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**Jul 16 2021**

**SC Court of Appeals**

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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Certiorari to Anderson County

Honorable R. Scott Sprouse, Circuit Court Judge

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JOANIE FAITH HOLCOMBE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO 2020-000495

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PETITION FOR WRIT OF CERTIORARI

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**ISSUE PRESENTED**

Did the post-conviction relief court err in finding plea counsel was not ineffective for failing to file a notice of appeal from Petitioner's guilty plea?

## STATEMENT

Petitioner was indicted by the Anderson County grand jury in June 2016 for murder. App. 83. Petitioner was represented by Rodney Richey and the state was represented by Catherine Huey. App. 1.

On July 13, 2017, Petitioner appeared before the Honorable R. Lawton McIntosh and pled guilty to homicide by child abuse. App. 2, ll. 1 – 9. At Petitioner’s plea, the state alleged that Petitioner killed her newborn daughter by placing her in a trash bag and burying her. App. 12, ll. 13 – 25. Petitioner confessed to her actions on video after being advised of her rights. App. 13, ll. 2 – 15. Petitioner was sentenced to fifty-years-imprisonment. App. 24, ll. 4 – 10. Petitioner’s counsel did not file a notice of appeal.

Petitioner filed an application for post-conviction relief on April 5, 2018 and the state filed its Return on June 11, 2018. App. 26 – 39. An evidentiary hearing was held on February 18, 2020 before the Honorable R. Scott Sprouse. App. 41. Linda Whisenhunt represented Petitioner and Taylor Smith represented the state. App. 41. Petitioner and her plea counsel both testified at the hearing. App. 42.

Petitioner testified that her plea counsel never discussed with her the possibility of appealing her guilty plea. Petitioner acknowledged that during her guilty plea, the plea judge told her she had a right to appeal but Petitioner maintained she did not know what that meant. App. 47, l. 2 – 48, l. 8. After Petitioner pled guilty, she wanted to appeal her sentence because it was a much longer sentence than she expected to receive. However, her plea counsel never discussed an appeal with her. App. 48, l. 9 – 49, l. 10. Petitioner maintained that counsel told her that he would come and speak with her about an appeal after she pled but that he never did. App. 51, ll. 6 – 24.

Petitioner's plea counsel, Richey, claimed that he did not recall Petitioner asking him about appealing her plea. App. 58, ll. 1 – 6. However, Richey did recall Petitioner's mother calling him after her plea to ask what their options were and that he discussed the appeal with Petitioner's mother. App. 58, ll. 6 – 15. Richey further admitted that he did not go to speak with Petitioner about an appeal after she pled guilty. App. 58, l. 16 – 59, l. 6.

Whisenhunt argued that plea counsel was ineffective for failing to file a notice of appeal. App. 65, l. 10 – 19. Whisenhunt argued that not only did counsel fail to properly advise Petitioner of her right to an appeal, but counsel also failed to file the notice of appeal after both Petitioner and her mother had indicated a desire to appeal her case. App. 65, l. 14 – 67, l. 8. Finally, Whisenhunt argued that Petitioner was prejudiced by counsel's failure to appeal because the appellate courts never had an opportunity to consider Petitioner's case. App. 67, l. 9 – 68, l. 9.

The PCR judge found that Petitioner failed to show that she had informed her plea counsel of her desire to appeal. App. 78. The PCR judge further found that Petitioner failed to show that “a rational defendant in her situation would want to appeal because she pleaded guilty to homicide by child abuse in order to leave the plea court with the option to sentence her to a lower minimum sentence that would [not] have otherwise been available.” App. 78. Petitioner's application was denied. App. 82.

On October 30, 2020, counsel filed a petition for writ of certiorari pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), and a motion to be relieved as counsel. On June 16, 2021, this Court denied the motion to be relieved and directed the parties to address whether the post-conviction relief court erred in finding plea counsel was not ineffective for failing to file a notice of appeal from Petitioner's guilty plea. This petition for writ of certiorari follows.

**STATEMENT OF ISSUE ON APPEAL**

Did the plea judge err in sentencing Petitioner to fifty-years-imprisonment where that sentence was excessive for Petitioner's criminal offense?

## ARGUMENT

The post-conviction relief court erred in finding plea counsel was not ineffective for failing to file a notice of appeal from Petitioner's guilty plea.

In order to prove ineffective assistance of counsel, Petitioner must show that “counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” Strickland v. Washington, 466 U.S. 668, 686 (1984); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687-688.

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Petitioner must prove “that counsel’s performance was deficient,” meaning that it fell below reasonable professional norms, and there is a reasonable probability that, but for counsel’s unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989) citing Strickland, 466 U.S. at 688. “A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial.” Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) citing Strickland, 466 U.S. at 668.

“After the client is convicted and sentenced, trial counsel in all cases has a duty to make certain that the client is fully aware of the right to appeal.” Matter of Anonymous Member of the Bar, 303 S.C. 306, 307, 400 S.E.2d 483, 483 (1991). A lawyer should also advise the client on whether an appeal is warranted and ascertain whether the client wants to file an appeal or not. Id. Even if the lawyer has a reasonable basis to believe that the client is aware of her appeal rights, counsel still should make sure that the defendant is aware of her rights and, if the client does not wish to waive her right to a direct appeal, counsel should pursue an appeal or follow the

procedure set forth in Anders v. State of California, 386 U.S. 738 (1967). White v. State, 263 S.C. 110, 118, 208 S.E.2d 35, 39 (1974). “To waive a direct appeal, a defendant must make a knowing and intelligent decision not to pursue the appeal.” Wilson v. State, 348 S.C. 215, 217, 559 S.E.2d 581, 582 (2002).

“[A] lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable.” Roe v. Flores-Ortega, 528 U.S. 470, 477 (2000). “[W]hen counsel fails to file a requested appeal, a defendant is entitled to resentencing and to an appeal without showing that his appeal would likely have had merit.” Peguero v. United States, 526 U.S. 23, 28 (1999) citing Rodriguez v. United States, 395 U.S. 327 (1969). “[W]hen 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, 528 U.S. 470, 484. “The defendant need not show that his hypothetical appeal might have had merit, only that but for counsel's deficient conduct, the defendant would have appealed.” Kinard v. State, 418 S.C. 478, 481, 795 S.E.2d 15, 16 (2016).

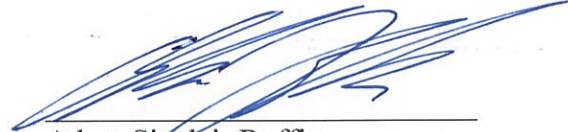
Here, Petitioner’s plea counsel acted in a professionally unreasonable manner when he failed to file a notice of appeal on Petitioner’s behalf. According to Petitioner’s testimony, she asked Richey about appealing her case and Richey told her he would come talk to her about appealing. However, Richey admitted that he never actually went to speak with Petitioner about appealing her plea. Richey failed to file the notice of appeal even after speaking with Petitioner’s mother who had strongly indicated that they were unhappy with the result of the plea and wanted to appeal.

In Kinard v. State, 418 S.C. 478, 480, 795 S.E.2d 15, 16 (2016), this Court found that plea counsel was ineffective for failing to file a notice of appeal on the defendant's behalf. The Kinard Court found that the PCR judge had used the incorrect legal standard in evaluating the defendant's claim of ineffective assistance of counsel by considering whether the defendant's appeal would have been successful. Id. at 481, 795 S.E.2d at 16. The Kinard Court went on to affirm the defendant's convictions after a review of the merits of his direct appeal claims. Id. at 481-482, 795 S.E.2d at 16-17. See Davis v. State, 288 S.C. 290, 342 S.E.2d 60 (1986) (establishing procedural guidelines for PCR cases where the petitioner's waiver of his right to appeal is at issue).

Here, Petitioner's plea counsel was ineffective for failing to file a notice of appeal on her behalf after she expressed a desire for him to do so. Counsel's failure was professionally unreasonable, and the PCR judge erred in finding otherwise. Petitioner is entitled to a belated appeal pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974). See Kinard v. State, 418 S.C. 478, 795 S.E.2d 15 (2016).

**CONCLUSION**

Based on the foregoing argument, Petitioner respectfully requests this Court grant the petition for writ of certiorari, reverse the finding of the PCR judge, find that counsel was ineffective for failing to file a notice of appeal, grant the belated appeal pursuant to White v. State, and order briefing on the direct appeal issue.



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Adam Sinclair Ruffin  
Appellate Defender

ATTORNEY FOR PETITIONER

This 16th day of July, 2021.

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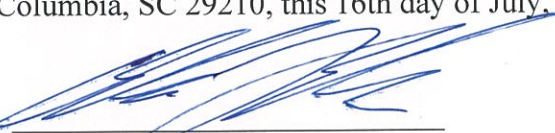
RESPONDENT.

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CERTIFICATE OF SERVICE

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Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a true copy of the Petition for Writ of Certiorari and accompanying appendix in the above-referenced case has been served upon Taylor Z. Smith, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), and a copy of the Petition for Writ of Certiorari and accompanying appendix have been served on Joanie Holcombe, #373202, at Graham Correctional Institution, 4450 Broad River Road, Columbia, SC 29210, this 16th day of July, 2021.



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