STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to Horry County

Honorable William H. Seals, Circuit Court Judge

ROBERT LEE MYERS, JR.,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2021-000919

AMENDED PETITION FOR WRIT OF CERTIORARI

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INDEX

INDEX i

ISSUES PRESENTED 1

STATEMENT 2

ARGUMENT

1.

The PCR court erred where it dismissed Petitioner's ineffective assistance of counsel claims based on failure to comply with the one-year limitations period for PCR actions, where the application was sent to and received by the Clerk of Court within the one-year time period but the clerk's office erroneously returned the application,

i.

Since the application was filed the first time it was delivered to and received by the Clerk of Court 6

ii.

Since, alternatively, equitable tolling of the limitations period was warranted under these circumstances 10

2.

The PCR court erred where it found counsel provided effective representation despite her failure to file a notice of appeal, where Petitioner testified he asked counsel to file a notice of appeal immediately after the plea hearing, and where counsel could not recall whether she met with Petitioner after the plea hearing, since counsel was obligated to initiate an appeal when one was requested 12

STATEMENT OF ISSUE ON APPEAL 15

CONCLUSION 16

ISSUES PRESENTED

1.

Whether the PCR court erred where it dismissed Petitioner's ineffective assistance of counsel claims based on failure to comply with the one-year limitations period for PCR actions, where the application was sent to and received by the Clerk of Court within the one-year time period, but the clerk's office erroneously returned the application,

i. Since the application was filed the first time it was delivered to and received by the Clerk of Court?

ii. Since, alternatively, equitable tolling of the limitations period was warranted under these circumstances?

2.

Whether the PCR court erred where it found counsel provided effective representation despite her failure to file a notice of appeal, where Petitioner testified he asked counsel to file a notice of appeal immediately after the plea hearing, and where counsel could not recall whether she met with Petitioner after the plea hearing, since counsel was obligated to initiate an appeal when one was requested?

STATEMENT

During the February 2017 term, an Horry County Grand Jury indicted Petitioner for first-degree burglary, armed robbery, and assault and battery of a high and aggravated nature (ABHAN). App. 94 – 99. Petitioner was also indicted for first-degree criminal sexual conduct, kidnapping, and possession of a weapon during the commission of a violent crime. App. 3, ll. 2-8.

On March 4, 2019, Petitioner appeared before the Honorable Benjamin Culbertson and pleaded guilty to three of the charges: first-degree burglary, armed robbery, and ABHAN. App. 3, ll. 9-13; App. 38, ll. 2-6; App. 1. Petitioner was represented by Kia Wilson and Colon Cagle. App. 1. The court sentenced Petitioner to serve concurrent terms of imprisonment of forty years, thirty years, and twenty years, respectively. App. 38, ll. 7-16. No direct appeal was filed. The other three charges were not part of the plea and remained outstanding. App. 12, ll. 3-9.

Petitioner filled out and signed an application for post-conviction relief (PCR). App. 39 – 46. The second to last page of the application (the "verification") was signed by Petitioner and was notarized in the prison mailroom on February 27, 2020, which was prior to the expiration of the one-year limitations period for filing PCR applications contained in S.C. Code Ann. § 17-27-45. App. 44.

Petitioner mailed the application. However, the Clerk of Court returned the application, apparently because the last page was not notarized. (The last page was the "application to proceed without payment of costs and affidavit in support thereof.") App. 80, l. 18 – 81, l. 5. Upon receiving the returned application, Petitioner again took the application to the prison mailroom to be notarized and he remailed the application. App. 80, l. 18 – 81, l. 5 The final page of the application form was notarized on March 17, 2020, which was outside of the one-year

limitations period for PCR actions. App. 45. The Clerk of Court received the remailed, twice-notarized application on March 19, 2020. App. 39.

On November 12, 2020, the State made a return and partial motion to dismiss to Petitioner's application. App. 47 – 53. On June 25, 2021, the parties appeared before the Honorable William H. Seals, Jr. Petitioner was represented by Carla Grabert-Lowenstein and the State was represented by William Ray. App. 54.

At the outset of the hearing, the State moved to dismiss the allegations based on untimely filing, with the exception of the allegation that counsel was ineffective for failing to file a notice of appeal. App. 58, l. 23 – 59, l. 10. Petitioner was incarcerated, and PCR counsel noted that he was a "layperson." PCR counsel "ask[ed] that the Court find the other allegations are not barred . . . the case . . . is still alive and ready for a challenge of ineffective assistance of counsel." App. 59, ll. 12-25.

After hearing briefly from plea counsel about Petitioner's mental state (Petitioner was evaluated prior to the plea and he was found competent and criminally responsible), the PCR court granted the State's motion to dismiss all of Petitioner's ineffective assistance of counsel claims based on untimely filing, with the exception of his claim regarding the failure to file notice of appeal.[1] App. 61, l. 18 – 68, l. 4; App. 5, ll. 13-22.

Defense counsel said she had no memory of a conversation with Petitioner regarding his right to direct appeal, but she claimed it was her "habit" to "always" advise her clients there was a "ten-day process" and she said that a client who wants to appeal his conviction must call her office and leave a message with the "whoever answers" the phone. App. 61, l. 25 – 62, l. 8. Plea

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[1] *See Wilson v. State*, 348 S.C. 215, 217, 559 S.E.2d 581, 582 (2002) (statute of limitations for PCR applications does not apply to an applicant who alleges he did not knowingly and intelligently waive his right to a direct appeal).

counsel claimed, “I never had any notice that he was requesting an appeal.” App. 70, l. 16. Plea counsel also said due to the circumstances of the case and complaints by Petitioner about her representation, “I cannot imagine that I wouldn’t have been trying to cover my bases . . .” App. 62, ll. 15-20. Counsel admitted that she did not “recall the specifics of the day.” App. 65, ll. 15-23. Counsel did not remember whether she spoke with Petitioner at all after his guilty plea. App. 73, ll. 3-5.

> Q. Did you speak with Mr. Myers after his guilty plea?
>
> A. I want to say that I may have, but I don’t remember, honestly, with any specificity . . . I think I probably would have, I just don’t remember for certain.

App. 73, ll. 3-13.

In contrast, Petitioner testified that he did speak with counsel after the plea hearing, and he said he asked counsel to file a notice of appeal. App. 76, l. 20 – 77, l. 4.

On cross-examination, the State asked Petitioner, “[W]hy did it take you over a year to file your application for Post-Conviction Relief?” and Petitioner explained,

> Really, I don’t know. Really I didn’t have any guidance on any of that. I know at one point **when I did file it the mailroom lady at the prison**, **she forgot to stamp the back page, the pages, and they sent it back to me through the mail**. **They sent it back to me and told me that it needed to be stamped**.

App. 80, l. 18 – 81, l. 5 (emphasis added). The four corners of Petitioner’s PCR application are consistent with his testimony, since the “verification” section of the PCR application was notarized on February 27, 2020 (prior to the expiration of the one-year limitations period) but the last page, the “application to proceed without payment of costs and affidavit in support thereof” section, was not notarized until March 17, 2020 (after the expiration of the one-year limitations period). App. 44 – 45.

On July 31, 2021, the PCR court issued an order of dismissal. App. 85 – 93. The court did not make any credibility findings. The court did not allow Petitioner to have a hearing on his ineffective assistance of counsel claims, finding them barred as untimely (except for the belated appeal allegation). App. 90. The order of dismissal stated,

> This Court finds that Applicant **has failed filed** [sic] **his application within the one year statute of limitations** as required pursuant to Section 17-27-45. Furthermore, **he has not shown that he is entitled to equitable tolling of the statute of limitations**. He has not shown that his delay in filing his PCR application was due to incompetency or incapacity, and produced no evidence indicating that his application's filing was delayed by the prison mailroom. Instead the application was notarized after the window for timely filing had closed, indicating that it was not completed in a timely manner. Therefore, **the State's partial motion to dismiss all allegations except the request for a belated appeal is granted and those allegations are dismissed with prejudice**.

App. 90 (emphasis added).

The PCR court further found Petitioner was not entitled to a belated direct appeal. The order of dismissal stated,

> [P]lea counsel testified that she did not specifically recall telling Applicant that he could appeal his conviction or sentence, but she is certain that she did so because there were issues communicating with him and she made a point to cover all of her bases. She explained that it is her habit to always thoroughly explain the appeals process to every client . . . She did not recall Applicant requesting an appeal at any point, and believes that the only conversation she had with him after his plea was to discuss the length of his sentence.

App. 91.

This petition for writ of certiorari follows.

ARGUMENT

1.

The PCR court erred where it dismissed Petitioner's ineffective assistance of counsel claims based on failure to comply with the one-year limitations period for PCR actions, where the application was sent to and received by the Clerk of Court within the one-year time period but the clerk's office erroneously returned the application,

i. Since the application was filed the first time it was delivered to and received by the Clerk of Court.

Petitioner was entitled to a hearing on his allegations of ineffective assistance of counsel since his application was received by the Clerk of Court within a year of his conviction. The four corners of Petitioner's PCR application and his testimony showed that his filing was timely.

The Sixth Amendment to the United States Constitution guarantees an accused the right to effective assistance of counsel. U.S. CONST. amend. VI; *Strickland v. Washington*, 466 U.S. 668 (1984). "All 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). "Under the PCR rules, an applicant is entitled to a full adjudication on the merits of the original petition, or one bite at the apple." *Id*. at 261, 523 S.E.2d 755 (quoting *Aice v. State*, 305 S.C. 448, 452, 409 S.E.2d 392, 395 (1991)) (internal quotations removed).

An application for post-conviction relief "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, whichever is later." S.C. Code Ann. § 17-27-45(A). "Mailing does not constitute filing of a PCR application for PCR purposes." *Mose v. State*, 420 S.C. 500, 507, 803 S.E.2d 718, 721 (2017) (citing *Gary v. State*, 347 S.C. 627,

557 S.E.2d 662 (2001)). “[R]ather, the application is deemed ‘filed’ when it is delivered to and received by the Clerk of Court.” *Id*.

The filing of a PCR application is complete when it is received by the Clerk of Court, regardless of any failures perceived by the clerk. *Barnes v. State*, 433 S.C. 399, 859 S.E.2d 260, 262 (2021). “We take this opportunity to remind the clerks of court of their ministerial duty to docket filings irrespective of potential procedural flaws that exist.” *Id*., 433 S.C. 399, 859 S.E.2d at 261. A “clerk of court does not have the authority to reject a filing based on ostensible or perceived failures, including whether the document is contained on the proper form.” *Id*. “A clerk of court may not reject a pleading for lack of conformity with requirements of form; only a judge may do that.” *Id*., 433 S.C. 399, 859 S.E.2d at 261-62 (internal quotations and alterations omitted). “Instead, the clerk shall accept the filing, thereby permitting the court to decide any issues the parties may have with it.” *Id*., 433 S.C. 399, 859 S.E.2d at 262. *See also* S.C. Code Ann. § 17-27-40 (“The clerk *shall* docket the application upon its receipt and promptly bring it to the attention of the court . . .”) (emphasis added).

“Summary dismissal of a PCR application without a hearing is appropriate only when (1) it is apparent on the face of the application that there is no need for a hearing to develop any facts and (2) the applicant is not entitled to relief.” *Mose v. State*, 420 S.C. at 505, 803 S.E.2d at 720 (citing *Leamon v. State*, 363 S.C. 432, 434, 611 S.E.2d 494, 495 (2005)); *see also* S.C. Code Ann. § 17-27-70(c) (PCR court may grant summary disposition where there is “no genuine issue of material fact”). “When considering the State’s motion for summary dismissal of an application, where no evidentiary hearing has been held, the PCR judge must assume facts presented by the applicant are true and view those facts in the light most favorable to the

applicant." *Mose*, 420 S.C. at 505-06, 803 S.E.2d at 720. "When reviewing the propriety of a dismissal, an appellate court must view the facts in the same fashion." *Id*.

Reviewing the facts in the light most favorable to Petitioner, as is required here, reveals the PCR court's dismissal of Petitioner's claims was error. *Mose*, 420 S.C. at 505-06, 803 S.E.2d at 720. Petitioner timely filed his application; the Clerk of Court should have accepted it the first time it was received—it was in fact filed at that point. *Barnes*, 433 S.C. 399, 859 S.E.2d at 262. Petitioner signed his application and his signature was notarized by the prison mailroom notary February 27, 2020, which was prior to the expiration of the statutory limitations period on March 5, 2020.[2] Petitioner explained that "when I did file it the mailroom lady at the prison, she forgot to stamp the back page, the pages, and they sent it back to me through the mail. They sent it back to me and told me that it needed to be stamped." App. 80, l. 18 – 81, l. 5.

A review of the application shows the notary was the same prison mailroom employee both times—Lakiasa D. Gray notarized the "verification" (second to last page) of Petitioner's PCR application on February 27, 2020 and it was mailed for filing first time. The clerk's office, in error, did not file the application and instead returned it to Petitioner. Lakiasia Gray then notarized the "application to proceed without payment of costs and affidavit in support thereof" (last page) on March 17, 2020 and it was mailed for filing a second time. App. 44 – 45. The Clerk of Court clocked the application two days later, on March 19, 2020. App. 39. It took two business days for the application to travel from the prison mailroom and be accepted and punch-clocked by the clerk's office when it was sent the second time. Therefore, when Petitioner sent his application the first time (February 27, 2020) it would have arrived at the clerk's office two

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2 *See* Rule 6(a), SCRCP (time computation).

business days later (March 2, 2020), which was prior to the expiration of the statute of limitations.[3]

"In considering the [PCR] application, the court shall take account of substance, regardless of defects of form." S.C. Code Ann. § 17-27-70. The PCR court should consider an application "in light of the flexible pleading and amendment provisions of the South Carolina Rules of Civil Procedure."[4] *Barnes v. State*, 433 S.C. 399, 859 S.E.2d 260, 262 (2021). "[T]here are situations where the interests of justice require PCR courts to be flexible with procedural requirements before PCR applicants suffer procedural default on substantial claims." *Mangal v. State*, 421 S.C. 85, 99, 805 S.E.2d 568, 575 (2017). *See also* S.C. Code Ann. § 17-27-80 ("The application *shall be heard* in . . ." a court of competent jurisdiction) (emphasis added). "We encourage trial courts in PCR cases to use the discretion we grant them on procedural matters to find reasonable ways—within the flexibility of our Rules—to reach the merits of substantial issues." *Mangal*, 421 S.C. at 99-100, 805 S.E.2d at 576. Here, Petitioner raised substantial claims, such as the claim that plea counsel coerced him to plead guilty, failed to perform an adequate investigation, and that her deficient performance "deprived [Petitioner] of critical information relevant to an accurate assessment of [the] plea." App. 41; App. 46. These were genuine issues of material fact. Summary dismissal was improper. *Mangal*, 421 S.C. at 99, 805 S.E.2d at 575; *Mose*, 420 S.C. at 505, 803 S.E.2d at 720.

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3 This Court can take judicial notice of the 2020 calendar.

4 *See* Rule 15(a), SCRCP (providing that a party may amend his pleading "by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires and does not prejudice any other party"); Rule 71.1(d), SCRCP (providing that a PCR applicant's counsel "shall insure that all available grounds for relief are included in the application and shall amend the application if necessary"). *See also* S.C. Code Ann. § 17-27-70(b) (permitting a PCR court considering dismissal to "grant leave to file an amended application").

The PCR court's summary dismissal of Petitioner's PCR allegations based on untimely filing was error. The parties and witnesses were present in the courtroom. The court should have exercised flexibility to avoid a procedural default here and reached the merits of Petitioner's claims. *Barnes v. State*, 433 S.C. 399, 859 S.E.2d at 260. Petitioner was improperly denied his right to a "full and fair opportunity" to present his PCR claims. *Odom v. State*, 337 S.C. at 261, 523 S.E.2d at 755.

ii. <u>Alternatively, equitable tolling of the limitations period was warranted under these circumstances.</u>

The PCR court erred when it concluded that Petitioner was not "entitled to equitable tolling of the statute of limitations." App. 90. Under these unusual circumstances, the limitations period should be tolled from the date Petitioner delivered the application to the prison mailroom for filing the first time (February 27, 2020) until the date the application was punch-clocked by the Clerk of Court upon receiving it the second time (March 19, 2020).

Petitioner, an incarcerated layperson, could not hand deliver the application to ensure its acceptance and timely filing. Instead, he was at the mercy of the prison mailroom, the postal service, and the clerk's office. Because he was incarcerated, Petitioner was limited in his choice of a notary and used a notary at the prison mailroom. The clerk's office erroneously returned the application rather than filing it, apparently based on a mistake by the notary (a prison employee). App. 80, l. 18 – 81, l. 5. The filing of a PCR application is complete when it is received by the Clerk of Court, regardless of any failures perceived by the clerk. *Barnes*, 433 S.C. 399, 859 S.E.2d at 262. "A clerk of court may not reject a pleading for lack of conformity with requirements of form; only a judge may do that." *Id*. 433 S.C. 399, 859 S.E.2d at 261-62

(internal quotations and alterations omitted). The clerk must accept the application for filing. Nevertheless, the clerk did not.

"[T]he unique conditions of incarceration require a holding that the statute of limitations should be tolled if the circumstances warrant." *Mose*, 420 S.C. at 510, 803 S.E.2d at 722. The limitations period should be equitably tolled where circumstances preventing the applicant from making a timely filing are beyond his control and unavoidable despite due diligence. *Mose*, 420 S.C. at 508, 803 S.E.2d at 722. *See generally Houston v. Lack*, 487 U.S. 266, 270-71 (1988) ("Other litigants may choose to entrust their appeals to the vagaries of the mail and the clerk's process for stamping incoming papers, but only the pro se prisoner is forced to do so by his situation.")

In determining whether equitable tolling should apply, the PCR court "should consider any reasonably verifiable evidence of the date the document was purportedly in the possession of prison authorities for purposes of mailing." *Mose*, 420 S.C. at 723, 803 S.E.2d at 723. "[I]f the circumstances warrant, the statute of limitations shall be tolled from receipt of the document by the prison until formally filed with the clerk's office, provided the applicant can verify by competent evidence the date prison authorities received the document for mailing." *Id*. Here, the PCR application itself provides competent verification that the application was received by the prison mailroom prior to the expiry of the statute of limitations. Petitioner's signature on the verification page was notarized on February 27, 2020 by the prison mailroom notary. App. 44.

"Under the PCR rules, an applicant is entitled to a full adjudication on the merits of the original petition, or 'one bite at the apple.'" *Odom v. State*, 337 S.C. at 261, 523 S.E.2d at 755 (quoting *Aice v. State*, 305 S.C. at 452, 409 S.E.2d at 395. This Court should grant the petition for certiorari so that Petitioner may receive his bite at the apple.

2.

<u>The PCR court erred where it found counsel provided effective representation despite her failure to file a notice of appeal, where Petitioner testified he asked counsel to file a notice of appeal immediately after the plea hearing, and where counsel could not recall whether she met with Petitioner after the plea hearing, since counsel was obligated to initiate an appeal when one was requested.</u>

There was no evidence to support the PCR court's finding that counsel provided effective representation when she failed to file a notice of appeal. Petitioner said he asked counsel to file an appeal when he spoke with her immediately after the hearing and counsel said she had no memory of the day's events. App. 73, ll. 3-13; App. 76, l. 20 – 77, l. 4.

The Sixth Amendment to the United States Constitution guarantees an accused the right to effective assistance of counsel. U.S. CONST. amend. VI; *Strickland v. Washington*, 466 U.S. 668 (1984). A defendant claiming ineffective assistance of counsel must show (1) that counsel's representation fell below an objective standard of reasonableness and (2) that counsel's deficient performance prejudiced the defendant. *Strickland*, 466 U.S. at 688-94. This test applies to claims "that counsel was constitutionally ineffective for failing to file a notice of appeal." *Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000).

When a defendant timely requests that plea counsel file an appeal, plea counsel is obligated to do so. "We have long held that 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. at 477 (citing *Rodriquez v. United States*, 395 U.S. 327, 332 (1969); *Peguero v. United* States, 526 U.S. 23, 28 (1999)).

In *Kinard v. State*, 418 S.C. 478, 480, 795 S.E.2d 15, 16 (2016), this Court addressed facts similar to the facts here: Kinard "testified at the PCR hearing that he asked plea counsel, promptly after sentencing, to file a notice of appeal. Plea counsel testified he could not recall if [Kinard] made such a request at the conclusion of the plea proceeding . . . Counsel testified he did not see a reason to appeal." This Court found plea counsel was ineffective for failing to file an appeal after being asked to do so by defendant. *Id.*, 418 S.C. at 481, 795 S.E.2d at 16. "The merits of any such appeal, while relevant to an allegation that counsel failed to *advise* a defendant of the right to appeal, are not relevant where a PCR applicant alleges counsel failed to file an appeal after being asked to do so." *Id.* (citing *Roe v. Flores-Ortega*, 528 U.S. 470) (emphasis in original). *See also Turner v. State*, 380 S.C. 223, 225, 670 S.E.2d 373, 374 (2008) (PCR judge erred in finding applicant was entitled to a belated appellate review of his guilty plea where, *inter alia*, there was no evidence applicant requested counsel file an appeal).

The defendant has the ultimate authority to make certain fundamental decisions regarding his case, including the decision whether to take an appeal. *Jones v. Barnes*, 463 U.S. 745, 751 (1983). The decision of whether to forgo an appeal is "reserved for the client." *McCoy v. Louisiana*, 138 S.Ct. 1500, 1503 (2018). Pursuant to Rule 203(d)(1)(B)(iv), SCACR, when an appeal is from a guilty plea, the notice of appeal must be accompanied by "a written explanation showing that there is an issue which can be reviewed on appeal . . ." If counsel did not think the appeal had merit, she should have filed a guilty plea explanation stating that no issues were raised but the client insisted on an appeal.[5] It was not in counsel's discretion, however, to fail to

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[5] *See Weathers v. State*, 319 S.C. 59, 61, 459 S.E.2d 838, 839 (1995) (defendant's inquiry regarding direct appeal was extraordinary circumstance that required counsel to advise of his right to appeal following a guilty plea); *State v. Thrift*, 378 S.C. 70, 71-72, 661 S.E.2d 373, 374 (2008) (Rule 203 requires an explanation of issues be filed with the notice of appeal from a guilty plea).

file a notice of appeal once Petitioner timely requested an appeal. *Jones v. Barnes*, 463 U.S. at 751; *McCoy*, 138 S.Ct. at 1503.

Petitioner said he requested that counsel file an appeal and the PCR court did not find that his testimony was not credible. Although plea counsel testified it was common practice to advise her clients how to request an appeal, she could not specifically recall whether she spoke with Petitioner after the plea hearing. *See Simuel v. State*, 390 S.C. 267, 271, 701 S.E.2d 738, 740 (2010) (attorney's testimony "that he 'probably' spoke with [the defendant] about an appeal is not the same as affirmatively stating he spoke with Petitioner about an appeal"). Since Petitioner requested counsel file an appeal, counsel was obligated to initiate an appeal and she did not do so. This was deficient performance. *Kinard v. State*, 418 S.C. at 481, 795 S.E.2d at 16.

"[W]hen counsel fails to file a requested appeal, a defendant is entitled to . . . an appeal without showing that his appeal would likely have had merit." *Peguero*, 526 U.S. at 28. "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 inattention to the defendant's wishes." *Roe v. Flores-Ortega*, 528 U.S. at 477.

The PCR court's finding that Petitioner was not entitled to a belated direct appeal was error. Petitioner has shown deficiency and prejudice. "When 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 v. Flores-Ortega*, 528 U.S. at 484.

STATEMENT OF ISSUE ON APPEAL

Whether the court erred in accepting Petitioner's pleas of guilty, since the pleas were not voluntarily, knowingly, and intelligently tendered?

CONCLUSION

Based on the foregoing arguments, this Court should grant the petition for writ of certiorari to allow full briefing on these issues.

s/ Joanna K. Delany
Joanna K. Delany
Appellate Defender

ATTORNEY FOR PETITIONER

This 4th day of January, 2022.

CERTIFICATE OF COUNSEL

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

s/ Joanna K. Delany
Joanna K. Delany
Appellate Defender

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This 4th day of January, 2022.