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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Richland County

Honorable Perry H. Gravely, Circuit Court Judge

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SAVOYY WOODARD,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2021-000151

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JOHNSON PETITION FOR WRIT OF CERTIORARI

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ATTORNEY FOR PETITIONER

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**ISSUE PRESENTED**

Did the PCR Court err in denying Petitioner a belated appeal pursuant to White v. State<sup>1</sup> where the evidence showed Petitioner never knowingly and voluntarily waived his right to a direct appeal?

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<sup>1</sup> 263 S.C. 110, 108 S.E.2d 35 (1974)

## STATEMENT OF THE CASE

During the August 2012 term of the Richland County grand jury, Petitioner was indicted for two counts of armed robbery, two counts of strong-armed robbery, one count of attempted armed robbery, one count of assault and battery of a high and aggravated nature, one count of assault and battery first degree, and one count of possession of a stolen vehicle. The charges arose from a string of individual robberies that occurred in March and April of 2012. App. 58-81.

On January 22, 2013, Petitioner, represented by Courtney Gibbes, appeared before the Honorable DeAndrea G. Benjamin to enter a guilty plea. The State was represented by Kathryn Ashton. Pursuant to the plea agreement Petitioner pled guilty to two counts of armed robbery, two counts of strong-armed robbery, one count of attempted armed robbery, two counts of assault and battery first degree, and one count of possession of a stolen vehicle. App. 82-89. The State recommended a cap of twenty years imprisonment and requested that all sentences be run concurrently. App. 36, ll. 12-21. Petitioner was sentenced to concurrent terms of imprisonment for fifteen years on each robbery charge, ten years on the assault charges and ten years on the possession of a stolen vehicle charge. App. 82-89.

A direct appeal of Petitioner's convictions and sentences was never filed. App. 2. on November 20, 2019, almost seven years<sup>2</sup> after pleading guilty, Petitioner filed an application for post-conviction relief alleging, *inter alia*, an involuntary guilty plea and ineffective assistance of counsel for failing to file a direct appeal. App. 1-7. The State filed a return and partial motion to dismiss dated June 15, 2020. App. 8-14.

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<sup>2</sup> The transcript of Petitioner's guilty plea was destroyed, in compliance with Rule 607(i), prior to Petitioner filing the present PCR action. The undersigned has confirmed that the references to "the plea transcript" in the State's Return and the Order of Dismissal are scrivener's errors and that the PCR court did not have the plea transcript before it in this matter.

An evidentiary hearing was convened via WebEx before the Honorable Perry H. Gravely on December 3, 2020. Petitioner was represented by Tommy Thomas; the State was represented by Michael Davidson. App. 14. At the beginning of the hearing the State moved to dismiss all claims, except the White v. State claim, based on Petitioner's failure to comply with the PCR statute of limitations. App. 18, ll. 2-9. Counsel Thomas agreed that Petitioner's application was untimely and offered nothing to excuse the late filing. App. 18, ll. 12-25. The PCR court granted the State's motion to dismiss and proceeded forward only on the White claim for a belated appeal. App. 19, ll. 7-11.

Petitioner testified that he originally did not want to accept the plea offer of ten to twenty years imprisonment. He believed he should only get the minimum sentence of ten years imprisonment because these were his first offenses. However, Petitioner decided to take the plea after Counsel Gibbes explained that he would face a harsher sentence following trial. App. 24, 5-19. Petitioner further testified that after speaking with Counsel Gibbes about the plea offer he believed he would be getting the minimum sentence of ten years on all charges and was surprised by the fifteen-year sentences he received on the armed robbery charges. App. 25, l. 3 – App. 26, l. 17.

Immediately following the plea Petitioner asked Counsel Gibbes to file an appeal. He testified Counsel Gibbes told him he would also have to file a notice of appeal. App. 27, l. 18-App.27, l. 8. After arriving in SCDC Petitioner sent a letter to the Richland County Clerk of Court that stated "I, Savoy Woodard, would like to [sic] notice of an appeal. My public defender, Courtney Gibbes." The Richland County Clerk of Court responded stating Petitioner's letter had been forwarded to both the Solicitor's office and the Public Defender's office. He never heard anything else about a direct appeal. App. 29, l. 6-App. 30, l. 12. Petitioner testified

he had copies of the correspondence regarding his appeal, but SCDC lost his property in 2014. Unfortunately, he was unable to get copies of the letters from the Richland clerk's office. App. 29, l. 13-App. 31, l. 12.

Counsel Gibbes testified she knew she discussed Petitioner's right to appeal with him prior to the guilty plea because they reviewed an "advice of rights" form that included the right to appeal. She further testified that she had no recollection of Petitioner asking her to file an appeal and that she did not recall there being any issues at the plea hearing that would have supported an appeal. Counsel Gibbes stated that if a client requested an appeal, she would file one. App. 37, l. 20-App. 38, l. 25. On cross examination Counsel Gibbes conceded that Petitioner could have asked for an appeal, she simply did not have a recollection of him requesting an appeal and there was nothing in her notes referencing an appeal. She confirmed that Petitioner was not pleased with his sentence and that it would have made sense for him to want to appeal. App. 40, l. 9-App. 41, l. 5.

At the end of the hearing Judge Gravely ruled that Petitioner had not met the burden necessary for being granted a belated appeal. App. 47, ll. 19-25. An order of dismissal was filed on January 21, 2021. The PCR court found that by "applicant's own admission, he was aware he had the right to appeal if he wished. Additionally, this Court finds credible Counsel's testimony that Applicant never asked her to appeal and never showed any interest in pursuing a direct appeal." App. 50-57.

## ARGUMENT

The PCR Court erred in denying Petitioner a belated appeal pursuant to *White v. State*<sup>3</sup> where the evidence showed Petitioner never knowingly and voluntarily waived his right to a direct appeal.

“[C]ounsel 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, 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). In *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974) this Court held that a defendant must knowingly and intelligently waive the right to appeal from his conviction and sentence. Since then, this Court has announced two distinct standards for evaluating ineffective assistance of counsel claims for failure to file an appeal. For convictions following a trial this Court has held that “[i]n 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). For guilty pleas, this Court has held that “absent extraordinary circumstances, there is no constitutional requirement that a defendant be informed of the right to a direct appeal from a guilty plea.” *Weathers v. State*, 319 S.C. 59, 61, 459 S.E.2d 838, 839 (1995).

“The bare assertion that a defendant was not advised of appellate rights is insufficient to grant relief.” *Weathers*, 319 S.C. at 61, 459 S.E.2d at 839. In *Turner v. State*, 380 S.C. 223, 224; 670 S.E.2d 373, 374 (2008) this Court clarified that the standards articulated in *Roe v. Flores-Ortega*, *supra*, were examples of extraordinary circumstances that triggered counsel’s

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<sup>3</sup> 263 S.C. 110, 108 S.E.2d 35 (1974)

duty to consult with a defendant about his direct appeal rights. In Roe v. Flores-Ortega, *supra*, the United States Supreme Court defined “consult” to mean that counsel advised “the defendant about the advantages and disadvantages of taking an appeal” and made a “reasonable effort to discover the defendant’s wishes.” The Court noted that if counsel had not consulted with the defendant at all then “the court must ask whether that failure itself constitutes deficient performance.” Roe v. Flores-Ortega, 528 U.S. at 471.

In Simuel v. State, 390 S.C. 267, 271, 701 S.E.2d 738, 740 (2010), this Court found the PCR court erred in denying Simuel a belated appeal pursuant. At the PCR hearing counsel testified that he “normally discusses an appeal with defendants after trials but was not sure whether he did so with Petitioner.” Id. at 270, 701 S.E.2d at 739. He further testified that Simuel never asked him to file an appeal. Id. at 269, 701 S.E.2d at 739. The PCR court found counsel’s testimony credible and Simuel’s testimony not credible. The court rule that based on the testimony of counsel, Simuel was not entitled to a belated appeal because he did not request counsel file an appeal on his behalf. 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<sup>4</sup>, 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 (emphasis added).

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<sup>4</sup> Overruled on other grounds by State v. Burdette, 427 S.C. 490, 832 S.E.2d 575 (2019).

Here, as in Simuel, even considering the PCR court's credibility findings, there was no *probative* evidence that Petitioner knowingly and voluntarily waived his right to a direct appeal. Petitioner testified that he asked Counsel Gibbes to file an appeal immediately after his plea. Additionally, Petitioner contacted the Richland County Clerk of Court to request information about filing an appeal. This testimony was probative evidence that Petitioner did *not* knowingly and voluntarily waive his right to a direct appeal.

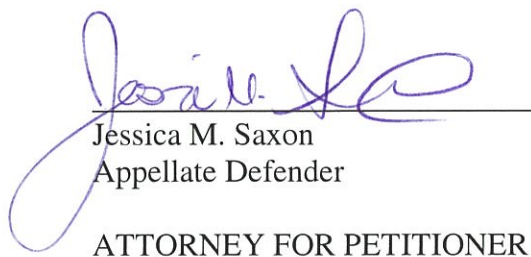
Further, Counsel Gibbes' testimony was not that Petitioner did not ask for an appeal but that she could not *recall* if he asked for an appeal. Counsel Gibbes remembered explaining to Petitioner that he had a right to an appeal when she reviewed an "advice of rights" form but did not offer any testimony that she consulted with Petitioner about the right to an appeal in a meaningful manner. Accordingly, Counsel Gibbes' failure to meaningfully consult with Petitioner about his appellate rights and failure to file a notice of appeal constituted ineffective assistance of counsel.

**STATEMENT OF ISSUES ON APPEAL**

Did the plea judge fail to exercise discretion when she sentenced Petitioner, who was a first-time offender, to a fifteen-year sentence?

**CONCLUSION**

Based on the foregoing, Petitioner respectfully requests that this Court grant the writ of certiorari to allow full briefing on the issue.

  
Jessica M. Saxon  
Appellate Defender  
ATTORNEY FOR PETITIONER

This 27<sup>th</sup> day of August, 2021.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Richland County

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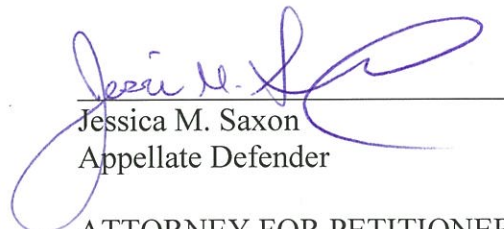
—————  
PETITION TO BE RELIEVED AS COUNSEL  
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Counsel for Savoyy Luvme Woodard states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
2. She has reviewed the record of petitioner's post-conviction relief hearing before Judge Perry H. Gravely, which was held on November 30, 2020, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed an arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve her as counsel for Savoyy Luvme Woodard.

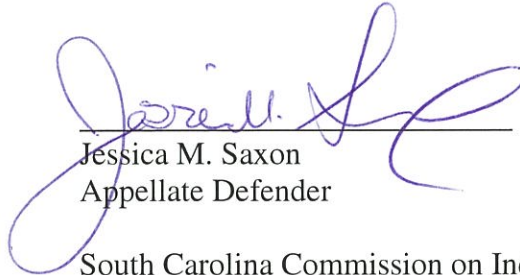
Respectfully Submitted,

  
—————  
Jessica M. Saxon  
Appellate Defender  
ATTORNEY FOR PETITIONER

This 27<sup>th</sup> day of August, 2021.

**CERTIFICATE OF COUNSEL**

The undersigned certifies that to the best of her ability this Johnson 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."



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South Carolina Commission on Indigent  
Defense  
Division of Appellate Defense  
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ATTORNEY FOR PETITIONER

This 27<sup>th</sup> day of August, 2021.

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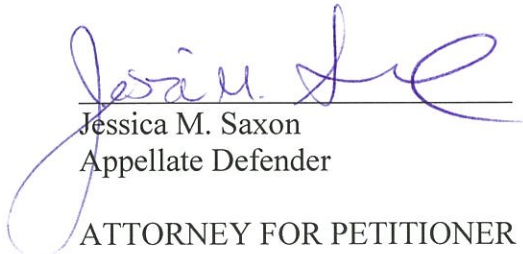
APPELLATE CASE NO. 2021-000151

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CERTIFICATE OF SERVICE

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Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies that a true copy of the Johnson Petition for Writ of Certiorari and Appendix in the above referenced case have been served upon Michael D. Davidson, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and upon Savoy Luvme Woodard, #353988, at Turbeville Correctional Institution, PO Box 252, Turbeville, SC 29162, this 27<sup>th</sup> day of August, 2021.



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Jessica M. Saxon  
Appellate Defender

ATTORNEY FOR PETITIONER