

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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MAR 13 2014

Certiorari to Newberry County

S.C. Supreme Court

James W. Johnson, Jr., Circuit Court Judge

MILO E. TUDOR,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2013-001242

**REPLY TO THE STATE'S RETURN OPPOSING
THE PETITION FOR AN ORDER TO RECONSTRUCT
THE RECORD OF PETITIONER'S
TRIAL OR IN THE ALTERNATIVE
AN ORDER SETTING ASIDE THE CONVICTIONS
AND ORDERING A NEW TRIAL**

On May 21, 2013, the Honorable Clifton B. Newman signed an order granting Petitioner a belated appeal pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974). On March 3, 2014, counsel for Petitioner Milo E. Tudor filed a petition for an order requiring the parties to reconstruct the record of Petitioner's jury trial held on August 7, 1997, before the Honorable James W. Johnson, Jr. in Newberry County because the trial transcript is no longer available. In the alternative, counsel for Petitioner moved for an order setting aside the conviction and

ordering a new trial. On March 7, 2014, the State filed a return opposing the motion to reconstruct the record.

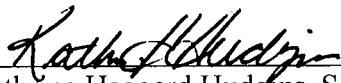
In paragraph seven (7) of the return the State argues that the motion to reconstruct the record should be denied because the transcript is missing due to actions by Petitioner. (Return p. 5). Trial counsel's undisputed failure to perfect the direct appeal was not the fault of Petitioner. During the May 14, 2004, PCR hearing before the Honorable James E. Lockemy, the attorney representing the State told the judge, "He is alleging that his attorney allowed his appeal to be dismissed. His appeal, the notice of intent to appeal was filed and dismissed, his attorney filed a motion to re-open that file and it was again dismissed. He was retained and the family did not pay him any money, they kept promising him money and did not pay him, so the appeal was never perfected." (May 14, 2004, PCR Tr. pp. 2-3, attached and made a part of this reply). While Petitioner then filed a petition for habeas corpus in federal court, rather than an application for post conviction relief in state court, once the federal court dismissed the petition on August 1, 2002, for failure to exhaust all state court remedies, Petitioner immediately on August 21, 2002, filed an application for post conviction relief in state court, 2002-CP-36-357. The missing transcript in the present case is not due to Petitioner's absence for a ten year period as in State v. Serrette, 375 S.C. 650, 652-653, 654 S.E.2d 554, 555 (Ct. App. 2007). Petitioner continually attempted to pursue his appeal rights as best he knew how. The motion to reconstruct the record should not be denied based on Petitioner's ill advised attempt to secure his appeal rights in the federal court first.

In paragraph eight (8) of the return the State argues that *res judicata* bars the belated direct appeal issue making a reconstruction hearing unnecessary. (Return pp. 5-6). In paragraph nine (9) the State argues that the motion to reconstruct the record should be denied based on the doctrine of laches. (Return pp. 6-7). In paragraph ten (10) the State argues that the motion to

reconstruct the record should be denied based on filing outside the statute of limitations. (Return p. 7). While these may have been arguments to make in a State's appeal of Judge Newman's order granting the belated appeal, the State did not appeal that order. Judge Newman ordered the belated appeal and in order to perfect that appeal, counsel seeks to reconstruct the record.

Counsel respectfully requests an order for the reconstruction of the record from Petitioner's trial on August 7, 1997, so that, pursuant to Judge Newman's order granting belated review pursuant to White v. State, counsel may perfect the belated appeal. In the alternative, given the likelihood that it will be impossible to reconstruct the record, counsel requests this Court set aside the conviction and remand for a new trial.

Respectfully submitted,



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March 13, 2014

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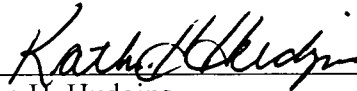
STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2013-001242

CERTIFICATE OF SERVICE


The undersigned attorney hereby certifies that a true copy of the petition for order to reconstruct the record, or in the alternative, an order setting aside the conviction and ordering a new trial in the above referenced case has been served upon J. Rutledge Johnson, Esquire, at Rembert Dennis Building, Room 519, 1000 Assembly Street, Columbia, South Carolina 29201, this 13th day of March, 2014.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER.

SUBSCRIBED AND SWORN TO before me
this 13th day of March, 2014.



(L.S.)

Notary Public for South Carolina

My Commission Expires: August 21, 2023.

2010CP26-154

EXHIBIT #8

(7) Pages

STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS
2002-CP-36-357

COUNTY OF NEWBERRY

MILO EARL TUDOR,)
)
 Plaintiff,)
 -vs-)
)
 STATE OF SOUTH CAROLINA,)
)
 Defendant.)

May 14, 2004

B E F O R E:

HONORABLE JAMES E. LOCKEMY

A P P E A R A N C E S:

DOANLD B. HOCKER, Esquire
Attorney for the Plaintiff

JULIE M. THAMES, Esquire
SALLEY WOODS ELLIOTT
Attorney for the Defendant

Henry P. Young
Court Reporter

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1 P-R-O-C-E-E-D-I-N-G-S

2 MS. THAMES: Your Honor, the State calls Milo
3 Tudor versus the State.

4 THE COURT: All right, we're in the-matter of
5 my Milo Tudor. Background, Miss Thames?

6 MS. THAMES: Yes, sir. Mr. Tudor was tried
7 on August 7th, 1997, for kidnapping, assault and
8 battery with intent to kill, possession of a
9 firearm during commission of a violent offense. He
10 was found guilty of the charges and sentenced by
11 Judge Johnson to thirty years, suspended to fifteen
12 years and five years probation. Notice of appeal
13 was filed and was dismissed on May 5th, 1998, and
14 this is here on the State's motion to dismiss.

15 THE COURT: All right, what is the basis of
16 your motion?

17 MS. THAMES: Yes, sir. The State argues that
18 the application should be dismissed for failure to
19 comply with the provisions of the Post Conviction
20 Relief Act, which requires applications to be filed
21 within one year of conviction. Mr. Tudor was
22 sentenced on August 7th, 1997, he filed his
23 application on June 21st, 2002, well past the
24 filing period.

25 He is alleging that his attorney allowed his

Wrong Sentence →

Statute of Limitations →



2010 CP36-154

*Harry DeLoe
did not file a re-estate
petition.
was not owed money
this is not true.*

1 appeal to be dismissed. His appeal, the notice of
 2 intent to appeal was filed and was dismissed, his
 3 attorney filed a motion to re-open that file and it
 4 was again dismissed. He was retained and the
 5 family did not pay him any money, they kept
 6 promising him money and did not pay him, so the
 7 appeal was never perfected.

8 The State would argue that even if the
 9 attorney is at fault, the application should still
 10 be dismissed for Statute of Limitations. The State
 11 also argues that the application is barred by the
 12 Doctrine of Laches. He has neglected to file for
 13 an unreasonable and unexplained amount of time.
 14 The state is prejudiced because due to the length
 15 of time, it appears that there is no transcript
 16 available since it was a 1997 case, and we
 17 respectfully request the application be dismissed.

18 THE COURT: Okay. Mr. Hocker?

19 MR. HOCKER: If it please the Court, Your
 20 Honor, we don't really have anything to add as far
 21 as the Statute of Limitations is concerned. The
 22 only thing we would add as far as Laches, that he
 23 did go through, attempt federal habeas way before
 24 now, attempt a federal habeas which was dismissed
 25 on the Magistrate Court's recommendation.

#108

1 So he has taken action since that time.
2 Obviously we have some factual issues as far as the
3 appeal is concerned but that is something we
4 wouldn't raise until you ruled on the motion to
5 dismiss.

6 THE COURT: Let me ask this. Is he alleging
7 ineffective assistance of counsel at trial?

8 MR. HOCKER: At the trial and for the appeal.

9 THE COURT: But the State is under a
10 difficult burden here without the transcript.

11 MR. HOCKER: Yes, sir, we understand that.

12 THE COURT: When did he file this?

13 MS. THAMES: He filed the application, Your
14 Honor, June 21st, 2002.

15 THE COURT: What's the statutory time they
16 have to keep the transcript, I thought it was six
17 years?

18 MS. ELLIOTT: May I, Your Honor?

19 THE COURT: Yes.

20 MS. ELLIOTT: It is my understanding for a
21 period of time the Court reporters were told they
22 only needed to retain the transcript and the
23 records for three years and a lot of records have
24 been destroyed, so I think now they are required to
25 keep them a little bit longer, for five years, but

1 this may have been the case that it was, the
2 transcript was destroyed.

3 THE COURT: Even at five years, it may have
4 been destroyed.

5 MS. ELLIOTT: Certainly whenever that ruling
6 or advisory was issued by Court Administration, I
7 would imagine most transcripts that were being held
8 were then destroyed, that were older than three
9 years.

10 THE COURT: Tell me again your argument
11 against their motion on the Statute of Limitations.

12 MR. HOCKER: We didn't have anything to add
13 on the Statute of Limitations issue. I was saying
14 on the Laches issue there wasn't an unreasonable
15 delay because he filed a federal habeas. By the
16 time he found out his appeal had been dismissed he
17 was outside the statute to file a PCR. He had gone
18 through a federal habeas, he had to come back
19 because he had not exhausted his statutory remedy,
20 the federal court wouldn't hear it, but we don't
21 have anything to add additionally on the statute
22 argument.

23 THE COURT: In looking at this, I try to be
24 as fair as I can, regardless, but the law
25 prohibits, whether one wants to or not, making

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1 discretionary rulings, when in fact you have no
 2 basis to do anything but follow the law, and the
 3 law says you have one year to file a PCR
 4 application. Here, if I were to somehow not follow
 5 the law and permitted you to go foreward I would be
 6 putting the State under a tremendous burden, by not
 7 having the transcript on the trial situation. For
 8 that reason, the law provides that it's got to be
 9 filed in one year. It was filed here five years
 10 later, almost five years later.

11 I will grant the motion for dismissal based
 12 on the Statute of Limitations. Thank you.

13 MR. HOCKER: Thank you, Your Honor.

14 MS. THAMES: Thank you, Your Honor.

15 (Hearing Concluded).
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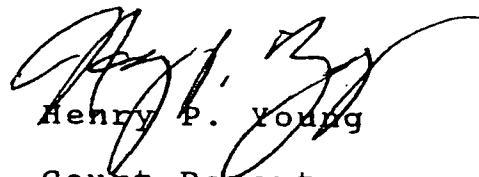


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I, the undersigned Henry P. Young, Official Court Reporter for the Eighth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the trial of the captioned case in the Circuit Court for Newberry County, South Carolina, on the 14th day of May, 2004.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

August 19, 2004


Henry P. Young
Court Reporter

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