. Daughter was scared, and this made

her more scared, so she, Son, and Child all three went to try and use the neighbor's phone. Bryan and Rachel stopped the children from going to the neighbors. App. 149. Son was about to enter the woods to get to the neighbor's house when "[Bryan] rushed over there and grabbed Son . . . by the stomach and squeezed . . . the side of his waist." App. 133. The children were crying and calling Bryan names, and Bryan put Son down and said "everything's going to be okay." App. 133. Everyone went back in the house, and the children went to sleep. App. 133-34.

The next morning, Bryan and Rachel were fighting again. Daughter recalled Bryan yelling "Fuck you," to Rachel. App. 134. Rachel was "a little angry and very sad." App. 134. The next Wednesday at school, Daughter told her teacher what happened the past weekend because "I was scared and I didn't want nothing [to] happen again because I was tired of Dad beating up my Mama." App. 135.

At trial, after the State rested its case, and trial counsel moved for a directed verdict on each charge, the trial court asked:

[Trial] Court: All right. [Counsel], do - - do I need to interview Mr. Bryan with regard to his right to testify or not testify?

(Sotto voce discussion between [Counsel] and the defendant.)

[Trial counsel]: Your Honor, you do not need to interview Mr. Bryan. I have talked to Mr. Bryan about him testifying and not testifying, and he is not testifying.

[Trial] Court: All right. With that being said then, and your advising the Court I do not need to interview him, I - - I will not do so. Again, I am sure you've explained it to him fully and completely, and if you need any more time to discuss that with him, you certainly may have that, [trial counsel].

[Trial counsel]: Your Honor, I think we're okay on this.

App. 373-74.

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).

To establish ineffective assistance of counsel, the PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness, and (2) the applicant sustained prejudice as a result of counsel's deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Cherry v. State*, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989). For ineffective assistance of appellate counsel, the applicant must first show deficiency—appellate counsel's performance “fell below an objective standard of reasonableness.” *Pantovich v. State*, 427 S.C. 555, 561, 832 S.E.2d 596, 599 (2019). The inquiry is retrospective, seeking to determine whether counsel was deficient at the time of the alleged error. *Strickland*, 466 U.S. at 689. Then an applicant must show prejudice “by demonstrating that, but for counsel's deficient performance, there is a reasonable probability the result of the appeal would have been different.” *Pantovich*, 427 S.C. at 561, 832 S.E.2d at 599.

ARGUMENT

The PCR court erred in granting Bryan a belated appeal pursuant to *White v. State*, due to ineffective assistance of appellate counsel for failing to brief whether Bryan knowingly and voluntarily waived his right to testify at trial for four reasons: (1) the relief granted is not the appropriate remedy for ineffective assistance of appellate counsel; (2) Bryan never asserted ineffective assistance of appellate counsel for failing to argue he unknowingly and involuntarily waived his right to testify; (3) the PCR court failed to recognize the deferential standard when assessing appellate counsel's performance as appellate counsel reasonably did not brief the waiver issue because nothing in the record indicated Bryan did not knowingly and voluntarily waive his right to testify, and the issue was not preserved; and (4) the PCR court failed to conduct a prejudice analysis; Bryan cannot show prejudice because the waiver issue was unpreserved, and the record shows Bryan knowingly and voluntarily waived his right to testify.

1. The relief granted is not the appropriate remedy for ineffective assistance of appellate counsel

Appellate counsel was not constitutionally ineffective. However, the PCR court erred in granting Bryan a belated appeal as this was not the appropriate remedy for ineffective assistance of appellate counsel. *See Ezell v. State*, 345 S.C. 312, 315-16, 548 S.E.2d 852, 854 (2001) (stating the appropriate remedy for ineffective assistance of appellate counsel is a new trial); *Pantovich*, 427 S.C. 555, 832 S.E.2d 596 (granting the applicant a new trial due to ineffective assistance of appellate counsel). Relief pursuant to *White v. State* is "limited to situations where the PCR applicant did not knowingly and intelligently waive his right to a direct appeal." *Douglas v. State*, 369 S.C. 213, 215, 631 S.E.2d 542, 543 (2006); *see also Legge v. State*, 349 S.C. 222, 224 n.1, 562 S.E.2d 618, 619 n.1 (2002) (noting the PCR court's grant of a belated appeal pursuant to *White v. State* due to ineffective assistance of appellate counsel was in error because *White* is inapplicable to cases where the applicant was not denied his right to a direct appeal).

There is no question Bryan received a direct appeal in this case. Accordingly, the PCR court erred in granting a belated appeal pursuant to *White v. State* because Bryan already had a

direct appeal of his conviction. As such, certiorari should be granted, and the portion of the PCR court's order granting a belated appeal should be reversed in part.

2. Bryan never asserted ineffective assistance of appellate counsel for failing to argue he unknowingly and involuntarily waived his right to testify, and therefore, the PCR court's ruling on this issue sua sponte is improper.

The PCR court, *sua sponte*, found appellate counsel was constitutionally ineffective for failing to brief whether Bryan knowingly and voluntarily waived his right to testify at trial. The PCR court found, “[Appellate counsel’s] failure to address [this issue] on appeal without explanation to the court [was] ineffective assistance of appellate counsel.” App. 751-51. The PCR court erred because it granted relief on an issue never raised. *See Mize v. Blue Ridge Ry. Co.*, 219 S.C. 119, 129-30, 64 S.E.2d 253, 258 (1951); *State v. Taylor*, 399 S.C. 51, 64, 731 S.E.2d 596, 603 (Ct. App. 2012); *Duncan v. Hampton Cty. Sch. Dist. No. 2*, 335 S.C. 535, 545 n.6, 517 S.E.2d 449, 454 n.6 (Ct. App. 1999) (all holding a matter not raised by one of the parties to be unpreserved for appeal even if the trial court raises it *sua sponte*). Therefore, certiorari should be granted, and the portion of the PCR court's order granting Bryan a belated direct appeal should be reversed and vacated.

Bryan had the burden of proving his allegations of ineffective assistance of counsel. *See Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (“The burden of proof is on the Applicant in post-conviction proceedings to prove the allegations in his application.”). Similarly, Bryan also had the burden of raising any and all issues he wished for the PCR court to consider. *See* Rule 71.1, SCRCPP (“[PCR counsel] shall insure that all available grounds for relief are included in the application and shall amend the application if necessary.”). Additionally, Bryan prosecuting his PCR action *pro se* does not allow the PCR court to rule on issues not before it. Indeed, “The right of self-representation is not a license . . . not to comply with relevant rules of procedural and substantive law.” *Faretta v. California*, 422 U.S. 806, 834 n.46 (1975). Bryan

knowingly and voluntarily waived his right to PCR counsel in this case. Therefore, Bryan should be held to the same procedural standards as a PCR attorney. If Bryan wanted the PCR court to rule on whether appellate counsel was ineffective for failing to brief whether he knowingly and voluntarily waived his right to testify, he needed to “duly raise” the issue in his PCR application or an amendment thereto.

Bryan simply never raised whether appellate counsel was ineffective for failing to brief whether he knowingly and voluntarily waived his right to testify at trial. Similarly, the PCR court erred in ruling on an issue that was never presented to the court. Because of these procedural errors, the issue of whether appellate counsel was ineffective for failing to brief whether Bryan knowingly and voluntarily waived his right to testify at trial is itself not preserved for this Court’s review. Certiorari should be granted, and the portion of the PCR court’s order granting Bryan a belated appeal should be reversed.

3. The PCR court improperly shifted the burden of proof to the State, and failed to recognize the deferential standard when assessing appellate counsel’s performance as appellate counsel reasonably did not brief the waiver issue because nothing in the record indicated Bryan did not knowingly and voluntarily waive his right to testify, and the issue was not preserved.

In any event, the PCR court erred in finding appellate counsel was deficient for failing to raise the waiver issue because appellate counsel the State does not have the burden of proof to “produce . . . evidence as to why it was not addressed,” and this issue was not preserved at trial so appellate counsel cannot be deficient for failing to raise it. App. 751.

First, the PCR court erred by shifting the burden of proof to the State in concluding, “The State produced no evidence as to why the issue was not addressed.” App. 751. It is well settled that a PCR applicant bears the burden of proving both deficient performance and prejudice. *See Strickland*, 466 U.S. at 687 (“First, the [applicant] must show that counsel’s performance was

deficient. . . . Second, the [applicant] must show that the deficient performance prejudiced the defense.”); *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (“The burden of proof is on the Applicant in post-conviction proceedings to prove the allegations in his application.”); Rule 71.1, SCRCP (“The applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence.”).

Here, Bryan needed to prove there was no reasonable explanation for why appellate counsel did not brief the waiver issue. Bryan presented no such reason; as shown above, Bryan did not even argue appellate counsel was ineffective for failing to present the issue. It was Bryan’s burden to overcome the high bar of *Strickland*, not the State’s burden of showing appellate counsel was not ineffective. *See Strickland*, 466 U.S. at 669 (“Judicial scrutiny of counsel’s performance must be highly deferential, and a fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time. A court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.”).

As noted above, the trial court asked trial counsel if it needed to advise Bryan of his right to testify at trial. “A defendant’s knowing and voluntary waiver of . . . constitutional rights . . . ‘may be accomplished by colloquy between the Court and the defendant, *between the Court and defendant’s counsel*, or both.’” *Pittman v. State*, 337 S.C. 597, 599, 524 S.E.2d 623, 625 (1999) (emphasis added). Here, the trial record showed that Bryan knowingly waived the trial court advising him of his right to testify at trial. The waiver was evinced by the trial court’s colloquy with trial counsel. Trial counsel not only did not object to the lack of questioning of his client, he informed the trial court, “[Y]ou do not need to interview Mr. Bryan. I have talked to Mr.

Bryan about him testifying and not testifying, and he is not testifying.” The trial court clarified that trial counsel was advising the court it did not need to interview Bryan. Trial counsel stated the trial court did not. App. 373-74.

Further, the waiver issue was not preserved for appeal as there was no objection to the trial court failing to advise Bryan of his right to testify at trial. *See State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003) (“In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge. Issues not raised and ruled upon in the trial court will not be considered on appeal.”); *State v. Byers*, 392 S.C. 438, 445, 710 S.E.2d 55, 58 (2011) (quoting *State v. Torrence*, 305 S.C. 45, 67, 406 S.E.2d 315, 327 (1991)) (“The rationale behind the requirement of a contemporaneous objection is to ‘enable [] trial judges to make reasoned decisions by appropriately developing issues by way of argument, both for or against any particular legal proposition.’”). It was reasonable for appellate counsel not to argue the unpreserved issue, as this Court directed in *Dunbar*, “An issue that was not preserved for review should not be addressed” 356 S.C. at 142, 587 S.E.2d at 694. Further, this Court has held appellate counsel is not ineffective for failing to raise an issue that was not preserved. *See Legge*, 349 S.C. at 225, 562 S.E.2d at 620 (finding appellate counsel not ineffective for failing to raise an unpreserved issue). Therefore, the PCR court erred in finding appellate counsel was ineffective because the issue was not preserved.

In concluding the State failed to produce no evidence as to why the issue was not addressed on appeal, the PCR court ignored the “highly deferential” standard that is to be applied to appellate counsel’s performance and improperly shifted the burden of proof to the State. Accordingly, certiorari should be granted, and the PCR court’s order granting a belated appeal due to ineffective assistance of appellate counsel should be reversed in part.

4. The PCR court erred by failing to conduct a prejudice analysis; Bryan cannot show prejudice because the waiver issue was unpreserved, and the trial court's colloquy shows Bryan knowingly and voluntarily waived his right to testify.

The PCR court granted Bryan a belated direct appeal due to ineffective assistance of appellate counsel for failing to present whether he knowingly and voluntarily waived his right to testify, finding the issue was not addressed by appellate counsel in Bryan's original appeal, and, "[t]he State produced no evidence as to why the issue was not addressed." App. 751. As noted above, the PCR court erred in shifting the burden of proof to the State and by not applying the deferential standard afforded to appellate counsel's decisions in determining deficiency. Additionally, the PCR court did not conduct a prejudice analysis, but, rather, granted a belated appeal because the issue was not briefed on direct appeal. The PCR court erred because the issue was not preserved, and the record shows that Bryan knowingly and voluntarily waived his right to testify at trial; therefore, the outcome of the appeal would not have been different. For the reasons discussed below, certiorari should be granted, and the portion of the PCR court's order granting Bryan a belated appeal should be reversed.

As noted above, an applicant must show prejudice "by demonstrating that, but for counsel's deficient performance, there is a reasonable probability the result of the appeal would have been different." *Pantovich*, 427 S.C. at 561, 832 S.E.2d at 599. Bryan cannot show the result of his appeal would have been different because, as discussed in section 3, *supra*, the waiver issue was not preserved for appellate review. *See Dunbar*, 356 S.C. at 142, 587 S.E.2d at 694 ("An issue that was not preserved for review should not be addressed . . ."). Here, not only is it unlikely his appeal would have been different, the issue would not have even been addressed because it was unpreserved.

Further, had the issue been preserved, the Court of Appeals would have affirmed Bryan's conviction because the record shows that Bryan knowingly and voluntarily waived his right to testify at trial.

"A defendant's knowing and voluntary waiver of . . . constitutional rights . . . 'may be accomplished by colloquy between the Court and the defendant, *between the Court and defendant's counsel*, or both.'" *Pittman*, 337 S.C. at 599, 524 S.E.2d at 625 (emphasis added). Here, the trial court's colloquy with trial counsel satisfies the knowing and voluntary waiver requirement. The trial court asked trial counsel if it needed to advise Bryan of his right to testify. App. 373-74. Then, the record shows there was a brief discussion between trial counsel and Bryan. App. 374. After their discussion, trial counsel informed the trial court it did not need to interview Bryan because trial counsel had spoken to Bryan about testifying, and Bryan was not going to testify. App. 374. The trial court then stated, "I am sure you've explained [the right to testify] to [Bryan] fully and completely, and if you need any more time to discuss that with [Bryan], you certainly may have that." App. 374. Trial counsel responded, "[W]e're okay on this." App. 374.

Had the issue been preserved and presented to the Court of Appeals by appellate counsel, the Court of Appeals would have affirmed Bryan's conviction. Accordingly, Bryan cannot show he was prejudiced by appellate counsel's alleged failure to present the waiver issue on direct appeal, and the PCR court erred in granting Bryan a belated appeal due to ineffective assistance of appellate counsel. For this reason, and the reasons stated above, certiorari should be granted, and the portion of PCR court's order granting a belated direct appeal should be reversed.

CONCLUSION

Based on the forgoing, the PCR court erred in granting Bryan a belated appeal due to ineffective assistance of appellate counsel. First, *if* appellate counsel was ineffective for failing to present the waiver issue, the appropriate remedy is a new trial, not a belated appeal as relief pursuant to *White v. State* is only available when an applicant was denied his right to a direct appeal. Bryan had a direct appeal; as such, a second appeal is not the appropriate remedy. Second, the PCR court erred by granting relief on an issue that was never presented. Third, the PCR court failed to apply the deferential standard when assessing appellate counsel's performance. Finally, the PCR court failed to apply the prejudice analysis. Therefore, certiorari should be granted, and the PCR court's order granting Bryan a belated appeal should be reversed in part and vacated in part.

Respectfully submitted,

s/Samuel L. Key
SAMUEL L. KEY
Assistant Attorney General
S.C. Bar No. 103206

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211

ATTORNEY FOR
RESPONDENT/PETITIONER

August 17, 2020