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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Kershaw County
The Honorable G. Thomas Cooper, Trial Judge
The Honorable Diane S. Goodstein, Post-Conviction Relief Judge

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Appellate Case No. 2019-002057

MICHAEL BOYKIN,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF ISSUES PRESENTED FOR CERTIORARI

Petitioner's Statement of Issues

I. Trial counsel erred in not specifically objecting to the trial judge's failure to issue a sealed sentence in the case after petitioner was tried *in absentia* because the sentence phase was a critical stage at trial during which petitioner had a right to be present.

II. The PCR judge erred in denying petitioner's request for a belated direct appeal because petitioner did not voluntarily and intelligently waive his right to a direct appeal.

Respondent's Counterstatement of Issues

I. The PCR court correctly determined Trial Counsel was not constitutionally ineffective for failing to specifically object to the trial judge's refusal to seal Petitioner's sentence because the issue was already preserved for appeal, because a sealed sentence was not legally required, and because Petitioner failed to establish any resulting prejudice from this alleged deficiency.

II. Petitioner is entitled to a belated appellate review pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974), because Petitioner did not knowingly, voluntarily, and intelligently waive his right to a direct appeal, even though he absconded from his trial prior to sentencing.

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections. In April 2017, the Kershaw County Grand Jury indicted Petitioner for possession with intent to distribute (PWID) crack cocaine—third offense (2017-GS-28-0768), possession of hydrocodone—third offense (2017-GS-28-0769), and possession of oxycodone—third offense (2017-GS-28-0770). Ronald Moak (Trial Counsel), Esquire, represented Petitioner. Assistant Solicitor Brett Perry of the Fifth Circuit Solicitor's Office prosecuted the case.

On January 8–11, 2018, Petitioner proceeded to a jury trial before the Honorable G. Thomas Cooper, Jr. During a break after the close of evidence but before closing statements, Petitioner absconded from his trial. The jury convicted Petitioner as indicted on the possession of hydrocodone and oxycodone charges, and the lesser-included offense of possession of crack cocaine. Immediately after the verdict was announced, Judge Cooper sentenced Petitioner to an aggregate term of fifteen years' imprisonment—concurrent terms of five years for the possession of hydrocodone and oxycodone charges, plus a consecutive ten years for possession of crack cocaine. Petitioner was eventually apprehended and taken into custody of the South Carolina Department of Corrections. Petitioner did not file a notice of appeal.

Petitioner timely commenced this PCR action on April 26, 2018, alleging the following:

1. Ineffective assistance of Counsel:
    a. "Counsel did not argue anything."
2. Sentencing:
    a. "Sentencing on evidence that was not correct."
3. Prejudice of the Court:
    a. "Picking of the jury."

Respondent made its return on July 16, 2018. On March 6, 2019, Applicant, through PCR counsel, amended his PCR application alleging:

1. Ineffective assistance of Counsel:
    a. Counsel failed to adequately relay and explain the plea offer to Applicant and advise Applicant to accept the plea offer;
    b. Counsel unreasonably advised Applicant, after Applicant testified at trial, that Applicant would be convicted and was going to receive more time, and Counsel failed to advise Applicant that he had the option to ask the trial court's permission to enter a guilty plea at this point;
    c. Counsel failed to investigate and reasonably prepare for trial;
    d. Counsel failed to object after the trial court failed to seal Applicant's sentence;
    e. Counsel failed to preserve Applicant's due process rights which were violated by the sentencing procedure that took place, and Counsel failed to ensure that Applicant was brought to court for a sentencing hearing;
    f. Counsel failed to file any post-trial motions on Applicant's behalf including a motion to reconsider the sentence; and
    g. Counsel failed to file a notice of appeal.

. An evidentiary hearing was held on June 19, 2019, at the Richland County Courthouse. Applicant was present and represented at the hearing by Kristy Goldberg, Esquire. Assistant Attorney General Brianna L. Schill of the South Carolina Office of the Attorney General represented Respondent. At the outset of the evidentiary hearing, PCR counsel indicated Petitioner would proceed only on the allegations set forth in the amended PCR application. Petitioner, Trial Counsel, and Petitioner's previous attorneys, James F. Lyon and Michael D. McMullen, Esquires, testified at the hearing. On September 19, 2019, the PCR court denied relief on all allegations and dismissed the action with prejudice. Thereafter, Petitioner filed a Motion to Alter or Amend Judgment pursuant to Rule 59(e) SCRCP, on October 11, 2019. Respondent subsequently filed a Return to Petitioner's motion to alter or amend. By Order dated November 18, 2019, and filed November 22, 2019, the PCR court denied Petitioner's motion to alter or amend in its entirety.

Petitioner filed a timely notice of appeal of the denial of post-conviction relief and the denial of his motion to alter or amend the judgment on December 13, 2019. Petitioner filed a

petition for writ of certiorari on November 20, 2020.

Statement of Facts Presented at Trial

Petitioner's charges stem from a police investigation regarding suspected narcotics activity at the Plantation Motel in Camden, South Carolina. (App. 69). During the investigation, Deputy Lawson and Investigator Lee Young of the Kershaw County Sheriff's Department witnessed two individuals leave the Plantation Motel and enter a taxi cab. (App. 70-71).

Shortly after the taxi's departure from the Planation Motel, the taxi driver committed a traffic infraction. (App. 70, l. 14-19). Law enforcement pulled the taxi cab over for this traffic infraction. (App. 70, l. 24-25). Law enforcement officers recognized Petitioner by sight as there were active bench warrants issued for Petitioner. (App. 71, l. 9-16). Lawson noticed Petitioner seemed visibly nervous and was sweating profusely. (App. 71, l. 22-25). Petitioner was taken to the detention center due to the active warrants on him. (App. 75-76). Law enforcement conducted a strip-search of Petitioner and found a bag of crack cocaine, as well as hydrocodone pills and oxycodone pills on Petitioner's person. (App. 76, l. 21-25).

The South Carolina Law Enforcement Division (SLED) submitted a drug analysis of the drugs found on Petitioner. (App. 99-103). Lynn Black, a SLED drug analyst, testified at Petitioner's trial. (App. 98-109). Black testified she determined through chemical analysis that Petitioner possessed 2.83 grams of crack cocaine and three five-milligram hydrocodone pills. (App. 100-104). Black testified that she did not perform a chemical analysis of the third drug found on Petitioner, but used pharmaceutical markings to determine that it was one ten-milligram oxycodone pill. (App. 100-102).

Petitioner presented his Rite Aid prescription history at trial. (App. 166-167). According to Petitioner's Rite Aid prescription history, Petitioner was prescribed: fourteen ten-milligram

oxycodone pills on November 4, 2017; twenty five-milligram hydrocodone pills on May 31, 2017; and twelve five-milligram oxycodone pills on June 26, 2016. (App. 168-170; 178-180).

After Petitioner rested his case but before closing arguments began, Petitioner absconded his trial. (App. 184-186). Subsequently, Trial Counsel asked the Court to seal Petitioner's sentence, suggesting that if Petitioner's sentence were to become public he might attempt to flee from law enforcement. (App. 229, l. 1-9). However, the trial court denied Trial Counsel's request on the record by stating, "[the sentence] is going to be probably pretty public when we leave here today." (App. 229, l. 7-8). Trial Counsel did not challenge Judge Cooper's ruling further. The trial court opined Petitioner's trial did not constitute a trial *in absentia* because Petitioner had the opportunity to appear, testify, and he in fact testified on his own behalf. (App. 186, l. 9-12).

STANDARD OF REVIEW

The standard of review for PCR matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839 (2018). When reviewing factual findings, appellate courts defer to the PCR court's factual findings and will uphold them if there is probative evidence in the record to support them. Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Smalls, 422 S.C. at 180-81, 810 S.E.2d at 839-40. Appellate courts will reverse the decision of the PCR court when controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

Petitioner asserts that Trial Counsel was ineffective for failing to object to the trial court's refusal to seal Petitioner's sentence and the PCR court erred by denying Petitioner a belated appeal pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974). The PCR court was correct in finding Trial Counsel was constitutionally effective where he did not object to the trial court's refusal to seal Petitioner's sentence because the issue was already preserved for appellate review, because sealing a defendant's sentence is not a legal requirement based on clearly established law, and therefore, Trial Counsel cannot be deficient on that basis, and because Petitioner failed to establish any resulting prejudice from this alleged deficiency.

However, Respondent agrees Petitioner did not knowingly, voluntarily, and intelligently waive his right to a direct appeal, and therefore, he is entitled to petition this Court for belated appellate review of direct appeal issues. Accordingly, this Court should grant Petitioner belated appellate review pursuant to White. However, the PCR court's remaining findings are supported by ample probative evidence and not premised on any errors of law, and, therefore, this Court should deny certiorari as to all other issues.

Petitioner, like all other defendants, has a right to the assistance of effective counsel as provided by the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008). Petitioner has the burden of proving the allegations in his PCR action, and when alleging counsel was constitutionally ineffective, he must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that it cannot be relied upon as having produced a just result." Strickland, 466 U.S. at 686. In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668.

First, Petitioner must prove counsel's performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). Petitioner must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, counsel's deficient performance must have prejudiced Petitioner such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. 668.

Moreover, Strickland does not require a finding of ineffectiveness merely for deviation from a rigid rule of representation. Rather, Strickland requires the applicant to prove "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. at 697. The function of the PCR court is to determine if "in light of all the circumstances, the identified acts or omissions were outside the wide range of professional competent assistance" required of a criminal defense attorney." Id. at 690.

Although courts may not indulge "post hoc rationalization" for counsel's decision-making that contradicts the available evidence of counsel's actions, Wiggins v. Smith, 539 U.S. 510, 526-527 (2003), neither may they insist counsel confirm every aspect of the strategic basis for actions. There is a "strong presumption" that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than "sheer neglect." Yarborough v. Gentry, 540 U. S. 1, 8 (2003). After an adverse verdict at trial even the most experienced counsel may find it difficult to resist asking whether a different strategy might have been better, and, in the course of that reflection, to magnify their own responsibility for an unfavorable outcome. Strickland, however, calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind. Strickland at 688; Harrington v. Richter, 562 U.S. 86 (2011).

With respect to prejudice, an applicant must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. It is not enough "to show that the errors had some conceivable effect on the outcome of the proceeding." Id. at 693. Counsel's errors must be "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id. at 687. Harrington, 562 U.S. 86.

"Surmounting Strickland's high bar is never an easy task." Padilla v. Kentucky, 559 U.S. 356, 371 (2010). An ineffective assistance of counsel claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the Strickland standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversarial process the right to counsel is meant to serve. Strickland, 466 U.S. at 689–690. Even under *de novo* review, the standard for judging counsel's representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials

outside the record, and interacted with the client, opposing counsel, and the judge. It is "all too tempting" to "second-guess counsel's assistance after conviction or adverse sentence." Id. at 689; see also Bell v. Cone, 535 U. S. 685, 702 (2002); Lockhart v. Fretwell, 506 U. S. 364, 372 (1993). The question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom. Strickland, 466 U.S at 690.

In assessing prejudice under Strickland, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. Wong v. Belmontes, 558 U.S. 15 (2009); Strickland, 466 U.S. at 693. Instead, Strickland asks whether it is "reasonably likely" the result would have been different. Id. at 696. This does not require a showing that counsel's actions "more likely than not altered the outcome," but the difference between Strickland's prejudice standard and a more-probable-than-not standard is slight and matters "only in the rarest case." Id. at 693, 697. The likelihood of a different result must be substantial, not just conceivable. Id. at 693; Harrington, 562 U.S. 86.

"In determining whether the applicant has proven prejudice, the PCR court should consider the specific impact counsel's error had on the outcome of the trial." Smalls v. State, 422 S.C. 174, 188, 810 S.E.2d 836, 843 (2018) (citing Strickland, 466 U.S. at 695-96 (explaining the court must analyze how individual errors of counsel affect the important factual findings in a particular case)). "In addition, the PCR court should consider the strength of the State's case in light of all the evidence presented to the jury." Smalls, 422 S.C. at 188, 810 S.E.2d at 843 (citing Jones v. State, 332 S.C. 329, 333, 504 S.E.2d 822, 824 (1998) ("In deciding whether Jones was prejudiced, we must bear in mind the strength of the government's case . . . ," and "we must consider the totality

of the evidence before the jury.")). "In general, the stronger the evidence presented by the State, the less likely the PCR court will find the applicant met his burden of proving prejudice." Smalls, 422 S.C. at 188, 810 S.E.2d at 843 (citing Strickland, 466 U.S. at 696 (stating "a verdict . . . only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support"). However, while the strength of the State case is one significant factor the PCR court must consider when determining whether an applicant can establish prejudice, it is generally not a categorical bar that precludes a finding of prejudice. Smalls, 422 S.C. at 188, 810 S.E.2d at 843. However, this Court has reiterated that there are rare cases where overwhelming evidence of an applicant's guilt precludes a finding of prejudice; in those cases, "the evidence must include something conclusive, such as a confession, DNA evidence demonstrating guilt, or a combination of physical and corroborating evidence so strong that the Strickland standard of 'a reasonable probability . . . the factfinder would have had a reasonable doubt'" cannot possibly be met." Smalls, 422 S.C. at 191, 810 S.E.2d at 845.

I. The PCR court correctly determined Trial Counsel was not constitutionally ineffective for failing to specifically object to the trial judge's refusal to seal Petitioner's sentence because the issue was already preserved for appeal, because a sealed sentence was not legally required, and because Petitioner failed to establish any resulting prejudice from this alleged deficiency.

Petitioner argues the PCR court erred in denying him relief because Trial Counsel was ineffective for not objecting to the trial court's refusal to seal Petitioner's sentence. However, Trial Counsel cannot be held ineffective because the issue is preserved for appeal as Trial Counsel requested that the sentence be sealed and the trial court ruled upon the request on the record, and because sealing a sentence is not a legal requirement and, therefore, Trial Counsel is not expected to be clairvoyant regarding this issue. Petitioner has also failed to establish any resulting prejudice

from this alleged deficiency. Accordingly, the PCR court's findings on this issue are correct and are not based on any errors of fact or law, and therefore, this Court should deny certiorari on this issue.

As noted above, Trial Counsel requested Petitioner's sentenced be sealed, stating: "One thing I would suggest, Your Honor, not that – I'm not trying to minimize anything, but maybe if you consider doing a sealed sentence because if he finds out, say, if you do hammer him, if he finds out what the sentence is it might affect his conduct. So I don't want to like encourage him to do something stupid." (App. 228, l. 25- 229, l. 6). The trial court denied this request by saying, "It is going to probably be pretty public when we leave here today," and then immediately proceeding with the sentencing. (App. 229, l. 7-9).

To the extent Petitioner argues Trial Counsel was ineffective because he failed to preserve the sealed sentence argument for appeal, the PCR court correctly found the issue was preserved for appeal. Trial Counsel preserved the issue by requesting that the trial court seal Petitioner's sentence, and the trial court ruled upon Trial Counsel's request on the record. Herron v. Century BMW, 395 S.C. 461 (2011) ("At a minimum, issue preservation requires an issue to be raised to and ruled upon by the trial judge."); Wilder Corp v. Wilke, 330 S.C. 71 (1998) (an issue "must have been raised and ruled upon by the trial judge to be preserved for appellate review."); cf. State v. Gee, 262 S.C. 373 (1974) ("It is well settled that an issue that has not been presented to or passed upon by trial judge will not be considered on appeal."). Trial Counsel is not required to continue objecting when the issue has been clearly raised and ruled upon. State v. Douglas, 367 S.C. 498, 521, 626 S.E.2d 59, 71 (Ct. App. 2006), aff'd in part, rev'd in part, 380 S.C. 499, 671 S.E.2d 606 (2009) ("A party must object at the first opportunity to preserve an issue for review. . . . Yet, this rule does not require defense counsel to harass the judge by making continued objections after

the trial court has ruled upon the issue.") (internal citations omitted). Therefore, Trial Counsel was not ineffective for not continuing to object to the trial court's refusal to seal Petitioner's sentence, as he had already received a ruling on the issue.

In any event, Petitioner's sentence was a legal sentence as it did not violate the applicable statutes and was within the trial court's discretion. Moreover, Petitioner acknowledged in his Return to Alter or Amend Judgment Pursuant to 59(e) SCRCP, that the issue of whether a sentence must be sealed when the defendant is not present at the time of sentencing is "surprisingly unclear." (App. 380). Further, Petitioner's motion acknowledged that while several cases in South Carolina's jurisprudence address the proper procedure for unsealing and enforcement of sealed sentences, none make a finding as to whether sealed sentences are legally required. (App. 380).

An Office of the Attorney General Opinion seems to indicate it is not a legal requirement to seal a sentence. See State of South Carolina Office of the Attorney General Informal Opinion, Hon. Robert K. Whitney (April 21, 1995) ("[W]ith respect to sealing of a sentence, although I am not aware of any legal requirement for this procedure, it is the usual practice, apparently based on custom, or our courts to seal the sentence where a defendant is tried in his absence."). It appears the only case even alluding to the possibility of sealing a sentence being a requirement is contained in the factual background of State v. Thompson, in which the South Carolina Court of Appeals indicated "a sealed sentence was given as required by law." 355 S.C. 255, 259, 584 S.E.2d 131, 133 (App. Ct. 2003). However, this single reference is not a finding of law such that the requirement of a sealed sentence can be plausibly construed as clearly established. Because the question is a novel issue, even if Trial Counsel had failed to preserve the issue, he cannot be held deficient for failing to foresee a questionably successful appellate challenge on this issue. See Teamer v. State, 416 S.C. 171, 183, 786 S.E.2d 109, 115 (2016) ("This Court has previously held

that reasonable representation does not require trial counsel to foresee successful appellate challenges to novel questions of law.")

Moreover, Petitioner has failed to meet his burden as to prejudice by any alleged failure of Trial Counsel for failing to object to the trial court's refusal to seal Petitioner's sentence. To establish prejudice under Strickland, Petitioner must show a reasonable probability that, but for counsel's deficient performance, the results of the proceeding would have been different. 466 U.S. at 694. Petitioner did not provide any evidence at the PCR hearing, nor did he highlight any evidence in his Petition for Writ of Certiorari to this Court indicating the result of his sentencing hearing would have been different had his sentence been sealed and had Petitioner been present for the unsealing of his sentence.

II. Petitioner is entitled to a belated appellate review pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974), as Petitioner did not knowingly, voluntarily, and intelligently waive his right to a direct appeal, even though he absconded from his trial prior to sentencing.

Petitioner is entitled to belated appellate review pursuant to White because he did not intelligently, voluntarily, and knowingly waive his right to appeal. "Following a trial, counsel must make certain the defendant is made fully aware of the right to appeal." Simuel v. State, 390 S.C. 267, 271, 701 S.E.2d 738, 740 (2010). "To waive a direct appeal, a defendant must make a knowing and intelligent decision not to pursue the appeal." Clark v. State, 396 S.C. 164, 168, 719 S.E.2d 708, 710 (2011). In the absence of an intelligent waiver by the defendant, counsel must either initiate an appeal if requested or comply with the procedure required by Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967). White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974). Where the post-conviction relief judge determines that the applicant did not freely and voluntarily waive his appellate rights, the applicant may petition the South Carolina Supreme Court for review of

direct appeal issues pursuant to White v. State, See Rule 227(g) (1), SCACR; Davis v. State, 288 S.C. 290, 342 S.E.2d 60 (1986).

In Braddock v. State, our Supreme Court held a defendant tried in his absence did not waive his right to appeal from his conviction. 344 S.C. 578, 580, 545 S.E.2d 498, 499 (2001). Where a defendant is tried in his absence, an appeal may not be taken until the judgment is final. State v. Robinson, 287 S.C. 173, 173, 337 S.E.2d 204, 204 (1985). "Judgment in a criminal case is not final until sentence is imposed." Id.

In its Return to Petitioner's Motion to Alter or Amend Judgment pursuant to Rule 59(e), Respondent conceded this issue as follows:

> "Here, Applicant absconded before he was convicted. As such, Applicant was tried in his absence. While the trial court refused to seal Applicant's sentence, Applicant's sentence did not become final until the sentence was imposed. *See Robinson*, 287 S.C. at 173, 337 S.E.2d at 204 ("Judgment in a criminal case is not final until sentence is imposed."). Therefore, Counsel was correct in assuming the time to file a notice of appeal did not run until Applicant was arrested after his conviction. However, this Court found Applicant presented no evidence he attempted to contact Counsel after his arrest to notify Counsel he had been arrested. Because Applicant made no effort to contact Counsel after he was arrested, the Court found Applicant failed to show he did not knowingly and voluntarily waive his right to a direct appeal. At this juncture, the State concedes Applicant did not knowingly and intelligently waive his right to a direct appeal, as Applicant is entitled to a direct appeal of his conviction. In making this concession, the State points out if Applicant is denied his right to a belated appeal even though he was never advised of his right to a direct appeal, Applicant has an arguable claim for federal habeas corpus relief on this issue. *See Frazer v. South Carolina*, 430 F.3d 696, 711 (4th Cir. 2005) ("Simply demonstrating that the defendant was actually or constructively aware of his right to appeal is insufficient to relieve defense counsel of his obligations under *Flores-Ortega*."). Therefore, the State concedes to limited relief granting Applicant belated appellate review pursuant to *White*."
>
> (App. 395-396).

The PCR court again denied relief on this issue, denying Petitioner's Motion to Alter or Amend

Judgment Pursuant to 59(e) in full without explanation.

Respondent again concedes Petitioner did not knowingly, voluntarily, and intelligently waive his right to a direct appeal, and therefore, he is entitled to belated appellate review pursuant to White. Petitioner's scenario is unique. While Respondent maintains a sealed sentence is not required, Respondent recognizes sealing a sentence is a typical practice. Trial Counsel reasonably believed that Petitioner would be brought before the trial court when he was apprehended and that the time to file post-trial motions and an appeal would not begin until Petitioner was apprehended and the sentence officially imposed upon him. (App. 323-325). However, Trial Counsel was not informed that Petitioner had been apprehended until approximately two or three months after Petitioner was apprehended, when Petitioner's sister contacted Trial Counsel to obtain a copy of his file. (App. 325, l. 1-9). Petitioner testified he was sent directly to SCDC and never returned to the trial court for a sentencing hearing. (App. 297). Although Petitioner absconded his trial prior to sentencing, in this case, the presence of the full trial record enables a belated appellate review to proceed. Respondent agrees he is entitled to belated appellate review. See Braddock, 344 S.C. at 580 (2001). Accordingly, this Court should grant certiorari as to this issue only.

CONCLUSION

This Court should deny certiorari on all issues with the exception of Petitioner's request for belated appellate review pursuant to White. However, should this Court grant Petitioner's Petition, Respondent would request permission to fully brief the issues discussed herein.

Respectfully submitted,

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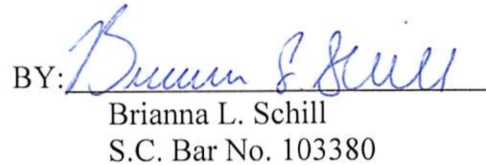
BY: 
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April 5th, 2021