



ALAN WILSON  
ATTORNEY GENERAL

**RECEIVED**

MAR - 7 2014

**S.C. Supreme Court**

March 7, 2014

The Honorable Daniel E. Shearouse  
Clerk, South Carolina Supreme Court  
Post Office Box 11330  
Columbia, South Carolina 29211

**RE: Milo E. Tudor v. State of South Carolina  
2013-001242**

Dear Mr. Shearouse:

I am enclosing the original and six (6) copies of the Return to Petition for Order to Reconstruct the Record of Appellant's Trial or In the Alternate an Order Setting Aside his Convictions and Ordering a New Trial in the above case.

Sincerely,



J. Rutledge Johnson  
Assistant Attorney General

JRJ:cey  
Enclosures

cc: Kathrine Hudgins, Esquire  
Trisha Allen, Victim Services

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

---

Certiorari to Newberry County  
James W. Johnson, Jr., Circuit Court Judge

---

Appellate Case No. 2013-001242

---

**RECEIVED**

MAR - 7 2014

**S.C. Supreme Court**

Milo E. Tudor,

Petitioner,

v.

State of South Carolina,

Respondent.

---

**RETURN TO PETITION FOR ORDER TO RECONSTRUCT  
THE RECORD OF APPELLANT'S TRIAL OR IN THE  
ALTERNATE AN ORDER SETTING ASIDE HIS  
CONVICTIONS AND ORDERING A NEW TRIAL**

---

The State of South Carolina respectfully submits the following in opposition to the Petitioner's petition for an order to reconstruct the record of Petitioner's trial pursuant to Rule 240(c) SCRCR:

1. Petitioner, Milo E. Tudor, was indicted at the January 1997 term of the Newberry County Grand Jury Kidnapping, Assault and Battery with Intent to Kill (ABWIK), and Possession of a Weapon during the Commission of a Violent Crime (1997-GS-36-21). Petitioner was represented by Harry DePew, Esquire. On August 7, 1997, Petitioner proceeded to trial at which he was found guilty of kidnapping, ABWIK, and use of a knife in commission of a violent crime. The Honorable Judge James W. Johnson, Jr. sentenced Petitioner to confinement for a

period of twenty (20) years for ABWIK, thirty (30) years, consecutive, suspended upon the service of fifteen (15) years and five (5) years' probation for Kidnapping, and five (years), concurrent, for Use of a Knife during the Commission of a Violent Crime.

A timely Notice of Appeal was filed on Petitioner's behalf, but the appeal was not properly perfected. The South Carolina Court of Appeals issued an Order of Dismissal on May 5, 1998 and a Remittitur on May 21, 1998.

2. Petitioner then filed a Federal Habeas Corpus in the Federal District Court for the District of South Carolina (2:00-1358-12AJ). The Magistrate issued a Report and Recommendation on June 21, 2000, recommending that the action be dismissed without prejudice for failure to exhaust all state remedies. On August 1, 2002, the Honorable C. Weston Houck adopted the Report and Recommendation and dismissed Petitioner's Federal Habeas Corpus claim without prejudice for failure to exhaust all available state court remedies.

3. Petitioner subsequently filed an application for post-conviction relief (PCR) on August 21, 2002 (2002-CP-36-0357). The Applicant raised the following issues in his first PCR:

1. Ineffective assistance of counsel;
2. Denial of right to direct appeal.

Respondent filed its Return on August 22, 2003. Respondent was represented by Julie M. Thames, Esquire and Petitioner was represented by Donald B. Hocker, Esquire. On May 14, 2004, a hearing was held before the Honorable James E. Lockemy. Respondent moved to dismiss Petitioner application on the grounds of failure to file within the statute of limitations and the doctrine of laches. On June 24, 2004, Judge Lockemy denied and dismissed the application with prejudice by written Order, specifically finding the trial transcript was no longer available and that Petitioner offered no explanation as to why he did not pursue state court

remedies sooner. (Order of Dismissal 2002-CP-36-0357 p. 3). A Petition for a Writ of Certiorari was filed on the Petitioner's behalf pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988). The South Carolina Supreme Court denied the Petitioner's Petition by written Order on August 26, 2005. The Remittitur was issued on September 14, 2005.

4. Petitioner filed a second Petition for Writ of Federal Habeas Corpus in the Federal District Court for the District of South Carolina (:06-0342-RBH). The Magistrate issued a Report and Recommendation on September 15, 2006, recommending that the action be dismissed. Petitioner responded to the Report and Recommendation on October 12, 2006. On January 30, 2007, the Honorable R. Bryan Harwell adopted the Report and Recommendation and granted the State's Motion for Summary Judgment, denying Petitioner's Habeas Corpus claim.

5. Petitioner then filed a second application for post-conviction relief on April 5, 2010 (2010-CP-36-0154). Petitioner raised the following issues in his second PCR:

1. Ineffective Assistance of Counsel
  - a. "Trial Counsel failed to perfect direct appeal, file brief, or advise of appeal rights"
2. Denial of Direct Appeal
  - a. "Applicant did not knowingly and intelligently waive direct appeal."
3. PCR Judge erred by summarily dismissing application
  - a. "Denial of fair proceeding where grounds for relief were not asserted and inadequately raised by counsel's ineffective assistance."

Respondent filed its Return and Motion to Dismiss on October 17, 2011. On October 25, 2011, the Honorable Eugene C. Griffith, Jr. signed a Conditional Order of Dismissal on the grounds that Petitioner's application was successive to his previous application and was also filed well outside of the statute of limitations. On November 10, 2011, Petitioner, through Counsel Tommy A. Thomas, filed a response to the Conditional Order of Dismissal on the

grounds that he is entitled to a belated appeal of direct appeal issues pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974). On December 9, 2011, the Honorable Eugene C. Griffith, Jr. issued a Final Order denying and dismissing Petitioner's second PCR application. On February 3, 2012, this Court dismissed Petitioner's PCR appeal for failure, as required by Rule 243(c) SCRCR, to assert an arguable basis that the determination of the lower court was improper.

5. On September 17, 2012, Petitioner filed a Petition for Writ of Habeas Corpus in the Court of Commons Pleas in Newberry County (2012-CP-36-0511). Respondent filed its Return and Motion to Dismiss on October 30, 2012, arguing Petitioner must file his Writ of Habeas Corpus in the original jurisdiction of this Court pursuant to Keeler v. Mauney, 330 S.C. 568, 500 S.E.2d 123 (Ct. App. 1998) and arguing Petitioner was procedurally barred from petitioning the circuit court for a writ of habeas corpus where the issue alleged was already alleged in a prior PCR application. On March 12, 2013, an evidentiary hearing was held before the Honorable Clifton B. Newman. Petitioner was presented and represented by Tommy A. Thomas and Respondent was represented by J. Rutledge Johnson. On May 21, 2013, Judge Newman granted a belated appeal of direct appeal issues pursuant to White v. State.

6. A copy of Petitioner's trial transcript is unavailable. Neither the Office of Appellate Defense nor the South Carolina Attorney General's Office has a copy of the transcript as it was missing at the time of the first PCR hearing on May 14, 2004. In a letter dated February 7, 2014, Desiree R. Allen, Court Reporter manager for the South Carolina Court Administration confirmed that the trial transcript from proceedings before the Honorable James W. Johnson, Jr. on August 7, 1997 was no longer available.

7. In this case, Petitioner's own actions are the reason the trial transcript does not exist. When the loss of a trial transcript is due to a petitioner's own actions, an appellate court can deny a request for reconstruction and dismiss the appeal. See State v. Serrette, 375 S.C. 650, 652, 654 S.E.2d 554, 555 (Ct. App. 2007) (Court of Appeals denied a request for reconstruction where, by becoming a fugitive for a period of time exceeding the time period a court reporter must keep a copy of the transcript (5 years), petitioner's own actions were the basis of the destruction of the transcript). Petitioner was convicted on August 7, 1997. A notice of appeal was filed on his behalf, but the appeal was not perfected. Instead of timely filing an application for PCR, Petitioner chose to file a Petition for Writ of Federal Habeas Corpus in the Federal District Court for the District of South Carolina. This was ultimately denied for failing to exhaust all state court remedies, namely PCR. It was not until August 21, 2002 that Petitioner filed an application for PCR. By this time, a transcript of Petitioner's trial was unavailable. Had Petitioner properly filed an application for PCR prior to the five-year limit, a copy of the transcript would have been timely ordered and this problem would not exist. Because the lack of a trial transcript is due only to Petitioner's own actions, this Court should deny the request to reconstruct the record.

8. Additionally, this issue has already been ruled upon in Petitioner's prior PCR cases. Petitioner specifically raised "denial of right to direct appeal" in his first PCR case (2002-CP-36-0357). The Honorable James E. Lockemy denied and dismissed Petitioner's case on the grounds of statute of limitations and laches. The Order specifically stated Petitioner offered no explanation as to why he did not pursue a PCR application prior to his filing date and also acknowledged the Respondent was prejudiced due to the fact that Petitioner's trial transcript is no longer available. More importantly, this Court conducted a review of Petitioner case pursuant

to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), and denied Petitioner's petition for writ of certiorari. Moreover, in his second PCR application, Petitioner alleged trial counsel failed to perfect a direct appeal and that he did not knowingly and intelligently waive his right to a direct appeal (2010-CP-36-0154). The Honorable Eugene C. Griffith, Jr. in the Final Order of Dismissal, after reviewing Petitioner's response to the Conditional Order of Dismissal, denied and dismissed Petitioner's case as being successive to his first PCR case.

*Res judicata* prohibits subsequent actions by the same parties on the same issues. Bell v. Bennett, 307 S.C. 286, 414 S.E.2d 786 (Ct. App. 1992). A final judgment on the merits in a prior action bars subsequent consideration of those issues in a new action. Foran v. USAA Casualty Ins. Co., 311 S.C. 189, 427 S.E.2d 918 (Ct. App. 1993). *Res judicata* also bars any issues that could have been raised in the former action. Id. As the issues of trial counsel's failure to perfect a direct appeal on Petitioner's behalf and Petitioner not knowingly and intelligently waiving his right to direct appeal have been previously litigated in Petitioner's two prior PCR applications, *res judicata* bars these issues being re-litigated in the current action. As such, it is unnecessary to order a reconstruction of the record.

9. Furthermore, Respondent would be greatly prejudiced should this Court grant Petitioner's petition to reconstruct the record of Petitioner's trial or in the alternative grant Petitioner a new trial. First, the Honorable James W. Johnson, Jr. passed away in 2008. Second, Petitioner's trial counsel, Harry Depew, is no longer a member of the South Carolina Bar and his address is no longer current. Third, any and all potential witness from Petitioner's trial may be unavailable or impossible to locate. Absent some explanation or justification for the delay in seeking post-conviction relief, laches will prevent a petitioner from seeking collateral review of his conviction, especially where the delay affects the availability of evidence to refute the

applicant's claims. McElrath v. State, 276 S.C. 282, 277 S.E.2d 890 (1981); Honeycutt v. Ward, 612 F.2d 36 (2nd Cir. 1979). Clearly, the evidence and testimony to refute Petitioner's claims have been greatly and detrimentally affected due to Petitioner own delay in filing his PCR claims. Had he timely filed his original PCR claims, none of these problems would exist. Therefore, this Court should find that reconstructing the record of Petitioner's trial would greatly prejudice Respondent and deny this request.

10. Lastly, this Court should deny Petitioner request to reconstruct the trial record because Petitioner clearly filed his PCR application well outside of the statute of limitations. S.C. Code Ann. §17-27-10 to -160. S.C. Code Ann. §17-27-45(a) reads as follows:

An application for relief filed pursuant to this chapter 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.

This Court has held that the statute of limitations shall apply to all applications filed after July 1, 1996. Peloquin v. State, 321 S.C. 468, 469 S.E.2d 606 (1996). Petitioner was convicted of the offenses he challenges on August 7, 1997. Apparently, the appeal from Petitioner's trial was dismissed on May 5, 1998 and the Remittitur was issued on May 21, 1998. Therefore, Petitioner had until May 22, 1999 to file his original PCR application. He did not do so until August 21, 2002, well outside of the statute of limitations. As stated above, had Petitioner timely filed his original application, none of these current issues would be problematic.

8. Based upon the foregoing, the State requests that this Court deny the Respondent's request to reconstruct the record of Petitioner's trial.

Respectfully submitted,

ALAN WILSON  
Attorney General

J. RUTLEDGE JOHNSON  
Assistant Attorney General  
S.C. Bar #78871

BY:  \_\_\_\_\_

Office of the Attorney General  
Post Office Box 11549  
Columbia, South Carolina 29211  
(803) 734-3737

ATTORNEYS FOR RESPONDENT

March 7, 2014.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

---

Appeal from Newberry County  
Honorable Clifton B. Newman, Circuit Court Judge  
Appellate Case No. 2013-001242

---

MILO E. TUDOR,

Petitioner,

vs.

THE STATE OF SOUTH CAROLINA,

Respondent.

---

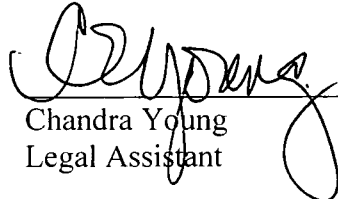
**PROOF OF SERVICE**

---

I, Chandra Young, certify that I have served the within Return to Petitioner for Order to Reconstruct the Record of Appellant's Trial or in the Alternative an Order Setting aside his Convictions and Ordering a New Trial on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Kathrine Haggard Hudgins, Esquire  
Appellate Defender  
South Carolina Commission on Indigent Defense  
Appellate Division  
1330 Lady St. P.O. Box 11589  
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served.  
This 7th day of March, 2014.

  
Chandra Young  
Legal Assistant

Office of the Attorney General  
Post Office Box 11549  
Columbia, SC 29211  
(803) 734-3737