

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Greenville County  
Honorable J. Cordell Maddox, Circuit Court Judge

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ANTONIO OCHOA-TAVERA,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-001115

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PETITION FOR WRIT OF CERTIORARI

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The court correctly granted Petitioner a belated direct appeal pursuant to White v. State, 263 S.C. 110, 108 S.E.2d 35 (1974), where trial counsel failed to timely file a notice of appeal on Petitioner’s behalf and Petitioner did not knowingly and intelligently waive his right to a direct appeal. ....5

2.

Petitioner’s Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to prepare Petitioner to testify before trial and ultimately advised Petitioner not to testify in his defense merely because counsel did not want to lose the right to the last closing argument, and where Petitioner was prejudiced because if he would have testified in his defense, there is a reasonably probability the outcome of his trial would have been different. ....6

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## ISSUES PRESENTED

1.

Did the court correctly grant Petitioner a belated direct appeal pursuant to White v. State, 263 S.C. 110, 108 S.E.2d 35 (1974), where trial counsel failed to timely file a notice of appeal on Petitioner's behalf and Petitioner did not knowingly and intelligently waive his right to a direct appeal?

2.

Whether Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to prepare Petitioner to testify before trial and ultimately advised Petitioner not to testify in his defense merely because counsel did not want to lose the right to the last closing argument, and where Petitioner was prejudiced because if he would have testified in his defense, there is a reasonable probability the outcome of his trial would have been different?

## STATEMENT OF THE CASE

Phillip Lewis was arrested on April 25, 2014 for trafficking methamphetamine, distribution of cocaine base, possession with intent to distribute marijuana, possession of a controlled substance, and possession of a weapon during the commission of a violent crime. App. 206, l. 15 – 207, l. 3; App. 234, ll. 8-9. He was facing fifty-six years imprisonment. App. 239, l. 23 – 243, l. 2. After he posted bond, Lewis contacted Special Agent Randy Smith with the Drug Enforcement Administration (DEA). He told Agent Smith he could “purchase ounce quantities of crystal methamphetamine from a Hispanic male.” App. 177, ll. 13-16. Lewis hoped by assisting the DEA he would “earn some leniency on [his] charges.” App. 207, ll. 4-8.

On July 1, 2014, Lewis called Mauricio Ramirez and arranged to purchase eight ounces of methamphetamine for eight thousand four hundred dollars. The two agreed to meet in the Wal-Mart parking lot off Whitehorse Road in Greenville the following day. App. 178, l. 17 – 179, l. 21. Law enforcement planned the operation as a “buy-bust,” meaning once Lewis saw the drugs, officers would move in and arrest Ramirez. App. 179, l. 22 – 180, l. 13. During a “buy-bust,” officers “do not allow the money to be brought out there for fear we could be robbed.” App. 179, l. 22 – 180, l. 1.

Shortly before the meeting, Lewis was outfitted with a “wire,” which provided officers with a live audio feed of the transaction. App. 180, ll. 2-8. He then drove to Wal-Mart in his own vehicle where he met Ramirez. App. 181, ll. 8-22. Lewis demanded to see the methamphetamine to make sure it was of good quality. He told Ramirez “that his money man, the guy with the money, was located directly up the street at a bank” waiting on word from Lewis. App. 181, ll. 11-22. However, Ramirez admitted he did not have the drugs with him, but “was willing to show him the eight ounces” at a nearby apartment. App. 182, l. 2 – 183, l. 4.

Lewis followed Ramirez to a convenience store down the road where Ramirez left his van and got into Lewis' truck. Ramirez then directed Lewis to an apartment complex less than a minute away. App. 183, l. 10 – 186, l. 11.

Lewis claimed a man, who was later identified as Petitioner, pulled into the apartment complex at the same time as he and Ramirez and joined them. App. 186, ll. 12-18. The three walked to an apartment. Manuel Cruz, who was later identified as the lessee, opened the door for them. App. 217, ll. 11-20. Lewis claimed Petitioner led him into a bedroom, reached under a dresser, and pulled out a grocery bag containing what appeared to be nine ounces of methamphetamine. According to Lewis, Petitioner took four “ziplock bags” of methamphetamine out of the grocery bag and placed them on the bed. After Lewis saw the drugs and Ramirez assured him the drugs were “good,” Lewis left telling Ramirez he was going to get the money and would return. App. 218, l. 2 – 223, l. 8.

Within minutes of Lewis leaving, officers entered the apartment without a warrant and detained Petitioner, Ramirez, and Cruz. Investigator Jonathan Garrett with the Greenville County Sheriff's Office eventually obtained a search warrant for the apartment and seized what was later confirmed to be 273.26 grams of methamphetamine. App. 309, l. 7 – 311, l. 18; App. 339, l. 25 – 343, l. 2. Petitioner, Ramirez, and Cruz were all charged with trafficking methamphetamine. Ramirez ultimately pled guilty and agreed to testify against Petitioner. App. 257, ll. 3-20.

A Greenville County Grand Jury indicted Petitioner on November 25, 2014 for trafficking methamphetamine, two hundred grams or more, but less than four hundred grams. App. 504-505. His case was called to trial on February 9, 2015 before the Honorable Daniel D. Hall, and a jury. App. 1. He was tried jointly with his codefendant Manuel Cruz. App. 1.

Assistant Solicitor Joyce Monts represented the state, Scott D. Robinson represented Petitioner, and John Crangle represented Cruz. On February 11, 2015, the jury found Petitioner guilty as indicted. App. 442, ll. 9-19. He was sentenced to the mandatory minimum of twenty-five years imprisonment. App. 445, ll. 12-19. Judge Hall granted a mistrial as to Manuel Cruz as the jury could not reach a unanimous decision. App. 441, ll. 12-24.

On July 16, 2015, Petitioner filed an application for post-conviction relief (PCR). App. 451-459. The state filed a return to this application dated January 29, 2016. App. 460-464. An evidentiary hearing was convened on April 16, 2018 before the Honorable J. Cordell Maddox, Jr. App. 465. Assistant Attorney General Deshawn H. Mitchell represented the state, and R. Mills Ariail, Jr. represented Petitioner. App. 464. By order filed May 31, 2018, Judge Maddox granted Petitioner a belated direct appeal pursuant to White v. State, 263 S.C. 110, 108 S.E.2d 35 (1974). However, he denied Petitioner relief on his remaining grounds. App. 496-503.

Because Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated, this petition for writ of certiorari follows.

## ARGUMENT

1.

The court correctly granted Petitioner a belated direct appeal pursuant to *White v. State*, 263 S.C. 110, 108 S.E.2d 35 (1974), where trial counsel failed to timely file a notice of appeal on Petitioner's behalf and Petitioner did not knowingly and intelligently waive his right to a direct appeal.

The PCR court correctly granted Petitioner a belated direct appeal pursuant to *White v. State*, 263 S.C. 110, 108 S.E.2d 35 (1974). The court found Petitioner “did not knowingly and intelligently waive his right to a direct appeal” and “is entitled to an appeal from his conviction.” App. 500-501. Moreover, both counsel for Respondent and counsel for Petitioner consented to the grant of a belated direct appeal. App. 467, l. 21 – 468, l. 13; App. 501.

“The appropriate scope of review of this Court is that any evidence of probative value is sufficient to uphold the PCR judge's findings.” *Cherry v. State*, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). This case meets that standard. At the beginning of the evidentiary hearing, the assistant attorney general told the court it was his understanding, based on his conversation with Scott Robinson, Petitioner's trial counsel, that Robinson did not timely file a notice of appeal. App. 468, ll. 2-5. Consequently, the state conceded Petitioner was entitled to a belated direct appeal. App. 468, ll. 4-5. This evidence supports the PCR judge's conclusion that Petitioner is entitled to a belated direct appeal pursuant to *White v. State*.

Respectfully, this Court should grant the petition for writ of certiorari and consider Petitioner's belated direct appeal.

Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to prepare Petitioner to testify before trial and ultimately advised Petitioner not to testify in his defense merely because counsel did not want to lose the right to the last closing argument, and where Petitioner was prejudiced because if he would have testified in his defense, there is a reasonable probability the outcome of his trial would have been different.

Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to prepare Petitioner to testify before trial and ultimately advised Petitioner not to testify in his defense merely because counsel did not want to lose the right to the last closing argument. Petitioner was prejudiced because if he would have testified in his defense, there is a reasonable probability the outcome of his trial would have been different.

Petitioner testified at the evidentiary hearing that he "wanted to defend myself but Mr. Robinson [trial counsel] told me that it was better that I not say anything." App. 471, l. 20 – 472, l. 3. Petitioner explained that on the day he was arrested he was in the process of moving from the trailer where he lived with his wife. That morning he loaded his truck with all his possessions, such as pots and pans. However, he needed help moving a mattress. He drove to the apartment where he was ultimately arrested to pick up his friend who had agreed to help him move the mattress. Petitioner said he did not have time to talk to anyone that day and was not involved in any drug transactions. He denied the drugs belonged to him. App. 472, l. 20 – 474, l. 4; App. 476, l. 21 – 477, l. 10. This is the evidence Petitioner would have presented if he had testified at trial. He said the only reason he did not testify was because counsel "told me not to." App. 474, ll. 2-8.

Petitioner explained that he went to trial because he is innocent. App. 476, ll. 1-20. He denied the state's offer to plead guilty to a lesser included offense "because I wasn't going to admit to something that I didn't do." App. 477, l. 19 – 478, l. 4. He asserted, "I was never going to plead guilty because I wasn't guilty." App. 478, ll. 12-16.

Scott Robinson, Petitioner's trial counsel, testified at the evidentiary hearing that it was Petitioner's decision whether to testify. App. 485, ll. 21-23. However, Robinson recommended Petitioner not testify because "I'm not sure exactly what he could add to this whole defense in this case. I mean, he could say, well I was moving, well, . . . I didn't live there. But he can't get around the fact that when they [law enforcement] busted in this house, that he was right next to the drugs. That's what he couldn't get around." App. 485, l. 18 – 486, l. 4. Noting that Petitioner's trial was before this Court's decision in State v. Beaty, 423 S.C. 26, 813 S.E.2d 502 (2018), was published, Robinson emphasized that if Petitioner chose to testify, he would have lost his right to the last closing argument, which Robinson thought "was important in this case." App. 486, ll. 4-9.

After noting trial counsel's testimony that it was Petitioner's decision not to testify and the fact that the trial judge fully advised Petitioner on the record of his right to testify at trial, the PCR court found the "record indicates clearly that [Petitioner] made a choice, of his own free will and volition, not to testify after having been fully advised of his rights and ramifications of testifying or, in the alternative, not testifying. [Petitioner] chose not to testify." App. 501. Consequently, the court concluded Petitioner failed to prove both deficient performance and prejudice as required pursuant to Strickland v Washington, 466 U.S. 668 (1984). App. 501-502.

The Sixth Amendment to the United States Constitution guarantees a defendant the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984). In order

to show ineffective assistance of counsel as a ground for relief, Petitioner must prove 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.” Id. at 686; 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.

The United States Supreme Court has established a two pronged test to evaluate allegations of ineffective assistance of counsel. Petitioner must prove “that counsel’s performance was deficient” and fell below reasonable professional norms, and the deficient performance prejudiced Petitioner. Strickland, 466 U.S. at 687. Under the second prong, Petitioner must show “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).

Trial counsel was ineffective for failing to prepare Petitioner to testify before trial and for ultimately advising him not to testify in this defense merely because counsel did not want to lose the right to the last closing argument. Petitioner testified at the evidentiary hearing that on the morning of his arrest he was in the process of moving from the trailer where he lived with his wife. He explained that he only went to the apartment where he was ultimately arrested to pick up a friend who had agreed to help him move a mattress. Petitioner denied the drugs belonged to him and vehemently maintained his innocence.

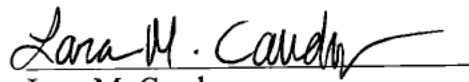
Petitioner was prejudiced by counsel's deficient performance because if the jury would have heard Petitioner's testimony, there is a reasonable probability the outcome of his trial would have been different. More specifically, there is a reasonable probability the jury would have found him not guilty. Petitioner's testimony was more important for the jury to hear than the right to the last closing argument.

Because of counsel's deficient performance and the resulting prejudice, Petitioner respectfully requests this Court reverse his conviction and sentence and remand for a new trial.

**CONCLUSION**

Petitioner respectfully requests this Court grant the petition for writ of certiorari and consider Petitioner's belated direct appeal. As to issue two, Petitioner respectfully requests this Court reverse his conviction and sentence and remand for a new trial.

Respectfully submitted,



Lara M. Caudy  
Appellate Defender

ATTORNEY FOR PETITIONER

This 24th day of January, 2019.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Greenville County  
Honorable J. Cordell Maddox, Circuit Court Judge  
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ANTONIO OCHOA-TAVERA,

PETITIONER

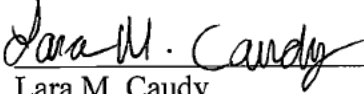
V.

STATE OF SOUTH CAROLINA,

RESPONDENT


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CERTIFICATE OF SERVICE  
—————

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case have been served upon Megan Harrigan Jameson, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served upon Antonio Ochoa-Tavera, #363134, at Lee Correctional Institution, 990 Wisacky Highway, Bishopville, SC 29010, this 24th day of January, 2019.

  
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Lara M. Caudy  
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me  
this 24th day of January, 2019.

  
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(L.S)

Notary Public for South Carolina

My Commission Expires: September 27, 2028.