ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Certiorari to Aiken County

Doyet A. Early, III, Circuit Court Judge

RECEIVED
OCT 05 2018
SC Court of Appeals

WILLIAM MCCLADDIE,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2016-001979

BRIEF OF PETITIONER

SUSAN B. HACKETT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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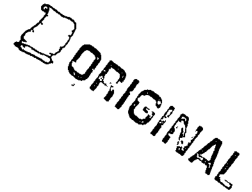

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ISSUES PRESENTED

I. Did the PCR court correctly grant Petitioner a belated direct appeal pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974), where the state consented to the request and the undisputed evidence showed that although trial counsel filed and served a notice of appeal, he failed to do so in a timely manner as required by Rule 203(b)(2), SCACR?

II. Is Petitioner entitled to a remand for a determination of whether he knowingly, intelligently, and voluntarily waived his right to raise post-conviction relief claims independent of his request for a belated direct appeal?

STATEMENT

On July 6, 2015, an Aiken County grand jury indicted Petitioner for burglary in the first degree (2015-GS-02-1103), possession of implements capable of being used in a crime (2015-GS-02-1104), and possession of a stolen vehicle (2015-GS-02-1105). App. 286-287; App. 289-290; App. 292-293. On July 7-8, 2015, Petitioner was tried before the Honorable Doyet A. Early, III, and a jury. App. 1. Jay Slocum and Cassie Hall represented the state. App. 1. Bradley McMillian and Wallis Alves represented Petitioner. App. 1. The jury found Petitioner guilty as charged. App. 254, l. 22 – App. 255, l. 7. On July 8, 2015, Judge Early sentenced Petitioner to fifteen years' imprisonment for burglary, ten years' imprisonment for the stolen vehicle, and five years' imprisonment for the burglary tools. App. 261, ll. 16-24. He ordered the sentences to be served concurrently. App. 261, ll. 24-25; App. 288; App. 291; App. 294.

On August 6, 2015, trial counsel served his notice of intent to appeal. App. 264-265. The notice was filed at the Court of Appeals on August 11, 2015. App. 264-265. On August 19, 2015, the Court of Appeals dismissed the notice of appeal because it was not timely served as required by Rule 203(b)(2), SCACR. App. 266-267. Remittitur was issued on September 28, 2015. App. 268-269.

On October 19, 2015, Petitioner filed an application for post-conviction relief. App. 270-276. Subsequently, the state filed its return. App. 277-282. There was no hearing. By an order filed August 22, 2016, Judge Early dismissed Petitioner's PCR application with prejudice. App. 283-285. Judge Early also granted Petitioner a belated review of direct appeal issues pursuant to White v. State, 263 S.C. 110, 108 S.E.2d 35 (1974). App. 283-285. The order appears to have been a consent order as it was signed by Petitioner, his PCR counsel, Aimee Zmorczek, and the state's attorney, Julia A. Coleman. App. 283-285.

On September 22, 2016, Petitioner filed and served his notice of appeal. This petition for writ of certiorari follows. In compliance with the Supreme Court's directive in Davis v. State, 288 S.C. 290, 342 S.E.2d 60 (1986), Appellant filed his petition for writ of certiorari addressing the issue of the waiver of his direct appeal as well as an additional post-conviction relief issue, and Appellant filed a brief addressing his direct appeal issue simultaneously. Subsequently, the state filed its return and brief of respondent. On October 30, 2017, the South Carolina Supreme Court transferred Petitioner's case to this Court pursuant to Rule 243(l), SCACR. By an order filed September 24, 2018, this Court granted the petition for writ of certiorari and directed the parties to brief the issues presented in the certiorari petition. This brief of petitioner follows.

STANDARD OF REVIEW

Recently, the Supreme Court clarified the standard of review an appellate court reviewing a PCR action must use when analyzing claims of ineffective assistance of counsel pursuant to Strickland v. Washington, 466 U.S. 668, 688 (1984). Smalls v. State, 422 S.C. 174, 180-181, 810 S.E.2d 836, 839-840 (2018). The Court explained the "standard of review in PCR cases depends on the specific issue" raised on appeal. Id. at 180, 810 S.E.2d at 839. The reviewing court will "defer to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them." Id. at 180, 810 S.E.2d at 839. However, the appellate court will "will review questions of law de novo, with no deference to trial courts." Id. at 180-181, 810 S.E.2d at 839.

In another recent case, the Court explained the appellate courts give "great deference to the factual findings of the PCR court and will uphold them if there is any evidence of probative value to support them." Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). "Questions of law are reviewed de novo," and the reviewing court must "reverse the PCR court's decision when it is controlled by an error of law." Id. See also Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013).

In a case reviewing whether the PCR court erred in denying a belated direct appeal, the Court explained that "[o]n appeal, the PCR court's ruling should be upheld if it is supported by any evidence of probative value in the record." Simuel v. State, 390 S.C. 267, 270, 701 S.E.2d 738, 739 (2010). Only when "there is no evidence to support the PCR court's ruling" will a reviewing court reverse. Id.; Clark v. State, 396 S.C. 164, 167, 719 S.E.2d 708, 710 (Ct. App. 2011). When the issue presented concerns credibility, the appellate court must give "great deference to [the] PCR judge's findings." Simuel, 390 S.C. at 270, 701 S.E.2d at 739.

ARGUMENT

I. The PCR court correctly granted Petitioner a belated direct appeal pursuant to *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974), where the state consented to the request and the undisputed evidence showed that although trial counsel filed and served a notice of appeal, he failed to do so in a timely manner as required by Rule 203(b)(2), SCACR.

Discussion

When a client is convicted and sentenced, trial counsel has a duty to make certain the client is fully aware of the right to appeal. Simuel, 390 S.C. at 270, 701 S.E.2d at 739; see also In re Anonymous Member of the Bar, 303 S.C. 306, 400 S.E.2d 483 (1991); White v. State, 263 S.C. 110, 118, 208 S.E.2d 35, 39 (1974). "Following a trial, counsel is required to make certain the defendant is made fully aware of the right to appeal." Turner v. State, 380 S.C. 223, 224, 670 S.E.2d 373, 374 (2008). "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) (internal quotation omitted). "In 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)." Smith v. State, 309 S.C. 413, 424 S.E.2d 480 (1992); see also White, 263 S.C. at 118, 208 S.E.2d at 39. Even after a trial in absentia, a defendant is entitled to a direct appeal; the voluntary absence from trial does not act as a waiver of the right to a direct appeal. Braddock v. State, 344 S.C. 578, 580, 545 S.E.2d 498, 499 (2001).

"[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). "This is so because a defendant who instructs counsel to initiate an appeal reasonably relies upon counsel to file the necessary notice. Counsel's failure to do so cannot be considered a

strategic decision; filing a notice of appeal is a purely ministerial task, and the failure to file reflects in attention to the defendant's wishes." Id. The South Carolina Supreme Court held a defendant was entitled to a belated direct appeal where the defendant informed trial counsel he wanted to appeal, but decided against appeal after receiving erroneous advice from counsel. Sheppard v. State, 357 S.C. 646, 651-652, 594 S.E.2d 462, 465-466 (2004). Sheppard had been convicted of murder, and the jury had found an aggravating circumstance, but recommended a sentence of life imprisonment. Id. at 651-652, 594 S.E.2d at 465. When Sheppard told his counsel that he wanted an appeal, counsel advised against an appeal because the state could seek the death penalty again if he were granted a new trial. Id. at 652, 594 S.E.2d at 465. Based on this advice, Sheppard decided not to appeal. Id. at 652, 594 S.E.2d at 466. Counsel's advice was erroneous in light of controlling Supreme Court precedent that the state cannot seek a harsher sentence upon retrial when a jury or appellate court finds the prosecution failed to prove its case for death. Id. at 653, 594 S.E.2d at 466 (citing Bullington v. Missouri, 451 U.S. 430 (1981)). Sheppard's decision not to appeal was not a voluntary waiver as it was induced by erroneous advice; thus, he was entitled to a belated direct appeal. Id.

As mentioned, the appropriate scope of review on appeal in PCR proceedings is whether 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). Ample evidence supports the PCR court's determination. The state consented to the grant of the belated direct appeal, acknowledging that Petitioner was entitled to the appeal and no evidence in the record supported a conclusion that Petitioner waived that right. See Davis v. State, 288 S.C. 290, 290, 342 S.E.2d 60, 60 (1986) (granting a defendant the right to a belated direct appeal where the state conceded the defendant was entitled to such after a PCR hearing). On appeal, the state maintained its consent to the grant of the

belated direct appeal. Ret. at 5. Trial counsel's filing and serving of a notice of appeal, albeit untimely, demonstrated Petitioner's intent to appeal his convictions and sentences. Petitioner was denied his "one fair bite at the apple" because he did not voluntarily or intelligently waive his right to a direct appeal. Wilson v. State, 348 S.C. 215, 218, 559 S.E.2d 581, 582 (2002) (providing that "[a] defendant has the procedural right to one fair bite at the apple. That is, every defendant has a right to file a direct appeal."); Legge v. State, 349 S.C. 222, 562 S.E.2d 618 (2002) (providing that a defendant has the right to a belated direct appeal when he did not knowingly an intelligently waive his right to a direct appeal). Therefore, the record is replete with evidence supporting the PCR judge's conclusion that Petitioner is entitled to a belated appeal pursuant to White, supra.

II. Petitioner is entitled to a remand for a determination of whether he knowingly, intelligently, and voluntarily waived his right to raise post-conviction relief claims independent of his request for a belated direct appeal.

Error preservation

Respondent argued this issue was not preserved for review because the PCR court did not rule on the issue and no motion pursuant to Rule 59(e), SCRCP was filed. Ret. at 5-6. It is precisely the PCR court's failure to make findings of fact and conclusions of law regarding whether Petitioner knowingly and voluntarily waived his right to present PCR claims that requires this case be remanded.

In the "Statement of The Case" portion of the return, Respondent purportedly recounted how the order of dismissal granting the belated direct appeal developed:

> After reviewing the file and speaking with the appropriate parties, Respondent indicated to Petitioner it would consent to Petitioner's request for a belated review of direct appeal issues pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974). Accordingly, Petitioner's attorney requested the matter be handled via consent order. An Order was drafted, and all parties reviewed and signed the Order indicating their consent to dismissing the application and granting Petitioner a belated review of his direct appeal issues pursuant to White.

Ret. at 4. Tellingly, Respondent provided no citations to the Appendix for these statements as these matters were *not* before the PCR judge and *not* included in the Appendix. Presumably, these statements are Respondent's recollection of what transpired. Therefore, Respondent's inclusion of these matters in the return is improper. See Rule 243(g), SCACR. The statements were not contained in documents presented to the lower court or as part of the "entire lower court record." See Rule 243(f)(1), SCACR; cf. Rule 210(c), SCACR (explaining the Record on Appeal "shall not ... include matter which was not presented to the lower court or tribunal").

Although Petitioner's signature appeared on the order of dismissal, there was no indication in the order that Petitioner was waiving his PCR claims. Therefore, Petitioner would have been unaware of such a waiver from the face of the order. In no way did the order indicate Petitioner was waiving his PCR claims or, more importantly, that he was doing so in a knowing and voluntary manner. Respondent's statement that "Petitioner voluntarily signed an order consenting to the dismissal of all of his claims for post-conviction relief outside the scope of his request for a belated appeal" is not supported by the record. See Ret. at 6. Petitioner signed the order, but the record contained no evidence that Petitioner understood he was waiving the right to present his PCR issues. Why would Petitioner waive his right to present his PCR claims in order to obtain a belated direct appeal when he was clearly entitled to both – a belated direct appeal and a full PCR evidentiary hearing?

While Petitioner maintains this issue is ripe for review, if this Court determines Petitioner should have taken additional action to preserve the matter, Petitioner respectfully requests this Court excuse the issue-preservation requirements because the interests of justice require such. See Mangal v. State, 421 S.C. 85, 99, 805 S.E.2d 568, 575 (2017).

Discussion

South Carolina's Legislature created the Uniform Post-Conviction Procedure Act to provide a universal mechanism for individuals convicted of crimes to challenge their convictions and sentences. S.C. Code Ann. § 17-27-10, et seq. The Act permits "[a]ny person ... convicted of, or sentenced for, a crime" to file an application for post-conviction relief. S.C. Code Ann. § 17-27-20(A). Generally speaking, the application "must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from

an appeal or the filing of the final decision upon an appeal, which is later." S.C. Code Ann. 17-27-45(A).

In South Carolina, "[a]ll applicants are entitled to a full and fair opportunity to present claims in one PCR application." Odom v. State, 337 S.C. 256, 261, 523 S.E.2d 753, 755 (1999). Pursuant to the rules and statutes governing PCR proceedings, an applicant is entitled to a full adjudication on the merits of the original petition. Id. Specifically, the statutes provide for the "application" to be "heard in, and before any judge of, a court of competent jurisdiction in the county in which the conviction took place." S.C. Code Ann. § 17-27-80. During this hearing, "[a] record of the proceedings shall be made and preserved." Id. At the conclusion of the hearing, "[t]he court shall make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented." Id. One's "full adjudication on the merits" includes the right to seek appellate review of the denial of PCR and the right to assistance of counsel in that appeal. Odom, 337 S.C. at 261, 523 S.E.2d at 755-56; see also S.C. Code Ann. § 17-27-100; Rule 243, SCACR.

South Carolina bars "second or successive" applications for PCR. S.C. Code Ann. § 17-27-90. "Successive PCR applications and appeals are generally disfavored because they allow an applicant to receive more than 'one bite at the apple as it were.'" Odom, 337 S.C. at 261, 523 S.E.2d at 755. Specifically, the relevant statutory provision requires "[a]ll grounds for relief available to an applicant under [the Act] must be raised in his original, supplemental, or amended application." S.C. Code Ann. § 17-27-90.

> Any ground finally adjudicated or not so raised, or knowingly, voluntarily, and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental, or amended application.

Id.; see also Aice v. State, 305 S.C. 448, 451, 409 S.E.2d 392, 394 (1991)(holding a successive application for PCR on the ground that first PCR application was insufficient due to ineffective assistance of PCR counsel is not allowed); Carter v. State, 293 S.C. 528, 530, 362 S.E.2d 20, 21 (1987)(explaining that "successive applications for post-conviction relief are viewed with disfavor and the applicant has the burden of showing that a new ground for relief could not have been raised in a previous application"); Hunter v. State, 271 S.C. 48, 53, 244 S.E.2d 530, 533 (1978)(concluding a PCR applicant failed to satisfy his burden of showing his ground for relief could not have been raised earlier); Rule 243(c), SCACR (requiring an explanation as to why a ruling by the PCR judge that an application is barred as successive was improper in order to proceed on appeal).

South Carolina permits successive applications in only limited circumstances. See Tilley v. State, 334 S.C. 24, 28, 511 S.E.2d 689, 691 (1999) (explaining a PCR application was not successive where the applicant first learned of the factual predicate supporting the claim one month prior to filing the current application and could not have raised the claim in a previous application); Council v. Catoe, 359 S.C. 120, 130, 597 S.E.2d 782, 787 (2004) (permitting successive PCR applications where the applicant was incompetent during his original PCR); Austin v. State, 305 S.C. 453, 454-455, 409 S.E.2d 395, 396 (1991)(permitting successive applications to allege ineffective assistance of PCR counsel limited to failing to seek appellate review of the denial of PCR); Carter v. State, 293 S.C. 528, 530, 362 S.E.2d 20, 21 (1987) (holding a successive PCR application alleging ineffective assistance of trial counsel is not barred when the applicant was represented in his initial post-conviction relief proceedings by trial counsel and the record contains no showing that the applicant was advised of the hazards of being represented by trial counsel and that the applicant consented to the arrangement); Case v. State, 277 S.C. 474, 475, 289 S.E.2d 413,

413-414 (1982) (permitting a hearing on the PCR application "despite its successiveness" due to the "unique combination of facts" presented in the case).

As stated, a criminal defendant, who has been convicted of, or sentenced for a crime, has a statutory right to seek post-conviction relief of his conviction and sentences. S.C. Code Ann. § 17-27-20(A). However, an individual may waive that right. "A defendant's knowing and voluntary waiver of statutory or constitutional rights must be established by a complete record, and may be accomplished by a colloquy between the court and defendant, between the court and defendant's counsel, or both." Moore v. State, 399 S.C. 641, 732 S.E.2d 871 (2012) (citing Roddy v. State, 339 S.C. 29, 34, 528 S.E.2d 418, 421 (2000)); see also Brannon v. State, 345 S.C. 437, 548 S.E.2d 866 (2001). "The validity of a defendant's waiver" turns "on the presence of a record supporting the validity of that waiver." Moore v. State, 399 S.C. 641, 641, 732 S.E.2d 871, 874 (2012).

In Spoone v. State, 379 S.C. 138, 665 S.E.2d 605 (2008), the South Carolina Supreme Court held a criminal defendant may waive his right to appellate and post-conviction review as long as the waiver is knowing and voluntary. Recognizing the issue was novel in South Carolina, the Court turned to federal precedent for guidance. First, the Court explained the Fourth Circuit Court of Appeals held a defendant may waive his federal statutory right to appeal just as he may waive his right to counsel and right to a jury trial. Id. at 142, 665 S.E.2d at 607 (quoting United States v. Wessells, 936 F.2d 165, 167 (4th Cir. 1991)). Turning to the issue of collateral review, the Court recognized the Fourth Circuit's holding that there was "'no reason to distinguish the enforceability of a waiver of direct-appeal rights from a waiver of collateral-attack rights' in a plea agreement." Id. (quoting United States v. Lemaster, 403 F.3d 216, 220 (4th Cir. 2005)). Nevertheless, such waivers are only valid if entered into knowingly and

voluntarily by the defendant. Id. The Court adopted the test announced by the Fourth Circuit to determine the validity of a waiver of direct appeal and post-conviction relief rights: the reviewing court examines the particular facts and circumstances surrounding the case, including the background, experience, conduct of the accused, and whether the issue sought to be appealed falls within the scope of the waiver. Id. at 143, 665 S.E.2d at 607.[1]

The Supreme Court remanded a case for a determination of whether a PCR applicant knowingly and voluntarily withdrew his application in Brannon, supra. After pleading guilty, Brannon filed a PCR application. Brannon, 345 S.C. at 438, 548 S.E.2d at 867. Brannon told the PCR court that he wanted his sentenced reduced. Id. The PCR court advised Brannon that it had no authority to reduce his sentence. Id. Thereafter, PCR counsel indicated Brannon wanted to withdraw his application. Id. The judge granted the motion with no further discussion. Id. Subsequently, the PCR judge signed an order dismissing the application with prejudice. Id. The order indicated "Brannon was questioned to ensure the withdrawal of his application was free and voluntary," but there was no such questioning on the record. Id.

In Narciso v. State, 397 S.C. 24, 723 S.E.2d 369 (2012), the Supreme Court was confronted with a factual scenario similar to the one presented in the instant matter. Narciso "signed a consent order granting belated direct appeal and waived his right to raise any other PCR allegations." Id. at 33, 723 S.E.2d at 373. The Court noted that although the consent order signed by Narciso was "straightforward" concerning his waiver of his PCR allegations, Narciso had "a limited command of the English language" and the colloquy with the PCR court did not

[1] Although a defendant may enter into a plea agreement in which the defendant waives his right to seek post-conviction relief as long as the defendant does so knowingly and voluntarily, a defendant is still "entitled to challenge whether the advice he received in agreeing to that waiver was constitutionally defective." Sanders v. State, 412 S.C. 611, 617, 773 S.E.2d 580, 583 (2015).

"show that the PCR court specifically asked [Narciso] about the waiver." Id. at 34, 723 S.E.2d at 374. See also Turner v. State, 380 S.C. 223, 225, 670 S.E.2d 373, 374 (2008) (remanding for an evidentiary hearing to allow the applicant to present evidence that he was entitled to belated appellate review of his guilty plea "and any other allegations withdrawn at the original PCR hearing based on the state's agreement that [applicant] was entitled to a belated review of his direct appeal issues").

In Garner v. State, 371 S.C. 1, 2, 636 S.E.2d 860, 860 (2006), the PCR judge granted Garner a belated direct appeal, but dismissed his other PCR claims without prejudice. The Supreme Court remanded the case to the PCR judge to conduct a hearing and issue a final order ruling on all of the issues raised in Garner's PCR application. Id. at 3, 636 S.E.2d at 861. The Court determined the PCR judge's order was not a final order because it did not include specific findings of fact and conclusions of law relating to each issue presented as required by the statute. Id. Instead, the order dismissed some of the issues without prejudice to them being raised in a future PCR proceeding. Id. The Court likened Garner's procedural posture to that in Pruitt v. State, 310 S.C. 254, 423 S.E.2d 127 (1992), remarking that the "failure to finally resolve each of the issues presented in the PCR application when it is initially considered ultimately increases the work load of all involved when a new hearing is required to secure the rulings which should have been made initially." Garner, 371 S.C. at 3, 636 S.E.2d at 861.

While Petitioner did not sign a waiver of his right to have his PCR allegations heard and ruled upon, he did sign a consent order granting him a belated direct appeal and dismissing his PCR application *with* prejudice. In light of the "prejudice" language, it is unlikely that Petitioner would be permitted to file a second PCR application after completion of his direct appeal. "The voluntary dismissal of an action by a plaintiff with the consent of the opposing party is without

prejudice unless otherwise stated in the notice of dismissal or stipulation." Gamble v. State, 298 S.C. 176, 177, 379 S.E.2d 118, 118 (1989)(citing Rule 41(a)(1), SCRCP). Thus, if the order dismissing the case includes that the dismissal is *with prejudice*, the plaintiff, or in the case of PCR proceedings, the applicant, may *not* make another application. Gamble, 298 S.C. at 177, 379 S.E.2d at 118-119.[2] Thus, Petitioner would likely forever lose his right to have his PCR claims litigated. This is particularly true in light of the statutory bar to successive applications, and the Supreme Court's strict adherence to the bar except in the rarest of circumstances. The record is devoid of any evidence that Petitioner signed the consent order with knowledge that he was also waiving the right to have his PCR allegations considered.[3] Therefore, this Court should

[2] The lower court dismissed Gamble's first application for post-conviction relief prior to an adjudication on the merits and with the state's consent. Gamble v. State, 298 S.C. 176, 177, 379 S.E.2d 118, 118-119 (1989). When Gamble filed a second application, the lower court dismissed it, finding it was successive. Id. at 177, 379 S.E.2d at 118. The Supreme Court held Gamble was entitled to file the second application because the first had been dismissed without prejudice and with the state's consent. Id. at 177, 379 S.E.2d at 119. The Court explained that although the rules bar "subsequent petitions on grounds available to or waived by an application in a prior action or petition," the rules also "contemplate an adjudication on the merits of the original petition, one bite at the apple as it were." Id. 178, 379 S.E.2d at 119. As put by the Court, the "rules" must "not be construed to operate as a trap for the unwary." Id.

[3] In his PCR application, Petitioner cited three grounds on which he sought relief: (1) ineffective assistance of counsel; (2) subject matter jurisdiction; and (3) illegal sentence. App. 272. Additionally, his application stated that trial counsel "[f]ailed to file appeal in time," that there were "sham indictments" and that his sentence exceeds and/or does not coincide with the charge. App. 272. A review of the appendix reveals trial counsel failed to object to hearsay testimony from a police officer regarding what a witness told the officer that alerted the officer's suspicions. App. 99, ll. 10-20. Additionally, trial counsel failed to object to hearsay testimony from a police officer regarding what a witness told the officer concerning the ownership of property. App. 129, ll. 16-20; App. 130, ll. 12-16. Trial counsel actually elicited hearsay testimony concerning missing property. App. 146, ll. 8-17. Trial counsel failed to object to hearsay from a witness regarding what another witness told her. App. 187, ll. 9-10. Trial counsel did not object to a police officer testifying that pry marks found on a door "were lining up" with a pry bar recovered from the scene where the officer was not qualified as an expert to give such an opinion. App. 122, ll. 15-25. Trial counsel did not request an instruction on direct and circumstantial evidence and did not join in the state's request. App. 251, ll. 20-24. While this is not an exhaustive list of potential PCR issues as an independent investigation would need

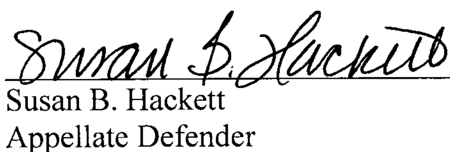
remand the matter for a hearing to determine whether Petitioner intelligently, knowingly, and voluntarily waived his right to consideration and adjudication of his PCR claims. Petitioner respectfully requests his case be remanded to a judge other than Judge Early pursuant to Floyd v. State, 303 S.C. 298, 400 S.E.2d 145 (1991)[4] for this determination. If the judge determines Petitioner did not intelligently, knowingly, and voluntarily waive his right to adjudication of his PCR claims, Petitioner respectfully requests the court hold an evidentiary hearing pursuant to the Act in which he may present evidence to support his claims for relief.

to be undertaken and is beyond the scope of this appeal, but these examples are offered to demonstrate the potential issues that may be litigated on remand.

[4] This Court granted the defendant a new PCR hearing because the judge who presided over his PCR hearing also presided over the trial from which PCR was sought. Floyd v. State, 303 S.C. 298, 299, 400 S.E.2d 145, 146 (1991). This Court held that "in all [PCR] hearings . . ., a judge shall, upon motion, recuse himself if he was the judge who presided at the guilty plea, criminal trial, or probation revocation proceeding for which relief is being sought." Id. The Floyd court emphasized that "a per se rule of recusal . . . will eliminate even the suggestion of partiality." Id.

CONCLUSION

Petitioner respectfully requests this Court affirm the PCR court's decision that Petitioner is entitled to a belated direct appeal. Additionally, Petitioner respectfully requests this Court remand his PCR application to the Court of Common Pleas for the Second Judicial Circuit for a determination of whether Petitioner knowingly, intelligently, and voluntarily waived his right to raise any other PCR allegations. If the circuit court judge determines Petitioner did not waive voluntarily his right to raise other PCR allegations, then the circuit court shall proceed with a hearing on Petitioner's other PCR allegations. Petitioner respectfully requests his case be remanded to a judge other than Judge Early pursuant to Floyd, supra.



Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 4th day of October, 2018.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Certiorari to Aiken County

Doyet A. Early, III, Circuit Court Judge

RECEIVED
OCT 04 2018
SC Court of Appeals

WILLIAM MCCLADDIE,

PETITIONER

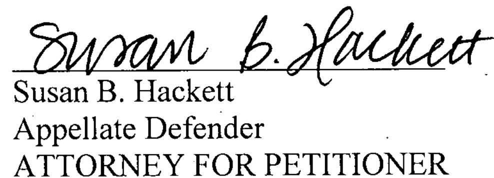
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Brief of Petitioner in the above referenced case has been served upon Julie Coleman, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Brief of Petitioner have been served on William McCladdie, #364614, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 4th day of October, 2018.



Susan B. Hackett
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me this 4th day of October, 2018.

(L.S)

Notary Public for South Carolina
My Commission Expires: July 3, 2023