

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Kershaw County

Honorable Roger E. Henderson, Circuit Court Judge

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WARREN WASHINGTON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2021-000234

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JOHNSON PETITION FOR WRIT OF CERTIORARI

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Taylor D Gilliam  
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ATTORNEY FOR PETITIONER

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**Oct 15 2021**

S.C. SUPREME COURT

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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

A Kershaw County grand jury indicted Petitioner on seven different drug offenses in May and September 2017. App. 87 – 107. Represented by Kristy Goldberg, Petitioner appeared for a plea before the Honorable DeAndrea Benjamin on October 31, 2017. App. 1. Brett Perry appeared on behalf of the state. The plea was subject to negotiations, both for a twelve year sentence and to include the dismissal of a trafficking charge. App. 4 ll. 7 – 15.

The solicitor deferred to a police officer to provide the alleged facts giving rise to the charges. According to the state, Petitioner was arrested on March 17, 2017 following a traffic stop wherein an officer found drugs in the car. App. 6 l. 1 – App. 8 l. 1. The officer contended that Petitioner admitted ownership to the drugs. Id. The officer further claimed Petitioner bonded out and was then arrested following a second traffic stop on June 29, 2017. Id.

After the factual recitation, Petitioner initially disputed the claims by the state. When asked by the plea judge if he was pleading guilty to the charges, Petitioner simply responded “Pressure.” App. 8 ll. 10 – 18. He indicated: “Too much pressure got to me.” Id. The plea colloquy continued, and the plea judge eventually found that Petitioner’s decision to plead was made freely, voluntarily, knowingly, and intelligently. App. 14 ll. 9 – 16.

The plea judge sentenced Petitioner to twelve years’ incarceration in accordance with the negotiations. App. 17 ll. 3 – 15. He received twelve years for each of the more serious offenses and five years for the less serious ones, all crafted to run concurrently to one another. Id.

Petitioner filed an application for post-conviction relief (“PCR”) on July 16, 2018. App. 24. It contained allegations of ineffective assistance of counsel, including claims that counsel failed to investigate his case. App. 25. He also noted that the PCR process was his “first opportunity ... to appeal.” Id. The state filed its Return and Motion for More Definite Statement

on or about September 26, 2018. App. 31. Through counsel, Petitioner's PCR application was amended on August 14, 2019. App. 108 – 109.

An evidentiary hearing was convened before the Honorable Roger E. Henderson on August 22, 2019. App. 36. Overture Walker represented Petitioner, and Samuel Key appeared on behalf of the state. Petitioner and plea counsel testified at the hearing.

The PCR judge took the matter under advisement. App. 68 ll. 17 – 19. On February 4, 2021, an Order of Dismissal was filed with the Kershaw County Clerk of Court. App. 70. The PCR court found that Petitioner failed to show that his counsel was deficient.

This petition follows.

## ARGUMENT

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

### Relevant facts

Plea counsel was appointed as a conflict attorney through the public defender's office. App. 55 ll. 1 – 3. Petitioner recalled that she did not represent him for long, approximately two months, before he was brought to court for a plea. App. 42 ll. 13 – 15. Petitioner testified that he and counsel met twice throughout the short duration of her representation. App. 42 l. 24 – App. 43 l. 1.

Although the two discussed the potential punishments, plea counsel never advised Petitioner about the collateral consequences of his choice. App. 43 l. 13 – App. 44 l. 4. Petitioner indicated they never spoke about the strength of the state's case. App. 44. ll. 5 – 11. Additionally, Petitioner shared his belief that plea counsel failed to investigate his case thoroughly. App. 49 ll. 1 – 8.

Regarding the issue that is the subject of this petition, the following exchange occurred at the PCR evidentiary hearing:

Q: Did you communicate to her that you wanted to appeal your guilty plea?

A: Yes, sir.

Q: You did communicate that to her?

A: Yes, sir.

Q: And when did you communicate that to her?

A: In front of the judge.

Q: In front of the judge? So you wanted to appeal your guilty plea?

A: Yes, sir.

App. 50 ll. 10 – 19.

When plea counsel was asked about the direct appeal issue, she was unable to recall specifics from her representation:

I don't remember a specific conversation. I did see in the transcript that the judge did mention it. I don't remember talking about appeal before or after the plea. I don't remember the concept ever coming up necessarily.

App. 60 ll. 15 – 20.

Plea counsel testified Petitioner never asked her to file an appeal from his guilty plea.

App. 60 l. 21 – App. 61 l. 1. Had he made that request, she would have complied. Id.; App. 65 ll. 2 – 8.

As part of the plea colloquy, the plea judge asked Petitioner if he understood his right to appeal. App. 14 ll. 1 – 5. Petitioner responded in the affirmative. Id. It is therefore undisputed that he was aware of his right to appeal.

Through its Order of Dismissal, the PCR court found Petitioner's claim that he was entitled to a belated appeal to be without merit. App. 84. The Order of Dismissal contained credibility findings wherein Petitioner was not credible but plea counsel was credible. App. 85. In particular, the PCR court found "[Petitioner] knew he could appeal his guilty plea but did not ask Counsel to file an appeal." Id.

## Discussion

This petition has been prepared in accordance with the South Carolina Appellate Court Rules. According to Rule 243(i)(2), SCACR:

When the post-conviction relief judge has found that the applicant is not entitled to a White v. State review, the petition shall raise the question of waiver of the right to a direct appeal along with all other post-conviction relief issues petitioner seeks to have reviewed. The petition shall also contain a "Statement of Issues on Appeal" listing the issues to be raised if a White v. State review is granted; this statement of issues shall comply with the requirements of Rule 208(b)(1)(B). Briefing of the direct appeal issues will not be allowed unless certiorari is granted on the issue.

Following a trial, counsel is required to make certain the defendant is made fully aware of the right to appeal. White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974). "To waive a direct appeal, a defendant must make a knowing and intelligent decision not to pursue the appeal." Simuel v. State, 390 S.C. 267, 271, 701 S.E.2d 738, 739-740 (2010). "In the absence of an intelligent waiver by the defendant, counsel must either initiate an appeal or comply with the procedure in [Anders]." Id. (quoting Turner v. State, 380 S.C. 223, 224, 670 S.E.2d 373, 374 (2008)). Following a guilty plea, when there is reason to think a defendant would want to appeal or when the defendant reasonably demonstrated an interest in appealing, there is a constitutional requirement that a defendant be informed of the right to a direct appeal from a guilty plea. Roe v. Flores-Ortega, 528 U.S. 470, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000); Weathers v. State, 319 S.C. 59, 459 S.E.2d 838 (1995).

"[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 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 following his trial. 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. Much like the matter at hand, the PCR court found counsel's testimony credible and Simuel's testimony not credible. The court found 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. This Court reversed the decision of the PCR court and granted Simuel a belated appeal. Id. Footnote 1 reiterated the above dichotomy regarding an attorney's obligations following a plea versus a trial. Id.

In Petitioner's case, extraordinary circumstances should have caused plea counsel to file a notice of appeal. As noted above, Petitioner testified at the plea that he was under pressure to plead guilty. He validated that position with his testimony at the PCR hearing. Although there were no objections or motions at the plea, counsel should have filed a notice of appeal to preserve any issues her client wished to raise on direct appeal. The PCR judge erred, because extraordinary circumstances were present such that counsel should have known to file a notice of appeal.

**STATEMENT OF ISSUE ON APPEAL**

Did the plea judge err in accepting Petitioner's guilty plea and finding that it was freely and voluntarily made, where Petitioner indicated he was under pressure to plead?

CONCLUSION

Based on the foregoing, Petitioner respectfully requests that this Court grant certiorari to allow further briefing on the issues raised herein.



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Taylor D Gilliam  
Appellate Defender

ATTORNEY FOR PETITIONER

This 15th day of October, 2021.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Richland County

Honorable Roger E. Henderson, Circuit Court Judge

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WARREN WASHINGTON,

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V.

STATE OF SOUTH CAROLINA,

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\_\_\_\_\_  
PETITION TO BE RELIEVED AS COUNSEL  
\_\_\_\_\_

Counsel for Warren Edward Washington states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
2. He has reviewed the record of petitioner's post-conviction relief hearing before Judge Roger E. Henderson, which was held on August 22, 2019, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He 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 him as counsel for Warren Edward Washington.

Respectfully Submitted,



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Taylor D Gilliam  
Appellate Defender

ATTORNEY FOR PETITIONER

This 15th day of October, 2021.

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CERTIFICATE OF COUNSEL

S.C. SUPREME COURT

The undersigned certifies that to the best of his 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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ATTORNEY FOR PETITIONER

This 15th day of October, 2021.